

INTERNATIONAL LAW ASSOCIATION

RIO DE JANEIRO CONFERENCE (2008)

INTERNATIONAL TRADE LAW

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EIGHTH REPORT OF THE COMMITTEE

by Prof. F.M.Abbot (Part III), Prof. L.Bartels (Part IX), Prof. T.Cottier and Prof. A. Ziegler (Part V), Prof. P.C.Mavroidis and Prof. F.Ortino (Part IV), Prof. A.H.Qureshi (Part VI), Dr. S.Bhuiyan (Part VII), Prof. E.U.Petersmann (Parts I-XII), Prof. G.Erasmus (Part X) and Prof. Meng (Part XI), with the benefit of numerous additional comments from ITLC members.

I. Introduction

1. The International Trade Law Committee (ITLC) held its annual meeting on 29 June 2007 in the premises of the Appellate Body of the World Trade Organization (WTO). This meeting enabled a comprehensive discussion - with the directors of the WTO Division of Legal Affairs, the Appellate Body Legal Service, the legal advisor of the WTO GATS Division, the director of the WTO TRIPS Division as well as with other experts from the WTO Secretariat and of WTO Members - of the legal

problems to be analyzed in the 8th Report of the ITLC. The Draft ILA Declaration on ‘*International Trade Law and Human Rights*’, elements of which had already been outlined and discussed in the 5th, 6th and 7th ITLC reports since the 2002 conference at New Delhi, was circulated and refined once again. A large number of ITLC members (not only from developed countries but also from less-developed countries in Asia and Africa) contributed drafts to this 8th Report, which was repeatedly circulated and deliberated among all ITLC members in spring 2008 and will serve as a basis for further discussions at the ILA meeting at Rio de Janeiro in August 2008. Following the ILA's 2006 conference, many ITLC members also cooperated in the context of other international conferences convened by members of the ITLC, such as the 2007 conference on *The WTO and Human Rights: Interdisciplinary Perspectives* at the Monnash University Centre at Prato, Italy, and the 2008 conference on *Global Constitutionalism* organized by the Universities of Basel and Bern in Switzerland.

II. Developments in the Trading System

2. The world trading system continues to be confronted with new challenges (such as rising food, energy and commodity prices), slow progress in the consensus-based Doha Development Round (DDR) negotiations among 152 WTO Members, an ever increasing number of today more than 250 regional trade agreements (RTAs), as well as by a burgeoning jurisprudence of worldwide and regional dispute settlement systems (e.g. almost 380 WTO dispute settlement proceedings since 1995).

Doha Development Round Negotiations¹

3. The GATT/WTO regularly holds trade negotiations in order to extend multilateral trade rules to new areas and deepen the existing rules to better deal with contemporary challenges. While the built-in agenda of the DDR covers two of the most important sectors of world trade (agriculture and services), WTO Members also acknowledged that substantial progress in the negotiations requires extending their scope to other areas such as non-agricultural market access, anti-dumping, subsidies, countervailing measures, trade facilitation, fishing subsidies and development issues. The DDR also aims at reversing the marginalization of some developing countries, particularly the least-developed ones in the multilateral trading system, through improved market access for products of export interest to them, capacity-building and increasing their participation also in services trade. According to World Bank estimates, the reduction of barriers in the agriculture sector could produce dynamic gains that could lead to higher global income of some US\$400 billion by 2015. A 50 per cent reduction in barriers to services trade would result in gains four times larger than gains from liberalization of non-services trade. A study by Professors Stern, Deardoff and Brown concluded that reducing barriers to trade in agriculture, manufacturing and services by a third could increase global income by US\$ 686 billion, while doing away with all trade barriers could increase global income by as much as US\$ 2.1 trillion dollars. While trade liberalization would entail winners and losers, consumer welfare and productivity of producers are bound to increase in all trading countries and to enable governments to use parts of the “gains from trade” for poverty reduction and adjustment assistance to import-competition. Notwithstanding these potential benefits, the DDR negotiations have lurched from one crisis to another since their launch in November 2001. The negotiations were supposed to have been concluded by 1 January 2005, but the modalities for the reduction of barriers in the agricultural and industrial sectors are yet to be agreed.

4. Notwithstanding the fact that the share of agriculture in world merchandise trade is less than 10 per cent, it holds the key to unlocking progress in all the DDR negotiating areas. Progress has been made regarding export competition with the decision in Hong Kong in December 2005 to phase out all forms of export subsidies by 2013. As regards market access, there is agreement to group tariffs in four bands depending on the height of their restrictiveness; there is no agreement on the cuts to be made in each band. There is also no agreement on whether tariffs should be capped to prevent excessive tariffs being imposed on particular products which tend to be of export interest to many countries. More controversially is the treatment to be accorded to sensitive and special products in light of the Doha mandate that there should be substantial improvement in market access for all agricultural products. There is also continuing disagreement on the conditions to be attached to special safeguard mechanism to be created for developing countries when there is a sudden surge in imports or when prices drop below a certain level. As regards domestic support, the most contentious issue is the cuts to be made to

¹ This section of the report benefited from input by Edwinie Kessie from the WTO Secretariat and focuses on developments since the 2006 ITLC report..

Members' overall trade-distorting support. Many Members have stressed that there should be effective cuts and that countries should not have a huge cushion between their WTO legal entitlement and the amount that they are currently providing.

5. As regards non-agricultural market access, while there is agreement on the use of a simple Swiss formula to reduce tariffs, there is disagreement on the co-efficients to be used by developed and developing countries and the flexibilities to be granted to developing countries. Regarding trade in services, the main issue is the quality of offers on the table. In several instances, the offers tabled by countries do not match the current access provided by them. Whereas there is pressure on developing countries to improve their offers particularly under mode 3, there is also pressure on developed countries to improve their offers under mode 4. Regarding the rules negotiations, substantive progress has been made on fisheries subsidies; but there are wide divergences in the views on Members on how to deal with issues such as zeroing in the anti-dumping negotiations. The challenge is how to tighten WTO disciplines on anti-dumping and subsidies and countervailing measures to prevent abuse while not making it excessively difficult for countries to have recourse to these disciplines to protect their industries if they face competition. There are also other difficult issues in the other negotiating areas, including trade facilitation, trade and environment, dispute settlement and TRIPS-related issues. With the circulation of revised draft texts by the Chairpersons of the agriculture and non-agricultural market access negotiations in May 2008, there is renewed momentum to agree on the modalities before the end of the summer and conclude the negotiations by the end of this year.

6. Aid for trade and the costs of adjusting to import competition are integral parts of the DDR, reflecting a new "Geneva Consensus" (Pascal Lamy) aimed at ensuring that trade will produce real benefits to all people in their everyday lives. Since the WTO is not a development agency, aid-for-trade continues to be coordinated by an Aid-for-trade Task Force including, *inter alia*, the WTO, the IMF, the World Bank, UNDP, UNCTAD, ITC, regional development banks and WTO Members (see below section VI on the 'Development dimension' of the DDR). The continuing failure of so many governments to look beyond narrow group interests so as to make the compromises necessary for strengthening the multilateral trading system for the benefit of all illustrates the collective action problems in the supply of international public goods (including an open, rules-based and mutually beneficial world trading system).

III. Trade-Related Aspects of Intellectual Property Rights

7. Intellectual property rights (IPRs) continue to play an important role in the functioning of the international trading system, affecting economic development, industrial policy, social welfare and the attainment of human rights objectives. There is widespread hope that advances in technology will provide new means to address global challenges like climate change, food and energy supply, risks to public health and others. The design and implementation of the global IPRs system will help to determine the pace at which new technologies are developed, and the way these technologies are made available to countries and people at all stages of economic development. The ITLC has played a meaningful role in the international dialogue on IPRs policies as illustrated by the ILA Resolutions on Parallel Importation (London 2000) and on Regional Arrangements and Public Health (Toronto 2006).

The TRIPS Agreement and the Medicines Export Amendment

8. The 2006 Committee Report described the first Amendment to the TRIPS Agreement (i.e., Article 31*bis*) adopted by Members to enable predominant exports under compulsory patent license. The Amendment will enter into force upon acceptance by two thirds of the WTO Members. On December 18, 2007, the WTO General Council extended the deadline for submitting acceptances from December 31, 2007 to December 31, 2009. As of May 12, 2008, the Medicines Export Amendment had been accepted by forty-one Members, including China, the European Union, India and the United States. Acceptance by the European Union followed an important discussion in the European Parliament, the adoption by the Parliament of a resolution directed to the Commission, and agreement on a set of principles among the Council and Parliament.² The European Parliament has emphasized the importance of assuring access to medicines, *inter alia*, through the use of TRIPS flexibilities. The

² Cf. Frederick M. Abbott and Jerome H. Reichman, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INT'L ECON. L. 921-87 (2007), based on the authors' study for the Committee on International Trade of the European Parliament.

first notification of intention to use the system established by the Decision of August 30, 2003 (the waiver establishing a bridge to the Amendment) for a specific transaction was made by Rwanda on July 17, 2007. The Canadian Commissioner of Patents issued the first compulsory license for export under Canada's Access to Medicines Regime (CAMR) to a Canadian pharmaceutical enterprise (Apotex) authorizing this transaction on September 19, 2007.³ On May 7, 2008, Rwanda awarded its tender to Apotex for the supply of antiretroviral medicines making use of the Canadian license.⁴ Despite adoption in 2001 of the Doha Declaration on the TRIPS Agreement and Public Health, use of TRIPS Agreement flexibilities to provide low-cost access to medicines continues to be the source of controversy among WTO Members. The government of Thailand in 2007 issued several government use licenses under Article 31 of the TRIPS Agreement (and national implementing legislation) concerning medicines to treat HIV-AIDS, cancer and coronary disease. Notwithstanding the clear intention of the Thai government to use those licenses to supply its non-commercial public health system with generic products, the European Commission and the US Trade Representative each have exerted pressure on the Thai government to refrain from issuing such licenses.⁵

