

INTERNATIONAL LAW ASSOCIATION

LONDON CONFERENCE (2000)

COMMITTEE ON INTERNATIONAL TRADE LAW

Members of the Committee:

Professor E U Petersmann (Germany): *Chairman*
Professor Frederick M Abbott (USA): *Co-Rapporteur*
Professor Petros Mavroidis (HQ/Greece): *Co-Rapporteur*

Dr R I R Abeyratne (HQ/Sri Lanka)
Mr Alonzo Q Ancheta (Philippines)
Ms Vivienne Bath (Hong Kong)
Alternate: Mr Raymond L S Wang
Dr Wolfgang Benedek (Austria)
Professor Paulo Borba Casella (Brazil)
Alternate: Professor Nadia de Araujo
(Brazil)
Professor Jacques Bourgeois (Belgium-
Luxembourg)
Dr Hui-wan Cho (China (Taiwan))
Alternate: Mr Chun-I Chen
Dr Patricia Conlon (Ireland)
Professor WR Cornish (UK)
Alternate: Ms Mary Footer
Alternate: Mr Jeremy P Carver
Professor Katrin Cutbush-Sabine (Australia)
Professor William J Davey (HQ/*WTO)
Mr Armand De Mestral (Canada)
Alternate: Professor Debra Steger
Mr Justice (Retd) Fakhruddin G Ebrahim
(Pakistan)
Professor Mayer Gubbay (Israel)
Alternate: Professor Talia Einhorn
Professor Gerhard Erasmus (S. Africa)
Dr Raul Anibal Etcheverry (Argentina)
Professor A A Fatouros (HQ/Greece)
Professor Thiebault Flory (France)
Alternate: Professor Jacqueline Dutheil
de la Rochere

Dr John H Hastings (Australia)
Mr Gary N Horlick (USA)
Dr Kamal Hossain (Bangladesh)
Professor John H Jackson (USA)
Alternate: Mr Alan C Swan (USA)
Alternate: Professor Joel P Trachtman
Professor Sergeij Lebedev (Russia)
Dr Fadi Makki (HQ/London)
Dr Gabrielle Marceau (Canada)
Professor Mitsuo Matsushita (Japan)
Alternate: Professor Yuji Iwasawa
Professor Werner Meng (Germany)
Alternate: Professor Meinhard Hilf
Alternate: Dr Hans P Kunz-Hallstein
Dr Rodrigo Montufar (Guatemala)
Professor Thomas Oppermann (Germany)
Professor Nohyoung Park (Korea)
Mr Andrew Percival (Australia)
Professor Eugeniusz Piontek (Poland)
Professor Asif Qureshi (UK)
Ms Elisabetta Righini (Italy)
The Hon Mr Justice Y K Sabharwal (India)
Professor Giorgio Sacerdoti (Italy)
Professor Petar Sarcevic (Croatia)
Professor Richard Senti (Switzerland)
Alternate: Professor Thomas Cottier
Professor Filip Turcinovic (Yugoslavia)
Professor Friedl Weiss (Netherlands)
Alternate: Professor M C E J Bronckers

FOURTH REPORT OF THE COMMITTEE

By Prof. F.M. Abbott [Parts I, II (joint), III, IV, VI, VIII & IX],
Prof. P.C. Mavroidis [Parts II (joint), V, VII].

I. Introduction

1. Following its meetings at the Taipei Conference 1998, the International Trade Law Committee held its annual meeting at the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and the Graduate Institute of International Studies at Geneva on 24-25 June 1999. On June 24 at the WTO, in addition to considering its work program, the Committee heard reports from Robert Anderson of the WTO Intellectual Property and Investment Division regarding activities of the WTO Working Group on the Interaction between Trade and Competition Policy and J. Vigano of the WTO Trade and Environment Division regarding the work of the WTO Committee on Trade and Environment. On June 25 at WIPO, the Committee was welcomed by Shozo Uemura, WIPO Deputy Director General, and heard reports from Adrian Otten (Director) and Hannu Wager of the WTO Intellectual Property and Investment Division regarding developments in the field of trade-related aspects of intellectual property rights (TRIPS) and electronic commerce, and Christopher Gibson of the WIPO International Bureau who reported on the Internet Domain Name Process. On June 25 at the Graduate Institute, the Committee heard reports from William Davey, then Director of the WTO Legal Division, and Debra Steger, Director of the WTO Appellate Body Secretariat. Members of the WTO Appellate Body (James Bacchus and Claus-Dieter Ehlermann, as well as Mitsuo Matsushita, who is also a member of this Committee) attended various parts of the June 1999 meetings. The Committee decided to focus its report for the London Conference on TRIPS, trade and competition policies, trade and environmental policies, the WTO dispute settlement system, and the rule of law in international trade.

II. General Developments in International Trade Governance

2. On November 30 – December 3, 1999, the attention of the world was focused on the WTO Seattle Ministerial Conference (SMC). The extensive news media and interest group attention directed at this meeting of trade ministers may reflect the beginning of a new era in multilateral economic governance. The information revolution brought about by the emergence of new telecommunications technologies, including the Internet, has raised public awareness of the importance of decisions taken at the WTO and other multilateral institutions. The heightened level of public interest in the WTO increases the accountability of its decision-makers, and creates pressure to widen the spectrum of interests taken into account as decisions are made. Although news media attention was concentrated on protests by non-governmental organizations (NGOs), the unsuccessful SMC also exposed weaknesses in WTO governance procedures. Warning signs had been raised during the lengthy and contentious process of appointing a new WTO Director-General.

3. The success of the GATT/WTO during the second half of the twentieth century generated near-universal demand among states to join and participate in the governance of the institution. As the WTO has grown in size and importance, it is not clear that its existing consensus-based decision structure is suitable to its institutional role. The challenge of creating new decision-making mechanisms is a daunting one in light of the disparate interests among WTO Members, and the reluctance in public circles to allocate governance responsibilities to multilateral institutions. The multilateral trading system embodied in the WTO begins the new Millennium flush with the success of an increasingly open and integrated world economy, but facing a host of challenges. The ITLC hopes to play a role in addressing these challenges.

