The World Trade Organization Knowledge Agreements

SECOND EDITION

CHRISTOPHER ARUP

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THE WORLD TRADE ORGANIZATION KNOWLEDGE AGREEMENTS

The WTO intellectual property and services agreements (TRIPs and GATS) form the global legal framework within which governments now regulate trade in knowledge. This second edition analyses the provisions of the agreements and examines closely the thirteen years of implementation and revision. Gathering together the interpretations placed on the agreements by the WTO dispute settlement bodies, it reports on the initiatives taken by the members both to liberalise trade in knowledge and to shape international business regulation. Drawing on this experience, Christopher Arup assesses the future of the WTO as a global law-making institution. Three expanded case studies (legal services, genetic codes/essential medicines, and online media) illustrate the impact of the agreements and highlight the challenges faced by the WTO in reconciling free trade with social regulation.

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PREFACE AND ACKNOWLEDGEMENTS

This new edition of my 2000 book incorporates and evaluates the experience with the implementation and revision of the WTO agreements. I have decided to keep to the format of the original edition and integrate the new material. Because of the impasse in new trade negotiations, nothing radical has happened to the agreements recently. Yet there has been a huge amount of consolidation, refinement and reconsideration, so much so that it was quite daunting at times to encompass the field, and select the key aspects.

This experience means that the dispute settlement system now plays a bigger part in the construction of WTO law than it did when I was writing up the first edition in 1998. So it receives close examination here, but along with the other interesting experiments in WTO decision making such as the TRIPs system for trade in medicines under compulsory licence and the GATS work on disciplines for domestic regulation. It would have been easiest to stay with these institutional developments but I have also persisted with the three detailed case studies. The aim is to show, I hope, that the WTO still has challenges to face and choices to make if it is to accommodate alternative producer claims and support international business regulation.

Also regarding the format, I should note that I have retained quite a few of the 'old' references because they represent the formative context at the imaginative, innovative time the agreements were fashioned and the members embarked on implementation. All the same, I have added substantially more, not least because the WTO epistemic community is the biggest growth area since the first edition. The recent work of the secretariats, the government officials, the scholars and the activists is the source of many useful insights and constructive ideas. This edition has the benefit of the many excellent scholars who have been attracted to the WTO, but of course I have not been able to do them justice.

I have moved universities twice since I laboured on the first edition and I want to thank warmly those colleagues who have been supportive

of me continuing (fitfully) my own work in the field, especially Michael Blakeney, Peter Drahos, Andrew Stewart, Justin Malbon, Pat O'Malley and Richard Mitchell, and my new university, Monash. Thanks also to Cambridge University Press and particularly to Finola O'Sullivan for continued faith in me. Last but not least I thank my family (Jenny, Tom and Henni Arup) for indulging such abstruse preoccupations.

LIST OF WTO DISPUTE RULINGS

Canada – Patent Protection of Pharmaceutical Products, Complaint by the European Communities, WT/DS114, Report of the Panel, 17 March 2000, DSR 2000:V, 2289.

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Complaint by Canada, WT/DS135, Report of the Appellate Body, 12 March 2001, DSR 2001:VII, 3243.

European Communities – Measures Affecting the Approval of and Marketing of Biotech Products, Complaint by the United States, WT/DS291, Report of the Panel, 29 September 2006.

European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, WT/DS48, Complaint by the United States, WT/DS26, Report of the Appellate Body, 13 February 1998, DSR 1998:I, 135.

European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia, WT/DS290,Complaint by the United States, WT/DS174, Report of the Panel, 15 March 2005, DSR 2005:X–XI, 4603, 5121.

European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, Guatemala, Honduras, Mexico and the United States, WT/DS27, Report of the Appellate Body, 9 September 1997, DSR 1997:II, 589.

India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the United States, WT/DS50, Report of the Panel, 5 September 1997, DSR 1998:I, 41.

India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the United States, WT/DS50, Report of the Appellate Body, 19 December 1997, DSR 1998:I, 9.

Indonesia – Certain Measures Affecting the Automobile Industry, Complaint by the European Communities, WT/DS54, Report of the Panel, 2 July 1998, DSR 1998:VI, 2201.

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Japan – Taxes on Alcoholic Beverages, Complaint by the European Communities, WT/DS8, Report of the Appellate Body, 4 October 1996, DSR 1996:I, 97.

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Complaint by United States, WT/DS161, Complaint by Australia, WT/DS Report of the Appellate Body, 11 December 2000, DSR 2001:I, 5.

Mexico – Taxes on Soft Drinks, Complaint by the United States, WT/DS308, Report of the Appellate Body, 6 March 2006.

Mexico – Measures Affecting Telecommunications Services, Complaint by the United States, WT/DS204, Report of the Panel, 2 April 2004, DSR 2004:IV, 1579.

United States – Import Prohibition of Certian Shrimps and Shrimp Products, Complaints by India, Malaysia, Pakistan and Thailand, WT/DS58, Report by the Panel, 13 February 1998, DSR 1998:VII, 2821.

United States – Import Prohibition of Certain Shrimps and Shrimp Products, Complaints by India, Malaysia, Pakistan and Thailand, WT/DS85, Report by the Appellate Body, 12 October 1998, DSR 1998:VII, 2755.

United States – Measures Affecting the Cross-Border Supply of Betting and Gambling Services, Complaint by Antigua and Barbuda, WT/DS285, Report of the Appellate Body, 7 April 2005, DSR 2005:XII, 5663.

United States – Section 110(5) of the US Copyright Act, Complaint by the European Communities, WT/DS160, Report of the Panel, 15 June 2000, DSR 2000:VIII, 3769.

United States – Sections 301–310 of the Trade Act of 1974, Complaint by the European Communities, WT/DS152, 22 December 1999, DSR 2000:II, 815.

United States – Section 211 of the Omnibus Appropriations Act of 1998, Complaint by the European Communities, WT/DS176, Report of the Appellate Body, 2 January 2002, DSR 2002:II, 589.

United States – Standards for Reformulated and Conventional Gasoline, Complaint by Venezuela, WT/DS2, Complaint by Brazil, WT/DS4, Report of the Appellate Body, DSR 1996:I, 3.

LIST OF INTERNATIONAL INSTRUMENTS

WORLD TRADE ORGANIZATION AGREEMENTS

Agreement Establishing the World Trade Organization

Agreement on Sanitary and Phytosanitary Measures

Agreement on Technical Barriers to Trade

Agreement on Trade-Related Aspects of Intellectual Property Rights

Agreement on Trade-Related Investment Measures

General Agreement on Tariffs and Trade 1994 (1947)

General Agreement on Trade in Services

Second Protocol to the GATS (Financial Services)

Third Protocol to the GATS (Movement of Natural Persons)

Fourth Protocol to the GATS (Basic Telecommunications)

Fifth Protocol to the GATS (Financial Services)

Understanding on Commitments in Financial Services

Understanding on Rules and Procedures Governing the Settlement of Disputes

OTHER AGREEMENTS, CONVENTIONS AND TREATIES

Berne Convention for the Protection of Literary and Artistic Works

Convention on Biological Diversity

Doha Declaration on TRIPS and Public Health

GATS Annex on Financial Services

GATS Annex on Movement of Natural Persons

GATS Annex on Telecommunications

International Convention for the Protection of New Varieties of Plants

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Lisbon Agreement for the Protection of Appellations of Origin and their International Registration

Paris Convention for the Protection of Industrial Property

Treaty on Intellectual Property in respect of Integrated Circuits

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Vienna Convention on the Law of Treaties

WIPO Copyright Treaty

WIPO Performances and Phonograms Treaty

PART I

GLOBALISATION, LAW AND THE WTO

CHAPTER 1

TRADE LAW AS A GLOBAL MEDIATOR

This first chapter identifies the subject matter of the book and charts its course. As the book is situated in a large and often hazardous field, I am sure it would be useful to make clear what it hopes to achieve. Here, I introduce the ideas that I wish to pursue, and indicate the purposes which the book might serve.

My primary objective is to examine the texts and assess the impact of the World Trade Organization (WTO), largely through the medium of two of its new multilateral agreements. The agreements in focus here are the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[1] In so doing, I should like the book to serve as a useful resource for any student of the WTO. Therefore, a solid component of the book is given over to what I hope will be regarded as a careful analysis of the norms and processes of the organisation, using these two most innovative agreements to illustrate how its reach has been extended significantly.

The two agreements were struck when the Uruguay Round reached a conclusion late in 1993.[2] Much of their early analysis was provided by specialists in trade policy, working within the context of the transition from the General Agreement on Tariffs and Trade (GATT) to the WTO. Their perspective was often one of neo-classical economics and consumer welfare.[3] Another established approach, found for example in international relations, began to focus on the WTO and its new regimes, thinking particularly in terms of their impact on state power and specifically, of national sovereignty.[4] Sourced in political science

and policy studies, a related approach considered where the WTO fits into theories of regulation.[5] Public choice and game theories figured among the theories which were brought to bear on the explanation of the WTO agreements. Here, a focus has been the international dynamics of regulatory competition and cooperation. More critical stances drew on the long-standing resources of political economy,[6] while post-colonial studies developed a concern about the impact of the agreements on economic development and cultural diversity.[7]

Now in 2007 we have the benefit of thirteen years of experience with implementation, elaboration, dispute settlement, critique, review and renegotiation. In many ways, the analysis of the first edition holds true because there have been few additions to the agreements and no new agreements on competition policy or investment rights. Yet WTO commentary and scholarship have developed rapidly, especially in the last six years. Contributions come from academics, consultants, staff of the secretariat, Appellate Body members past and present, national government officials, the trade bar, industry lobbyists, NGO activists, researchers from aid banks and other international organisations, public advocacy groups and philanthropic foundations, to name but a few. Lately, the WTO has itself been fostering this intelligence work and dialogue directly, for example through the convening of seminars, workshops and forums in Geneva and online. We can read this material for its insights into WTO law and policy, but just as interesting, particularly if we take the notions of epistemic communities and regulatory conversations seriously, is its influence on understandings and agendas.

Much of the writing is concerned to fill out the learning on the WTO agreements: this scholarly work synthesises, rationalises and normalises the body of WTO knowledge.[8] As implementation proceeds, attention is focused on the ways the WTO governs. Yet, much too is actively engaged, seeking to advance a cause or encourage reform. The best takes account of the diagnoses of the WTO's situation so it can be realistic about the options. Despite the many good efforts, the institution is reaching a roadblock and it is not easy to say where it will find the efficacy and legitimacy to further its goals, especially on agriculture. One of the features of the landscape now is the proliferation of voices and the intensification of scrutiny. Together with the policy circles operating inside the institution, the WTO is subject to a great deal of critical commentary from outside. Some of that rejects the WTO and turns elsewhere, while some again delves deeper, for example analysing

Appellate Body rulings for space for national environmental measures (such as the precautionary principle) or new agreement negotiations for support for international regulation (such as access to essential medicines).

GLOBALISATION AND LAW

In this book, I decided to look at the provisions and implications of the WTO agreements from a different angle again. Our understanding can be advanced if we consider the roles they are playing in the globalisation of law. To do so, we shall need to draw on the assistance of theoretical concepts from the field of socio-legal studies. A discussion of those concepts precedes the analysis of the texts. While I appreciate that the concepts will be foreign to some readers, they will allow us to avoid the traps of more technical legal terms. As well, I thought that an understanding would be aided by an empirically minded identification of the operation and impact of the agreements. So the analysis is succeeded by case studies of the roles which they play in the provision of legal services, the appropriation of genetic codes and the organisation of the online media. These case studies have been chosen because their areas of interest also contribute greatly to the process of globalisation. They are what I shall call 'global carriers'.

The book then has a specific contribution to make. But I would like to think it might also offer something of general value to the current discussion around globalisation and law. For it will be my contention that these two agreements are much more than a logical extension of the GATT and the agreements which its parties have made to trade industrial goods over national borders. Because the agreements deal with personal services and intellectual endeavours, they reach 'behind the border' into social fields that were not regarded on the whole as related to trade.[9] In extending the notion of trade, they press for domestic laws and legal practices to be adjusted in distinctive ways to the expectations of foreign suppliers. Furthermore, we shall see that they themselves use the law in interesting ways to achieve these ends. Consequently, we shall find that much more which is in the core of economics, politics, cultures, and law, becomes subject to the influence of trade norms and processes.

In favouring this perspective, I appreciate that a choice has been made that others would not have made, especially those who work within one of the more established approaches to trade or who are

concerned with the urgent matters of policy to hand. Nonetheless, I believe this focus on law will prove to be a perspective that can accommodate some of the nuances of the complex, fluid character of globalisation. Yet, at the same time, it need not render us entirely dispassionate about the outcome of this high-stakes transformation of society.

LEGAL PLURALISM AND INTER-LEGALITY

The perspective employs several conceptual tools familiar to socio-legal scholars. They shall be noted here and discussed more fully in Chapter 2. The first is the concept of legal pluralism, the idea that social fields are likely to incorporate a multiplicity and diversity of legalities. We shall identify several varieties of 'legality' in a moment. Under conditions of globalisation, such legal diversity often comes to be regarded as difference. From the viewpoint of some traders, this difference gives rise to 'systems friction'. This friction needs to be eliminated. But for others it represents alternative sources of expression and ordering that ought to be preserved and promoted. We shall be suggesting that the subsuming phenomenon is one of inter-legality. Inter-legality is an uncommon term which Boaventura de Sousa Santos derived from postmodernism's literary interests in inter-textuality.[10] But the concept of inter-legality nicely conveys the sense that the plural legalities of the world encounter and interact with each other. They clash on occasions, but they can also inter-mingle and create new hybrid legalities. Hence, while it seems unfamiliar, inter-legality proves a more accommodating notion than, for instance, the traditional notion of conflict of laws.

Globalisation can be expected to widen and deepen the phenomenon of inter-legality. Such inter-legality is multiplying 'horizontally' as many more countries open up to the global flows of goods, persons, money, information and services. Thus, these fields of legal interaction spread across the world. Inter-legality is also extending 'vertically' as foreign-sourced supplies reach deeper down into the layers of each locality. In keeping, we shall see that the two WTO agreements are still concerned with the cross-border supply of personal services and intellectual resources. This supply is taking on added dimensions, greatly enhanced by technological innovations. But, additionally, the agreements are concerned with the inter-legalities involved in the establishment of a commercial presence or the presence of natural

persons within the locality. In establishing this presence, the foreigner encounters a rich variety of legal arrangements which have been made for domestic production and provision, indeed for socially significant activities such as legal services, farming practices, healthcare and communications media. These local legal arrangements involve not only legislative measures but also judicial and administrative norms and all manner of unofficial customs and practices.

Why might it be useful to talk here of legalities as well as laws? In such an analysis, we shall need to speak with some precision about particular laws, such as rules for the constitution of the legal profession, national patent laws and telecommunications access codes. We shall need to do the same for the second order laws which govern the relationships between these different laws, such as the bodies of private and public international law. But the concept of legality assists the discussion by providing a more accommodating notion. It allows us to acknowledge a greater variety of normative ordering and certainly more varieties than the official laws of the nation state. It is also accommodating enough to show how the law reflects the colours of economics, politics and cultures. We can anticipate for instance that some legalities will be largely constitutive, others regulatory in an instrumentally or strategically minded way, while others again embody custom and tradition. Perhaps the reader will allow a relaxed sense of the possibilities, so that we do not become too caught up in definitional debates. I suggest we shall find that the WTO agreements themselves have a feel for these broader legalities.

To trace the fields in which these agreements operate, it is necessary to identify the patterns or matrices of inter-legality. We shall see that, primarily, the agreements address relationships between legalities that are distinguished by their geo-political origins or attachments. Essentially, they see things in terms of foreign and local legalities. A common focus for international and comparative law has been nation-to-nation legalities. Along these lines, the foreign legality is founded in another national legality, that of the home rather than host country. Our subject, the foreign supplier of services, finds that the host country's legality conflicts with the home country legality. This conflict becomes more complicated when some suppliers are able to compare legalities and possibly manipulate their choice of laws to connect with the most sympathetic 'home country' legality they can find. The suggestion is that globalisation makes this strategy accessible to a wider range of persons. In the process, national jurisdictions cut across

each other because of the multiple points of attachment that global carriers, such as online media, make available to the suppliers and receivers. Yet, the various countries which are implicated will not necessarily accept the suppliers' private choices of law. They may engage in competition over conflict of laws criteria as well as over substantive regulatory standards.

At the same time, the foreign legality need not be centred on one nation state or another. Studies of globalisation are finding that certain emerging legalities are much more free-floating and self-referential. There is interest, for instance in the re-emergence of a supra-national *lex mercatoria* in the business field.[11] Built on transnational contracts, model codes and private arbitration, it gives its own legal character to financial transactions, licensing agreements, strategic alliances and corporate mergers. Through the media of electronic commerce, these legal arrangements might assume even more ethereal and transitory manifestations.

So too, the local legalities which the foreigner encounters need not be grounded in the official public laws of the nation state. We need not treat local legalities as entirely synonymous with national sovereignty. Local legalities might be said to embrace a host of private as well as public legalities. When the law in the statute books converges, the foreigner only encounters further layers of normative ordering. This ordering can run to the closed co-operative relationships that are forged between local businesses when they organise the production or distribution of services. Or it might be founded in the customary arrangements indigenous peoples make to manage and share native resources. These private and unofficial legalities receive various degrees of recognition and support from the nation state.

So supply across the border or the establishment of a presence within a territory may encounter a variety of adverse local legalities. The foreign supplier dealings with the locals will not be confined to a small elite group which shares common perspectives and interests.[12] It will not be possible to settle on a single legality simply as a matter of consensus. The further 'trade' reaches, the more likely it is to make contact with strangers, in large numbers, whose value systems diverge. These strangers do not always respect the foreigner's legal claims, yet the foreigner increasingly comes to rely on them either for resources or for consumption. The foreigners seek to export their legal models but the extent of importation also depends on the configuration of local interests.[13]

No doubt I am already saying that I do not think that globalisation produces convergence or homogeneity in law. While, certainly, that tendency is present within globalisation, we should see through the studies why difference remains sustainable. For a variety of reasons, global suppliers find that they still have to negotiate the richness of local diversity. They need to call on the legal support, primarily of the nation state, to open a path for them and safeguard their passage. But, perversely, the same process of globalisation undermines the competence of the national jurisdictions to which they turn for support.

THE WTO INTERFACE BETWEEN LEGALITIES

These features of globalisation stimulate the efforts being made to formulate agreements such as the WTO agreements. I shall argue that, if we are to understand the agreements and their role in the globalisation of law, we need to add the less familiar concept of an interface to our array of conceptual tools.[14] Like a software interface in computer technology, our interface operates to connect legalities, to make them work together. But it does not need to suggest a full integration of the legalities which are interacting or even an ordering of them in a strictly hierarchical fashion. As well as disciplining legalities, the interface provides a kind of mediation. Mediation is meant in its common sense of connecting or creating a link between two positions which initially seem strange or hostile to each other. Mediation is a process of connection which should involve some give and take. The main outcome of the book I hope is a better appreciation of the nature of the interface constructed by the WTO and its two 'behind the border' agreements. Perhaps it will also help to make the concept deployable in other contexts. There will of course be many further attempts to mediate legalities as globalisation gains in intensity.

While the concept of the interface is drawn from the field of computers and communications technology, I do not want to give the impression that the interface will operate in a neutral, machine-like way. Even when we are dealing with the interfaces between technologies, we find that some are more open, less proprietary, than others. Any attempt to manage inter-legality will put its own particular stamp on the legalities involved. So, at this early stage, it would be unwise to overstate the accommodating nature of the WTO agreements. Indeed, they may turn out to be among the most emphatic of the interfacings in the global legal field. On this basis, another purpose of the book is to

characterise the agreements, to point up their biases as it were, and make suggestions for opening out the values and interests they can accommodate.

What might the WTO interface look like? We would naturally expect the interface to favour those legalities which support trade. But the interface is operating with a much more expansive notion of the legalities which relate to trade and which, specifically, act as barriers to trade. To think of intellectual endeavours and personal services as objects of trade is to place them squarely within the realm of the international marketplace and to trust their fate to the forces and values which operate in that marketplace. More subtly, this exposure has a tendency to abstract or decontextualise these endeavours or services or, more precisely, to extract them from the milieus in which their meanings and values are derived primarily from their local and particular resonances. We might expect some to make the shift and go from strength to strength, while others will find it difficult to compete.

We might also expect the WTO interface to favour global legalities over local. We need to gauge the implications of looking at certain traditional ways of dealing with these endeavours and services (certain legalities) as barriers to trade. The onus is placed on national governments to refashion their regulations as trade-neutral measures or as legitimate exceptions to the norms of trade law. This means that, at the least, local legalities must be mindful of and receptive to the legalities which foreigners bring with them. They must become more cosmopolitan. But we cannot expect all the legalities to survive in harmonious coexistence. The WTO is pushing in a particular direction.

