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The Contribution of the ILA Committee on International Trade Law

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The Committee on International Trade Law (ITLC) was established by the International Law Association in 1992 and prepared its first report for the Buenos Aires Conference in 1994. The ITLC finally concluded its work in 2014 in conjunction with the Washington Conference.

In its early years, the ITLC was chaired by Professor Thomas Opperman of the University of Tübingen, Germany, and the Committee owed much of its long-term success to Professor Opperman's deft early chairmanship. Professor Ernst Ulrich Petersmann and I were the initial rapporteurs. Professor Opperman retired as chair following the Taipei Conference in 1998 and was succeeded in that role by Professor Petersmann. I was joined in the role of rapporteur by Dr Sharif Bhuiyan, Professor Thomas Cottier and Professor Petros Mavroidis between 2008 and 2010.

The working procedure of the ITLC is notable. On the 'off years' between the ILA biennials a meeting would be organised in Geneva, typically taking place at the headquarters of the World Trade Organization (WTO), and partly at the World Intellectual Property Organization. At these meetings the plan for the next Committee report would be agreed. In addition to discussions among Committee members, the ITLC would have the benefit of meeting with and hearing from members of the international organisation secretariats.

I. WTO DISPUTE SETTLEMENT

The International Trade Law Committee counted among its members several present and former members of the WTO Appellate Body, members who had served on GATT (General Agreement on Tariffs and Trade) and/or WTO

dispute settlement panels, and members of the WTO Secretariat involved in administering the dispute settlement mechanism. In addition, academic members of the Committee had played important roles in promoting improvement of the WTO dispute settlement system, helping it toward a rule of law orientation (as contrasted with a more diplomatic orientation).

A good deal of discussion at ITLC meetings concerned developments in WTO jurisprudence. Debates addressed the place of WTO rules and decisions in the domestic law of WTO members, the extent to which members have an obligation to implement decisions (or alternatively elect to suffer withdrawal of concessions), the role of 'external' treaties and customary rules within the WTO legal system, the specific role of human rights rules in the context of WTO jurisprudence, the extent to which the filing of *amicus briefs* should be permitted, whether the WTO dispute settlement proceedings should be open to public view, how certain procedural conflicts within the WTO dispute settlement procedures could be reconciled, and other important questions.

Over the course of the ITLC's work program, a good number of the issues debated by the Committee members were advanced or resolved within the WTO framework. So, for example, *amicus brief* filing came to be an accepted part of the WTO dispute settlement, and Appellate Body hearings were open to the public with the consent of the disputing parties.

From the outset of the work of the Appellate Body, the WTO dispute settlement jurisprudence moved away from the 'self-contained system' orientation of the former GATT dispute settlement system, taking into account instruments and developments outside the narrow confines of trade law. The trend reflected a perspective favoured by ITLC members.

Contemporaneously with the work program of the ITLC, Professor Petersmann, along with Professor Federico Ortino, organised an important publication analysing the jurisprudence of the WTO dispute settlement system from the inception of the WTO (and the creation of the new Appellate Body), in 1995, to 2003.[1] There was a substantial overlap between members on the ITLC, members of the WTO Secretariat that participated in the ITLC meetings in Geneva, and contributors to this volume. It might thus be viewed as an ancillary work product of the Committee.

The publishers overview of this publication observed:

> Essays concerned with rules emphasise proposed improvements and clarifications in such areas as special and differential treatment of less developed countries,

1 Federico Ortino and Ernst Ulrich Petersmann (eds), *The WTO Dispute Settlement System 1995-2003* (Alphen upon Rhine, Kluwer Law International, 2004). This was not the first book edited by Prof. Petersmann that addressed the new WTO dispute settlement system. An earlier volume is Ernst Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (Alphen upon Rhine, Kluwer Law International, 1997).

surveillance of implementation, compensation, and suspension of concessions. Other contributions discuss such jurisprudential and practical issues as discrimination, trade-related environmental measures, subsidies and countervailing measures, and trade-related intellectual property rights. The authors frequently refer to the panel, Appellate Body and arbitration reports, a chronological list of which appears as an annex. The contributors include WTO arbitrators, members of the WTO Appellate Body, WTO panelists, and academics from a broad spectrum of countries engaged as legal advisers by the WTO, by governments, or by non-governmental organisations.