TRIPS Negotiations

9. The 2006 Committee Report described Doha Development Round negotiations in the TRIPS Council regarding proposals for disclosure in patent applications of source and origin of biological resources, and proposals concerning establishment of a multilateral register and extension of protection with respect to geographical indications (GIs). Although constellations of WTO Members supporting different positions on these subjects have developed and/or shifted over the past two years, there has been little change in the basic proposals under negotiation as outlined in the 2006 Report. Interested persons may have reference to comprehensive descriptions of the proposals before the TRIPS Council prepared by the WTO Secretariat.⁶

10. While a number of Committee Members take an active interest in the negotiations on geographical indications, the Committee has not endeavored to develop a common position or recommendation on this subject, and it is not proposed that the Committee do so now. A number of Committee Members also have an active interest in negotiations concerning the relationship between the TRIPS Agreement and the Convention on Biological Diversity. Professor Cottier (a member of this Committee) also Chairs the ILA Committee on International Law on Biotechnology. This Committee might consider in Rio de Janeiro whether it would be useful to seek to formulate a common position and recommendation regarding the best way forward to resolve the present impasse in negotiations in the TRIPS Council. Several developed countries, including the European Union and the United States, have sought to place on the negotiating agenda of the TRIPS Council proposals to strengthen enforcement obligations under the TRIPS Agreement. These efforts have been resisted by developing countries. Demands to strengthen enforcement activity with respect to IPRs characterized the period leading up to the mandate for TRIPS negotiations in the Uruguay Round, and the latest demands suggest renewal of multilateral IPRs enforcement pressures (which have also been evident at recent G-7 meetings). The World Customs Organization (WCO) is one forum being actively used by developed countries and their industry groups to promote a "strong enforcement agenda", including through recent WCO adoption of a model law on IPRs-related border measures.

³ See for details, Frederick M. Abbott, Introductory Note to: World Trade Organization Canada First Notice To Manufacture Generic Drug For Export, 46 I.L.M. 1127, 46 I.L.M. 1127 (2007), 2007 WL 4856913 (I.L.M.), Nov. 2007.

⁴ Application for a compulsory license for export has also been made in India for export to Nepal.

⁵ See details in Abbott & Reichman, *supra* note [2]. Brazil also in 2007 issued a compulsory license on the antiretroviral at Efavirenz.

⁶ With respect to the relationship between the TRIPS Agreement and the Convention on Biological Diversity, see Note by the WTO Secretariat, The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity, Summary of Issues Raised and Points Made, Revision, IP/C/W/368/Rev.1, 8 Feb. 2006, and the developing country proposal Doha Work Programme – The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity, Communication From Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand And Tanzania, WT/GC/W/564/Rev.2, TN/C/W/41/Rev.2, IP/C/W/474, 5 July 2006. With respect to geographical indications, see WTO Secretariat, side-by-side presentation of proposals, Compilation of Points Raised and Views Expressed on the Proposals, TN/IP/W/12/Add.1, 4 May 2007 and WTO Secretariat, Side-by-Side Presentation of Proposals, TRIPS Council, TN/IP/W/12, 14 Sept. 2005.

Dispute Settlement

a. China – Enforcement of IPRs

11. In April 2007 the United States requested consultation with China concerning enforcement measures with respect to IPRs, and subsequently requested appointment of a dispute settlement panel.⁷ In December 2007, a panel was appointed by the WTO Director-General. This is the first WTO proceeding in which a Member's alleged failure to comply with obligations under Part III on enforcement of the TRIPS Agreement forms the principal subject matter. The panel and, if appealed, Appellate Body decisions are likely to establish new lines of WTO jurisprudence. The United States is claiming several specific deficiencies in Chinese IPRs enforcement law and implementation. These include that: (a) China's established thresholds for criminalization of trademark counterfeiting and copyright piracy are inflexible, encouraging counterfeiters to compartmentalize operations in a way that avoids potential criminal penalties; (b) China's law and practice with respect to disposal of infringing goods does not effectively place them outside the stream of commerce; (c) China improperly subjects copyright protection for foreign subject matter to a precondition of regulatory approval, contrary to the Berne Convention, and provides a safe harbor for domestic copyright piracy. This dispute remains under submission.

b. Cross-Retaliation in TRIPS –US-Gambling/Antigua Arbitration

12. The second arbitration involving a request to suspend concessions under the TRIPS Agreement to redress failure by a complained-against Member to remedy inconsistent measures under another covered agreement (in this case, the GATS) was initiated by the United States in response to a request for authorization to suspend concessions by Antigua and Barbuda ("Antigua").⁸ The United States challenged Antigua on grounds that it had failed to follow the principles and procedures established in Article 22.3 of the Dispute Settlement Understanding. In their December 2007 decision, the arbitrators accepted that Antigua's relative economic and trade position compared with United States made it exceedingly difficult to suspend concessions under GATS in a way that would induce compliance because (a) the relative size of Antigua's services import market meant that suspending concessions in services would have a negligible impact on the United States, and (b) that suspension of concessions in the services sector would impose additional costs on Antigua's consumers, as well as adversely affect its travel, tourism and other services industries.⁹ Antigua had indicated its intention to suspend concessions under TRIPS Agreement "Section 1: Copyright and related rights, Section 2: Trademarks, Section 4: Industrial designs, Section 5: Patents and Section 7: Protection of undisclosed information".¹⁰ In authorizing Antigua's suspension under the TRIPS Agreement, the arbitrators rejected the US demand for a specific plan of implementation. While regretting that Antigua had not provided explanations as to how it proposed to implement the TRIPS suspension, the arbitrators found that they did not have a mandate to consider the "nature" of the obligations to be suspended and could not question the complaining party's choice of specific obligations to be suspended. The arbitrators then favorably invoked the decision in EC-Bananas III arbitration, and indicated that the same considerations would apply with respect to Antigua's suspension regime.¹¹

Accession

13. The extent of TRIPS commitments continues to be a major issue in negotiations on accession to the WTO, as evidenced by the case of Russia.¹² Acceding countries are agreeing to IPRs commitments greater than those required under the TRIPS Agreement.

The World Intellectual Property Organization (WIPO)

⁷ China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362

⁸ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Arbitration by the United States under Article 22.6 of the DSU, Decision by the Arbitrator, WT/DS285/ARB, 21 Dec. 2007.

⁹ Id., e.g., paras. 4.90-4.100.

¹⁰ Id., para. 5.6.

¹¹ Id., para. 5.11.

¹² For Russia, see Letter from USTR Susan Schwab to Russian Minister of Trade German Gref, dated November 19, 2006, available at

http://www.ustr.gov/assets/World_Regions/Europe_Middle_East/Russia_the_NIS/asset_upload_file148_10011.pdf ("Exchange of Letters").

14. WIPO plays a role complementary to that of the WTO in the regulation of intellectual property at the multilateral level. The 2006 Report of this Committee described the state of negotiations with respect to a Substantive Patent Law Treaty (SPLT) proposed to harmonize international patent law, at least with respect to certain matters, including the criteria of patentability. Negotiations on the SPLT did not make appreciable progress during the past two years because of differences in perspective as to the range of subject matter to be included, particularly as between developed and developing countries, and because of differences on substantive rules (such as the grace period for non-anticipating disclosure) which continue to divide developed countries. There is no reason to expect these negotiations to make rapid progress in the near future, absent some significant shift in the position of key states. The Fourth Session of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) met on June 11-15, 2007. At that meeting, the PCDA approved a list of 45 proposals in a number of areas, including capacity building, technical assistance, norm-setting and technology transfer, in addition to proposing establishment of a permanent Committee on Development and Intellectual Property at WIPO.¹³ In October 2007, the proposal for the Committee was adopted by the WIPO General Assembly. The Committee on Development and Intellectual Property held its first meeting in Geneva on March 3-7, 2008.¹⁴ This Committee has broad mandate to study and make recommendations with respect to improving the intellectual property framework in order to better promote the development and use of technology, especially by developing countries. It is expected to make its first progress report in July 2008.

The World Health Organization (WHO)

15. The relationship between intellectual property, trade and public health has for many years been the subject of considerable controversy at the WTO. Regrettably, the WHO played very little role in the TRIPS negotiations during the Uruguay Round. However, during the past several years WHO as an institution, and WHO member states, have evidenced considerably greater interest in the role that IP plays in the development of new health-related technologies, and the role it plays in helping to determine access to those technologies (including pharmaceutical products). An Inter-Governmental Working Group on Health, Innovation and Intellectual Property (IGWG) has been working over the past two years on a draft Global Strategy and Plan of Action intended to improve the way innovation is generated and the way results are made available to those in need. The second session of IGWG resumed at the end of April 2008 and made further progress on this Plan of Action.