Put at its strongest, the WTO agreements can be linked to a neoliberal agenda of regulatory reform. The objective is not just to ease conflicts between foreign and local legalities but to promote 'efficient pro-competitive regulation' around the world.[15] This agenda extends beyond free trade in the sense of breaking down barriers at the border. Its program for reform behind the border seeks to achieve two more ambitious goals. It aims to ensure that markets are accessible to foreign, commercial suppliers while remaining secure for their investments. There are different ways of characterising this package of reforms. They can be seen as a blend between access and security, liberalisation and control, free and fair trade, or deregulation and re-regulation.

Such a program requires a re-orientation, not just of legalities which were designed to protect local industries from foreign competition, but ultimately of a wide range of legalities with preoccupations other than

trade, such as professional conduct, natural heritage and media diversity. One immediate target of the agreements is the kind of nationally based, industry-specific legislation which limits foreign participation, guarantees space for local and less powerful producers, and insists on meeting public service obligations. We can expect the agreements to challenge these regulatory legalities and enlarge the scope for more generic bodies of business law, such as private property and contractual rights, to operate in their place. But the new agreements go further than this, as they begin to prescribe the content of that business law directly. Intellectual property and competition law provide two early tests of the prescriptive nature of that content.

However, we should appreciate that, in keeping with the nature of mediation, the agreements remain tentative in their approach to industry-specific regulation. Similarly, their specifications of business law remain incomplete. Moreover, it is not their view to treat intellectual property or even competition law solely as business law. Therefore, we should not be too ready to portray the agreements as single minded. In particular, we should see whether they lend support to independent and alternative producers, those producers, we might say, who cannot make use of the same powers of capital and technology as the largest operators in a laissez-faire global market. So we are asking after the breadth of the agreements' access to the rules and resources of globalisation.

NON-DISCRIMINATION

To answer these questions, we examine the norms and processes of the agreements. The examination requires some background on the WTO as an institution, specifically on the processes established for the conduct of negotiations, the setting of agendas and the settlement of disputes. Of particular interest here is how law is used to enhance the WTO's own capacity to mediate as well as to discipline the relationships between legalities. The agreements do not decide which national jurisdiction is to apply in the way that traditional conflict of laws doctrine does. We shall see that this kind of choice is becoming increasingly problematic. Instead, the agreements proceed from a principle of non-discrimination. The principle has two component norms, called 'most-favoured-nation' treatment and 'national' treatment. The essence of non-discrimination is that national legalities treat foreigners no less favourably, the point of comparison for most-favoured-nation

treatment being the treatment of other foreigners, the point of comparison for national treatment being the treatment of locals.

The liberal norms of non-discrimination may seem innocuous and unobjectionable to apply. It is said in particular that both most-favoured-nation treatment and national treatment do not prescribe to the content of a host country's regulatory standards. They only need to apply the standards they choose to adopt equally among foreigners and locals. We shall see that it is becoming rather simplistic to characterise the norms in this way. When the norms are applied in the fields of personal services and intellectual endeavours, being required to treat foreigners no less favourably tends to narrow the regulatory legalities or 'modalities' which are available to national governments when they pursue their preferred policies. A key task for this book is to gauge the reach of these norms in those fields where the foreigner is importing legalities associated with certain types of production process, forms of business organisation and modes of service supply (see Chapters 3 and 4 particularly).

For example, we shall see that most-favoured-nation treatment means that foreigners cannot be treated less favourably because a host country disapproves of the policies of their home country, for example in the way they treat the host country's nationals or the spill-over effects they produce internationally. So the norm restricts its ability to influence the home legalities of another country. National treatment is significant enough because countries do wish to apply restrictions to foreigners. They have sought to treat foreigners differently. They wish, for instance, to protect local industries from foreign inroads or to assert regulatory competence over foreign operators. But the discrimination need not be overt to fall foul of the norm. Particularly when national treatment says that formally identical treatment can be less favourable treatment, it means that foreigners cannot be treated simply according to local legalities. It requires local legalities to make concessions to foreign legalities.

Our analyses will show that the agreements work on the content of legalities in a number of ways. For example, the agreements make exceptions for certain non-conforming regulatory measures. But the measures must nonetheless satisfy disciplines which the agreements prescribe. Possibly, the treatment of the foreigner may be deemed satisfactory, if it is part of a formal procedure for the recognition of the home country legality, or if it is in line with an agreed international standard.

MARKET ACCESS AND INTELLECTUAL PROPERTY PROTECTION

Eventually, we shall see that, as influential as they may be, these norms of non-discrimination do not convey all the character of the WTO interface today. While still deregulatory in direction, the additional norm of market access begins to push the reform agenda further. Such a norm pushes against the non-discriminatory controls which national regulatory measures have placed on participation in domestic markets. It starts to point in the direction of economic liberalisation across the board. In the tradition of trade law, its focus is primarily on government measures that place barriers in the way of access to markets. Our analyses will reveal how government 'measures' are being conceptualised in a broader fashion. However, as these measures fall away, the WTO seems to be asking for more again. It begins to expect that member countries regulate to remove 'private' obstacles to market access. The agreements start to query whether government inaction is good enough. The WTO's tests for nullification or impairment of the benefits of an agreement are explored for potential here (see Chapter 3). Another responsibility being furthered concerns the regulation of exclusive suppliers, such as telecommunications carriers. If government measures have afforded suppliers the power to operate in a discriminatory or anti-competitive way, then government should be responsible for disciplining the supplier.

We have already suggested that the interface expects member countries to provide security to suppliers as well as freedom to trade. Again, if we were to think in conventional terms, the interface would be signalling to governments that they may not disrespect the private property rights of foreigners. In this respect, the draft OECD Multilateral Agreement on Investment (MAI) sought to prohibit government expropriation of foreign investment.[16] The discussion around the MAI showed how far reaching might be the impact of that negative constraint. But it is worth appreciating that the WTO interface already goes further. It expects governments to provide foreigners with legal protection against the threats to their intellectual property which stem from the unauthorised activities or measures of other private persons (see Chapter 6). If trade agreements traditionally signalled a deregulatory response, this intellectual property protection indicates there is at the same time a strong re-regulatory dimension to the interface. Such a standardisation of legalities is a clear way to overcome the conflict

between laws, even the arguments about discrimination. Foreigners can expect the same legality to be observed around the world.

The WTO's norms of intellectual property protection also reach far behind the border. The initial target of trade-related intellectual property rights was cross-border traffic in pirated and counterfeited goods. But the TRIPs agenda broadened considerably to address the legalities of domestic production in areas such as agriculture, health, culture and human life itself. A main task of this book is to consider the circumstances in which the WTO requires a national legality to recognise a foreigner's entitlement to intellectual property. Crucial too are the control and enforcement rights which the members must provide over the uses of the intellectual resource. On the whole, we can say that the WTO favours the liberal legality of the private property right. Yet, as emphatic as the norms are in translating clashes of legalities into issues of private property, it is not surprising that the WTO has left room for other national and international legalities to interact. These legalities recognise alternative bases for building entitlements and make allowances for competing uses of the resource.

COMPETITION POLICY

These allowances are evidence of an appreciation that the interface should not become too one-sided. Economic liberalism provides opportunities for market power to be strengthened, here now on a global scale. Accordingly, accommodation must be made for measures that seek to counteract abuses of this market power. Otherwise, liberalisation might simply end in laissez faire. Already, we are seeing evidence of second thoughts about the virtues of untrammelled financial freedom. There are a number of critical regulatory legalities which the WTO is being asked to bring within the contemplation of the interface. They include regulation for tax collection, the prudential supervision of financial institutions, core labour standards, and the protection of the natural environment. But for the time being at least, the WTO's position is to keep these issues of regulation at bay. The most it seems to do is to make a minor allowance for certain approved national measures, when they risk cutting across the liberal trade norms themselves. As we shall see, the WTO is being prevented from moving on these urgent concerns by its own conceptual and political limitations.

So, without in any way underestimating the importance of these issues, my work here will focus on another regulatory legality. The focus

is competition policy. My judgement is that competition policy represents the re-regulatory initiative most likely to be brought within the interface of the WTO. It is the approach which a neo-liberal regulatory reform agenda is most likely to offer us as a safeguard against abuses of market power. But the content of the competition policy which the WTO will support is very much unresolved at this stage. The WTO may expect competition policy to override those remaining national legalities which afforded domestic industry immunities and impeded the access of foreigners to domestic markets. But, as competition policy is drawn into the WTO interface, we can also ask whether it will offer a means to question the legality of the restrictive trade practices in which some transnational suppliers engage. Simply leaving a space within the trade norms for national governments to regulate will not necessarily make this happen. Without some impetus being provided from within the interface, globalisation will mean that many national governments do not enjoy the legal jurisdiction or the political power needed to apply such disciplines. The commitment is not only important in its own right. If the WTO was prepared to forge a re-regulatory code of conduct here, it could serve as the experimental model for the fashioning of codes in other areas too (such as labour). We shall return to the question of the WTO's competition policy after we have sought to evaluate its contribution to economic liberalisation.

WTO LAW

In the first edition I resisted writing anything about the form that WTO law takes as a clear theme or characteristic of the WTO, to accompany the substantive policies I have just described. With further experience, I think that abstention holds true, though not for any lack of rhetorical claims concerning the rule of law at the WTO and even the rule of law for the national measures member countries apply to trade. It is worth returning to this query now because of the genuine interest among international law colleagues about legalisation and the role of law.

Legalisation is a worthy benchmark for the WTO because it can be a virtue. Often, though, the ultimate goal is a higher state, possibly freedom, prosperity, sustainability or justice. But each of these values is contested and there is virtue in pursuing them and their trade-offs through law. Yet law cannot be distilled either. In practice, it proves impossible to achieve exhaustive rules and normatively ambiguity can

be constructive – certainly if WTO law is to mediate the many competing legalities.

Lately, jurisprudential arguments have been made to bring law in a strong sense back to the forefront of the WTO. The ideal is constitutionalism. If law will not be pervasive or comprehensive, it will have a crucial role as the framing document, the constitution that limits government trade politics while guaranteeing freedoms and protections for economic trading interests: rules to constrain governments and rights to emancipate enterprises.

The record shows that constitutionalism – the WTO as a constitution for the world economy – has not taken hold. The concept provides some explanatory power, especially with the judicialisation of norms enjoining governments from restricting trade in certain ways.[17] All the same, there are too many gaps and lacunae in the agreements themselves, even in TRIPs, certainly in GATS.[18] The WTO is marginal to the increasingly central global mechanism of direct foreign investment, while many are ambivalent about the WTO taking up human rights causes for the poor such as labour rights or rights to food.[19] Despite their use of dispute settlement, the members experiment with a repertoire of routines to go round the agreements, both inside the WTO (such as granting waivers, accommodating interpretations, various strategies of issue avoidance, and moratoriums on compliance) and outside the WTO (eg, in the pursuit of bilateral agreements, forum shifting to other international organisations, and reliance on informal networks). Law is best seen not as a constitution but as part of the looser system of global governance.[20]

Neither is the WTO regulating trade. By its injunctions and prescriptions, it is denying some (mainly national governments) space to regulate, while affording others space to do so instead (mainly transnational corporations (TNCs)). It operates at several stages removed – a kind of meta-regulation, if regulation at all. Only when its categorical positions prove unworkable, as they have in the case of trade in essential medicines, is the WTO drawn directly into regulatory systems – a kind of international administrative law. Even then, it is not engaging directly the large private players, such as the TNCs or those who deal with them, consumers, workers, local communities or indigenous peoples. So, in this second edition, I retain my interest in global competition regulation and broader based codes of conduct. However, I still conclude there is not enough common ground or mutual trust among the member governments to pursue them constructively.

The key relationship is between WTO law and national government measures. It is not one simply of deregulation but neither is it one positively of assisting in international coordination of national regulation, despite the clear cross-border challenges of financial volatility, displacement and poverty, movements of people and environment hazards. Part of the challenge is the difficulty of obtaining international regulatory cooperation and coordination generally, but specifically it is the WTO's slowness to mesh with the looser forms of global governance needed to make progress. So the main interest in the WTO has still to be in what it does or does not do to mediate other legalities, principally those of its member countries but also increasingly those of other international organisations.

The longer the WTO operates, the greater the interest in its own legal *modus operandi*. With the Uruguay Round agreements still essentially unaltered, dispute settlement becomes a natural focus for lawyers. But this book's analysis will acknowledge the extra-legal features of this process, and with it, the times the members bypass its facilities to prefer other means of dispute resolution. The useful question is not law, but rather when, how and why the members are disposed (or driven) to work inside law or outside, and specifically of course WTO law. With the benefit of a rich view of law that socio-legal studies can allow,[21] we can appreciate the multiple options inside law: law can be rules to invoke but also opportunities to establish conversations, commence negotiations, make statements or seek modifications. On the whole, this repertoire proves to be a healthy mix, a productive process.

Options mean choices, when for example it is better to stress the hard law aspects and when the soft law. They may be choices about how best to realize common goals. Finally, however, we should remain alert to the possibility of bias in the pattern to law's endowment. At each point, who participates, decides and benefits?[22] Global governance is commonly presented as an inclusive benign system. Global governance blends hard and soft law as a means of focusing attention on other public goods than high technology trade, for instance enabling coalitions of developing countries and NGOs to achieve outcomes not attainable in any single forum.[23] Nonetheless, Santos and Rodriguez-Garavito are right to query whether the outcomes are always so even: some get the benefit of rules, others make do with governance.[24] This query seems apt at the moment when the new WTO treaty negotiations are stuck, yet the dispute settlement system makes rulings. There is

little shortage now of useful insights and constructive ideas from the epistemic communities that surround the WTO. Will key states and major interests cooperate or will they persist to the end with gladiatorial struggles, hoping that the winner can take all?[25]

GLOBAL CARRIERS

These types of inquiry inevitably give the book a somewhat dry flavour. I wish to give the treatment more life by looking at the ways in which the WTO agreements, using the kind of conceptual and procedural approaches we have begun to describe, mediate the inter-legality of certain global 'carriers'. The carriers selected for study are those of legal services, genetic codes and online communications media.

The carriers are worthy of study because of their role in the circulation of knowledges, technologies and signs around the globe. Along with money, they are among the most physically mobile, indeed the most symbolically conveyed of all the global currencies. Furthermore, by enhancing the power of calculation and critique, they promote the capacity of persons and firms to operate in a socially reflexive fashion.[26] For whoever enjoys access to their rules and resources, they provide means to monitor, circumvent and exploit many of the different conditions to be found around the world. These differences range from physical conditions, production factors, financial charges, regulatory requirements, to cultural mores and social practices. Not only do the carriers afford capacity to cut loose from the imperatives of the locality, in this way, they help to construct new global networks of social relations. We should see how legal services provide means to fashion commercial transactions and business associations globally. The genetic codes of the living organism help promote global systems for the production of food and medicines. So too, the online media can project popular entertainment content and specialist informative services in all corners of the globe.

Yet the studies reveal how the ties to the locality can still be strong. If the carriers themselves offer ways to undermine locally based regulation, the legalities associated with these carriers continue to reflect a diversity of established approaches. More proactively, they represent efforts to position particular groups advantageously within an expanding global competition. Those seeking to make use of the carriers, in extreme circumstances to obtain control of them, are interested in mediation of the relationships between their favoured legalities and

those of others. If the WTO is asked to mediate, what impact does it have on the relationships between these legalities? In particular, we ask whether it can offer assistance to various sorts of independent and alternative producers, providers and users who seek to override the control points of the past and make globalisation work for them too. Thus, the case studies can help us to 'ground', where it matters, the kind of general observations we are making about the WTO's norms and processes.

Chapter 2 provides a global context for the WTO, exploring the basic phenomena I have characterised as legal pluralism, inter-legality and interface. Chapter 3 gives essential information about the WTO processes and norms. Chapter 4 analyses the provisions of the GATS, while Chapter 5, still focussing on the GATS, makes the first of the case studies, the study of legal services. Chapter 6 analyses the provisions of TRIPs. Chapter 7 follows up with a case study of genetic codes. Chapter 8's case study, online media, enables the impacts of the GATS and TRIPs to be considered within the same field. For those readers intending to pick and choose, you will find that each chapter commences with a summary of its contents.

NOTES

1. The WTO legal documents are generally available through electronic media and in hard copy. The texts of the Uruguay round agreements, including the GATS and TRIPs, can be accessed at the WTO's website: www.wto.org. In hard copy, they are available in the publication: WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Negotiations* (Cambridge: Cambridge University Press, 2000).
2. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was adopted at a meeting of government representatives in Marrakesh on 15 April 1994. The head agreement is the Agreement Establishing the World Trade Organization. By the Final Act, the representatives agreed that the WTO Agreement would come into force by 1 January 1995. Participants in the negotiations were given two years to accept the Agreement individually. See WTO, *Legal Texts*.
3. As well as various collections of papers, there have been many articles in the journals. *The Journal of World Trade*, *Journal of International Economic Law*, and *World Trade Review* are good sources for this perspective.
4. See, eg, P. Alston and M. Chiam (eds.), *Treaty-Making and Australia: Globalisation versus Sovereignty?* (Sydney: Federation Press, 1995); J. Kelsey, Global Economic Policy-Making: A New Constitutionalism?, *Otago Law Review* 9 (1999), 535.

5. For extended analyses, see M. Trebilcock and R. Howse, *The Regulation of International Trade* (London and New York: Routledge, 1995, 3rd edn, 2005); M. Kahler, *International Institutions and the Political Economy of Integration* (Washington: The Brookings Institution Press, 1995); and B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* (Oxford: Oxford University Press, 1996, 2nd edn, 2001).
6. For example, R. Nader *et al.*, *The Case Against Free Trade: GATT, NAFTA and the Globalization of Corporate Power* (San Francisco: Earth Island Books, 1993); G. Dunkley, *The Free Trade Adventure* (Melbourne: Melbourne University Press, 1997).
7. Such as C. Raghavan, *Recolonisation: GATT, the Uruguay Round and the Third World* (London: Zed Books, 1990); V. Shiva, *Protect or Plunder? Understanding Intellectual Property Rights* (London: Zed Books, 1995). The website of the Third World Network is a good source of critical commentary: www.twnside.org.
8. See, eg, M. Matsushita, T. Schoenbaum and P. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2nd edn, 2006); K. Anderson and B. Hoekman (eds.), *The WTO's Core Rules and Disciplines* (Cheltenham: Edward Elgar Publishing, 2006).
9. I owe this idea to S. Ostry, The Domestic Domain: The New International Policy Arena, *Transnational Corporations* 1(1) (1992), 7 at 7. Ostry forecast that: 'Most of the policies which will be the subject of the new international initiative are in the domestic domain: The new international policy arena'.
10. See B. De Sousa Santos, Law: A Map of Misreading: Towards a Postmodern Conception of Law, *Journal of Law and Society* 14 (1987), 279.
11. Yves Dezalay and Bryant Garth have been perhaps the most perceptive students of this phenomenon; see, for example Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Order* (Chicago: University of Chicago Press, 1996). Of course, there have been versions in the past too, such as the law merchant of the trade fairs, the ecclesiastical law of the churches and the law of the international sports associations.
12. R. Appelbaum, W. Felstiner and V. Gessner (eds.), *Rules and Networks: The Legal Culture of Global Business Transactions* (Oxford: Hart Publishing, 2001).
13. Y. Dezalay and B. Garth (eds.), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002); J. Gillespie, *Transplanting Commercial Law: Developing the Rule of Law in Vietnam* (Aldershot: Ashgate, 2006).
14. This concept has already been employed by the renowned trade lawyer, John Jackson, in relation to the GATT agreements, see J. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge: MIT Press, 1989).

15. An insider's view of this objective is provided by Kawamoto (1997) who was with the OECD Trade Directorate, see A. Kawamoto, Regulatory Reform on the International Trade Agenda, *Journal of World Trade* 37(3) (1997), 81; more recently see A. Mattoo and P. Sauve, Domestic Regulation and Trade in Services: Looking Ahead. In A. Mattoo and P. Sauve (eds.), *Domestic Regulation and Service Trade Liberalization* (Washington: World Bank, 2003; available at www.elibrary.worldbank.org). My emphasis is on the content of this 'efficient' regulation. Some commentators prefer to emphasise the national character of this legality, suggesting in particular that trade law is exporting a peculiarly European or American type of legality such as the Washington consensus. But there is also overlap between the two.
16. The restriction on government regulation would be substantial, as expropriation runs to any measures having equivalent effect. See now the United States FTA investment chapters and the commentary in Chapter 8.
17. D. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford: Oxford University Press, 2005).
18. M. Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (The Hague: Kluwer Law International, 2003).
19. E. Petersmann, Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration, *European Journal of International Law* 13 (2002), 621; P. Alston, Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann, *European Journal of International Law* 13 (2002), 815.
20. C. Joerges, I. J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004).
21. M. Finnemore and S. Toope, Alternatives to 'Legalization': Richer Views of Law and Politics, *International Organization* 55 (2001) 743.
22. G. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington: Brookings Institution Press, 2003).
23. L. Helfer, Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Making, *Yale Journal of International Law* 29 (2004) 1.
24. B. De Sousa Santos and C. Rodriguez-Garavito (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2006).
25. I. Mgbeoji, *Global Piracy: Patents, Plants, and Indigenous Knowledge* (Vancouver: UBC Press, 2006), at 197. Generally, P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Allen Lane, 2005).
26. For an articulation of this concept, see A. Giddens, *Beyond Left and Right: The Future of Radical Politics* (Cambridge: Polity Press, 1994).

