

INTERNATIONAL LAW ASSOCIATION

NEW DELHI CONFERENCE (2002)

COMMITTEE ON INTERNATIONAL TRADE LAW

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FIFTH REPORT OF THE COMMITTEE

By Prof. F.M. Abbott, Parts I, II (joint), III, VIII
Prof. P.C. Mavroidis, Parts II (joint), V (joint), VII (joint)
Prof. T. Cottier, Part VI (joint)
Prof. E.-U. Petersmann. Parts IV, V (joint), VI (joint) and VII (joint)

I. Introduction

1. Following its meeting at the London Conference in July 2000, the Committee on International Trade Law (ITLC) met in Geneva on 25-26 June 2001 at the World Trade Organization (WTO), World Intellectual Property Organization (WIPO) and the University of Geneva. On June 25 at the WTO, in addition to considering its work program, the ITLC had the benefit of reports from Prof. Pieter Jan Kuijper,

Director of the WTO Legal Division, regarding dispute settlement activities and proposals for revision of the WTO Dispute Settlement Understanding (DSU), and Prof. Frieder Roessler, Director of the Advisory Center of WTO Law, regarding dispute settlement concerning measures in favor of developing countries and regional integration arrangements. On June 26 at WIPO, the ITLC had the benefit of reports from Mr. Adrian Otten, Director of the WTO Intellectual Property and Investment Division, regarding implementation of and issues raised in connection with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and from Dr. Werner Zdouc of the WTO Appellate Body Secretariat regarding WTO jurisprudence under the General Agreement on Trade in Services (GATS). The ITLC also heard additional reports on various aspects of WTO dispute settlement practice from a number of its members, including Dr. Gabrielle Marceau, and Profs. Frederick Abbott, Thomas Cottier, William Davey, Petros Mavroidis, Mitsuo Matsushita (former Appellate Body Member), Ernst- Ulrich Petersmann and Debra Steger. The ITLC takes note that one of its members, Prof. Giorgio Sacerdoti, was appointed in 2001 to serve as a Member of the WTO Appellate Body. At its June 2001 meeting, the ITLC decided to focus its 2002 Report on trade-related aspects of intellectual property rights (TRIPS), trade-related competition rules and policies, trade-related environmental measures (TREMS), the rule of law and human rights in international trade, and WTO dispute settlement. This report incorporates comments by a number of ITLC members on a first draft circulated in December 2001.

II. General Developments in International Trade Governance

2. Since the failed WTO Seattle Ministerial Conference of November-December 1999, a great deal of public attention has been focused on issues surrounding “globalization” and the extent to which that process is accounting for the interests of the various actors participating in the international economic system, especially developing (including least developed) countries. The terrorist attacks in New York on September 11, 2001, heightened awareness that the world community is closely linked and that “democratic peace” even inside the most powerful country can be threatened by disregard for human rights abroad and by tolerance for terrorism in “failed states”. An event in one major economic actor created waves that washed through economies around the globe, harming both the powerful and the vulnerable. As trade negotiators approached the Ministerial Conference in Doha, Qatar, in November 2001, it was clear that failure to reach agreement on a negotiating agenda might undermine recently shaken confidence in the international economic system, and create even deeper problems. Trade negotiators also understood the urgency of beginning to address in a serious way the concerns of developing and least developed countries over a perceived failure of the WTO to support their particular interests in market access, and their concern that implementation of the TRIPS Agreement was creating serious obstacles to providing effective health care in the face of immediate and growing disease burdens.

3. On 14 November 2001 in Doha, concluding the Fourth WTO Ministerial Conference, Ministers adopted a Declaration that effectively commences a new round of trade negotiations nominally intended to focus on the interests of developing and least-developed Members.¹ Ministers also adopted a Declaration on the TRIPS Agreement and Public Health that addresses interests of developing and least-developed Members in providing more affordable access to health care, including medicines, and took a decision on Implementation-Related Issues and Concerns.² The Declarations and decisions made at Doha involve a number of complex issue areas. Some, including TRIPS, competition, TREMS, and reform of the DSU, are addressed in some detail in this report. Other major issue areas, including agriculture and investment, do not yet form part of the ITLC’s formal work program. The Doha negotiating mandate is controversial. It encompasses several areas of negotiation resisted by developing Members, such as TREMS and investment. Several controversial issue areas will not be subject to concrete negotiations until further consensus decisions are taken at the Fifth WTO Ministerial Conference.

4. With respect to the traditional GATT agenda, the Doha Declaration reflects the agreement of all WTO Members to further address what proved to be the most contentious issue in the traditional agenda, agriculture. It is true that agriculture is part of the existing WTO mandate in the sense that, following the

¹ Documents regarding the WTO, including official texts arising out of the Doha Ministerial Conference, may be found at the WTO website, <http://www.wto.org>.

² Ministers also took waiver decisions concerning EU measures in favor of ACP countries, and procedures for developing country extensions under the Subsidies Agreement.

“tariffication” of agricultural protection, negotiators agreed during the Uruguay round on disciplines for export subsidies, domestic support and market access for agricultural products. Agricultural protection constitutes still though a “tariff peak”. The Ministerial Declaration (WTO Doc. WT/MIN(01)/DEC/1) reaffirms the resolve of WTO Members to proceed towards establishment of a “fair and market-oriented trading system” with respect to agricultural products taking into account “non-trade concerns reflected in the negotiating proposals submitted by Members.”