4. Opening up of markets might (and indeed often does) encroach on other societal values, like protection of environment, protection of health and human rights. Trade liberalization can prove to be incompatible with other revealed preferences of national societies. Hence, the need to guarantee a “peaceful cohabitation”, since this is probably the most appropriate means for the WTO to acquire the much needed legitimacy for its actions. The ITLC has contributed towards this perspective. In the most recent years, we first published a book whereby we aimed at presenting a comprehensive compilation and critical analysis of GATT case-law since the inception of GATT in 1947.¹ We then focused on the most “thorny” subjects of international trade law: preparing reports on the role of the WTO regarding trade and intellectual property rights and trade and environment, and on issues that have yet to be comprehensively approached (reports on trade and competition).

5. Our work on these fields is far from being completed. In the immediate future, we aim to continue researching in all of the fields mentioned above. The Committee further moves to topical questions presenting tomorrow’s challenges for the WTO system (*e.g.*, the interface between trade liberalization and cultural policy and the place, if any, for a cultural exception to trade)² and to broader, horizontal issues like those dealt with in our reports on the rule of law in international trade. Much of the work of the Committee either directly or indirectly revolves around the functioning of the WTO dispute settlement system. For example, our draft resolution on the rule of law in international trade contains an explicit provision to the effect that specific performance of the WTO contract should be the preferred option for a WTO Member, found to be in violation of a WTO provision, to bring its measures into compliance (adding thus to the existing Art. 22.1 DSU). In view of the wealth of experience of ITLC members (*e.g.*, as former WTO panel and Appellate Body judges, arbitrators, legal advisors to governments and international organizations), we decided to dedicate a part of our agenda (Part VII) specifically to the WTO dispute settle-

¹ Ernst-Ulrich Petersmann ed., *International Trade Law and the GATT/WTO Dispute Settlement System*, Kluwer, 1997, 668pp.

² Mary Footer and Christoph Beat Graber, *Trade Liberalization and Cultural Policy*, 3 J. INT’L ECON. L. 115 (2000).

ment system and its currently ongoing review. It is our aim to produce another collection of papers and publish them as a book (echoing our 1997 experience). According to current plans, our book project would cover three areas (the evolution of WTO dispute settlement procedures in practice; the interpretation and application of WTO law by the WTO adjudicating bodies; the “full review” and the future of the WTO dispute settlement system).

III. Trade-Related Aspects of Intellectual Property Rights (TRIPS)

6. Since its inception, the work program of the Committee has involved close attention to the field of TRIPS. As intellectual capital plays an ever-increasing role in defining the competitive advantage of industries and nations, the manner in which intellectual property rights (IPRs) are regulated may have critical implications across a wide spectrum of economic and social interests.³

A. Expiration of Transition Periods

1. Developing Member Obligations

7. On January 1, 2000 an important transition period expired, and developing Members (and Members in transition to market economy) became obligated to implement most of the substantive obligations, as well as the enforcement obligations, of the TRIPS Agreement. There is considerable concern among the developing countries about whether they will be able to meet their new obligations, and concern that they may face a large number of WTO dispute settlement complaints from industrialized Members. Many developing Members have joined together to seek an extension of the TRIPS Agreement transition periods. This demand for extension has been resisted by the industrialized Members, although the final WTO Council meeting of 1999 resulted in an informal standstill agreement on the initiation of complaints until this demand could be more fully considered.

2. Non-Violation Nullification or Impairment

8. January 1, 2000 also marked the end of a moratorium on non-violation nullification or impairment complaints in TRIPS Agreement dispute settlement. Although members of the ITLC have generally favored allowing the possibility for non-violation complaints in TRIPS – largely so that the various WTO agreements are interpreted in an equivalent manner – they have also expressed concern that the non-violation concept be construed narrowly. The regulation of IPRs at the national level involves sensitive issues of industrial and social policy. Article

³ See generally, FREDERICK ABBOTT, THOMAS COTTIER AND FRANCIS GURRY, *THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS* (1999: Kluwer), for elaboration of international intellectual property institutions, norms and policy considerations.

8 of the TRIPS Agreement recognizes that WTO Members may take necessary measures to promote domestic policy goals consistently with the TRIPS Agreement. The non-violation cause of action should not be viewed as a means to inhibit national discretion in the implementation of the TRIPS Agreement. As the WTO Appellate Body stressed in its *India – Mailbox* decision,⁴ WTO Members are obligated to comply with the terms of the TRIPS Agreement. They are not obligated to address the expectations of other Members which were not expressly agreed upon and embodied in the text of the Agreement.

B. Built-In Agenda

9. The SMC did not produce an agenda for further TRIPS negotiations among WTO Members. Matters that might be included in a new Round of multilateral trade negotiations are considered below. In any event, the work of the TRIPS Council will continue on several important “built-in” agenda items, including a review of the TRIPS Agreement, and negotiations on geographical indications and modalities for the protection of plant varieties.

10. Negotiations on the protection of plant varieties may be of particular importance in light of developments in the bio-engineering of foodstuffs. The rules of the TRIPS Agreement regarding the protection of biotechnological inventions are ambiguous.⁵ For example, it is not clear whether Members are obligated to provide protection for genetic material. Developing countries have expressed particular concern over the treatment of genetic resources located within their territories that may be protected by the terms of the Convention on Biological Diversity, but without a counterpart rule in the TRIPS Agreement.⁶

11. As the transition periods applicable to developing countries expire, their laws and enforcement procedures will be reviewed by the TRIPS Council. The review procedure has so far proved a useful forum for information sharing and clarification of Member obligations. It may well be that the first steps in addressing industrialized Member concerns with developing Member implementation of the TRIPS Agreement should be taken in this cooperative forum, rather than in the formalized dispute settlement process.

C. Agenda Items for a New Round

12. Prior to the SMC, the major industrialized countries placed emphasis on assuring that developing countries implemented their TRIPS obligations in

⁴ India - Patent Protection For Pharmaceutical and Agricultural Chemical Products, AB-1997-5, WT/DS50/AB/R, 19 Dec. 1997.

⁵ Article 27:3(b), TRIPS is based on article 53 of the European Patent Convention (EPC), which has long been the subject of controversy.