Bilateral and Regional Arrangements and IPRs

16. The United States and European Union have each shifted to negotiation of bilateral and regional trade agreements as their preferred forum for extending the scope and depth of IPRs obligations. At the Toronto ILA Biennial Meeting, this Committee proposed and the full ILA adopted Resolution No. 3/2006 urging governments to refrain from using bilateral and regional trade negotiations and agreements to limit or eliminate flexibilities in the TRIPS Agreement “which are recognized in the Doha Declaration on the TRIPS Agreement and Public Health to support the protection of public health and to promote access to medicines for all.” Since the adoption of that resolution in 2006, the US Congress exercised its trade negotiating authority to require the US Trade Representative to renegotiate the intellectual property chapters of draft free trade agreements with Colombia, Peru and Panama to substantially ameliorate the restrictions on use of TRIPS flexibilities in so far as they may affect public health. This is a positive development reflecting the spirit of this Committee and the ILA Resolution. The US Trade Representative was not directed to, nor did it, renegotiate existing provisions in a draft free trade agreement with South Korea which represent the more restrictive position. Nor were renegotiated rules with developing countries applied retroactively to previously negotiated FTAs. Although members of this Committee recognize that developing countries are especially in need of low-cost access to newer medicines that may be facilitated by use of TRIPS flexibilities, individuals in more economically developed countries, including those in the highest income countries suffer from lack of access to affordable medicines and healthcare. Members of this Committee stress that access to affordable medicines is not an issue limited to countries at the lower stages of economic development, and that the Doha commitment to access to medicines “for all” means just that. It is regretted that some

¹³ http://www.wipo.int/ip-development/en/agenda/pcda07_session4.html.

¹⁴ *New Body on Development and IP Wraps up Inaugural Meeting*, Geneva, March 10, 2008 PR/2008/540, WIPO Press Release, http://www.wipo.int/pressroom/en/articles/2008/article_0012.html.

countries seek to sharply limit public health flexibilities with respect to access to medicines as a matter of mercantile trade policy in light of the important human rights interests at stake.

17. Intellectual property chapters in bilateral and regional trade agreements present other potential difficulties in the implementation of WTO commitments. There is conflict among substantive obligations, in matters of procedure, and in the realm of dispute settlement. It is important to focus on the problems raised by incomplete integration of trading system rules and dispute settlement mechanisms that might be resolved through careful attention at the negotiation stage, or through multilateral agreement regarding hierarchy of norms.

IV. The WTO Dispute Settlement System and Jurisprudence 2006-2008

18. The following 10 WTO panel and 3 Appellate Body (AB) reports were *circulated* in 2007: DS 331 Mexico – Steel Pipes and Tubes; DS 332 Brazil – Retreaded Tyres; DS 334 Turkey – Rice; DS 335 US – Shrimp (Ecuador); DS 336 Japan – DRAMs (Korea); DS 337 EC – Salmon (Norway); DS 334 US – Stainless Steel (Mexico). The remaining three dealt with implementation issues (Art. 21.5 DSU): DS 267 US – Subsidies on Upland Cotton; DS 285 US – Gambling; DS 312 Korea – Certain Paper. Five AB reports were issued, three of which dealt with appeals against reports by original panels: DS 322 US – Zeroing (Japan); DS 332 Brazil – Retreaded Tyres; DS 336 Japan – DRAMs (Korea). The remaining two were appeals against panel reports that dealt with implementation issues (Art. 21.5 DSU): DS 207 Chile – Price Band System; DS 268 US – OCTG Sunset Reviews

Jurisprudential Evolution

19. There are two areas where the AB contributed to the evolution of its current jurisprudence:

a) *Contingent protection*: the AB clarified two issues, the type of evidence that is appropriate in order to demonstrate that subsidy exists, and its consistent rejection of the *zeroing* practice. In DS 336, the AB permitted *circumstantial evidence* to demonstrate the existence of a subsidy. In this case, the evidence presented to substantiate a claim to this effect, consisted of memos regarding meetings between government officials and the private sector, whereby it was reasonably clear that the government intended to subsidize a specific recipient. On the other hand, in DS 322 the AB outlawed *zeroing*, a practice whereby an investigating authority will disregard positive dumping margins when calculating the dumping margin.¹⁵

b) *Trade and Environment*: DS 332 occupied the headlines for some time last year. Brazil's treatment of retreaded tyres was challenged before the WTO. According to the AB, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) GATT, a panel must carry out a two-step assessment. First, the panel must *weigh and balance* all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. For purposes of this first assessment, a panel may conclude that the measure is necessary on the basis of a demonstration that the measure "is apt to produce a material contribution to the achievement of its objective", where this demonstration "could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."¹⁶ According to the AB, the results obtained from certain actions—including measures adopted in order to attenuate global warming and climate change—can only be evaluated with the benefit of time. Second, the panel must compare the measure under review with its possible alternatives, which may be *less trade restrictive* while providing an equivalent contribution to the achievement of the objective pursued. For purposes of this second assessment, the burden of proof rests upon the complaining Member.¹⁷ Furthermore, the AB, partially overturning the panel report, held that there is no *effects-test* in the chapeau of Art. XX GATT: WTO Members must respect the non-discrimination test as established therein (that is, it must treat both domestic and *all* foreign products in the same way).

c) *Non-compliance procedures*: The two "non-compliance panel reports" under Article 21.5 DSU released in April and May 2008 upheld the complaints by Ecuador and the USA that the EC import regime for bananas continued to grant preferences for ACP countries in violation of GATT Articles I

¹⁵ In DS 344, which was circulated in 2008, the AB underscored this point.

¹⁶ Appellate Body Report, Brazil – Re-treaded Tyres, at para. 151.

¹⁷ Appellate Body Report, Brazil – Re-treaded Tyres, at para. 156.

and XIII. A WTO Appellate Body report released on 2 June 2008 upheld the complaint by Brazil that the USA continued to grant subsidies for US cotton producers in violation of the WTO Agreements on Agriculture and Subsidies. This continued, long-standing non-compliance of two of the leading WTO trading powers with their WTO obligations vis-à-vis developing countries was strongly criticized by many less-developed WTO Members as reflecting a lack of leadership for advancing the development dimensions of the Doha Round negotiations.

d) Principle-oriented interpretation: In contrast to the long-standing “Hart-Dworkin debate” about the nature of legal systems in common law countries (e.g. whether they consist only of rules or also of principles) and about whether judges enjoy “judicial discretion”, international law, WTO law and WTO dispute settlement practice explicitly recognize “basic principles ... underlying this multilateral trading system” (Preamble WTO) and international law (cf. the “general principles of law” mentioned in Article 38 of the ICJ Statute). In the ITLC preparations of an ILA draft resolution on *International Trade Law and Human Rights* (section VII below), the ITLC engaged in extensive discussions about the customary methods of international treaty interpretation and the related tasks of judges, such as their obligation (e.g. under Article 1 UN Charter and customary law) to settle “disputes concerning treaties, like other international disputes, ... in conformity with principles of justice and international law”, including “respect for, and observance of, human rights and fundamental freedoms for all” (Preamble Vienna Convention on the Law of Treaties).¹⁸

V. Need for Reforming Multilevel Trade Governance

20. In its 2006 Report, the Trade Law Committee called for the creation of a WTO Legal and Institutional Committee with a view to reviewing decision-making processes and the modus operandi of the WTO. This recommendation was informed by the Report of the Consultative Board to the Director General (Sutherland Report) issued in 2004.¹⁹ Eventually, an expert group consisting of economists and international relations scholars (Warwick Report, issued in 2007) confirmed the need for structural reform in the WTO.²⁰ ITLC members have, for some time, contributed to discussing institutional reforms from a legal perspective²¹ – yet, so far, with little success.²² Trade diplomats, as well as the Secretariat of the WTO, have been fully preoccupied with a stalling Doha Development Agenda, mainly struggling with liberalization in agricultural trade and the difficulties to cope with the implications of structural adjustment. Short of adequate institutional powers for leadership, the influence of the Director-General continues to be mainly based upon persuasion and personality. Negotiators work mainly in informal modes, including green-room processes and novel forms seeking to bring about consensus among the 152 members of the WTO. It is difficult to assess to what extent the obstacles encountered in the DDR up to today are due to the substantive complexity of the subject matter on the table, or to what extent they are due to institutional deficiencies in decision-making processes. It may well be argued that classical issues of market access do not differ from negotiations in early days and problems would equally emerge under different working methods in the WTO. The intricacies are partly caused by longstanding delay in addressing structural reform and adjustments in the agricultural sector, which inherently takes time. The same may be true for enhancing market access in services and industrial goods. In other areas, however, trade liberalization has given way to trade regulation and international harmonization of domestic laws. In this increasing area of the DDR negotiations, there is a need for different modes of negotiation promoting better coordination of legislative processes beyond consensus diplomacy. Also the role of the DG and of the Secretariat, the relationship of rule-making to dispute settlement and to other international organizations should be reviewed.²³ The ITLC strongly reiterates the need for a specialized Legal Committee addressing these constitutional issues. Citizens are faced with the paradox that the WTO - in spite of being one of the

¹⁸ Cf. E.U. Petersmann, *Judging Judges: Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with ‘Principles of Justice and International Law’?* EUI Working Paper Law 2008/01, European University Institute Florence.

¹⁹ Report of the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (WTO 2004).

²⁰ The Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?*, The Report of the First Warwick Commission, University of Warwick, Nottingham 2007.

²¹ See E.U. Petersmann (ed), *Reforming the World Trading System. Legitimacy, Efficiency, and Democratic Governance* (2005).

²² See, however, the World Trade Report 2007 (WTO 2007), which offers a comprehensive analysis of the importance of WTO institutions for reducing collective action problems of WTO Members.

²³ See T. Cottier, *Preparing for Structural Reform in the WTO*, 10 JIEL 479-508 (2007).

most important international organizations for promoting economic development, poverty reduction and international rule of law - has failed to develop appropriate legal and institutional structures for leadership in the collective supply of international public goods, such as a rules-based, mutually beneficial world trading system. While we recognize the difficulties to bring about change, we submit that a legal and institutional committee would assist in creating the necessary awareness in capitals to take up structural reform in the WTO.