5. Ministers in Doha also agreed to address “environment”. A series of GATT/WTO panel reports have directly addressed environment-related issues. The WTO Committee on Trade and Environment has also addressed a series of issues relating to the Trade and Environment debate. Still, a number of issues remain unsettled, and most notably the relationship of the WTO with multilateral environmental agreements (MEAs). Ministers agreed in Doha to address this issue albeit in a limited way (MEAs which contain specific trade obligations and without prejudging the rights of non parties to MEAs).

6. The Doha Declaration reflects the willingness of Ministers to negotiate “new issues”, like competition and investment. This is of course not the first time that the two issues are present on the WTO table of negotiations. The 1996 Singapore Ministerial Declaration reflects the commitment of WTO Members to establish a Working Group on Trade and Competition. The Group has been in session ever since and, under the leadership of Frederic Jenny, has produced a series of reports that paved the way towards Doha. The Ministerial Declaration urges the group on Trade and Competition to include in its future work items like (i) the clarification of core principles such as transparency, non-discrimination, procedural fairness, provisions on hardcore cartels and modalities for voluntary cooperation; and (ii) support for progressive reinforcement of competition institutions in developing countries through capacity building.

7. On the other hand, an international agreement on investment has been negotiated (but not concluded) under the auspices of the OECD: the Multilateral Agreement on Investment (MAI). Developing countries however, have already voiced their unwillingness to see an extension of MAI into the WTO and hence, one should expect a different pattern of negotiations this time. The Doha Declaration reflects the agreement of participants to negotiate the relationship between trade and investment “on the basis of a decision to be taken by explicit consensus” at the Fifth Session of the Ministerial Conference (WT/MIN(01)/DEC/1 at p. 4). Between now and then, a Working Group on the Relationship Between Trade and Investment will focus on the scope and definition of the future Agreement, transparency, non-discrimination, modalities for pre-establishment commitments based on a GATS-type positive list approach, development provisions, exception and balance of payments safeguards and consultation and the settlement of disputes between Members.

8. There are a number of governmental and non-governmental groups that view negotiations on investment measures with intense skepticism. The interests of these groups are widely disparate. Reconciling their perspectives into a workable agreement presents extraordinary challenges. For example, interest groups demanding respect for the environment and protection of labor rights express concern that trade-related investment rules will facilitate challenges to more stringently protective national and regional regimes (as impediments to liberal trade interests). While the EU, by way of illustration, has developed a nuanced approach to reconciling these interests based on concepts such as proportionality, it is not clear that the WTO constitutive system has developed to a stage where multidimensional balancing such as that undertaken within the EU is made feasible on a global scale.

9. Issues involving the extent to which legislative measures may constitute “takings” in the expropriation sense are already a source of great controversy in the NAFTA, which incorporates rules on investment and third party dispute settlement. Any attempt in the WTO to deal with measures that may constitute taking is fraught with risk, raising concerns not only regarding intrusion on national legislative prerogative, but also recalling struggles over the New International Economic Order fought not so long ago.

10. Developing countries are inherently vulnerable to the attempted imposition of investment-related rules by developed countries since the latter are the major source of investment capital. The interests of venture capitalists and the interests of emerging economies may often converge, but they may also differ. Negotiations on trade-related investment rules must be approached with critical sensitivity to these differences.

11. Three titles in the Doha Declaration explicitly refer to developing country issues: Technical Cooperation and Capacity Building; Least-Developed Countries; Special and Differential Treatment. From a pure legal perspective, it is perhaps the last of the three titles that can potentially have the most far-reaching implications. WTO Members have already agreed in Doha (WT/MIN(01)/17) in a Decision on “Implementation-Related Issues and Concerns” to instruct the Committee on Trade and Development to (i) identify special and differential provisions of mandatory character from those of pure hortatory character and consider the legal and practical implications of transforming the latter to provisions of mandatory character; (ii) to examine under which conditions special and differential treatment can become more effective; and (iii) to consider how special and differential treatment may be incorporated into the architecture of WTO rules. The Doha Declaration builds on this agenda and further reflects the commitment of WTO Members to “the objective of duty-free, quota-free market access for products originating from LDCs” (p. 9 of the Declaration, *op. cit.*). Finally, the Doha Declaration reflects the agreement of WTO Members to “instruct the Committee on Budget, Finance and Administration to develop a plan for adoption by the General Council in December 2001 that will ensure long-term funding for WTO technical assistance at an overall level no lower than that of the current year and commensurate with the activities” (pp. 8-9 of the Declaration, *op. cit.*).

12. At the Doha Ministerial, WTO Members voted to approve the accession of the People’s Republic of China (as well as that of Taiwan), and China formally became a WTO Member on 11 December 2001.³ China’s accession presents opportunities and challenges for the world trading system.⁴ The integration of more than one-fifth of the world’s population into the WTO market-based trading system increases the potential for greater international economic productivity and stability, and for reduction in strategic tensions. At the same time, China’s economic and legal framework requires substantial reform to effectively address WTO commitments, and this creates a heightened risk of dispute over implementation issues. The successful integration of China into the WTO system will require patience and understanding on the part of all Members.

13. The ITLC endeavors to contribute to the WTO system by identifying and analyzing challenging legal issues, and developing proposals to address them. Its on-going work program on TRIPS resulted in the adoption by the ILA in 2000 of a Resolution Regarding the Exhaustion of Intellectual Property Rights and Parallel Trade that has proven of considerable value in respect to recent discussions in the Council for TRIPS. The ITLC’s work program on the rule of law is now integrated with its study of the relationship between human rights and trade. Members of the ITLC are contributing to a second book on WTO dispute settlement to complement a first publication that is often referenced by the WTO Appellate Body.⁵ The ITLC and its members will play an active role assisting to develop legal solutions for the negotiations initiated at Doha.