CHAPTER 2

A GLOBAL CONTEXT

Chapter 2 provides the global framework for the analysis of the two new WTO agreements and the impact they are having on the inter-legalities of legal services, genetic codes and online media. It gives some definition to the three key concepts we shall be carrying with us through the studies. It begins by suggesting why globalisation is both something new and something old. It spends time considering how globalisation reconfigures the plural legalities of the world. Sources of convergence are identified in the ways economies work but also in the role of cultures. The chapter notes too, the influence of politics and the complex processes of regulatory competition and cooperation and global governance.

The contention here is that diversity remains sustainable, even if that diversity increasingly comes to be treated as difference. Convergence theory tends to suggest that nation states must offer the same regulatory regime if they are to meet the expectations of global suppliers. But it appears that localities retain some leeway to vary their approaches and, indeed, globalisation provides opportunities for the expression of new differences, both as inward looking resistance and outward looking activism. So too it is necessary for us to be prepared to 'deconstruct' the content of global legalities and here we can appreciate that they do not push simply in the direction of some kind of standardised regulation. Globalisation creates new terrain, social fields on which legalities interact and regulate each other.[1] So within globalisation, we are likely to be exposed to currents which are running opposite ways, towards destruction and creation, deregulation and re-regulation, disconnection and re-attachment, exclusion and access.

This chapter then identifies the capacities within law specifically to promote both convergence and divergence. On the one hand, law abstracts and generalises. These capacities are enlisted by those who would disconnect the networks of social relations from their ties in space and time. But of course law can also display rich, localised textures. The navigation of these legalities depends on familiarity with detailed, even tacit knowledge which can only be acquired through an enduring presence deep within the layers of the locality. The chapter relates the examples of intellectual property and competition law to indicate why, when economic, political, cultural and legal fields interact, conflicts of laws are likely to continue.

The chapter goes on to acknowledge the interest which socio-legal scholars have shown in the phenomenon of inter-legality. It begins to outline ways in which this interest can be translated into the contemporary global scene to help us understand the nature of international law making. If inter-legalities seem predominantly to be national to national (that is inter-national) legalities, globalisation adds more complexity to the grid of relationships. It constructs relationships between transnational, national and sub-national legalities. It leads on indeed to relationships between different international legalities. This matrix of inter-legalities is complicated today by the participation of a greater number of nation states, the operation of many more non-government organisations and communities, and the increasingly multi-polar arrangement of international institutions. The analysis employs the concepts of networks, norms and governance to aid this understanding.

Finally, to see if it can assist us in understanding how these inter-legalities might be mediated, the chapter adds in the concept of an interface. The concept is defined and its role expounded. The interface under scrutiny here is operated by the WTO. This leads to a consideration of the way such multilateral institutions proceed. Looking at the role of law here as a kind of 'meta-regulation', we shall ask what sort of legal arrangements provide one such institution with the rules and resources to regulate and mediate successfully? In particular, we shall be interested to know whether the indeterminacy and flexibility of law, as much as its capacity to order and discipline relationships, assists in the task of mediation. We find these conditions in the norms and processes of the successful institution.

Chapter 2 stresses the point that we should measure the success of an institution by the capacity of the interface to accommodate

perspectives. Success is not to be marked by a single-minded insistence on a narrow agenda. Yet the interface is far from being a neutral conduit. While the concept of inter-legality rejects the more extreme ideas abroad about the incommensurability of legal traditions, it is not meant to imply that the different legalities meet on equal terms. Certainly, the widening and deepening of the contacts between legalities make it more difficult to impose a strict hierarchy or uniformity on law. We might observe that, in many instances, the past methods of imposition are becoming less effective. The use of military force or even economic sanctions meets greater resistance, and less deference is shown to the superiority of western models of universality. A more subtle approach is sought. But, inevitably perhaps, the mediating device puts its own twist on the relationship between the legalities. It may very well skew the relationship in favour of certain kinds of legality. Moreover, we might discover that it is successful in doing so precisely because it proceeds by way of mediation.

RESEARCH

That law is moving more and more to engagement across international and transnational fields has become a major topic for research in studies of law and society. The identification of such fields for law emerges from the pursuit of varied research interests. The interests have included the changing nature of lawyering and the legal profession, the relationship between lawyers and business, international business regulation, human rights, the rights of indigenous peoples, trans-border health and environmental hazards, and population and migration movements. The research may start as subject-specific work, good examples being the regulation of international business taxation and international securities markets. But it assumes more general significance as it identifies new regulatory norms and processes at work, such as regulatory competition and cooperation, and even the globalisation of legal phenomena.[2]

Whenever the concept of globalisation is invoked, we are reminded of the lengthy and weighty pedigree of comparative and international law scholarship. Not surprisingly, much of the recent interest is still organised around such established headings and it moves only gradually to a more holistic view of the world. Such organisation reflects a naturally cautious response to the sweeping claims made for globalisation. However, we should not be too ready to let go of the idea that something profound is represented by the proliferating multi-polarity,

yet essential inter-connectedness, of legal fields. Much of the recent work could be said to be striving for an approach that recognises the scale of the issues at stake, while remaining positive about the degree of diversity and contingency in the world.

Here, my inclination has been to agree with Joel Handler that 'something big is happening', at least to the extent that some commentators envisage the globalisation of free trade and a borderless capitalist economy.[3] Nonetheless, Yves Dezalay is right to counsel us not to confuse practices with the discourses which 'orchestrate' them.[4] We should appreciate that globalisation is as much an idea or perspective that competes with others, such as the seeming naturalness of local legal traditions. For the time being at least, we should be inclined to expect that: 'there will be more cognitive orientation, more decentralised norm creation, more autonomy of political arenas, more cultural competition, hence less stability and less transparency of the normative order'.[5] After making a valiant attempt to plot the matrix of international securities regulation, Joel Trachtman makes a similar point: 'This Article has indicated the overlapping, interacting, and generally chaotic nature of international deference and cooperation in the single sector of securities regulation. Multiple reasons, multiple methods, and multiple scopes interact to form a complex and often indistinct matrix'.[6] This recalls the idea, from globalisation theory, of there being 'unity in diversity'.

Ultimately, case studies are needed to capture and convey a sense of this variability and much of this book is devoted to case studies. At the same time, it might be possible to say something provisionally about the shape that legal globalisation assumes, not the least because we each harbour a normative aspiration for the kind of world we hope to see. That aspiration can vary of course too in all sorts of ways: it may be economic productivity, wealth creation, political sovereignty, cultural diversity, environment sustainability, social justice, human rights or the rule of law. But, however clear the outcome we desire, we must be prepared to use the conceptual and methodological tools that enable us to work with complexity and fluidity, such that regulation and governance studies offer us for example.[7]

OUTLOOKS

It follows that one way we might 'cope' with the very demanding task of conceptualising globalisation is to think of it as a construct. Globalisation may be invested with various meanings and enlisted to

different causes. So, the conceptualisations of globalisation produce contrasting attitudes. In particular, these attitudes may contrast activism with fatalism, or hope with despair. We appreciate that the most confident global outlook is usually associated with the new economic liberalism. The 'end of history', the collapse of communist regimes in Eastern Europe, and the transition to market economies in Latin America and Asia, have led many to conclude that it is the dominant fact of world life. In recent times, there have of course been different versions of this formulation. We might say that the modernisation movement aimed to educate 'backward' societies in the virtues of western liberal institutions.

The more contemporary and powerful version has proved to be the idea of an inevitable search for greater economic efficiency on a global scale. Among this search is the most efficient set of regulatory arrangements on offer.[8] Open trade and free markets are said to enable that search to take place. The 'neo-liberalism' of open trade and free markets has attracted a great deal of attention in business, government, university and international circles since the eighties. This conjuncture provides an opening for the widespread acceptance of global markets in agricultural commodities, manufactured goods, the supply of services, investment flows and transfers of information. Finally, it might be possible to make full use of comparative advantages, so raising the level of consumer welfare across the world.

An approach which is allied in many ways is that of 'big science' and high technology.[9] Our drive to control nature is exemplified by the ambitious plans to mobilise nature's genetic codes. Genetic science and biotechnology will transform food production and health care, perhaps human reproduction as well. As we should see from the case studies, through their powers of analysis, calculation and representation, professional and communication services may also hold out the promise of more technocratic mastery over the forces of nature and human society.

On the other hand, globalisation has fostered a somewhat more pessimistic view, harking back to the political economy of world systems theory. Today, there is understandable concern about the global power of corporate conglomerates and technocratic elites. Globalisation may produce the conditions for a new economic order, accentuating divisions, even to the extent of a new kind of feudalism which is based on control over abstract values and social capital such as information resources. In this world view, the division between

centre and periphery may have lost much of its spatial specificity. But it takes on new form in the polarisation of the working conditions of skilled and unskilled workers, or the gap between the information rich and the information poor. So too it promotes short-term excesses of wealth and consumption at the expense of long-term environment sustainability.

Globalisation can produce such divisive effects because it undermines what has been one of the main lines of defence for social welfare. Democratic forms of government have been centred on the nation state or, in some instances, the local community. For those concerned about global overshadowing, the struggle to maintain the viability of domestic regulation is vital. This regulation has been important to the efficacy of a number of local protections. For instance, it has provided a means to ensure a local revenue return, build up indigenous capability, maintain political authority, preserve cultural traditions and safeguard physical and social environments. Hence, in the process of globalisation, the local, the spatial, becomes the rallying point for a considerable range of distributional concerns, communitarian sentiments and non-economic values. For some, of course, this orientation points to the need to preserve existing state institutions, public instrumentalities and statutory requirements. But we should appreciate that it also runs to the defence of a whole host of informal, local and private regulatory spaces.

As important as these concerns are, the discussion rarely ends there. A notable addition to the debate is the cautious optimism about the value of looking outward and making the global shift work for various 'social' groups. Among these groups are represented consumer, labour, feminist, indigenous and environmental perspectives. As we have suggested, the main themes of globalisation often stress the power of such 'players' as financial dealers, multinational corporations, big science, media conglomerates, and elite technocrats. They may do so in a positive or negative light. But globalisation becomes a source of hope for others who have experienced disenchantment with the policies of their nation state. As Baxi reminds us, this orientation is not new.[10] Indeed, he argued that the new narrative of economic globalisation is a challenge to an older culture of globalism, of universal human kind, human rights and self-determination. The new social movements are the successors to this tradition of globalism for which the main international institutional field has been the United Nations. Professor Baxi is not as optimistic as others about the prospects for the two streams to

be reconciled. He detects a reluctance to do so in both self-confident economic liberalism and relativising post-modernism to maintain this culture.

Axford casts this issue in sociology's terms of the structure-agency distinction.[11] To some degree, we can accept that individuals are scripted by institutional orders and cultural accounts. However, globalisation undermines existing institutions especially nation states, and offers new ones (such as international organisations) which compete. So it may provide individuals with opportunities to adopt fresh perspectives and practices. It erodes the physical and temporal barriers which once protected local interests and identities, so that it appears a welcome opportunity in some cases to escape local intolerances and insularities. At the same time, it exposes individuals to a wider range of knowledges and experiences. Global economics and technologies do not engender a feeling of certainty and safety, rather they increase the sense of risk and contingency in people's lives.[12]

Yet, as more informed and critical, albeit anxious and insecure, agents, they might enjoy greater scope for self-realisation and collective development. They gain the capacity to interpret, act upon and perhaps transform the institutions which are in the making. Susan Sell also sees potential in this interplay between structure and agency.[13] Nevertheless, she reminds us to remain hard-headed in our reading of the prospects. Globalisation depends on who gets to play the game and influence the outcomes (who participates? who decides?). Power matters, but so too the nature of the institutions that mediate between the macro-level forces and the micro-level activities make a difference, including the role of law. So the process of global 'structuration' is to be seen as a negotiated and contingent one.

CONVERGENCE AND DIVERGENCE

How might these broad orientations and aspirations contribute to both the multi-polarity and inter-connectedness of globalisation? Perhaps the most sensitive and nuanced representations of globalisation characterise it as a fluid process, riven by cross-currents of economic, cultural and political flows. These representations put to good use the metaphor of water. In assigning some direction to the flows, the uncertainties and ambivalences surrounding the potentialities of globalisation may be revealed in the force which people are prepared to attribute to the currents of economies, polities and cultures. Thus, a common

view presents a mismatch between the strong tides of a global economy, on the one hand and, on the other, the backwaters of fragmented political power, which is still at least formally speaking assigned to the nation state. In addition, the rich diversity of cultural experience may be viewed as a source of harbour-like relief or respite from the reduction of the life world to either market exchanges or power relations.

It would be convenient, schematically, if the various sources of legalities could be compartmentalised like this. But we should acknowledge that the compelling issues of identity cannot be so neatly separated from those which are connected with material interests or wills to power, that is with desire or reason. Such a separation is especially artificial in the fields where the WTO agreements are reaching, such as intellectual and artistic endeavours, the provision of services with a high personal or social quotient, and the construction of law itself. In any integrated analysis, the economies of culture have to be related to the cultural and political contexts of the market. A ready example comes from the field of tourism. From personal experience maybe, we understand how global tourism both trades on culture and aestheticises economics, while at the same time it may attract intense political attention. For a current illustration, we might point to the case of tourism in Egypt.

This kind of interactivity has implications for law. In keeping with the mismatch analysis, it has been suggested that material exchanges which take place on a global scale have dispensed with the need for normative integration. If there is integration of systems, it will be 'behind the backs' of the participants. So, as we noted, Gessner foresees a greater cognitive and instrumental orientation to social relations with, accordingly, less political solidarity and less effective cultural ties. But it has long been understood that markets are never pre-social: there are as many markets as there are possible legal rules to define them. Furthermore, when markets are structured by rules, such rules are not taken up in merely an instrumental fashion. They form part of the politics and cultures that afford meaning and legitimacy to claims of interest, for example by building up the necessary respect and goodwill for them. So, while they certainly include the laws promulgated by nation states, the conventional site of legal authority, they are also comprised of all kinds of informal normative knowledges and observances. We could say that this has been the lesson for those societies which have endeavoured to embrace the free market and expose their

economy to open trade, without the build up of the value systems and community networks of civil society which are needed to glue it all together.[14] In truth, open trade and free markets only expose to competition, once again, the sources of the necessary economic, cultural and political associations of the law. We have resolved to see how the WTO agreements entail a struggle over those associations. In particular, we seek to identify the support which they give to competing perspectives and interests.

The economic sphere

While doing its best to be interdisciplinary, a work like this cannot expect to convey all the richness and complexity of globalisation. So the present remarks are intended merely to give a feel for the essential duality of globalisation. Globalisation breaks down the boundaries of time and space, while at the same time underscoring the continuing ties of the locality.[15] Such a broad brush is meant to provide a backdrop to the subject matter of the case studies. With this in mind, we can start with the economic sphere by acknowledging the tendency of globalisation to give a world-wide organisation to economic processes. It is notable for feeding lines of investment, transfers of information and travel of personnel into the flow channels, along of course with the more established trade in finished goods and primary commodities. The most obvious example is the lightning speed of the speculative trades in financial markets. Business services support the global coordination of production in which the transnational corporation emerges as the key actor and many of the flows are not only intra-industry but also intra-firm. Increasingly, they also involve the supply of intellectual and personal services across borders into end consumer markets.

Yet, paradoxically perhaps, the same process of coordination takes advantage of local specialisation. It reveals the national base of many corporations, the varying industrial organisations of national cultures, the shifting pattern of strategic alliances and contracting out, the contribution made by small firms, the use of flexible modes of production and feedback from sophisticated users. However, these developments should not be treated simply as evidence of disintegration or even disorganisation. Rather, we should appreciate that they give rise to the complex organism of the network. Place still has a role to play in these global networks, even if it is not always place centred on the boundaries of the nation state but place given prominence by globalisation such as global service cities and production regions.[16]

In these formations, participants draw on their historical and geographical strengths. For example, recent work has detected the clustering of industry in regional webs of researchers, suppliers, producers, distributors and users. Even the management, financing, design and fashion functions of global operators tend to be grouped in certain city centres.[17] But globalisation provides outlets for all sorts of strengths and dependencies. The entry of Asian centres into services sectors as well as manufacturing markets is a recent expression. Certain groups in the least developed countries are the target of science and industry thirsty for fresh supplies of cheap dexterous labour, natural genetic materials and original forms of artistic expression. Perhaps the environmental threat will lead to economic value being placed on a new set of capacities and products, those less energy and water consuming.

Furthermore, we know that much production continues to be for home markets. Producers often need to be near to their customers if their demands are to be met responsively. This need to maintain a local presence makes the movements of natural persons and the flows of direct investment both more crucial and more sensitive issues. In this configuration, connections also need to be made with indigenous producers, say through strategic alliances with local firms and the employment of locally skilled workers. Of course, any capacity to abstract and standardise supply modes works in the other direction. But we should keep in mind that standardisation is not fail safe. For example, supply from a distance often exposes the services to the risk of unauthorised access and competition from copying technology.

The political sphere

A strong theme in the writing about globalisation is of economic processes that undermine the nation state's capacity to exercise regulatory choice and competence. For example, free flows of capital enable financial markets and business corporations to pass judgement on national policies through capital flight and to obtain favourable concessions by playing states off in rounds of 'regulatory arbitrage'. States feel pressed to adopt the kind of policies which attract and reassure investors. The ethos and practices of the private international business world may be introduced into the national realm more directly through the corporatisation and privatisation of public sector instrumentalities.

The resulting cross-investments, intra-group transfers and transnational linkages make it increasingly difficult for nation states to apply

regulation effectively, either to capture the benefits of globalisation or control its costs. Taxation is proving to be a case in point. Tax competition through transfer pricing is replacing competition through trade in finished goods. If, at an earlier stage, the flows had materialised in a particular location, then states at least knew where to apply disciplines to the competition they experienced. Now a transactional cyberspace conveys the notion that markets need not have any geographic location or time zone at all. They could almost be regarded as existing somewhere in the ether.[18] In Ruggie's imaginative conceptualisation, a 'space' of flows floats free above the space of places.[19] Such flows create enormous uncertainties for national governments. They enable further detachment of formal abstract relations from the physical sites of production and delivery, throwing conflict of laws criteria into confusion and making regulatory regime an option for greater numbers of ordinary people.

Yet the same process of globalisation provokes many domestic groups (including business groups) to look to the nation state for protection. These constituencies may vary with issue. Indeed, it is important to understand that the very same people may find themselves shifting between roles, in one capacity the beneficiary, in another the victim, of globalisation. We shall use intellectual property as an example of this. Many producers are also borrowers and copyists. As a consequence, nation states continue to address the use of market freedoms and powers in a range of regulatory policies. So, when intellectual products and personal services reach behind the border, they encounter sensitive regulatory domains and local movements, designed to assert economic independence, political sovereignty and cultural integrity.

At the same time, we should accept that the attitudes of global suppliers to state policy are not single-minded. Certainly, we can say that they do not produce simply a demand for deregulation. Much of the deregulation appears to be occurring unilaterally, as local elites invoke globalisation as a rationale for their domestic agendas. Instead, global suppliers often seek a mixture of flexibility and security. This mix involves a relaxation of restrictions on flows at the same time as protection from unfair or excessive competition. Much of the manipulation is based on the forms that the state underwrites such as the corporate veil for conducting personal business and the protection of private property. Dezalay wryly comments: 'Not only does the logic of the market, of which they are the agents, gradually submerge the national cultures of which they are the inheritors; but, to construct

an international market, they rely on the very state structures they are undermining'.[20]

If state regulation is still an issue, there seems to be no singular desire to standardise that regulation. The cost of complying with differential national requirements is a consideration for global operators but they may themselves see convenience in the maintenance of differences. Even if the search is for efficiency, there is no single set of 'efficient' regulatory arrangements.[21] What is efficient will depend in part on one's standpoint. The recent vagaries of the international financial markets highlight this observation. The message to be derived from this is that we should be prepared to 'deconstruct' the demands of the global, just as we expect there to find diversity among local aspirations. Thus, for nation states, the lesson of new growth and strategic trade theories is (to adopt economic terminology) the imperfect nature of competition in global markets. Advantages are to be gained by practising selective support, brokerage and organisational policies. While no longer necessarily inward looking, that is based on defensive measures which aim to shelter domestic production and further import substitution, the national stance may be a neo-mercantilist one rather than one which is receptive to free trade.

For activists, this suggests that the pressures of globalisation are refracted through the prism of national policies. It is sometimes said that standardisation is more likely to emerge in the regulation of areas like private property, market transactions and business association, the basic building blocks of a liberal market economy.[22] But any serious comparison reveals differences in these respects as well as the more predictable areas of industry assistance and social regulation. Furthermore, while regulatory competition analysis often suggests a laddering down of standards, a race to the bottom, it may be possible for localities to engage in a global economy on the strength of high standards. Success may be found in a compromise between competition and cooperation, private freedoms and public policy, consumption and production.[23] Good institutions are a source of comparative advantage as well as social welfare. We must accept that institutions are largely a product of circumstance, historical paths, regulatory traditions, economic conditions and cultural mores, even legal origins, but taking an actor-centred approach, we may still entertain the idea that they can be reshaped.