⁶ The “Cartagena Protocol on Biosafety” to the UN Convention on Biological Diversity was signed by 130 countries in January 2000. It provides for new rules regarding genetically altered seeds, crops and animals which might become relevant also for the interpretation of WTO rules.

accordance with TRIPS Agreement timetables. The EU and Japan proposed that the United States abandon its first-to-invent patent system in favor of a first-to-file system. The developing countries proposed to extend the transition timetables. There also were proposals from certain of these countries to increase the level of protection accorded to geographical indications of origin with respect to agricultural products (e.g., Basmati Rice), and to incorporate into the TRIPS Agreement the protections which the CBD extends to genetic resources. Developing countries also made proposals regarding so-called Traditional Intellectual Property Rights (TIPRs). These rights would protect ideas and expression that have been developed by local cultures (such as traditional medicinal practices and folk songs), but which ideas and expression may not meet the customary criteria for the grant of IPRs protection (such as novelty). Developing countries have observed that customary IPRs protection criteria may undervalue the stock of ideas and expression that their societies have developed over generations.⁷

13. Since the conclusion of the Uruguay Round, two copyright-related treaties (the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) intended to meet the needs of the digital era have been agreed to at WIPO, and a new Round of WTO negotiations might seek to incorporate the provisions of these treaties into the TRIPS Agreement.

14. The WTO has initiated an Electronic Commerce study program, and a number of E-Commerce issues include a TRIPS component.

D. TRIPS and E-Commerce

1. The Internet Domain Name Process

15. The ITLC's June 1999 meeting at WIPO focused on IPRs issues relating to electronic commerce and the Internet. The development of the Internet as a business marketing tool has created a significant interest in the regulation of the "domain names" that are used to identify the websites of public and private entities. The global and instantaneous character of the Internet demanded new thinking about the territorial nature of IPRs protection. Institutional mechanisms were needed through which business enterprises could secure and enforce rights on a worldwide basis without the heavy transaction costs historically attendant to IPRs registration and enforcement litigation. At the same time, public Internet users demanded that mechanisms intended to secure such protection did not interfere with the Internet's role as a universal information forum. WIPO developed an Internet Domain Name Process that was used to solicit views from a worldwide public regarding the best mechanisms for regulating Internet

⁷ See Thomas Cottier, *The Protection of Genetic Resources and Traditional Knowledge in International Law: Towards More Specific Rights and Obligations in World Trade Law*, 1 J. INT'L ECON. L. (1998).

domain names. WIPO's Final Report on this subject was intended as a basis for further action by governments and the Internet Corporation for Assigned Names and Numbers (ICANN).⁸ Since December 1999, new ICANN and WIPO procedures for the settlement of disputes over abusive use of Internet domain names have been increasingly used. The WIPO Internet Domain Name Process may provide a model for further efforts to make international economic governance more transparent.

3. *GATT or GATS*

16. One of the central issues for E-Commerce regulation at the WTO is whether such regulation is more appropriately dealt with as a component of trade in goods (subject to the GATT) or trade in services (subject to the General Agreement on Trade in Services, GATS). On one hand, many E-Commerce transactions result in the sale and transfer of goods just as might take place following an exchange of communications by mail, and such transactions might be considered to fall within the rules of the GATT. On the other hand, many E-Commerce transactions involve the transmission of data over the Internet (or other communications networks). This might, for example, involve payment for and downloading of computer software programs or videos. A cross-border transfer of data over a network might fall within the rules of the GATS since telecommunications services are part of the GATS regulatory framework, and a computer program or video performs a service. There will certainly be instances in which the boundary between goods and services will be uncertain. One objective of the WTO E-Commerce program is to clarify the rules that will be applied to E-Commerce transactions.

4. *The Decline of Territoriality*

17. The rapid evolution of E-Commerce challenges the traditional roles played by national regulators in the field of commerce. It is exceedingly difficult for any nation to be linked to a global electronic network that instantaneously transfers data and facilitates the conclusion of transactions, while at the same time enforcing a unique set of rules to which only its own citizens are subject. The world of E-Commerce forces a rethinking of traditional territorial regulation of the marketplace.

18. At the same time, governments are reluctant to accept challenges to their sovereign regulatory authority, and publics throughout the world are wary of rules dictated at the international level. One of the great challenges of E-Commerce is to develop common rules that will protect the public interest, and

⁸ WIPO, *The Management of Internet Names and Addresses: Intellectual Property Issues*, Report of the WIPO Internet Domain Name Process, <http://wipo2.2ipo.int>, Apr. 30, 1999, WIPO Pub. No. 439 (E).

at the same time allow markets to function efficiently. Nowhere is this challenge more evident than in the field of IPRs regulation – which has historically been at the cutting edge of the international legislative process.

5. *The ITLC Report and Recommendation on Parallel Trade*

19. At its first meeting at the GATT/WTO in 1993, the Committee identified the subject of parallel importation as of central importance to defining the role of IPRs in the multilateral trading system. At its meeting at WIPO in 1995, the Committee initiated a formal work program on the subject of the exhaustion of IPRs and parallel importation, and requested its Co-Rapporteur, Prof. Frederick Abbott, to prepare a report for the Committee's consideration. A draft of that report was presented and debated by the Committee at the Helsinki ILA Conference in 1996, at which time the Committee recommended that the report (as amended to reflect the results of the meeting) be circulated to interested groups for comment.⁹ At its meeting at WIPO in 1997, taking into account a substantial level of interest among trade associations and business groups in the Committee's work program and the First Report, the Committee requested that Prof. Abbott organize a meeting among interested persons to further explore the subject matter of the Report. At the Taipei ILA Conference in 1998, the public session of the Committee heard views of a number of commentators on the subject of the First Report. A meeting on this subject was convened by the ITLC at the Graduate Institute of International Studies in Geneva in November 1998. This meeting was attended by representatives of international organizations (including the WTO, WIPO, UNCTAD, World Bank and WHO), by representatives of a number of WTO Member governments, by representatives of a substantial number of industry associations (including the International Federation of Pharmaceutical Manufacturers Associations, InterPharma, the International Intellectual Property Alliance and the International Publishers Association), and by leading academics in the fields of economics, intellectual property law and international trade law, and by members of the ITLC. At the conclusion of this meeting, members of the Committee requested that Prof. Abbott prepare a Second Report and recommendations for consideration by the Committee. At its meeting at WIPO in June 1999, the Committee considered the Second Report and recommendations prepared by the Co-Rapporteur. The Committee decided to propose the adoption of a resolution on the subject of parallel trade by the ILA at its London 2000 Biennial, and it recommended that the Co-Rapporteur publish the Second Report.¹⁰

⁹ The report is published at Frederick M. Abbott, *First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation* (June 1997), 1 J. INT'L ECON. L. 607 (1998) (Oxford).

