

INTERNATIONAL LAW ASSOCIATION

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INTERNATIONAL TRADE LAW

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SIXTH REPORT OF THE COMMITTEE

By S. Amarasinha (Parts IV, VI), Prof. F.M. Abbott (Parts I-III,VII), M.Barutciski (Part VI), Prof. J. Bourgeois (Part IV), Prof. M.Footer (Part II), Dr.G. Marceau (Part VIII), Prof. P.C. Mavroidis (Part VIII), Prof. E.-U. Petersmann (Parts I-X), with the benefit of numerous additional comments from ITLC members.

Introduction

1. On 17-19 March 2003, the International Trade Law Committee (ITLC) convened at the University of Stellenbosch in South Africa at the invitation of Profs. Gerhard Erasmus and Neville Botha. The ITLC meeting coincided with two conferences jointly sponsored by the South African

Branch of the ILA and the Trade Law Center for Southern Africa on *Developments in International Trade Negotiations and their Relevance for South Africa and Southern African Development Community Dispute Settlement and Safeguard Procedures*. ITLC members made presentations in these conferences which were well attended by individuals from academia, governments of the region, the private sector and multilateral institutions. The meetings helped to promote interest in activities taking place at the World Trade Organization (WTO) and in regional trade organizations. The Committee agreed on an outline for the Sixth ITLC Report for the ILA 2004 Berlin Conference, with a view to circulation of a draft for consideration by Committee members in the Spring of 2004. In addition to this formal ITLC meeting in 2003, ITLC members organized various annual conferences on international trade law (e.g. in 2002, 2003 and 2004 at the World Trade Institute in Bern, Switzerland, the British Institute for International Law at London, England, at the European University Institute in Florence, Italy) which enabled ITLC members to informally consult on their work in the ITLC.

II. Developments in the Trading System

2. At the Fourth Ministerial Conference held in Doha (Qatar) in November 2001, WTO Ministers adopted, with some important qualifications, an ambitious agenda for a new round of trade negotiations referred to as the Doha Development Round (DDR). The Doha Development Agenda (DDA) envisaged new liberalization commitments in the fields of agriculture, industrial tariffs and services, possible negotiations in the areas of competition, investment, transparency in government procurement and trade facilitation (the so-called “Singapore issues”), a work program on implementation, and potential reform of the dispute settlement system. The objective of the Fifth Ministerial Conference held in Cancun (Mexico) in September 2003 included producing a framework agreement on agriculture and decisions on whether to initiate negotiations with respect to the Singapore issues. Ministers failed to reach any agreement in Cancun. Since then, delegates have been meeting in Geneva with a view toward re-invigorating the DDR by concluding two framework agreements in July 2004, one on liberalization of market access and reduction of domestic support and export subsidies for agricultural goods, and the other on international trade liberalization for non-agricultural goods and services.

3. Although it is difficult to single out issues for special attention, there are three systemic issues affecting multilateral governance at the WTO that raise deep questions about the future of the organization. The *first issue* relates to the question of whether the current governance architecture of the WTO is still suited to meeting the WTO objectives. The failure of the Cancun ministerial conference has been described as further proof that - due to the increasing number and diversity of the currently 147 WTO Members - the consensus practice, negotiating methods (e.g. green-room meetings, “friends of the chair” groups), institutional structures of the WTO (e.g. the limited powers of the Director-General, the absence of a consensus-building consultative body), as well as the WTO relationships with other worldwide organizations need to be reconsidered. The imbalances between the very active “(quasi)judicial branch” (WTO panels, Appellate Body, Dispute Settlement Body), the lack of political consensus in the “legislative branch” (WTO Members, Ministerial Conferences, General Council), and the too limited competencies of the “executive branch” of the WTO (Director-General, Secretariat, WTO Councils, WTO Committees) have led to proposals for various institutional reforms.¹ GATT 1947 was widely perceived as a framework for bureaucratic bargaining which, according to the “bicycle theory”, risked toppling down if the periodic GATT Rounds did not lead to intergovernmental liberalization commitments that were ratified by domestic legislatures. The large number of more than 310 WTO dispute settlement proceedings, and their obviously “strategic use” for enhancing the bargaining power and negotiating agenda of the DDR, illustrate that the ‘GATT 1947 bicycle’ has evolved into a ‘WTO tricycle’ based on intergovernmental rule-making, national ratification of WTO agreements, and the (quasi)judicial clarification and progressive development of WTO rules through WTO jurisprudence. As the momentum of a tricycle tends to be slower and different from that of a bicycle, the member-driven ‘WTO tricycle’ could benefit from a more powerful ‘four-wheel engine’ based on a stronger, institutional capacity of the WTO (e.g. its Director-General, the WTO Secretariat, an advisory WTO Committee composed of members of national parliaments) to defend the collective WTO interests (e.g. in more transparent, ‘principled bargaining’) more strongly vis-à-vis bureaucratic

¹ See e.g. the proposal by R.Blackhurst and D. Hartridge for creation of a “WTO Consultative Board”, and the proposal by G.Sampson for creation of a “Functioning of the WTO System Group”, in: E.U.Petersmann (ed), Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System, European University Institute 2004, at 233-248, 282-296.

'positional bargaining', (quasi)judicial dispute settlement proceedings, national government positions and civil society deliberations and pressures (e.g. by single-interest non-governmental organizations).²

4. A *second systemic problem* results from the more than 250 free trade areas, customs unions and other regional integration agreements which continue to limit the multilateral scope of WTO rules (e.g. of the most-favored nation obligations in Articles I GATT and II GATS), even though the legal consistency of such regional agreements with GATT Article XXIV and GATS Article V remains often contested. The resort to regional free trade areas, customs union agreements and other "coalitions of the willing" outside the WTO has been explicitly linked (e.g. by the United States in response to the failure of the WTO Ministerial Conference at Cancun) to the (in)capacity of "Member-driven", consensus-based negotiations inside the WTO to reach agreement on additional trade liberalization. GATT and WTO practice suggest that the scope for strengthening the *substantive* WTO legal disciplines for regional integration agreements – either by way of WTO jurisprudence or WTO negotiations – appears very limited, for example because almost every WTO Member participates in such agreements and has a vested interest in preserving national policy autonomy. The failure of the WTO ministerial conference in Cancun seems to confirm that, after more than 50 years of reciprocal liberalization of welfare-reducing border discrimination in successive GATT and WTO Rounds, the need for complementary competition rules, investment rules, environmental, social and other legal rules can be realized more effectively through regional agreements. Such *inter se* agreements among "coalitions of the willing" may initiate decentralized adjustments of the world trading system which, as illustrated by the 1979 Tokyo Round Agreements and the subsequent "globalization" of some of their rules by means of the 1994 WTO Agreement, may later serve as precedents for new worldwide rules. Yet, the increasing resort to *inter se* agreements may also reflect "forum shopping" by countries better-equipped to negotiate in multiple fora which use that capacity to their advantage. The trend may have negative implications for less-developed WTO member countries with less capacity to negotiate and defend their interests simultaneously in multiple fora.

5. A *third systemic problem* results from the increasing challenges to the legitimacy of state-centered rules that do not adequately take into account the today universally recognized human rights of citizens. Intergovernmental "top-down *liberalization*" of *discriminatory border restrictions* through successive GATT/WTO commitments may be politically more legitimate than intergovernmental "top-down *regulation*" of *internal regulatory problems* (such as production processes, health protection standards, property rights, competition and investment rules) that affect parliamentary competencies and constitutional values in many countries. In order to become effective, WTO rules have to be approved and supported by democratic parliaments and citizens. This democratic approval will become ever more difficult if WTO negotiations are neither transparent nor perceived to promote "social justice", and WTO law does not refer to the traditional safeguards of "input-legitimacy" (e.g. human rights, democratic procedures) and "output-legitimacy" (e.g. consumer welfare). Just as the realization of internal markets inside countries has usually required constitutional safeguards of non-discriminatory competition and social justice, the realization of an international *social market economy* may be easier to achieve "bottom-up" through regional integration agreements among constitutional democracies than through secretive WTO negotiations without adequate democratic involvement by national parliaments and civil society. These democratic and human rights dimensions of regional and worldwide trade law have been analyzed in numerous publications by ITLC members over the past years.³

III. Trade-Related Aspects of Intellectual Property Rights {TRIPS}

A. TRIPS and Public Health

6. The 2002 Report of this Committee discussed the adoption by Ministers of the Doha Declaration on the TRIPS Agreement and Public Health (the "Declaration"). It called attention to Paragraph 6 of the Declaration which directed further negotiations on the problem of effective use of compulsory licensing by Members with insufficient or no manufacturing capacity in the pharmaceutical

² On this evolution from the 'GATT 1947 bicycle' to the 'WTO tricycle' and the advantages of a 'four wheel WTO motor' see: E.U.Petersmann, The End of the WTO's Peace Clause: Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agriculture, in: E.U.Petersmann (ed), Preparing the Doha Development Round: WTO Decision-Making Procedures, Trade in Agricultural Goods and Services, and Less-Developed WTO Member Countries, European University Institute 2004 (forthcoming).