However, before we get too hopeful, we should enter a note of caution. This strategy may have its limits. As the global actors become even more mobile and reflexive, there is a limit to what can be done

within one country, and the viability of social regulation may depend on the control of regulatory competition through the introduction of international standards.[24] Many countries lack the technical resources, legal jurisdiction or political bargaining power to regulate the transnational players. The interest turns to the prospects for international regulatory coordination (see below).

The cultural sphere

While it accommodates a richer pattern of economics and politics, this kind of analysis is still too materially and instrumentally oriented ever to begin to encapsulate the nature of globalisation. We shall benefit by taking to heart the renewed interest in culture. Certainly, it can be said that the regulation of intellectual products and personal services assumes cultural significance. But culture too has contradictory tendencies. Cultural flows may be treated as the ultimate carriers of universalising global messages. In Waters' handy formulation: 'material exchanges localize; political exchanges inter-nationalize; and symbolic exchanges globalize'.[25] It is not hard to see how products and services which are largely symbolic in nature can detach identity from place. Submersion within some of the contemporary media may also encourage people to lose track of time. Living in an ever transient present, diverted by imaginary futures, they are tempted to forget the lessons of history and the value of traditions. One short-hand for this is McDonaldisation and the power of brands, to which intellectual property and services law make an important contribution.[26]

However, globalisation can also be seen to sharpen a sense of cultural difference. While that sense can be highly defensive, in its positive manifestations, it points up the strength of long-standing cultural practices. It is readily appreciated that, across the world, the range of cultures is great. Many locations contain a variety of religious and ethnic groups within them, some of them, as cultural diasporas, also linking across borders. These variable practices include non-market and non-industrial means of meeting material needs. In other words, disjuncture does not simply arise out of modernisations not taking readily in developing countries. Various localities show resistance to the wholesale commodification of cultural significant activities, such as farming, health care, education, artistic expression, professional practice, conflict resolution and essential services, which have symbolic as well as material values attached to them. Socio-legal studies have taken up the concept of legal cultures to indicate how law is part of this diversity.

Even from within the organisation of thoroughly capitalist societies, differences are significant. The recent 'varieties of capitalism' literature shows how contrasts can be made, for example, in the levels of commitment capitalists make to long-term relationships with suppliers, workers, customers and communities and the extent to which governments give institutional support in coordinating relations of production in spheres such as industrial relations, vocational training and education, corporate governance and inter-firm relations.[27] A broad contrast is made between insider and outsider economies, but such levels of commitment and involvement vary, not only from country to country, but also from sector to sector and period to period. In our fields, such cross-cultural divides can frustrate attempts to gain market access for services or to win local respect for claims to intellectual property. Again, law varies with these organisational forms of capitalism and some theory even argues that legal origins are the explanation for the economic and social differences.[28]

Yet, scepticism remains. In some quarters, there is doubt whether all the cultural profusion and traffic associated with 'post-modernity' is anything more than the surface phenomena of another highly adaptive phase in capitalism's development.[29] The hyper-reality of media cyberspace or science eugenics provides no substitute for the authentic identities and personal relations which are rooted in local communities. Others though are more optimistic about the prospects for cultural pluralism at the global level. The most obvious candidates for a third culture are the business elites and symbolic analysts. But globalisation may enable new (and not so new) social movements to connect up across the world and bring influence to bear on transnational fields. 'Destructuration' at the national level is especially evident in the growth of non-class movements, some seeking definition and association through their choice of expressive or ethical lifestyles, rather than their rational and material outlooks (again see below).[30] The participation of these various transnational advocacy groups, epistemic communities, aid charities, internet networks and moral movements is summed up in the concept of global civil society.[31]

LEGAL PLURALISM

Horizontal private business justice

Where do we begin to place law within this loose frame of reference? Of course we have already touched on law in the discussion of the

economic, political and cultural spheres. For law is 'imbricated' within these spheres and displays all the fluidity and contrariness of their flows. So, we can begin by claiming that law works for globalisation, most obviously where its symbolic and abstract qualities are enlisted to disconnect relations from their spatial and temporal reference points. Certain kinds of laws (and lawyers) become the carriers of worldly ideas and practices. For Dezalay, it is precisely law which fills the void left by the withdrawal of coercion, the symbolic production of law playing an active role in the construction of a transnational field of business justice.[32] We can think of this justice being built on off-shore incorporation, transnational contracts, commercial arbitration, cross-border third cultures and model commercial codes, leading to the crystallisation of a new supra-national, and possibly a-national, *lex mercatoria*.[33]

It is important to note that the facilities lent by this kind of law do not just guide traders and investors in their selection of physical location. The legal media of contracts and corporations provide opportunities to manipulate the matrix of jurisdictions. Components of a total legal package may take different transactional forms and be routed between entities with a variety of jurisdictional links (money laundering).[34] We know that sophisticated legal and other business services play an important part in designing these packages and fitting them to the circumstances of the clients. That is why access to these services, especially on a cross-border, fully integrated service basis, has implications, not just for competition between different types of professional services, but more broadly for advantage in markets for corporate governance, financial trades, investment avenues and hence the management of national economies.

Enhanced mobility and reflexivity make it difficult for nation states to fix their sights on the fast moving, sometimes heavily concealed, traders and investors, so that their regulation is 'competent'. Indeed, as we noted in our discussion of politics, they may feel compelled to offer up these regulations if they are to compete for business. In this process, more and more areas of national law, previously regarded as domestic concerns, become subject to international economic considerations. Eventually, it is suggested, business will find a home in a self-contained and self-referential field of justice that floats free above the claims of the nation state altogether. Much of this change is a result of business law models being imported into national legal systems but some occurs above the heads or 'behind the backs' of responsible governments and ordinary citizens.

Yet our understanding of the role of law in globalisation needs to be given greater nuance. First, we should acknowledge that business law is not developing merely out of immediate material self-interest. Studies capture the dualism of business lawyers, torn between competition and ideals. They often evince a desire to affirm the legitimacy of their vocation through a contribution to international public service. Certainly, such lawyers have been involved with national governments making diplomatic representations and acting as expert consultants advising on changes to local legislation or agreement to bilateral treaties which are meant to accommodate the needs of business, for example in the tax area. But, even if it makes a good career move, they may place their role on a higher plane.[35] They make a contribution to world growth by building systems of cross-cultural communication, peaceful dispute resolution and private justice. One could acknowledge, for instance the public-spirited work done by lawyers towards the codification of business law through such international organisations as UNCITRAL, the Vienna Convention on the International Sale of Goods, the Hague Convention and Unidroit. It seems their peculiar skills may fit them to this task. Law lends legitimacy to specific economic practices by translating them into law's specialist discourse of abstract principles and equality of treatment.

Richly textured local law

Furthermore, the process does not produce convergence. The legal irritant that is introduced from outside the national system is likely to produce more diversity rather than less.[36] In their studies of production, exportation and importation of law, Dezalay and Garth find that it depends partly on whether the interests of the local elites are served if a particular legal model is adopted, indeed if a legal approach (such as the rule of law) is followed at all in preference to another economic or social system such as corporatism, clientilism or authoritarianism.[37]

If law were to be involved in the construction of a transnational field of business justice, we would most likely expect it to be sourced in freedom of contract. Its autonomy would derive primarily from the consent and cooperation of the parties. However, if this kind of cohesion comes apart, a more likely prospect as the field widens and deepens, then the participants will continue to look to national legal systems for support.[38] National jurisdictions may take this opportunity to question the content of international contracts and the autonomy of arbitrations. The controversies over the validity of exemption and

penalty clauses, indeed over choice of law clauses, provide evidence of this remaining oversight. But such an interest is reflected not only in differential national contract law. It is also manifested in a range of what are more conventionally called regulatory laws such as fair trading, consumer protection, prudential supervision, access and equity, taxation, employment protection, and environment management laws.[39] One consequence of this is that countries do not simply accept private choice of law manoeuvres. They clash over conflict of laws criteria as well as substantive standards of conduct. A pertinent example is their unwillingness to accept commercial arbitration where it encompasses regulatory questions such as competition law.[40] It remains difficult to obtain the cooperation of local courts in the enforcement of foreign judgments in some countries.[41]

Such abiding national law displays – to use Olgiati's descriptive terminology – rich or thick localised characteristics.[42] A whole range of economic advantages, political privileges, cultural traditions and legal peculiarities provides reasons for continuing legal differentiation and the failure of universalist models to take at the local level. Certainly, this is observable when one looks beyond the layers of law represented by the law in the statute books and judicial decisions. So the location of law making still matters. When laws converge on the surface, they merely give way to further layers of institutional and cultural resistance to external influences.[43] The simile sometimes employed is one of 'peeling an onion'. Ultimately, such resistance turns not so much on overt formal rules as on deep informal, private understandings and customs. Thus, law continues to assume specific cultural and social forms. Just as transnational business constructs its own regulatory systems, law at the local level is made by private practices. Even where jurisdictions are attracted to international trade and investment, for example through corporate mergers and acquisitions or public sector privatisation, the local legal culture will still end up displaying its own peculiarities. Knowledge and practice of this law are enhanced by presence, proximity and temporality.

In this process of differentiation, the locality need not always be inward looking. Globalisation provides an opening for a variety of national and other legal bases to orient outwards, inserting their own models into international fields and exporting them to other places. The usual suspect is the west and one can see, for instance the significance of choice of law clauses in international finance transactions nominating English or New York as their governing law. But, given the

different organisational forms which capitalism assumes, we might expect to see more self-confident assertions of transnational legal links across non-western cultures. A case in point is the operation of Singapore lawyers in countries like Hong Kong, Vietnam and China. Greater consciousness of the culturally specific origins of legal universals and greater acceptance of cultural relativism have tempered the force with which legal liberalism is recommended as the sole model for adoption by modernising and internationalising countries. For example, North American administrative law does not export readily to other national legal cultures or into the international legal arena.[44]

Intellectual property and related laws

To underscore this basic point, we shall now consider the main subject matter of the book. Again, as well as illustrating these basic points, the discussion should help set the scene for our case studies. We might begin by observing that dealings in intellectual property are quite often not confined to small elite groups which share common understandings and interests. If we think about the circumstances in which the seeds of plants are produced and then utilised, or how snatches and samples of music, text and images are deployed in the online media, the practices involve widely dispersed strangers and divergent value systems. Divergence characterises views, for example, about what is invented or authored, or what is entitled to attract remuneration rather than be open to free access and use.[45] These views are not just held by isolated individuals. Now there are global networks communities dedicated to open source media, the free exchange of research and creative commons, together with whole new business models for consuming, indeed producing multi-media products (music, vision and text) in YouTube, MySpace and their less commercial counterparts.[46]

Of course, such problems do not stem just from differences in attitudes. Logistically, old-fashioned enforcement is a daunting task. Aided by communications and copying technologies, these strangers take advantage of the public and intangible nature of many intellectual resources. The producers need to be able to call on legal regulation, if there is to be an effective social relation of exclusion and control. Yet the multi-party, multi-national way in which these resources are often produced and distributed, places in considerable confusion the law which is to apply.[47] The problems producers face controlling the infringements of their putative property rights present the obvious case. It is unlikely a consensus mechanism like contract can be used that often.

For instance, a phenomenon like the new online media allows many possible points of attachment to jurisdictions. Among these points might be the site of the origin of the work, the site of an assignment or licence, the site of the emission or reception of the transmission, the nationality or residence of the producer, or the nationality or residence of the infringer. So the media can readily be seen to generate permutations with a vast potential for a clash of laws. Indeed, the operation of the media may make it hard to decide just where those sites of attachment happen to be, even if agreement has been reached on which site is to provide the locus for the law. Whereas the earlier technology made physical copying so much easier, now it is communication itself which is enhanced dramatically. Messages can be switched from point to point, from server to server for instance, travelling around the world in thin air and at great speed. They are often received within the privacy of domestic households. In a sense, such problems are inherent in the notion of intellectual property, for it is property in something intangible and as such much more a relation between people than command over a material object which can be physically and temporally connected with a location. Could intangible ideas know no bounds whatsoever? The picture is further complicated where the law concedes that the many people who are involved in these activities may operate as juridical entities rather than as natural persons. Location can then be manipulated through the abstract forms in which they appear as well.

The traditional way of resolving these problems is through conflict of laws criteria. Very broadly, we can suggest that private international law involves the resolution of three issues: governing law, judicial forum and recognition of judgments. Another way to characterise this conundrum is think in terms of locating three functions: legislation, adjudication and enforcement. The necessary determinations interact in a very, very complex manner.[48] Practical as well as doctrinal reasons lead property holders to litigate in a host jurisdiction, where a real purchase can be obtained on the infringing activity or entity. But this necessity may affect the governing law; the forum may well be disposed to apply its own local law rather than a foreign law. Application of the foreign law would be regarded as having an extraterritorial reach.

How does intellectual property sit within this approach? Except perhaps in the matters that can be characterised as purely contractual, intellectual property is a body of law very much characterised as

territorially based. Recognition from local law must be obtained in each territory in which protection is desired. Consequently, if the territorial locus of the law is to be where the subject matter is exploited or infringed, rather than the nationality of the holder or the site of the invention, origination or publication of the subject matter, we may have to concede that the holder is at the mercy of the host country. Producers cannot manipulate location as a strategy to obtain the best protection, unless the host country sees it as serving its interests or consistent with its values to offer protection. We might anticipate that some countries will see an advantage in withholding protection, either to support local producers and users, or even to act in transnational commerce as an intellectual property 'haven'. They might resent attempts by the home countries to assert their own laws extra-territorially. At the same time, agreement may not be reached on common choice of law criteria. Again, these positions will not simply be strategically driven. They may be rooted in alternative cultures, for instance of agricultural or media production.

For our discussions below, we should recognise that company and competition law presents similar conundrums. This links us to the regulation of services supply. Of course, there are many instances in which the practices in question, such as collusive agreements, exclusionary dealing, or mergers and acquisitions, are locally situated. But as markets are opened to global flows, it is equally clear that practices and persons which are situated abroad can have effects at home. Again, the presumption of territoriality is likely to operate. Yet, it is far from easy to establish a satisfactory territorial connection when the very object of the competition regulation is a trade in symbolic forms such as contracts and corporations. For example, we know that the corporate form can be multiplied many times, until it assumes complex patterns of associated and related companies, parents and subsidiaries, and holding and operational companies. If responsibility is to be effectively sheeted home, not only must the veil of the corporation be pierced, but regulatory regimes must be prepared to see through the formal legal structures of corporate groups and networks into the realities of their technical and economic connections. In his perspicacious way, Teubner argues that this insightfulness must extend to piercing the 'contractual veil'.[49]

The task is complicated by the fact that the corporate group or network may be distributed among foreign and local companies. An example in intellectual property regulation is how Kazaa was

structured globally. Jurisdiction over corporations has traditionally turned on nationality. If the separate entity approach to corporate regulation is employed, nationality will be defined on the basis of the country where the particular company is incorporated or maybe the location of its seat or head office. But if enterprise principles are applied, so that the regulators can strike at those who exercise real decision-making authority or financial power, the regulations may need to extend to foreign affiliates and become involved in what conventionally looks like extra-territorial application.[50] But, increasingly, we may not be able to centre functional control as neatly as this approach requires.

Of course, these challenges range much wider than competition law to other projects of business regulation such as financial and gambling regulation. The field of competition law is one in which we have seen some countries endeavour to assert an extra-territorial jurisdiction. Here, the United States has been active in its roles both as a host and home country. Yet few countries, even the US, may be able to carry off such a policy unilaterally. The linking of enterprise concepts of corporate responsibility with extra-territorial application may render host countries unattractive to mobile investors who are making strategic locational decisions. At the same time, home country corporations may resist being told what to do abroad. The extra-territorial extension may clash with laws in other overlapping jurisdictions; the US reach, for instance has met with blocking statutes. Yet, at the same time, the coordination of competition regulation continues to face hurdles. The bilateral cooperation agreements are hesitant. One suspects that most countries wish to retain the opportunity to maintain differences and exercise discretion, so that they can, for instance protect their own industries domestically and bolster them externally. Likewise, the international regulation of money laundering runs up against the short-term interests that countries have in hosting the funds and related professional services, for example the City of London.[51] Regulatory coordination waits on the patient building of links between the functional regulators, speeded every now and then by publicity surrounding a crisis such as threats of terrorism.

INTERNATIONAL LAW MAKING

Under conditions of pluralism, we need to think about how the encounters between legalities might be resolved. For globalisation

means they will be brought into relation with each other. They will not, as it were, continue to live in splendid or clinical isolation. We should quickly acknowledge that the intersections and interactions of these many different legalities has become a theme of the writing on legal pluralism.[52] Here, the focus has been at the national and local levels though, given it has often concerned inter-legality in the colonial situation, it has also involved a world dimension, the relations between the old and new worlds, the north and the south.

The colonial situation was one in which we might expect military force to be used to impose a hierarchical order on legalities. But the picture often proved to be more a more complex one of inter-dependence and learning. The research has identified areas where the indigenous and local orders continued to operate. Conceding that the legalities intermingle, the interest turned to the avenues which opened up for two-way flows between state and other sources of normative ordering, dialogue rather than coercion. Rather than putting the question endlessly as an opposition between European and other law, it looked for possibilities for mutually constructive and transformative relations. Now, the resonances of such pioneering work are to be heard in post-colonial studies when they speak of 'hybridities' of law.[53] Likewise, they are looking for initiatives 'from below' that contribute to counter-hegemonic globalisation and cosmopolitan legality.[54]

However, when writing on legal pluralism, Sally Merry sounded a cautionary note. It was evident that the legalities could vary greatly in their access to power, that is to say in their coercive force or their strength symbolically. Thus, inter-legality could present an opportunity to express asymmetrical relations of power, subjecting people to structures of dominance, sometimes from far outside their immediate worlds.[55] Subtly, Santos suggested that world legalities tend to be good at abstraction and standardisation, but they tend to achieve this effect at the expense of the particularity and embeddedness of local legalities.[56] This observation is in keeping with the remarks above concerning law's contrary capacities.

In a post-colonial word, we need to think once again about the processes whereby inter-legalities are resolved. Braithwaite and Drahos draw our attention to the mechanisms by which global business regulation is fashioned. They too identify mechanisms of coercion, reward and dialogue. Where national governments support their investors and exporters, they use not only the power of ideas and persuasion, but the lure of rewards (grants of preferential access, soft

loans and technical assistance) or the threat of economic sanctions (closing of markets, withholding of investment and withdrawal of aid), even military invasions and blockades, to obtain favourable changes in law. There will be times when a particular legality prevails. Public international law becomes a means to elevate one legality emphatically over alternative legalities, even to define a constitution for a world economy. That legality becomes international hard law. Currently, some commentators see this happening: the new constitutionalism is said to contain both legal substance and method. Global producers, traders and investors will enjoy commercial freedoms and property protections worldwide. Legally, there will be careful specifications, not just of the content of such rights, but also the means by which their interpretation will be determined and their compliance obtained.[57]

We can identify a strong current to legal globalization running in this direction. However, my feeling is that global constitutionalism remains a project in the making. It is a stretch to claim constitutionalism for the developments to date.[58] For the time being, the concepts of legal pluralism, regulatory webs and global governance better describe the nature of relationships between legalities (and other forms of ordering). These concepts suggest that we do not look for formal hierarchies of legal authority and settled rules of conduct. They allow us a richer view of law, as a range of possibilities, suggesting we investigate the competition and cooperation between legalities.

Networks

Let me identify two features to represent the variety and fluidity of these global legal fields. The first is the idea of the network, one that international relations and international law scholars have been borrowing from political science and regulatory studies.[59] Employing this idea, Anne-Marie Slaughter suggests we can pursue relationships along both horizontal and vertical axes.[60] Conventionally, the main focus is the vertical line, between national and international levels or layers of law making. But now the lines multiply, forming a regulatory crisscross. So, for example, international organisations may sometimes bypass national governments, reaching down directly to indigenous groups that are experiencing discrimination.

The horizontal lines include bilateral relations between national governments. But there are significant relationships being formed across national borders 'below' government level, for example between

the functional regulatory officials in such fields as food standards, prudential supervision, securities trading, accounting standards, business taxation, competition policy, patent grants and the allocation of domain names.[61] Another interesting line of cooperation is the informal cross-border contacts between judicial officers over issues in law and economics or human rights jurisprudence. So too, relations develop between international organisations, naturally at official levels, but also through the contacts between their secretariats.

The looser fit to these concepts allows us to add in a whole range of non-state actors, some sub-national and so perhaps confined to domestic politics, but others operating cross-border and transnationally. Such relations are formed in multinational corporate groups, industry alliances and professional associations, epistemic communities of academic experts, consultants, trade lawyers and economists, that is, within the global business world. They are joined now by the constituents of global civil society, the grab-bag of advocacy and watch groups, aid agencies and churches, rock stars, philanthropists, and academics again, at least at the margins.