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

14. The TRIPS Agreement has from the outset of negotiations in the Uruguay Round been the subject of controversy. The owners of valuable commercial technology largely reside in the industrialized countries. The foreseeable effect of the TRIPS Agreement was to increase the level of payments for the use of technology from the developing to the industrialized countries, *i.e.* a static rent transfer. During and after the TRIPS negotiations, industrialized countries argued that developing countries would benefit from increased research and development (R & D) within their territories, increased levels of foreign direct investment, and transfer of technology programs designed and implemented to reduce the technology gap with the industrialized countries, *i.e.* dynamic effects of introducing intellectual property protection. The TRIPS Agreement included transition periods that allowed developing and least developed WTO Members

³ For the terms of the accession, including China’s Protocol of Accession, *see* Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001.

⁴ A number of members of the Committee prepared analytical papers concerning China’s accession. *See* CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT (F.M. Abbott, ed. 1998: Kluwer).

⁵ *See* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed., 1997: Kluwer)

to phase-in changes to intellectual property (IP) laws so as to ameliorate immediate impact of the agreement.

15. Although it was apparent that introducing patent and other IP protection on pharmaceutical products would result in increased drug prices in developing countries, there was minimal attention paid to the public health consequences of the TRIPS Agreement during the Uruguay Round. As developing (including least developed countries) confronted increasingly severe disease burdens brought about by the HIV/AIDS pandemic and other epidemic disease, there was growing awareness that patent protection operated to reduce access to essential medicines, exacerbating already difficult conditions. The political challenge by the United States and EU to South Africa's medicines reform legislation, and the suit brought by 39 pharmaceutical companies against the South African government, illustrated the tensions between claims to TRIPS Agreement protection and governmental interest in providing more affordable access to medicines. The United States eventually toned down its threatening posture towards South Africa's legislation due to political protests within the United States. Under intense public pressure brought about by NGO action, and in light of an extremely weak legal case, the 39 pharmaceutical companies withdrew their lawsuit in April 2001. The South African experience, along with persistent pharmaceutical industry pressure on public health policy in a number of developing and least developed Members, gave rise to a widely shared demand among developing countries to find ways to minimize the adverse effects of the TRIPS Agreement on access to medicines.

16. The WTO Council for TRIPS held sessions in June and September 2001 specifically devoted to issues concerning access to medicines. A substantial group of developing countries submitted a detailed proposal for a declaration on TRIPS and Public Health to be adopted at the Doha Ministerial.⁶ The United States and a small group of like-minded countries submitted an alternate proposal. Following extensive negotiations based on a compromise text prepared by the WTO Secretariat, Ministers in Doha adopted a Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2).

17. The Doha Declaration on the TRIPS Agreement and Public Health is comprised of 7 paragraphs. Three of these are preambular, and indicate the importance that WTO Members ascribe to effectively addressing public health concerns, especially epidemic disease. The fourth paragraph includes a strong statement in support of Member's rights to take measures to protect public health and provide affordable access to medicines. The fifth paragraph clarifies provisions on compulsory licensing and exhaustion of IPRs. It affirms, *inter alia*, that the TRIPS Agreement does not limit the grounds on which Members may grant compulsory licenses, that each Member has discretion to determine the existence of a public health emergency, and that the TRIPS Agreement permits each Member to adopt its own policies and rules regarding the exhaustion of IPRs and parallel trade. The final point takes precisely the position adopted by the ILA at its London 2000 Conference based on the recommendation of the ITLC. The sixth paragraph places the issue of compulsory licensing for export on the agenda of the TRIPS Council, requiring that a proposal be furnished to the General Council by the end of 2002. The seventh paragraph extends until 1 January 2016, the transition period for least developed Members to provide or enforce pharmaceutical product patent protection.

18. On January 1, 2005, developing Members will be required to have in place pharmaceutical patent protection. As of that date applications that were filed during the transition period will be converted as appropriate into patents as a consequence of mailbox filing mechanisms. As a result of these developments, starting in 2005 the world supply of generic pharmaceutical products will gradually diminish as new products (and products in the mailbox pipeline) come under patent protection. Although least developed Members, as a consequence of the Doha Declaration, will be allowed to produce and sell generic drugs until 2016, many or most least developed Members lack the capacity to manufacture a broad supply of medicines. The major generic producers are located in developing Members such as Brazil and India. These developing Members will gradually be restricted in their manufacture and sale of generic drugs.

⁶ Issues raised by developing countries in regard to the TRIPS Agreement and access to medicines were identified and analyzed in F. M. Abbott, *The TRIPS Agreement, Access to Medicines and the WTO Doha Ministerial Conference*, 5 J. WORLD INTELLECTUAL PROP. 15 (2002), first published as Quaker United Nations Office Occasional Paper No. 7, Sept. 8, 2001.

19. Article 31(f) of the TRIPS Agreement provides that a compulsory license shall be issued predominantly for supply of the local market. A strict textual interpretation of the TRIPS Agreement may limit least developed Members, for example, from issuing compulsory licenses that will be satisfied by manufacturers located in Members where patent protection is enforced, if that supply would require Members to issue compulsory licenses predominantly for export. Article 30 (Exceptions to Rights Conferred) may provide an alternative basis for authorizing such exports. Absent constructive interpretation of the TRIPS Agreement, the effect of the Article 31(f) restriction is that developed Members with minimum needs for inexpensive generic medicines will have the capacity to utilize the tool of compulsory licensing, while less developed Members that require generic medicines will be unable to take advantage of this important tool. The objective of the forthcoming TRIPS Council deliberations is to develop a proposal that will allow developing and least developed Members to make effective use of compulsory licensing and exceptions as the world supply of generic drugs is otherwise reduced by the operation of the TRIPS Agreement patent provisions.

