

# INTERNATIONAL LAW ASSOCIATION

## TORONTO CONFERENCE (2006)

### INTERNATIONAL TRADE LAW

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### SEVENTH REPORT OF THE COMMITTEE

by S. Amarasinha (Part II), Prof. F.M.Abbott (Part III), Prof. M. Footer (Part V), Prof. G. Marceau (Part II), Prof. P.C.Mavroidis (Part IV), Prof. E.U.Petersmann (Parts I-VII), Prof. A.H.Qureshi (Part II) with the benefit of numerous additional comments from ITLC members.

#### I. Introduction

1. The International Trade Law Committee (ITLC) held its annual meeting on 30 June and 1 July 2005 in the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and in the Advisory Center for WTO Law (ACWL) at Geneva and discussed the legal problems to be analyzed in its 7<sup>th</sup> Report with the legal advisors and policy experts of these international organizations, including members and legal staff of the WTO Appellate Body. Various ITLC members contributed

drafts to this 7<sup>th</sup> Report, which was circulated among all ITLC members in spring 2006 for their comments and will serve as a basis for further discussions at the ILA meeting at Toronto in June 2006. Following the ILA's 2004 conference, many ITLC members cooperated in the context of other international conferences convened by members of the ITLC (like a 2004 conference on *Constitutionalism and Multilevel Trade Governance* at the European University Institute at Florence and the 2005 conference of the British Branch of the ILA on *Regional Trade Agreements*).<sup>1</sup>

## II. Developments in the Trading System

2. The world trading system continues to be characterized by strong economic expansion, slow progress in the consensus-based Doha Development Round (DDR) negotiations among 149 WTO Members (as illustrated by the WTO Ministerial Declaration of 18 December 2005), an ever increasing number of today more than 250 regional trade agreements (RTAs), as well as by a burgeoning jurisprudence of worldwide dispute settlement systems (e.g. more than 200 WTO panel, appellate and arbitration reports), regional and national courts. There are numerous interrelationships between RTAs and WTO rules and policies, as illustrated by the conclusion of more than 60 RTAs since the failure of the 2003 WTO Ministerial Conference at Cancun, or by the RTA provisions on free choice of the appropriate dispute settlement forum. As no single expert can follow all these legal developments, this section continues the tradition of previous ITLC reports to offer a brief survey of the current state-of-play of the worldwide WTO negotiations.

3. In Hong Kong, Ministers renewed political commitment to the conclusion of the DDR by the end of 2006 and reaffirmed that development must be central to it.<sup>2</sup> The development dimension permeates all negotiation areas so as to correct the imbalances in the world trading system. While the conclusion of new RTAs among liberal trading countries is likely to continue, the prospects for reaching consensus on a successful conclusion of the DDR prior to the expiry of the US negotiating mandate on 1 July 2007 remain uncertain. The modalities of implementing future DDR Agreements (e.g. by amendments of WTO provisions, additional GATT and GATS Protocols, financial commitments) also remain to be clarified.

### Agriculture

4. Even though agriculture represents less than 3% of world trade, 70% of the world's poor live in rural areas. The agricultural sector maintains the highest level of subsidies and trade distortion. There are 5 main issues in the WTO negotiations on agriculture: export competition, domestic support, market access, food aid and state-trading enterprises. The Hong Kong Declaration secured an end date for all *export subsidies* – 2013 - with a "substantial part of such reduction realized" by 2010. Negotiations on export credits continue. On *domestic support*, the Hong Kong Declaration confirmed that domestic support reductions would be classified in three bands with the European Union having to undertake the biggest reductions, then Japan and the United States in the second band and then the others. On *market access*, there is a working hypothesis of four bands of tariff reductions, with the top group reducing most. Developing countries' cuts of two-thirds of the amount of the cuts for developed countries could be a plausible compromise. Least-developed countries (LLDC) would remain exempted from any reduction. All Members will be entitled to some flexibility in the formula for cutting tariffs that would allow them to designate a number of products as "*sensitive*". Developing countries will be entitled to additional flexibilities for some "*special products*" and to make use of a special agriculture safeguard. Members at Hong Kong agreed to provide duty free quota free access for LLDC cotton exports by 2008; it was furthermore agreed that US export subsidies affecting cotton will be eliminated by the end of 2006. On *food aid*, Members are negotiating criteria for WTO-consistent food aid. *State-trading enterprise* are also the object of negotiations with a view to ensuring that their activities comply with the competitive principles of the WTO.

### Market access for non-agricultural products (NAMA)

5. In the area of market access for industrial products, Members agreed in the Hong Kong Declaration that there should be *parallelism* between the level of ambition in the agriculture and

<sup>1</sup> Cf. L.Bartels/F.Ortino (eds), *Regional Trade Agreements and the WTO Legal System*, 2006; C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2006.

<sup>2</sup> WT/MIN(05)/DEC

NAMA negotiations. They also agreed to use the "Swiss" formula as the main tariff cutting mechanism and accepted the principle of progressivity under which high tariffs would be reduced by a higher margin. Members agreed that developing countries should benefit from "*flexibilities*", that is a percentage of tariff lines they will be able to exempt from the agreed cuts for *sensitive items*. The EU and the US want the negotiations to take place on the basis of applied rates while developing countries want market access to be negotiated on the basis of bound rates which are much higher.

#### Special and Differential Treatment (SDT) and Trade Facilitation

6. SDT refers to measures and rules taking the particular needs of less-developed countries (LDCs) and LLDCs into account. Following the Doha Declaration mandate to review the numerous SDT provisions in WTO law, the first new decision in the area of SDT following Doha was the simplified and accelerated WTO accession procedure for LLDCs, adopted by the WTO General Council in December 2002. The Hong Kong Ministerial Declaration includes decisions on five outstanding LLDC-specific proposals on SDT, such as an agreement that developed countries and LDCs declaring themselves in a position to do so provide *duty-free and quota-free market access for at least 97 per cent of LLDCs' products*, defined by tariff lines. Members have agreed to work progressively towards achieving 100% tariff line coverage. A further 82 SDT proposals remain pending, including 28 proposals on which agreement (in principle) was reached pre-Cancun in 2003.<sup>3</sup> The WTO practice of self-designation regarding LDC/LLDC status, and its invocation as a justification for trade protectionism (e.g. inadequate trade liberalization commitments by Brazil and India), remain subject to criticism. Even though no developed WTO Member questions the need for SDT, the negotiations on more than 80 different SDT claims (e.g. for "less than full reciprocity", duty and quota free schemes for LLDCs, GSP and GSP-plus, trade-related assistance and capacity-building, "aid for trade", the "cotton issue", preference erosion, "implementation issues" resulting from previous WTO commitments) reflect a lack of agreed conceptual strategies.<sup>4</sup>

7. The Doha Ministerial Declaration mandated the Council for Trade in Goods to review, clarify and improve relevant aspects of Articles V (freedom of transit), VIII (trade-related fees and formalities) and X GATT (regulation and administration of trade) and identify the technical assistance and trade facilitation needs of LDC/LLDCs so as to enhance capacity building. Such assistance would involve support for LDC/LLDCs during the negotiations as well as in the implementation of the Doha Round results. Other relevant international organizations will be involved in technical capacity building (e.g., the IMF, OECD, UNCTAD, WCO and the World Bank). Taking into account of the SDT principle, the commitments for infrastructure development in LDC/LLDCs would be related to the availability of assistance from developed members. A successful conclusion of the *Trade Facilitation* negotiations could lower transaction costs in developing countries and make their trade and growth policies more competitive. Infrastructure-related bottlenecks and administrative hurdles account for 75% of the total cost to business in many LDCs.<sup>5</sup> The Hong Kong Ministerial Declaration endorsed the report of the negotiating Group on Trade Facilitation submitted to it, notably the continuation of identifying individual Member's trade facilitation needs and priorities, and the cost implications of possible measures in conjunction with the assistance of relevant international organizations.

#### Services

8. Plurilateral WTO negotiations on the liberalization of services trade continue in the following sectors: Legal, Architectural/ Engineering/ Integrated Engineering, Postal/Courier including express delivery, Telecommunications, Audiovisual, Construction and Related Engineering, Distribution, Education, Environmental services, Financial services, Maritime transport, Air transport, Logistics, Energy, Mode 4. Offers and revised offers should be completed by the end of July 2006.

<sup>3</sup> While some have questioned the economic and developmental value of these proposals, no WTO Member has formally requested a reopening of the proposals.

<sup>4</sup> Cf. E.U.Petersmann (ed), *Developing Countries in the Doha Round*, 2005.

<sup>5</sup> For example, in Denmark, an exporter needs 3 documents and two signatures to complete all shipping formalities. The entire process takes 5 days from start to finish. In contrast, in Burundi, it takes 11 documents, 17 visits to various offices, 29 signatures and 67 days on average for an exporter to have his goods moved from factory to ship.

### Rules. Trade and environment

9. The 'rules negotiations' focus on improving WTO disciplines governing anti-dumping, subsidies, countervailing measures, fisheries subsidies, and the regulation of Regional Trade Agreements. Liberalization in the trade of environmental goods will offer opportunities to increase exports of such goods. The negotiations on the relationship between multilateral environment agreements (MEAs) and WTO law do not seem to progress well.

### Implementation issues. Aid for trade

10. In Hong Kong, Members agreed to take immediate action to address concerns of developing countries arising from the implementation of the Uruguay Round, including concerns relating to implementation of the TRIMS Agreement, the TRIPS Agreement, its relationship to the Convention on Biodiversity, requests for the protection of the geographical indication (GI) of products other than wine and spirits (the so-called GI extension)<sup>6</sup>, technology transfer, particularly to LDCs, and human and institutional capacity building (e.g. for standard-setting activities). 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 requires coordinated work with other international organizations. An Aid-for-trade Task Force has been set up including, *inter alia*, the WTO, the IMF, the World Bank, UNDP, UNCTAD, ITC, regional development banks and WTO Members.

## **III. Trade-Related Aspects of Intellectual Property Rights**

### The TRIPS Agreement and Public Health

11. On 6 December 2005, WTO Members agreed upon the first amendment to the TRIPS Agreement.<sup>7</sup> Once acceptance of the amendment has been notified by two-thirds of Members, Article 31*bis* will be added to the main text of the Agreement, and an Annex and Appendix to the Annex also will be added. The Article 31*bis* amendment (hereinafter the "Medicines Export Amendment") follows on from Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.<sup>8</sup> That paragraph recognized that countries with insufficient or no manufacturing capacity in the pharmaceutical sector may have difficulty in making effective use of compulsory licensing, one of the principal flexibilities of the TRIPS Agreement. Paragraph 6 directed Members to find a solution to this problem. The ITLC took an active interest in the negotiations leading to the Medicines Export Amendment. At its biennial meeting in Geneva in 2005, the Committee heard and discussed reports regarding negotiations on transforming the August 30, 2003 waiver decision into the Amendment.<sup>9</sup>

12. Up until January 1, 2005, a country seeking to import supplies of low-priced generic medicines generally could find them for export in India. Even if the product was patented in the importing country, the issuance of a compulsory license in that country would be adequate to permit the importation. As of 1 January 2005 (i.e. the end of the transition period for introducing pharmaceutical product patent protection), new drugs -- and "older" drugs which are patentable pursuant to the mailbox system -- could be protected by patent in all developing countries,<sup>10</sup> including India. Generic supplies would be restricted. If an importing country sought low-cost supplies from a country where products are under patent, the existing text of the TRIPS Agreement created a potential impediment. The exporting country could issue a compulsory license and produce a generic version of the drug, but pursuant to Article 31(f) of the TRIPS Agreement it could only export a non-predominant

<sup>6</sup> There are also TRIPS negotiations regarding requests for an international GI registry for wine and spirit.

<sup>7</sup> Amendment of the TRIPS Agreement, WTO General Council, Decision of 6 December 2005, WT/L/641, 8 Dec. 2005, available at <http://www.wto.org>.