A legalist perspective might say that these networks are not involved in formal and authoritative law making. Today, this is too narrow a view to be useful. Such informal mixes of experts, officials and activists networks make their contribution to norm building. An example is where coalitions of national governments involved in pursuing complaints within the WTO dispute settlement process are joined by multinational corporations and non-governmental organisations, the cross-border pattern to economic investments and social movements meaning these relationships are not simply fashioned at the domestic level within one country.[62] Once this influence is conceded, attention may turn to their accountability, where, adopting a broad perspective again, we are not confined to forms of accountability associated with representative democracy or judicial oversight. The accountability of the networks of functional regulators is one such issue; the accountability of non-government organisations (NGOs), which have burgeoning roles in the provision of governance services, especially in failed states, is another.[63]

Norms

The second feature is the idea of the norm or principle. This notion also recommends we look beyond formal legal rules and dispositions. In international law, variations on this theme involve the distinction

made between hard and soft law.[64] Thus, Nimmer and Krauthaus were among the earliest to recognise the role of legal modeling in bringing laws in the contemporary era closer together.[65] In some ways, this current process is a variation on the transplantation phenomenon which Alan Watson pursued so insistently in his research.[66] However, Nimmer and Krauthaus suggest the production of models is a much more concerted and purposeful activity today.

Here, we can certainly identify the influence of professional and expert communities, lawyer diplomats, Chicago School economists and moral entrepreneurs at work. They formulate and disseminate suitable models for adoption by the governments of countries that are seeking to bring their legal systems into line with what they read, or at least represent to their domestic counterparts, as international expectations.[67] We might also note the weight that exporting governments, philanthropic foundations and industry associations are putting behind the provision of 'technical' assistance to countries in transition from centralised to market economies. For countries that are hungry for foreign trade and investment, the phenomenon of regulatory competition can give a real urgency to this search for suitable models, even if it is the case that the international interest would be shown when they are not adopted.[68] For some countries, a major pressure to take up these models has been the IMF and World Bank policies of conditioning aid on internal reforms, such as 'good governance', a concept that has included the adoption of intellectual property laws and the privatisation and liberalisation of services supply.[69]

These models begin to be converted from soft to hard law when they are written into bilateral subject-specific or multi-sector trade agreements. For instance, the sanctions the United States government threatened under sections 301–337 of its trade legislation were influential in strengthening intellectual property and foreign investment rights around the world. A steadily mounting catalogue of bilateral agreements demarcated the parties' respective jurisdictions, addressed conflicting requirements, and promised fair treatment within each other's territories. Yet, the bilateral approach appeared to have its shortcomings. Not only did it demand the devotion of considerable resources when more countries were interacting, but the nature of the global flows made it difficult to tie the benefits to the nation states which chose to become involved.

Of course, bilateral agreements have been supplemented for some time now with multi-party conventions. However, on the whole, the

ambitions of these conventions were also limited. For example, they were often content to lay down broad principles of non-discrimination such as national treatment or to coordinate bargaining within a procedural framework. Important as they can be, multilateral principles of non-discrimination do not deal squarely with the conflict of laws question. They simply say that, where a country's law does apply, it should be applied without discrimination to foreigners. Nor do they deal with the question of disparities between substantive standards. They leave countries free to set their own levels of access and security, provided they offer the same levels to foreigners as they do to locals.

In a conventional account, we might see a logical progression to this law making. It will move gradually but inexorably towards multilateral international law with wider and deeper coverage. Norms or principles, which are first advanced tentatively and experimentally, will firm into rules and standards. They will be given substance, precision and obligation by virtue of inclusion in international treaties, legislation and judgments. With globalization, the attractions of a multilateral international law making institution brighten. Most obviously, the institution becomes the reference point for those seeking to escape the industry–government bargaining or popular political controversies which operate at the national level. It may also seem a way to escape the worst of the unbalanced power relations or the expensive uncertainty involved in bilateral approaches. Both those who are seeking benefits from globalisation, and those feeling threatened, may be prepared to support harmonisation of laws or, given the rather nebulous content of this concept, to seek legal standardisation at the multilateral level.

Yet, it is well understood that standardisation encounters obstacles at this level too. When a large number of countries are involved, each possibly carrying different configurations of domestic interests and global aspirations, it is not surprising it proves difficult to develop multilateral rules. In terms of making headway, a key consideration is whether any countries enjoy enough power to insist on a strong line being followed. Latterly, this inquiry has centred on the 'hegemonic power' of the United States to promote its preferences for multilateral standards. Some analysts insist on the strength of the power inequalities between nations as a way of explaining the pattern of international regime formation.

Certainly, this power is one explanation for the institution of exceptional hard law regimes, such as our subject matter, the WTO TRIPs

and GATS agreements, would appear to be. However, the analysis must account for the ambivalences we find in these agreements from their outset, certainly now in the muddled experience with their implementation and renegotiation. In the post-colonial era, it seems that more states are gaining the confidence to play an assertive role in institutional affairs, their power bolstered by new economic and cultural alignments. The most recent WTO experience suggests this of the larger developing states including Brazil, China and India. Not only do the ex-colonial states become less deferential, but the national unities of the once powerful countries are fractured by globalisation. Allegiances are forged across national lines by business and industry associations and the new social and moral movements. These non-government organisations both place pressure on national governments as part of domestic politics and seek their own independent voice in supra-national forums.

Paradoxically, observers and advocates are able to discern within these developments the potential for new kinds of coalitions.[70] A general theme is the part that knowledge and dialogue (regulatory conversations) might play in promoting acceptance of new conceptual linkages and institutional arrangements. However, these coalitions also need to be enterprising in marshalling material resources such as technical skills and trade weight, together with the resources of social capital such as enduring trust and confidence, if they are to make the most of their opportunities.[71] While these developments create opportunities for coalitions on an issue-by-issue basis, greater contingency accompanies the solutions they produce.

Governance

Thus, plurality and interaction are likely to be features of the configuration of regulatory fields at the global level too. These conditions will continue even after a multilateral standard has been struck. Within an international organisation, the members develop a versatile repertoire of decision-making processes. They shift between these processes as it suits, bringing complaints in order to bargain over the rules in dispute settlement or returning to negotiations to fashion amendments and understandings. They continue to 'play for rules'. Sometimes, too, they are prepared to go outside the organisation altogether. The multi-polar pattern of international agreements provides scope for forum shopping. There is movement back and forward between forums in search of the most sympathetic rules and resources.

We would expect the best resourced countries and other players to exploit this situation. TRIPs itself is explained as a switch in international intellectual property law making from the established forums like WIPO to a new trade site and, now that TRIPs has stalled, the United States has switched again to pursue intellectual property chapters with FTAS. But that is not the whole picture. Rodriguez-Garavito suggests that 'counter-hegemonic' coalitions also pragmatically exploit the tensions and contradictions inherent within this 'kaleidoscope legal landscape'. To maximise gains, they too shift strategically among the different scales (local, national, international) and types (hard, soft) of law, as well as between political and legal strategies.[72]

Such activity suggests there is a rivalry between the forums and at times a clash of norms. But it also points up the interconnectedness, the complex interdependencies, which increase the chances of hybrid regimes being fashioned. The strategy of regime shifting is often a negative checking move, but more positively it can sometimes blend new hard and soft law as a means of focusing on neglected public goods, enabling coalitions of smaller countries and NGOs to achieve outcomes that are not attainable in a single negotiating forum.[73]

As part of this process, we might expect the major multilateral organisations to create their own linkages, exchanging information, joining committees, and taking part in each other's deliberations. They might go further to acknowledge and assign each other a respective sphere of operations, even be prepared to apply each other's standards or defer to each other's standard setting processes. Operating here is the sense of the respective jurisdictions of the international organisations, or the capacity of each to let in consideration of sources external to the organisation itself and the text of its agreements.

We shall see in the intellectual property field how the WTO drew on the cognitive work and the political legitimacy of long-standing intellectual property conventions, now administered by WIPO. Subsequently WIPO has re-entered the field in a vigorous way, with the 1996 Treaties substantially adding to intellectual property rights over the uses of material online. The WTO dispute settlement bodies have been prepared to take account of these Treaties. Yet, so far, the WTO has not yet proved productive in linking with the WIPO or, further afield, to the Convention on Biological Diversity (CBD), on other intellectual property issues such as recognition for traditional medicines and cultural expressions. In more recent days, the shift to

these other forums has largely had a neutralising effect. It has blocked further intellectual property protection for high technology producers and owners but it has not led to treaty level protections for alternative producers, performers and users.

The recent bilateral FTAs also have to be placed within this schema. Currently, the US offers access to its affluent markets in food produce and industrial goods to gain stronger intellectual property rights for its producers, as well as deeper market access for its suppliers of financial and professional services and direct foreign investment. Foremost, these agreements change the laws of the two national partners. But they also bear a complex relation to the multilateral agreements such as the WTO TRIPs and GATS agreements. While the FTAs are essentially parasitic on the multilateral agreements, they have the potential to fragment law making again. Predominantly, they are WTO-plus in the sense of adding to intellectual property rights or freedoms to supply services markets. But they also cut back on the compromises worked out at the WTO, including the allowances to take exceptions.[74] They sometimes restate WTO provisions in terms favourable to one partner's exporters and install an alternative dispute settlement process for interpretations.

It is possible then that they are strategic interventions, undermining the authority of the multilateral institution, building suitable models to be put to it at a later date, while dividing countries that might have coalesced on an alternative path. Yet, we should note that FTAs are now proliferating among all sorts of countries. They are being made between countries in the South as much as on the North-South axis. Some of these agreements prefer not to broach intellectual property and expert services topics at all, but others develop their own models, for instance for protection of traditional knowledge.

So too, we continue to see local resistance to the imposition of international requirements. Domestic politics remain an important factor in explaining adherence to international regimes. Of course, the most likely opposition is from local business and industrial interests that will be disadvantaged by the economic competition when barriers are lifted and foreigners gain access. Resistance comes from those dependent constituencies, especially in the developing countries, who stand to lose their traditional access to resources such as essential public services, if a neo-liberal programme of privatisation and foreign ownership is implemented.[75] This kind of resistance has surfaced strongly in Latin America again. There are still powerful sentiments

set against the authority of multilateral institutions. In the US, political interests see them as undermining the nation's political sovereignty and legal constitutionality, in some quarters it would seem too its freedom to exploit its power. Recently, the US has retreated from multilateralism.[76]

Yet in many ways sectional defence is the old response to trade liberalisation. Recent studies identify a shift at the national level from trade protection to regulatory trade policy. Industry–government alliances push for market access coupled with regulatory reform in the new institutionalised and partly legalised trade arenas such as the WTO.[77] This approach is more outwards and upwards orientated. Instead of playing for votes and favours locally, industry and government combine technical expertise and policy options in a cooperative relation in order to influence the international trade regulation.[78] Global institutions provide new openings for elites at the national level such as regulatory agencies, industry peak councils, expert courts and professional advisors. Brazil is a case in point for successful efforts to gear up. But of course neither is this transformation smooth. Participants at the national level can have different international reference points, whether they come from trade, finance or health ministries for instance or agriculture, manufacturing or services industries. Some countries struggle to marshal the resources for such a strategy.

Laws

What role does law itself play mediating between legalities? Here we are thinking of a secondary role for law as a kind of meta-regulation of inter-legality. For our purposes, that law is the kind that shapes the WTO agreements themselves. Geoffrey Garrett took the view that a 'legal system' is the strongest indication of effective supra-nationalism.[79] Legal systems succeed if the parties are prepared to abide by a ruling or countenance a sanction, even if it means that a domestic constituency or some other international aspiration must be sacrificed to do so. Support for the adverse decision is necessary if the long-term benefits of a viable system are to be obtained. Such an attitude relies on there being recognition and acceptance that the system can produce benefits overall. It calls for a certain cognitive convergence as well as a normative consensus. Many judgements are bound up in that attitude, though one may well be that the alternative forms of resolution are not workable. For example, the more powerful participants no longer think

it is feasible to operate an old boys club where informal manoeuvres and corridor deals suffice. The less resourceful participants expect the rule-based system to extend benefits to them that they could not obtain by bilateral bargaining or unilateral action.

On this approach, law itself gives the system efficacy and legitimacy. Other regimes suffer by comparison if they are not legalised or their law is considered to be 'soft' law. On the other hand, 'hard' law helps set up the system in such a way that it is difficult to alter or avoid. We can think here in terms of the constitution of the regime, such as the voting rights on key issues or the freedom to resile from commitments. The substance, specificity and compellability of its norms will be important too.

Beyond the text of the agreements, the authority of the dispute settlement process can be crucial. The system gains purchase if this process has a measure of automacity and enforceability to it. But the role of the dispute settlement process is not just a technocratic one, to ensure the rules are followed. Its contribution includes the legitimacy it can give to the kind of decisions needed to advance the system. In acquiring legitimacy, familiar 'access to justice' considerations come into play here. They turn on patterns of participation and benefit within dispute settlement. But another contribution is the extent to which a judicial approach can take the political controversy out of decisions. Assessing the European Court of Justice, Mattli and Slaughter pointed to the way in which its decisions are couched in apparently technical and apolitical terms, though inevitably they must carry profound social implications.[80] The appeal to principle and precedent, the insistence that the decisions are only interpreting and applying words of the text rather than choosing between policies, the requirement that political and social claims be framed as legal arguments, and the exclusion of controversial points as non-justiciable, all build up a highly specialised way of treating issues.[81] Sol Picciotto suggests that the WTO Appellate Body's legal formalism stems from its concern about legitimacy.[82]

In a major argument, Slaughter and colleagues see a trend to legalisation as a very positive trend in international relations. They see legalisation developing along these kinds of hard law lines: obligation, precision and delegation.[83] However, Finnemore and Toope argue that such an emphasis on the virtues of formal liberal law is at the expense of a richer view of law and politics.[84] In the light of the observations we have already made, one is entitled to suspect that the agreements will

continue to provide some space within the bounds of their prescriptions for the operation of national variations and indeed for the retention of national sovereignty over which differences to pursue. Furthermore, they will leave open opportunities for other international institutions to fill out the norms along certain lines.

The agreements' structure can enable this to happen (such as optional commitments and voluntary guidelines), together with the particular provisions made (such as conceded allowances and specified exceptions). The agreements' generality and ambiguity encourage interaction too, at least until the jurisprudence of dispute settlement rulings accrues. Once the agreements are formed, much depends on the choices made within the dispute settlement process about modes of interpretation and argumentation. A key choice is the extent to which the process opens to sources that extend beyond the text of the substantive provisions themselves. Those sources could be the national members' own views of compliance; they might be the principles and perspectives present in the surrounding international law. Other key decisions will include whether to insist on strict compliance in the face of a member's resistance, more positively whether the members can agree collectively on waivers or understandings.

Rather than insisting on rules, the agreements might provide space for the members to refrain from disputation and adjudication, returning to negotiation and consensus, should gaps appear or interpretations diverge. Such proceduralism might be better suited to deal with the issues, especially if rulings make for hard cases. In other words, the institution is likely to find ways to mediate differences, rather than legislate or arbitrate them out of existence. Law plays a different kind of role in facilitating this kind of proceduralism.

In this vein, while Markus Krajewski agrees that the WTO has to source legitimacy in the procedural conditions for its law-making process, he recommends against it assuming the mantle of a constitution for a world economy.[85] This critique extends to the ambitions for the content of the agreements themselves and the WTO's modes of decision making across the board. He also argues that judicial activism is not the answer to the WTO's problems of legitimacy. However, we should appreciate that a suitably conservative style is not just a matter of rendering decisions in legalistic and apolitical terms. Most thoughtfully, Robert Howse suggests that, along with the observance of due process and integrity in interpretation, the WTO should also display

an institutional sensitivity. Without abdicating the WTO's role in overseeing national measures, dispute settlement rulings should give due respect to the credibility and competence of other regulatory institutions. In doing so, they should take account of the representative nature of these institutions as well as their technical expertise; that respect should be extended both to national and other international organisations.[86]

It comes as no surprise then that law is not autonomous from the economic, political and cultural currents that run through the governance of these institutions. The take-up of legal options can turn on quite pragmatic cost–benefit calculations, even if they include political as well as economic considerations. Governments and other participants also bring preferences for styles of law making and modes of conflict resolution rooted in local legal cultures to decision making. The legal processes have an impact on the calculations the parties make, they stimulate further discourse over norms, and they may encourage cooperation and compliance. Nevertheless, we find that legal practices are influenced by economic rationalities, political sensitivities and cultural mores, as well as by legal cultures.

Garrett warned us against attributing any magical properties to law. Legalism is unlikely to guarantee legitimacy. Appropriately, perhaps, legitimacy will also turn on the opportunities provided for democratic participation and social accountability in the decision making of the institution. While some have hoped that the international organisations can avoid 'politicisation',[87] others did not expect such a *modus operandi* to be sustainable.[88] But this appreciation has only opened up a bigger question: what sort of democracy and accountability is to earn legitimacy?

For some, the WTO's democracy depends very much on the member states remaining in control and the government representatives occupying the table. The WTO is several stages removed from representative democracy, but that democratic deficit can be ameliorated if the executive national governments make more of an effort to inform and consult their electorates. There are variations on this theme, such as the recent proposals to add a legislative arm to the WTO, an elected body modeled, say, on the European parliament. Yet democracy at the multilateral trade organisation might depend, not just on the accommodation of a wider range of nation states representative of their domestic constituencies, but also on the access which is offered to non-governmental organisations in civil society and the links that

are forged with other, complementary international organisations. This vision is for a cosmopolitan democracy that extends deliberation and participation.[89]

Restraint and respect are good virtues but, if the WTO is to make sensible decisions and support global regulation, it will need to learn how to work with this wider range of stakeholders, such as functional regulators, professional associations, socially responsible business, charities and philanthropic foundations. As the studies will indicate, parts of the WTO would like to do so but some member governments and other interests remain opposed.

INTERFACES

In keeping with this approach, the ultimate 'success' of the institution should be measured by the values it recognises, that is, the world views and interests which it accommodates, rather than by its strength and single mindedness. So how might an institution such as the WTO do this? The first edition picked up on a metaphor John Jackson employed to explain the role of the GATT. Can we see the WTO agreements providing a genuine open interface between legalities?

As one might suspect, the concept is borrowed from the world of computing and communications media. To dwell in this world for a moment, we know that people use these media to exchange messages. The reach and depth of their particular messages will be enhanced by the capacities of the carriers they can employ. But we should appreciate that the carriers are not just a matter of powerful hardware. The senders need software to enhance their connectivity with the receivers. To be effective, the software must do more than provide a channel for incoming signals, even do more than translate the language of the server into the language of the browser. It must connect systems, so that they can operate together.

In this regard, we should note as well that reception is not just a passive, one-directional process. The receivers put up resistance to the messages, interpret them from their own standpoint and provide feedback to the sources. Lury calls this 'reactivation', a version really of interaction.[90] So we should not think of the local as merely an empty vessel through which global messages will flow. Global flows can be localised and played back on their originators. In fact, the global network allows for many communications, which criss-cross in all sorts of directions.

Furthermore, the interface will not act merely as a conduit, linking the various terminals. It begins to take on a life of its own. In the spirit of metaphors, it is easy to stray over to the biological world for further inspiration here. Picking up this connection, it might be said, that through their many interactions, the senders and receivers begin to lose their individual identities and merge into new hybrid forms. However, we know enough to treat biological metaphors with caution and there is a warning here for the study in hand. The replacement of long-standing local means of sustenance carries a risk to biodiversity. Likewise, in the communications field, some remain sceptical about the emancipating powers of the Internet. In particular, they question whether its interfaces produce truly open systems. Could they institute proprietary standards that require alternative producers and needy users to fit the mould of dominant suppliers?

Generally optimistic about global business regulation, Drahos and Braithwaite query whether participation in the WTO really means the ability to influence outcomes. The fuzzy values of governance draw developing countries into complex webs that they do not have the resources to disentangle and that do not serve them well. Governance is networked but the networks have nodes and the key question is who has access to the nodes.[91] A critical inspection will reveal a bias to the pattern of legal endowments. The presence of law does not necessarily assist the weak a great deal. Governance leads, for example to hard multilateral rules for intellectual property but soft local lines for corporate conduct. So, if we are to take the WTO seriously, we must ask questions about the way it operates. These questions should include: whether its process is flexible and accommodating; whether the process compensates for lack of technical resources or bargaining power; and whether the process shares the costs and benefits.

Moreover, while they too recognise the virtues of governance, Santos and Rodriguez-Garavito remind us that the framework always matters. So one should ask whether the WTO framework is genuinely open to a broad range of legalities or whether they must find a fit with neo-liberalism. This query is not to deny the value of liberalisation but rather to say that liberalisation is not the same as laissez-faire. It is to suggest that something more than laissez-faire is needed, if liberalisation is to live up to its promise of improving welfare around the world, especially if that welfare is to run to lasting social and environmental welfare.