20. The ILA 2002 Conference will take place in India. That country has a well-developed generic pharmaceutical sector that presently supplies much of developing world demand for affordable drugs. It will be fitting for the ITLC at the New Delhi Conference to consider the work of the TRIPS Council and perhaps offer a recommendation on this subject.

21. In addition to the Declaration on the TRIPS Agreement and Public Health, the Ministerial Declaration, and the Decision on Implementation Issues and Concerns, also addressed TRIPS subject matter. The Ministerial Declaration provided for additional negotiations on the subject of geographical indications of origin.⁷ It also instructed the TRIPS Council to examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), the protection of traditional knowledge and folklore, and other new developments.⁸ Examining the relationship between the CBD and the TRIPS Agreement has assumed immediate importance because the patent provisions of the TRIPS Agreement have been raised as a potential obstacle to certain parts of a revised International Undertaking on Plant Genetic Resources (IUPGR) being negotiated in the Food and Agriculture Organization (FAO) forum.⁹

22. The Decision on Implementation Issues includes direction to the TRIPS Council to continue examination of issues regarding non-violation nullification or impairment causes of action in TRIPS dispute settlement and to make recommendations to the Fifth Ministerial Conference.¹⁰ It also includes a “standstill agreement” that non-violation complaints will not be initiated prior to that conference.

23. At the ILA New Delhi Conference, the ITLC may consider the issue of the relationship between the CBD and TRIPS Agreement, and the issue of non-violation causes of action in the context of TRIPS, with a view toward formulating additional recommendations on these issues.

24. At the start of 2002, the WTO Appellate Body rendered a decision regarding interpretation of the TRIPS Agreement as it relates to trademarks and trade names in the U.S. – Section 211 Omnibus Appropriations Act of 1998 (“Havana Club” case).¹¹ The Appellate Body confirmed the panel’s view that the Paris Convention Article 6quinquies *telle quelle* (“as is”) obligation is addressed to accepting trademarks for registration in the same form, and not to eliminating Member discretion to apply rules concerning other rights in marks. It found that Articles 15 and 16 of the TRIPS Agreement do not prevent each Member from making its own determination regarding the ownership of marks within the boundaries established by the Paris Convention. It decided that Article 42 regarding procedural rights does not obligate a Member to permit adjudication of each substantive claim regarding trade mark rights a party might assert,

⁷ Ministerial Declaration, para. 18.

⁸ *Id.*, para. 19.

⁹ The proposed revised IUPGR includes an obligation to pay royalties to a multilateral fund based on patented inventions arising out of use of materials obtained from a resource bank. It has been suggested by some negotiating states that obligations directed solely to agricultural patents would violate the TRIPS Article 27:1 prohibition against discrimination based on field of technology.

¹⁰ Decision on Implementation Issues, Para. 11.1.

¹¹ Report of the Appellate Body, AB-2001-7, WT/DS176/AB/R, 2 Jan. 2002.

if that party is fairly determined *ab initio* not to be the holder of an interest in the subject mark. In sum, the Appellate Body confirmed the right of the United States to refuse registration and enforcement of trademarks it determines to have been confiscated in violation of international law.

25. The Appellate Body analyzed U.S. law relating to Cuba's alleged confiscation of trademarks in regard to national and most favored nation treatment obligations. It observed that as a matter of WTO law, these obligations are fundamental. It rejected the panel's determination that, although certain minor discriminatory aspects of the U.S. legislation could be identified, those aspects were unlikely to have a practical effect, and so are not WTO-inconsistent. The Appellate Body, in a somewhat strained reliance on an earlier GATT panel report (U.S.- Section 337)¹², found that even discriminatory aspects unlikely to have effect in practice were nonetheless inconsistent with the U.S. national treatment and MFN obligations.¹³

26. The ITLC has since its inception paid close attention to issues raised in the context of the TRIPS Agreement, and plans to actively continue to monitor and analyze its implementation.

27. In addition to developments in the WTO TRIPS Agreement context, an important development concerning patent law is also in early stages at WIPO. This is the resumption of negotiations aimed at the harmonization or approximation of substantive provisions of patent law. The WIPO patent law negotiations bear a close relationship to the TRIPS Agreement as they may affect the degree of flexibility afforded to WTO Members in the adoption and implementation of patent laws. For this reason, the ITLC will follow closely these related developments at WIPO.

IV. Trade-Related Competition Rules and Policies

28. In its Resolution 2/2000, prepared by the ITLC and adopted at its 69th Conference at London, the ILA had recommended that the "WTO should consider introduction of a multilateral agreement on competition policy" containing "rules regarding transparency and due process of law as well as principles of most-favored-nation treatment and national treatment in the enforcement process of competition laws of Members." The WTO Ministerial Declaration of November 2001 decided to launch negotiations "for a multilateral framework to enhance the contribution of competition policy to international trade and development" subject to the proviso "that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations." The Declaration recognizes "the needs of developing and least-developed countries for enhanced support for technical assistance and capacity-building in this area", and requests the WTO Working Group on the Interaction between Trade and Competition Policy to focus on the clarification of: "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hard core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing and least-developed country participants and appropriate flexibility provided to address them." The Declaration also requests WTO Members to cooperate with other relevant intergovernmental organizations, including UNCTAD.