¹⁰ The draft resolution of the Committee is set forth at the conclusion of this Report.

20. The proposed resolution:

1. *Encourages* WTO Members to refrain from threatening or taking actions with respect to Member government policies which permit parallel trade into their territories in so far as such policies are consistent with the terms of the TRIPS Agreement;
2. *Recommends* that WTO Members recognize a doctrine of international exhaustion with respect to trade marked goods that have been placed on the market by, or with the consent of, the trade mark holder; provided, however, that WTO Members should safeguard the interests of the public and of producers by allowing protection against consumer confusion as to the source and material characteristics of goods;
3. *Recommends* that WTO Members continue to inquire into the approach to parallel trade in copyrighted works that is best suited to promoting the interests of the public, recognizing that copyrighted works may be expressed in different forms, including tangible works (such as printed books) and intangible works (such as digitally-stored music); and further recognizing that different approaches might be considered regarding different forms of copyrighted expression, and;
4. *Recommends* that WTO Members continue to inquire into the approach to parallel trade in patented inventions that is best suited to protecting the interests of consumers and producers, recognizing that Members may adopt their own national and regional approaches to parallel trade in patented inventions consistently with the terms of the TRIPS Agreement.

IV. Trade-Related Antitrust Measures (TRAMS)

A. WTO Activities

21. There is a clear relationship between legal mechanisms designed to reduce governmental barriers to international trade and legal mechanisms designed to maintain competitive relations among private enterprises. The enhanced access among national markets that in principle is obtained by reductions in trade barriers may be offset by private (and public) anti-competitive arrangements and the abuse of dominant position. The prescription and application of competition laws has historically been constrained at the international level by sovereignty concerns. Competition laws traditionally have been enforced by regulatory authorities that are distinct from the authorities with responsibility for administering international trade laws.

22. A WTO Working Group on the Interaction between Trade and Competition Policy was established by decision of the Singapore Ministerial Conference in 1996. Working Group meetings have enjoyed active participation by developed and developing WTO Members.¹¹ The introduction or substantial

¹¹ See, e.g., Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/3, 11 Oct. 1999.

revision of competition laws in more than 35 developing or “transition” countries since 1990 illustrates the interest among developing Members in adopting and implementing more effective competition law frameworks. The WTO Secretariat has prepared several useful reports concerning the relationship between trade and competition laws for the Working Group.

23. There has been an evident tension among WTO Members regarding the potential direction of future WTO activities in the competition law area. The European Union has proposed that the WTO consider adopting a fairly comprehensive set of competition rules, while the United States and Japan have expressed concern that the WTO first identify with more precision the trade-related competition issues that new rules would address. Developing Members have expressed both positive and negative views regarding the negotiation of WTO competition rules. On one hand, such rules may represent an extension of the principles embodied in the UNCTAD Restrictive Business Practices Code that developing countries have strongly endorsed. On the other hand, such rules may represent mechanisms by which Members will seek to attack state-owned and controlled enterprises and chartered monopolies. Such monopolies play a substantial role in the economy of a number of developing or transition countries. In addition, a number of Members have indicated that new WTO rules on competition should replace antidumping laws. This idea is resisted by some other Members.¹²

B. ITLC Member Proposals

24. ITLC members have expressed their support for the integration of trade and competition law principles. A number of members consider that the most appropriate course at present would be for the WTO to adopt a set of basic core principles of competition policy. Prof. Swan has suggested that the WTO address the issue of competence to prescribe competition rules for transnational arrangements, and provide for dispute settlement concerning allegations of over-extended jurisdiction. Prof. Matsushita has recommended the adoption of a Plurilateral Agreement on Competition and Trade that would (1) contain rules regarding transparency, objectivity and due process of law, (2) apply the principles of most-favored nation and national treatment in Member enforcement processes, and (3) at its initial stage, incorporate rules which deal with matters which directly affect trade between WTO Members (such as international cartels and export/import cartels). At a subsequent stage, WTO Members might consider further rules regarding conduct traditionally regulated domestically, such as mergers and acquisitions, taking into account the effects of such activities on the objectives of the WTO system. The Committee will give further consideration to these proposals.

¹² For an overview, see E.U. Petersmann, *Competition-Oriented Reforms of the WTO World Trade System-Proposals and Policy Options*, in R. Zäch, *Towards WTO Competition Rules* (1999) 43-71.

C. TRAMS and TRIPS

25. As Prof. Matsushita has noted in his proposal, there is a linkage between competition principles that in general are intended to promote market access, and intellectual property rights that are intended to exclude potential market entrants. The TRIPS Agreement recognizes the right of Members to take action to remedy anti-competitive practices, and identifies a limited number of potentially anti-competitive practices. WTO Members might consider a further elaboration of potentially anti-competitive practices in the field of technology licensing and other IPRs-related fields so as to provide further guidance to Members. The parallel trade issue is closely linked to competition law in so far as opening markets to parallel trade is a means to prevent competitors from limiting supplies and fixing prices.

V. Trade-Related Environmental Measures (TREMS)

26. The recent Appellate Body report on *Shrimps-Turtles*¹³ marks a substantial departure from previous GATT case-law in the field of environmental protection. In a nutshell, the Appellate Body report holds for the proposition that, contrary to the decision in *Tuna-Dolphin*, WTO Members can adopt unilateral environmental policies to the extent that the letter of Art. XX GATT is respected. Further, the Appellate Body understands Art. XX GATT as imposing a “balancing” test between on the one hand, the revealed national preference to protect the environment, and on the other, trade liberalization.

27. The said report does raise a number of issues:

(a) Following its interpretation of Art. 13 DSU, in principle, anyone can draft an *amicus brief* and have it sent to panels. Actors, other than WTO Members, may enjoy more room for intervention because they are not bound by the specific procedures laid down in the DSU which all WTO Members must apply. Should this be the case?