³ See e.g. C.Breining/ T.Cottier (eds), Human Rights and International Trade, 2004.

sector. Paragraph 6 envisaged that the TRIPS Council would make a recommendation on this issue to the General Council by the end of 2002. A proposal for a solution was blocked by the United States in December 2002. On August 30, 2004, the General Council, on recommendation of the TRIPS Council, adopted the Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (“Decision on Implementation”). Adoption of the Decision was preceded in the General Council by the reading of a Chairperson’s Statement expressing certain “shared understandings” of the Members. The Decision on Implementation takes the form of a waiver that will remain in effect until an amendment to the TRIPS Agreement enters into force for each Member. The waiver is directed to Articles 31(f) and (h) of the TRIPS Agreement.

7. The Decision on Implementation establishes the conditions for exports of pharmaceutical products under compulsory license that might otherwise be restricted by Article 31(f) of the TRIPS Agreement (i.e., the requirement that compulsory licenses shall be issued “predominantly for the supply of the domestic market”). The conditions include notifications to the TRIPS Council, the granting of compulsory licenses in both the importing and exporting countries when patents are present, limitations on the quantity of supply and destination of exports, and exercise of reasonable efforts to prevent diversion. Throughout the negotiations interested groups expressed concerns about the terms and potential effects of the solution. Major research-based pharmaceutical patent holder industry groups worried that the solution might undermine incentives for pursuing further research and development. These groups pressed for additional limitations in the solution, such as restrictions as to the group of potential importing countries. On the other side, public health oriented non-governmental organizations (NGOs) and the World Health Organization strongly advocated a solution that would avoid cumbersome bureaucratic procedures that would make implementation difficult for countries with limited resources.

8. Adoption of the Decision on Implementation shortly before the Cancun Ministerial Conference was hailed by the Director-General of the WTO as evidence that the institution is capable of responding to the needs of the world’s poor. This sentiment was echoed by representatives of the major industrialized Members. While the Decision was generally welcomed by developing Members, it was greeted skeptically by civil society groups because of anticipated difficulties in coping with its bureaucratic requirements. Until January 1, 2005, there will remain a substantial supply of newer off-patent medicines available for export because certain pharmaceutical producing Members, most notably India, will not provide pharmaceutical product patent protection until that date. Test of the workability of the Decision on Implementation will likely take place only after January 1, 2005. A number of Members, including Canada, India and Norway, have proposed or adopted legislation to implement the Decision as prospective exporting (and/or importing) Members. Technical support for implementation in exporting and importing Members is being provided by a number of multilateral organizations, including the World Bank. Whether the Decision will work in practice to address public health needs in developing countries is likely to depend on the extent to which Members initiating efforts to operationalize the Decision are pressured by patent holders and their home governments not to do so. There is, of course, public interest in assuring that the chain of pharmaceutical supply is protected, and continuing attention also must be paid to the way in which the supply of medicines is managed “on the ground”.

9. The Decision foresees the negotiation and conclusion of an amendment to the TRIPS Agreement that ultimately will take the place of the waiver. These negotiations are in their early stages. Some Members may seek changes to the terms of the Decision,⁴ and there is debate concerning the legal character of the “Chairperson’s Statement”, whether and how it should be associated with an amendment. In light of the outstanding issues, there may be a substantial reflection period as Members and interested groups seek to determine the way forward. As this Committee played an important role in affirming the right of WTO Members to adopt their own policies on the exhaustion of intellectual property rights,⁵ which right was confirmed in the Doha Declaration, the ITLC might similarly play a useful role in the implementation of the Decision by monitoring the process, analyzing, and considering ways in which the system enabled by the solution might be supported and/or improved. It is therefore

⁴ Paragraph 11 of the Decision provides that the amendment will be based “where appropriate” on the Decision, leaving substantial room for Members to seek changes in the process of negotiating the amendment.

⁵ See the *Declaration Regarding the Exhaustion of Intellectual Property Rights and Parallel Trade* in Annex 1 to ILA Resolution No.2/2000 on International Trade Law, in: Report of the 60th ILA Conference, London 2000, 18-25.

recommended that the Committee establish a subcommittee to study the implementation of the Decision and direct its Rapporteur for TRIPS, in consultation with the subcommittee, to make a report to the ILA Conference in 2006.

B. Review of Article 27.3(b) and Related Matters

10. Article 27.3(b) of the TRIPS Agreement addresses the patentability of biological materials, including plants, and the extent to which Members may provide exceptions to patentability of such materials. This subparagraph provides that it will be reviewed by the TRIPS Council commencing January 1, 1999. The terms of the first clause of Article 27.3(b)⁶ were borrowed from Article 53(b) of the European Patent Convention (EPC) which, however, provided for mandatory exclusions from patentability⁷, as opposed to the optional exclusion approach of the TRIPS Agreement. The meaning of Article 53(b) of the EPC was the subject of much uncertainty and litigation within EPC member countries. It is not therefore surprising that Article 27.3(b) of the TRIPS Agreement is similarly the subject of uncertainty and controversy. To address the uncertainties inherent in the EPC, as well as to take into account new technologies, the European Union adopted a comprehensive Biotechnology Directive.⁸ Many WTO Members do not share the approach taken in the Biotechnology Directive.⁹

11. Article 27.3(b) also provides that Members may protect new plant varieties either by patent or a *sui generis* form of protection. There is debate concerning the extent to which the choice of *sui generis* systems of protection may be limited, for example, to a particular version of the UPOV Convention.

12. A related set of issues concerns the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD). Since the entry into force of the TRIPS Agreement, concerns have been raised regarding potential conflicts between rights and obligations established by the two international agreements. Although some Members have suggested that conflicts will not arise, potential conflicts surfaced in connection with negotiation at the Food and Agriculture Organization of the International Treaty on Plant Genetic Resources for Food and Agriculture (= ITPGRFA), and influenced the outcome of negotiations¹⁰; the ITPGRFA entered into force on 29 June 2004, with the EC as one party alongside the 25 member states. The main issue presently drawing the attention of Members concerns whether and how an obligation with respect to disclosure of the source and origin of genetic resources should be incorporated into the TRIPS Agreement. It is argued that such an obligation is necessary to recognize sovereignty over such resources (as confirmed by Article 15.1 of the CBD), and the complementary obligations of prior informed consent (Article 15.5, CBD) and benefit sharing (e.g., Article 15.4 & 7, CBD). A substantial cross-section of Members are sympathetic to the concept of an obligation to disclose source and origin in the patent application process, but there are significant differences of opinion regarding issues such as the potential consequences of failure to comply and the appropriate forum (e.g., WTO or WIPO) for the negotiation and adoption of any new rules.¹¹

13. Concerns with respect to “traditional knowledge” extend beyond genetic resources to the accumulated know-how of communities with respect to the use of plants and other biological resources

⁶ “Members may also exclude from patentability: ... plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.” Article 27.3(b), TRIPS Agreement.

⁷ EPC Article 53(b): “European patents shall not be granted in respect of: ... (b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.”

⁸ Its adoption illustrates the extent of the uncertainty created by the terms of Article 27.3(b). See Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30/07/1998 p. 0013 – 0021

⁹ For example, the African Group has proposed that Article 27.3(b) provide a mandatory exclusion from patentability of genetic materials.

