THE

INTERNATIONAL LAW ASSOCIATION

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Charles Clore House, 17 Russell Square, London WC1B 5DR

MULTIS MELIOR PAX UNA TRIUMPHIS

REPORT

OF THE

SIXTY-EIGHTH CONFERENCE

HELD AT

TAIPEI, TAIWAN, REPUBLIC OF CHINA

24-30 May 1998

London
1998

Editors: Professor A. H. A. Soons, Dr. Michael Byers

Assistant Editor: Mrs. Barbara Osorio

Reporters: Michael Byers; Lindsay Burn; Viviane Contin-Williams; Erik J. Molenaar; Christopher Ward

The Association acknowledges with gratitude a donation made by the Japan Foundation.

PUBLISHED BY THE INTERNATIONAL LAW ASSOCIATION, CHARLES CLORE HOUSE, 17 RUSSELL SQUARE, LONDON WC1B 5DR

PRINTED IN ABERYSTWYTH, WALES, UK BY CAMBRIAN PRINTERS

ISSN - 0074-6738

INTERNATIONAL LAW ASSOCIATION

TAIPEI CONFERENCE (1998)

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Third Report of the Committee

by Prof. E.U. Petersmann (Parts I,III,V-VII), Prof. F.M. Abbott (Part II), Prof. T. Cottier (Part IV) and Prof. T. Oppermann (Part VII)

I. INTRODUCTION

1. Following its meetings at the Helsinki Conference 1996, the International Trade Law Committee (ITLC) held its 1997 annual meeting, as in previous

years, in the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) at Geneva on 19-20 June 1997. At WIPO, Committee members had an extensive discussion on trade-related intellectual property issues, in which the acting WIPO Legal Counsel and Director of WIPO's Arbitration Center F. Gurry as well as the Director of the WTO's Division on Intellectual Property and Investments A. Otten participated. At the WTO, the Committee had a broad exchange of views on current developments in the WTO legal system, together with members of the WTO Legal Division, the WTO Appellate Body and its legal staff. After discussing the WTO's Singapore Ministerial Declaration of 13 December 1996, the ITLC decided that its report for the Taipei ILA Conference should focus on the following subjects: trade-related intellectual property rights; trade-related competition problems; relationships between WTO law and domestic law; trade-related environmental measures; and the GATT/WTO dispute settlement system. Other important subjects, such as the new GATS Protocols on the liberalization of telecommunications and of financial services, will remain on the agenda of the ITLC. The ITLC's 1997 annual meeting concluded with a half-day public conference on the GATT/WTO dispute settlement system which took place, at the invitation of Prof. Petersmann, at the Geneva Graduate Institute of International Studies with the participation of lawyers from international organizations and academia at Geneva.

II. TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

2. Technology plays a pervasive role in the international economy. Intellectual property rights (IPRs) protect the technology component of goods and services, and influence the marketing and distribution of goods and services on international markets. The Committee continues to pay close attention to developments in the field of intellectual property law insofar as these developments relate to international trade and economic development. In pursuit of its work program with respect to TRIPS, the Committee has closely followed developments at WIPO and at WTO. As observed in the 1996 Report of the Committee, its members view the roles of these two international organizations as complementary.

3. At its 1997 meeting at WIPO, the ITLC had the benefit of reports on developments involving the two organizations from Mr. Francis Gurry, Acting Legal Counsel of WIPO and Director of the WIPO Arbitration and Mediation Center, and from Mr. Adrian Otten, Director of the Investment and Intellectual Property Division of the WTO.

Developments at the World Intellectual Property Organization

4. In December 1996 two new treaties were concluded under WIPO auspices – the WIPO Copyright Treaty and the WIPO Performances and Phonograms

Treaty. These two treaties are intended, *inter alia*, to supplement existing WIPO-administered copyright and neighboring rights treaties so as to bring WIPO rules into conformity with WTO TRIPS Agreement rules. These treaties are also intended to address issues raised by the evolution of technology that makes possible the transformation of expressive works into digital electronic form. Digital technology facilitates the reproduction, transmission and retransmission of expressive works, and the Internet and other international communications networks make commonplace the transmission of such expressive works across national and regional borders. These activities are distinctly trade-related.

5. As Mr. Gurry observed, the two new WIPO treaties only begin to address the IPRs protection issues raised by the evolution of computer and communications technologies. For example, the proliferation of Internet web-sites has led to disputes over the right to use "domain names" that serve to identify such sites. The "domain name" is emerging as a form of intellectual property that is sufficiently distinct from the trademark to require the elaboration of a new set of governing rules. There are proposals for a number of additional treaties to supplement the existing body of WIPO-administered treaties in the IPRs field, particularly for addressing the impact of new technologies. In addition, WIPO member governments have proposed to establish new digital transmission infrastructures to facilitate the international registration of intellectual property interests, and thereby to enhance the security of IPRs holders on a worldwide basis.

6. The Committee will follow closely the negotiation of rules relating to the international movement of IPRs protected works, including works in digital electronic form. Such works constitute an important component of international trade, and the Committee might usefully participate in the shaping of the rules needed in this area.