(b) The relationship between Art. XX(b) and XX(g) GATT remains a puzzle. Is Art. XX(g) GATT *lex specialis* to XX(b) GATT? Should any case where reproduction of a natural resource takes place at a slower pace than its elimination be understood to be a case where applicability of Art. XX(g) GATT is welcome?

(c) The report deals with the term “disguised restriction of trade” but stops short of interpreting it. Should this term be equated with the concept of “abuse of right” (*abus de droit*)? If so, how do we square such an understanding with the long standing GATT case-law according to which panels cannot question the invocation of the revealed preference as such (what is known as “full proportionality” test in constitutional settings), but can only examine whether the

¹³ United States - Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R, 12 Oct. 1998.

means used to reach the stated objective constitute the least restrictive option (i.e. “the test of necessity”)?

(d) What is the place for multilateral environmental treaties (MEAs) in the WTO dispute settlement system? The Appellate Body did not have to deal with this issue, but it surely is one of the issues that will occupy the trade and environment dialogue in the years to come. Should the existing Art. XX GATT be formally amended so as to include an explicit reference to MEAs? Can the same objective be reached without formal amendment by reference to “subsequent practice” in accordance with Art. 31 of the Vienna Convention on the Law of Treaties?

(e) The issue of permissible extent of the jurisdictional reach of national environmental legislation was not discussed either. But there are more and more often claims against “impermissible extra-territoriality” regarding the application of national legislation.

(f) The already issued WTO Panel and Appellate Body reports on the WTO Agreement on Sanitary and Phytosanitary Measures (SPS) have clarified some of the interrelationships between GATT rules and the SPS Agreement. The relationship of the Agreement on Technical Barriers to Trade (TBT) to the GATT, and the TBT rules on various issues, remain controversial.

28. Several ITLC members participated in a Symposium on “The WTO After the Seattle Ministerial Conference” in Vienna, Austria in December 1999, where Prof. Petersmann presented a report on TREMs in WTO legal practice. The ITLC will continue to co-ordinate its work on TREMs with the ILA Committee on Trade and Sustainable Development.

VI. The Rule of Law in International Trade

29. This agenda item provoked long, and often contradictory discussions among members of the ITLC. During our June 1999 meeting in Geneva, two proposals tabled by Prof. Oppermann and by Prof. Petersmann failed to reach consensus among members of the ITLC. The first proposal (Oppermann) aimed at proposing a WTO Understanding between Members to allow private parties to assert, where appropriate, violations of WTO law before national and regional authorities and courts of WTO Members on the basis of violations confirmed by final rulings given under the DSU. The second proposal (Petersmann) envisaged that, as in competition law, WTO Members should recognize, also in the trade rules of the WTO, rights of their citizens to invoke precise and unconditional WTO guarantees of freedom and non-discrimination before domestic courts. Most of the criticism against the two proposals came from Prof. Jackson and was based on the inherent national discretion as to the modes of implementation of international obligations and the often observed national distrust vis-à-vis international rules. Other ITLC members shared the criticism advanced by Prof. Jackson and hence no consensus could be reached on any of the two proposals.

30. Based on remarks by Prof. Cottier, Prof. Oppermann and Prof. Petersmann, the ITLC discussions on this agenda item led to the emergence of a consensus on the following five principles which also constitute the basis of the Draft Recommendation on the Rule of Law in International Trade prepared by Prof. Oppermann (See Annex 3).

(a) *Bona fides compliance with international trade law*: In accordance with Art. XVI:4 of the WTO Agreement and Art. 22.1 DSU, WTO Members are obliged to ensure at all times full conformity of their behaviour with WTO law. In case WTO adjudicating bodies have found that Members acted inconsistently with their WTO obligations, Members must ensure full implementation of their international obligations. Compensation instead of full implementation remains a transitional option (pending implementation). Suspension of concessions remains an exceptional measure to be used only after authorization by the DSB and only as long as WTO Members do not bring their measures into conformity with their international obligations;

(b) *Transparency*: The WTO Agreement contains a series of provisions referring to transparency. Of utmost importance is Art. X GATT which calls for publication and notification of all relevant national laws. In the WTO dispute settlement system, a number of steps have been taken so as to enhance transparency: publication of a nonconfidential summary of submissions to WTO adjudicating bodies, publication of all panel and Appellate Body reports on the day they are circulated to Members, enhanced participation of interested parties. A number of “grey areas” though still remain. For instance, notwithstanding Art. 3.6 DSU, practice shows that WTO Members are often reluctant to notify mutually reached solutions.

(c) *Democratic participation*: There is a need to strengthen democratic participation in the negotiation and the implementation of WTO rules at the international and national levels. Prof. Petersmann proposed to this effect the creation of an advisory WTO Economic and Social Committee consisting of representatives of the various economic and social activities, modeled after the EC Economic and Social Committee, whose access to all WTO documents and regular consultation by other WTO bodies could enhance public support for WTO and limit one-sided influences by NGOs and rent-seeking lobbies on WTO activities. Private party submission of *amicus curiae* briefs to WTO dispute settlement panels and the Appellate Body could likewise set incentives for private involvement and support for the WTO.

(d) *Consistent interpretation*: Parliamentary legislation and administrative regulations are presumed to be consistent with higher national and international law. In case of ambiguous terms, the judiciary should interpret the national rules in conformity with the international obligations ratified by the country concerned. The resolution of clear conflicts between international and national rules depends on the respective international and national legal and dispute settlement rules (e.g., on whether countries with “dualist” legal systems have incorporated the international rules concerned into the domestic legal system, or

whether the legislator has constitutional power to adopt later legislation in violation of prior international treaty obligations).

(e) *Access to courts*: To a large extent the effectiveness of a legal regime is tested before courts. The human right to effective judicial protection vis-à-vis governmental restraints of individual freedom and non-discrimination needs to be strengthened in the foreign policy area in order to better protect freedom and non-discrimination across frontiers.

31. Subsequent to our discussions, Prof. Cottier tabled a series of additional proposals aiming at further clarifying the Draft Recommendation. Prof. Cottier essentially proposed a precise concept of “consistent interpretation”; stated his preference for a Parliamentary Assembly in place of a WTO Economic and Social Committee, since the former would be much clearer in terms of composition and could enjoy enhanced legitimacy. He also proposes a distinction between consistent interpretation on the one hand (where, to his mind, strong, unambiguous language is required), and direct effect and compliance with rulings, on the other. He suggests that the latter two items can constitute the subject-matter of further work in the future. He finally raises the issue of (an eventual introduction of) advisory opinions and a review of the existing enforcement mechanism which would ultimately lead to a stronger commitment to comply with rulings. Prof. Cottier’s comments have been reflected in Prof. Oppermann’s annexed Draft Resolution on the “Rule of Law in International Trade”.