Upon joining the Committee as a rapporteur, Professor Petros Mavroidis prepared for the biennial reports of the Committee a summary of developments and trends in WTO dispute settlement. For those with interest in the evolution of WTO jurisprudence, these reports of the Committee represent a valuable resource as a chronicle of the development of that jurisprudence.

II. THE RULE OF LAW

Members of the ITLC were active as policy advisors when the WTO was formed out of the previous GATT institution. One of the driving forces during the Uruguay Round negotiations (1986-1993) was a concern among many countries that governance of the international trading system was largely 'power-based', with the stronger economic powers making and imposing rules on the less economically powerful states. A core idea motivating agreement on the new WTO was transformation to a more rule-based system in which members would be treated, if not equally, then at least 'more equally'.

In its biennial Geneva meetings and in its reports and resolutions, the Committee paid close attention to implementation of the rule of law system of the new WTO and how it might be strengthened. The Committee's resolution entitled 'Declaration on the Rule of Law in International Trade', adopted by the full ILA at the 2000 London Conference, and the concluding Resolution of the Committee, adopted by the full ILA at the 2014 Washington Conference stress the importance of the rule of law:

> RECALLING that the WTO Agreement and its dispute settlement rules aim at providing security and predictability to the multilateral trading system through guarantees of 'access to justice' both at the international level as well as within domestic legal systems, and require each WTO Member to 'ensure the conformity of its laws, regulations and administrative procedures' with WTO law (Article XVI:4 WTO Agreement);
>
> RECOMMENDS that domestic and international dispute settlement bodies in trade law duly respect the 'consistent interpretation' and 'judicial comity'

requirements of national and international legal systems in order to promote the transnational rule of law for the benefit of citizens.[2]

In 2021, we are hard-pressed to claim success in achieving a rule-based international trading system. The past several years have witnessed a deterioration of the rule-based system, with at least temporary suspension of the WTO Appellate Body and its work, and perhaps more important with the resumption of power-based trade diplomacy, for which many illustrative examples are possible.

Could a strong and continuing Committee have exercised the type of influence necessary to counter the forces of atrophy? On one hand, such a proposition might be dismissed as a delusion of grandeur. A small group of influential trade experts could hardly be guiding the trend of decisions of powerful governments around the globe. And yet, during the functioning years of the Committee and its meetings in Geneva, one could have the sense that there was a 'centre' of ideas that developed by consensus and that did exert an external influence. Could the Committee as such have made a difference in the more recent unfolding of world events? At the margins?

III. TRADE, INTELLECTUAL PROPERTY AND PUBLIC HEALTH

Early on in its work program, the ITLC undertook to study issues surrounding the relationship between the 'exhaustion' of intellectual property rights and international trade. From an international trade standpoint, the exhaustion issue addresses whether 'parallel imports' of products protected by intellectual property (IP) rights are permitted without the consent of the IP owner after the goods have been placed on a market outside the importing country with the consent of the IP owner. If IP rights are exhausted by a first sale outside the importing country, the result is referred to as 'international exhaustion' of the international property rights. The alternative in which IP rights are not exhausted by a first sale outside the importing country is referred to as 'national exhaustion.' This seemingly arcane legal question has the potential for a very significant impact on trade. If IP owners are able to prevent the importation of products placed on the market outside a particular country, this allows them to establish disparate pricing arrangements, typically charging higher prices where disposable incomes are higher or where prices are not subject to government control. On the other hand, if IP owners are unable to prevent the importation of products placed on the market outside a particular country, they are constrained in their pricing policy at the level at which arbitrageurs can no longer profit from the

2 'International Trade Law', 76 *International Law Association Reports of Conferences* (2014) 602, at 633.

export/import trade. Very early in the integration of the common market, the European Court of Justice recognised the importance of preventing IP owners from re-partitioning the region by invoking member state-based IP rights and thus created a doctrine of regional exhaustion.