21. A second problem area of multilayered governance relates to the interaction of global, regional and national law in the field of international trade regulation. Some ITLC members analyze multilevel trade regulations from constitutional perspectives (e.g. in terms of additional international, legislative and judicial restraints on protectionist abuses of discretionary trade policy powers and interest group politics; additional legal and judicial remedies for citizens engaged in - or affected by - international trade; more effective democratic participation and control, more effective institutions for collective supply of international public goods), as it has been generally accepted in European economic law. Outside Europe, the hegemonic trade policies of major trading countries prompt most governments and lawyers to focus on the “global administrative law dimensions” of WTO law and regional trade agreements (such as NAFTA), without challenging the “state sovereignty”, “constitutional nationalism” and “parliamentary sovereignty” paradigms prevailing in many countries.²⁴ The WTO’s World Trade Report 2007 offers a comprehensive overview of the diverse economic, political, legal and constitutional conceptions of international trade law and policies.²⁵ Just as the transformation of national and international law in Europe since World War II confirms the adage that “there is nothing more practical than a good theory”, the obvious failures in the collective supply of global public goods call for academic leadership in re-designing international law and institutions so as to protect citizens’ interests in the international rule of law, mutually beneficial economic cooperation, poverty reduction, protection of the environment, multilevel protection of human rights and democratic peace more effectively.

VI. The Development Dimension of the WTO

22. The ‘development dimension’ of the Doha Development Round serves as criteria against which to measure the progress in the Round. It is generally considered inclusive of the ‘development aspects’ of the multilateral trade negotiations under the Round, as indicated in the Doha Declaration²⁶, in particular paragraphs (2) and (3), which refer to the needs and interests of developing countries and the integration of the least developed countries in the multilateral trading system. The negotiations on the development aspects of trade are being considered not only in the framework of Special and Differential Treatment but also in all other areas under negotiation: viz., Agriculture; Non-Agricultural Market Access; Services; Trade Facilitation; Implementation-Related Issues; Rules; Trade-Related Aspects of Intellectual Property; Trade and Environment; and Dispute Settlement Understanding. The development aspects under the negotiations have been regularly updated in a comprehensive note by the WTO Secretariat.²⁷

23. The development aspects in the agricultural sector are to be found in all the areas of the negotiations namely --- market access, domestic support and export competition’. Thus, greater market access for agricultural products from developing countries is sought. Certain items are identified for special attention, for example tropical products and cotton. Market access is sought against the background of certain ‘flexibilities’ i.e. defensive interests, for example in the amount of tariff reduction for certain Special Products, along with the availability of certain Special Safeguard Mechanisms. Concern is also expressed about the erosion of special preferences enjoyed by certain developing countries. Domestic support and export subsidies engaged in by developed countries are of concern to all developing countries, although it is noted that some export subsidies may result in increased costs of imported food products for developing countries.

²⁴ Cf. J.H.Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006); E.U.Petersmann, *State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?* in: Shan/Simons/Singh (eds), *Redefining Sovereignty in International Economic Law* (2008), 27-60.

²⁵ Cf. World Trade Report 2007 (WTO 2007). On the diverse academic approaches see also: C.Joerges/ E.U.Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006).

²⁶ Doha Declaration adopted on 14th November 2001.

²⁷ Committee on Trade and Development: Note by the Secretariat ‘Development Aspects of the Doha Round of the Negotiations’ WT/COMTD/W/143/Rev.3 (22nd May 2007). Much of what follows is drawn from this paper.

24. In the non-agricultural market access negotiations, the development aspects are reflected in the endeavours to secure market access through tariff reductions in North-South trade, South-South trade, preferential market access for LDCs, and the reduction or elimination of non-tariff barriers. It has already been agreed that LDCs are to be exempted from tariff-reductions. Furthermore developing countries have asked for 'flexibilities' in their market access commitments, based on the principles of special and differential treatment and less than full reciprocity in the negotiations of respective commitments'. Several justifications for such 'flexibilities' have been advanced viz., (1) the need to preserve 'policy space' to facilitate the pursuit of developmental goals; (2) the need to protect infant industries; (3) the need to maintain unbound duties, particularly in sensitive sectors; (3) the need to maintain non-reciprocal preference margins; (4) the need to prevent the loss of tariff revenue.

25. The negotiations in the services sector focus on market access and rule-making in the spheres of Emerging Safeguard Measures, Government Procurement, Subsidies and Domestic regulations. Market access commitments on the part of developing countries may be formulated according to their development needs, whereas LDCs need not undertake any new commitments. The Guidelines and Procedures for the Negotiations on Trade in Services adopted under GATS Article XIX take into account the development dimension by acknowledging the need to ensure greater participation of developing countries in the services sector, taking due account of national policy objectives and development circumstances. In particular, Members are expected to give special attention to sectors and modes of supply of export interest to developing countries, especially LDCs, for example the international movement of persons and the cross-border supply of services. Moreover, adjustment costs from liberalisation in the form of assistance and capacity building programmes are also needed.

26. Developing countries have been active participants in the negotiations on Trade Facilitation, given the benefits for example of 'improved revenue collection, border controls and security and reduced costs'²⁸. In the Hong Kong Ministerial Declaration recommendations for deeper negotiations on Special and Differential (S&D) and technical assistance were made which have resulted in a number of substantive proposals. On S&D generally, developing countries feel that deeper and more prevalent S&D provisions should be negotiated. Moreover these should be made more operational. A number of proposals have been made and there is agreement on a number --- including the Hong Kong decision that developed countries, including willing developing countries, accord duty-free and quota-free market access of at least 97% of products originating from LDCs. In addition, there seems general agreement on the establishment of a Monitoring Mechanism to review the effectiveness and operationalization of S&D provisions. On Implementation-Related Issue and Concerns there has been little progress. The outstanding issues include questions relating to longer transitional periods for implementation, safeguarding market access for developing countries, exemptions from implementation of certain obligations and technical assistance. The mandate on the negotiations on TRIPS has few development aspects. One aspect of note is the administrative burden that might ensue with respect to the system of notification and registration of geographical indications for wines and spirits.

27. With respect to anti-dumping the developing countries are divided between tightening antidumping rules so as to reflect exporter interests; and others arguing for making the Investigation Authorities' functions easier, given that the rules are becoming too complex for developing countries' Investigating Authorities to administer. Approaches to subsidies differ according to the level of development, although the proposal by certain developing countries to 'prolong the exemption of certain developing countries from the SCM Agreement prohibition on export subsidies is to be noted. With respect to the negotiations on regional trading agreements (RTAs) progress has been made on transparency issues, which includes provision for technical assistance for developing countries. In relation to substantive RTA disciplines it is noted that the transition periods need to be short and the product coverage wide. Moreover, the need for coherence with the multilateral trading system is also to be noted including the need to take into account development concerns.

28. In the negotiations on trade and environment of interest to developing countries is the scope of any definition of 'environmental goods and services' --- in particular so as to include products and services of export interest to developing countries, for example natural resource based products. Of interest also

²⁸ Ibid p.16.

are questions of technology transfer and S&D, and capacity building in the production of environmental goods and services.

29. Finally, developing countries have been active in the negotiations on dispute settlement reform --- both in terms of systemic issues as well as those of particular interest to them, for instance with respect to access to the process (e.g., litigation costs); S&D (e.g., time frameworks); enhanced third party rights; implementation (e.g., strengthening cross-retaliation). The Doha Agenda with respect to development is the result of political compromise. It has the appearance of being piece-meal in its approach rather than a coherent mainstreaming of development into the very and every fabric of the multilateral trading system. Moreover, the development aspects are being 'negotiated' as between developed and developing countries --- a process that goes against the very objective of development and which relies on the negotiating skills of developing country negotiators.

VII. Least Developed Countries and the New Partnership for Development Bill

30. The duty free-quota free (DF-QF) market access initiative within the WTO, aimed at providing duty and quota free access to all products from all Least Developed Countries (LDCs) in the markets of developed countries, has failed to stand up to the expectations of the LDCs. The US (and to some extent Japan) has indicated that it will take advantage of the 97 per cent provision (i.e., providing DF-QF market access for only 97 per cent of the tariff lines from the LDCs). The apprehension is that the 3 per cent "exclusion list" could exclude the major items of export interest of LDCs, including apparels, from preferential market access under the WTO's DF-QF initiative. In view of this, the New Partnership for Development Act of 2007 (NPDA) Bill²⁹ introduced in the United States House of Representative on 18 October 2007 with bipartisan support can be seen as an important initiative for providing LDCs preferential access to the US market.

31. The African Growth and Opportunity Act (AGOA) providing DF access to the US market to countries of sub-Saharan Africa (SSA) will come to an end this year. The NPDA would guarantee continuation of DF access in the US market for these countries. Additionally, under the NPDA it is being proposed that other non-SSA LDCs be included in a DF market access initiative. NPDA proposes to provide DF market access in the US for all products from all LDCs and low-income SSA countries beginning from 1 January 2009. NPDA would cover many agricultural items that were not covered under the AGOA, and SSA countries will stand to gain significantly from preferential access for these products. Through the ongoing WTO negotiations, tariffs on various items of interest to LDCs, including apparels, are set to decline in near future. This will lead to serious preference erosion and loss of competitiveness for LDCs. The 7 per cent cap put on imports of apparels from China will be withdrawn from 1 January 2009. China being a major competitor in the US apparels market, this withdrawal is likely to pose renewed challenge for LDCs' export of apparels to the US.

32. In accordance with the Doha Round objective of integrating LDCs in the multilateral trading system, it can be argued that provision for DF-QF market access for LDC products should be made within the WTO framework. Having such provision within the WTO would provide tangible benefits to LDCs in the form of providing security and predictability of the market access commitments. Having regard to the negotiating capacity of LDCs, WTO perhaps is also a suitable forum, compared to bilateral negotiations. Nonetheless, given the existing state of market access for LDC products in the US market, the NPDA Bill is a positive development and this Committee would hope that in due course the Bill would be passed by the US legislature.