<sup>8</sup> For description and analysis of the negotiating history and text of the August 30, 2003 waiver decision which forms the basis of the Amendment, see Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317 (2005).

<sup>9</sup> These included reports by the Rapporteur, F. M. Abbott, and the director of the WTO Intellectual Property Division, A. Otten.

<sup>10</sup> This does not include least developed countries which, further to the Paragraph 7 of the Doha Declaration and WTO implementing measures, have at least until January 1, 2016 to introduce or enforce pharmaceutical patent and data protection.

portion of its production. This might significantly restrain export supply capacity.<sup>11</sup> Article 31*bis* authorizes the issuance of compulsory licenses predominantly for the supply of pharmaceutical products to export markets, thereby overcoming the potential obstacle presented by Article 31(f). It also provides that the obligation of Article 31(h) to provide adequate remuneration in the circumstances of the case is satisfied by the payment of remuneration in the exporting country. There are various conditions associated with the grant of compulsory licenses for export under Article 31*bis*. These include certain notifications to the TRIPS Council, a determination by the importing country that it lacks manufacturing capacity,<sup>12</sup> and identification of the exported products as supplied pursuant to the Article 31*bis* system. A number of NGOs, generic producers and some developing countries argue that the conditions make the system overly difficult to use. Some developed countries and pharmaceutical industry constituencies argue that the system is too open-ended. A substantial number of developed and emerging market countries "opted out" of the system as importing countries, either wholly or by limiting their usage to certain circumstances.<sup>13</sup> Canada and Norway were the first countries to adopt legislation and regulations implementing the August 30 waiver decision. China, the European Union, India, South Korea and Switzerland each have adopted (or are soon to adopt) implementing legislation or regulations.

13. The Committee welcomes adoption of the Medicines Export Amendment. However, the Committee recognizes that effective use of the Amendment can be adversely influenced by political pressure from Members and their industry constituencies. It therefore urges WTO Members to refrain from seeking to prevent use of the Amendment by the application of political pressure. It also urges Members not to seek terms in bilateral and regional trade agreements which undermine the letter or spirit of the Amendment.

#### The TRIPS Agreement and the Convention on Biological Diversity (CBD)

14. In the Doha Ministerial Declaration, the TRIPS Council was instructed "to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1."<sup>14</sup> At the Hong Kong Ministerial Conference, the WTO Director-General was directed to intensify consultations on this subject, among others. The General Council would "review progress and take any appropriate action no later than 31 July 2006."<sup>15</sup> Proposals by WTO Members to further the objectives of the CBD by mandating disclosure of the source and origin of genetic resources in patent applications, as well as by requiring evidence of compliance with prior informed consent (PIC) and equitable benefit sharing (EBS) requirements, remain controversial.<sup>16</sup> Members of this Committee have authored a number of contributions on this subject matter.<sup>17</sup> The positions of WTO Members fall roughly into three categories:

- (a) A substantial group of developing countries argues that mandatory disclosure of source and origin is necessary to assure that patent examiners take into account information relevant to assessment of patentability (including novelty and inventive step), as well as in making determinations of inventorship. Evidence of compliance with PIC and EBS is argued to assure consistent implementation of TRIPS Agreement and CBD requirements. The penalty for failure to comply with mandatory disclosure and evidence requirements may include patent forfeiture.
- (b) A second group of countries sees merit in the proposal to impose a requirement to disclose the source and origin of genetic resources, but expresses concern with the potential remedy of patent

<sup>11</sup> Article 30 of the TRIPS Agreement on Exceptions to Rights Conferred may also provide the basis for third-party exports of patented pharmaceuticals. The Amendment reserves the position of Members on this question. Medicines Export Amendment, Article 31*bis*(5).

<sup>12</sup> Least developed countries are automatically determined to lack manufacturing capacity.

<sup>13</sup> As the threat of an avian flu pandemic has emerged in 2005-06, and as there are shortages of patented antiviral drug therapy for the flu in many developed countries, questions have been raised regarding the wisdom of opting out of a system that facilitates importation of drugs necessary to protect public health.

<sup>14</sup> Adopted 14 Nov. 2001, WT/MIN(01)/DEC/1(20 Nov. 2001), at para. 19.

<sup>15</sup> WT/MIN(05)/DEC (18 Dec. 2005), at para. 39.

<sup>16</sup> 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.

<sup>17</sup> See, e.g., Frederick M. Abbott, *Preservation and Use of Genetic Resource Assets and the International Patent System, A Study for the Ministry of Foreign Affairs of Norway*, Mar. 31, 2005; Thomas Cottier and Marion Pannizon, *Legal perspectives on traditional knowledge: the case for intellectual property protection*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY* 565 (EDS. K. MASKUS & J. REICHMAN 2005).

forfeiture. Alternative remedies are suggested to include the civil assessment of compensation (e.g. royalties). Concern is also expressed with the potential bureaucratic complexities involved in evidencing compliance with PIC and EBS.

(c) A third group of countries considers that complementarity between the TRIPS Agreement and CBD can be adequately addressed through contractual arrangements between countries housing genetic resource stocks and bio-prospecting enterprises and argues against the imposition of a mandatory disclosure and/or evidence requirement. This group argues that the source and origin of genetic resources are not relevant to determinations of patentability or inventorship, and that disclosure and/or evidence requirements would be unduly burdensome and create harmful uncertainty regarding the enforceability of patents.

15. Members of this Committee have supported efforts to promote complementarity between the TRIPS Agreement and CBD, including by requiring the disclosure of source and origin of genetic resources. However, some have questioned whether disclosure would be an effective approach and suggested more comprehensive alternatives such as the establishment of new forms of traditional intellectual property rights (TIPRs). These issues are closely related to the regulation of biotechnology. The Committee shall cooperate with the Committee on International Law and Biotechnology which focuses on various regulatory aspects, such as patenting, SPS and the impact of human rights.<sup>18</sup>

#### Protection of Geographical Indications (GI)

16. The TRIPS Agreement includes as part of its built-in agenda negotiations toward the establishment of a multilateral register for GIs for wines and spirits for members participating in the system.<sup>19</sup> At the Hong Kong Ministerial, WTO Members “agree[d] to intensify these negotiations in order to complete them within the overall time-frame for the conclusion of the negotiations that were foreseen in the Doha Ministerial Declaration.”<sup>20</sup> Article 24.1 of the TRIPS Agreement also refers to the possibility of further negotiations on specific GIs; whether this refers to extension to products beyond wines and spirits is the subject of debate in the TRIPS Council. In Hong Kong, WTO Members agreed that the Director-General should intensify negotiations on the subject and report to the General Council “no later than 31 July 2006”. WTO Members remain divided as to whether additional measures are necessary with respect to GIs protection. The EU has submitted a proposal to the TRIPS Council for an extended system of GI registration for wines, spirits and other agricultural products that would effectively operate as a worldwide grant of rights in a name or symbol, subject to challenge by other members or ultimately in national courts. The EU has also proposed a claw-back to recover certain designations that may have become generic or commonly descriptive, or may have been trademarked by third parties. The U.S. and Cairns Group of agricultural producing countries have resisted this proposal and extension, arguing that the current system for protection of GIs is adequate. Developing countries do not share a common position on extension of GIs protection. Some believe that their agricultural industries would benefit from extended protection. Others consider that such extended protection would act as a market access barrier and entail administrative costs that are difficult to justify. Although Members of this Committee have taken an active interest in the GIs dialogue, the Committee as a whole has not considered it necessary to prepare a recommendation on this subject matter.

#### Activities at WIPO

17. WIPO shares primary responsibility with the WTO in the field of multilateral IPRs regulation. A dialogue regarding the relationship between the CBD and IPRs is taking place in various committees and working groups at WIPO. WIPO's "Development Agenda" and the WIPO negotiations on a draft Substantive Patent Law Treaty are particularly relevant to the work of the ITLC:

(a) The Development Agenda was proposed by a group of developing countries which expressed concern with the policy orientation of WIPO. These "friends of development" argued that the technical advice given by the WIPO Secretariat to developing countries does not take into account the specific interests of those countries, but is based instead on the policy perspective of developed countries. They also argued that as a specialized UN Agency, WIPO should take a greater interest in developmental

<sup>18</sup> See Draft Report submitted by the Committee on International Law and Biotechnology, 2006

<sup>19</sup> Article 23.4, TRIPS Agreement.

<sup>20</sup> Hong Kong Ministerial Declaration, at para. 29.

issues connected with IPRs, and should move away from a narrow focus on promoting higher standards of IPRs protection and enforcement. A Provisional Committee on Proposals Related to a WIPO Development Agenda has been established with a view toward developing specific proposals for consideration by the WIPO General Assembly.

(b) Under the auspices of the Standing Committee on the Law of Patents, member states of WIPO have been debating a proposal for a Substantive Patent Law Treaty (SPLT). A number of developed countries favor a limited range of subject matter for the draft SPLT, particularly focusing on harmonizing rules regarding the criteria of patentability (i.e., novelty, inventive step, industrial application and disclosure). They argue that lack of a harmonization on these basic patentability concepts leads to significant economic inefficiencies in the international patent system, and that harmonization of these concepts is a "technical exercise". A number of developing countries have objected to this limited focus, arguing that the SPLT, if it is to be negotiated, should also address flexibilities (such as exceptions to patent rights) and controls (such as rules on anticompetitive practices) that are important in establishing a balance between patent holders and society more generally. These countries argue that the way in which the criteria of patentability are defined significantly affects the extent to which patents are granted or denied, and involves important issues of industrial policy. These negotiations are therefore not merely a "technical exercise". The Development Agenda and negotiations on the draft SPLT are linked because each involves questions regarding the policy perspective of WIPO and the extent to which the interests of different stakeholders will be taken into account. ITLC Members have taken an active interest in these agendas at WIPO. It is proposed that the Committee continue to closely monitor these developments.

#### Bilateral and Regional TRIPS-Plus Agreements

18. One of the most serious issues confronting the international trading system involves the extent to which bilateral and regional negotiations are supplanting multilateral negotiations as the principal focus of governments. The trend towards regional solutions was a principal focus of the Sutherland Report which raised concerns about the impact this may have on the WTO.<sup>21</sup> The United States and, to a more modest extent, the EU - in a number of recent bilateral and regional trade agreements - have secured concessions by developing countries limiting their flexibilities under the TRIPS Agreement (through the adoption of so-called "TRIPS-Plus" standards). While the limitations affect most areas of IPRs regulation (including copyright, trademark and geographical indication), particular concern is raised by the potential impact of stricter standards of patent and regulatory data protection designed to inhibit the introduction of generic pharmaceutical products on to developing country markets. Concerns have been voiced by public health officials and NGOs, and the acceptance of TRIPS-Plus commitments has been the subject of public protest in developing countries. While members of this Committee recognize the importance of encouraging research and development on new pharmaceutical products, they do not believe it is necessary for enterprises based in the OECD countries (and their governments) to demand additional patent and/or data-based commitments from developing countries beyond those already stipulated in the TRIPS Agreement. WTO Members have confirmed the importance of TRIPS flexibilities in the Doha Declaration on the TRIPS Agreement and Public Health, and have committed the WTO to promoting access to medicines "for all". This Committee therefore proposes that the ILA adopt a resolution urging governments to respect the object and purpose of the Doha Declaration and to refrain from seeking TRIPS-Plus commitments affecting medicines in bilateral and regional trade negotiations (see the draft resolution in Annex A to this report). Any such demands should be made at the front door of the WTO and not through the backdoor of imbalanced bilateral and regional negotiations.

#### **IV. The WTO Dispute Settlement System and Jurisprudence 2004-2005**

19. The large number of 20 WTO panel reports adopted in 2005, of which 12 (60%) were appealed, illustrates the substantial dispute settlement activity continuing in the WTO. The majority of disputes in 2004-2005 concerned the consistency of contingent protection (notably antidumping and countervailing duties) with WTO rules. As most lawyers find it difficult to follow the today already more than 200 WTO panel, appellate and arbitration reports (e.g. in view of their together more than

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<sup>21</sup> Peter Sutherland, et al., *The Future of the WTO, Addressing institutional challenges in the new millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (2005).