¹⁰ Specifically, proposals for royalty mechanisms based on patenting of inventions based on materials obtained under the system established by the treaty were challenged on the basis of alleged conflict with Article 27.1 of the TRIPS Agreement (i.e., nondiscrimination based on field of technology). Compare draft Article 14.2(d)(iv) of Proposed Revised International Undertaking on Plant Genetic Resources and Article 13.2(d)(ii) of the International Treaty on Plant Genetic Resources for Food and Agriculture.

¹¹ On some of these problems see: Mary E. Footer, Our Agricultural Heritage: Agricultural Sustainability, Common Heritage and Intergenerational Equity, in: Nico Schrijver/Friedl Weiss (eds.) International Law and Sustainable Development: Principle and Practice, 2004.

(such as for medicinal purposes), and to areas such as protection of folklore, traditional music, religious symbols and other forms of expression that may not be adequately protected by existing forms of “intellectual property”.

14. This Committee is in a position to make contributions in the review of Article 27.3(b), related analysis of the relationship between the TRIPS Agreement and CBD, and the protection of traditional knowledge. We note, however, that the ILA has recently established a new Committee on *International Law on Biotechnology* chaired by a Member of the ITLC, Prof. Cottier. In order to ensure a complementary relationship between this new ILA Committee and the related ITLC work on biotechnology aspects of TRIPS and the human rights dimensions of international trade law, the ITLC Rapporteur for TRIPS and other ITLC members will closely coordinate their related activities (e.g. a series of conferences on the *Impact of Biotechnology on International Law and Human Rights* at the European University at Florence and the University of Siena in October 2004) with Prof. Cottier.

C. Other TRIPS Issues

15. There are a number of other issues on the agenda of the TRIPS Council. The most pressing involves the question whether non-violation nullification or impairment causes of action should be authorized in dispute settlement under the TRIPS Agreement. It may be recalled that Article 64.2 provided a five-year moratorium on non-violation causes of action. Article 64.3 provided that during the five-year moratorium, Members would examine the “scope and modalities” for such causes of action and prepare recommendations for adoption by the Ministerial Conference. Article 64.3 provided that any such recommendations would require consensus and that any decision to extend the five-year moratorium would be made only by consensus. At the Doha Ministerial, Members acted to extend the moratorium until the Cancun Ministerial. Prior to the Cancun Ministerial, Members had agreed in principle to a further extension of the moratorium. When Ministers failed to adopt any decisions at Cancun the situation regarding non-violation causes of action became highly uncertain. Some Members argue that the five-year moratorium expired by its own terms, and in the absence of an affirmative vote to extend the moratorium, non-violation actions, at least in principle, may be brought. Others argue that because the TRIPS Council has not made a recommendation to the Ministerial Conference on scope and modalities, such actions may not be brought. It is exceedingly difficult to resolve this controversy on the basis of the express language of Article 64 because Article 64.3 may be understood to assert contradictory directives.

16. The more fundamental question is, of course, whether non-violation causes of action would be a desirable addition to TRIPS dispute settlement. Some members of this Committee in the past have expressed the view that such actions should be permitted so as to establish a common character for WTO dispute settlement (*i.e.*, under the GATT, GATS and TRIPS). Others, including the Rapporteur for TRIPS, consider that the introduction of non-violation causes of action into TRIPS dispute settlement would create very substantial uncertainties, and would be contrary to the interests of developing country Members of the WTO.¹² At the Berlin 2004 conference, members of the Committee may usefully explore whether a common position on the question of non-violation causes of action under TRIPS might be agreed and a resolution adopted on the subject.

17. The European Union, Switzerland and other WTO Members are advocating enhanced protection for geographical indications under the TRIPS Agreement, notably extending the existing protection (cf. Article 23 TRIPS) to products other than wines and spirits. Currently, the WTO group of “Friends of GIs” encompasses more than 50 WTO Members. There is a wide range of views among other Members concerning the economic utility of extending protection of geographical indications, which would currently appear to favor the countries of Europe. While arguments have been made that developing countries would benefit from extending the scope of protection, there has not yet been a systematic economic analysis of the situation from the standpoint of developing countries. As extended legal protection of geographical indications may have systemic legal implications (e.g. for the definition of “like products”), and the non-discriminatory application of geographical indications and their delimitation with trade marks is the subject of a WTO dispute settlement proceedings, the ITLC will continue to review WTO developments in this field.

¹² See the contributions by Abbott, Cottier, Roessler and Schefer to: E.U.Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System*, 1997.

D. TRIPS-Plus Obligations

18. It is often said that the Uruguay TRIPS Agreement negotiations achieved a delicate balance among WTO Members with different economic and social interests, and that Members should strive to avoid upsetting this delicate balance. In this context, it is important to take note of the recent trend among certain Members to incorporate in bilateral and regional trade agreements standards of IPRs protection that substantially exceed those of the TRIPS Agreement, and to ask whether those standards are in the best interests of countries accepting them. If not, why are they being accepted?

19. Developed Members of the WTO are the predominant owners of IPRs-based assets, and their export industries rely on these assets for competitive advantage. Developing country Members, on the other hand, tend to be dependent on exports of lower technology goods, such as textiles and agricultural products. Bilateral and regional trade agreements are typically negotiated to take account of a country's producer interests. For developing Members, those producers are typically not IPRs-dependent. As a consequence, developing country negotiators may be willing to accept IPRs commitments because these do not affect their producer base, even though this may have a dramatic impact on consumers. In other words, developing country trade negotiators may be willing to meet developed Member demands for higher levels of IPRs protection because consumer interests are not represented at the bargaining table.

20. Some have suggested that because Article 1.1 of the TRIPS Agreement says that Members may, but are not "obliged to", adopt higher standards of IPRs protection than those in the TRIPS Agreement, pressure on developing Members to adopt TRIPS-plus terms constitutes a form of impermissible coercion. However, because developing countries accepting such terms do so as sovereigns, it seems difficult to conclude that there is coercion in an international legal sense. This does not end the inquiry. In light of current trends, this Committee may wish to ask whether the TRIPS Agreement should not be understood to embody the *rights* of WTO Members, as well as to impose obligations. That is, Members shall always be able to take advantage of the flexibilities embodied in the TRIPS Agreement unless its rules are altered at the WTO. Such a policy commitment could be used during the review of regional agreements. A "TRIPS-supremacy" clause might be understood as a condition to approval of such bilateral and regional agreements.

The consequences of importing increasingly high standards of IPRs protection in regional and bilateral trade agreements has yet to be adequately studied from the standpoint of the MFN principle. Are members of regional and bilateral agreements that adopt TRIPS-plus standards obligated to provide those higher standards of protection to WTO Members not part of the arrangement? Since there is no exception for differential IPRs treatment within arrangements negotiated after the TRIPS Agreement (*see* Article 4(d), TRIPS Agreement), this may appear to be the case. But if these higher standards make it more difficult for imports to penetrate the market (because of internal barriers), is this a "concession" as to which Members are benefiting as a consequence of MFN, or does this represent a withdrawal of concessions and a fundamental alteration of the conditions of competition as to third countries? The answer to this question may have broad systemic ramifications for the WTO. It is recommended that this Committee undertake a research program to address it.