33. There are, however, a few areas in which the Bill may be improved for the benefit of the LDCs. As a pre-condition for receiving DF access, the NPDA requires LDCs to protect intellectual property.³⁰ However, this requirement is "without prejudice to any rights conferred by World Trade Organization agreements."³¹ Thus, in respect of protection of intellectual property, the NPDA reflects the spirit of this Committee as reflected in its 2006 Report and also the spirit of Resolution No. 3/2006 adopted by the full ILA in Toronto, which urged governments to refrain from eliminating flexibilities in the WTO TRIPS Agreement.³² Another pre-condition under the NPDA is to provide national

²⁹ 110th Congress, 1st Session, H.R. 3905, available at <http://www.govtrack.us>.

³⁰ NPDA, Title I, Section 506C(b)(2)(C)(iii)(II).

³¹ Ibid.

³² See paragraph 16 above.

treatment to foreign investment.³³ Given that LDCs are given flexibility under the WTO TRIMS Agreement and the GATS in respect of investment measures, it may be recommended that the NPDA provision regarding foreign investment be qualified in the same manner as the provision regarding intellectual property.

34. An LDC would lose eligibility under the NPDA if the country fails to “effectively enforce” core labour standards.³⁴ The NPDA itself recognizes the challenges faced by LDCs in improving labour conditions and quite appropriately and commendably makes provision for assistance in respect of workforce competitiveness, including assistance in respect of drafting labour laws and regulations, increasing the capacity of employers, workers and the governments, etc.³⁵ Given the challenges faced by LDCs, labour standards can be more effectively promoted in LDCs, if instead of excluding countries for failures resulting from their circumstances, the NPDA adopts an inclusive approach by making countries eligible on the basis of their continued and effective progress.

VIII. Draft ILA Declaration on International Trade Law and Human Rights

35. Since its 1st Report to the 66th ILA Conference at Buenos Aires in 1994, all bi-annual ITLC Reports discussed the evolving WTO legal and dispute settlement system from the perspective of rule-of-law and “the basic principles and ... objectives underlying this multilateral trading system” (WTO Preamble). As WTO law respects the sovereign freedom of each WTO Member to decide on the level of its trade tariffs and on its national trade and public interest regulation, constitutional and legislative regulations of trade tend to differ from country to country according to its constitutional and political traditions and democratic preferences. Hence, the ITLC discussions and proposals for elaborating an ILA Resolution on *International Trade Law and Human Rights* focused on legal and judicial remedies in the field of international trade, with due respect for the diverse constitutional traditions regarding regulation of human rights and “economic freedom” (e.g. to choose one’s profession and exchange the fruits of one’s labour for cheaper and better imported goods) in national and international trade law. This focus on legal and judicial remedies is reflected also in Article 3 of the Dispute Settlement Understanding (DSU), according to which the “dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.” The systemic character of WTO law and of its legal and procedural remedies is further reflected in the ever more “systematic” methods of treaty interpretation applied in the jurisprudence of WTO panel, appellate and arbitral reports.

WTO Law Protects Legal Security and Judicial Remedies also for Individuals

36. The WTO Agreement differs from other worldwide agreements not only by its compulsory jurisdiction for international third-party adjudication based on panel, appellate review and arbitration proceedings; it also includes numerous guarantees of individual access to independent “judicial, arbitral or administrative tribunals or procedures for... prompt review and correction of administrative action relating to customs matters” (Article X GATT), anti-dumping measures (Article 13 Anti-Dumping Agreement), subsidies and countervailing duties (Article 23 Agreement on Subsidies), restrictions of trade-related services (Article VI GATS), trade-related intellectual property rights (Articles 41-50 TRIPS) and government procurement proceedings (Article XX GPA). Hence, as goods and services are produced, traded and consumed by individuals, the “dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system” (Article 3 DSU) not only in international relations among WTO Members, but also in the international trade transactions of producers, traders and consumers, as reflected in several WTO dispute settlement provisions (e.g. the private access to “independent review procedures” administered by the WTO pursuant to Article 4 of the WTO Agreement on Preshipment Inspection). This focus on legal security also for “individuals and enterprises” engaged in international trade is most explicit in the WTO Protocols on the accession of China, Vietnam and other formerly communist countries, notably in their comprehensive guarantees of individual “rights to trade”, including “the right to import and export goods”, property rights and “impartial and independent judicial review”, including “the opportunity for appeal, without penalty, by individuals or enterprises affected by any administrative action subject to review.”³⁶ These actionable

³³ NPDA, Title I, Section 506C(b)(2)(C)(iii)(I).

³⁴ NPDA, Title I, Section 506C(b)(2)(A), (B) and (E)

³⁵ NPDA, Title I, Section 402(c).

³⁶ The quotations are from the 2001 WTO Protocol on the Accession of China, WT/L/432, Part I, sections 2 and 5.

WTO obligations go beyond the customary international law obligations for the protection of aliens and have contributed to the fact that legal and judicial remedies tend to be more effective in national and international trade law than in other areas of international relations.

Justice Requires Coherent and Reasoned Judicial Interpretations of the Law

37. Since antiquity, judges have asserted inherent powers to decide disputes independently and impartially based on coherent, reasoned interpretations of the applicable law. Most national legal systems include obligations, or rebuttable presumptions, that domestic laws must be interpreted in conformity with the international legal obligations of the country concerned. This “consistent interpretation principle”, as well as the objective of the “dispute settlement system of the WTO... to clarify the existing provisions of (WTO) agreements in accordance with customary rules of interpretation of public international law” (Article 3 DSU), may require national and international judges to settle disputes involving WTO agreements not only in conformity with *formal principles* of treaty interpretation (like *lex specialis*, *lex posterior*, *lex superior*); customary law also prescribes “that disputes concerning treaties, like other international disputes, should be settled ... in conformity with the principles of justice and international law”, including “respect for, and observance of, human rights and fundamental freedoms for all”, as explicitly codified in the Vienna Convention on the Law of Treaties (Preamble VCLT). Numerous WTO provisions and WTO dispute settlement reports refer explicitly to such “principles” (e.g. of “good faith”) underlying WTO guarantees of non-discriminatory market access, national treatment and the numerous “general exceptions” and “public interest clauses” in WTO agreements. In view of the economic consensus that international trade liberalization increases the economic welfare of all trading nations and contributes also to poverty reduction (e.g. by reducing the prices of consumer goods, enhancing productivity, creating new job opportunities, enabling governments to redistribute part of the “gains from trade” for helping the poor and granting adjustment assistance to workers shifting from import-competing to export sectors of the economy), also economists (from Adam Smith to Amartya Sen) increasingly emphasize that legal protection of equal freedoms to engage in mutually beneficial, voluntary trade transactions reflects basic principles of justice. Political scientists, likewise, increasingly argue that – as the main task of international organizations (like the WTO) is to provide “collective public goods” (like an open, rules-based trading system) and limit functional failures of states under conditions of interdependence (e.g. “trade wars”, protectionism with adverse effects abroad) – the legitimacy of international organizations should be judged in terms of universal human rights and justice rather than merely in terms of utilitarianism or democracy which remains difficult to realize in global governance.³⁷

Clarification of the Human Rights Dimensions of WTO Law by Human Rights Bodies

38. Following the ITLC’s proposal for ILA Resolution No. 2/2000 on ‘*International Trade Law and the Rule of Law in International Trade*’³⁸, all ITLC Reports explored in more detail the potential legal impact of the human rights obligations of all WTO Members as “relevant context” (in the sense of Article 31 VCLT) for the interpretation of WTO rules and “basic principles ... underlying this multilateral trading system”. As described in previous reports³⁹, various ITLC members (Profs. Abbott, Benedek, Cottier, Jackson, Pauwelyn, Petersmann and others) organized, since 2001, annual conferences – in close cooperation with human rights experts – leading to a large number of books and other publications analyzing the human rights dimensions of WTO rules and practices. These publications and ITLC reports essentially confirmed the conclusions in the eight reports by the UN High Commissioner for Human Rights on the human rights dimensions of WTO law and other trade agreements⁴⁰, notably:

- All 192 UN member states have today, as recognized in numerous UN resolutions and decisions of international courts, human rights obligations under the UN Charter, under other international treaties and general international law, notwithstanding the frequent disagreement

³⁷ On the “constitutional functions” of WTO rules, which were extensively discussed in previous ITLC reports, see now: World Trade Report 2007 (WTO 2007), 79-98.

³⁸ ILA, Report of the 69th Conference at London (2000), 18-25.

³⁹ Cf. Report of the 72nd ILA Conference at Toronto (2006), 256 ff; Report of the 71st ILA Conference at Berlin (2004), 527 ff; Report of the 70th ILA Conference at New Delhi (2002), 659 ff.

⁴⁰ For a discussion of these reports see: J.Harrison, *The Human Rights Impact of the WTO* (2007); E.U.Petersmann, *The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy?* in: JIEL 2004, 605-628.