30'000 pages), this section continues the tradition of previous ITLC reports to discuss some of the legal dispute settlement findings. ITLC members participated in the "Tenth Anniversary Conferences" (in Brazil, Egypt, Italy, Japan, the US) organized by WTO Appellate Body members, which will lead to comprehensive book publications on WTO jurisprudence and the broader WTO legal and dispute settlement system.

20. Since *EC – Bananas III*<sup>22</sup> and *EC – Computer Equipment*, an increasing number of cases concern the interpretation of schedules. WTO adjudicating bodies opened up to extra-WTO sources of law by recognizing that the Harmonized System (HS), an international treaty negotiated and concluded under the auspices of the World Customs Organization, is context (in the sense of Art. 31.2 VCLT) for the interpretation of WTO commitments. The HS-equivalent for services, the Scheduling Guidelines, have not been accorded the same legal relevance by the Appellate Body (AB); they are relegated to preparatory work. As a result, whereas adjudicating bodies will always have to look into the HS when dealing with disputes concerning the ambit of concessions in goods, they will adopt the same attitude when dealing with disputes concerning the ambit of concessions in services, only under the conditions embedded in Art. 32 VCLT. The remaining cases deal with various issues: among them, special mention is probably due to *EC – Tariff Preferences*, a high profile case, dealing with the conditions under which a donor country can give extra preferences to recipient developing countries; in *Mexico – Taxes on Soft Drinks*, the panel and AB dealt with the issue whether retaliation under NAFTA can be legitimized in the WTO-context. There was also a first case where a panel took distance from a ruling of a prior Appellate Body report dealing with the same issue: in *EC – Commercial Vessels*, the panel explicitly refused to apply the test for inconsistency with Art. 18.1 of the *Agreement on Antidumping*, as spelled out in *US – Offset Act (Byrd Amendment)*.<sup>23</sup> The number of compliance panels has continued to increase. The absence of suggestions by WTO adjudicating bodies for the implementation of dispute settlement findings may be one of the reasons for this trend. Suggestions, as per WTO case-law, are not binding on their addressees, but do provide a prima facie consistent approach to guide implementing activities. A recent panel report [*US – Softwood Lumber VI (Article 21.5 – Canada)*] went one step further holding that not even the various findings in a panel report provide binding guidance as to what should be done in terms of implementation. This is regrettable since a panel's finding of inconsistency signals that a particular measure must cease.

#### Contingent protection: Circumstantial evidence to prove government involvement in subsidies

21. Regarding the evidentiary standard required for a demonstration that an indirect financial contribution has been granted, the panel report on *US – Export Restraints* interpreted the terms *entrusts* and *directs* in Art. 1.1a SCM as requiring evidence of an explicit and affirmative act by a government vis-à-vis a particular entity to perform a particular task (§ 8.17). The panel report on *EC – Countervailing Measures on DRAM Chips* explicitly dismissed this interpretation. In the panel's view, a mere encouragement by government will not suffice; proof of an explicit and affirmative act is not required either (§§ 7.52 ff.). Recourse to circumstantial evidence on a case by case scenario may be unavoidable; absence of normal commercial behavior could be a relevant factor (§ 7.131) in determining that an indirect financial contribution has been made. The AB upheld this finding when asked to pronounce on this issue following an appeal by the United States against another panel report dealing with the same issue but reaching the opposite outcome. The AB reversed or modified almost the totality of the panel's findings; in its report on *US – Countervailing Duty Investigation on DRAMS*, the AB held that findings on this score will on many occasions be based on circumstantial evidence (§ 175). As to the standard of review applicable on this issue, the AB makes it clear that there is no need for compelling evidence for a finding of financial contribution to be legitimately made (§§ 175ff.). A lesser standard apparently will suffice. There remains uncertainty as to how much less is required. The panel in *EC – Countervailing Measures on DRAMS Chips* found, that amid Hynix's deteriorating financial situation, financial disbursements by private channels following a series of meetings where government officials participated was sufficient evidence to find that Korea had entrusted and/or directed private channels to help the ailing company.

<sup>22</sup> This report uses the official abbreviations of disputes as referred to in WTO reports.

<sup>23</sup> The panel report on *US – Zeroing (EC)* as well took some distance from prior case-law on the consistency of zeroing with the Agreement on Antidumping. However, this report did not present its report as a direct contradiction of prior case-law.

### Under what conditions can a policy Bulletin be challenged?

22. In its report on *US – Oil Country Tubular Goods*, the AB confirmed the panel's findings that a *Bulletin* used by the US administration in antidumping investigations could be legitimately challenged before a WTO panel, since it was an act of normative character, applicable to an indefinite number of transactions (§§ 187 ff.). The *Bulletin* regulates, *inter alia*, the standard of review applied to administrative and sunset reviews. However, in a subsequent report, the AB made it almost impossible to challenge the *Bulletin*: in *US – Anti-dumping Measures on Oil Tubular Goods*, the AB faced a challenge by the United States against the panel's findings with respect to the justiciability of the *Bulletin* itself. The panel, reproducing faithfully in its view the AB's (*US – Oil Country Tubular Goods*) findings, held that the United States had violated their obligations under the Antidumping (AD) Agreement by consistently finding (in application of the *Bulletin*'s prescriptions) that continuation of AD duties was necessary. The panel essentially had found that by applying consistently a WTO-inconsistent procedure (by virtue of the *Bulletin*'s prescription), the United States were in violation of their obligations under the WTO. The AB rejected the panel's findings. In its view (§§ 203ff.), the panel hastily rushed to conclusions; absent an inquiry into the rationale of the US domestic authority's decisions in 206 individual cases reviewed by the panel, its conclusions were unfounded. This AB finding raises at least two legitimate concerns: *first*, why does the rationale for the US investigating authority's decisions matter since the methodology used is anyway, as the AB itself ruled in previous cases, illegal? *Second*, how can a panel inquire into the rationale of these cases without actually performing *de novo* review, which it cannot anyway, as the AB has ruled in prior case-law?

### The standard of review in sunset reviews

23. In its report on *US – Anti-dumping Measures on Oil Country Tubular Goods*, the AB had to face the following issue: should an investigating authority, in the context of a sunset review, demonstrate that, if duties were to be removed, there is likelihood that dumping will be causing injury? In other words, is the task of the investigating authority to demonstrate, besides the likelihood that dumping and injury might occur, that the former will cause the latter? The AB responded in the negative (§§ 123 – 124). This is a highly problematic finding, probably, the apotheosis of textualism as interpretative tool and the total neglect of contextual interpretation. In the AB's view, an investigating authority which establishes that dumping might continue (even if not injurious), and injury might continue to exist (although caused by factors other than dumped imports) were duties to be revoked, can legitimately keep duties in place to address non-injurious dumping and injury caused by factors other than dumping. In the AB's view, although original AD duties can be in place only if dumping has been found to cause injury, they can remain in place even if this is not the case. This construction of the sunset clause seems to be *prima facie* at odds with its negotiating history: it was conceived as means to discipline the duration of AD duties, and not the other way around.

### What is specific action against dumping?

24. In *US – Offset Act (Byrd Amendment)*, the AB had ruled that an action having a dissuasive effect against dumping is inconsistent with Art. 18.1 AD and 32.1 SCM if it is not one of the three permissible actions with such dissuasive effect (provisional, definitive AD duties, price undertakings). Subsequent panel-practice seems to take a distance from the *Byrd* ruling. In *EC – Commercial Vessels*, the panel was faced with a claim brought forth by Korea that the EC's 'temporary defence mechanism' (TDM) was in violation of Art. 32.1 SCM. Korea and the EC had previously reached agreement on subsidization of their respective shipbuilding industries. The EC decided to deviate from the terms of the agreement by granting subsidies to its shipbuilding sector through the TDM Regulation based on its belief that Korea had not respected its commitment to ensure an effective price mechanism. The panel agreed that the TDM was a specific action, but distanced itself from the view that it was against subsidization (§§ 7.154 – 7.174). In the panel's view, a counter-subsidy (like the TDM) is not in and of itself a measure against subsidization. In the panel's view, an additional requirement is necessary; otherwise, the adjudicator would be adding to the disciplines on subsidies beyond those existing in Parts II (prohibited) and III (actionable) of the SCM (§§ 7.160 – 7.164). The panel acknowledged that its role is not to act as a legislator and declined to assume responsibilities antithetical to its *raison*

d'être. This report is a departure from the *US – Offset Act (Byrd Amendment)* jurisprudence, since, contrary to the findings there, the panel held that a mere dissuasive effect does not suffice in order to qualify a measure as specific action against subsidy. This report was not appealed; as a result, the AB did not have to confront arguments against its own jurisprudence. It remains to be seen whether the sweeping *Byrd*-conclusions will be reaffirmed or set aside in posterior jurisprudence.

#### Zeroing: back from the back door?

25. Following the AB's report on *US – Softwood Lumber V*, one might have legitimately thought that we had seen the back of zeroing. Zeroing however, came back through the back door. In *US – Zeroing (EC)*, the panel faced another re-incarnation of zeroing; this time, it found that the practice is WTO-consistent. The EC had complained that the US practices *retroactive duty assessment* whereby the authority will assess a provisional duty that importers do not have to pay until it is finalized. Within one year, the US investigating authority will determine the final liability and request from importers to pay the difference between the first and the second assessment. The AD Agreement does not outlaw the retrospective duty assessment. In fact, Art. 9.3.1 AD explicitly acknowledges that such a system could legitimately be practiced. The problem in this case was that the US had stopped zeroing during the preliminary-stage, as a result of previous condemnations of their practices, but practiced zeroing at the final liability-stage. The European Community complained that the US practice at hand was WTO-inconsistent since, otherwise, WTO Members would be incurring different obligations depending on whether they practiced prospective or retrospective duty assessment. The panel disagreed with the EC claim; basing itself on a rather idiosyncratic understanding of the term investigation (reflected in Art. 5 AD), it constructed an argument to the effect that the zeroing obligation was co-extensive with the duration of the investigation (§§ 7.186ff.) Since the duty assessment review was perceived to lie outside the period of investigation, the US were free to zero (§§ 7.213ff. and especially 7.220). In a dissenting opinion (§§ 9.1ff.), an unnamed member of the panel took issue with the majority's understanding (§ 9.14). The dissenting opinion correctly points to the fact that the majority's understanding is at odds with the rational expectations of the negotiating partners, and privileges an understanding of the term investigation which is not dependent on the type of duty assessment (prospective, retrospective). The dissenter finds that the US system is in violation of the AD Agreement (§§ 9.21ff.).

#### Farm subsidies

26. In *US – Upland Cotton*, the AB confirmed that the agreements on agriculture (AG) and on subsidies (SCM) must be read in tandem, in the sense that the former cannot be used as a device to circumvent obligations assumed under the latter (§§ 532ff.). It further clarified that, under the AG Agreement, for a payment scheme to be deemed de-coupled, it should be free of any contingencies. It condemned a US practice whereby beneficiaries of payments were prohibited from cultivating particular farm goods. The US system did not affirmatively condition the payment of subsidies on the production of particular goods. The AB held that, by imposing this prohibition, US farmers would produce specific goods; hence, in this indirect way, payments were not de-coupled from production (§§ 325ff.). This ruling is difficult to accept as a matter of economic logic: rationally farmers will invest in the field where they obtain maximum return; to the extent that there is no affirmative coupling, they might, for example, invest in the stock market, if this is the highest return-investment. The AB seems to have extended the coverage of de facto decoupled payments. In the same report, the AB held, by a majority view, that export credits are illegal under Art. 10.1 AG. In a dissenting opinion, a member of the AB pointed to the fact that the open-ended wording of Art. 10.2 AG, as well as numerous negotiating documents, dictated the opposite approach: there was no agreement as to the treatment of export credits and the issue was left open to future negotiations. In light of the wording of Art. 10.2 AG, it is difficult to disagree with the dissenting member (§§ 632 ff.).