29. In October 2001, competition authorities of the United States, the EU and a large number of additional countries launched a new *International Competition Network (ICN)* for worldwide cooperation among antitrust authorities in developed and developing countries. With over 80 countries that have enacted some form of competition law, and more than 60 countries now reviewing mergers, the multiplicity of competition and merger proceedings create risks of inconsistent outcomes and unnecessary procedural

¹² United States – Section 337 of the Tariff Act of 1930, Panel Report, adopted 7 Nov. 1989, BISD 36S/345. The AB's reliance is strained because the panel in the U.S. – Section 337 case identified a number of differences between rules applicable to patent proceedings involving domestically-produced and imported goods, and found only a limited number inconsistent with U.S. national treatment obligations. Those found to constitute discrimination (such as the incapacity of a import-related patent holder to assert counterclaims in a 337 proceeding) were matters that as a matter of intellectual property rights enforcement had meaningful consequences.

¹³ The Appellate Body further held, contrary to the panel, that trade names are within the subject matter scope of the TRIPS Agreement.

burdens and transaction costs. International cartels also harm consumers in many countries and cannot be effectively prevented without international coordination of competition investigations. After the first meeting of the ICN in Italy in spring 2002, annual conferences for coordination of competition policies will be held in Mexico, Korea, Germany and South Africa.

30. An increasing number of free trade agreements (FTA) with or among developing countries provide for competition rules and assistance for introducing more effective competition laws and policies in developing countries.¹⁴ These rules reflect the increasingly universal recognition that markets are not only a necessary consequence of effective protection of human rights (e.g. liberty rights and property rights protecting and entailing individual demand, supply and rivalry for the use of scarce resources). There is also increasing recognition that “human rights make better economic actors”, and market competition is the most efficient generator of prosperity and of resources necessary for the enjoyment, protection and promotion of human rights.¹⁵ Economic theory confirms that competition rules are indispensable for limiting “market failures” and for promoting an efficient economy without which the non-economic social objectives of a human society cannot be met. Criticism of welfare-reducing anti-competitive abuses is manifestly *not* a new issue either in policy debates or economics, as illustrated by Adam Smith’s criticism, e.g. of the monopoly power of the East India Company in his classic *The Wealth of Nations* (1776).

31. Also in the WTO Working Group on the Interaction between Trade and Competition, the focus of proposals for a multilateral framework on competition policy has shifted from securing market access to the needed promotion of national competition institutions and expanded international cooperation to address mutually harmful anti-competitive practices.¹⁶ Other increasingly important issues include the relationship of competition policy, economic regulation and liberalization in services sectors with oligopolistic markets (e.g., air and shipping transports); and the role of competition rules as a limitation on abuses of intellectual property rights protected under the TRIPS Agreement. Many other WTO rules, for instance in the Agreement on Safeguards (e.g., Article 11:3 prohibiting government support for non-governmental anti-competitive practices) and in the GATS- and TRIPS Agreements, demonstrate that it is impossible to exclude competition policy considerations from an efficient world trading system. The ITLC envisages organizing an international conference at the European University Institute at Florence on problems of negotiating competition rules in the WTO and the desirable content of multilateral WTO rules on competition policy. Past submissions by WTO members to the WTO Working Group have so far focused on the following three elements:

- a) A commitment by WTO members to certain core principles, including transparency, non-discrimination and procedural fairness in the application of competition law and/or policy, and measures against hardcore cartels. Flexibility for different national approaches is viewed as more desirable than a comprehensive harmonization of competition rules. Likewise, political “peer review mechanisms” seem to be preferred to judicial review of determinations of competition authorities by WTO dispute settlement panels.
- b) Modalities for voluntary cooperation regarding national legislation and cooperation among competition authorities (e.g. exchange of national experiences, enforcement cooperation).
- c) Commitments to support technical assistance and institution-building in the field of competition policy, with cooperation by governments and other international organizations. All WTO Members recognize the need for assistance for developing countries in using competition laws and policies as effective instruments for the promotion of economic development.

V. Trade-Related Environmental Measures

¹⁴ Such as Articles 35-40 of the EU-South Africa FTA and Articles 44-45 of the EC’s Cotonou Agreement with 77 African, Caribbean and Pacific Developing Countries.

¹⁵ See the contributions by E.U. Petersmann and A. Sykes to the book on human rights and international trade to be edited by ITLC members F. M. Abbott and T. Cottier (2002).

¹⁶ See generally Ignacio Garcia Bercero and Stefan D. Amarasinha, *Moving the Trade and Competition Debate Forward*, 4 J. INT’L ECON. L. 481 (2001)

32. In their Ministerial Declaration of November 2001, WTO Members “agree to negotiations... on:
- (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
 - (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
 - (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.”

Ministers also instruct the WTO Committee on Trade and Environment in pursuing its work program to give particular attention to the effect of environmental measures on market access, the relevant provisions of the TRIPS Agreement, and labeling requirements for environmental purposes so as to identify the need to clarify relevant WTO rules. Ministers emphasize “the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them.”

33. Two Appellate Body reports address, one directly and one indirectly, the trade and environment debate. The Appellate Body report on *United States – Import Restriction of Shrimp and Shrimp Products, Recourse to Art. 21.5 of the DSU*, essentially rejected all claims presented by the complaining parties and accepted that the United States had adequately implemented the recommendation of the panel and the Appellate Body itself by introducing flexibility into their domestic legislation (banning imports of shrimps which are fished in a way that does not minimize/eliminate the incidental taking of sea turtles) and by agreeing to conduct negotiations with all affected/interested parties. The importance of the original Appellate Body report has already been stressed in the Fourth ITLC report of 2000.