VII. WTO Dispute Settlement System

A. Overview

32. Five years after the entry into force of the WTO, 188 consultations had been requested under the DSU 30 cases have been completed by adoption of the Appellate Body report and/or the panel report, whereas 40 cases have been settled or are currently inactive.¹⁴

33. At this point it is rather difficult to identify trends in the WTO dispute settlement practice. The overall number of disputes has increased in comparison to the pre-WTO era. At the same time, participation of developing countries in WTO dispute settlement practice has increased as well: according to the cited “Overview” prepared by the WTO Legal Affairs Division, developing countries have acted as complainants in 36 proceedings since 1.1.1995 and have been represented in approximately 100 disputes as either complainants or defendants during the same period. Interestingly, some of them (especially, India) take advantage of the opportunity acknowledged to third parties to present their

¹⁴ For a detailed description of all cases submitted to the WTO DSU and the current state of each one of them, see the ‘Overview of the State-of-Play of WTO Disputes’ prepared by the Legal Affairs Division of the WTO Secretariat at <http://www.wto.org/wto/dispute/bulletin>.

views to panels. The increasingly active involvement of developing countries in the WTO dispute settlement system (e.g. India participated as complainant, defendant or third party in 29 WTO disputes 1995-1999) has contributed to the conclusion of the “Agreement establishing the Advisory Center on WTO Law” signed by 29 WTO member countries on 1 December 1999 at the Seattle Ministerial Conference.

34. There has been increasing recourse to the special “compliance panel” proceedings provided for in Art. 21.5 DSU (four cases were reported in 1999 alone, that is following the notorious *Bananas* litigation between the EC on the one hand, and various Central American exporters and the United States on the other), as well as to arbitration on the authorization of countermeasures pursuant to Article 22.6 DSU.

35. During the ongoing DSU review, specific proposals to address the link between Art. 21 and Art. 22 DSU were tabled. Negotiators agreed before the Seattle meeting that a “compliance panel” must always be established in order to examine, in case of dispute between the interested parties, the compatibility of actions taken by the defendant party during the reasonable period of time to comply with the rulings of the panel/Appellate Body. In a sense, negotiators accepted a time sequence between Arts. 21 and 22 (a “compliance panel” will establish whether measures taken by the defendant are adequate to comply with the panel/Appellate Body’s rulings and, only in case the “compliance panel” rules that such measures are not adequate, a request to impose countermeasures can be lawfully deposited). Decisions by the “compliance panel”, according to the agreement, would not be subjected to appeal. This understanding was supposed to be formally approved during the Seattle meeting. In view of the overall breakdown there, it remained an informal agreement between negotiators.

36. Subsequent to Seattle, negotiators continued their meetings in the context of the DSU review. The idea of replacing parts of the existing text of Arts. 21 and 22 through provisions establishing the “compliance panel” continues to be unanimously accepted by negotiators. At the same time, negotiators have agreed on some other amendments of the DSU. None of those amendments carries the same weight as the agreement to establish a non-appealable “compliance panel” procedure. Most notably, negotiators agreed to add to existing Art. 3.6 DSU (dealing with the obligation of WTO Members to notify all bilateral agreements reached in the process of dispute settlement) a paragraph explaining that notifications must be comprehensive so as to provide a basis for assessment of their conformity by other WTO Members. At this stage, there can be only speculation as to whether anything will be added to the DSU regarding the entry into force of the “compliance panel” mechanism as expressed in the DSU review negotiations. The momentum seems to be there, and its eventual inclusion will depend on a series of considerations, not necessarily of a legal nature.

B. ITLC Work

37. ITLC members have been active in a series of conferences and book projects relating to the WTO Dispute Settlement system. Most notably, Prof. Weiss organized a conference in May 1999 on “Improving WTO Dispute Settlement Procedures: Issues and Lessons From the Practice of Other International Courts and Tribunals”. Several ITLC members participated in the conference the contributions to which will soon be published. In addition, a number of ITLC members are actively involved in the ongoing UNCTAD Program and Workshops on “Settlement of Disputes in International Trade, Investment and Intellectual Property”. The most recent meeting in this context took place on January 20-22, 2000 in Geneva. Prof. Petersmann edited two special issues of the *Journal of International Economic Law* on the “WTO Dispute Settlement System” (1998: pp. 175-322) and “Dispute Settlement Procedures of International Organizations” (1999: pp. 185-398), to which ITLC members contributed. Finally, David Palmeter and Petros C. Mavroidis co-authored a book on “WTO Dispute Settlement Practice and Procedure” (Kluwer, 1999).

38. ITLC members have voiced their willingness to participate in a book-project on the evolutions of WTO case-law, comparable to the one already undertaken and published by Kluwer.¹⁵

VIII. Cultural Exception

39. The ITLC has undertaken a preliminary examination regarding whether to include study of a possible “cultural exception” to WTO rules and disciplines to its work program. This preliminary examination was initiated at the suggestion of Dr. Patrick O’Keefe, Chair of the ILA Cultural Heritage Law Committee. Mary Footer has taken responsibility for this task, and presented a report on this subject at the June 1999 meeting in Geneva.¹⁶

40. The question of the “cultural exception” is a controversial one. The term has been ascribed different meanings by WTO Members and interested parties depending on the context of their usage. The European Union, for example, has tended to use the term in connection with its audio-visual market access restrictions, and by doing so has raised concerns among other WTO Members regarding potentially broad restrictions on trade. Developing WTO Members and other Members have used the term to refer to potential mechanisms for protecting the cultural heritage of indigenous cultures. One of the objectives of any ITLC study of the possible creation of a “cultural exception” would be to endeavor to clarify the meaning of the concept from a trade perspective.

¹⁵ See note 1 *supra*.

¹⁶ See note 2, *supra*.