#### Unknown exporters

27. In its report on *Mexico – Antidumping Measures on Beef and Rice*, the AB dealt with an issue where probably, absent legislative change, we will continue to experience problems in the years to come. The Antidumping Agreement does not deal with the duties that exporters should be paying if

they were not identified during the investigation process but are regarded as new shipments (Art. 9.5 AD). Practice around the world on this score is quite disparate. The panel tried to narrow down the size of the problem by imposing a duty on the investigating authority to actively look out for sources of supply (and thus expand the number of known exporters). The AB disagreed with the panel on this score, but still went on to find that un-identified exporters should not be paying duties based on adverse facts available (Art. 6.8 AD). We remain in the dark, as to what is the amount of duties that such exporters should be paying.

#### The WTO and the Generalized System of Preferences (GSP)

28. In its report on *EC – Tariff Preferences*, the AB examined the EC *drug arrangements*, whereby the EC provided developing countries actively combatting the production and trafficking of drugs with preferences beyond those granted to all other developing countries under the EC's GSP. India complained that the preferences were inconsistent with Art. I GATT. Since the Enabling Clause enables WTO Members to grant tariff preferences to developing countries, the AB held that it constitutes an exception to Art. I GATT (§ 99). The Enabling Clause thus takes precedence over Art. I GATT, to the extent of a conflict between the two provisions (§ 102, confirming the panel's view on this issue, see the panel report at § 7.60). The AB reversed the panel with respect to its findings on the obligation not to discriminate across developing countries, except for the statutory distinction between developing and least developed countries. In the view of the AB, § 3(c) of the Enabling clause made it plain that development needs are not necessarily shared to the same extent by all developing countries (§ 162). A GSP scheme responding to different needs may be 'non-discriminatory' even if 'identical' tariff treatment is not accorded to all GSP beneficiaries (§ 165). Additional preferences cannot be outright excluded (§ 169). "In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond." (§ 173). Applying its test to the specific case, the AB found that the *drug arrangements* were not WTO-consistent, since the EC laid down a closed list of beneficiaries (§§ 180, 187). For its scheme to be deemed WTO-consistent, the EC, in the AB's view, would have to modify its current Regulation so as to ensure that it reflects "criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries." (§ 188). Accordingly, WTO Members can distinguish between less-developed recipients of preferences, provided they have established criteria to this effect. The AB did not define principles which could serve as benchmark to distinguish between acceptable and (eventually) unacceptable extra preferences. It is unclear whether such criteria should be unilaterally defined, or whether they should be the outcome of some consensus between donor and recipient countries. Regarding burden of proof, the AB accepted that the Enabling Clause is an exception to Art. I GATT rather than a self-standing obligation; yet, the AB held that India had to specify its arguments under the Enabling Clause, without having to demonstrate compliance of the EC measures with the Enabling Clause.

#### The WTO, other adjudicating fora and international law

29. The Panel and AB reports on *Mexico – Taxes on Soft Drinks* dealt with the following situation: The United States claimed that Mexico had raised its domestic taxes on soft drinks in violation of Art. III.2 and 4 GATT by discriminating soft drinks in a manner protecting domestic products. Mexico claimed its measures were "necessary" and justified in terms of Art. XX(d) GATT in order to enforce countermeasures aimed at remedying alleged US violations of NAFTA rules and dispute settlement procedures. Mexico also asked the Panel to decline to exercise its jurisdiction in view of the existence of a NAFTA dispute inextricably linked to the WTO dispute. The panel dismissed Mexico's claims. It held that Mexico's measures were essentially international, whereas the indicative list in Art. XX(d) GATT, as well as its preparatory work were pointing to an understanding of this provision as covering only domestic and not international measures (§§ 8.162ff.). The AB "agree(d) with Mexico that WTO panels have certain powers that are inherent in their adjudicative function." In this case, however, the AB "saw no reason to disagree with the Panel's statement that a WTO panel 'would seem... not to be in a position to choose freely whether or not to exercise its jurisdiction'" (paras. 45-53). The AB emphasized that "accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the

covered agreements”; yet, there was “no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes” (paras. 55-56,78). The AB agreed with the Panel “that Article XX(d) is not available to justify WTO-inconsistent measures that seek ‘to secure compliance’ by another WTO Member with that other Member’s international obligations.” Yet, the AB clarified that the terms “laws or regulations” cover “rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that Members’ legal system” (para. 79).

30. Several ITLC members have extensively published on the controversial question to what extent WTO dispute settlement bodies may apply non-WTO rules of international law not only as relevant context for interpreting WTO rules (Article 31.3,c VCLT). In the recently issued interim report in the *EC-Biotech Products* case, the Panel found that “relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used” (paras. 7.90-96); other WTO dispute settlement bodies appear to have applied non-WTO rules of international law (e.g. multilateral environmental agreements, general principles of international law) outside the context of Article 31.3,c VCLT.<sup>24</sup> Regarding the related problem of exclusive jurisdiction clauses, the AB noted in *Mexico – Taxes on Soft Drinks* that Mexico “has expressly stated that the so-called ‘exclusion clause’ of Article 2005.6 of the NAFTA had not been ‘exercised’” (para.54); thus, the AB did not address this issue, notwithstanding its explicit recognition of the inherent power of panels to determine the scope of its jurisdiction in a given case. The problem of competing jurisdictions, and of the risk of mutually incoherent legal findings, also came up in *US – Softwood Lumber VI (Article 21.5 – Canada)*, where a WTO compliance-panel and a NAFTA panel reached the opposite conclusion on the same issue.

#### Implementation (compliance panels)

31. Following the panel’s finding, in *US – Softwood Lumber VI (Article 21.5 – Canada)*, that the United States had violated its obligations under Arts. 3.7 AD and 15.7 SCM (§ 7.5), the competent US authority re-visited its original determination; without making any substantive changes, it simply re-focused its justification and presented it as its implementing measure. Canada took the view that it is impossible to comply without introducing a new measure. The panel accepted (§ 8.1) that the manner in which the US authority had now interpreted the same factual evidence was enough for a finding of implementation. The fact that Canada had presented reasonable alternative explanations of the data was not enough for a finding of non-implementation. It seems problematic that the United States was found to have implemented the original panel’s rulings without undertaking any new measure, except for re-drafting their decision to impose duties. This case appears at odds with the AB holdings in *US – Lamb* that an investigating authority must address other reasonable interpretations of the facts and compare them with its own interpretation of the facts.

#### Interpretation of schedules: legal relevance of the HS and the Scheduling Guidelines

32. In *EC – Chicken Cuts*, the panel and AB dealt comprehensively with the interpretation of a concession. The panel went through all interpretative elements of the VCLT-system, paying particular attention to the HS-system since it considered it to be context of the negotiation (§§ 7.104ff.). It further held that EC regulations and decisions by the EC judiciary on this issue were legally relevant, in the sense that they constituted supplementary means of interpretation (Art. 32 VCLT). The AB upheld the panel’s findings in this respect (§§ 199ff.). In *US – Gambling*, however, the AB held the view that the Scheduling Guidelines (the document which plays a role similar to that of HS in the context of trade in services) is part of the *travaux préparatoires*, as the latter are defined in Art. 32 VCLT (§ 196). As a result, recourse to HS and the Scheduling Guidelines will take place in an uneven manner in future adjudication. In its report on *EC – Export Subsidies on Sugar*, the AB confirmed that the Members’ schedules of concession have to adhere to the disciplines enshrined in the AG Agreement (§§ 224 – 226). The AB rejects a ‘contractual’ approach in interpreting the commitments undertaken by trading partners (§ 180). The panel report on *Dominican Republic – Importation and Sale of Cigarettes* discussed the GATT-consistency of a foreign exchange fee imposed by the Dominican Republic and attempted to classify it under one of the possible categories of impositions featuring in the GATT. As

<sup>24</sup> Cf. E.U.Petersmann, The WTO Dispute over Genetically Modified Organisms: Interface Problems of International Trade Law, Environmental and Biotechnology Law, in: F.Francioni (eds), *Biotechnology and International Law*, 2006.

Art. VIII GATT impositions are distinct from other duties (§ 7.115), impositions under the purview of Art. VIII GATT do not have to be included in a schedule of concessions. They have, however, to respect the general transparency requirement embedded in Art. X GATT.

#### State-trading enterprises

33. In its report on *Canada –Wheat Exports and Grain Imports*, the AB held that the two obligations in Art. XVII.1(b) GATT are a mere illustration of the obligation in Art. XVII 1(a) GATT; as a result, WTO Members do not incur any obligation additional to non-discrimination. In doing that, the AB re-visited all prior case-law in this respect, and settled the score as far as the relationship between the two first paragraphs of Art. XVII GATT is concerned (§§ 89 – 106).

#### Use of economic analysis in dispute settlement practice at the WTO

34. WTO dispute settlement bodies are increasingly been requested to address economic expertise submitted to them by the parties to the dispute. As most WTO rules tend to be interpreted without regard to trade effects, quantification of damages usually takes place at the stage when recourse to countermeasures is being requested. At that stage, the Legal Affairs Division will normally work in tandem with economists from the WTO.<sup>25</sup> Over the recent years, there is a notable change. In *US–Upland Cotton*, an elaborate econometrics model was submitted to the panel to substantiate Brazil’s claims that the United States was indeed subsidizing its cotton production. The same could happen in other areas of WTO law (e.g. in causality and injury analysis in contingent protection instruments; analysis of like products).<sup>26</sup>

#### DDR Negotiations on Improvements of the DSU

35. The negotiations on improvements and clarifications of the DSU currently focus on a limited number of proposed amendments to the DSU (concerning post-retaliation, sequencing, remand, third party rights, open meetings, possible time-saving, preventive measures) and proposed actions by the DSB or other WTO bodies (regarding open meetings, panel composition, additional guidance to WTO adjudicative bodies). ITLC member and WTO Ambassador Prof. Georgiev is in the process of publishing an edited volume on these DDR negotiations which have also been analyzed in earlier ITLC reports.

### **V. WTO Governance and Constitutionalism**

36. Globalization of international trade, communications and law has become an inevitable fact offering not only enormous welfare opportunities (as illustrated by the rapid growth and poverty reduction in China and India), but also many risks. WTO law reflects the worldwide recognition that the economic efficiency and political legitimacy of economic markets, no less than that of political markets (democracy), depend on law and institutions limiting “market failures” as well as “government failures” (such as the unnecessary poverty in many non-democratic countries and “failed states”). Recent democratic elections (e.g. in Iraq, Iran, Venezuela) have confirmed the ancient insight that democratic elections guarantee neither democratic governance nor a peaceful, welfare-enhancing division of labour. Political history suggests that “constitutionalism” has proven to be the most effective, albeit imperfect safeguard for protecting consumer welfare and general citizen welfare against abuses of political and economic power. Just as modern political governance is characterized by multilevel decision-making and interdependent rules in national and international institutions (e.g. regional and UN institutions and UN law aimed at providing “international public goods”), so depend multilevel trade governance and the successful conclusion of the consensus-based DDR negotiations on regional and worldwide rules and institutions. ITLC members have published numerous books and joint analyses analyzing multilevel trade governance and the need for multilevel constitutionalism over the past years.

<sup>25</sup> Panels can, of course, have recourse to *outside* economics expertise, if need be; by virtue of Art. 13 DSU, they have never done so.

<sup>26</sup> The WTO World Trade Report (2005) dedicates a chapter (pp. 171 – 213) to the role of economic analysis in WTO jurisprudence.