7. The Committee has followed developments in respect to the proposal for a WIPO Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property. In its 1996 Report, the Committee noted that there are sound reasons for the conclusion of such a treaty. Among other reasons, there is not an identity between substantive WTO TRIPS Agreement rules and WIPO rules with respect to IPRs. The Committee has observed that new rules governing international IPRs protection may be concluded at WIPO substantially in advance of their adoption at the WTO. It would therefore be useful to provide an effective WIPO forum for the settlement of inter-governmental disputes. While there is disagreement among governments regarding the wisdom of concluding a treaty on dispute settlement at WIPO, Committee members continue to support attempts to resolve issues that are impeding the conclusion of such a treaty.

8. The Committee takes note that the recent establishment of the WIPO

Arbitration and Mediation Center offers private parties an opportunity for the expeditious settlement of IPRs disputes by expert arbitrators, and also notes that private parties and governments may agree to use the facilities of the Center for the settlement of private- to-government IPRs related disputes.

Developments at the WTO

9. Activities at the WTO with respect to TRIPS have focused on the successful implementation of the TRIPS Agreement. In June 1997, Mr. Otten reported that since the entry into force of the Agreement, more than 600 questions had been directed by WTO Members to the TRIPS Council and WTO Secretariat regarding their duties with respect to implementation of patent-related obligations, and that WTO Members have shown a positive attitude toward fulfilling these obligations. Subsequent to Mr. Otten's report, the TRIPS Council announced the completion of its first review of WTO Member IPRs laws. This review involved approximately 30 mainly developed country Members which were obligated to fully implement the Agreement by January 1, 1996. A number of developed country Members reportedly agreed to modify their IPRs laws in light of this review. Most developing countries are obligated to implement the largest part of their TRIPS Agreement obligations by January 1, 2000, and a similar review of the IPRs legislation of these Members will be undertaken after that date.

10. There has been significant activity with respect to TRIPS Agreement dispute settlement. To date, the United States has initiated most of the dispute settlement actions in the TRIPS field. The first such action to reach a WTO dispute settlement panel involved a complaint by the United States against India alleging the latter's failure to implement its obligation with respect to establishing a "mailbox" for the receipt of patent applications pursuant to TRIPS Agreement article 70:8, and with respect to its obligation to establish a mechanism for the granting of exclusive marketing rights pursuant to article 70:9.[1] India's Parliament had failed to amend national law (the Patents Act) to authorize the filing of mailbox applications.[2] The government of India argued that its administrative authorities had the power to accept such applications even if to do so would appear contrary to mandatory national legislation. The WTO panel and Appellate Body found that because there was substantial uncertainty concerning India's claim that its administrative authorities were permitted under nation-

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[1] India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Report of the Appellate Body, WT/DS50/AB/R, 19 Dec. 1997; Report of the Panel, WT/DS50/R, 5 Sept. 1997.

[2] A "mailbox" permits the filing of a patent application with respect to a pharmaceutical or agricultural chemical product in a manner that preserves the filing and priority dates of the application, and preserves the criteria for determining patentability as from the date of the mailbox filing or priority date. This provision protects patent applications regarding the above-mentioned categories of products during the transition period allowed to developing country Members to implement patent protection in respect to new areas of protection.

tional cultures is preserved, and to assure that an equitable distribution is made of the proceeds of the exploitation of such knowledge.

20. Furthermore, traditional cultures may embody works of creative expression that are not within existing definitions of works qualifying for protection by copyright. Some have suggested that it may be appropriate to extend a form of TIPRs protection to such traditional forms of expression.[9]

21. Because the commercial exploitation of TIPRs takes place internationally, the Committee agreed that the subject matter of TIPRs is trade-related. The Committee decided that the subject of TIPRs should constitute an active part of the Committee's TRIPS-related work program.

III. TRADE-RELATED INTERNATIONAL COMPETITION RULES AND POLICIES

Work Program and legal analyses of the ITLC

22. The 67th ILA Conference requested the ITLC to continue its work on the agenda set out in its Second Report and, *inter alia*, to focus on the role of competition law and policy within the framework of the WTO. Building on their interim report on "The Role of Competition Law and Policy within the Framework of the WTO" of 1995, Prof. Bourgeois and Prof. Matsushita submitted an additional discussion paper on the same subject at the ITLC meeting in 1997. The paper recalls the trade and competition policy problems resulting from the absence of international competition rules, such as recourse to suboptimal trade remedies with anti-competitive effects, additional transaction costs and legal insecurity if agreements among firms are subject to mutually inconsistent rules in different countries. The paper suggests, as a tentative approach, to focus on the WTO disciplines and to examine what could be done in the area of competition policy to ensure that the WTO objectives are not put in jeopardy by restrictive business practices (RBPs). A series of typical RBPs could be scrutinized with a view to assessing whether, to what extent and how they should be regulated by international competition rules. With regard to the GATT 1994 (notably Articles III,XI,XVII) and the Government Procurement Code, the following RBPs could be dealt with: export and import cartels; boycots against imported products; some aspects of vertical restraints, such as exclusive dealings, customer restriction and tie-ins which specifically exclude foreign products; abuse of market power including exclusive and other dealings that tend to foreclose, refusals to deal, high price strategies and discriminatory exclusions that have the same results as governmental restrictions on international trade; predatory pricing by which domestic enterprises attempt to prevent access of foreign products to the domestic market, or foreign enterprises seek to