IX. Future Program of Work

41. At its June 1999 meeting in Geneva, the Committee identified several subjects as the focus of attention for its future work. These include: (1) the preparation of a second volume of articles regarding the WTO dispute settlement system (to concentrate on developments since the entry into force of the WTO Agreement); (2) continuing study of the issues regarding TRIPS, including those raised by developments in biotechnology; (3) continuing study of all aspects of E-Commerce and its relationship to world trade; (4) continuing study of the relationship between trade and competition policies and rules; (5) continuing study of the relationship between trade and environmental policies and rules; (6) continuing study of the rule of law in international trade, and (7) continuing study of the WTO dispute settlement system, including potential reforms and its interrelationships with other dispute settlement systems (such as the ICJ, ICSID, WIPO arbitration, regional dispute settlement mechanisms, *e.g.*, in the EU and NAFTA).

ANNEXES

ITLC Draft Resolutions on:

1. Parallel Trade
2. Trade-Related Antitrust Measures
3. Rule of Law

Annex 1

Proposal of the Committee on International Trade Law for an ILA Resolution Regarding the Exhaustion of Intellectual Property Rights and Parallel Trade

The Committee on International Trade Law of the International Law Association, having studied the subject of the exhaustion of intellectual property rights and parallel trade, and having carefully considered the views and recommendations of interested persons and groups, including governments, businesses, consumers, economists and lawyers:

1. *Recalls* that WTO Members are obligated by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to take effective measures to prevent trade in goods and services that are produced and distributed in a manner that infringes rights in intellectual property, including trade marks, copyrights and patents.

2. *Recalls* that WTO Members are obligated by the General Agreement on Tariffs and Trade 1994 to respect the principle of national treatment (non-discrimination), and that each WTO Member is obligated to treat imported goods on an equivalent basis with goods produced within its territory.
3. *Recalls* that Article 6 of the TRIPS Agreement provides that “For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 [national and most favored nation treatment, respectively] nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”
4. *Notes* that an intellectual property right is subject to exhaustion when a particular good to which it pertains has been placed on a market with the consent of the right holder. Upon the exhaustion of an intellectual property right, the holder of that right may no longer control the distribution or movement of that good. Parallel importation and exportation involves trade in specific goods that have been placed on markets with the consent of intellectual property rights holders. Under a doctrine of national (or regional) exhaustion, the placing of a good on a national (or regional) market exhausts the right of the intellectual property holder only in respect to that national (or regional) market. Under a doctrine of international exhaustion, the placing of a good on any national (or regional) market exhausts the right of an intellectual property holder in respect to all markets.
5. *Notes* that goods placed on the market with the consent of intellectual property rights holders must be distinguished from counterfeit and pirated goods, and that distribution of counterfeit and pirated goods (*i.e.* goods produced without the consent of rights holders) is never subject to exhaustion of rights, but is instead prohibited by the TRIPS Agreement.
6. *Encourages* WTO Members to refrain from threatening or taking actions with respect to Member government policies which permit parallel trade into their territories in so far as such policies are consistent with the terms of the TRIPS Agreement.
7. *Notes* that the principal function of the trade mark is to identify the source of goods in commerce for the benefit of consumers. Trade marks also serve to protect the goodwill of producers. In order to perform these functions, the law must ensure that goods are marked with the consent of trade mark holders and that consumers are not confused regarding the origin or characteristics of goods. A doctrine of international exhaustion with respect to trade marks is consistent with the objectives of trade liberalization and the promotion of competition, provided that the interests of consumers are safeguarded.
8. *Recommends* that WTO Members recognize a doctrine of international exhaustion with respect to trade marked goods that have been placed on the market by, or with the consent of, the trade mark holder; provided,

however, that WTO Members should safeguard the interests of the public and of producers by allowing protection against consumer confusion as to the source and material characteristics of goods.

9. *Notes* that copyright promotes the public interest by encouraging the creation and dissemination of authors' and artists' creative expression and acknowledges that the interests of the public may be served by the free movement between national and regional markets of copyrighted works that have been placed on the market with the consent of the copyright holder. There are, however, circumstances in which the interests of authors and artists in achieving adequate remuneration may justify restrictions on the movement of copyrighted works between markets.
10. *Recommends* that WTO Members continue to inquire into the approach to parallel trade in copyrighted works that is best suited to promoting the interests of the public, recognizing that copyrighted works may be expressed in different forms, including tangible works (such as printed books) and intangible works (such as digitally-stored music); and further recognizing that different approaches might be considered regarding different forms of copyrighted expression.
11. *Notes* that patents serve the public interest by encouraging inventive activity, investment in inventive activity and the dissemination of information concerning inventions. Patent protection seeks to strike a balance between the interests of inventors and producers in securing adequate rewards by the grant of market exclusivity, the interests of consumers in the benefits of new technologies, and the interests of consumers in the benefits of competitive market prices.
12. *Notes* that certain forms of government regulation in respect to patented products may result in distortions in international trade, and that such regulation might be taken into account in formulating recommendations regarding parallel trade in patented products. Particular product sectors may be regulated differently, and an approach to parallel trade in patented products might involve sectoral distinctions.
13. *Recommends* that WTO Members continue to inquire into the approach to parallel trade in patented inventions that is best suited to protecting the interests of consumers and producers, recognizing that Members may adopt their own national and regional approaches to parallel trade in patented inventions consistently with the terms of the TRIPS Agreement.
14. *Notes* that intellectual property rights are also used in connection with trade in services, and that the subject of the exhaustion of intellectual property rights and parallel trade in services demands further attention.
15. *Encourages* WTO Members to give special attention to the interests of developing countries in parallel trade. Restrictive parallel trade policies have the potential to limit the export opportunities of developing Members, and might impede the development of globally competitive industries. On the other hand, in certain instances, unless restrictive poli-

cies are permitted goods may not be made available in the developing country in the first place. Developed Members should take into account the market access interests of developing Members in formulating their parallel trade policies.