- on the precise scope of human rights and of corresponding government obligations, notably in the regulation of the economy.
- Also all 152 WTO Members have legally committed themselves to respect for human rights. WTO Members and WTO bodies are, therefore, legally required to interpret and apply WTO rules in conformity with the human rights obligations of WTO Members so as to avoid that trade rules negatively impact upon human rights.
 - The more than 400 GATT and WTO dispute settlement reports since 1948 have not identified any concrete conflicts between GATT and WTO rules and the human rights obligations of WTO Members. This may be due, *inter alia*, to the fact that trade liberalization tends to increase individual freedom and consumer welfare, and the GATT/WTO “general exceptions” (e.g. for protection of “public morals”, “human, animal or plant life or health”, “essential security interests”, “public order”) reserve the right of every WTO Member to protect human rights.
 - WTO instruments (like the 2001 WTO Declaration on access to medicines) usually avoid explicit references to human rights and, in the rare exceptional cases (such as the reference to “gross violations of human rights” in the 2003 WTO waiver for the “Kimberley Protocol” limiting trade in “conflict diamonds”⁴¹), do not specify the legal relationships between WTO rules and human rights. The 2001 WTO Declaration on access to medicines, the 2003 WTO waiver for the ‘Kimberley agreement’ on the control of conflict diamonds, the additional 2003 WTO waiver from Article 31(f) of the TRIPS Agreement (recourse to compulsory licenses for promoting access to medicines), and the 2004 WTO dispute settlement rulings on the right to make trade preferences for less-developed countries conditional on “objective standards” illustrate the flexibility of the WTO legal system in accommodating human rights concerns and other public interests.

Political WTO Bodies Avoid References to Human Rights Obligations

39. The universal recognition – for example, in the Constitution of the World Health Organization ratified by all 193 WHO member states – of “the fundamental right to the enjoyment of the highest attainable standard of health” influenced the WTO Declaration on the TRIPS Agreement and Public Health as well as the pertinent ILA Resolution No. 3/2006 urging interpretations of international trade rules that promote “access to medicines for all”.⁴² Yet, just as the amendment of the TRIPS Agreement facilitating exports of medicines did not refer to human rights, respect for the diverse traditions of protecting human rights in national laws prompts most trade diplomats to avoid discussions about human rights in specialized trade regimes. As the political WTO bodies have not responded to the UN proposals to adopt a “human rights approach to trade”, it is unlikely that WTO Members will take initiatives for clarifying the human rights dimensions of WTO law, for example whether, and how, WTO provisions on “public morals” and “public order” should be legally defined (as in European law) in conformity with the human rights obligations of the countries concerned. Just as it was the EC Court and the EFTA Court which interpreted European economic law in conformity with human rights long before the EC and EFTA member states recognized human rights as “common constitutional principles” underlying economic agreements in Europe, so is it likely to fall on the WTO dispute settlement bodies to respond to human rights arguments by interpreting WTO rules in conformity with human rights. WTO dispute settlement bodies and independent, impartial judges may feel legally obliged to respond to human rights arguments, and to explain their judicial reasoning, by referring to the human rights obligations of WTO Members as “relevant rules of international law applicable in the relations between the parties” (Article 31.3,c VCLT). As more than 70% of “WTO judges” (e.g. in panel, appellate and arbitration proceedings) tend to be trade experts rather than international law experts, it is an important task of independent, worldwide legal associations (like the ILA) to assist WTO dispute settlement bodies in clarifying their legal obligations to take into account human rights as relevant legal context for interpreting WTO rights and obligations.

The Emerging Human Right of Access to Justice: Implications for WTO Law?

40. In international law, as in domestic legal systems, respect and protection of individual rights depends on effective judicial remedies. The progressive development of rights of access to justice,

⁴¹ Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, WTO Decision of 15 May 2003 (WT/L/518).

⁴² ILA, Report of the 72nd Conference at Toronto (2006), at 30.

from a customary international law requirement for the treatment of aliens into human rights recognized in regional and worldwide human rights treaties, has become an essential component of national and regional systems of protection of human rights.⁴³ Yet, the scope of such human rights remains limited (e.g. to civil, criminal and human rights matters). As noted above, international trade and investment law provides for more effective legal and judicial remedies of states and individuals than in most other areas of international law (e.g. in terms of compulsory international jurisdiction, individual access to national courts, investor-state arbitration and regional courts). But customary international law continues to leave a wide margin of discretion to states regarding their national system of courts and administration of justice. It seems uncertain, and was not further explored by the ITLC, whether human rights (as guaranteed in Articles 6 and 13 of the European Convention on Human Rights) to seek an “effective remedy” before a national court of law guaranteeing independence, impartial procedures and “due process of law” may be “relevant context” for interpreting trade rules on legal and judicial remedies.

The Focus of the ILA Draft Resolution on Customary Principles of Treaty Interpretation

41. UN human rights instruments often leave states broad discretion regarding their specific rules, procedures, institutions and priorities for protecting human rights in national, regional and international legal systems. In view of the diversity of constitutional laws and democratic legislation protecting human rights, the ITLC’s mandate and preparatory work for an ILA Declaration on International Trade Law and Human Rights⁴⁴ avoided taking legal positions on specific human rights and corresponding government obligations. The following proposal for an ILA Declaration on International Trade Law and Human Rights rather focuses on the obligation of dispute settlement bodies to clarify WTO rules “in accordance with customary rules of interpretation of public international law”, including “principles of justice” and “respect for, and observance of, human rights and fundamental freedoms for all” (VCLT). The various elements of the draft proposal, which were extensively discussed in ITLC meetings and ITLC reports since 2004 as well as in publications by ITLC members⁴⁵, also deliberately avoid certain controversies over the interpretation of human rights law (e.g. the current status of customary human rights law), international trade law (e.g. the limited jurisdiction and applicable law in WTO dispute settlement bodies), and of the customary international law rules on treaty interpretation (e.g. concerning the interpretation of Article 31.3,c VCLT). As the draft proposal emphasizes obligations that are already codified in the VCLT and have been acknowledged in numerous UN resolutions, its focus is on encouraging international dispute settlement bodies to actually take into account their legal obligation of settling “disputes concerning treaties, like other international disputes, ... in conformity with the principles of justice and international law”, including “universal respect for, and observance of, human rights and fundamental freedoms for all” (Preamble VCLT).

42. **Draft Proposal for a 2008 ILA Resolution on ‘International Trade Law and Human Rights’:**

- *Recalling* that the practice of the UN and of UN Specialized Agencies confirms that all UN member states have human rights obligations under the UN Charter, and that recognition of human rights in the primary law (e.g. the “fundamental right to the enjoyment of the highest attainable standard of health” recognized in the Constitution of the World Health Organization by 193 member states) and in the secondary law of UN Agencies (e.g. in the 1998 ILO Declaration on Core Labor Standards) has contributed to the progressive development, protection and universal recognition of human rights in the practice of states.

- *Recalling* also that all 152 WTO Members have human rights obligations (e.g. under the UN Charter, under UN human rights conventions, under customary international law and under “general principles of law recognized by civilized nations”) not only in intergovernmental relations among states, but also vis-à-vis domestic and foreign citizens. Even though the precise scope and content of such human rights obligations often remains contested, especially in the regulation of the economy, international courts have confirmed that some human rights obligations have evolved into international *ius cogens* and *erga omnes* obligations.

⁴³ Cf. F.Francioni (ed), *Access to Justice as a Human Right* (2007).

⁴⁴ Cf. ILA, *Report of the 72nd Conference at Toronto* (2006), at 30, 291.

⁴⁵ For an overview see, e.g., E.U.Petersmann, *Human Rights, Constitutionalism and the WTO*, in: *Leiden Journal of International Law* 2006, 633 ff.

- *Recalling* further that WTO dispute settlement bodies – in their task to interpret and “clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law” (Article 3:2 WTO Dispute Settlement Understanding) – may have to examine claims by WTO Members to interpret WTO rules (e.g. on protection of “public morals”, human health and other public interests) in conformity with human rights obligations of WTO Members, taking into account “any relevant rules of international law applicable in the relations between the parties” (Article 31:3,c Vienna Convention on the Law of Treaties);

- *Recalling* the ‘*Declaration on the Rule of Law in International Trade*’ adopted by the 69th Conference of the ILA in 2000 at London, as well as numerous other ILA Resolutions aimed at promoting mutually coherent interpretations of multilateral international treaties, and noting the extensive discussions on legal interrelationships between international trade law and human rights in the bi-annual reports of the ILA’s International Trade Law Committee since 2000 as well as in numerous books and other publications by ILA members;

- *Welcoming* the flexibility of the WTO system vis-à-vis human rights concerns, as illustrated by the WTO Declaration on Trade Related Intellectual Property Rights and Health, the WTO Waivers for the ‘Kimberley Rules for conflict diamonds’ and for ‘access to medicines’, and the 2007 Joint Study by the ILO and the WTO on ‘Trade and Employment’ (e.g. its explicit acknowledgment of freedom of association and the right to collective bargaining as “universally recognized human rights”). Just as UN law rightly emphasizes that respect for human rights is a precondition for international peace and a just world order, so can the WTO objectives of “sustainable development” and “providing security and predictability to the multilateral trading system” be enhanced by respect for the human rights obligations of all WTO Members.

The 73rd Conference of the ILA at Rio de Janeiro declares:

(1) It may only be a matter of time until WTO dispute settlement bodies may be confronted – as it has happened in national and regional economic courts and arbitral tribunals – with human rights arguments in support of interpreting trade and economic rules in conformity with human rights obligations of the countries concerned, or with related requests for “judicial comity” or “judicial deference.” Notwithstanding their limited jurisdiction and their right to exercise “judicial economy”, WTO dispute settlement bodies may be required by the customary methods of international treaty interpretation to examine whether human rights arguments invoked by WTO Members may be relevant for justifying, for example, restrictions of imports of goods and services in conformity with WTO rules if such restrictions are “necessary to protect public morals” (Articles XX,a GATT, XIV,a GATS), “to maintain public order” (Article XIV,a GATS), to protect security (Articles XXI GATT, XIV**bis** GATS), human health (Articles XX,b GATT, XIV,b GATS) and other basic human needs. Judicial respect for legal protection of human rights inside the importing country, without prejudice to judicial review of WTO obligations of the countries concerned, may be in conformity not only with the human rights obligations of WTO Members, but also with the “public interest” provisions in international trade agreements⁴⁶, especially if the lack of protectionist abuses is confirmed by the non-discriminatory application of restrictions to like goods and services regardless of their origin.

