PROF. ERNST-ULLRICH PETERSMANN AND THE WORK OF THE ILA COMMITTEE ON INTERNATIONAL TRADE LAW (1993–2012)

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The Committee on International Trade Law of the International Law Association held its first meeting at the headquarters of the GATT on June 25, 1993.[1] This was shortly before conclusion of the GATT Uruguay Round of trade negotiations and the resulting establishment of the World Trade Organization (WTO). The first Chair of the Trade Law Committee was Prof. Thomas Opperman of the University of Tübingen. Professor Petersmann and I were appointed Co-Rapporteurs of the Committee. The approximately 30 Committee members at that initial meeting represented the highest level of expertise in the field of international trade and related disciplines, including experts (just to name a few) such as Profs. John Jackson, Jacques Bourgeois and William Cornish, and individuals who went on to become members of the WTO Appellate Body (Profs. Mitsuo Matsushita and Giorgio Sacerdoti). Professor Petersmann took over as Chair of the Committee at the ILA Bienniel Conference in London in 2000.[2] His energy and enthusiasm for the work of the Committee has elevated it to the largest of the ILA committees. Today there are more than 50 members, many remaining from the initial meeting in 1993.

The Committee meets every second year at the ILA Biennial. On the "off years", it also meets in the summer, usually in Geneva. It is customary practice for the Committee to spend at least one half day at the WTO, and the remainder at WIPO or another institution. Committee members hear updates from officials working on trade, and trade-related, issues at the multilateral organizations and have the opportunity to discuss these. The Committee and its work program are under the direction of the Committee Chair, though the interests of the individual members naturally become part of that agenda and work program.

The Committee produces Reports for the ILA Biennial Conferences. It also proposes "resolutions" to the full ILA membership for adoption. So far, the Committee

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[1] *See* First Report of the Committee, Committee on International Trade Law, International Law Association (ILA), Buenos Aires Conference (1994), at para. 1 (hereinafter "1994 Report").

[2] *See* Forth Report of the Committee, Committee on International Trade Law, ILA, London Conference (2000), at cover (hereinafter "2000 Report").

has proposed five (5) substantive resolutions that have been adopted by the ILA membership:[3]

- Resolution No. 2/2000[4]
  - Declaration regarding the Exhaustion of Intellectual Property Rights and Parallel Trade
  - Declaration on Competition Policy
  - Declaration on the Rule of Law in International Trade
- Resolution No. 3/2006 Resolving that governments are urged to refrain from using bilateral and regional trade agreements to limit WTO TRIPS Agreement flexibilities that protect public health
- Resolution No. 5/2008 Resolution on interpretation of WTO rules in conformity with members' human rights obligations.

Three of these resolutions arose out of proposals and a work program initially put forward and championed by Prof. Petersmann.[5] Looking back over the progressive development of these proposals, Prof. Petersmann has been a strong advocate of negotiating more detailed rule-structures at the WTO level, and of seeing those rule-structures directly applied in the national/regional law of its members. Members of the Committee have supported the general subject matter direction of these proposals There has, however, been some push back against the level of specificity recommended by Prof. Petersmann, and particular resistance to the direct incorporation of such rules into national/regional legal systems.

From its inception, and as reflected in the First Committee Report of 1994, there has been strong interest among Committee members in the relationship between competition policy and trade rules.[6] Prof. Petersmann's contribution to the 1994 Report suggested a potentially far-reaching set of proposals to create greater coherence between trade and competition rules, including, for example, eventually transforming antidumping rules to broader competition rules. A paper on trade and competition policy was tabled to Committee members by Professors Bourgeois and Matsushita in 1995, with a follow-up discussion paper in 1997, suggesting to assure that WTO rules are not used to restrict import competition, thereby undermining the objectives of WTO law.[7] In 1996, a proposal to negotiate

[3] The Resolutions are printed in the Biennial Conference Reports of the ILA. An initial resolution of 1994 set forth the work program of the Committee, and was approved by the ILA.

[4] There is no formal boundary between a "resolution" and a "declaration" that forms a part of the resolution. The text could read "three (3) substantive resolutions, one with three parts".

[5] This Co-Rapporteur, Prof. Abbott, was largely responsible for developing and supervising the work behind the resolutions on parallel trade and public health. Prof. Petersmann has been very supportive of these efforts, but they will not be discussed in this contribution as it is directed to the work of Prof. Petersmann.

[6] *See* 1994 Report, at paras. 42–45.