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[9] Prof. Cornish drew the attention of the Committee to this issue.

eliminate competition; bid rigging having the effect of excluding foreign bidders. At some later stage, the analysis could be extended to other WTO agreements, such as the TRIPS Agreement (for example, the Articles on compulsory licensing and exhaustion of intellectual property rights) and the GATS (e.g. the competition safeguards in the 1997 GATS Protocol on Commitments in Basic Telecommunications, which are based on an agreed "Reference paper on regulatory principles").

23. In addition to the issue paper by Prof. Bourgeois and Prof. Matsushita, the ITLC also discussed two background papers by Prof. Petersmann. The first paper on "The Need for Integrating Trade and Competition Rules in the WTO World Trade and Legal System"[10] explains why national and international competition rules are neccessary for correcting "market failures" as well as governmental distortions of competition; it also gives an overview of recent governmental and academic proposals for negotiating international competition rules in the WTO, and emphasizes the potential systemic advantages of integrating competition rules into WTO law (for example, if the existing inconsistencies between anti-dumping laws and competition laws could be reduced by focusing on consumer welfare and on the WTO objective of non-discriminatory conditions of competition). The second paper on the "WTO Working Group on the Interaction between Trade and Competition Policy" explained that trade and competition laws proceed from complementary objectives and principles (e.g. liberalization of market access and promotion of non-discriminatory conditions of competition by means of limitations on governmental and private market distortions). Yet, some WTO rules (such as GATT Articles VI and XIX) are used for restricting import competition and protecting import-competing producers without sufficient regard to the competition policy objective of promoting consumer welfare through open markets and undistorted competition. While national and international competition rules are often construed (e.g. by the EC Court of Justice) as conferring individual rights to private producers, traders and consumers that can be enforced through domestic courts, international trade rules (e.g. in WTO law) are widely interpreted as constituting rights and obligations of governments only; even *national* foreign trade laws often provide for only few private rights and then focus on "rights to protection" (e.g. in the context of safeguard, anti-dumping and countervailing duty laws) rather than private "rights to import". So far, it has been possible only in the context of customs unions (like the EC) and free trade areas (like the European Economic Area and the Australia-New Zealand Closer Economic Relations Agreement) to replace or complement trade protection rules (e.g. on anti-dumping measures) by competition rules so as to limit both *governmental* as well as *private* trade distortions. Since the inconsistencies between trade and competition rules

[10] The paper was published by the Geneva Graduate Institute of International Studies in the context of its Program for the Study of International Organizations (PSIO Occasional Paper WTO Series No.3, 1996).

member countries to these three Working Group meetings in 1997 reflects a worldwide interest in enhancing the complementarity and mutual consistency of trade and competition policies.

27. In December 1997, the WTO published its Annual Report 1997 which explores, as a "special topic", the interaction between trade and competition policies.[12] The report emphasizes, *inter alia*, that even with extensive liberalization of international trade and factor movements there remains a need for competition policy remedying competitive distortions (including trade-related distortions e.g. in case of RBPs restricting imports, abuses of market power in export markets, or by foreign investors and holders of intellectual property rights within trading countries). The report also draws attention to the fact that many competition policy interventions, like trade policy interventions, benefit certain groups to the detriment of others; hence, there is also a need for legal safeguards against "regulatory capture" and abuses of discretionary competition policy powers, such as private rights of action and judicial review. If national competition laws, drawn up and applied basically for national purposes, take account of considerations other than those of allocative efficiency and consumer welfare, such as enhancing the export competitiveness of national producers, they risk to lead to decisions with discriminatory and harmful effects for the trade and welfare of other countries: "The risk of decisions which are harmful to the welfare of trading partners is particularly strong where a total national welfare approach is taken, which allows national producer efficiencies to offset consumer costs. But even where national consumer welfare is the predominant consideration, a divergence between national and foreign welfare effects can arise, the most obvious example being export cartels."[13]

Since unilateral application of national competition laws to RBPs in foreign countries entails many problems (such as information gathering and enforcement abroad) and disadvantages (e.g. in case of conflicting standards and decisions), the report points to the advantages of internationally agreed rules on competition policy and on cooperation among national competition authorities: "The issue is not whether competition policy questions will be dealt with in the WTO context, but how and, in particular, how coherent will the framework be within which this will be done."[14] Especially developing countries, many of which do not yet have functioning competition laws and authorities, could benefit from such international rules. Without more consistent international competition rules, the extraterritorial application of domestic competition laws (notably of the USA and EC) is likely to engender increasing international conflicts, for instance if the efficiency and welfare effects on trading partners are ignored.

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[12] The Report explicitly thanks (at p.33) several ITLC members for their comments as "external readers".

[13] WTO Annual Report 1997, Vol.I, WTO 1997, at 31.

[14] WTO Annual Report 1997, Vol I, at 32.