IV. Trade-Related Competition Rules and Negotiations

21. Work in the WTO Working Group on Trade and Competition post-Doha focused on the so-called issues for clarification listed in paragraph 25 of the DDA, i.e. "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building." These issues correspond broadly with the elements that have been proposed for inclusion in a WTO competition agreement. It is worth recalling in this respect Resolution 2/2000, prepared by the ITLC and adopted at the 69th ILA Conference, which had recommended that the "WTO should consider introduction of a multilateral agreement on competition policy"; the proposed elements were roughly similar to those which were the subject of clarification in the WTO Working Group. In addition to these subjects, the WTO Working

Group - during its last meeting pre-Cancun (May 2003) - discussed issues relating to “progressivity and flexibility”, as well as dispute settlement and “peer review”.¹³

22. The Cancun WTO Ministerial ended prematurely with no results on the modalities for negotiations on a number of key issues, including non-agricultural market access, agriculture and the Singapore Issues (including competition). During discussions in the “Green Room” on the last day in Cancun, EU Trade Commissioner Lamy had offered to forego the issues of investment and competition. This offer – as also stated by Lamy in a subsequent press conference – had been contingent upon other WTO members showing flexibility; such flexibility never materialized as some WTO members insisted on all four Singapore Issues being the subject of negotiations, and other members indicating that they could accept none of the issues. The WTO General Council, during its meetings in December 2003 and February 2004, reconfirmed the commitment to the DDA and agreed upon a slate of new Chairs for the various negotiating groups and committees.¹⁴ No new Chairs were elected for the Singapore Issues of investment, competition and transparency in government procurement (the fourth Singapore Issue of trade facilitation is normally treated in the Council on Trade in Goods). It was understood that the non-election of Chairs for the three Singapore Issues was without prejudice to the position of WTO members on those issues.

23. In a Commission Communication of 26 November 2003¹⁵ to the Council, the Commission reconfirmed the importance of all four Singapore Issues for the multilateral trading system, but recognizes the hesitation on the part of certain other WTO members. The Commission indicates its willingness to lift one or more of the Singapore Issues out of the Single Undertaking provided (1) negotiations on a plurilateral agreement could take place among a “coalition of the willing” and (2) the negotiated result would be institutionally anchored within the WTO, presumably in Annex 4. The assumption would be that the actual negotiations would be “multilateral”, i.e. all WTO members could participate, and only towards the conclusion of the negotiations would members have to indicate whether they would sign up or not. Also, the agreements would be open for later accession for remaining WTO members. The Commission communication was embraced by EU member states during a meeting of EU ministers in December 2003.¹⁶ Unlike the EC and its Member States, USTR Zoellick (e.g. in his letter of 11 January 2004 to all WTO members) expressed a preference for either dropping the issues of investment and competition or for developing an agreed plan for further study of these issues.

24. As regards the remainder of the WTO membership, it would appear that some members may insist on all four Singapore Issues remaining within the DDA; a majority would be content with a solution whereby trade facilitation and, possibly, transparency in government procurement, would move ahead on the multilateral track within the Single Undertaking, whereas investment and competition (and possibly also transparency in government procurement) would be left outside the Single Undertaking. The open question would then be whether and how these issues could be negotiated on a different basis, while keeping the negotiated results institutionally anchored within the WTO.

25. One obvious question which will arise in the event of plurilateral negotiations is whether this will lead to a higher level of ambition and end-result. The presumption is that this would be the case, most likely with regard to the “qualitative” features of a competition agreement, i.e. transparency, non-discrimination and procedural fairness. It is less certain that substantive areas other than hard core cartels would be covered by the agreement. That, in turn, might also depend on developments in other fora dealing with international competition issues. Where the level of ambition and end-result is raised from what was proposed pre-Cancun, this raises some questions regarding the willingness and ability for non-signatories to adhere to the agreement in the near to medium-term after its conclusion. The current lack of outcome in the WTO is all the more disappointing as the number of WTO Members with domestic competition legislation on the books continues to increase. Similarly, the trend of

¹³ See e.g. written submissions WT/WGTCP/W/229 and 234 from the European Community and its Member States.

¹⁴ WTO press release available at http://www.wto.org/english/news_e/pres04_e/pr371_e.htm

¹⁵ Communication from the Commission to the Council, to the European Parliament, and to the Economic and Social Committee on “Reviving the DDA Negotiations – the EU Perspective”.

¹⁶ The unbundling of the Singapore Issues and recognition of the fact that Trade Facilitation was the most likely candidate for negotiations within the Single Undertaking was further confirmed in a joint letter of 9 May 2004 from EU Commissioners Pascal Lamy and Franz Fischler to WTO trade ministers.

including competition provisions in FTAs and other economic agreements continues. In the recently concluded FTA between Singapore and the US, for example, Singapore committed itself to introduce a national competition law by January 2005.¹⁷ The FTA contains a comprehensive chapter setting out definitions and cooperation modalities in the field of competition policies.

26. The WTO panel report of March 2004 on the US complaint against Mexican restrictions on foreign telecommunications services and foreign service providers¹⁸ examines not only Mexico's market access and national treatment commitments under the Fourth Protocol to the GATS (1996), but also Mexico's additional commitments to prevent anti-competitive practices in telecommunications and ensure non-discriminatory, cost-oriented interconnection rates. The panel findings on the detailed competition rules included into Mexico's telecommunications commitments confirm that there are no major obstacles to the enforcement of WTO competition rules (such as those included into the GATS commitments of more than 70 WTO Members) through WTO dispute settlement proceedings. In a press release of 1 June 2004 the USTR announced that the issue had been resolved between the parties to the dispute. Consequently, the panel report was adopted in June 2004 without appeal.

V. Trade-Related Environmental Measures

27. The 5th ITLC Report of 2002 described those trade and environment issues that are an integral part of the DDR, or which have been clarified in WTO jurisprudence. Pursuant to the mandate in para.31 of the Doha Declaration, negotiations in the WTO Committee on Trade and Environment (CTE) continued on the following three subjects: *First*, countries have deepened their analysis of the legal relationships between multilateral environmental agreements (MEAs) and WTO rules on the basis of a detailed matrix of trade measures pursuant to 14 MEAs¹⁹, focusing on four MEAs that have entered into force (CITES, the Basel Convention, the Montreal Protocol, the Convention on Biological Diversity) and two MEAs that have not (the Rotterdam Convention on Prior Informed Consent Procedures for hazardous chemicals and pesticides, the Stockholm Convention on Persistent Organic Pollutants). The outcome of these negotiations (e.g. an authoritative WTO interpretation clarifying WTO rules) remains uncertain. Some environmental groups have expressed concern that the negotiations might lead to a hierarchy of international norms favoring trade rules over environmental rules, or limiting recourse to trade instruments in future MEAs. *Second*, notwithstanding a number of proposals for information exchange between WTO and MEA secretariats and clear WTO rules for MEA observers at special sessions of the CTE, no decisions have yet been taken. *Third*, even though WTO Members agreed to shift the Doha mandate on liberalizing environmental goods and services to the Negotiating Group on Non-Agricultural Market Access and to the Council for Trade in Services special sessions, the CTE special sessions continued to examine more precise definitions of "environmental goods" and of the scope of the negotiations. The proposal by OECD and APEC countries to focus on an 'end-use approach' (i.e. goods primarily used to clean the environment or to contain or prevent pollution), and the inclusion of process and production methods (PPMs) criteria in defining environmental goods, remain controversial. Regarding environmental services (such as sewage, refuse disposal, sanitation), most negotiations on reductions in trade barriers continue to be at a bilateral request-offer stage.

28. The Doha Declaration also instructs (in para.32) the CTE to give particular attention to (1) the effect of environmental measures on market access, especially in developing countries; (2) the relevant provisions of the TRIPS Agreement; and (3) labelling requirements for environmental purposes. The 2003 report of the CTE to the Cancun Ministerial did not make recommendations to start formal negotiations on any of these three issues. Developing countries expressed concern that environmental measures in developed countries hamper the entry of developing country goods that may themselves be environmentally friendly. Major agricultural exporting countries argued that trade- and production-distorting subsidies (e.g. for fishery) often had negative effects on the environment not only in the countries applying such subsidies, but also in third countries. There is also no agreement on how to address eco-labelling issues at the CTE without creating new market access barriers and duplicating ongoing work in the WTO Committee on Technical Barriers to Trade. Hardly any progress has also been made on how to mainstream sustainable development concerns in the WTO negotiations.

¹⁷ Full text of agreement available at <http://www.ustr.gov/new/fta/Singapore/final/2004-01-15-final.pdf>. See Article 12.2.

¹⁸ WTO doc. WT/DS204/R of 12 March 2004, adopted in June 2004.

¹⁹ See WTO doc. WT/CTE/160/Rev.2.