The question of exhaustion become a critical disputed subject matter of international trade and intellectual property law in the late 1990s. After the end of the apartheid era in South Africa, the newly constituted government of Nelson Mandela adopted legislation relating to medicines intended to bring about greater equality of access. That legislation, the Medicines and Related Substances Control Amendments Act 1997, included a provision authorising the Minister of Health to allow parallel importation of patented medicines. The idea was that South African pharmaceutical procurement authorities could look at the world market for particular drugs, purchase them at the lowest available price, and import them as a means to reduce high prices. For reasons that were obscure then, and remain obscure even today, the originator pharmaceutical industry decided that parallel imports to South Africa should be blocked, and that this should be accomplished by encouraging the US and EU governments to assert that parallel importation was contrary to the 1995 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). This was not the only objection of the industry to South Africa's 1997 Medicines Act legislation, but it was the one that the industry decided should be attacked as contrary to WTO law.

The US and EU trade ministries threatened trade sanctions against the South African government for alleged violation of the TRIPS Agreement. These threats coincided with a sharp intensification of the HIV-AIDS epidemic in South Africa. Non-governmental organisations (NGOs), such as Médecins Sans Frontières (MSF), seized on the US, EU and industry threats as a direct attack on the ability of South Africa and other developing countries to secure low-priced AIDS medicines.

It was about this same time – November 1998 – that the Committee on International Trade Law convened a conference in Geneva on the subject of international exhaustion and parallel importation. Pharmaceutical industry representatives, members of the WTO TRIPS Secretariat, judges, and leading trade and IP scholars attended. In preparation for that conference, the rapporteur prepared and circulated a discussion paper. This paper was subsequently finalised and published in 1998 in the *Journal of International Economic Law* as the 'First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation'.

Events in South Africa were discussed at the November 1998 Conference. The position of the pharmaceutical industry regarding the TRIPS-legality of South Africa's Medicines Act legislation was puzzling. Individuals that had been directly

involved in the TRIPS negotiations, including the head of the TRIPS Secretariat, explained that the result of those negotiations was commonly understood and that the TRIPS Agreement did not address the subject of parallel imports, leaving each WTO Member to adopt its own exhaustion doctrine, whether national, regional or international. This was a well understood negotiating outcome. When directly asked how the pharmaceutical industry came to the position that South Africa's parallel imports legislation was inconsistent with the TRIPS Agreement, the then director general of the International Federation of Pharmaceutical and Manufacturers Associations (IFPMA) replied to the effect that this was a political question beyond explanation to the conference attendees.

In its First Report on the Subject of Parallel Importation,[3] the rapporteur of the ITLC made clear that from the standpoint of the members of the Committee it was accepted that the WTO TRIPS Agreement allowed each member to adopt its own position on the subject of exhaustion. While there was a difference of opinion among some members as to what the optimal doctrine of exhaustion should be, there was no disagreement as to what the TRIPS Agreement said, and the resolution on the subject adopted by the full ILA at the London Conference in 2000 – preceded by circulation and discussion among the Committee of the Second Report on the Subject of the Exhaustion of Intellectual Property Rights and Parallel Importation[4] – made this point. Moreover, the resolution expressly discouraged governments from making threats based on the parallel imports policies adopted by other WTO members.

In 2001, the pharmaceutical originators continued to pursue their TRIPS Agreement claims against Nelson Mandela *et al.* in the civil litigation in the High Court of Pretoria, South Africa. The director general of the World Health Organization requested this rapporteur, Professor Abbott, to travel to South Africa and assist the government in its defence at trial.

The ITLC's previous work on exhaustion of rights and parallel importation proved to be useful. The 1998 Geneva conference provided a record of the views of leading experts, including from the WTO Secretariat, that South Africa was within its rights under the TRIPS Agreement to authorise parallel imports of patented medicines. Substantial assurance could be provided to the South African government in resisting industry claims. The government was

3 Frederick M. Abbott, 'First Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of Parallel Importation', 1/4 *Journal of International Economic Law* (1998) 607, available at: https://ssrn.com/abstract=915046 (accessed 13 September 2021).

4 Frederick M. Abbott, 'Second Report (Final) to the Committee on International Trade Law of the International Law Association on the Subject of the Exhaustion of Intellectual Property Rights and Parallel Importation', prepared in connection with the 69th Conference of the International Law Association, July 2000 (London), available at: https://ssrn.com/abstract=1921856 (accessed 13 September 2021).

on solid footing. In addition, the litigation briefs submitted by the government team referred to the position of the ILA in support of its interpretative position.