28. The WTO dispute settlement proceeding concerning the US complaint against 21 separate Japanese measures affecting the importation, distribution and sale of consumer photographic film and paper, is the most recent illustration of international trade disputes over alleged RBPs in foreign jurisdictions. The 1998 Panel Report confirmed that government support for RBPs (including informal and non-binding "administrative guidance" to industries) may be actionable under the WTO dispute settlement system. But the Panel could not find sufficient evidence justifying the US claim that Japan's laws, regulations and requirements affecting the distribution, offering for sale and internal sale of imported consumer photographic film and paper violated GATT Articles III and X or otherwise impaired benefits accruing to the US under WTO law. Another WTO dispute over US claims that Japanese measures affecting distribution services (not limited to the photographic film and paper sector) through the operation of the Large-Scale Retail Store Law (which restricts floor space, business hours and holidays of supermarkets and department stores) violates Articles III,VI,XVI and XVII of the GATS, continues to be pending. In addition to these WTO dispute settlement proceedings focusing on governmental measures, both the USA as well as Japan invoked the 1960 GATT Decision on "Restrictive Business Practices: Arrangements for Consultations" in regard to private vertical restraints that restrict market access and price competition in the respective national markets. While the above-mentioned WTO disputes related to vertical market restraints, other RBPs may likewise trigger international trade disputes (e.g. in the case of the 1988 GATT panel report on export cartels and orderly marketing arrangements for semi-conductors) or risk to give rise to trade disputes (e.g. following the initially divergent positions taken by the US and EC competition authorities on the 1997 merger between the two major US producers of aircraft Boeing Co. and McDonnell Douglas Corp.).

29. Some of the problems of WTO dispute settlement proceedings regarding RBPs (such as lack of standing of private parties, treatment of confidential information, recourse to expertise, standards of proof, inadequate legal remedies) have been analyzed in recent publications by ITLC members.[15] The 1998 WTO panel report on the *Kodak/Fuji dispute* could be used by the ITLC as basis for a more systematic study of the problems of WTO dispute settlement proceedings involving trade-related competition policy problems. In 1997, ITLC members organized academic conferences also on other trade-related competition problems, such as state-trading enterprises[16], which merit further study by the ITLC.

[15] See, e.g., P.C.Mavroidis/S.J.Van Siclen, The Application of the GATT/WTO Dispute Resolution System to Competition Issues, in: Journal of World Trade 1977, 5-45; M.Matsushita, Restrictive Business Practices and the WTO/GATT Dispute Settlement Process, in: E.U.Petersmann (ed.), International Trade Law and the GATT/WTO Dispute Settlement System, 1997, 357-373; E.U.Petersmann, Enforcement of International Competition Rules through GATT/WTO Dispute Settlement Procedures?, in: Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules, European Commission 1995, 52-58.

[16] See the forthcoming conference books by: F.M.Abbott (ed.), China in the World Trading

IV. THE RULE OF LAW IN INTERNATIONAL TRADE REGULATION: WTO LAW AND DOMESTIC LEGAL SYSTEMS

30. The Committee held first deliberations relating to the broad topic of the rule of law in international trade regulation, based upon a discussion paper submitted by Prof. Cottier[17] and a comprehensive conference book edited by Prof. Jackson and Prof. Sykes.[18] The discussion paper deals with an important aspect of the rule of law, without exhausting the subject: the complex interrelationship of WTO law, national and regional law. This subject is addressed both on the level of international and domestic law. It analyzes the relationship of these levels in general international law, and in dispute settlement before WTO panels and the Appellate Body in particular. It also addresses, on the level of national or regional law, the issues of interpretation of national or regional law in accordance with WTO rules (the doctrine of consistent interpretation) and the issue of whether, and on what conditions, WTO rules should be given direct effect before national and regional courts in cases of conflict between WTO rules and national or regional law. The paper emphasizes the important role of the principle or doctrine of consistent interpretation. It suggests to consider the problem of direct effect of WTO rules in the context of legitimacy of international trade rules; further legal research is necessary in order to explore the relationship of legitimacy and impact in domestic legal systems. In the long run, the complex issues of direct effect will require negotiations by the major trading partners within WTO with a view to seek a level playing field in terms of legal protection available to individuals in different Members of the WTO.

31. The Committee's first discussion on these topics focused upon the issues of direct effect of WTO rules, in particular in light of statutory exclusion of such effect of WTO rules in the United States[19] and reiterated denial of such effect by the European Court of Justice in recent case law relating to GATT.[20] Views expressed by members of the Committee considerably vary on this subject. They range from support of direct effect of WTO rules in accordance with monist traditions and the concept of the rule of law, to denial of such effects. The Committee agreed on the importance of the principle of consistent interpretation. In most cases, it is possible to avoid discrepancies and conflicts of WTO rules and national or regional rules by means of construing domestic norms in accordance with WTO rights and obligations. Given the fact that these rules often are of a principled or detailed nature and have been ratified by par-

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System: Defining the Principles of Engagement, 1998; T.Cottier/P.Mavroidis (eds.), Trade Liberalization and Property Ownership: State-Trading in the 21st Century, 1998.