34. The Appellate Body report on *Asbestos*, although technically dealing with a health externality, is potentially quite relevant for the Trade and Environment debate. This is the case since the Appellate Body accepts that likeness can be influenced by factors such as risk to health.¹⁷ If this case-law is transposed to environmental externalities, one could imagine that likeness could be determined by factors such as the risk to environment that (some) products might carry. The same report reflects a first from a procedural perspective: a Member of the Appellate Body inserted in the report his minority but concurring opinion. Never before has there been a case where an Appellate Body report reflects a minority opinion (be it dissenting or concurring).

35. In December 2001, the BP Chair in Transatlantic Relations, under the direction of Prof. Petersmann, hosted an international conference at the European University Institute at Florence on *Environmental Policies of the United States and the EU* which attempted to identify and explain, *inter alia*, the diverging evolution of EU and US positions regarding trade and environmental linkages over the last decade. These divergences are likely to influence future WTO negotiations on linking trade liberalization and environmental protection. While the EU has urged clarification of WTO rules relating to MEAs, the precautionary principle and trade restrictions based on production processes and methods (PPMs), the US – and also many developing countries - appear less persuaded of the need to change WTO rules. In view of the increasing responsiveness of WTO dispute settlement findings to environmental considerations, the US has enhanced its reliance on WTO dispute settlement proceedings to clarify the necessary balancing between trade rules and environmental protection.

36. Views continue to diverge on the phasing-out of “environmentally harmful” subsidies. Another difference relates to the fact that industry interests in the US Congress have prevented any major environmental legislation since the 1990 Clean Air Act Amendment, and the US plays no longer a

¹⁷ It should be noted that whether a product contains carcinogenic components is a physical characteristic issue affecting the like product determination, and that the Appellate Body’s ruling in the *Asbestos* case might be construed to have limited implications for environmental issues regarding production processes and methods. See Gabrielle Marceau, *The WTO Dispute Settlement Procedures and Human Rights*, presented in connection with the Berne meeting referenced in para. 38 of this report, to be published in the book arising out of that meeting.

leadership role in international environmental policy (e.g., it has ratified neither the Basel Convention on Hazardous Wastes, the Kyoto Protocol nor the Biosafety Protocol). By contrast, EC environmental regulations and EC leadership in international environmental negotiations have become increasingly vigorous.

VI. The Rule of Law and Human Rights in International Trade

37. At its June 2001 meeting in Geneva, the ITLC noted with satisfaction the adoption of the resolution on the rule of law proposed to the London Conference of ILA in 2000 and discussed further work in the field. Professors Abbott and Cottier informed the ITLC about a joint project on human rights and trade under the auspices of the American Society of International Law and sponsored by the MacArthur Foundation (United States), directed by Professor Abbott and jointly undertaken by the IIEL (Prof. Jackson), the World Trade Institute (Prof. Cottier) and the Max Planck Institute for Foreign and Public International Law (Prof. J. Frowein). The process of global legal integration requires enhanced research efforts in exploring the mutual relationship of trade regulation and human rights. Developed in splendid isolation and mutual ignorance, if not distrust, the legal and political interaction of the two fields is increasingly felt and conceptual work to explore the relationship will be beneficial for both traditions. The topic raises a large number of complex and unresolved conceptual problems in interfacing trade regulation and human rights protection and advancement.

38. A first conference was subsequently held at the World Trade Forum in August 2001 at the World Trade Institute, supported by the Silva Casa Foundation and the MacArthur Foundation. The ITLC discussed the project with great interest and agreed to co-ordinate its future work with the efforts undertaken by the project. The importance of factual analysis and careful reasoning was emphasized in the light of the risk of engaging in an ideological battle. These concerns were well noted. The rapporteur will inform the ITLC on ongoing work. The item will be further pursued at the next meeting of the ITLC. It is submitted that the agenda should also include further discussion, in the context of the rule of law, as to how domestic legal remedies could be better coordinated in the light of progress achieved under the doctrine of consistent interpretation and in light of continued resistance to work towards direct effect of WTO law. These issues are closely linked to fundamental problems of accountability and democratic values in the law-making process. The lack of interest shown for these issues at the Doha Ministerial Conference should encourage the ITLC to reinforce its efforts in this field of fundamental importance for the future of the multilateral trading system and its continued legitimacy and success.

39. Under the direction of Prof. Petersmann, and with the collaboration of various other ITLC members, the 4th summer course 2001 by the *Geneva Academy of International Economic Law and Dispute Settlement* was devoted to the subject of *Human Rights, International Economic Law and Dispute Settlement*. The more than 50 different lectures and round-tables by academics and legal advisers from international organizations were attended by almost 200 diplomats, practitioners and students from more than 60 countries. The ITLC was also represented in the “day of general discussion” organized by the UN Committee on Economic, Social and Cultural Human Rights at the office of the UN High Commissioner of Human Rights at Geneva in May 2001, where Prof. Petersmann presented a paper on the need for integrating human rights into the law of worldwide organizations.¹⁸

40. Prof. Petersmann suggested to focus future ITLC discussions on the *Rule of Law and Human Rights in International Trade* on the following, open-ended list of legal and policy questions¹⁹:

- a) What are the characteristic legal structures of the regional and global “integration law” (e.g., reciprocal liberalization of transnational movements of goods, services, persons, capital and payments enhancing market competition and national as well as international market regulation) which differ from the classical “international law of coexistence” (focusing, e.g., on prohibitive rules protecting sovereign equality of states) as well as of the intergovernmental “international law of cooperation” (e.g., on financial contributions to the Bretton Woods institutions) and appear to

¹⁸ Accepted for publication in the *European Journal of International Law* in spring 2002.