37. ITLC member Prof. Jackson was one of the co-authors of the advisory report for the WTO Director-General on *The Future of the WTO* which, in its sub-title, calls for ‘addressing institutional challenges in the new millennium.’ In his Foreword, WTO Director-General Supachai Panitchpakdi recalled that – during the Uruguay Round negotiations on the Agreement establishing the World Trade Organization (WTO) – “there had been too little thinking on whether the institutional design and practice that had served the GATT so well would do the same for the WTO”; in his view, the enlarged WTO membership and the political responsibilities of WTO Members require a new “dialogue on the options available to reinforce this vitally important institution for the future.”<sup>27</sup> The first WTO Director-General and chairman of the Consultative Board Peter Sutherland – in his Preface to the report – confirms this diagnosis: the WTO “is not by any means fully equipped for its tasks. There is a real need for institutional reforms to, and increased support for, the WTO. Yet, the report limits itself “to propose realizable reforms rather than more substantial changes that could not, in our view, have commanded the degree of support necessary for them to be effected.”<sup>28</sup> Moreover, only few of the proposals for more coordination with other international organizations (chapter IV), more transparency and dialogue with civil society (chapter V), improvements of the WTO dispute settlement system (chapter VI) and of the consensus-based decision-making processes in the WTO (chapter VII), for establishment of a senior-level consultative body without decision-making powers (chapter VIII), and for a stronger leadership-role of the Director-General and of the Secretariat (chapter IX) are on the agenda of the DDR negotiations. In order to promote public support for institutional reforms, ITLC members organized and published a worldwide discussion on the recommendations contained in the *Sutherland Report*.<sup>29</sup>

38. ITLC members also published monographs<sup>30</sup> as well as collective works<sup>31</sup> on the needed institutional reforms of the world trading system. The emphasis by WTO Members on the “member-driven”, *sui generis* character of the WTO, which is neither a specialised UN agency nor part of the UN system, is increasingly challenged from political and legal perspectives. For example,

(a) in order to promote a better functioning of the “rule-making branch” of the WTO and enable more adequate legislative responses to the adjudicative processes, the WTO’s “executive branch” (notably the Director-General) and a new WTO Consultative Body (possibly as suggested in the *Sutherland Report*) should be granted additional powers of initiative and of coordination (e.g. by making the Director-General chair of the General Council);

(b) Members of the WTO should be better organized and prepared in dealing with institutional and constitutional issues arising in the WTO, such as the legal interaction of different agreements within and outside the WTO, the relationship to international and domestic law. To this affect appropriate bodies should be created, such as a proper legal Committee.

(c) the proper functioning of the WTO as the central international organisation for a welfare-enhancing world trading system, and the proper servicing of the over 70 specialized WTO institutions, require better financial and institutional resources, notably if technical assistance and capacity building for LDC/LLDCs evolve into major new tasks of the WTO;

(d) the ‘development functions’ of the WTO call for greater policy coherence not only in terms of global economic policy-making (a function which the WTO exercises with the IMF and the World Bank on the basis of Article III:5 WTO Agreement) but also in the field of development policy, without transforming the WTO into a development institution;

(e) there are also important *legal* reasons, such as the lack of input-legitimacy (e.g. in terms of respect for human rights and democratic decision-making) and of output-legitimacy of the WTO (e.g. lack of explicit commitments to promotion of consumer welfare rather than special producer interests), why WTO Members should not leave it to WTO jurisprudence to clarify that WTO rules are integral parts of broader legal systems aimed at open markets, transparent policymaking and rule of international law;

(f) reforms of the WTO decision-making processes have so far concentrated on improving internal and external transparency rather than the effectiveness of WTO governance. The elaborate set of WTO rules on majority decisions notwithstanding, voting has remained exceptional and “decision-making by consensus” (Article IX:1 WTO Agreement) continues to be the preferred means of adopting a decision in the WTO. Introduction of a system of weighted voting, or resort to a ‘critical

<sup>27</sup> *The Future of the WTO* (above note 20), at 2-3.

<sup>28</sup> Note 21, at 5.

<sup>29</sup> Cf. the two *Mini-Symposia* in: *Journal of International Economic Law* 2005, at 287 ff, 591 ff.

<sup>30</sup> See, e.g., M.E. Footer, *An Institutional and Normative Analysis of the World Trade Organization*, 2006.

<sup>31</sup> See, e.g., E.U. Petersmann (ed), *Reforming the World Trading System : Legitimacy, Efficiency and Democratic Governance*, 2005.

mass approach' as hinted at in the *Sutherland Report* (with Members agreeing to refrain from blocking consensus in the event that a critical number of them support the decision), would probably fail to win the approval of the Membership and would risk to entail polarisation. The consensus practice protects the quality and inclusiveness of decision-making and gives each WTO Member a veto power, limited by joint political pressures, which is otherwise not present in the case of voting.<sup>32</sup>

#### Does Multilevel Trade Governance Require Multilevel Constitutionalism?

39. An increasing number of lawyers, including members of the ITLC (such as Profs. Cottier, Jackson, Oppermann, Petersmann), argue that multilevel trade governance requires multilevel constitutional restraints in order to protect rights of citizens, and limit abuses of power, more effectively at national and intergovernmental levels of private and public governance. *International constitutionalism* is presented as a functionally limited, but necessary complement to *national constitutionalism* which, only together, can protect human rights and democratic self-government more effectively across frontiers in a globally integrating world. None of the supporters of "international constitutionalism" claims that international "treaty constitutions" constituting and limiting international rule-making, executive and judicial powers for the collective supply of international public goods are, or should become, constitutions in the same sense as national constitutions. In line with the diverse national constitutional traditions, constitutional approaches to multilevel governance differ inevitably. Some use the notion of a "WTO constitution" in view of

- (a) the comprehensive rule-making, executive and (quasi-) judicial powers of WTO institutions;<sup>33</sup>
- (b) the "constitutionalization" of WTO law resulting from the jurisprudence of the WTO dispute settlement bodies;<sup>34</sup>
- (c) the domestic "constitutional functions" of GATT/WTO rules, for example, for protecting constitutional principles (like freedom, non-discrimination, rule of law, proportionality of government restrictions) and domestic democracy (for example, by limiting the power of protectionist interest groups) for the benefit of transnational cooperation among free citizens;<sup>35</sup>
- (d) the international "constitutional functions" of WTO rules, for example, for the promotion of "international participatory democracy" (e.g., by holding governments internationally accountable for the "external effects" of their national trade policies, by enabling countries to participate in the policy-making of other countries)<sup>36</sup> and of the enhancement of "jurisdictional competition among nation states"<sup>37</sup> and "the allocation of authority between constitutions";<sup>38</sup> or
- (e) in view of the necessity of "constitutional approaches" for a proper understanding of the law of comprehensive international organizations which use the term "constitution", as well as constitutional methods and principles, for more than 80 years (see, e.g., the "Constitutions" of the ILO, WHO, FAO, EU);<sup>39</sup>

<sup>32</sup> But see T. Cottier & S. Takenoshita, *The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response*, 58 *Aussenwirtschaft* p. 171 (2003).

<sup>33</sup> See J.H. Jackson, *The World Trade Organisation: Constitution and Jurisprudence*, (London: Royal Institute of International Affairs, 1998).

<sup>34</sup> See D.Z. Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutionalization', in: *European Journal of International Law* 2001, at 39-75.

<sup>35</sup> See E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, 1991; J.O. McGinnis & M.L. Movsesian, "The World Trade Constitution", in: (2000) 114 *Harvard Law Review* 511-605; P.M. Gerhart, "The Two Constitutional Visions of the World Trade Organisation", in: (2003) 24 *University of Pennsylvania Journal of International Economic Law* 1-75, contrasts the "inward-looking, economic vision of the WTO" in helping member countries addressing internal political failures with the "external, participatory vision of the WTO" helping WTO members to address concerns raised by policy decisions in other countries.

<sup>36</sup> See, for example, P.M. Gerhart, "The WTO and Participatory Democracy: The Historical Evidence", in: (2004) 37 *Vanderbilt Journal of Transnational Law* 897-934.

<sup>37</sup> See J.O. McGinnis, "The WTO as a Structure of Liberty", in: (2004) 28 *Harvard Journal of Law and Public Policy* 81-88.

<sup>38</sup> J. Trachtman, *The WTO Constitution: Toward Tertiary Rules*, in *European Journal of International Law* 2006.

<sup>39</sup> See, for example, E.U. Petersmann, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, in: Joerges/Petersmann (note 1); N. Walker, "The EU and the WTO: Constitutionalism in a New Key", in: G. de Búrca & J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues*, 2001.

- (f) in view of the need to interface and coordinate different levels of governance on the national and international level.<sup>40</sup>

40. All these constitutional approaches agree that the WTO should not be simply viewed in narrow *economic* terms (for example, as an institution promoting economic welfare through trade liberalization). WTO rules and policies also pursue *political* as well as *legal* objectives that are no less important than the economic benefits from liberal trade, as illustrated by the guarantees of private “rights to import and export”, of private access to independent courts and rule of law in the 2001 WTO Protocol on the accession of China. The introduction of rule of law in China and of a system of independent trade courts (supervised by a chamber of the Chinese Supreme Court specialized in WTO law) illustrates that the WTO Agreement is one of the most revolutionary “transformation agreements” in the history of international law. In Europe, multilevel constitutionalism has become generally recognized by governments and courts which protect EU law and the European Convention on Human Rights as European constitutional law. Regarding worldwide trade governance, however, multilevel constitutionalism remains contested, for instance by Anglo-Saxon lawyers claiming that, compared with “mature constitutional systems, for example in the United States, Canada and Australia,” the “WTO is not constitutionalized, and nor, according to any current meaning of the term, should it be”.<sup>41</sup> More important than academic controversies about whether “constitutional approaches” to multilevel trade governance in the WTO are “idiotic”<sup>42</sup> (e.g. given the absence of a constitutional *demos* of the WTO), and whether such comparisons of state-centered national constitutionalism with functionally limited *international constitutionalism* are sensible, is the question of the practical relevance of “constitutional approaches” for the future of the WTO rules and policies.

#### Practical Policy Relevance of Constitutional Approaches?

41. E.U. Petersmann has suggested that, compared with traditionally power-oriented foreign policy approaches (e.g. vis-à-vis GATT 1947), multilevel constitutionalism may justify different policy approaches in various areas of multilevel trade governance. For instance:

- (a) At the level of WTO law, the customary rules of international treaty interpretation and WTO jurisprudence admit that the “contractual” dimensions of the law of international organizations may require different interpretative approaches (e.g. for interpreting GATT and GATS schedules of commitments) than their “constitutional” dimensions (e.g. in case of judicial clarification of the inherent powers of WTO dispute settlement bodies, or of WTO Members under the WTO exceptions protecting “public morals” and “public order”).
- (b) In a globally integrated world composed of some 200 sovereign states, international treaties constituting and limiting multilevel governance are a necessary precondition for the collective supply of global public goods (like a liberal, rules-based world trading system) which cannot be secured through power-oriented foreign policies focusing only on *national* interests. The inherent tendencies of freedom and competition to destroy themselves (“paradox of freedom”) require internationally agreed “constitutional restraints” on abuses of foreign policy powers in order to secure rule of law in international relations (e.g. by means of the WTO dispute settlement system), open markets (e.g. by means of WTO guarantees of non-discriminatory conditions of competition), respect for human rights and social justice. The legitimate diversity of national constitutional traditions notwithstanding, constitutionalism offers criteria for designing the law of international organizations (e.g. the necessary “checks and balances” between rule-making, executive and adjudicative powers).
- (c) From a rights-based constitutional perspective (as e.g. in EU constitutional law), national and international constitutionalism should be perceived as complementary instruments for the protection of the constitutional rights and human rights of citizens. Just as economists (from Adam Smith to Amartya Sen) perceive market economies and economic growth as

<sup>40</sup> T. Cottier & M. Hertig, *The Prospects of 21<sup>st</sup> Century Constitutionalism*, 7 Max Planck Yearbook of United Nations Law p. 261 (2003).