Until now, the WTO is very much focused on the task of providing the rules for a global game of economic competition between traders. It is not asked to take responsibility for the consequences of this game, or the overall world picture, even if it does proceed virtuously on the assumption that the world will be better off for free trade. We can see, for example how environmental questions vital to the survival of the world are approached negatively as reluctant exceptions to the right to trade. This is why some cosmopolitan globalists are turning away from the WTO. Instead of expending their efforts fighting for openings and flexibilities within the WTO agreements, they will concentrate on building new frameworks that make global public goods like access to knowledge and sustainability of biodiversity the principal objectives. There is a sense now of bigger issues. Enforcement of the WTO agreements frees up trade in cotton products and improves the opportunities for developing countries to compete, but what of the irreversible damage to water tables and ground water supplies if cotton farming in dry places is encouraged?

However, the WTO needs to be part of these global solutions. Otherwise, separate streams of international regulation will continue to open up, carrying the potential either to undermine the WTO or be trumped by it.[92] The WTO can do so, but not by taking over from others, rather by playing a complementary role. In this vein, it might benefit from appreciating that development will not be fostered simply by opening markets, if a country does not have a sound base from which to trade in the first place. That base is not built from the exploitation of finite natural resources or the cheap labour of people but by investment in human capital, gender equality, knowledge management, social organisation and regulatory competence.[93] There is a crucial role for efficient government services, corporate social responsibility, ethical conduct, public–private partnerships, generous philanthropy and strong local communities.

Moreover, that development will not be beneficial ultimately, unless the economic gains are linked with long-term human and environmental health. Beginning with the issue of essential medicines, we see the WTO being drawn reluctantly into these broader reckonings. As we shall see, it was not enough for the WTO to find a loophole within the framework of patent protection. With the cooperation of members and advice from other international organisations and NGOs, it constructed a regulatory system for cross-border drug production and trade. That system falls short of a proper global health delivery system, that

would be too much to demand of the brief of the WTO, but it still represents a new kind of involvement for the WTO. Is the access to medicines issue a forerunner for other involvements? On other fronts, the WTO might realise it cannot set up a new global dynamic of competition without sharing in the responsibility for the consequences. There are many in the WTO who appreciate this point, but the institution is still looking for a circuit breaker so their energies can be freed up.

CONCLUSIONS

In establishing a context for the examination of the WTO agreements, this chapter has endeavoured to convey a balanced view of globalisation. Such a view should be mindful of the fact that something big is happening, yet remain positive about the degree of diversity and contingency in the world. The strongest, certainly the most self-confident, global view carries the economic prescription of neo-liberalism for open trade and free markets. But it need not be overwhelming. A more nuanced view may lack the elegant simplicity of more linear projections. But it finds reasons, in the ways economies, polities and cultures work, why differences are still maintainable, indeed, why alternatives can be injected into the global circuits.

Such pluralism is also an attribute of law. Where its powers of abstraction and symbolism can be employed, law works for a certain kind of convergent and ordered globalisation. Law detaches our social relations from their spatial and temporal reference points. But law continues to display rich localised characteristics. Knowledge and practice of this law are enhanced by the power of presence, proximity and time. Such a feeling for the cross-currents in law is to be obtained by observing the conflicts within intellectual property law and related laws such as competition law. The persistence, and even the proliferation, of these conflicts give rise to demand for mediation by an intergovernmental institution.

The most interesting feature of globalisation is the relationships between the legalities and the way we might conceptualise the interfaces which begin to mediate them. The notion of an interface suggests that the relationships should amount to more than a one-way transmission of messages from dominant to subordinate actors. They should comprise a many to many round of communications which carries with it possibilities for transformative outcomes. The chapter began to apply

that concept to the understanding of international law making and the appraisal of the role of a multilateral institution like the WTO. The concepts of networks, principles and governance are helpful in characterising that role. A special interest is the place of law in the mediating role of such an institution. The discussion ended, however, with a note of caution by stressing that the 'success' of an interface should be measured by the values it promotes, the world visions and conditions it accommodates, not simply by its strength and single mindedness. Mediation is an accommodating, inclusive concept but it might be that in practice the resources of hard and soft law are distributed unevenly between perspectives and interests.

NOTES

1. P. Bourdieu, *The Social Structures of the Economy* (Cambridge: Polity, 2005).
2. For a perceptive and early formulation, see R. Nimmer and P. Krauthaus, Globalisation of Law in Intellectual Property and Related Commercial Law Contexts, *Law In Context* 10(2) (1992), 80; see further D. Esty and D. Geradin (eds.), *Regulatory Competition and European Integration: Comparative Perspectives* (Oxford: Oxford University Press).
3. A phrase used by Joel Handler in his insightful address as President of the Law and Society Association, see J. Handler, Postmodernism, Protest and the New Social Movements, *Law and Society Review* 26 (1992), 697.
4. Y. Dezalay, Introduction: Professional Competition and the Social Construction of Transnational Markets. In Y. Dezalay and D. Sugarman (eds.), *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets* (London: Routledge, 1995).
5. V. Gessner, Global Approaches in the Sociology of Law: Problems and Challenges, *Journal of Law and Society* 22 (1995), 85 at 93.
6. J. Trachtman, Unilateralism, Bilateralism, Regionalism, and Functionalism: A Comparison with Reference to Securities Regulation, *Transnational Law and Contemporary Problems* 4 (1994), 69 at 117.
7. J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).
8. For a version of this, see U. Mattei, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics, *International Review of Law and Economics* 14 (1994), 3.
9. In her Presidential Address to the Law and Society Association, Susan Silbey (1997) wonders whether the narrative of reason might here be subordinated to the narrative of desire. She hopes that the narrative of justice will also find a place in this world. S. Silbey, 'Let Them Eat Cake': Globalisation, Postmodern Colonialism and the Possibilities of Justice, *Law and Society Review* 31 (1997), 207.

10. Upendra Baxi's writing on law and society allows us the benefit of a non-western perspective, see for instance U. Baxi, Life of Law Among Globalization. In C. Arup and L. Marks (eds.), *Cross-Currents: Internationalism, National Identity and Law* (Melbourne: La Trobe University Press, 1996).
11. Axford is one of a number of theorisations which sees opportunities in globalisation; B. Axford, *The Global System: Economics, Politics and Culture* (Cambridge: Polity Press, 1995).
12. U. Beck, *Power in the Global Age: A New Global Political Economy* (Cambridge: Polity, 2005, translated by Kathleen Cross); A. Elliott and C. Lemert, *The New Individualism: The Emotional Costs of Globalization* (London: Routledge, 2006).
13. S. Sell, *Private Power Public Law: The Globalization of Intellectual Property Rights* (New York: Cambridge University Press, 2003).
14. J. Gray, *False Dawn: The Delusions of Global Capitalism* (London: Granta Books, 1998).
15. Z. Bauman, *Globalization: The Human Consequences* (Cambridge: Polity Press, 1998).
16. S. Sassen, *Global Networks, Linked Cities* (New York: Routledge, 2002); R. Lester and M. Piore, *Innovation – The Missing Dimension* (Cambridge MA: Harvard University Press, 2004).
17. Sassen provided a rich empirical account; S. Sassen, *The Global City: New York, London, Tokyo* (Princeton: Princeton University Press, 1991). The same might be said about locations or geographies of intellectual property production.
18. The implications were neatly captured in W. Mitchell, *City of Bits: Space, Place and the Infobahn* (Cambridge MA: MIT Press, 1995).
19. J. Ruggie, Territoriality and Beyond: Problematizing Modernity in International Relations, *International Organization* 47 (1993), 139.
20. Dezalay, 'Professional Competition', p. 4.
21. A point made very clearly by a colleague of mine, see V. Goldwasser, Current Issues in the Internationalisation of Securities Markets, *Companies and Securities Law Journal* 16 (1998), 464.
22. For example, in a commentary on the Russian experience, see T. Waelde and J. Gunderson, Legislative Transplants in Transition Economies: Western Transplants – A Short-Cut to Social Market Economy Status?, *International and Comparative Law Quarterly* 43 (1994), 347.
23. Hirst and Thompson have striven to show the possibilities here; P. Hirst and G. Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance* (Cambridge: Polity Press, 1996).
24. Though, again, the situation may hold promise, see D. Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge MA: Harvard University Press, 1995).
25. M. Waters, *Globalisation* (London: Routledge, 1995), at p. 9.
26. N. Klein, *No Logo* (London: Flamingo, 2000).
27. P. Hall and D. Soskice, An Introduction to Varieties of Capitalism. In P. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional*

Foundations of Comparative Advantage (Oxford: Oxford University Press, 2001).

28. See, eg, H. Gospel and A. Pendleton (eds.), *Corporate Governance and Labour Management: An International Comparison* (Oxford: Oxford University Press, 2005).
29. See, eg, D. Harvey, *The Condition of Post-Modernity: An Inquiry into the Origins of Cultural Change* (Oxford: Blackwell, 1989).
30. For illustrations in the fields under study here, see S. Lash and J. Urry, *The Economy of Signs and Space* (London: Sage, 1994).
31. J. Keane, *Global Civil Society?* (Cambridge: Cambridge University Press, 2003).
32. See Dezalay, Professional Competition.
33. G. Teubner, 'Global Bukowina': Legal Pluralism in the World Society, in G. Teubner (ed.), *Global Law Without A State* (Aldershot: Dartmouth, 1997).
34. The work of Sol Picciotto has been most painstaking in appraising these complexities, see, eg, S. Picciotto, *International Business Taxation: A Study in the Internationalization of Business Regulation* (London: Weidenfeld and Nicolson, 1992).
35. B. Garth, Noblesse Oblige: As an Alternative Career Strategy, *Houston Law Review* 41 (2004), 93.
36. G. Teubner, Legal Irritants: How Unifying Law Ends up in New Divergences. In Hall and Soskice, *Varieties of Capitalism*.
37. Y. Dezalay and B. Garth, *The Internationalization of the Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002).
38. R. Appelbaum, W. Felstiner and V. Gessner (eds.), *Rules and Networks: The Legal Culture of Global Business Transactions* (Oxford: Hart Publishing, 2001).
39. A realistic treatment of conflicts is F. Juenger, *Choice of Law and Multistate Justice* (Dordrecht: Martinus Nijhoff, 1993).
40. From J. Werner, Application of Competition Law by Arbitrators: The Step Too Far, *Journal of International Arbitration* 12(1) (1995), 21.
41. R. Peerenboom, *The Long March: Towards the Rule of Law in China* (Cambridge: Cambridge University Press, 2002).
42. Offering us an Italian example, V. Olgiati, Process and Policy of Legal Professionalization in Europe: The Deconstruction of a Normative Order. In Dezalay and Sugarman, *Professional Competition*.
43. As my colleague, Christoph Antons, shows in reference to certain Asian countries, see C. Antons, Analysing Asian Law: The Need for a General Concept, *Law In Context* 13(1) (1995), 106.
44. J. Weiler (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford: Oxford University Press, 2000).
45. See, eg, D. Saunders, *Authorship and Copyright* (London: Routledge, 1992).
46. K. Bowrey, *Law and Internet Cultures* (Melbourne: Cambridge University Press, 2005).

47. For an indication, see P. Geller, Conflicts of Laws in Cyberspace: International Copyright, *Copyright Bulletin* XXXI(1) (1997), 3.
48. Ably explained by J. Ginsburg, Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure, *Journal of the Copyright Society of the USA* 42 (1995), 318.
49. G. Teubner, Piercing the Contractual Veil: The Social Responsibility of Contractual Networks. In T. Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (Aldershot: Dartmouth, 1993). Here again, 'networks' are an appropriate metaphor. See more generally M. Castells, *The Rise of the Network Society* (Oxford: Blackwell, 1996).
50. For a very good treatment, see P. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York: Oxford University Press, 1993).
51. N. Kochan, *The Washing Machine: Money, Crime and Terror in the Offshore System* (London: Duckworth, 2006).
52. For a very helpful review, see S. Merry, Review Essay: Law and Colonialism, *Law and Society Review* 25 (1991), 889.
53. For example, R. Coombe, The Properties of Cultures and the Possession of Identity: Postcolonial Struggle and the Legal Imagination. In B. Ziff and P. Rao (eds.), *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick: Rutgers University Press, 1997).
54. B. de Sousa Santos and C. Rodriguez-Garavito (eds.), *Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2006).
55. S. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Chicago University Press, 2006).
56. B. de Sousa Santos, Law: A Map of Misreading: Towards a Postmodern Conception of Law, *Journal of Law and Society* 14 (1987), 279.
57. D. Schneiderman, Investment Rules and the New Constitutionalism, *Law and Social Inquiry* 25 (2000), 757; P. Drahos with J. Braithwaite, *Information Feudalism* (London: Earthscan, 2003).
58. I-J. Sand, 'Polycontextuality as an Alternative to Constitutionalism,' in C. Joerges, I-J. Sand and G. Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing, 2004).
59. Eg, J. Speth and P. Haas, *Global Environmental Governance* (Washington: Island Press, 2006).
60. A. Slaughter, *A New World Order?* (Princeton: Princeton University Press, 2004).
61. S. Picciotto and D. Campbell (eds.), *New Directions in Regulatory Theory* (Oxford: Blackwell, 2002).
62. G. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington D.C.: Brookings Institute, 2003).
63. See M. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006).
64. Eg, J. Kirton and M. Trebilock (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance* (Brookfield: Ashgate, 2004).

65. Nimmer and Krauthaus, Globalisation of Law.
66. Eg, A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974).
67. Y. Dezalay and B. Garth (eds.), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002).
68. The search is most obviously for models of business law. But a more general movement towards legal 'constitutionalism' has also come under notice. Societies in transition adopt constitutions, often with bills of rights, which to a certain extent 'judicialise' politics. There are recent instances in Eastern Europe, Latin America and South Africa, see, eg, H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2001).
69. D. Stone and C. Wright (eds.), *The World Bank and Governance: A Decade of Reform and Reaction* (New York: Routledge, 2007).
70. For an application to the WTO, see M. Kahler, *International Institutions and the Political Economy of Integration* (Washington: Brookings Institution Press, 1996).
71. P. Drahos, When the Weak Bargain with the Strong: Negotiations in the World Trade Organization, *International Negotiation* 8 (2003), 79.
72. C. Rodriguez-Garavito, Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas. In Santos and Rodriguez-Garavito, *Law and Globalization from Below*.
73. L. Helfer, Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking, *Yale Journal of International Law* 29 (2004), 1.
74. D. Vivas-Ergui, Regional and Bilateral Agreements and a TRIPs-plus World: The Free Trade Area of the Americas (FTAA), *TRIPs Issues Papers* (Geneva: Quaker United Nations Office, 2003).
75. B. Morgan, Social Protest against Privatization of Water: Forging Cosmopolitan Citizenship. In M. Seggier and C. Weeramantry (eds.), *Sustainable Justice: Reconciling International Economic, Environmental and Social Law* (Leiden: Martinus Nijhoff, 2005).
76. P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (London: Allen Lane, 2005).
77. C. Wolf and A. Artigas, When Trade Liberalization Turns into Regulatory Reform: The Impact on Business–Government Relations in International Trade Politics, *Regulation and Governance* 1 (2007), 121.
78. G. Shaffer, What's New in EU Trade Dispute Settlement? Judicialization, Public-private Networks and the WTO Legal Order, *Journal of European Public Policy* 13 (2006), 832.
79. G. Garrett, The Politics of Legal Integration in the European Union, *International Organization* 49 (1995), 171.
80. W. Mattli and A. Slaughter, Law and Politics in the European Union: A Reply to Garrett, *International Organization* 49 (1995), 183.

81. P. Davies, Market Integration and Social Policy in the Court of Justice, *Industrial Law Journal* 24 (1995), 49.
82. S. Picciotto, The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance, *Governance* 18 (2005), 477.
83. See Slaughter, *A New World Order?* (2004).
84. M. Finnemore and S. Toope, Alternatives to 'Legalization': Richer Views of Law and Politics, *International Organization* 55 (2002), 743.
85. M. Krajewski, Democratic Legitimacy and Constitutional Perspectives of WTO Law, *Journal of World Trade* 35 (2001), 167.
86. R. Howse, Adjudicative Legitimacy and Treaty Interpretation in International Trade Law. In Weiler, *Towards a Common Law?*
87. For example, P. Nichols, Realism, Liberalism, Values, and the World Trade Organization, *University of Pennsylvania Journal of International Economic Law* 17(3) (1996).
88. S. Charnovitz, Participation of Non-Governmental Organizations in the World Trade Organization, *University of Pennsylvania Journal of International Economic Law* 17 (1996), 331; S. Charnovitz, The WTO and Cosmopolitics, *Journal of International Economic Law* 7 (2004), 675.
89. D. Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press, 2004).
90. In an evaluation of copyright policy, see C. Lury, *Cultural Rights: Technology, Legality and Personality* (London: Routledge, 1993).
91. S. Burris, P. Drahos and C. Shearing, Nodal Governance, *Australian Journal of Legal Philosophy* 30 (2005), 30.
92. M. Janow, Transatlantic Regulatory Cooperation in Competition Policy: The Case for 'Soft Harmonization' and Multilateralism over New Bilateral US-EU Institutions. In G. Berman, M. Herdegen and P. Linseth (eds.), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford: Oxford University Press, 2000).
93. G. Stiglitz, *Globalization and its Discontents* (London: Allen Lane, 2002).

CHAPTER 3

THE WORLD TRADE ORGANIZATION

This chapter provides an introduction to the norms and processes of the WTO and its two agreements. Such an introduction seeks to highlight aspects of the agreements which reveal most about their role in mediating inter-legalities around the world. But necessarily it commences with essential background on the institutional housing for the agreements, the WTO itself. We shall note that the WTO reveals both continuities and discontinuities with its predecessor, the GATT. Looking forward, there are general features of the WTO which are important to the impact, and possibly the modification, of the agreements. The chapter identifies the WTO's constitutional bodies for decision making over obligations, the nature of negotiations over amendments and additions to the agreements and especially the scope and force of the dispute settlement processes.

A particular interest lies with the role which law plays in structuring these processes. We should see that both order and indeterminacy are evident here. While the agreements impose disciplines, in many respects, they are best regarded as 'unfinished stories'. They are providing further opportunities for mediation through successive rounds of agenda setting and bargaining over commitments, as well as the progressive output of the dispute settlement process in particular cases, and the opening out to influences from other international organisations and global civil society. Drawing on the thirteen years of implementation, a focus is the strategies the dispute settlement bodies have been adopting to manage the inter-legalities, as well as the experiments in the governing councils with different ways of negotiating space in the agreements.

The measures of order and indeterminacy in the agreements depend as well on the styling of the norms which they advance. Chapter 3 offers some initial characterisation of these norms, drawing on the jurisprudence which is relevant to such norms. The norms start with the principles of non-discrimination, that is, the principles of most-favoured-nation treatment and national treatment. We begin to see how the WTO interface requires the inter-legality to be resolved. The focus here is how national legalities are meant to deal with foreign legalities in a non-discriminatory way. The analysis moves on to the potentially more demanding norms of providing market access and protecting intellectual property. At this point, the main interest becomes their potential to advance the neo-liberal agenda for regulatory reform, which we can broadly characterise as a combination of liberalisation and protection, more specifically as access and security. We move from an interest in legalities as they are distinguished by their geo-political origins into a prescription of the contents and, to a lesser extent, the forms which legalities should adopt.

If the traditional preoccupation is with deregulation at the national level, we begin to see how the norms also allow, authorise and even prescribe different kinds of legalities. If the 'silences' of the agreements leave some space for member nations to maintain their regulatory autonomy, the chapter also identifies the tendency of the agreements to make explicit exceptions for non-conforming national measures, provided this regulation is linked to certain specified objectives. But, in another instance of mediation, the agreements apply strictures to these kinds of regulation, demanding that they adopt trade-friendly approaches for the fulfilment of their objectives. The necessity test is considered.

While, on the one hand, the agreements give some support to mutual recognition and harmonisation of regulatory standards, on the other, they limit the capacity of members to express their regulatory concerns on a unilateral basis. A key example is their concerns with the negative spill-overs from the policies adopted in other countries, such as the destructive tendencies towards regulatory competition. If the tendency of the agreements is to enhance global market power, we look for indications they might counter-balance this power. The chapter starts to search within the agreements for the international impetus to advance, and not simply tolerate, the regulatory concerns of the members. Part of this potential lies in the capacity to coordinate efforts with other international organisations which might be more sympathetic to

social causes. The chapter entertains the doubt of whether the WTO is ready to promote the broader concerns of international 'social regulation'.

Consequently, it suggests that the focus for the time being should be on the contribution it might make to the regulation of business practices. Competition policy is the most likely candidate. The chapter notes how trade law can treat competition regulation either in a deregulatory fashion, that is, as a conventional barrier to trade, or in a re-regulatory fashion, as a device for opening market access. Could it then transcend this preoccupation with national government measures and turn its attention to the restrictive business practices of transnational corporations? But how far would this turn in competition policy advance the cause of international regulation?