¹⁹ Some of these questions are examined in the two contributions by ITLC members Petersmann and Hilf to the forthcoming conference book by S.Griller (ed.), *International Economic Governance and Non-Economic Concerns*, 2002.

- enable more effective rule-of-law-mechanisms in European integration and in WTO law (e.g. compulsory international adjudication) than in most other fields of international law?
- b) What policy lessons are to be drawn from the fact that free trade area agreements (such as NAFTA), customs union agreements (such as the EC) and GATT/WTO law – even though these inter-locking treaty systems are based on similar principles (e.g., GATT Articles III,XI,XXIV) and confronted with similar regulatory and dispute settlement problems (such as reciprocal liberalization, safeguard clauses, harmonization of laws, protection of national regulatory autonomy) – have given rise to such different institutions and dispute settlement systems?
 - c) The comparative studies of WTO, EC and NAFTA jurisprudence in our ITLC book on *International Trade Law and the GATT/WTO Dispute Settlement System (1997)* showed differences (e.g., as regards the 18 investment disputes under Chapter 11 of NAFTA up to 2001) as well as commonalities in WTO, EC and NAFTA dispute settlement practice (e.g., concerning the judicial interpretation of national treatment principles as illustrated by the *Keck judgment* of the EC Court). How could “cooperation” and mutual learning among WTO, EC and NAFTA judges be promoted?
 - d) What are the legal consequences of the universal recognition and progressive development of UN human rights principles for the legal and judicial interpretation of WTO rules protecting liberty rights, property rights, non-discrimination, rule of law, access to courts, social human rights values and other “public interests”? Even though courts tend to clarify these legal questions only case-by-case and article-by-article, judicial findings of inconsistencies between treaty implementation rules and human rights have remained extremely rare even in the EC: On which particular WTO rules and human rights should our ITLC Committee focus its future work (e.g., the relationship between certain TRIPS provisions and the human right to health)?
 - e) Does the recent recognition of the “proportionality principle” in the Appellate Body case-law (e.g. US-Safeguard Measures on Cotton Yarn from Pakistan, WT/DS192/AB/R, adopted 5 November 2001) reflect the “constitutional principle” recognized also in human rights treaties that governmental restrictions of freedom, and their “end and means relationship”, have to be justified and balanced with other conflicting principles and human rights? What is the relationship between the “necessity” and non-discrimination principles recognized in WTO law (e.g., GATT Article XX) and the proportionality principle? How should the proportionality principle be applied in other areas of WTO law? What is the relationship between the proportionality principle and the good faith principle?
 - f) Would it be desirable to recognize the “constitutional primacy” and “indivisibility” of the “inalienable core” of human rights, emphasized in numerous UN resolutions, also in WTO political or dispute settlement practice? Should WTO practice emphasize that all human rights need to be defined and mutually balanced through democratic implementing legislation and court judgments which may legitimately differ from country to country?
 - g) Which civil, political, economic, social and cultural human rights are of particular importance for WTO law? How should the political and legal relationships between the WTO and UN human rights bodies, as well as with UN agencies focusing on particular human rights problems (such as WIPO, ILO, UNESCO, WHO, FAO), be structured in the future?
 - h) Prior to the “human rights revolution of 1989” made possible by the fall of the Berlin Wall, many international lawyers argued that the legitimacy of international rules derived from their respect for domestic constitutional democracy (e.g., parliamentary discussion and ratification of international rules, democratic implementing legislation, judicial review, protection of domestic human rights).²⁰ Even though the universal recognition of human rights offers a new international legal source of legitimacy, international economic law continues to be characterized by strong interrelationships between international and domestic rules (see, e.g., the requirements of the GATS Protocol on Telecommunications for the setting-up of an independent national regulator

²⁰ See the joint book project of the ITLC edited by Hilf/Petersmann, *National Constitutions and International Economic Law*, 1993.

and of national competition rules, or the recent launch of an International Competition Network for cooperation among and strengthening of domestic competition authorities). What are the main sources and methods for reducing the “democracy deficit” of state-centered and power-oriented international law rules focusing on freedom of governments rather than on the human rights of their citizens?

41. At the ILA conference at New Delhi, Prof. Thomas Oppermann will present a paper regarding the balancing of human rights and trade interests. He suggests that tensions between the two spheres must be resolved in a way that does not presuppose that either should be placed in a position superior to the other.

VII. The WTO Dispute Settlement System

A. Overview

42. Dispute settlement continues to be one of the most active areas in WTO. By December 2001, more than 240 disputes had been submitted to the WTO.

43. Developing countries continue to actively participate in WTO dispute settlement proceedings. As of last year, they can count on the services of the WTO Law Advisory Center which started its operations in the summer of 2001 and offers legal advice to developing countries participating in disputes before the WTO adjudicating bodies. The first case handled by the WTO Law Advisory Centre is the *Sardines* case (complaint by Peru against a technical regulation by the European Community reserving the name “sardine” to sardines fished in a particular part of the world).

44. Two recent cases helped clear a disputed area in WTO law: to what extent WTO Members can legitimately have recourse to only one or more compliance panel(s) in accordance with Art. 21.5 DSU. In the *Dairy Products* dispute between New Zealand and Canada, the complaining party requested (and obtained) a second compliance panel to review implementation of the recommendation of the original panel. In the *FSC* dispute between the European Community and the United States, the ruling of the compliance panel was appealed.