<sup>41</sup> D.Z. Cass, *The Constitutionalization of the WTO*, 2005, at x, 191, who admits, nonetheless, that “thinking about WTO constitutionalisation” is normatively necessary in view of the inadequacies of the “received account” of national constitutionalism in a globally interdependent world” (at 240-245).

<sup>42</sup> Statement by R. Howse during an international WTO conference on 12 March 2005 at Stresa, Italy. Howse disregards the obvious shortcomings of national constitutionalism for the worldwide realization of the cosmopolitan human rights objectives of constitutionalism.

instruments for enabling and promoting individual freedom as the ultimate goal of economic life and the most efficient means of realizing human welfare, so should national and international law (e.g. the WTO objective of “sustainable development”) be seen as instruments for the protection of human rights and democratic self-government of peoples. Multilevel constitutionalism can promote welfare-enhancing synergies between national and international constitutionalism which power-oriented foreign policies and border discrimination often undermine (e.g. by ignoring self-imposed WTO obligations in domestic courts).

## VI. Human Rights and International Trade

42. The legitimacy of the state-centered WTO legal and trade policy system has been challenged by members of parliaments, civil society, non-governmental organizations and UN human rights bodies for the WTO's inadequate regard to human rights and democratic governance. In response to these challenges, ITLC members Profs. Abbott, Cottier, Jackson, Pauwelyn and Petersmann organized a series of international conferences - in cooperation with human rights lawyers - on *International Trade and Human Rights* at Bern, Florence and Washington, which have led to comprehensive publications analyzing the manifold interrelationships between international trade law and human rights and the potential relevance of human rights for interpreting WTO rules.<sup>43</sup> At the 2005 ITLC meeting at Geneva, ITLC members discussed a paper submitted by Prof. Petersmann on whether WTO Members should be invited to clarify the relationships between WTO law and human rights by adopting a WTO Declaration, and how the ITLC could proceed with realizing its agreed objective of elaborating and proposing an ILA Declaration on Human Rights and International Trade.<sup>44</sup> A draft of this paper had also been sent to the chairman and rapporteurs of the ILA Committee on International Human Rights Law and Practice for their comments and advice.

43. For a number of legal and political reasons, human rights are likely to have an increasing impact on the future interpretation of WTO rules and on the progressive development of WTO policies:

- (a) Every WTO Member has accepted obligations under international law to protect and promote human rights.
- (b) The universal recognition of "inalienable" human rights entails that the WTO system, like any domestic legal and political system, will be increasingly evaluated (e.g. by civil society) from the perspective of respect for human rights and moral principles of social justice.
- (c) Even though the political WTO bodies have not responded to the UN proposals to adopt a "human rights approach to trade"<sup>45</sup>, it appears to be only a matter of time until WTO dispute settlement bodies will be requested by complainants or defendants to interpret WTO rules with due regard to the human rights obligations of the WTO Members concerned.
- (d) The insertion of human rights clauses into regional FTAs among WTO Members confirms an increasing awareness of governments for the political need to respect human rights also in international trade relations.<sup>46</sup> EU law explicitly requires the external development policies (cf. Article 177 EC) and common foreign policies of the EU (cf. Article 11 EU) to promote human rights and democratic decision-making.<sup>47</sup>

<sup>43</sup> Cf. T.Cottier/J.Pauwelyn/E.Bürgi (eds), *Human Rights and International Trade*, 2005 ; F.M.Abbott/C.Breining-Kaufmann/T.Cottier (eds), *International Trade and Human Rights*, 2006 ; F.Francioni/P.M.Dupuy/E.U.Petersmann (eds), *Human Rights and Biotechnology in International Law*, 2006.

<sup>44</sup> Cf. the Sixth Report of the ITLC, sections VII and X, in : Report of the 70th ILA Conference, 2004, at 543 ff, 554 f.

<sup>45</sup> Cf. 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 : Petersmann (note 30), 357-380.

<sup>46</sup> On the different kinds of human rights clauses, and their rare invocation for suspending economic cooperation in response to human rights violations (e.g. in Zimbabwe), see: L.Bartels, *Human rights conditionality in the European Union's International Agreements*, 2005.

<sup>47</sup> Article III-292 of the 2004 Treaty Establishing a Constitution for Europe explicitly prescribes that the “Union’s action on the international scene shall be guided by, and designed to advance in the wider world, the principles which have inspired its own creation, development and enlargement: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and for international law in accordance with the principles of the United Nations Charter”.

- (e) Human rights arguments also influence proposals for institutional reforms of the WTO system, such as holding WTO dispute settlement meetings in public<sup>48</sup>, promoting regular meetings of parliamentarians from WTO Members during WTO ministerial conferences<sup>49</sup>, and expanding the annual public WTO symposia with NGOs on international trade policy issues.

#### A WTO Declaration on *The WTO and Human Rights*?

44. The diversity of national and regional human rights traditions, the narrow trade policy mandate of WTO diplomats, and the lack of human rights expertise in the WTO make it unlikely that the political WTO bodies will attempt to clarify the impact of human rights on WTO rules and policies and respond to the UN proposals for a 'human rights approach to international trade.' WTO instruments (like the 2001 WTO Declaration on access to medicines) usually avoid explicit references to human rights (though the 2001 Declaration does refer to "WTO Members' right to protect public health") 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"<sup>50</sup>), do not clarify 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 response to human rights arguments. But they also show that political agreement on such Declarations and "waivers" may be possible only as part of comprehensive "package negotiations" (e.g. on the 2001 WTO Ministerial Declaration launching the Doha Development Round).

45. In their 1996 Singapore Ministerial Declaration, WTO Members renewed their commitment to the observance of internationally recognized core labor standards, affirmed their support for the ILO's work in promoting these standards, and rejected protectionist abuses of such standards. In a similar way, WTO Members could respond to the UN proposals for a "human rights approach to trade" by a WTO Ministerial Declaration that could, for example:

- (1) renew the commitment of WTO Members to respect, protect and promote universal human rights in all policy areas, both individually and through international cooperation, and to ensure the consistency of WTO rules and policies with universal human rights;
- (2) affirm their support for the clarification by human rights bodies of the impact of universal human rights on trade rules and policies, with due respect for the legitimate diversity of human rights traditions at national, regional and worldwide levels of international economic relations and of the limited jurisdiction of WTO bodies;
- (3) acknowledge the need for harnessing the complementary functions of WTO rules and human rights for welfare-increasing cooperation among free citizens in international trade, in conformity with the worldwide recognition - 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);
- (4) recognize that the customary rules of international treaty interpretation may require WTO bodies to take into account human rights obligations of WTO Members as relevant legal context for the interpretation of WTO rules;
- (5) are convinced that the objectives, principles and exception clauses of WTO agreements are flexible enough to enable each WTO Member to implement WTO

<sup>48</sup> On 5 August 2005, the WTO dispute settlement panel examining the Canadian and US trade sanctions against the EC restrictions on imports of hormone-fed beef (DS 320, 321) announced that – at the request of Canada, the EC and the US – the Panel's meeting with the parties to the dispute in September 2005 will be open to the public.

<sup>49</sup> On WTO support for parliamentary meetings see the WTO documents on 'Policy Issues for Parliamentarians' (2001) and 'Regional Workshop for Parliamentarians on the Multilateral Trading System' (2003), as well as the contributions by the member of the European Parliament E. Mann and former US Congressmen Bacchus and Skaggs, in Petersmann (above note 30), at 409 ff, 421 ff, 429 ff.

<sup>50</sup> Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, WTO Decision of 15 May 2003 (WT/L/518).

rules in conformity with its obligations to promote and protect the human rights of its citizens;

- (6) urge WTO dispute settlement bodies, if they are requested by WTO Members to take into account human rights as relevant legal context for the interpretation of WTO rules, to exercise judicial restraint and fully respect the margin of appreciation which every WTO Member may legitimately claim in designing its domestic human rights laws and policies in conformity with its international obligations and in response to the democratic preferences and social needs of its citizens.

46. From the perspective of human rights activists, such a Declaration might appear disappointing. Yet, just as human rights were only gradually introduced into EC law in order to limit (rather than enlarge) the discretion and regulatory powers of the EC, so should a WTO Declaration on trade policies and human rights proceed cautiously by beginning to clarify the “limiting functions” of human rights for preventing abuses of trade governance powers, before addressing the more controversial “empowering functions” of human rights. The experience of European integration suggests that the functional interrelationships between human rights and international economic law are bound to intensify over time in order to protect basic human needs more effectively in the worldwide division of labor across frontiers. The proposed collective pledge by WTO Members to respect their existing, universal human rights obligations could - without creating new legal obligations or new WTO competencies, and without attempting to define the contested scope of universal human rights obligations and their impact on WTO rules - improve the limited "input-" and "output-legitimacy" of WTO rules and WTO negotiations by acknowledging that the numerous "public interest clauses" in WTO law are flexible enough to be interpreted in conformity with the human rights obligations of WTO Members and to take into account the social adjustment problems of international trade (e.g. for small subsistence farmers in poor countries, for vulnerable 'losers' in international competition, for sick people depending on access to foreign medicines at affordable prices). For the reasons mentioned above, political support for the adoption of a WTO Declaration on “The WTO and Human Rights” appears, however, very unlikely, even if the DDR negotiations should result in additional “aid for trade” and capacity-building commitments. Many WTO Members appear to be concerned at recognizing adjudicative powers of the WTO dispute settlement bodies to interpret the "applicable law" and "jurisdiction" in WTO dispute settlement proceedings as comprising trade-related human rights. Similar concerns appear to have motivated the UN High Commissioner for Human Rights to refrain from repeating her earlier proposal for inserting human rights provisions into WTO law. It seems more likely that the clarification of the relevance of human rights for the interpretation of WTO rules will fall, once again, on the WTO dispute settlement bodies if they should be confronted with human rights arguments in their future jurisprudence.

An ILA Declaration on *International Trade Law and Human Rights*?

47. During the ITLC discussions on international trade law and human rights, many ITLC members seemed to agree on the following observations:

- (a) the worldwide, regional and national human rights obligations of WTO Members are likely to increasingly influence the interpretation and implementation of WTO rules at intergovernmental and national levels;
- (b) the political WTO bodies are unlikely to acknowledge and clarify their responsibilities for respecting and protecting human rights in multilevel trade governance, for example by means of “authoritative interpretations” of WTO rules (e.g. DSU rules on the jurisdiction of WTO dispute settlement bodies to apply human rights law) and on agreed responses to the proposals by UN bodies for a “human rights approach” to WTO law and policies;
- (c) leaving the clarification of the impact of human rights law on WTO rules to WTO dispute settlement bodies risks engendering tensions, once again, among the rule-making and (quasi)judicial branches of the WTO;
- (d) independent, worldwide legal associations, like the ILA, could assist WTO Members and WTO dispute settlement bodies in clarifying the impact of human rights on WTO rules and policies through promoting a transparent, public discussion and identifying relevant rules and “balancing principles” – with due regard to the diversity of national and regional human rights traditions, and without attempting to define the contested scope of the universal human rights obligations under general international law;

- (e) such an ILA Declaration on ‘International Trade Law and Human Rights’ should take into account the experiences of national and regional courts in balancing the rights and obligations of states under trade laws and human rights law and – by promoting international cooperation among judges as well as civil society support for citizen-oriented interpretations of intergovernmental trade rules – could assist WTO dispute settlement bodies in coping appropriately with human rights arguments in future WTO dispute settlement proceedings;
- (f) if such an ILA Declaration would receive the political support from the regular inter-parliamentary meetings during WTO Ministerial Conferences, it could set an example for what WTO Director-General Pascal Lamy has called “cosmopolitan constituencies” and “cosmopolitics” in support of the global public good of a rules-based world trading system<sup>51</sup>, whose democratic input- and output-legitimacy and effectiveness require focusing no longer exclusively on rights and obligations of states, but also of their citizens.