(2) WTO Members have not expressed any intention to deviate from their human rights obligations when they negotiated and ratified the WTO Agreements. They have recognized in numerous WTO provisions the rights and obligations of all WTO Members to protect human life, human health, human security and other human needs and public interests. Hence, in their examination of legal claims to interpret WTO rules in conformity with human rights, trade dispute settlement bodies should proceed from the legal presumption that WTO provisions can and should be interpreted consistent with the human rights obligations of WTO Members under international law.

(3) In examining legal claims concerning an alleged impact of human rights on the interpretation of WTO rules, WTO dispute settlement bodies must respect their limited jurisdiction and the legitimate

⁴⁶ See, e.g., the Appellate Body’s reference (in its 2006 *US Gambling Report*) to public morals in Article XIV GATS as concerning “fundamental interests ... as reflected in law”, and the Appellate Body’s acknowledgment (in its 2001 *EC Asbestos Report*) that the more vital the value pursued by import restrictions, the higher may be the degree of judicial deference towards the protective measure.

diversity of national and regional human rights traditions provided such diverse traditions remain consistent with universal human rights obligations.

(4) In conformity with the worldwide recognition – e.g. in the 1993 Vienna Declaration of the UN World Conference on Human Rights – that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing” (para.8), the ILA endorses the calls by the UN High Commissioner for Human Rights (e.g. in its reports on the human rights dimensions of WTO rules that directly affect citizen interests) to interpret and apply WTO rules in conformity with the respective human rights obligations of WTO Members. Just as human rights and public discourse on the human rights dimensions of economic law have played an important role in promoting civil society support for European law and the legal consistency of European integration law with human rights, so can respect for universal human rights and public discourse on the human rights dimensions of WTO law promote civil society support for the WTO and help to ensure that WTO rights and obligations contribute to the protection of consumer welfare and other general citizen interests as defined by universal human rights;

(5) Respect for the universal human rights obligations of WTO Members is warranted also by the legal requirement (as stated in the Preamble to the Vienna Convention on the Law of Treaties as well as in Article 1 of the UN Charter) to settle disputes concerning treaties, like other international disputes, “in conformity with the principles of justice and international law”, including “respect for, and observance of, human rights and fundamental freedoms for all.” National and international tribunals should cooperate in promoting the rule of law not only in intergovernmental relations among states but also in international trade transactions among citizens, including the just settlement of international trade disputes for the benefit of citizens whose welfare is ever more influenced by international trade.-

IX. Regional Trade Agreements: The 2006 WTO Transparency Decision

43. As of May 2008, the WTO listed 205 regional trade agreements as being in force. These comprise 13 customs unions, 115 free trade agreements, 52 economic integration agreements in services and 25 preferential agreements between developing countries. All 152 WTO Members are party to at least one such agreement with the single exception of Mongolia. Major examples of regional trade agreements include the North American Free Trade Area, European Union, Mercosur and the Association of South-Eastern Asian Nations. In some cases, such as the EU, a regional trade agreement is also the foundation for regional political integration. In December 2006 the WTO General Council adopted a Transparency Decision on the notification and examination of regional trade agreements within the WTO.⁴⁷ The Decision builds on Article XXIV:7 GATT and paragraph 7 of the Understanding on Article XXIV, Article V:7 GATS and paragraph 4 of the Enabling Clause, and it entrenches certain aspects of the non-binding Guidelines on Procedures to Improve and Facilitate the Examination Process which were adopted in 2004.⁴⁸

44. The Transparency Decision establishes detailed rules on the notification of regional trade agreements to the WTO. Under paragraph 1, WTO Members ‘shall endeavour’ to notify any agreements being negotiated and they must notify any agreements that are signed, along with basic information on the agreement. Full notification must be done on ratification or provisional application. This is set out in paragraph 3, which states that ‘[t]he required notification of an RTA by Members that are party to it shall take place as early as possible. As a rule, it will occur no later than directly following the parties’ ratification of the RTA or any party’s decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties.’ To date, there have been 26 negotiations and 6 signed agreements notified as ‘early announcements’⁴⁹ and 28 new RTAs notified under paragraph 3 of the Decision. There are however some notable omissions. Neither the Economic Partnership Agreement between the EU and 15 Cariforum countries nor the Interim Economic Partnership Agreements between the EU and 20 African and Pacific countries have been notified to the WTO, even under the ‘early announcement procedure’, notwithstanding the fact that the EU has been provisionally applying these agreements on a unilateral basis since 1 January 2008. An Annex specifies the data to be included in notifications made under the Decision. For the

⁴⁷ WTO General Council, Transparency Mechanism for Regional Trade Agreements - Decision of 14 December 2006, WT/L/671, 18 December 2006.

⁴⁸ Committee on Regional Trade Agreements, WT/REG/W/15/Add.1, 16 November 2004.

⁴⁹ These notifications are listed at http://www.wto.org/english/tratop_e/region_e/early_announc_e.xls.

goods aspects of the agreements, this includes information on all duty rates applied at the time of entry into force of the agreement and during the implementation period as well as preferential rules of origin and import statistics. For the services aspects, statistical information on the agreement is required. For preferential agreements between developing countries, which are usually notified under the Enabling Clause, the data requirements will be interpreted with reference to their technical constraints. Insofar as the provision of such data is now mandatory, this is an improvement on the previous situation, though it has also been noted that the data required to be notified under this Annex is more superficial than specified in the voluntary 'Standard Format' adopted in 1996.⁵⁰

45. There are various steps in the examination of an RTA. First, the Secretariat prepares a 'factual presentation' of the RTA, which takes 45 weeks for Article XXIV RTAs under Article XXIV GATT and 35 weeks for agreements under the Enabling Clause.⁵¹ The factual presentations are based primarily, though not exclusively, on the information provided by the parties. To date 21 factual presentations have been completed. The factual presentation is then circulated to WTO Members, who are able to submit written questions to the parties. Finally, there is a single meeting of the CRTA and CTD at which the agreement is 'considered'.⁵² This meeting to take place no later than one year after notification of the agreement. The purpose of the Transparency Decision is essentially to break a deadlock in the process of examining regional trade agreements. This process was originally conducted by *ad hoc* Working Parties and, since 1996, was conducted by the CRTA, which was set up in part for this purpose.⁵³ The CRTA was to present its report to the relevant political organs (the Council on Trade in Goods, the Council on Trade in Services and the Committee on Trade and Development) and these organs were then to take any 'relevant action'. The nature of such action is set out in Article XXIV:7(a) and (b) GATT, together with paragraphs 7, 8 and 10 of the Understanding on Article XXIV, as well as in Article V:7(c) GATS and paragraph 4(b) of the Enabling Clause. These provisions give the relevant organs the power to make recommendations on regional trade agreements. In fact, due to a lack of consensus, virtually no recommendations have ever been made in either the GATT or WTO systems. The exceptions are three early agreements in the 1950s and the 1993 Czech-Slovak customs union.

46. The approach of the Transparency Decision to this problem is twofold. On the one hand, it gives the WTO Secretariat a new role in examining RTAs from a factual point of view. It is hoped that such increased transparency will itself have a reforming effect on WTO Members concluding RTAs. Second, and more significantly, the Decision removes the power of the CRTA to present a report to the political organs. Without such a report, it is virtually impossible for these organs to make any recommendations to the parties to regional trade agreements. In practice, the Transparency Decision has therefore removed the possibility of any political control over regional trade agreements. Where this is particularly notable is in the context of interim agreements on trade in goods because on such agreements the political organs have the power to make binding recommendations. This follows from paragraph XXIV:7(b) GATT and paragraph 10 of the Understanding, according to which the parties shall not maintain or put into force, as the case may be, an interim agreement if they are not prepared to modify it in accordance with these recommendations. It follows from the Transparency Decision that such recommendations will no longer be made.

47. This said, it must also be acknowledged that this possibility has in any case become unlikely in recent years, as no regional trade agreements have been notified as interim agreements since 1995. The practice of WTO Members has rather been to notify regional trade agreements as 'full' agreements with an implementation period, and the corresponding practice of the WTO has been to subject these agreements *de facto* to the conditions that are *de jure* applicable to interim agreements. At one stage, it

⁵⁰ Committee on Regional Trade Agreements, Standard Format for Information on Regional Trade Agreements, WT/REG/W/6, 15 August 1996. See Youri Devuyt and Asja Serdarevic, 'The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap' (2007) 18 *Duke Journal of Comparative and International Law* 1, at 47.

⁵¹ The timeline for Factual Presentations is at www.wto.org/english/tratop_e/region_e/timeline_e.doc.

⁵² The CTD's power under the Transparency Decision to examine agreements notified under the Enabling Clause does not sit easily with the CRTA terms of reference, according to which this power resides with the CRTA.