45. Notably, a very recent panel report (*India – Measures Affecting the Automotive Sector*, WT/DS146/R of 21 December 2001) discusses, *inter alia*, the relevance of the public international law principle *res judicata* in the WTO legal order. It is not the first time that a WTO report moves into this area and discusses the incorporation of a principle of public international law into the WTO legal order. It is however one of the few occasions where such a comprehensive discussion takes place. Although at the end of the day the request by India was not, in the panel’s view, covered by *res judicata*, the panel in its report refers to decisions of the International Court of Justice as well as to the doctrine to clarify what exactly should come under the said principle. As the panel notes, this is the first time ever that a panel report had to deal with this issue.

46. In 2001, we also experienced the first ever recourse to Arbitration under Art. 25 DSU. It is reminded that Art. 25 DSU provides for “expeditious arbitration within the WTO as an alternative means of dispute settlement.” It had never been used before the *Section 110(5)* dispute between the European Community and the United States. The Arbitration helped clarify a number of issues: (i) procedural rules are drafted by the parties to the dispute but the DSU rules serve as source of inspiration for the Arbitrators in case of *lacunae* in the agreed procedural rules; (ii) Arbitrators have “Kompetenz Kompetenz” (*i.e.* they can review their own jurisdiction); (iii) Arbitrators can be requested under Art. 25 DSU to calculate the level of nullification and impairment (there can thus be an overlap with respect to subject-matter with Art. 22.6 DSU); (iv) burden of proof is allocated in accordance with WTO panel/Appellate Body practice; (v) Arts. 21 and 22 DSU are *mutatis mutandis* applicable (as indeed, the text of Art. 25 DSU makes it plain) but were applied in the present case with a certain degree of flexibility; (vi) the parties to the dispute explicitly stated their willingness to abide by the letter of Art. 25 DSU and accept the Award as final.

B. Work Of The ITLC

47. Several Members of the International Trade Law Committee published books and articles on various aspects of the WTO dispute settlement system. For example, F. Weiss edited a conference book on “Improving the WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and Tribunals” (Cameron & May: 2000). The 2nd edition of the book by David Palmeter and Petros C. Mavroidis on the WTO Dispute Settlement, Practice And Procedure (Cambridge

Univ. Press: 2002) focuses on procedural issues in the evolution of WTO dispute settlement practice. A joint book project of the ITLC on "WTO Jurisprudence and Dispute Settlement Practice 1995-2001" was discussed at the ITLC meeting on 25-26 June 2001 and will be published by Kluwer Publishers before the end of 2002. This book builds upon the earlier ITLC book on *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer Publishers: 1997) and will include 30 contributions by members of the ITLC, Appellate Body members, lawyers from the WTO and from other experts covering developments of both WTO dispute settlement *procedures* as well as of *substantive* WTO law. Another conference book on *Dispute Prevention and Dispute Settlement in the Transatlantic Partnership*, to be edited by Prof. Petersmann in collaboration with other ITLC members, will publish the 15 case studies and additional analytical papers and policy recommendations presented at two international conferences at the European University Institute at Florence in 2001/2002.

C. DOHA Declaration Mandate for "Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding"

48. In the WTO Ministerial Declaration of November 2001, the 143 WTO Members agreed "to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter." The "DSU Negotiations" are thus part of the common mandate for WTO negotiations, but not part of the "single undertaking" method for concluding the new Round of WTO negotiations. The reference to the "work done thus far" implies that the numerous proposals made during the general review of the DSU in 1998/1999 remain relevant also for the future DSU negotiations, for instance the specific proposals for improving notifications of mutually agreed solutions, consultation procedures, establishment of panels (including establishment of a "permanent panel") and of panel's terms of reference, panel proceedings, rights of multiple complainants and third parties, appellate review powers (e.g. remand authority) and procedures, adoption of panel and appellate reports, surveillance of implementation and recommendations of the DSB, compensation and suspension of concessions, special rights and treatment of developing countries, and other suggestions (e.g. on standing to bring claims under the WTO agreements, standard of review, role of the WTO secretariat). Certain issues clarified in WTO dispute settlement practice had remained controversial among WTO members (e.g., *amicus curiae* briefs) and are likely to lead to new "clarifications" or amendments of WTO rules. The broad mandate of the Doha Ministerial Declaration for negotiating new WTO rules will also raise numerous new questions for the future WTO dispute settlement system (e.g., as regards coordination of dispute settlement rules in the WTO with those in international services, investment and environmental agreements outside the WTO). In order to contribute to the objective of improving and clarifying the DSU, the ITLC envisages organizing an international conference on improvements and clarifications of the DSU in due time before the conclusion of these WTO negotiations by May 2003.

VIII. The ITLC Future Program of Work

49. The ITLC intends to continue its active ongoing work programs in the trade-related fields of TRIPS, TREMS, competition law and policy, human rights and the rule of law, and dispute settlement. As the mandate for a new round of trade negotiations has now been adopted, the ITLC will - at the ILA 2002 New Delhi Conference - give consideration to whether additional elements of this mandate, such as trade and investment, should be added to its work program.

50. The ITLC has accepted, in principle, an invitation to hold its 2003 meeting at Stellenbosch University in South Africa in combination with a regional meeting to be held there and in collaboration with the University of Windhoek (Namibia). Alongside that meeting, various members of the ITLC will act as instructors in an UNCTAD training program on WTO dispute settlement procedures. In the context of this training program, several ITLC members are preparing a series of brochures on the different aspects of dispute settlement in international trade, investment and intellectual property law, to be published by the UN as teaching materials in future training courses for lawyers from developing countries. As discussed above, members of the ITLC, along with other invited experts, also intend to produce a comprehensive new book on WTO Jurisprudence and Dispute Settlement Practice 1995-2001.--