48. An ILA Declaration, from an academic association of international law experts, should go beyond the six political principles suggested for a WTO Declaration (above para. 44) and attempt to elaborate more precise legal rules for the methodology and judicial standards necessary for promoting the mutual consistency of human rights law and international trade law. In view of the “layered” structures of national, regional and worldwide human rights and trade rules, the more than 4’000 international lawyers cooperating in the ILA - and representing more than hundred different countries - offer a unique source of knowledge for taking into account the diverse experiences of national and international courts. It would be presumptuous to try to anticipate the potential outcome of such ILA deliberations. The discussions in the ILA could begin with exploring, and complementing, the following questions regarding the legal interrelationships between WTO rules and policies and the human rights obligations of WTO Members:

- (1) How could the ILA contribute best to clarifying the legal impact of the universal recognition of “inalienable”, “indivisible” and interrelated human rights on the future interpretation (e.g. in WTO jurisprudence) and implementation of international trade rules (e.g. in WTO negotiations and domestic laws implementing WTO obligations)?
- (2) As UN human rights law prescribes minimum standards that do not prevent WTO Members from committing themselves to additional human rights and “fundamental freedoms” in national and regional laws (like the EU Charter of Fundamental Rights): Should worldwide UN and WTO bodies only focus on UN human rights law? Or does the examination of the consistency of trade measures with WTO rules require taking into account also national and regional human rights, e.g. if the WTO Member concerned justifies the trade measure concerned as being necessary for protecting national or regional human rights or “fundamental rights” of domestic citizens? Do the principles of the Universal Declaration of Human Rights (1948) express general international obligations of all WTO Members?
- (3) All WTO Members have to comply with all their international legal obligations in good faith. What does the limitation of the mandate of WTO dispute settlement bodies imply for the “applicable law” and “jurisdiction” in WTO dispute settlement proceedings? Can WTO dispute settlement bodies fulfill their dispute settlement function if their findings of “violations” of WTO rules do not take into account other non-WTO legal rules which may exclude the jurisdiction of WTO dispute settlement bodies (e.g. Articles 292 EC, 2005 NAFTA, 1.2 of the MERCOSUR Olivos Protocol of 2002 constituting an exclusive jurisdiction for disputes over WTO violations among the contracting parties concerned) or may justify departures from WTO rules (e.g. in case of WTO-consistent *inter se*- agreements among the disputing WTO Members)?
- (4) Do the customary methods of international treaty interpretation (e.g. Article 31.3(c) of the Vienna Convention on the Law of Treaties) permit WTO dispute settlement bodies to take into account only *universal* human rights obligations of all WTO Members, or also human rights obligations accepted by some WTO members (e.g. in an *inter se* agreement permitted by GATT Article XXIV and GATS Article V and accepted by all parties to the WTO dispute concerned)? Do the customary methods of treaty interpretation permit recourse to the “General Comments” adopted by UN

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<sup>51</sup> See P.Lamy, *Towards World Democracy*, 2006, and S.Charnovitz, *The WTO and Cosmopolitics*, in: Petersmann (note 31), at 437-446.

- human rights committees regarding the interpretation of UN human rights obligations?
- (5) Do the explicit objectives of WTO law (such as “raising standards of living”, “ensuring full employment”, “sustainable development”, “protection of intellectual property rights in a manner conducive to social and economic welfare”), the legal “principles underlying this multilateral trading system” (as referred to in the Preamble to the WTO Agreement and defined in “public interest” clauses such as Article 8 of the TRIPS Agreement), the numerous “general exceptions” from WTO rules (e.g. for protecting “public morals”, “public order”, human health, “essential security interests”), and the “balancing methods” applied in WTO jurisprudence offer adequate “policy space” for interpreting and implementing WTO rules in conformity with the human rights obligations of WTO Members? Is the European practice of defining “public morals” and “public order” in conformity with human rights relevant for the future interpretation of these legal terms in WTO law?
  - (6) Are the “balancing principles” applied in WTO jurisprudence (such as the “necessity requirements” in GATT Article XX) consistent with those applied in the context of UN human rights conventions? Would a WTO Declaration acknowledging the legal relevance of universal human rights for the interpretation and progressive development of WTO law be politically and legally desirable (e.g. for clarifying the jurisdiction of WTO dispute settlement bodies)? Under what conditions can violations of human rights justify recourse to international trade sanctions? Do WTO Members have a larger “margin of appreciation” in democratically designing their respective domestic human rights laws for the protection of their domestic citizens than for resorting to international sanctions in response to human rights violations by foreign governments?
  - (7) Is there empirical evidence for “conflicts” between WTO rules and human rights that cannot be resolved by interpreting WTO rules in conformity with the human rights obligations of WTO Members? Does the universal recognition of respect for human dignity and for human liberty as sources of “inalienable human rights” imply that the “inalienable core” of human rights must always prevail (as *ius cogens*) over other conflicting rules of international law?
  - (8) Should UN human rights law and practices offer more guidance for designing a world trading system that takes more systematically into account the social welfare of all citizens and the realization of human rights? What is the relevance of human rights for WTO rules in favor of less-developed countries and related WTO assistance (such as “trade facilitation”)?

#### Relevance of Human Rights for the Interpretation of WTO Rules

49. Even if the ILA should fail to reach agreement on answers to the above-mentioned questions regarding the complex interrelationships between human rights and trade rules, promoting a worldwide discussion – inside and beyond the ILA membership – on such legal questions could assist WTO bodies in their task of promoting synergies between international trade law and human rights. Such an ILA initiative would complement the ILA’s earlier resolution on ‘The Rule of Law in International Trade’, adopted at the ILA Conference in July 2000 at London<sup>52</sup>, and could assist WTO dispute settlement bodies in coping adequately with human rights arguments in future WTO dispute settlement proceedings. The 2005 ITLC discussion paper by Prof. Petersmann suggested that the legal relevance of human rights for the interpretation of WTO rules in WTO dispute settlement proceedings might differ depending on whether they are invoked (1) by the complainant or by the defendant, (2) for the protection of human rights at home or abroad, and (3) in support of discriminatory or non-discriminatory trade measures:<sup>53</sup>

#### Applicable Law and Limited Jurisdiction in WTO Panel Proceedings

50. In WTO dispute settlement practice, panels and the Appellate Body have explicitly rejected interpreting WTO rules ‘in clinical isolation’ from other fields of international law, and increasingly

<sup>52</sup> Report of the 69<sup>th</sup> Conference at London, 2000, at 18-25.

<sup>53</sup> These proposals were presented and discussed at the 2005 meeting of the ITLC as well as at the 2005 conference of the British Branch of the ILA at Edinburgh and are published in: E.U.Petersmann, *The WTO, Regional Trade Agreements and Human Rights*, in: Bartels/Ortino (note 1), 2006, chapter 3.

resort to MEAs, RTAs and general rules of international law in interpreting WTO rules.<sup>54</sup> There is broad agreement that the DSU requires the complainant to base its legal claims on the ‘covered WTO agreements’ (Articles 1, 7 DSU). Complaints based on human rights law would be outside the limited jurisdiction of WTO dispute settlement bodies. WTO lawyers disagree, however, on whether the DSU implicitly authorizes WTO dispute settlement panels to apply non-WTO law as a defence against WTO complaints and to ‘fill gaps’ in WTO rules and dispute settlement procedures;<sup>55</sup> whether the DSU limits the mandate of WTO dispute settlement bodies to the application of the ‘covered WTO agreements’;<sup>56</sup> and whether the recognition, in numerous WTO rules, of “basic principles underlying this multilateral trading system” offers a source of WTO law that is sufficiently flexible for interpreting WTO rules in conformity with other multilateral obligations of WTO Members.<sup>57</sup> All these views recognize that many WTO rules explicitly refer to international treaties negotiated outside the WTO, and that the requirement to clarify WTO rules ‘in accordance with customary rules of interpretation of public international law’ (Article 3 of the DSU) implicitly calls for taking into account ‘any relevant rules of international law applicable in the relations between the parties’ (cf. Art. 31.3,c VCLT). The controversy is thus essentially over the correct interpretation of the definition – in the DSU – of the jurisdiction of WTO dispute settlement panels, *i.e.* whether the DSU excludes direct application of non-WTO international law in WTO dispute settlement proceedings; or whether the DSU implicitly authorizes application of general principles of law and of non-WTO international law not only for interpreting WTO rules but also as directly applicable law (e.g. for ‘filling gaps’ in WTO law or justifying departures from WTO rules in the unlikely case of a conflict with international *ius cogens*). Arguably, (1) the large number of ‘public interest clauses’ in WTO law (e.g. in Article 7 TRIPS Agreement on ‘objectives’, Article 8 TRIPS on ‘principles’) and of WTO ‘exceptions’ (e.g. in GATT Article XX, GATS Article XIV, Article 30 TRIPS); (2) the broad mandate of panels, e.g. to ‘make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)’ (Article 7 DSU); (3) a broad reading of the customary international law rules of treaty interpretation (e.g. Article 31.3 VCLT) and on the admissibility of *inter se* agreements; and (4) the judicial clarification of “the principles underlying this multilateral trading system” (Preamble WTO Agreement) for a principle-oriented interpretation and ‘balancing’ of WTO rights and obligations offer enough flexibility for WTO dispute settlement bodies to interpret WTO rules in conformity with the human rights obligations of the WTO Members concerned.

51. Human rights law and WTO jurisprudence suggest that, in examining the potential impact of human rights on the interpretation of WTO rules, the following three different kinds of trade regulations should be distinguished and might require different ‘balancing principles’.

#### International Trade Sanctions/Preferences for the Promotion of Human Rights Abroad

52. In past GATT and WTO dispute settlement proceedings over international trade sanctions, the respondent countries often refrained from requesting establishment of a GATT panel (e.g. in the case of trade sanctions against Argentina and Cuba). In the few cases where a GATT working party (e.g. in case of US trade sanctions against Czechoslovakia) or a GATT panel (e.g. in case of trade sanctions against Nicaragua and South Africa) examined the trade embargoes, human rights arguments were neither raised nor addressed in the dispute settlement findings. If a WTO dispute settlement body has to examine the influence of human rights law on the interpretation of WTO rules in international relations among WTO Members, it has to respect their ‘sovereign equality’ (e.g. as regards ratification of international human rights conventions) and the ‘margin of appreciation’ of each WTO Member in designing its domestic human rights legislation and prioritizing scarce resources for the realization of human rights and social needs. The respective scope of freedom of WTO Members might have been limited by international rules or UN resolutions ‘that sanctions and negative conditionalities which directly or indirectly affect trade are not appropriate ways of promoting the integration of human rights

<sup>54</sup> See J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Rules Relate to Other Rules of International Law*, 2003), e.g. at 244-72.

<sup>55</sup> This is the view of e.g. Pauwelyn (note 54), e.g. at 459-61.

<sup>56</sup> This is the view of e.g. J. Trachtman, ‘The Domain of WTO Dispute Resolution’ (1999) 40 Harv Int’l L J 333, at 342; see also Trachtman’s critical review of the above-mentioned book by Pauwelyn in (2004) 98 AJIL 855.

<sup>57</sup> This is the view of E.U.Petersmann, Future Challenges for the WTO Dispute Settlement System, in : Y.Taniguchi *et alii* (eds), *The WTO at Ten : Dispute Settlement, Multilateral Negotiations, Regional Integration*, 2006.

in international economic policy and practice.<sup>58</sup> As Article XXI GATT explicitly provides that ‘nothing in this Agreement shall be construed ... (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security’, UN Security Council resolutions prescribing economic sanctions may justify departures from WTO rules (cf. Article 103 UN Charter) and limit individual rights.<sup>59</sup> The legal relevance of other UN resolutions on the interpretation of WTO rules remains to be examined case-by-case.<sup>60</sup> Other questions to be clarified relate to the WTO-consistency of trade restrictions in response to alleged violations of human rights in international relations among WTO Members which have explicitly committed themselves to respect for human rights in their reciprocal trade relations (e.g. in the human rights clauses included in the Cotonou Agreement and in other trade agreements between the EC and less-developed WTO Members). Multilateral agreements on the collective promotion of human health (e.g. through the Framework Convention on Tobacco Control adopted by the World Health Organization in 2003) and of other human rights values (e.g. the 2003 Kimberley Process Certification Scheme) may likewise support recourse to human rights arguments as relevant context for interpreting WTO rules (such as GATT Article XX(b) on protection of human health).