THE ETHOS OF THE WTO

Trade liberalisation

The representatives and supporters of the Organization convey a strong sense of a mission to promote open trade across the world and free markets in every locality. There is a touch of evangelism to this mission. For open trade and free markets are seen as the natural concomitants of globalisation. 'Globalisation is more than the liberalisation of trade, capital movements, communications, and technology. It is about the gradual convergence of our interests, our goals and aspirations, and our perceptions of the world'.[1] The then Director-General, Renato Ruggiero, went on to argue that such a development, such an idea really, is blurring all the old divisions, the divide between the north and the south, the gap between the developed and the developing economies, and the debate over the roles of the state and the market. Globalisation means greater economic prosperity for all and a true community of nations.

The optimism of the Director-General echoes several of the themes we have identified within the general discourse around globalisation, the blurring of boundaries, the role of carriers, and the new opportunities opening up. But it does not subject to scrutiny the particular twist which the pursuit of an open trade and free market agenda might place on the shape of globalisation. Perhaps a more detached appraisal can help ascertain which perspectives, aspirations and interests may find room within this vision of our future. We begin that appraisal here with an overview of the norms and processes characteristic of the

WTO. We link them to the two selected agreements. The subsequent chapters investigate their application within the specifics of these agreements.

In working through the norms and processes of the WTO agreements, it is helpful to think in terms of the effect of building a frame of reference for globalisation around trade. Nowhere is this framing device more significant than in its acceptance that intellectual endeavours and personal services are primarily objects of world trade. To regard these endeavours and services as objects of trade is to trust their fate to the forces and values which operate in a global marketplace. More subtly, their exposure to the global marketplace has the tendency to lift them out of the milieus in which their meanings and values are derived largely from their local and particular resonances. Instead, it is to measure their worth and stake their benefits on their treatment in a far larger and possibly less sympathetic environment. We might expect some to make the shift and go from strength to strength, while others will find it difficult to compete.

Secondly, the appraisal needs to gauge the implications of looking on certain traditional ways of dealing with these products and services, such as certain legalities, as barriers to trade. This means that at the very least local legalities must be receptive to the different local legalities which foreigners bring with them. They must become more cosmopolitan. But, as we have suggested, it does not necessarily mean that all legalities survive in a harmonious coexistence. The norms of open trade and free markets place a range of 'behind the border' legalities on the defensive, such as industry-specific regulation, corporatist industry–government relationships and public sector instrumentalities. The onus is placed on national governments to refashion their legalities as trade-neutral measures or as legitimate exceptions to the norms of trade.

This onus starts with the requirement that national legalities treat foreigners no less favourably than they do locals. National treatment, a seemingly simple principle of non-discrimination, has far-reaching implications. National legalities have sought to treat foreigners differently. As we shall see, they have sought to restrict the participation of foreigners in certain sensitive sectors to preserve a space for locals. They have sought to apply conditions to foreign participation to ensure a return to the locality from that participation. But it may not be enough for non-discrimination simply to subject the foreigner to the same legality as the locals. Non-discrimination may require the local

legality to make allowance for the foreign legality. Furthermore, we shall see that the norms of trade law move beyond non-discrimination. Norms of market access and intellectual property protection signify a broad-based agenda of regulatory reform. The objective is not merely to ease conflicts between foreigners and local legalities, but to promote 'efficient', pro-competitive regulation across the world. These norms challenge non-discriminatory local legalities. Do they promote a particular kind of economic liberalism, with a preference for legalities such as property, contract and business association? If so, local legalities must adjust to a particular kind of transnational legality which those with mobility in such a marketplace can carry with them and deploy on a world stage.

Multilateralism

If the norms of trade are vital to our understanding of the WTO, the processes which it deploys to further those norms are also worthy of our attention. A multilateral, rule-based regime is said to provide an opportunity to impose order on the processes of globalisation. For example, it provides legal definition to the norms and it 'juridifies' the resolution of disputes over compliance with them. Legalisation promotes the norms, but it also provides an opportunity to limit the scope of such change, perhaps to develop a new space in which alternative views can also find voice. It is not altogether surprising then that the WTO agreements display hesitancy in pursuing such profound changes; they tend to act in some respects as mediating as well as disciplining devices. They may even provide a focal point for initiatives to apply correctives to the abuses of global market power. The core of this chapter concerns the norms of the two agreements. But let us first say something about the nature of the institution which backs the agreements and the ways its processes promote adherence to the norms.

Chapter 2 nominated certain institutional features which were likely to give the necessary support to a program of trade liberalisation. Of course, the success of the program depends essentially on how compliance with its norms suit different perspectives and interests. In any one case, there may be costs associated with bringing national measures into line with the norms. But we should understand that adherence to the norms comes as part of a package. Compliance is not a judgement to be made in isolation in the individual case. Member governments are asked to sign up to the WTO agreements as a system for the conduct of

trade relations or, in our terms, for the resolution of inter-legalities. They are being asked to support an institution.

The manner in which the WTO norms are to be embodied and observed is a feature uppermost in the minds of those who represent the Organization. In 1995, the Director-General, Renato Ruggiero made enthusiastic claims for this organisational form.[2] He argued that, without a firm framework of rules and disciplines, openness of trade would degenerate into anarchy. Open trade must therefore be trade within the rule of law, which is why the WTO is so important, for it is the only body of agreed trade rules whose coverage approaches the global. Indeed, the aspirations of the Organization extend further. Identifying the WTO with globalisation, the Director-General advanced the proposition that the universal, rule-based, multilateral trading system is rapidly becoming a central pillar of a new international order, a key link between the north and the south, an indispensable foundation for an ever more interdependent world.[3]

In such prescriptions, we can discern a hint of the reasons why such regimes might receive support. It is true that many countries are opening markets to trade individually. Domestic reform programs tend to free demand for foreign goods, investment and expertise, together with access to export markets for the local counterparts. But it is also true that some countries stand to gain more than others, at least in the short term. All countries choose to maintain selective controls, especially in those sectors which they regard as sensitive. Such a regime offers a further means to overcome resistance, a more legitimate means perhaps than other means such as the threat of military or economic sanctions.

A multilateral, rule-based approach may also appeal to those who hold reservations about open trade. The rules are meant to provide the smaller nations with a defence against the demands of the larger nations or the transnational corporations which might otherwise play them off against each other. Multilateralism is said to generalise the benefits of the open trade to those who would not have the power to obtain them through bilateral bargaining. And, from our point of view, it is interesting that law is given a major role in providing this order to the global trading system. We would be wise to retain our doubts about the capacity of such regimes to override imbalances in power relations. But we can look for evidence of order in the presence of clear rules and a centralised design. Constitutional procedures for making policy and resolving disputes provide another useful indicator. Let us begin with the constitution of the WTO.

AGREEMENT MAKING

The WTO Constitution

The WTO has grown out of a contractual arrangement known as the GATT, the General Agreement on Trade and Tariffs. The GATT began its life modestly, following the failure of the attempt after World War II to implement a broad compact, the Havana Charter. That Charter would have established a major institution, the International Trade Organisation. But it founded on the reservations of several countries, finally being killed off when the United States Congress declined to accept it in the early 1950s.[4]

For most of its life, the GATT was concerned with standardising and, to some extent, reducing tariff barriers, which are imposed at the border on the import of manufactured goods. Of course this trade was a significant enough phenomenon and over the years the GATT consolidated its position considerably. Through a succession of rounds, the text of its agreement was elaborated, supplemented by the construction of national schedules of commitment to tariff reductions and the processing of disputes between the parties over compliance. But it continued to style itself as a contract between national parties and it minimised its institutional features.

This position began to alter when the GATT felt compelled to turn its attention to the use of non-tariff barriers to trade. The proliferation of these national measures led its trade-related interest to reach behind the border, beyond control on imports such as voluntary export restraints and other 'grey measures', to a variety of local support measures such as differential technical standards, financial subsidies for local industry, and the preferential use of government procurement powers.[5] The GATT also examined more closely the measures of retaliation against unfair trade, such as countervailing duties and anti-dumping procedures, which it had allowed the contracting parties. Its panel process began to examine the use of the exceptions to its norms which it had been obliged to concede to doubtful parties.

While this interest generated a great deal more trade regulation, it was largely on the basis of 'side codes' to the main agreement. Adherence to these codes was optional. So too, with infringing parties holding effective veto power, the GATT's dispute resolution processes remained essentially voluntary. Furthermore, great swathes of world trade such as trade in agricultural commodities and trade in services were still left largely outside its purview. From the perspective of this

book, the most significant result of the Uruguay Round was the expansion in the sectors and consequently the measures which were brought within the GATT frame of reference and ensemble of norms. But the institutional arrangements were also strengthened considerably.

In contrast to the GATT, the WTO is notable first for being styled as an organisation with members rather than an agreement between contracting parties. Here, the message is that it has more of a life of its own which transcends the desires and manoeuvres of its national constituents. In many ways, it can still be regarded as a collection of specialist agreements. But now the agreements are presented as a package with associated legal instruments. The price of membership of the WTO is submission to the Agreement Establishing the World Trade Organization, together with the Multilateral Agreements on Trade in Goods, updated versions of the Tokyo side codes, the Agreement on Trade-Related Investment Measures, the GATS, the TRIPs, the Trade Policy Review Mechanism, and the Understanding on Rules and Procedures Governing the Settlement of Disputes (see Articles II:2 and XI:1 of the WTO Agreement).[6] Only four plurilateral trade agreements, which include the Agreement on Government Procurement, remain optional (Article II:3). The price of membership also extends to the making of commitments under the GATT and the GATS (Article XI:1).[7]

Representatives of the governments involved in the negotiations met at Marrakesh in April 1994. There they signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, whereby they agreed to submit the WTO Agreement for the consideration of their respective competent authorities with a view to seeking approval of it in accordance with their procedures. They also agreed on the desirability of acceptance of the WTO Agreement by all participants in the Uruguay Round with a view to its entry into force by 1 January 1995. They further agreed to adopt a raft of ministerial declarations and decisions, some of which as we shall see relate to implementation of the GATS and TRIPs.[8] The WTO Agreement has subsequently come into force. Article XIV was to keep the Agreement open for acceptance by the participants for a period of two years following that date.

Interestingly, it is not so clear that the package has to be taken by those countries which are subsequently seeking accession to the Agreement (presently some twenty-nine countries). Article II has to be read with Article XII which says that other countries may accede on

terms agreed between it and the WTO. Article XIII also seems to envisage that a particular agreement would not need to apply between the acceding member and any other particular member. On the other hand, the suggestion is that the People's Republic of China had to take on extra obligations in order to gain accession, especially in terms of its commitment to uniform administration and judicial review.

The agreements come with a common institutional framework for the conduct of trade relations (Article II). The WTO Agreement establishes a constitution for decision making such as setting agendas, conducting deliberations, shaping policy, reviewing compliance and settling disputes. The WTO is headed up by a Ministerial Conference composed of representatives of all the members (Article IV:1). It is to meet at least once every two years. In the intervals between the meetings of the Conference, the functions of the WTO are to be conducted by a General Council which again is made up of representatives of all the members (Article IV:2). The Council establishes its own rules of procedure.

The General Council also convenes two specialist bodies designed to give the system greater follow-through, the Trade Policy Review Body and the Dispute Settlement Body (Article IV:3 and 4). These two bodies also establish their own rules of procedure. Picking up on specifications in the individual trade agreements, the WTO Agreement provides for a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property (Article IV:5). Again, they have carriage of their own procedures. Membership of these Councils is to be open to representatives of all members. The Ministerial Conference is charged to establish a Committee on Trade and Development; it has also created a Committee on Trade and Environment.

The Agreement says the WTO shall continue the practice of decision making by consensus followed under the GATT 1947 (Article IX:1). Nonetheless it contains brakes on ready alterations to the framework of norms and disciplines. The most notable are the requirements for large majority votes among members. Each member is to have one vote and decisions of the Conference and the General Council are to be taken by a majority of the votes cast (Article IX:1). However, a decision to adopt an interpretation of the agreements requires a three-fourths majority, so too any decision to waive an obligation imposed on a member by an agreement (Article IX:2 and 3). A waiver

can only be granted in exceptional circumstances and it is subject to a procedure. Amendments to the agreements may only be made by a two-thirds majority of members; while those amendments which would alter the rights and obligations of members shall only affect those members which accept them (Article X). Alteration to certain constitutional provisions, including the MFN obligation contained within the GATS, requires acceptance by all members. It is possible to withdraw from the Agreement (see Article XV).

Trade negotiations

Of course, a formal specification like this does not fully disclose the nature of decision making. The WTO must develop a *modus operandi* for making decisions about agenda items, negotiations to gain more liberalisations, implementation of existing agreements, the level of compliance and room for social regulation. A *modus operandi* was effective in concluding the Uruguay Round and producing the 1995 agreements. But inevitably it has changed over time with, to identify a few factors, the establishment of the institution, shifts in the global economy, the vagaries of domestic politics, splits between the large developed economies, the assertiveness of the larger developing countries, scrutiny from global civil society, the persistence of bilateralism and regionalism, and greater substance and maturity to thinking about international law and global governance. Amongst the copious WTO literature are insightful commentaries on the WTO processes, together with many proposals for how it might be improved. The effect of this enrichment or diversification of the WTO negotiations has recently been to freeze up and scale down actual decision making at the WTO. However, for our purposes, this effect should just encourage a search for the more subtle means by which the WTO has advanced its program while mediating the tensions between liberalisation, protection and social regulation.

The analysis begins with the negotiations over further liberalisations. To explain progress in our two focus areas, intellectual property and services, we should remember they remain part of a comprehensive trade pact. We can expect these cross-national and cross-sectoral currents, or the balance of rights and obligations, to influence the course of negotiations in our two areas, even the patterns to dispute settlement. Some developing countries have remained dissatisfied with the Uruguay Round deal. In our quarter, some have seen intellectual property protection and access to services markets as an imposition,

while they have wanted more from the textiles and clothing trade agreements, the regulation of import relief measures such as anti-dumping, the disciplines applied to quarantine and sanitary measures, and the new negotiations over agricultural subsidies. On the other hand, the larger developing countries have been pressing for further access to services markets, such as banking, finance and insurance, and certain additional intellectual property protections, as well from time to time, as progress on new agenda issues such as investment, competition, procurement and labour. All this tends to be bound up together. Thus, concessions towards liberalisation of trade in agriculture, for example are linked to intellectual property protections such as geographical indications. Some countries would like to break down this single undertaking approach. Making use of a 'variable geometry', negotiations in the various sectors should be separated from each other; the result should not need to be all or nothing.[9]

At the same time, the field has been shifting ground along the dimensions we identified in the preceding chapter, that is, economically, politically and culturally. For example, economic conditions are changing, from country to country, and the dividing line in the terms of trade is not simply between North and South. Most explicitly in the styling of the Doha Development Round, the WTO has sought to emphasise ways in which trade liberalisation can work for developing countries.[10] We shall see in the case studies how the larger developing countries like India are picking up on categories of intellectual property (eg, geographical indications, film and software copyright) and modes of service supply (including cross-border supply with back office data processing, call centres, health tourism, or the temporary movement of people). This new confidence means such countries may join developed countries in supporting some liberalisation initiatives.

Politically, there are signs on the other hand that the US is retreating from multilateralism into protectionism, its use of trade remedies, production subsidies and security restrictions at home attracting criticism in particular. Europe has found it difficult to move on agriculture and its newer poorer members are threatened by competition from lower wage, higher skilled countries. The rise of China is the latest stimulus for developed countries to revisit the costs and benefits of trade liberalisation. These countries continue to query China's protection for intellectual property, while clothing products are entering western markets in high volumes, and China companies are investing directly overseas in the mining, energy and manufacturing sectors.

Politically too, Latin America has experienced a major shift with the election of nationalist left-of-centre governments and the rise of local indigenous movements. Brazil has been active bringing major cases for ruling by the DSB. All grist for the mill, we might say; instead the biggest challenge to the WTO is how to arrest the marginalisation of the LDCs, which have actually slipped backwards in trade and well-being in recent years.

Governance issues

Dissatisfaction at the direction which trade regulation is taking becomes an issue of reforming WTO governance. As it remains essentially an organisation of nation states, the immediate question is the quality of decision making over institutional issues and the conduct of further trade negotiations. While the WTO has increasingly been scrutinised from outside, the denouement at Seattle was due to differences between members and the refusal of the smaller and developing countries to accept the power plays of the QUAD countries (the US, the EC, Canada and Japan). If the WTO Agreement does adhere to an internal constitution, for example for decision making on such matters as amendments to the existing agreements, in practice it has been more difficult to find ways to democratise negotiations over further trade liberalisation. The Cancun Ministerial dissolved too and Doha became the test of wider participation.[11]

The club-like culture of the Green Room process has attracted criticism.[12] The Green Room is a catch-phrase for the system whereby the QUAD trade super-powers reach deals informally among themselves, attracting support by inviting other members into select circles that expand outwards concentrically. By the time members are in open session, it is hard for any one country to move amendments; instead, the pressure is for consensus on the deal. If opposition is strong, it is block mode, and the result is a standoff. As the membership grows in number and more members become assertive, the Organization faces a problem reaching decisions on new agreements.

While the larger developed countries have always caucused, more representative decision making may depend on other like-minded countries forming effective coalitions too. On agriculture, the Cairns Group was one such initiative. Recently, India, Brazil and China have collaborated on certain issues. Wisely, Peter Drahos points out that greater participation in the deliberative processes does not necessarily give more power over decision making.[13] Some countries have more

bargaining power because they have a greater share of world trade. While this attribute holds potential for the larger developing economies such as China, smaller players have to look for other ways they can combine their economic power.[14]

Much of this depends on material and ideological conditions extending beyond the WTO. The US retreat from multilateralism is a factor right now; the level of trust and cooperation between countries in the South is another. Nonetheless, there is interesting work being done to see how the WTO's own processes can assist deliberations and decisions. The institutionalisation of the WTO means that economic coercion is not the only bargaining power. The studies suggest that information and expertise become valuable resources too, certainly in the settlement of disputes over compliance with the existing agreements, but perhaps also in negotiations over new agreements.

So the WTO has experimented with reforms to its negotiating procedures.[15] For example, the WTO has convened issue-specific committees that members may choose to join. The Divisions of the Secretariat play a constructive role developing options.[16] The fresh round of negotiations for commitments under the GATS first proceeded on a bilateral request/offer basis. But, recently, the members have spent more time identifying modalities for negotiations. As part of the modalities, members are being encouraged to open up a minimum number of sectors and agree on a minimum extent of liberalisation. The members may opt into a plurilateral approach to negotiations. These switches in the process attract their own controversies (see Chapter 4).

In some quarters, constitutionalism is seen as the way to deal with the messy politics of the WTO and its members.[17] The WTO becomes the constitution for a world economy. Such a constitution would constrain politics, principally because it would guarantee rights to trade and invest, though it might also contain some other rights too so far as they could be reconciled with trade and investment. However, the experience suggests this ambition is over-blown.[18] The agreements lack this kind of comprehensiveness. The rights are not fully entrenched; nor are the other public goods with a claim to consideration (such as access to knowledge) properly accommodated within the WTO scheme of things. Many members are wary of the WTO assuming such a mantle. The more fitting discourse remains one of linkages and, while we shall see much good work to articulate those linkages, in practice they develop only haphazardly.

Where insistence on strict legal compliance has threatened the political stability of the WTO, the members have pursued other more responsive avenues of resolution. In the politically sensitive areas of TRIPs, the members have pulled away from laying complaints. As a release from compliance issues, when other values were at stake, they have made use of the opportunities in the WTO Agreement to formulate consensual interpretations of key allowances and grant waivers of existing obligations. However, these mediations may not be long lasting. It is even possible they will draw members into their 'own juridical webs'.[19] The agreements will need amendment at some point, otherwise the WTO will seize up and countries will go elsewhere for solutions (see Chapters 6 and 7).

If the WTO is not able to embrace those other values holistically, the interest lies in fashioning processes that will make it receptive to other influences, some more diplomatic or political than legal. There is a tendency, when finally all the hard bargaining and horse trading is put aside, to plump for proceduralisation. At times, this governance concern may develop into a full blown debate about WTO democracy, participation, accountability and legitimacy. Thus, ideas have been run about establishing a WTO Parliament to complement the executive and judicial bodies.[20] However, in the meantime, the emphasis is on modest reforms. In dispute settlement, for example they are to facilitate combinations between smaller country complainants and to allow civil society greater standing. In agenda setting, they are to open up committees to the rank-and-file members and to step up cooperation with other international organisations.

To complement the cautious openings from the WTO to external influences is the deference which Robert Howse recommends.[21] Regarding national measures, we see those with European experience recommend that the WTO favour the principle of subsidiarity in standard setting and give national measures a margin of appreciation when adjudicating.[22] There may be good reasons why these issues are left to the discretion of the individual members at the national level (or in certain world views to the laissez faire of the marketplace or the customs and practices of local communities for that matter).

Increasingly, though, interdependence would seem to demand a level of international cooperation too. The obstacles may lie, not so much in the inability to see linkages, as in the difficulty finding a satisfactory structure for governance at the global level. This starts with WTO governance but spreads to structures that connect the

WTO with other international and transnational organisations, for instance a kind of open-architecture governance.[23] Within an open decision-making structure, international governance should be distributed to the organisation most suited to the particular subject matter. The WTO has done little to manage this interdependence, proactively, by specifying the kind of re-regulation reference point that is appropriate. The implementation experience reveals few efforts to take up the opportunities made available in the 1995 agreements and the membership remains wary of entering negotiations on the new issues of competition policy, labour standards and environmental regulation. Other issues with clear linkages to trade, such as recognition for traditional knowledge or support for anti-corruption measures, have gone nowhere so far.