Ultimately, under pressure of worldwide opinion, the pharmaceutical originators backed down and withdrew the litigation they had initiated, agreeing to pay the legal fees of the South African government. Among the pivotal culminating moments was a meeting at which the government explained to the leader of the industry negotiators that his lawyers were simply wrong, and that for this reason the government would not compromise its position to settle the case.

The events in South Africa were a precursor to demands from developing countries to insist on a greater recognition of their flexibilities to address health issues under the TRIPS Agreement. There were a number of stakeholders and groups that played important roles in giving greater priority to public health interests in WTO law. No single actor motivated this transition. It is, however, fair to say that the foundational work of the ITLC on the issue of the exhaustion of intellectual property rights and parallel importation played an important role in the pivotal judicial proceeding in South Africa, and the ILA can be proud of its accomplishment in this arena. Ultimately, in December 2001 was adopted the Doha Declaration on the TRIPS Agreement and Public Health, recognising flexibilities, including expressly the right of each WTO member to adopt its own rules on parallel importation.

IV. TRADE AND HUMAN RIGHTS

Professor Ernst-Ulrich Petersmann, chair of the ITLC, emphasised the importance of integrating human rights interests within the legal framework of the WTO. Reports of the ITLC reflect a deep interest in this subject matter. The ILA Resolution 5/2008, adopted in Rio de Janeiro, provides in relevant part:

> RECALLING that by virtue of the UN Charter and human rights conventions and under customary international law and general principles of international law, states have human rights obligations;
>
> CONSIDERING that it is likely that WTO dispute settlement bodies will be confronted – as has happened in national and regional economic courts and arbitral tribunals – with human rights arguments in support of interpreting trade and economic rules in conformity with the human rights obligations of the countries concerned, or with related requests for 'judicial comity' or 'judicial deference';
>
> DECLARES: WTO members and bodies are legally required to interpret and apply WTO rules in conformity with the human rights obligations of WTO members under international law.[5]

5 'Resolution 5/2008 – International Trade Law', 73 *International Law Association Reports of Conferences* (2008) 55.

As with other work of this committee, its members contemporaneously were involved in projects that included significant overlap with the work program of the Committee. With respect to the interface between trade and human rights, considerable research was done alongside a project under the auspices of the American Society of International Law.[6]

V. TRADE AND COMPETITION

The interrelationship of trade law and competition law is a subject matter addressed as early as the agreement on the Charter of the International Trade Organization (ITO), which preceded the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. With the failure of ratification of the ITO Charter, the incorporated rules on competition were lost.

By the time of the WTO Singapore Ministerial Conference in 1996, there was sufficient interest among WTO members to create a working party to discuss possible new rules on competition for the organisation. Prior to the London Conference in 2000, Professor Mitsuo Matsushita put forward a proposal to the Committee members for 'the adoption of a Plurilateral Agreement on Competition and Trade that would (1) contain rules regarding transparency, objectivity and due process of law, (2) apply the principles of most-favoured nation and national treatment in Member enforcement processes, and (3) at its initial stage, incorporate rules which deal with matters which directly affect trade between WTO Members (such as international cartels and export/import cartels). At a subsequent stage, WTO Members might consider further rules regarding conduct traditionally regulated domestically, such as mergers and acquisitions, taking into account the effects of such activities on the objectives of the WTO system.'[7]

There was considerable interest among Committee members in the subject of the relationship between trade and competition rules, as the number of publications by these members addressing the topic attests. It may be recalled that the European Union was a strong advocate of incorporating a set of competition rules into the WTO legal system, but that this initiative faced resistance from other high-income countries, including the United States, as well as from developing countries that had concerns about preserving their policy space in favour of national champions.

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6 Frederick M. Abbott, Christine Breining-Kaufmann and Thomas Cottier (eds), *International trade and human rights: foundations and conceptual issues* (Ann Arbor, Michigan, University of Michigan Press, 2006); Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford, Oxford University Press, 2005).

7 'Committee on International Trade Law', 69 *International Law Association Reports of Conferences* (2000) 172, at 181.