53. In response to India’s challenge of the discriminatory effects of certain preferences granted under the EC’s GSP, the WTO Appellate Body clarified, *inter alia*, that the existence of a ‘development, financial (or) trade must be assessed according to an objective standard’, and ‘the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences’, without imposing ‘unjustifiable burdens on other Members’.<sup>61</sup> The EC’s new GSP system of June 2005 aims at promoting ‘sustainable development’ by differentiating tariff preferences depending on whether LDCs have ratified and effectively implemented major UN human rights conventions, ILO conventions, UN environmental convention, UN conventions on drugs and the UN Convention against corruption.<sup>62</sup> This use of UN human rights law as ‘objective standard’ for differentiating trade preferences for less-developed countries may also influence the interpretation of the WTO-consistency of future RTAs and may entail future WTO disputes on whether preference-granting WTO Members have correctly interpreted and applied UN human rights standards as justifying trade discrimination among less-developed countries.

#### International Trade Restrictions Protecting Human Rights *Inside* the Domestic Jurisdiction

54. The WTO disputes over the EC’s import restrictions on hormone-fed beef,<sup>63</sup> asbestos<sup>64</sup> and the US restrictions on gambling services<sup>65</sup> illustrate that WTO rules grant importing countries broad regulatory discretion regarding restrictions of imported goods with proven and potential health risks. As UN human rights conventions prescribe minimum standards that do not prevent WTO Members from accepting higher human rights standards in regional human rights conventions as well as in national human rights laws, the WTO-consistency of import restrictions designed to protect the human rights of domestic citizens (e.g. health protection measures pursuant to Article XX(b) GATT or Articles 30-31 TRIPS) may be legitimately influenced by arguments based on *regional* and national human rights rather than UN human rights law. Many human rights arguments in trade disputes before the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) could be similarly raised in WTO dispute settlement proceedings.<sup>66</sup> In the *Omega case*, for instance, the ECJ held that a national restriction on the importation of foreign services was legally justified on the ground that it was necessary for protecting public policy by prohibiting a commercial activity affronting human dignity

<sup>58</sup> Resolution 1999/30 of 26 August 1999 on ‘Trade Liberalization and its Impact on Human Rights’, adopted by the Sub-Commission (of the UN Commission on Human Rights) on Promotion and Protection of Human Rights.

<sup>59</sup> See the recent judgments of 21 September 2005 by the EC’s Court of First Instance in *Yusuf v Council and Commission* (Case T-306/2001) and *Kadi v Council and Commission* (T-315/2001) concerning UN Security Council resolution branding individuals as terrorists and seizing their bank accounts.

<sup>60</sup> Myanmar, a WTO Member, refrained from invoking WTO dispute settlement procedures against the trade sanctions imposed by various WTO Members (e.g. under the Burmese Freedom and Democracy Act 2003 adopted by the US Congress).

<sup>61</sup> WT/DS246/AB/R, paras. 161-67.

<sup>62</sup> See above at n 11.

<sup>63</sup> WT/DS48/AB/R adopted 13 February 1998.

<sup>64</sup> WT/DS135/AB/R adopted 5 April 2001.

<sup>65</sup> WT/DS204/R, *Mexico – Telecoms*, adopted 1 June 2004.

<sup>66</sup> For a discussion of relevant ECJ and ECtHR jurisprudence see note 50 above.

(laser games simulating acts of homicide).<sup>67</sup> If the same import restrictions on the supply of international services (laser games simulating acts of homicide) had been challenged in the WTO by a third country, the importing country (Germany) and the EC could have invoked the same national and EC human rights guarantees in support of the legal justification of the import restrictions as being ‘necessary to protect public morals’ or ‘to maintain public order’ in terms of GATS Article XIV(a). As these WTO concepts recognize that ‘public morality’ and ‘public order’ may legitimately vary from one community to the other,<sup>68</sup> WTO dispute settlement bodies would have to respect the legitimate ‘margin of appreciation’ of the national authorities concerned to define ‘public morality’ and ‘public order’ in conformity with national and regional constitutional law.

#### Human-Rights-Related *Non-Discriminatory* International Trade Regulation

55. The proposals for further harmonization of (non-discriminatory) domestic laws in the context of the WTO – for instance, by elaborating WTO rules on intellectual property rights, technical and health regulations, trade facilitation, competition and environmental rules, investments and public services – may raise different human rights concerns. For example, future WTO rules on private rights (such as the private ‘rights to trade’ protected in the 2001 WTO Protocol on the accession of China), anti-competitive private practices, private access to financial assistance in the context of trade-facilitation, limitations on private intellectual property rights, and the administration of a WTO Register for private geographical indications may give rise to legal challenges whether such WTO rules are themselves consistent with human rights law. The ECJ balances economic freedoms with other ‘fundamental rights’ case-by-case without explicit recognition of human rights as hierarchically superior to ‘fundamental economic rights’. Yet, the ECJ has noted that – in interpreting fundamental rights – the EC judiciary ‘must take into account’ the case law of the European Court of Human Rights.<sup>69</sup> However, in ECJ proceedings, the burden of proving the ‘necessity’ and ‘proportionality’ of restrictions of the EC’s market freedoms may fall on the government invoking the need to protect fundamental rights whether the restrictions are discriminatory or not. The ECtHR, by contrast, imposes a higher burden of proof on those who claim that economic freedoms should prevail over fundamental political rights; the Court tends to apply a ‘strict interpretation’ to the scope of exception clauses in the ECHR, but recognizes a ‘margin of appreciation’ of national authorities regarding the ‘necessity’ of non-discriminatory, domestic restrictions (e.g. economic regulation) balancing different human rights values.<sup>70</sup> In worldwide jurisdictions, views on the proper balancing of economic and non-economic ‘fundamental freedoms’ may differ considerably. These different views may be relevant in WTO dispute settlement proceedings, for instance if WTO dispute settlement bodies were asked to interpret national and WTO competition and intellectual property rules in conformity with the human rights obligations of WTO Members. As freedom of information and expression, including freedom of speech and of the press, are of constitutional importance for the proper functioning of *economic* markets no less than of *political* markets (i.e. democracy), the European jurisprudence and ‘balancing principles’ on reconciling economic and non-economic ‘fundamental freedoms’ may inspire future WTO jurisprudence. Even though the WTO Agreement is drafted in terms of rights and obligations of WTO Members, numerous WTO rules recognize obligations to protect the private rights of market participants, such as private ‘rights to trade’, procedural rights, property rights and judicial remedies.

#### **VII. Future Work Program**

56. The ITLC has evolved into one of the largest ILA committees because, as illustrated by the so far seven reports of the ITLC, regional and worldwide trade law and jurisprudence have evolved into the most “legalized” area of international relations. The WTO dispute settlement system and the

<sup>67</sup> Cf. Case C-36/2002, Judgment of 14 October 2004, in (2005) CMLR 91. The respondent referred to the constitutional protection of human dignity as a human right in Article 1 of the German Basic Law as well as in Article 1 of the EU Charter of Fundamental Rights. UN human rights conventions, by contrast, recognize respect for human dignity only as a legal principle and source of inalienable human rights, but not as a human right in itself.

<sup>68</sup> See e.g. the footnote to GATS Article XIV(a) which states: ‘The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.’

<sup>69</sup> For a discussion of these cases see: A. Rosas, *The Legal Sources of EU Fundamental Rights: A Systemic Overview*, in N. Colneric et al (eds), *Une Communauté de Droit. Festschrift für G. C. R. Iglesias*, 2003.

<sup>70</sup> On these two principles, and their inherent tensions, in the jurisprudence of the European Court of Human Rights see e.g. D. Gomien, D. Harris and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, 211-19.

contribution of its ever more comprehensive jurisprudence to the rule of international law remain unique in international relations. The envisaged conclusion of the DDR negotiations in spring 2007, the implementation of future Doha Round Agreements, and the complex interrelationships between worldwide, regional, bilateral and national trade rules and policies and other fields of international law raise enormous challenges for international lawyers and practitioners, as illustrated by this report on the constitutional and human rights dimensions of international trade law. Ever more countries, including developing countries like China and India, introduce new university programs, specialized institutions and research programs on international trade law and policies. The ITLC is conscious of the ILA tradition of limiting the existence of most ILA committees to a limited number of years (subject to notable exceptions like the ILA's longstanding International Monetary Law Committee). Yet, concluding and terminating the work of the ITLC would seem to run counter to the increasing worldwide academic and practical interest in the ever more dynamic evolution of international trade law and its ever greater importance for the rule of international law and economic welfare.

57. The ITLC is also conscious of the fact that many areas of international trade law, including the tentative proposals in this Report for some of the constitutional and human rights dimensions of international trade law, remain academically and politically controversial and in need of much more public discussion and scrutiny. The 6<sup>th</sup> Report of the ITLC, as revised and approved in 2004 at Berlin, had 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.”<sup>71</sup> Even though a proposal for such an ILA Declaration was discussed during the ITLC meeting as well as the British Branch ILA meeting in 2005, the ITLC has not yet received comments from other ILA committees (notably the Committee on International Human Rights Law & Practice). The constitutional and human rights dimensions of international trade law are among the most controversial areas of international law and foreign policies which appear to require much more discussion inside and outside the ILA before consensus on the proposed ILA Declaration would seem to be possible. The ITLC therefore proposes to continue its work on all the five major subjects discussed in this Report (DDR negotiations, trade-related intellectual property rights, WTO dispute settlement system, multilevel trade governance, constitutional and human rights dimensions of international trade law) and, depending on the views of ILA and ITLC members, also on additional subjects of international trade law discussed in previous ITLC reports (e.g. trade-related environmental, competition and investment rules and policies) or analyzed in the trade-related research of ITLC members and other Committees (e.g. the impact of biotechnology on international trade law).

## Annex A

### **The 72nd Conference of the International Law Association, held in Toronto, Canada, 4-8 June 2006:**

**TAKING NOTE** of the Report of the Committee on International Trade Law approved at the Committee's June 5, 2006 plenary session at the Toronto 2006 Biennial Meeting, and particularly paragraphs 13 and 18 of that Report;

**RECALLING** that the Report addresses the use by some governments of bilateral and regional trade negotiating forums to limit or eliminate flexibilities in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) that are recognized in the WTO Doha Declaration on the TRIPS Agreement and Public Health of November 14, 2001 to support the protection of public health and promotion of access to medicines for all;

**OBSERVING** that the 2005 Report by the Consultative Board to the Director-General of the WTO (the “Sutherland Report”) expressed serious concern over the pursuit by some WTO Member countries of commitments in regional and bilateral agreements that could not be secured through multilateral negotiations;

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<sup>71</sup> Report of the 70th ILA Conference, 2004, at 554 f.

**RECOGNIZING** that limitation or elimination of TRIPS flexibilities that facilitate the introduction of medicines onto national markets may have adverse consequences for less affluent parts of the population and that governments should exercise caution in adopting trade-related measures that may disproportionately affect more vulnerable individuals;

**RECOGNIZING** that all countries and peoples are susceptible to disease burdens, including but not limited to epidemic disease burdens, that may require facilitated access to medicines, and that the limitation or elimination of TRIPS flexibilities supporting access to medicines may affect all countries and peoples;

Upon the recommendation of the Committee on International Trade Law, as provided for in paragraphs 13 and 18 of its 2006 Report:

The International Law Association hereby resolves that:

Governments are urged to refrain from using bilateral and regional trade negotiations and agreements to limit or eliminate flexibilities in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 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.