⁵³ WTO General Council, Committee on Regional Trade Agreements – Decision of 6 February 1996, WT/L/127, 7 February 1996.

was noted that this practice weakens the rights of third parties during the implementation period by circumventing the power of the CRTA to make binding recommendations to the parties.⁵⁴ However, this objection seems to have disappeared. Indeed, this practice has now been endorsed by the 2006 Transparency Decision, which omits any mention of ‘interim agreements’ and provides that the parties must submit data, including, ‘when the agreement is to be implemented by stages, a full listing of each party’s preferential duties to be applied over the transition period’. One open question is whether the net result of removing political control over RTAs will be to increase the chance that questions on their legality will now be resolved in dispute settlement proceedings.⁵⁵ There is indeed the possibility that the increased transparency of regional trade agreements might facilitate such action. In an effort to forestall this possibility, paragraph 10 of the Transparency Decision states that ‘[t]he WTO Secretariat’s factual presentation shall not be used as a basis for dispute settlement procedures’. But quite how such evidence may be excluded from any dispute settlement proceedings is not explained, and this statement should perhaps rather be seen as an implicit acknowledgement that the Transparency Decision may lead to further litigation on regional trade agreements.

X. The Cotonou Agreement and its Economic Partnership Agreements (EPAs)

48. Economic Partnership Agreements (EPAs) between the EU and the ACP (African, Caribbean and Pacific) countries are intended to provide for WTO compatible trade arrangements and to replace the trade chapter in the Cotonou Agreement. Preferential trade between the EU and these countries has been conducted in terms of a WTO waiver which expired at the end of 2007. Each of the 6 EPAs (a 7th configuration has been added for the East African Community) should eventually constitute an FTA (in terms of Art. XXIV GATT) and should, in addition, promote regional integration among the members. The EU wants these agreements eventually to include trade in services and investment. It adopted a regulation to allow for duty free and quota free access into the EU for goods originating in the ACP countries; effective from 1 January 2008.

49. These negotiations have been difficult and controversial. At the end of 2007 only one EPA (the CARIFORUM Agreement with Caribbean states) has been finalized. For the other EPAs negotiations are continuing and will cover a second phase devoted to services and investment. The inclusion of these disciplines has been resisted by many developing states as not being required in terms of the Cotonou Agreement. In several instances the final provisions on trade in goods must still be concluded and many ACP countries have refused to initial the texts negotiated by the end of 2007. The implementation of “Interim EPAs” has become a new problem, in particular in Southern Africa with respect to the SADC EPA. In this instance the members of the Southern African Customs Union (Botswana, Lesotho, Namibia, Swaziland and South Africa) have been joined by Angola and Mozambique to form the SADC EPA. (The other SADC members are negotiating their EPAs in several other configurations, resulting in the fragmentation of SADC.) Angola, Namibia and South Africa refused to initial the text on trade goods in December 2007 and raised several concerns about matters such as export taxes, infant industry protection, free movement of goods and a regional MFN clause, which requires future advantages to third parties to be extended automatically to the EU. Namibia eventually did initial the text but its concerns are still to be addressed in the course of 2008. Angola, Namibia and South Africa are not participating in the second phase of negotiations on services and investment. South Africa has its own bilateral trade agreement (The TDCA) with the EU, dating back to 2000.

50. It is feared that the implementation of the EPAs will have negative consequences for regional integration efforts in existing and new RTAs in Africa in particular. The promotion of regional integration is one of the objectives of the Cotonou Agreement but the new configurations created by the EPAs do not coincide with existing arrangements. In the case of SACU it will e.g. be very difficult to maintain the common external tariff of this particular customs union if the most important economy (South Africa) will be excluded from the arrangement. The EU is not prepared to include SA in the

⁵⁴ See WTO Committee on Regional Trade Agreements, Note on the Meetings of 27 November and 4-5 December 1997, WT/REG/M/15, 13 January 1998, paras 36-37.

⁵⁵ Traditionally, it had been argued that the power of the WTO political organs to make recommendations on the legality of regional trade agreements meant that this question could not be decided in dispute settlement. But this view has not been tenable since the adoption of the Understanding on Article XXIV and, more particularly, the Appellate Body Report in *Turkey – Textiles*, WT/DS34/AB/R, adopted 19 November 1999, paras 360 and 369. But see Devuyt and Serdarevic, op cit, at 71

duty free/ quota free offer applicable to the other members of this EPA. It must, however, be added that regional integration arrangements in Africa have never been particularly successful. They are plagued by overlapping membership problems and legal instruments are seldom enforced.

51. Negotiations to solve outstanding problems, to agree on services, investment and trade related matters and to ensure implementation and ratification of these agreements will continue during 2008. The EPAs have been quite controversial and will continue to be so when WTO notification of these agreements will eventually happen. This process will put both Art. XXIV GATT and Art. V GATS to the test, when the new transparency mechanism for RTAs will be operational. States such as Brazil and China have already raised concerns about the regional MFN clauses in the EPAs on which the EU insists. They claim that this will undermine the Enabling Clause which allows for special privileges for RTAs between developing nations. The integration of the ACP states into the fabric of the multilateral trading system is no easy matter.

XI. Trade-Related Competition Rules

52. After the report of the International Trade Law Committee to the ILA Session 2004 in Berlin⁵⁶, the “July Package” Decision in 2004⁵⁷ ended the (pre-) negotiation in the “Working Group on the Interaction between Trade and Competition Policy”: the subject “will not form part of the Work Programme ... and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.” Since then, the subject has disappeared from the WTO negotiations and, with regard to international coordination of merger policies and capacity-building for less developed countries, has been pursued outside the WTO in the context of the International Competition Network (ICN) among more than 65 national and European competition authorities. As recommended by the 69th ILA Conference in London⁵⁸, the ITLC continues to keep problems of international competition rules and policies under review.

53. The Doha Round discussions on trade-related competition rules had been specifically promoted by the European Community, while many developing countries had remained reluctant. Since 2004, several less-developed countries (including China, Hong Kong, India) have introduced or consider new competition legislation. In view of the widespread evidence of cartelization of international trade to the detriment of less-developed countries, limiting private abuses of market power and anti-competitive business practices remains a necessary complement to the WTO objective of promoting consumer welfare through liberalization of governmental trade restrictions.⁵⁹ The Panel decision Mexico - Measures Affecting Telecommunications Services of April 2, 2004⁶⁰, confirmed that competition rules are already part of GATS commitments for the liberalization of telecommunications services. Non-discriminatory application of domestic competition laws may also be a legal requirement under WTO obligations on national treatment. Sectoral liberalization of regulated services (e.g. air and shipping transports) in the context of the GATS might require complementary competition rules dealing with the widespread cartel and market-sharing practices in certain services sectors.

54. The Doha Round negotiations never aimed at a comprehensive harmonization of antitrust law. The exploratory discussions focused on procedural matters (e.g. transparency) and non-discrimination in order to reduce trade-restrictive effects of antitrust procedures. There was agreement that capacity-building assistance and flexibility were essential for making competition laws and policies in less-developed countries more effective. There had also been proposals for making a prohibition of “hardcore cartels” the starting point for developing worldwide competition rules in the WTO context. Antitrust law in developed countries shows that, so far, developed countries are not willing to deal unilaterally with restraints of competition on foreign markets if they do not feel an effect on their own

⁵⁶ ILA, Report of the 71th conference, 2004, p. 537 - 540

⁵⁷ WTO Decision Adopted by the General Council on 1 August 2004 WT/L/579.

⁵⁸ ILA, Report of the 69th conference, 2000, Resolution 2/2000

⁵⁹ A WTO briefing note to the Cancun Ministerial 2003 on cartels and other anti-competitive practices showed that price fixing across borders by private companies was estimated to raise costs to consumers in the affected industries by 20 – 40 %. Developing countries were thereby overcharged by billions of dollars. While developed countries may prevent or sanction such practices through their antitrust laws if anti-competitive practices adversely affect their domestic markets, developing countries are often not protected against such cartels in the absence of effective antitrust laws and policies.

⁶⁰ WT/DS204/R. Fox, Eleanor M., The WTO's First Antitrust Case - Mexican Telecom: A Sleeping Victory for Trade and Competition - Journal of international economic law 9 (2006) 271–292.

markets, either because they consider themselves prevented to do so by public international law or by “prescriptive comity”. In its latest pertinent decision the US Supreme Court said: “Why should American law supplant, e.g., Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?”⁶¹ While reciprocal commitments and capacity-building assistance remain essential for future WTO competition rules, such rules could be progressively developed by like-minded countries in the context of “Plurilateral Trade Agreement” (Annex 4 WTO Agreement) before being extended to other WTO Members.

XII. Future Work Program

55. The evolution of the ITLC into one of the largest ILA committees reflects the evolution of regional and worldwide trade law and jurisprudence into the most “legalized” and “judicialized” area of international relations that has become ever more important for economic welfare and poverty reduction all over the world. Yet, the future of the WTO and of some regional trade agreements (such as NAFTA) remains uncertain. Reducing the unnecessary poverty of more than 1 billion poor people living on 1\$ or less per day, and adjusting the world economy to increasing food and energy prices, will hardly be possible without an open, rules-based world trading system. The, since 1999, regular inter-parliamentary meetings and participation of ever more NGO’s in all WTO Ministerial Conferences reflect the increasing political awareness of governments, parliaments and civil society that the necessary reforms of the WTO legal and trading system, and the successful conclusion of the WTO’s Doha Round negotiations, will not be possible without stronger political support from civil society and parliaments. The ITLC therefore proposes to continue its work on all major subjects discussed in this Report as well as on other trade-related subjects of international law. The fact that the ITLC now includes members from all continents who actively contributed to the work of the ITLC since the 2006 ILA conference at Toronto, confirms the worldwide interest of ILA members in international trade law. The ILA rules on winding-up ILA Committees after a couple of years should be handled flexibly (as in the case of other ILA committees), with due respect for the increasing interest among ILA members in scrutinizing the dynamically evolving law and jurisprudence of world trade.-

⁶¹ Hoffmann La Roche v. Empagran, 542 U.S. 155 (2004)