VI. Trade-Related Investment Measures and Negotiations on Investment

29. The Doha Ministerial Declaration provides identical mandates for the “Singapore issues” covering investment, competition policy, transparency in government procurement and trade facilitation: negotiations will “take place after the fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations” (paras. 20,23,26 and 27 of the Doha Declaration). The post-Doha mandate of the Working Group on Trade and Investment (“WGTI”) aimed at the clarification of the possible elements of a multilateral investment agreement and listed the following elements for clarification: “scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members.”

30. The WGTI submitted its sixth annual report to the WTO General Council in July 2003²⁰, shortly before the Cancun Ministerial Meeting. This report summarized the status of discussions with regard to a number of substantive issues (such as scope and definition of ‘investment’ and ‘investor’, transparency, development provisions, a GATS-type ‘positive list approach’ to modalities for pre-establishment commitments, relationship between a Multilateral Investment Framework and the GATS) as well as the political question of whether moving beyond the analytical work to negotiation was premature. After six years of meetings and 164 written submissions from Members and the Secretariat, it is evident that there remain many outstanding differences with regard to fundamental issues such as the relationship between trade and investment and its implications for development and economic growth. Nevertheless, the numerous submissions and comments produced during the WGTI’s deliberations demonstrate that a large majority of Members recognize the vital importance of the relationship between trade and investment, even though a preponderance of Members believe that multilateral negotiations in this area may be premature.

31. Among the many specific areas examined by the WGTI, the following have attracted particular attention and arguably warrant further study and debate:

- definitional issues such as the relevant definitions of "investment" and "investor";
- the relationship between investment (especially FDI) and technology transfer;
- investment incentives;
- the application to investment of general principals such as "non-discrimination" and "transparency";
- modalities for pre-establishment commitments;
- experience to date under bilateral investment agreements;
- development provisions, flexibility and the application of "special and differential treatment" in the investment context;
- the "right to regulate";
- whether the investors and "home" governments should assume obligations in the context of investment rules; and
- technical assistance and capacity-building.

32. In spite of the extensive efforts of the WGTI and individual Members, as in the case of trade and competition (discussed above in section IV), no agreement was reached at the Cancun Ministerial Meeting to launch negotiations on trade and investment. Indeed, the future treatment of the issues within the WTO (aside from additional scheduled commitments under GATS mode 3) remains unclear, although there has been discussion about a possible plurilateral agreement among a smaller group of WTO members provided critical mass can be achieved. Although attempts have earlier been made at negotiating a plurilateral investment agreement, i.e. the now aborted negotiations within the framework of the OECD on the Multilateral Agreement on Investment (“MAI”), an appropriately framed agreement in the WTO, presumably using a GATS-type bottom-up approach as opposed to the blunter (and, to some, more threatening) MAI-style top-down solution, would appear preferable. As is also the case with competition provisions, investment provisions are increasingly an integral part of bilateral and regional FTAs such as the recently concluded FTA between the EU and Chile.²¹

²⁰ WTO doc. WT/WGTI/7.

²¹ http://europa.eu.int/comm/trade/issues/bilateral/countries/chile/index_en.htm

33. On TRIMs specifically, 10 countries (Argentina, Chile, Colombia, Egypt, Malaysia, Mexico, Pakistan, Philippines, Romania, and Thailand) had requested extension of their TRIMs, cf. TRIMs Article 5.3. Extensions were granted pre-Doha to all applicants except Chile who withdrew its application and Egypt whose request is still pending. In the case of Thailand the legal basis of the extension was Article IX of the WTO Agreement, rather than TRIMs Article 5.3. due to the timing of the Thai request. The extended TRIMs were due to be eliminated during the course of 2003 and appear to have been so with the exception of one country which has requested a further extension.

34. In the light of the lack of agreement on the launch of multilateral negotiations on investment, one way forward on this issue, as discussed above, would be the launch of plurilateral negotiations. Another TRIMs-specific solution would be for WTO members to agree on a revision of the TRIMs Agreement on the basis of the often overlooked Article 9 of the Agreement whereby the WTO Council for Trade in Goods may review the operation of the Agreement and consider whether the Agreement should be “complemented with provisions on investment policy and competition policy”. WTO Members have yet to table any formal proposal to this effect, although Members like India and Brazil have made some references to the possibility of such a review. Needless to say, given the goods-specific nature of the TRIMs Agreement, the effect of any review would be strictly limited to that area.

35. More generally, the WGTT's deliberations regarding the many issues that arise in the context of the relationship between trade and investment have underscored the importance of "rule of law" generally to fostering development and economic growth. Indeed, many of the controversies that have arisen in the context of investment-specific regulation can be easily viewed as having more general implications for domestic investment and its contribution to economic development under the rubric of "rule of law". It is to be hoped that the WGTT's contribution in these areas will be continued and built upon regardless of the final resolution of the "trade and investment" issue within the context of the DDA.

36. Following the failure of the Cancun Ministerial, the likelihood of reaching consensus on modalities for negotiations on the relationship between trade and investment has significantly decreased. However, regardless of the approach that WTO Members eventually take to the trade and investment issue, it is important to bear in mind that there are existing WTO investment-related rules under TRIMs and GATS. As such, further work in this area (whether within or outside of the WTO) will require careful attention to the existing rules as well as to the vast (and growing) body of bilateral investment treaties.

VII. Rule of Law and Human Rights in International Trade

37. At the 70th ILA Conference at New Delhi, the list – in the 5th report of the ITLC - of legal and policy questions on interrelationships between human rights and WTO rules stimulated vivid discussions on how human rights and WTO rules should be construed in a mutually coherent manner. In 2003 and 2004, several ITLC members organized academic conferences on *Human Rights and International Trade Law* at the World Trade Institute in Bern, the European University Institute in Florence, and at Georgetown University in Washington.²² The emerging consensus at these conferences was that – even though human rights law and international trade law have evolved in separate ways - the human rights obligations and WTO obligations of WTO Members should be construed in a mutually consistent manner and can mutually support each other. For instance, international trade law promotes welfare increasing cooperation among citizens across frontiers and has enabled also less-developed trading countries (like China and India) to increase the economic welfare of their citizens and the available resources for the enjoyment of human rights. Human rights law promotes input-legitimacy (e.g. democratic procedures, access to justice) as well as output-legitimacy (e.g. fulfillment of basic needs, social justice) of government policies, including trade policies. Protection of human rights can limit market failures (such as asymmetrical information if freedom of expression and freedom of the press are not secured) as well as government failures (e.g. if governments do not protect the “losers in international competition” against unnecessary poverty). It was agreed that the 6th Report of the ITLC should again identify a number of topical questions and “interface problems” of human rights and international trade law in order to promote further discussions on this subject and enable the ITLC to prepare an ILA draft Declaration on Human Rights and International Trade Law.

²² See e.g. notes 1 to 3 above.

38. The legal relevance of national and international human rights guarantees for interpreting international economic agreements has been illustrated in a number of recent reports by the UN High Commissioner for Human Rights on the human rights dimensions of the WTO Agreements on Trade-Related Intellectual Property Rights, the Agreement on Agriculture, the General Agreement on Trade in Services, international investment agreements, non-discrimination in the context of globalization, and on the impact of trade rules on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.²³ The reports call for a "human rights approach to trade" which

- "(i) sets the promotion and protection of human rights as objectives of trade liberalization, not exceptions;
- (ii) examines the effect of trade liberalization on individuals and seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups;
- (iii) emphasizes the role of the State in the process of liberalization – not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer of human rights;
- (iv) seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
- (v) requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
- (vi) promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization."²⁴

39. The High Commissioner differentiates between obligations to respect human rights (e.g. by refraining from interfering in the enjoyment of such rights), to protect human rights (e.g. by preventing violations of such rights by third parties), and to fulfill human rights (e.g. by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights). As enjoyment of human rights depends on availability, accessibility, acceptability and quality of traded goods and services, the relevance of WTO rules for the collective supply of "public goods" (like access to low-priced goods and services), for limitations of "market failures" (e.g. in case of essential services), and for protection and fulfillment of human rights is acknowledged and discussed. The reports underline that, what are referred to - in numerous WTO provisions - as rights of WTO Members to regulate, may be duties to regulate under human rights law (e.g. so as to protect and fulfill human rights of access to water, food, essential medicines, basic health care and education services at affordable prices).