[17] See the revised version published in: Thomas Cottier, *The Relationship of WTO Law, National—and Regional Law*, 1 JOURNAL OF INTERNATIONAL ECONOMIC LAW (1998), April 1998.

[18] J.H.Jackson/A.Sykes (eds.), Implementing the Uruguay Round, 1997.

[19] 1994 Uruguay Round Agreements Act, 19 USCS § 3511, Publ. L. No. 104-305 (1996), § 102 (c).

[20] Recently: Case C-469/93, Amministratione delle Finanze dello State v. Chicquita Italia SpA [1995] ECR I-4558.

liaments in most WTO member states, they can, and should, be taken into account in the interpretation of national and regional law. The principle of consistent interpretation is an accepted doctrine in many Members of the WTO, including the United States and the European Communities. The Committee is of the view that the principle should be applied more vigorously in court rooms throughout the world. This not only entails an effort to stress the importance of the principle in relation to the debate on direct effect; it also, and foremost, entails the need for enhanced training and education of the legal profession in matters of WTO law with a view to invoking this vast body of law in administrative and civil litigation and to successfully supplement legal arguments relating to national or regional law.

32. The Committee will continue its work on the rule of law. In depth discussions are in particular required on the problem of direct effect and democratic legitimacy of international rules, with a view to eventually come to a conclusions on this important matter. Based upon a suggestion by its Chairman, the Committee will also seek to expand its discussion into other and equally important aspects of the rule of law. WTO law already contains a host of rules relating to the administration of national and regional law, judicial protection and transparency, which respond to evolving doctrines of good governance in international law and relations, and social and economic development.[21] Many of these aspects, in particular in the new field of service regulation, need to be further explored.

V. TRADE-RELATED ENVIRONMENTAL MEASURES (TREMS)

Developments at the WTO

33. The 1996 WTO Ministerial Declaration mentions, *inter alia*, that the Committee on Trade and Environment (CTE) has made an important contribution toward fulfilling its Work Programme and shall continue to carry out this programme under its existing terms of reference. The CTE has a two-fold mandate "to identify the relationship between trade measures and environmental measures in order to promote sustainable development", and "to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required". At its 1997 meeting, the ITLC had an extensive exchange of views with the secretary of the CTE concerning the 10 items on the CTE's work programme:

- *Item 1* (The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements) and *Item 5* (The relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental

[21] *Cf.* in this context: The World Bank, World Development Report 1997.

agreements) are closely linked and analyzed jointly in the CTE. In conformity with Principle 12 in the Rio Declaration adopted by the 1992 UN Conference on Environment and Development, the CTE has called for multilateral solutions based on international cooperation and consensus as the most effective way for governments to tackle environmental problems of a transboundary or global nature.[22] Although no conflicts have thus far arisen between WTO rules and Multilateral Environmental Agreements (MEAs), there is no reason to assume that no disputes would arise in the future. Views in the CTE, and also in the ITLC, differ on whether any modifications to WTO provisions (such as GATT Article XX, the TRIPS Agreement) are required under items 1 and 5 of the work programme.

- Under *Item 2* (The relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system), *Item 3,a* (The relationship between the provisions of the multilateral trading system and charges and taxes for environmental purposes) and *Item 3,b* (The relationship between the provisions of the multilateral trading system and requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling), the various trade-related instruments of environmental policies continue to be reviewed. No formal conclusions have been agreed upon so far. The discussion under *Item 4* (The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects) led to the conclusion that no modifications to WTO rules are required to ensure adequate transparency for existing trade-related environmental measures; the CTE recommended, however, the establishment of a single WTO database for such measures.
- Under *Item 6* (The effect of environmental measures on market access, especially in relation to developing countries, and environmental benefits of removing trade restrictions and distortions), the CTE identified, *inter alia*, environmental benefits of trade liberalization (such as more efficient allocation and use of resources, provided appropriate environmental policies are implemented at the national level) as well as adverse effects of environmental measures on the market access opportunities of small and medium-sized enterprises especially in developing countries.
- On the issue of the export of domestically prohibited goods (*Item 7*), serious concerns have been expressed by some developing countries about the export to them of products whose domestic sale or use is banned or severely restricted because they pose a threat to human, animal or plant life or health or the environment. These countries consider

[22] Cf. the Report (1996) of the CTE, at paragraph 171.

that they do not have sufficient timely information about the characteristics of these products nor the technical capacity to make informed decisions about importing them. The CTE recommended, *inter alia*, that countries participate in the activities of other specialized organizations which address problems created by trade in potentially hazardous or harmful products and have the relevant expertise for providing technical assistance in this field.