[7] *See* Third Report of the Committee, Committee on International Trade Law, ILA, Taipei Conference (1998), at paras. 22–25 (hereinafter "1998 Report").

a WTO competition agreement emerged as one of the "Singapore issues",[8] mainly supported by the European Union, and was referred to a WTO working group. In connection with the 2000 Biennial, Prof. Matsushita presented a proposal regarding a limited plurilateral trade and competition agreement.[9]

Committee Members, while broadly supporting greater coherence of trade and competition rules, as well as the negotiation of some form of agreement, were not prepared to make recommendations as far-reaching as the initial proposals of Prof. Petersmann.[10] Ultimately, the Declaration on Competition Policy, proposed by the Committee and adopted by the ILA in 2000,[11] represented a compromise, encouraging WTO Members to introduce a multilateral agreement on competition policy, with rules regarding transparency and due process, MFN and national treatment. It recommended initially adopting rules regarding international cartels and analogous practices directly affecting trade between Members, with a longer-term view of introducing additional rules to promote coherence and cooperation among Members. The ultimate form of the Resolution is ambitious in the sense that it recommends a "multilateral agreement on competition policy", but it is not so ambitious in the context of detailed rule-making.

The Singapore issue and concept of negotiation of a multilateral trade and competition agreement does not form part of the Doha Round negotiating agenda. Despite a great deal of attention from the academic community, there has been a lack of enthusiasm among governments to pursue harmonized and/or multilateral competition rules. There are important reasons for this. Competition rules are central to the development and implementation of industrial policy, and governments want to retain flexibility in this area.[12] In this regard, Prof. Petersmann's ambitious proposals were bound to run into resistance at the multilateral level. Yet it is unarguable that the international economic system faces challenges in the competition arena that are difficult to address through a nation by nation approach. As technological integration increases, these difficulties are likely to be heightened. While it may not be so clear that the WTO is the right forum in which to tackle multilateral competition issues, it should not be surprising if the question of multilateral competition rules continues to surface, at least from the academic side.

The Resolution on the Rule of Law in International Trade (2000) touched on a perspective that has been central to Prof. Petersmann's work in this field: namely,

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[8] WTO Secretariat, *Investment, competition, procurement, simpler procedures*, available at www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (visited 1 May 2012).

[9] *See* 2000 Report, at para. 24.

[10] See 1998 Report, at paras. 22–29; id.

[11] ILA Resolution No. 2/2000, Declaration on Competition Policy.

[12] *See, e.g.,* F.M. Abbott, 'Are the Competition Rules in the WTO TRIPS Agreement Adequate?', 7 *Journal of International Economic Law* 2004, 687–703 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917108).

promoting the direct application of multilateral trade rules in national law.[13] As noted in the 2000 Report, there were proposals tabled by each Prof. Oppermann and Prof. Petersmann during the June 1999 meeting of Committee members that would have allowed private parties to assert, where appropriate, violations of WTO law before national and regional authorities and courts of WTO Members on the basis of violations confirmed by a final ruling given under the DSU (Oppermann), and; WTO Members should recognize rights of their citizens to invoke precise and unconditional WTO guarantees of freedom and non-discrimination before domestic courts (Petersmann).[14] These proposals were criticized by Prof. Jackson based on the inherent national discretion as to modes of implementation of international obligations and the often observed national distrust *vis-a-vis* international rules. Prof. Jackson's position was supported by other members of the Committee.[15] In the meantime, Professor Cottier presented an alternative proposal that would focus on transparency and consistent interpretation, leading to a draft recommendation that incorporated additional suggestions from Prof. Petersmann on democratic participation.[16] Ultimately, the Committee proposed and the ILA adopted the Declaration in support of transparency (including through the opening up of WTO dispute settlement to observers), consistent interpretation, as well as strengthening judicial remedies for citizens.[17]

In early years, I was quite supportive of the direct application of international trade agreements for largely the same reasons elaborated by Prof. Petersmann.[18] Practical experience with the asserted direct application of these rules has turned me into a sceptic.[19] The problem is fairly straightforward. Large multinational enterprises are able to employ vast resources to promote their interests in courts and administrative bodies. Enterprises in developing countries, and their governments, are far less capable of employing legal rules to promote and protect their own interests. As a consequence, large multinational enterprises are able to invoke multilateral rules – as they interpret them – to challenge governments and private enterprises in developing countries, and the courts in these countries are often less than conversant with the asserted multilateral rules. The result is an uneven playing field, and sometimes very problematic roadblocks to the development

[13] *See generally* M. Hilf, E.-U. Petersmann (eds.), *The New GATT Round of Multilateral Trade Negotiations* (Deventer, The Netherlands: Kluwer, 1991).

[14] *See* 2000 Report, at para. 29.

[15] Id.

[16] Id., at paras. 29–30.

[17] ILA Resolution No. 2/2000, Declaration on the Rule of Law in International Trade.

[18] *See, e.g.,* F.M. Abbott, 'Regional Integration Mechanisms in the Law of the United States: Starting Over', 1 *Indiana Journal of Global Legal Studies* 1993, 155–184, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995094.