40. In case of conflicts between human rights and economic rules, human rights courts and economic courts often apply different rules on burden of proof and on the "balancing" of economic with non-economic rules and principles. For instance, in the EC Court and in WTO dispute settlement bodies, the burden of proving the "necessity" of restrictions of free trade obligations in order to protect non-economic public interests (including human rights) falls on the government invoking the need to protect such non-economic rights and obligations. Human rights courts, by contrast, tend to impose a high burden of proof on those who claim that economic freedoms should prevail over non-economic human rights. *Schmidberger v Austria*²⁵ seems to have been the first case in the EC Court in which a Member State had invoked the necessity to protect fundamental rights (freedom of expression and of assembly) to justify a restriction of freedom of trade (resulting from a private demonstration permitted by the Austrian authorities on the most important Alpine transit route between Austria and Italy and blocking this motorway for nearly 30 hours). The Court applied two "balancing principles" which could prove to be important also for similar judicial review problems in other worldwide and regional fora (e.g. WTO and NAFTA panels): First, the competent national government authorities enjoy a "wide margin of discretion" in weighing and balancing all legitimate interests involved and in determining whether the trade restrictions are proportionate in relation to the protection of fundamental rights. Recent WTO jurisprudence likewise emphasized that WTO exceptions may not have to be

²³ For a discussion of these UN reports see : 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 : *Journal of International Economic Law* 2004, 603-625.

²⁴ *Liberalization of Trade in Services and Human Rights*, E/CN.4/Sub.2/2002/9 (18 June 2002), p.2.

²⁵ See: Case C-112/00, *Schmidberger v Austria*, *Common Market Law Reports* 2003, 1043, at 1069.

interpreted restrictively, and that non-discrimination and “necessity” requirements may have to be construed flexibly. Second, rather than examining the human rights concerned under the rule of reason-exception to Article 28, or as a justification under Article 30 EC, the court ruled that “(t)he fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Arts.30 and 34 of the EC Treaty (now, after amendment, Arts 28 EC and 29 EC), read together with Art.5 of the EC Treaty (now Art.10 EC).”²⁶ This balancing method of deliberately avoiding to squeeze the human rights justification into one of the “exceptions” of the economic treaty could inspire also WTO dispute settlement bodies if they have to construe WTO obligations with due regard to the human rights obligations of the WTO Members involved in the dispute.²⁷

41. In their work on interface problems of human rights and international trade law, ITLC members identified a number of questions that remain controversial. Prof. Petersmann proposed the following list of questions to be clarified in preparation of an eventual ILA Declaration on Human Rights and International Economic Law:

- a) In constitutional democracies, human rights obligations assert legal primacy over post-constitutional regulations, at least if the latter interfere with the “inalienable core” of human rights. How should the legal relationships between international legal obligations of states and their human rights obligations be interpreted? Are all international legal obligations equally binding on states unless, as part of *ius cogens*, they assert legal supremacy?
- b) Are the human rights obligations of WTO Members relevant legal context for the interpretation and good faith implementation of WTO obligations? For which kinds of trade measures (e.g. non-discriminatory import restrictions, discriminatory trade sanctions, trade preferences) and WTO rules (e.g. on market access, non-discriminatory treatment, exceptions, non-discriminatory product or production standards) are human rights particularly relevant? Why have GATT and WTO panels never established a conflict between human rights and GATT/WTO obligations? Are general international human rights obligations also part of the applicable law in WTO dispute settlement proceedings unless their applicability has been specifically excluded by WTO rules? May human rights obligations require the non-application of WTO rules?
- c) What is the legal consequence of the fact that a large number of WTO Members has not ratified certain UN human rights conventions (e.g. on economic, social and cultural human rights) and that the precise scope of human rights obligations under general international law remains controversial? Are WTO panels and the Appellate Body competent and legitimated to interpret general human rights obligations and treaties that are not binding on all parties to the dispute, for instance if such rules are considered to reflect “contemporary concerns of the community of nations” (as in the Shrimp/Turtle Report) or “broad-based recognition of a particular need, set out in ... multilateral instruments adopted by international organizations” (GSP panel report)? Are WTO panels required to consult human rights experts in order to determine the scope and content of human rights obligations in an objective manner respecting due process of law? What is the legal relevance of the “general comments” and other decisions of human rights bodies in WTO law?
- d) As every WTO Member has ratified at least one UN human rights convention and committed itself in other UN human rights instruments to respect for “inalienable” human rights: Should WTO Members – similar to the 1996 Singapore Declaration on core labor standards – explicitly confirm their commitment to respect for their human rights obligations and to cooperation with the competent UN human rights bodies? Was the WTO waiver - granted on 15 May 2003 for a period of three years (1 January 2003 – 31 December 2006) in order to reconcile the export and import restrictions for “conflict diamonds” applied by the “Kimberley Process” participants with their WTO obligations – legally necessary and politically appropriate for avoiding conflicts between human rights and WTO obligations? What is the relevance of human rights for WTO negotiations (e.g. on agricultural subsidies and essential services) and related negotiations in other UN bodies (e.g. the WHO Framework Convention on Tobacco Control)? Are human rights relevant for enhancing the rights of individuals and of NGOs in WTO law and practices?

²⁶ Note 25, at 1092.

²⁷ Cf. E.U. Petersmann, Multilevel Constitutionalism and Judicial Balancing Principals, in: European Journal of International Law 2004 (forthcoming).

VIII. WTO Dispute Settlement Jurisprudence and Negotiations

42. Following their 1997 book on International Trade Law and the GATT/WTO Dispute Settlement System²⁸, ITLC members published another comprehensive handbook analyzing WTO dispute settlement jurisprudence and WTO negotiations on improving the dispute settlement procedures²⁹, as well as a series of additional books examining WTO dispute settlement practices and procedures.³⁰ This short report deals with the evolution of the WTO dispute settlement system since our 2002 report on this issue. The period covered starts on January 1, 2002 and extends up to March 1, 2004. The report focuses on litigation before the WTO adjudicating bodies. It also reflects a brief discussion on the ongoing negotiations on the review of the WTO dispute settlement system.

A. The Data Set

43. Since the entry into force of the WTO Agreement in 1995, more than 300 complaints were raised under the WTO Dispute Settlement Understanding (DSU). During the period of examination, 21 panel reports³¹, 15 Appellate Body (AB) reports³², three Article 21.3c DSU Arbitral Awards³³, and three Article 22.6 DSU Arbitral Awards were issued.³⁴ Two panel reports (DS 103/113 and DS 141) are compliance panel reports. They were both appealed (confirming prior practice in this respect). 16 of the 20 panel reports dealt with contingent protection instruments (antidumping, subsidies and countervailing and safeguards). During the same period, we had the first case in the context of Rules of Origin (DS 243), the first full case³⁵ in the context of the Agreement on Technical Barriers to Trade (TBT, i.e. the Sardines dispute, DS 231), and the first legal challenge on unilateral preferential schemes (DS 246).

As to the identity of complainants: the European Community (EC) was complainant on 6 instances, the United States (US) on 2 and the rest of the world on 35 instances.³⁶ As to the identity of defendants: the EC was defendant on 5 occasions, the US in 14 and the rest of the world on 6 occasions.

B. Some Notable Cases

44. During the period under review, some notable reports were issued. Leaving aside the reports dealing with countermeasures (see *infra*), the following reports deserve particular attention:

a) the GSP dispute (DS 246): India challenged the EC practice to grant Pakistan a more favourable treatment than that accorded to other GSP beneficiaries. EC granted Pakistan a GSP+ treatment because Pakistan had adopted some good governance policies, namely, measures aiming to combat drugs production and trafficking. The Panel held that such treatment is discriminatory and hence inconsistent with the obligations of the EC under the WTO Agreement. It should be kept in mind that the Panel report does not (and legitimately so) address the issue whether process-based distinctions can serve as basis for differential treatment: the adoption of good governance policies is *stricto sensu* unrelated to the production process of the goods under consideration in the context of the present

²⁸ See above note 12.