- As regards environment-related provisions in the TRIPS Agreement (*Item 8*), the CTE continues to examine the relationships between the TRIPS Agreement and the protection of the environment and the promotion of sustainable development, notably the contribution of TRIPS provisions to (a) facilitating the generation of environmentally sound technology and products (EST&P); (b) facilitating the access to and transfer and dissemination of EST&Ps; (c) environmentally-unsound technologies and products; and (d) the creation of incentives for the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including the protection of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity.
- Preliminary discussion in the CTE of the work programme envisaged in the WTO Decision on Trade in Services and the Environment (*Item 9*) has not yet led to the identification of any measures that may need to be applied for environmental purposes to services trade which would not be covered adequately by GATS provisions, in particular Article XIV(b).
- As regards appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO Agreement (*Item 10*), the CTE has adopted measures for, *inter alia*, public access to the CTE's documents and records of CTE meetings, close collaboration with NGOs as well as with MEAs and other intergovernmental organizations. In 1997, for example, the WTO organized another public symposium with approximately 70 NGOs on matters related to WTO work on trade environment and sustainable development, as well as an information session with representatives from the secretariats of 7 MEAs and 2 environmental financial mechanisms. Many intergovernmental organizations and MEA secretariats have observer status in CTE meetings and cooperate with the WTO on trade-related environmental matters. This cooperation among international institutions is in line with the "Programme for the Further Implementation of Agenda 21", adopted by the UN General Assembly in June 1997, which calls for closer cooperation among the CTE, UNCTAD, UNEP and other international organizations so as to better integrate trade, environment and development.

Work Program of the ITLC

34. At its 1997 meeting, the ITLC agreed to keep the CTE activities under review and to concentrate its legal analyses of TREMS on the two following subjects:

(a) Relationships between MEAs and WTO law, notably the TRIPS Agreement. Legal issues to be clarified could include: the need for harmonious interpretation and coordination of near-universal MEAs and WTO law (in 1995, for example, the Working Group of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, accepted by 162 countries, approached the WTO Secretariat for clarification of the GATT-consistency of certain proposals and later complained that the WTO had not been in a position to give a formal opinion on trade measures that were considered essential by members of the Montreal Protocol); extrajurisdictional application of MEA standards to third countries (e.g. in case of the prohibitions, under the 1988 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, of all transboundary movements of hazardous wastes to or from non-member countries and non-OECD countries); relationships between the dispute settlement mechanisms in MEAs, such as the legal non-compliance procedures in Article 11 of the 1985 Vienna Convention for the Protection of the Ozone Layer (which provides for negotiations, mediation, conciliation and arbitration) and the additional non-compliance procedures through an Implementation Committee set up by the Montreal Protocol, and the WTO dispute settlement system; interpretation of the TRIPS Agreement in a way that is conducive to MEA objectives; relationships between the Convention on Biological Diversity and WTO law, for instance as regards the protection of indigenous knowledge, plant breeders' rights and the equitable sharing of benefits from genetic resources; relevance of WTO law for the 1998 negotiations on the proposed "Prior Informed Consent" Convention and "Persistent Organic Pollutants" Convention; WTO law and the proposed use of energy taxes in the context of the UN Framework Convention on Climate Change.

(b) International standard-setting and WTO law. Legal issues to be clarified could include: mechanisms to avoid the risk of a "race to the bottom"; inadequate democratic control, or "regulatory capture", of international standard-setting processes; different regulatory approaches in the TBT and SPS Agreements regarding the need for scientific justification of standards; different treatment of "relevant international standards" in WTO law and in regional integration law (e.g. under Articles 30 and 36 of the EC Treaty).

35. At its 1997 meeting, the ITLC also discussed, on the basis of a background paper by Prof. Petersmann[23], the ever more comprehensive GATT and

[23] See E.U.Petersmann, The GATT/WTO Dispute Settlement System: The Case Law on Trade-Related Environmental Measures, to be published in the 1998 Yearbook of the World Trade Law Association, which was established in 1997 at London with the participation of several ITLC members.

WTO dispute settlement case law on TREMS. It was noted that all seven "GATT 1947" panel reports on TREMS, as well as the 1996 WTO panel and Appellate Body reports on US gasoline standards, confirmed the sovereign right of each GATT member country to decide on its own environmental policy objectives within its national jurisdiction, and on the level of its environmental standards, provided TREMS were applied in a non-discriminatory manner as required by GATT law in (conformity with economic theory and various UN resolutions). Yet, each of these dispute settlement reports had found that the government concerned had applied certain TREMS in an unnecessarily discriminatory manner in violation of GATT rules, or had used unilateral import restrictions as a means of forcing exporting countries to change their national production and environmental standards within the jurisdiction of the exporting country even though the embargoed trade products themselves did not pose any threat to health or environment in the importing country. The ITLC noted that the GATT/WTO dispute settlement system continued to be used more frequently for the settlement of international disputes over TREMS than any other dispute settlement system. It was also noted that, in view of the strong impact of the GATT/WTO case law on the future interpretation and application of WTO rules, several governments seemed to prefer to await the result of pending WTO dispute settlement proceedings (e.g. in the "shrimp/turtle dispute" over the US import prohibition of certain shrimp if it was caught without special devices to protect endangered sea turtles) before engaging in political negotiations on the clarification of WTO rules. The disputes over the unilateral EC ban on imports of fur caught in cruel leghold traps appeared defused in 1997 when several countries concluded agreemens with the EC on the phasing-out of inhumane steel-jawed traps and on compliance with humane trapping standards. International consultations also continued on the WTO-consistency of the EC Directive on compulsory labelling of new products containing genetically modified organisms.

