

RESOLUTION

Resolution No. 2/2000

INTERNATIONAL TRADE LAW

The 69th Conference of the International Law Association, held in London, United Kingdom, 25-29 July 2000:

HAVING CONSIDERED the Report of the Committee on International Trade Law;

ADOPTS the Declaration regarding the exhaustion of intellectual property rights and parallel trade, attached as Annex I to this resolution;

ADOPTS the Declaration on competition policy, attached as Annex II to this resolution;

ADOPTS the Declaration on the rule of law in international trade, attached as Annex III to this resolution;

RECOMMENDS that the Committee continue its work on the programme as specified in its Fourth Report (2000) to the 69th Conference at London in July 2000 and report thereon to the 70th Conference at New Delhi in 2002.

Annex I

DECLARATION REGARDING THE EXHAUSTION OF INTELLECTUAL PROPERTY RIGHTS AND PARALLEL TRADE

The 69th Conference of the International Law Association:

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 favoured 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 in many countries 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 policies 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

DECLARATION ON COMPETITION POLICY

The 69th Conference of the International Law Association:

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, that the Millennium Round will enhance further trade liberalization, 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-discrimi-

natory conditions of competition for the benefit of consumers in all WTO Member countries.

RECOMMENDS:

1. WTO should consider introduction of a multilateral agreement on competition policy.
2. The Agreement should contain 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.
3. In its initial stage, the Agreement 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. The Agreement 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

DECLARATION ON THE RULE OF LAW IN INTERNATIONAL TRADE

The 69th Conference of the International Law Association:

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 rights

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 in particular:

- (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.
- (d) Promoting the consistency of WTO rules and general international law.

4. WTO members should be encouraged to strengthen the legal and judicial remedies of their citizens and residents (natural and legal) 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.