²⁹ E.U.Petersmann (ed.), *The WTO Dispute Settlement System 1995-2003*, Kluwer 2004, 607 pages.

³⁰ See e.g. T.Cottier/P.C.Mavroidis (eds), *The Role of the Judge in International Trade Regulation. Experience and Lessons for the WTO*, 2003; D.Palmeter/P.Mavroidis, *WTO Dispute Settlement Procedures*, 2003; E.U.Petersmann/M.Pollack (eds), *Transatlantic Economic Disputes: The EU, the US and the WTO*, 2003.

³¹ DS 103 and 113, DS 141, DS 146 and 175, DS 206, DS 207, DS 211, DS 213, DS 217 and 234, DS 219, DS 221, DS 222, DS 231, DS 236, DS 238, DS 241, DS 243, DS 244, DS 245, DS 246, DS 243 and 259 and DS 257.

³² DS 103 and 113, DS 108, DS 141, DS 176, DS 206, DS 207, DS 212, DS 213, DS 217 and 234, DS 219, DS 231, DS 244, DS 245, DS 243 and 259 and DS 257.

³³ DS 189, DS 202 and DS 217.

³⁴ DS 108, DS 136 and DS 222.

³⁵ The *Asbestos* dispute was adjudicated in the context of the GATT since the Appellate Body, although it held for the proposition that the measure at issue was a technical regulation and hence came under the purview of the TBT reversing thus the panel's findings in this respect, felt that it could not complete the analysis and adjudicated the dispute within the four corners of the GATT.

³⁶ Since there were instances of multiple complaints as in the case of the *Byrd Amendment* and the *Steel Safeguards*. Our unit of account needs some explanation as well: we count as one dispute any pair of complainant/defendant independently of the number of reports (panel, Appellate Body, Art. 21.3DSU, Art. 21.5 DSU and/or Art. 22.6 DSU) that might be issued in its context.

dispute. The Appellate Body reversed the Panel's reasoning and concluded that, for the tariff preferences to be WTO consistent, they must comply with the criteria of the Enabling Clause. Such criteria include the fact that developed countries must respond positively to the needs of developing countries, according to "objective criteria" with a view to improving development, financial and trade situations in developing countries.

b) the Sardines dispute (DS 231): Peru challenged an EC scheme which, in contravention of an international standard dealing with the issue at hand, accorded differential selling conditions to EC- and non EC-sardines. This is the first full-fledged TBT dispute and Peru prevailed. It is interesting however, to note the allocation of burden of proof performed by the Appellate Body: in its eyes, in case a WTO Member deviates from an international standard, it does not carry the burden of proof to demonstrate whether its deviation has been justifiable. The complainant has to show, not only that an international standard exists but also that the international standard at hand can appropriately serve as basis for the defendant to reach its regulatory objectives and hence, no deviation is necessary. One wonders whether the complainant is best placed to gather the information that will allow it to carry its burden of proof and under what circumstances the burden of proof will shift, if ever, to the defendant. Remarkably – in light of the allocation of the burden of proof -- Peru, although it carried the burden of proof, prevailed in this dispute without submitting any substantial evidence beyond what it submitted to carry out its original burden of proof.

c) the Bed Linen dispute (DS 141): this case is interesting essentially because of what it entails in terms of corrective action. The final report puts into question a series of features in the EC Antidumping legislation and practice which, as a result, must be modified.

d) the Byrd Amendment dispute (DS 217 and 234): this case managed to attract the attention of a number of complainants. Remarkably, only Mexico (among the complainants) challenged the subsidy-character of the US measure. Mexico did not insist on this issue and neither the Panel nor the Appellate Body made any findings in this context. Instead, they condemned the US practice as contrary to the provisions of the Antidumping Agreement. The US have not brought their measures into compliance with their obligations and at the moment of writing there is a pending dispute between complainants and defendant as to the extent of permissible countermeasures that the former can adopt against the latter. In light of the recent developments in this field (see *infra*), the outcome is awaited for with a lot of interest.

e) the Line Pipe dispute (DS 202): this is another instance in the ever increasing chain of cases in the field of safeguards. The Safeguards Agreement suffers from two vices: the causality-test, as laid down in Art. 4.2, is non-sensical in the sense that trade, being an endogenous factor, cannot as such cause injury to domestic production. On the other hand there is absolutely no information as to the permissible extent of safeguards since the extent depends on the function of safeguards. The Agreement however, contains no information at all as to the objectives sought through the imposition of safeguards. In a series of reports, the Appellate Body has completely by-passed these issues and has outlawed all imposed safeguard-schemes, the consistency of which with the multilateral rules has been contested before it. There are by now legitimate concerns as to what needs to be done to be in compliance with the multilateral rules. In this report, the Appellate Body finds no intellectual vice in the causality-test, and interprets it as stopping short from imposing any requirements as to the extent of permissible safeguards (Art. 5.1, in its view fulfils this role).

f) the Steel dispute (DS 212): The Appellate Body modified the panel report which had concluded that non-recurring subsidies never pass through when subsidized entities are sold at arm's length operations. The Appellate Body concluded that the sale of state-trading enterprises at fair market value only creates a "presumption" that the subsidies received before the privatization benefited the new privatized enterprise's exports of state-trading enterprises.

g) the Steel Sunset Review dispute (DS 244): One was left with the impression that the distinction in WTO jurisprudence between mandatory and discretionary rules was an operational one until this dispute. The Appellate Body now states that it is only a methodological tool which needs to be applied on a case-by-case basis and goes on to state that nothing prohibits a WTO adjudicating body from reviewing the consistency of a US Bulletin (which codifies practice) with the multilateral rules. No one can of course argue that consistency is in and of itself a value, for one can be consistently wrong. When case-law changes however, one would expect from the adjudicating body either a demonstration of

distinguishing factors, or a demonstration of the intellectual faults in the prior approach.

h) the 'Telmex case' (DS 204) was the first dispute settlement proceeding under the GATS Protocol on Telecommunications and the first WTO complaint which was exclusively based on GATS rules and the market access commitments, national treatment commitments and additional commitments (notably the "Reference Paper" obligations for competition rules) of WTO Members.³⁷

C. Recourse to Countermeasures

45. Three Article 22.6 DSU Arbitrations finished during the period under review. On one occasion (DS 222), the authorization notwithstanding, no recourse to countermeasures took place. The FSC case (DS 108) has caught the public eye in light of the identity of the litigants and the sums involved. Following the inability of the US to bring its measures into compliance, the EC announced that it starts imposing countermeasures as of March 1, 2004:

"The EU countermeasures on a list of US products in the long-standing WTO dispute on the US Foreign Sales Corporations enter into force today 1 March 2004. Countermeasures on the selected products consist of an additional customs duty of 5% to be enforced as from today, followed by automatic, monthly increases by 1% up to a ceiling of 17% to be reached on 1 March 2005, if compliance has not happened in-between." EU Trade Commissioner Pascal Lamy said: "Despite waiting for more than two years, the US has not brought its legislation in line with WTO rules. We are therefore left with no choice but to impose countermeasures. The name of the game is not retaliation but compliance: countermeasures will be lifted the day the FSC is repealed. We now need to turn our attention to the post 1 March period. In my recent trip to Washington, I have discussed this issue with the US administration and congressional leaders and I am encouraged that progress can be rapidly achieved to adopt legislation repealing the FSC."

With the clear objective of obtaining withdrawal of the US measures, Council Regulation 2193/2003 (OJ L 328 p.3) provides for a gradual imposition of countermeasures as from 1 March 2004. It also includes a detailed list of products on which countermeasures will be applied, which was prepared following extensive consultations with EU economic operators and Member States. The countermeasures are well below the US \$ 4 billion level authorized by the WTO last year.³⁸

46. The Arbitral Award in DS 136 deals with a novel issue in the field of countermeasures: the complainant (EC) requested from the Arbitrators the possibility to adopt a 'mirror' legislation to the one (US) found to be inconsistent with the WTO rules (namely, the Antidumping Act of 1916). The Arbitrators declined the EC request arguing that it was impossible for them to accept it since there was no way they could ensure equivalence between the nullification suffered by either side (as a result of the original violation for the EC and the countermeasures for the US), as required by Article 22.4 DSU. They did open the way however for the EC to impose countermeasures in the future to recover monetary amounts paid pursuant to final judgments in the US or pursuant to settlements. The Award is not unproblematic: one could argue for instance with the intellectual foundation of the award; how can equivalence be *ex ante* ever established in a case where there is ongoing violation of this nature (WTO-inconsistent legislation which gives rise to WTO-inconsistent applications)? On the other hand, the Award most likely achieves what it is supposed to combat. The EC now knows that if they do enact a 'mirror' legislation and the US challenge it, they run no risk of immediate retaliation since no equivalence can be established (for the very same reasons that the EC challenge failed).