36. The ITLC noted that the WTO Agreement on Sanitary and Phytosanitary Standards (SPS) had introduced new legal standards for SPS measures which went beyond the traditional legal standards of the GATT 1947, such as the "necessity" of SPS measures, their basement on "scientific principles" and "sufficient scientific evidence", the use of "relevant international standards", and the need for "scientific justification" and "risk assessment procedures" for the introduction of SPS measures which result in a higher level of (phyto)sanitary protection than would be achieved by international standards. The 1997 WTO panel reports on the inconsistency, with Articles 3 and 5 of the SPS Agreement, of the EC's import ban on meat and meat products from animals to which certain growth hormones have been administered, were analyzed by several ITLC members in the context of a conference on "Implementation of Multilateral Environmental Agreements" at the Hague in September 1997.[24] The WTO

[24] See the conference report published by the Asser Instituut and the Ministry of the Environment

Appellate Body report on the appeal by the EC was published only on 16 January 1998.[25] The appellate report upholds the panel finding that the EC measures at issue are inconsistent with Articles 3.3 and 5.1 of the SPS Agreement, but reversed or modified various other panel findings. Compared with the 1997 panel reports, the 1998 Appellate Body report implies much less restrictive interpretations of the SPS Agreement, for instance of the obligation to "base sanitary or phytosanitary measures on international standards" (Article 3.1), the right to introduce SPS measures which result in a higher level of protection (Article 3.3), or the requirement to base SPS measures on a risk assessment (Article 5.1). The ITLC intends to continue its analysis of the WTO case-law on TREMS and SPS measures, and of the related interpretations of WTO law, in 1998.

VI. THE GATT/WTO DISPUTE SETTLEMENT SYSTEM

Developments at the WTO

37. Since its entry into force in 1995 up to the end of 1997, the WTO's Dispute Settlement Understanding (DSU) was invoked for the settlement of 110 disputes relating to 76 different matters. 20 cases were settled bilaterally or no longer pursued; this seems to indicate that the legalization of GATT/WTO dispute settlement procedures and quasi-automatic adoption of dispute settlement reports has increased the willingness of governments to agree to bilateral dispute settlements or to the unilateral adjustment of trade measures if they are inconsistent with WTO law. All panel reports were appealed and, following the so far 9 Appellate Body reports, adopted by the Dispute Settlement Body (DSB) as amended by the appellate reports. The fact that 7 out of 9 Appellate Body reports reversed part of the findings of the first-level panel report, and the strong reliance on general international law principles and on international court judgments in the reasoning of appellate reports, reflect the independence and active role asserted by the Appellate Body. Compliance with the WTO obligations to implement adopted dispute settlement findings within a "reasonable period of time" was regularly notified to, and reviewed by, the DSB. In two cases, the complainants requested international arbitration pursuant to Article 21(3)(c) of the DSU for the determination of the "reasonable period of time". The unique features of the WTO dispute settlement system are also reflected in the adoption by the DSB, in December 1996, of very detailed Rules of Conduct for panelists, experts, Appellate Body members and Secretariat staff; the rules are designed to ensure the impartiality of, and confidence in, the persons involved in WTO dispute settlement processes, and appear to be the most elaborate rules of their kind in international dispute settlement procedures.

38. The fact that the DSU, during the first three years of its existence, was

of the Netherlands in 1997, pp. 14-17.

[25] WT/DS26/AB/R of 16 January 1998.

used much more frequently for the settlement of international disputes than the International Court of Justice during the first 50 years of its existence, is a sign of growing trust of governments in the worldwide WTO dispute settlement system. The annual reports of the DSB, and also the 1996 WTO Ministerial Declaration, confirm that the DSU has worked effectively so far. It therefore appears unlikely that the 1994 Ministerial Decision - which called on the WTO Ministerial Conference "to complete a full review of dispute settlement rules and procedures under the WTO within four years after the entry into force of the Agreement Establishing the WTO" so as to decide "whether to continue, modify or terminate such dispute settlement rules and procedures" - will lead to major changes in the DSU. After only 3 years of successful experiences with the DSU, fundamental or premature changes might be unwise.