[19] *See*, e.g., F.M. Abbott, *Intellectual Property Provisions of Bilateral and Regional Trade Agreements in Light of U.S. Federal Law*, UNCTAD – ICTSD Project on IPRs and Sustainable Development, Issue Paper No. 12, February 2006 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912621).

and implementation of important government policies. There is no easy solution to this problem, other than to limit the direct application of multilateral rules in these national legal systems. This is a problem of an imperfect world, in which unfettered access to legal resources can be used in imperfect ways.

As reflected in the Committee's 2008 Report, in connection with that meeting Prof. Petersmann, as Chair, proposed an ambitious Declaration on International Trade Law and Human Rights.[20] This proposal included five detailed preambular paragraphs, and five detailed substantive declarations. The substantive provisions addressed the role of the judiciary in applying human rights provisions in trade disputes, declared that WTO provisions can and should be interpreted consistently with human rights obligations of WTO Members, that WTO disputes settlement bodies must respect their limited jurisdiction (and the legitimate diversity of national and regional human rights traditions consistent with international obligations), supported a call by the UN High Commissioner for Human Rights to interpret WTO rules in conformity with human rights obligations, and encouraged respect for human rights obligations of WTO members, including by national and international judicial authorities. There was little or no objection among Committee members to the general thrust of Prof. Petersmann's proposal on international trade and human rights.[21] However, there were a number of Committee members who expressed concern about the detailed drafting, and it was recommended that the resolution be reworked into a much more concise format. Ultimately, following several brief preamble paragraphs, the declaratory statement is in a single sentence:

> WTO members and bodies are legally required to interpret and apply WTO rules in conformity with human rights obligations of WTO members under international law.[22]

The reduced length of the Declaration on trade law and human rights does not reduce its vibrancy. From this author's perspective, it is strengthened by its directness. It is certainly an important statement emphasizing for trade lawyers the necessity to act, and interpret the law, consistently with human rights obligations.

As a general matter, it is evident that Prof. Petersmann has a strong commitment to multilateralism, and the premise that governments can and should seek to establish rules on the international plane that will be enforced throughout national and regional legal systems. Viewed broadly, his work envisions a progressive international legal order that will serve the interests of the individual citizen. Open competition and free trade – reflecting the values of individual choice – are central to this "internationalist" perspective.

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[20] Eighth Report of the Committee, Committee on International Trade Law, ILA, Rio de Janeiro Conference (2008) (hereinafter "2008 Report").

[21] *See* 2008 Report, Working Session, 20 Aug. 2008.

[22] ILA Resolution No. 5/2008.

Prof. Petersmann's vision has not been an "easy sell" among his Trade Law Committee colleagues, a number of whom have stressed political reality and need for a type of "subsidiarity". Who is right? On one hand, the WTO has just accepted the entry of its 154th Member, evidencing a sustained worldwide interest in the multilateral trading system, including its institutional structure. That high level of interest and participation is consistent with Prof. Petersmann's vision of a more multilaterally integrated world legal order. On the other hand, the WTO has so far proven incapable of producing any conclusion to the Doha Round of trade negotiations that began in 2001. The dispute settlement mechanism appears to be working, but the rule-making system has at least temporarily stalled. In the meantime, governments have shifted their focus to regional and bilateral negotiations. Perhaps as important, the European Union at the moment is suffering serious strains from an arguably too ambitious venture into monetary integration.

Certainly the internationalist must be frustrated. But, it could be that integration movements run in cycles – upwards and downwards over time.

A scholar through the force of his or her ideas can hope to influence those making political decisions. Unless the scholar elects to become a politician, he or she will not make those decisions. Even those who make the decisions are at the mercy of events and changing circumstances. Prof. Petersmann through the force of his ideas has influenced political decision-makers. He has persuaded some – though not all – of his colleagues to pursue strengthening of the multilateral trading system legal order, and its role in national and regional legal systems.

Separately from the proposal and adoption of the Resolutions referred to above, the Committee has issued a series of biennial Reports that include description and analysis of ongoing trends in the international trade law arena. Read from their initiation in 1994 through the most recent 2010 Report (the 2012 Report will be presented at the August 2012 Biennial in Sofia, Bulgaria), they present a rich history of the development of WTO jurisprudence, and of the various negotiating efforts that have (and have not) been undertaken since the conclusion of the GATT Uruguay Round. This panoply includes the development of WTO case law; the relationships between trade and competition, trade and human rights, trade and environment; the evolution of the TRIPS Agreement, related (and new) intellectual property instruments, the debates over IPRs and public health, and so forth; the trend towards regional and bilateral negotiations; and a host of other subject matter areas. Members of the Committee often are key actors in international and national dialogues on these issues, and the Committee has proven a valuable forum for open and constructive dialogue among them.

Prof. Petersmann has done a great service to the international community of scholars by organizing the work of the Trade Law Committee, and by putting forward (and seeing through) ambitious proposals. All of the members of the Committee, past and present, are indebted to him for that.