Annex 2

THE ILA LONDON 2000 “MILLENNIUM” DECLARATION ON COMPETITION POLICY

THE INTERNATIONAL LAW ASSOCIATION (ILA)

- Convening for its sixty-ninth (Millennium) conference in London from 23 to 29 July 2000,
- Recalling the progressive establishment of an international trade order with the inception of the General Agreement on Tariffs and Trade (GATT) on 30 October 1947; and its legal development in the course of eight rounds of trade negotiations from Geneva in 1947 to Punta del Este in 1986,
- Welcoming the strengthening of this multilateral trading system with the founding of the World Trade Organization (WTO) in 1995, now comprising more than 130 States Members and the European Communities; and regulating, in particular, trade in goods, trade in services and trade-related aspects of intellectual property rights,
- Recognizing that, through the eight trade negotiations conducted under the auspice of GATT, governmental trade barriers have been reduced, but that there are still considerable governmental barriers to trade and that, as governmental barriers to trade are reduced, private trade barriers are recognized as becoming more and more important impediments to trade,
- Considering that, under these circumstances, it is important for WTO to establish principles of competition policy within the framework of WTO in order to deal with both governmental and private trade barriers,

DECLARES:

1. Undistorted competition is a basic objective and principle underlying many WTO provisions.
2. The WTO should aim at elaborating a more coherent set of mutually complementary trade and competition rules so as to further promote non-discriminatory conditions of competition for the benefit of consumers in all WTO Member countries.

RECOMMENDS:

1. WTO should consider introduction of a plurilateral agreement on competition policy. Such agreement may be called: Plurilateral Agreement on Competition and Trade (PACT).

2. PACT should contain rules regarding transparency and due process of law as well as principles of most-favoured-nation treatment and national treatment in the enforcement process of competition laws of Members.

3. In its initial stage, PACT should incorporate rules which deal with matters such as international cartels and export/import cartels which directly affect trade between WTO Members. Such rules should state that public and private measures which restrict trade among Members are contrary to the purpose of WTO and would offset the benefit of liberal trade achieved through trade negotiations.

4. PACT should elaborate disciplines in regard to the field of judicial assistance and law enforcement such that Members may have obligations to cooperate in investigation and enforcement activities.

5. In due course, however, WTO may consider the possibility of introducing additional rules and procedures so as to promote overall coherence of trade and competition rules and international cooperation among competition authorities, *e.g.*, in cases of mergers and acquisitions notified to and affecting several countries.

6. WTO should formulate additional rules regarding the implementation of Article 40 of TRIPS in order to give more guidance to Members seeking to introduce legislation on restrictive business practices involved in licensing of technology. Also, WTO should clarify the requirements contained in other provisions in WTO agreements which are related to competition policy (such as Article 8 of the TBT Agreement, Article XVII of GATT, Article 9 of the TRIMs Agreement, Articles VIII and IX of GATS and Article 11 (b) of the Safeguard Agreement) in order to assist Members to implement such provisions.

7. WTO should consider whether some principles of competition policy may be incorporated into agreements regarding trade remedies such as the Antidumping Agreement and the SCM Agreement, for example, provisions on “injury to competition” and on participation of consumers associations as “interested parties” in domestic antidumping and countervailing duty proceedings.

8. WTO should consider the establishment of a permanent group of experts on competition and trade (such as the Permanent Group of Experts on subsidies and trade relations as provided for in Article 24 of the SCM Agreement) which advises WTO bodies on any matter related to competition policy including dispute settlements.

Annex 3

**THE INTERNATIONAL LAW ASSOCIATION (ILA)
Declaration on “The Rule of Law in International Trade”**

- CONVENING for its sixty-ninth (Millennium) Conference in London on 23 to 29 July 2000
- RECALLING the progressive establishment of a legal order in international trade with the inception of the General Agreement on Tariffs and Trade (GATT) in 1947, the legal development of GATT in the course of eight rounds of trade negotiations finally leading to the foundation of the World Trade Organization (WTO) in 1995 now comprising more than 130 States members and the European Communities, regulating trade in goods, trade in services and trade-related aspects of intellectual property right
- RECOGNISING that members are legally bound to perform in good faith their obligations deriving from the WTO and the agreements concluded thereunder (WTO law) including final rulings under the WTO Dispute Settlement Understanding (DSU) binding for the parties of the dispute,
- RECOGNISING that direct applicability of WTO law for the benefit of citizens on the national and regional level has been deferred for the time being by decisions of some WTO members, taken during the 1994 ratification process (for example by the US Uruguay Round Agreements Act of 1994 and by the European Community Council Decision (EC) No. 94/800 of 1994),-
CONSIDERING that the rule of law in international trade should be strengthened further by enhancing the legitimacy of WTO law and by improving the transparency of its rule making process and dispute settlement procedures
- DECLARES: 1. WTO law is part of international treaty law binding on all Members that have ratified the WTO agreements. International law requires Members to perform in good faith their treaty-obligations within their national and regional legal orders.
2. Given its multilateral character the WTO must promote uniform and consistent interpretation of its rules internationally and nationally.

This will be furthered by:

- (a) Compliance with final rulings under the DSU binding for the parties in the dispute.
- (b) Consistent interpretation of domestic trade law by national and regional authorities and courts in conformity with WTO obligations.
- (c) Mutual exchange of information between national, regional and WTO authorities and courts about the application of WTO rules.
- (d) Scholarly research and teaching of WTO law in order to enhance its understanding by traders, producers, consumers and governments.

RECOMMENDS:

3. WTO members should strengthen the rule of law in international trade by enhancing the legitimacy and acceptance of WTO rules by:

(a) Improving the transparency of the WTO rule making process i.a. by increasing the participation of national representatives of the economic and social activities in the work of the WTO, for instance, by creation of an Advisory Economic and Social Committee or an advisory parliamentary body of the WTO to be consulted regularly by the WTO organs.

(b) Opening the WTO dispute settlement system for observers representing legitimate interests in the respective procedures, and promoting full transparency of WTO dispute settlement proceedings.

(c) Allowing individual parties, both natural and corporate, an advisory locus standi in those dispute settlement procedures where their own rights and interests are affected.

4. WTO members should be encouraged to strengthen the legal and judicial remedies of their citizens if the latter are adversely affected by violations of precise and unconditional WTO guarantees of freedom and non-discrimination, especially where such violation of WTO rules has been ascertained in a legally binding manner by rulings of the DSB.

LOOKS FORWARD TO :

5. Further increase in WTO membership by admission to the World Trade Organization of all States willing and able to exercise the rights and to fulfil the obligations of membership of the WTO in order to achieve early and universal acceptance of the rule of law in international trade.