Work Program of the ITLC

39.The ITLC published its first joint book project with 20 contributions on different aspects of the GATT/WTO dispute settlement system in 1997.[26] As a further contribution to the full review of the DSU in 1998 and to the legal analysis of the WTO case law, the editors of the new *Journal of International Economic Law* (Prof. Jackson, Prof. Petersmann, Prof. Sykes) decided to devote the Summer 1998 issue of this JIEL entirely to the DSU and the settlement of international trade disputes. Some of the legal concerns deserving further analysis were identified at the 1997 ITLC conference on the WTO Dispute Settlement System. For instance: Is there a need for adjusting the very stringent time-frames for WTO dispute settlement procedures? Should the working procedures for panels (Appendix 3 of the DSU) be codified in more detail so as to enhance legal security? Should the WTO rules on presentation and evaluation of evidence, and on the "burden of proof", be clarified through case law rather than political negotiations? Should the needed clarification of the applicability, in the WTO context, of the general international law rules on state responsibility (e.g. as regards reparation of injury) be left to the dispute settlement practice? Is there a need for changes in the procedures and standards of review of the Appellate Body and Dispute Settlement Body (e.g. recognition of a power to remand disputes to the first-level panel so as avoid the current Appellate Body practice of *de novo* decisions on legal issues which are not subject to further appeal)? Have the (so far two) WTO arbitration awards under Article 21:3 of the DSU on the "reasonable period of time" for the implementation of adopted dispute settlement findings correctly interpreted the principle of "prompt compliance with recommendations or rulings of the DSB" (Article 21.1 DSU)? While the 1998 "full review" could lead to some useful reforms, such as the codification of the working procedures for WTO panels, it could be premature to aim at amending other parts of the DSU in the context of the 1998 review without the benefit of more practical experience with the so far satisfactory and

[26] Cf. E.U.Petersmann (ed.), International Trade Law and the GATT/WTO Dispute Settlement System, Kluwer 1997, 704 pp.

dynamic evolution of the WTO dispute settlement processes.

40. The development of European integration law was strongly influenced by judicial case law and by its critical review and support by lawyers, judges, academics and individual citizens throughout Europe. WTO law and the WTO dispute settlement practice will likewise benefit from close scrutiny by lawyers all over the world. They will therefore remain priority items on the agenda and future work program of the ITLC. As emphasized in another discussion paper submitted to the 1997 ITLC meeting[27], there is also a systemic connection between the mandatory WTO dispute settlement system and the ITLC project of preparing an ILA Resolution on the rule-of-law principle in international law and on its systemic implications for judicial review, at the international and national levels, of compliance by governments with their self-imposed international legal guarantees of freedom, non-discrimination and rule-of-law in transnational relations among private citizens. The traditional tendencies of many Executives to minimize legislative and judicial control in the exercise of foreign policy powers ("primacy of foreign policy") may be related to the problem that, in about one out of five dispute settlement proceedings under the old GATT 1947, governments found it politically difficult to promptly perform their international legal and dispute settlement undertakings under GATT 1947. The further strengthening of international and national judicial review may be a precondition for a more effective international rule-of-law and for the ability of the WTO dispute settlement system of securing high levels of compliance with international dispute settlement rulings.

VII. FUTURE WORK PROGRAMME OF THE ITLC

41. As agreed at the ITLC meetings in 1996 and 1997, the work programme of the ITLC will continue to focus on the following five subjects to be examined further at the 1998 Taipei Conference:

1. TRIPS: Implementation of the TRIPS Agreement; Relationships between the WTO/TRIPS and the WIPO; Exhaustion of IPRs and Parallel Imports; Traditional Intellectual Property Rights. Special consideration will be given at the Taipei Conference to the subject of exhaustion of IPRs and parallel imports (further study of the First Draft Report, see above II).
2. TRADE-RELATED INTERNATIONAL COMPETITION RULES AND POLICIES: Past and future work of the WTO Working Group on the Interaction between Trade and Competition Policy as well as of the WTO Working Group on the Relationship between Trade and Investment. The ITLC will focus on concrete "interaction problems"

[27] E.U.Petersmann, How to Promote the International Rule of Law? Contributions by the WTO Appellate Body, to be published in the Spring 1998 issue of the *Journal of International Economic Law*.

between WTO law and competition problems (*e.g.* inconsistencies between anti-dumping rules and competition rules on international price discrimination) and on an analysis of international dispute settlement procedures for trade-related competition problems (notably the 1998 WTO panel report on Japan's measures affecting photographic film and paper, see above III).

3. RELATIONSHIPS BETWEEN WORLDWIDE, REGIONAL AND NATIONAL TRADE LAWS: Continuation of the ITLC discussions on how to strengthen the "consistent interpretation principle"; democratic legitimacy, justiciability and effectiveness of international trade rules; their "direct applicability" by individuals in domestic legal systems; judicial review by domestic courts of the consistency of national implementing measures with international trade law. After in-depth-discussion of these and other aspects, the ITLC will attempt to elaborate a possible ILA Declaration of Principles on the Rule of Law in International Trade (see above IV).
4. TRADE-RELATED ENVIRONMENTAL MEASURES: Review of the work in the WTO Committee on Trade and Environment, with emphasis on legal relationships between Multilateral Environmental Agreements, international standard-setting, WTO law and domestic law. Special consideration will be given to the GATT/WTO dispute settlement case law on trade-related environmental measures (*e.g.* the "Shrimp/Turtle Case") and health protection measures (*e.g.* the Hormone Beef Case, see above V).
5. WTO DISPUTE SETTLEMENT SYSTEM: In continuation of the joint research project and handbook on the WTO Dispute Settlement System published by ITLC members in 1997, the "full review" of the DSU in 1998 and the analysis of the rapidly evolving WTO dispute settlement case law will remain on the agenda of the ITLC (see above VI).-

ITLC members will also participate in an ILA Workshop on Intellectual Property Protection during the 1998 Taipei Conference.