Committee members ultimately agreed on recommending the adoption of a multilateral agreement on competition policy that at the initial stage would have a scope limited to rules dealing with international cartels and import/export cartels that directly affect trade among WTO members, as well as disciplines regarding judicial assistance and enforcement cooperation. An additional subject matter was flagged for potential future consideration. Furthermore, the Committee suggested the formulation of additional rules giving guidance to members on the implementation of Article 40 of the TRIPS Agreement on restrictive business practices involved in licensing of technology. It also proposed to consider whether some principles of competition policy might be incorporated into agreements regarding trade remedies such as the Antidumping Agreement and the Subsidies and Countervailing Measures Agreement. Finally, the idea was advanced that the WTO should consider establishing a permanent group of experts on competition and trade which could advise WTO bodies on matters relating to competition policy, including dispute settlement.

The ILA adopted a resolution on Declaration on Competition Policy[8] supporting the recommendations of the Committee at the London Conference.

Ultimately, the initiative launched at the Singapore Round did not succeed in formal adoption of new rules on trade and competition at the WTO, and WTO work on trade and competition remains mainly a subject of study at the Secretariat level. In the meantime, a substantial number of regional and plurilateral trade agreements that have entered over the last decade incorporate chapters on competition. These chapters tend to focus on assurances of due process and cooperation among competition authorities, as well as national treatment, with limited efforts to establish competition rules regulating conduct. There are perhaps good reasons why governments remain somewhat wary of incorporating competition rules in trade agreements. This may bring competition authorities under the same types of pressure which are exerted when countries differ over trade policy, and this could pose a threat to the independence of these authorities as they pursue competition enforcement.

Although it is not easy to draw a direct correlation between the work of the ITLC on trade and competition and the evolution of international law in this area, members of the Committee played, and continue to play, an active role in the international dialogue.

The appropriate interface between trade and competition law remains a subject of considerable debate.

8 'Resolutions Proposed by International Committees', 69 *International Law Association Reports of Conferences* (2000) 13, at 21.

VI. TRADE AND THE ENVIRONMENT

The ITLC expressed interest in the relationship of trade law and environmental measures as early as its first formal report in 1994, which included a detailed listing of the provisions of the new WTO agreements that addressed environmental concerns, as well as reference to the potential implications of the newly adopted Convention on Biodiversity (1992) for technology transfer and intellectual property rights.

The ITLC followed closely the evolution of WTO dispute settlement decisions regarding the relationship between trade and environmental measures, a subject matter which occupied a substantial part of the early jurisprudence of the WTO Appellate Body. This included the first Appellate Body decision that involved import restrictions on gasoline imposed by the United States to reduce harmful refinery emissions, the *Gasoline Additives* case, as well as the *Shrimp-Turtle* case, involving US restrictions adopted to protect an endangered species. The decision of the Appellate Body in the *Shrimp-Turtle* case famously brought an end to the jurisprudential view of the GATT-WTO as an internally 'self-contained' system, with the Appellate Body referring to a panoply of international instruments relating to conservation of protected species and the environment, including the Rio Declaration (1992), as relevant to its decision that protection of an endangered species involved conservation of exhaustible natural resources within the meaning of Article XX, § g of the GATT. In the same decision, the Appellate Body adopted a doctrine of 'evolutionary interpretation' of WTO law, in this specific case acknowledging a substantial change in circumstances regarding treatment of the natural environment since the GATT was founded in 1947.

A range of decisions by the WTO Appellate Body and Dispute Settlement Body (DSB) relating to trade and environmental norms were rendered over the course of the work of the ITLC. These were discussed and reported on by the Committee in its biennial reports. As the international community increasingly confronts environmental problems associated with carbon emissions and global warming, it is likewise apparent that more work needs to be done to adequately integrate environmental norms and requirements into international trade rules. Issues such as whether WTO members may establish preferences in favour of local industries to promote the development of sustainable energy sources while addressing employment and domestic economic concerns loom large. Similarly, recent trends toward the adoption of trade protective measures to offset the negative carbon footprint of a specific WTO Member are likely to trigger new trade disputes that will be brought to the WTO for attempted resolution.

The ITLC and its members played a role in the evolution of jurisprudence relating to the interface of trade and environmental rules. Measures to address

climate change on a global basis have not so far been adequate, and urgent action is today required. Such urgent action may require a deep rethinking of the relationship between trade rules and environmental concerns. Such rethinking is left to a new generation of ILA committees addressing this area.