D. Discussing the Data

47. The number of reports issued indicates that 2002 and 2003 were rather busy years.³⁹ The case-law as shaped through the cases raises various issues, some of which have been raised in the context of the DSU review as well. The Article 22.6 DSU Arbitral Awards raise very interesting issues as to the calculation of countermeasures: In DS 108, the Arbitrators held for the proposition that the level of permissible countermeasures against an actionable subsidy can raise up to the amount of the subsidy

³⁷ See above note 18.

³⁸ Excerpt from EC Trade Issues, March 1, 2004 (www.europa.eu.int/com/trade/issues).

³⁹ Using cases/years ratio as of 1.1.1995 as benchmark, see Background Note of the WTO Secretariat JOB (03) 225 of 11 December 2003.

paid. This holding raises the issue (acknowledged but not dealt with sufficiently by the Arbitrators) what to do if there are sequential requests for countermeasures and the first in line has already taken countermeasures up to the level of the subsidy paid? In DS 136, the Arbitrators dealt (as noted above) with the issue of mirror legislation. Importantly, this was the first time that a request was made to suspend obligations other than concessions. The end result is probably not very satisfactory but the request in itself shows that suspending concessions is not necessarily the only possible form of retaliation envisaged by the institutional players.

E. The DSU Review

48. The Chairman of the DSB presented a paper regrouping proposed amendments to the DSU.⁴⁰ The breakdown of the negotiations in Cancun meant a breakdown of the DSU Review as well. Post-Cancun few things happened: the Secretariat presented a statistical document on the evolution of dispute settlement in the WTO since 1.1.1995.⁴¹ Mexico submitted a diagnosis paper reflecting where, in its view, the priority issues for re-negotiation of the DSU lie and a diagnosis paper comparing its data with that of the Chairman.⁴² Malaysia submitted a paper on provisional remedies; Thailand submitted two papers, one on the number of Appellate Body members and one on the selection of panellists (together with Indonesia). Finally, the EC submitted a paper on its original proposal to establish a permanent panelists' body. Following the appointment, in Spring 2004, of a new chairman for the DSB in special sessions, the initiatives for concluding the DSU review slowed down. There is so far no agreement on whether the Chairman's text of May 2003 for proposed amendments to the DSU could provide an acceptable compromise, or whether additional subjects (such as creation of a permanent WTO panel system with sufficient flexibility for appointment of mutually agreed panelists) need to be part of a future agreement on DSU reforms.

49. The academic publications by ITLC members on WTO dispute settlement practices and reform negotiations have also revealed a number of basic deficiencies of the WTO dispute settlement system that have been neglected also in the DSU reform negotiations. For example, the dispute prevention capacities and legal remedies of the WTO system appear underdeveloped. The classical international law paradigm of a conflict among "national state interests" does not properly reflect the true nature of many WTO disputes (such as the "Havana Club dispute" over the trademark rights of a European and a competing US company). Dispute prevention and dispute settlement procedures should distinguish different kinds of WTO disputes depending on their underlying conflicts of interests. For example, certain "high policy disputes" (e.g. over the US Helms-Burton sanctions against Cuba) may be better settled out of court through political negotiations. Certain kinds of WTO disputes over private rights (e.g. intellectual and other property rights) and over "obviously discriminatory WTO violations" could be left to domestic courts provided they are authorized to apply the relevant WTO rules (as provided for in Article XX of the WTO Agreement on Government Procurement). WTO disputes over legitimate non-discriminatory internal regulations call for a higher degree of judicial deference than WTO disputes over welfare-reducing border discrimination. "Follow-up disputes" over the implementation of adopted WTO dispute settlement rulings (e.g. compliance panel report pursuant to Article 21.5 DSU) may justify a higher degree of judicial control of domestic implementing legislation.⁴³

IX. Developments in Regional Integration

50. Following the failure of the WTO Ministerial Meeting at Cancun, US Trade Representative Zoellick announced the US intention to resort increasingly to "coalitions of the willing" prepared to conclude free trade area agreements (= FTAs) with the United States. Some of the new FTAs include innovative reforms, such as obligations to introduce competition rules (e.g. in the FTA Singapore-US) and the replacement of anti-dumping procedures by competition rules (e.g. in the FTA between Canada and Chile). While the new FTA between the US and Central American Countries has been concluded, the proposals for a Free Trade Area of the Americas (= FTAA), including more than 34 countries, continue to be under negotiation. As some of the recent arbitration awards under Chapter 11 of NAFTA

⁴⁰ WTO Doc. TN/DS/9 of 9 June 2003.

⁴¹ Background Note of the WTO Secretariat JOB (03) 225 of 11 December 2003

⁴² JOB (03)/208 and 220).

⁴³ On these five different categories of WTO disputes see the contribution by Petersmann to: Petersmann/Pollack, above note 29, at 582-585.

have remained very controversial, the extension of similar investment rules to the FTAA continues to be opposed by several countries. The US has concluded an increasing number of FTAs also with countries in Africa (e.g. Morocco) and Asia (e.g. Singapore, Australia).

51. The extension of the European Union to 10 additional countries, and the intergovernmental agreement on a Draft Treaty establishing a Constitution for Europe, entail far-reaching changes in the European trading system. The EU continues its policy of extending its network of FTAs to countries in Africa (e.g. South Africa) and Latin America (e.g. Mexico, the negotiations with the MERCOSUR countries continue). Some of the systemic conflicts between the worldwide WTO rules and the “spaghetti bowl” of more than 250 FTAs, customs union agreements and other preferential arrangements have been discussed in Section II above.

X. Future work Program

52. The world trading system has evolved not only into the most “legalized” area of international relations. It is also widely perceived as the most important legal and institutional framework for creating the welfare needed for poverty reduction, satisfaction of basic development needs and peaceful international cooperation based on respect for rule of law. The Doha Development Round negotiations in the WTO are likely to continue up to 2007 (provided the US fast-track legislation and trade promotion mandate will be renewed by the US Congress in 2005), and their successful conclusion and legal implementation may require far-reaching legal and institutional reforms of national and international rule-making, adjudication, trade and development policies. As the coming years will remain of crucial importance for the future of international economic law and peaceful international economic cooperation worldwide, the ITLC considers it important to continue its work program on international trade law and related problems of intellectual property law, human rights law, environmental, competition and social law. The effectiveness of any future Doha Development Round Agreements depends on their ratification and political support by domestic parliaments and citizens. Particular attention must therefore be devoted to the apparent problems in worldwide governance. For example, is the postwar paradigm of “embedded liberalism” still adequate, or does the increasing reality of multilevel governance by (sub)national, regional and worldwide institutions (e.g. monetary authorities, regulatory agencies, competition authorities, national and international courts and other law-enforcement institutions) require more democratic forms of multilevel constitutionalism?

53. It is suggested that the ITLC prepare, for the ILA conference in 2006, a draft ILA Declaration on International Trade Law and Human Rights which should – with due regard to the existing WTO principles and to the limited scope of the WTO - also recommend any institutional and other WTO reforms that may be necessary for making respect for human rights, rule of law, poverty reduction, and for “sustainable development” in WTO member countries more effective. The increasing number and legal diversity of regional free trade agreements all over the world continue to deserve attention. As the most frequently used dispute settlement system among states, the WTO dispute settlement procedures, practices and reform negotiations will remain a priority subject of the ITLC. The Committee will closely collaborate with other ILA Committees (e.g. on the impact of biotechnology on international law).