The alternative is that some countries and other actors will use forum shifting to obtain rules elsewhere. Currently the WTO is challenged by a wave of US-industry styled FTAs. They are much broader that the old single item bilateral agreements. As the analysis below suggests, they do not simply supplement the multilateral agreements with WTO-plus provisions. They also seek to close off the allowances made at the WTO and create alternative dispute settlement proceedings to secure competing interpretations. So too, country–civil society coalitions are placing less store by the flexibilities in the WTO. In other organisations, they are working to shape new frameworks that begin with public goods. However, it may well be these other texts cannot be kept separate from the WTO. Either they will be overruled by the WTO or they will feed back and alter the WTO itself.

Cross-institutional structures

So, if progress is to be made on social standards, some see reform of the structure of the WTO as the answer. Reform of the dispute settlement process broadens out into a campaign to make the WTO more democratic. Here, democracy is being conceptualised in a cosmopolitan, participatory sense consistent with an optimistic reading of globalisation.[24] The WTO's 'democratic deficit' is indeed a significant query for a body that aspires to a central place in a new international order.[25] Democratisation seems essential if trade values are to be reconciled with non-trade values. For instance, as we noted above, new processes need to be devised to ensure that the most powerful member countries (such as the QUAD countries) cannot simply foist deals on the bulk of the membership. There also needs to be access for

those organisations which increasingly cut across the perspectives of the nation states, such as the associations of indigenous peoples and the environmental movements. Environmentalists are especially suspicious that the current WTO carries no real sympathy for their cause.

The WTO Agreement picks up a clause in the original ITO charter that enables it to make 'appropriate arrangements for consultation and cooperation with non-governmental organisations concerned with matters related to those of the WTO' (Article V:2). The WTO secretariat has been making moves in this direction already, such as the timely provision of documents.[26] But the workings of the General Council and the Committees are a closed book and the NGOs do not sit at the conference table unless they are incorporated, as certain industry associations have been, within national delegations. At the Singapore meeting of ministers, for example some NGOs were first given official observer status, but many felt they were still shut out of the informal negotiations which determined the outcomes of the meeting.[27]

If the WTO were opened up to the NGOs, there would be a risk that they were being co-opted, lending credence to the decisions of a body that remained fundamentally inimical to their world views. In such a fluid and uncertain situation, the greatest potential may lie in an open interface with other international institutions. If it is not made for this kind of social responsibility, it might be better for the WTO to coordinate standard setting with the more experienced and dedicated institutions of the United Nations, such as the ILO. In this vein, Article V:1 of the WTO Agreement directs the General Council to 'make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO'.

Of course, the international landscape is already dotted with organisations that provide a contrast with the WTO in terms of their underlying ethos, their special expertise and their particular constituencies. The GATT itself developed quite distinctly from the United Nations organisations after the war. The WTO's assumption of the new trade issues clearly carries the potential for it to act as a rival to these organisations. Some read the TRIPs agreement as a successful strategy to shift the focus for intellectual property away from WIPO.[28] Likewise, the GATS could be said to take quite a different set on issues which have preoccupied bodies like UNCTAD for many years.

Yet the studies below will reveal that the relationships are not simply rivalrous. TRIPs has already applied many of the provisions from the Berne and Paris conventions. TRIPs makes use of the learning and legitimacy of these conventions, while in return providing powerful new sanctions for their non-observance. We explore these connections in Chapter 6. At the same time, we can say that cooperation has a long way to go. We should see that the WTO is hesitant to link TRIPs further afield, for instance with the UPOV convention or the United Nations Convention on Biological Diversity (CBD) (see Chapter 7). We should also note that the GATS has very little to say about linkages, though it does occasionally point the members in the direction of multilateral standard setting organisations such as the ISO and ITU (see Chapter 4). Though clearly of relevance, neither TRIPs nor GATS gives any support to the codes of conduct on technology transfer and restrictive business practices which have been developed in the United Nations. We shall argue in Chapter 8 that the WTO has acquired a responsibility to give material support to these kinds of codes.

Recent GATS negotiations

Both our two agreements had bargaining built into their processes. The GATS was cleverly designed for negotiations, so that members could feel they had a choice about the level of commitments to liberalisation they would make. Those negotiations over specific commitments commenced within the Uruguay Round itself. Negotiations often began between two major trading partners and then expanded to take in some other selected countries.[29] They largely proceeded on a bilateral basis of requests and offers but occasionally there would be plurilateral meetings convened to review progress in a particular sector. Eventually the best offers a country had made would have to be multilateralised for the benefit of all other members. In financial services and basic telecommunications, highly structured negotiations over commitments were extended over after completion of the Round to obtain better offers.

Several aspects of services trade proved too difficult to resolve at this early stage and they were set down to be revived. These aspects include subsidies and government procurement. More fundamentally, the GATS programmed members to enter into successive rounds of negotiations generally 'with a view to achieving a progressively higher level of liberalisation' (Article XX:1). The next round started up towards the end of 1999. It again proceeded on a bilateral basis. After initial requests and offers were lodged, deadlines were extended to encourage

new offers from members that had not previously participated and revised offers from those who had. But by July 2005 the Director-General was warning that the quality of offers remained poor and that the success of the Doha Round was being threatened.[30] Partly the reluctance lay in the sensitivities within the services sectors; partly it was linked with the lack of progress in other areas such as agricultural trade. The fact remains that few offers have come from members who did not make commitments in the Uruguay Round. Most offers augment commitments in the same sectors as were initially exposed.

Industriously, the Ministerial meetings have done work on developing modalities to give form and impetus to the negotiations. The modalities have encouraged members to make offers that open up a minimum number of sectors and agree to a minimum extent of liberalisation (see Chapter 4). At the same time, the members may opt into a plurilateral approach to negotiations. Yet, these concerted approaches have been cast very much as voluntary; some members have claimed they undermine the freedom within the GATS structure for them to decide individually whether to make commitments.

The modalities are part of a bigger effort the WTO has to make to overcome the resistance among members to participating. LDCs have been reassured in keeping with Article XIX that they will not be requested to make full commitments to national treatment (or to make additional commitments regarding domestic regulation) where they lack the capacity to do so. The WTO has run a campaign to try to dispel developing country and NGO concerns that public services were under threat from the GATS negotiations. The publicity made it clear every member had the right to exclude public services, including health, education and water distribution services, from commitments. The Director-General and the Chairman of the GATS Council said nothing in the GATS requires these services to be privatised or liberalised.[31] Even if they have been commercialised, it is not necessary to give foreigner suppliers participation rights such as access to licences or grants. Legally this view is correct. However, members with private companies wanting to export services, for example France with water management suppliers, are still pressing for market openings (see Chapter 4).

On the other hand, the WTO has run workshops in Geneva focusing attention on the opportunities that further liberalisation would present for the more labour intensive services likely to return the most value to developing countries as exporters. The topics have been well selected

such as the temporary movement of people to supply services in another country and cross-border supply of services (such as outsourcing offshore). The positive approach also includes strategies to moderate domestic regulation and this has become at Doha the second track services working group. We shall see individual approaches here seeking additional commitments from members to restrict their regulation in a certain way. However, the WTO has been making efforts to foster collective agreement on regulatory modalities. The aim here is to discipline national regulation, knowing that it will necessarily persist, but the view has also been taken that members may be readier to commit to liberalisation if they can feel confident that a sub-stratum of regulatory objectives and methods is accepted.[32]

In the Uruguay Round, the strongest initiative was the basic telecommunications reference paper, which some fifty-five countries adopted into their schedules. This 'pro-competitive regulation' has since been offered as a model for regulation in other sectors (see Chapter 8). The charge to the Services Council in Article VI, to work on disciplines for domestic regulation in the professional services sectors has so far produced the disciplines for the accounting sector. There has been a great deal of useful research, analysis and discussion on this issue, but the members have not yet agreed on disciplines for national regulation in other sectors or the links to other sites of international regulatory coordination that some commentators have recommended. For the time being, the action has shifted to other forums. As we shall see below, the bilateral free trade agreements become a substitute for the multilateral negotiations. On international regulation, there is much happening of positive value, for instance within the informal networks of functional regulators, but it remains independent of the WTO.

Recent TRIPs negotiations

Like GATS, the trade agreement on intellectual property was a singular event. As we shall recount in Chapter 6, the TRIPs agreement required much more than routine GATT-type bargaining over trade concessions.[33] It depended on the formation of a context conducive to adoption of an agreement, with private sector involvement right from the start, then the elongated Uruguay Round process of country to country negotiations on both framework and single issues, primarily between the QUAD countries, together with the construction of coalitions, until the outstanding issues were finalised and the momentum for the agreement realised.

The agreement was emphatic and TRIPs did not promise another round of negotiations. A general review of the provisions was timetabled but it has never really commenced. Several key provisions were flagged for review after negotiations produced a compromise.[34] The first was whether the patent exception allowed for plants and animals should be eliminated. That review has produced negotiations, some members endeavouring to link patentability with recognition for traditional knowledge, but a conclusion is not in sight (see Chapter 7). The second was whether the *per se* protection for geographical indications should be extended beyond wine and spirits and registration systems established. Those negotiations have revealed a split between old and new world developed economies, coloured now by a complaint brought on the existing provisions before the DSB by the new world against the old world protagonists for more protection. The third was of the initiatives the developed economy members are taking with their home-based private corporations to promote technology transfer to the developing world. That seems to have been confined so far to information gathering.

With innovation once again in media technology, business models and cultural practices, the period since 1995 has been a vital one for intellectual property. At the Ministerial meetings, proposals have been made to augment the agreement, for example by incorporating the 1996 digital environment WIPO Treaties, but they have been put on hold in the wariness about re-opening the agreement. The momentum for further intellectual property protections has been lost to other international forums, especially, as we shall see below, the bilateral free trade agreements. Likewise, the WTO has failed so far to take up the case for alternative forms such as traditional knowledge and it is beginning to see the effects of the discussion being recast within other international organisations in public policy terms such as cultural diversity (UNESCO) or a development agenda (WIPO), though these other organisations have their political problems too (see Chapters 7 and 8).

The exception is the issue of patent protection and access to medicines. In handling this issue, the WTO has shown how it can find avenues for negotiation in different places: not just over amendments to the text of the agreement but in compromise and settlement of disputes about compliance, fashioning collective consensus about the interpretation of provisions, waiver of rights and obligations, and administrative arrangements for implementation of provisions.

This issue had initially produced a conservative ruling on the scope of the three-step test in Article 30 for exceptions to infringement of patent rights. Instead, the question became the conditions on which members may utilise the 'flexibility' of Article 31 to licence without the authorisation of the patent holder the production, sale and export of generic drugs. As the case study in Chapter 7 will show, negotiation of this issue began with the settlement out of court of disputes between the US and developing countries and then an informal membership moratorium on bringing further complaints following the Seattle meeting. Subsequently, at the Doha meeting, the members fashioned a collective solution to the interpretation of the grounds in Article 31 for compulsory licensing. Essentially, the Doha Declaration on TRIPs and Public Health can be seen as a political compact to allow members liberal use individually of Article 31.

Nonetheless, further negotiations were necessary because of a clear requirement that such licensing be predominantly for supply of the domestic market. This requirement stood in the way of members who for lack of local manufacturing capacity needed to import generics under licence from other members. Two years of negotiations produced a temporary waiver of Article 31(f) and an administrative system for trade in generics. Another year of negotiations has turned it into the first amendment to TRIPs.

However, amendment has not brought closure either. Members have been deciding whether they will opt in or out of the system as importers and exporters. Meanwhile the terms of the allowance are still being argued and the argument could lead to a request for a DSB ruling if individual member's complaints are not placated. Through the terms of bilateral free-trade agreements, countries are relinquishing the flexibilities they have been given. With the end to the grace period for implementation of patent protection (for all but the LDCs), the economics of the generics industry is changing dramatically. Negotiations might need to shift again, this time to the making of public–private and North-South partnerships, in order to ensure the supply of essential medicines for disease crises like HIV-AIDS.

THE DISPUTE SETTLEMENT SYSTEM

Dispute settlement process

In Chapter 2's consideration of the prospects for consolidation of an international regime, significance was attached to the role of dispute

settlement. One of the most emphatic outcomes of the Uruguay Round was a strengthening of the GATT processes. As we have foreshadowed, the Round produced the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The process for dispute resolution still has much in common with the GATT. But it is clear from the nature of the personnel, the procedures elaborated, the sources on which it should draw, and the action which it must take, that the process has the incipient traits of a court. Further, an element of 'automacity' has been introduced into the overall process. While the process remains extremely cautious and elongated, the complaining country is effectively in a position to move a case through to the point of enforcement.

The primary objective of the process is to achieve agreement between the complaining and responding parties. The process starts with consultations between the members involved in the dispute (Article 4 of the Understanding). The Director-General of the WTO lends his or her good offices and seeks to conciliate and mediate, if need be (Article 5). However, if consultations fail to resolve the dispute, the complaining party may request the General Council, sitting as the Dispute Settlement Body (DSB), to establish a panel (Article 4). Thus the WTO continues with the panel system which the GATT introduced. Now, however, a panel must be established unless the DSB decides by consensus not to do so (Article 6). In other words, a negative consensus is now required to block a panel, whereas previously a positive one was needed to establish one.

Panels are to be drawn from the pool which member countries have nominated. For a particular dispute, the WTO Secretariat nominates the individuals from this indicative list. If there is no agreement on the panellists, the Director-General selects. They must be well-qualified individuals, whether they come from governmental or non-governmental backgrounds (Article 8). Article 8 is also concerned with their independence. They must serve in their individual capacities and not as government representatives or representatives of any organisation. In particular, the panellists for a particular dispute must not be citizens of the member countries involved.

What sources may the panels draw upon in making their decisions? The Understanding stresses that panels are to preserve the rights and obligations of the members under the covered agreements (Article 3:2). In other words, the basic prescription is to uphold the rules. As we have said already, much will depend on how rule-like the

obligations and commitments really are. In the event of uncertainty and ambiguity, the Understanding points to the general sources on which they may draw. The provisions of the agreements may be clarified in accordance with the customary rules of interpretation of public international law (Article 3:2). The Appellate Body has identified the Vienna Convention on the Law of Treaties as the embodiment of these rules. We should also recall Article XVI:1 of the WTO Agreement which provides more substantive guidance. It states that the WTO should be guided by the decisions, procedures and the customary practices followed by the contracting parties to the GATT 1947 and the bodies established under it. We should note that this GATT jurisprudence is gathered together in an official publication: the Analytical Index.[35]

Nonetheless, as we have been suggesting, the WTO agreements break new ground. It was to be expected that the jurisprudence would take new turns. New subject matter and new text will mean that the GATT jurisprudence is inadequate. The negotiations leading up to the conclusion of the agreements are one available source of enlightenment; a number of 'legislative histories' have already been prepared.[36] The GATS and, to a lesser extent, TRIPS have taken the trouble to elaborate statements of objectives, provide definitions and notes of interpretation, and particularise norms in specific annexes. In addition, we have seen that the Marrakesh meeting of Ministers reached a number of decisions which bear on the implementation of the agreements. Reference will be made to these sources as we work our way through the agreements.

The panels may of course wish to take evidence and argument in the individual case. The Understanding says that the panels are to meet in closed session with deliberations to be confidential (Article 14). The members involved in the dispute make written submissions (Article 12). They can be invited to make oral submissions which must then be made in the presence of the other members involved in the dispute. Appendix 3 to the Understanding elaborates these working procedures. At the same time, other members having a substantial interest in a matter before a panel are also to have an opportunity to be heard (Article 10). In addition, each panel shall have the right to seek information and technical advice from any individual or body it deems appropriate (Article 13). They may also seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. The Understanding does not give the

members the right to examine this information, advice and opinion, but in general terms the members have a right to respond at the time the panel issues its interim report (Article 15). All this relates significantly to expectations about procedural legalities.

Under the GATT, the panel could end its deliberations with a recommendation. Because the recommendation had to be accepted by the GATT Council, which operated according to consensus among the contracting partners, the infringing country could effectively veto any action. There was also 'fudging' in the way the Council adopted the panel reports. Now the panels report to the DSB. The DSB must adopt the report unless there is consensus against doing so (Article 16:4). At the same time, provision has been made for members to appeal from a panel report (Article 17). The Appellate Body is a standing body made up of persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally (Article 17:3). But any appeal is to be confined to the issues of 'law' covered in the panel report and legal interpretations developed by the panel (Article 17:6).[37]

The DSB is charged to decide how to implement the panel report. It makes recommendations and rulings. The Understanding says a solution mutually acceptable to the parties and consistent with the covered agreements is to be preferred (Article 3:4). Otherwise, if the measure is inconsistent with the agreement in question, the prime objective should be to secure its withdrawal. In the case of TRIPs, we should note that it will sometimes be more accurate to say that a party should introduce a measure consistent. In any case, in the event that it fails to conform to the agreement, the responding party must negotiate the payment of compensation to the complaining party (Article 22).

If no satisfactory compensation is agreed, then, as a last resort, the DSB can authorise suspension of concessions or other obligations. In other words, the complaining party can be authorised to impose trade sanctions. Such retaliatory action is to start with concessions or other obligations in the same sector and under the cover of the same agreement as the infringement. But, if this action is not practicable or effective, it can move to cross-retaliation within another sector covered by the same agreement. If the circumstances are serious enough, it can extend to other agreements. Nevertheless, the level of suspension must remain equivalent to the injury which the infringement has caused to the complaining country, that is, the level of the nullification or impairment (Article 22:4). We discuss the concept of nullification or

impairment below. Also below, we shall see that the Understanding distinguishes violation and non-violation complaints of nullification or impairment. It should be kept in mind that the programmed response to a non-violation complaint is more mild (Article 26). The responding country is not under an obligation to withdraw its measure. Rather, it is required to find a mutually satisfactory adjustment with the complaining country.

The record of dispute settlement

The WTO now has well over ten years to show for its dispute settlement system. What experience has it gained? We should point first to the wealth of information and analysis that is publicly available and a resource for readers. As part of an openness policy, the WTO has been systematically making documents available. The most amenable of course are the Panel and Appellate Body reports which are also distilled as one-page case histories and decision summaries and consolidated in the Analytical Index. Cambridge University Press publishes the official DSB reports. The Press along with other book and journal publishers are the source of much case commentary. There are several scholarly texts to be found on the procedural and substantive jurisprudence of the system, together with worthwhile evaluations from various perspectives.[38]

It is harder to capture the mood and the impact of the process overall as a socio-legal phenomenon. For this task, researchers need to read across the insiders' stories, the external critiques, the qualitative appraisals, and the quantitative analyses that again have become thick on the ground.[39] Given the log jam in trade negotiations, dispute settlement is the most active sign of WTO life. Consequently, the topic is important to an understanding of the WTO – and the future of international law, international tribunals and global justice more generally. That makes it worthy of detailed attention, though we should note that few disputes have adjudicated under TRIPs so far, and fewer still under GATS. Here, the section will highlight several aspects of dispute settlement in keeping with the book's themes of legal pluralism and inter-legality.

Threshold participation

An initial research question is why some disputes get to the WTO. As a starting point, the WTO has been helpful providing annual reports of the 'state of play' of WTO disputes and more frequent updates too.[40]

They include statistics and others have looked at the pattern of litigation and decision making too. To the beginning of 2007, 316 complaints had been notified to the DSB altogether. As we shall see, some are never really activated: they might serve as a warning to the respondent to reform measures unilaterally or create a bargaining relationship for informal resolution away from the WTO. We cannot delve into national government deliberations and domestic industry politics to determine the particular origins of disputes. This task will have to be left to the many good stories written about individual disputes.

If it is appropriate to approximate WTO dispute settlement to domestic civil litigation, then it can be suggested that various pragmatic considerations are influential. A familiar calculus is the expected benefits from a successful complaint, compared with the risks and costs of losing and the transaction costs of progressing. So we would expect members to run cases that promise aggregate benefits for their terms of trade or large-scale gains in strategic industries, rather than quick remedies for minor obstacles. Transaction costs are a consideration for all but the best endowed members, running into the millions of dollars for case preparation and prosecution. They make technical resources and transaction cost factors in access to justice.[41] Case costs can be political too, such as damage to a long-term relationship and even the integrity of the system, unless members come to regard suing each other as business as usual. We cannot say that of litigation under TRIPs or GATS. A win might create a legal precedent that rebounds on the complainant's own measures and, in the early days, there was some suggestion of complaints being brought as political paybacks.

The risk of losing depends on whose position the WTO law supports. The agreements have a bias in favour of trade liberalisation and against measures that act as trade barriers, but this thrust tends to vary with the sector in question, and the risks in the individual case are increased as the indeterminacy of the law makes it more difficult to predict the outcome. As rulings accumulate, the jurisprudence will become firmer. But even now both TRIPs and GATS remain novel in many respects. Furthermore, while most members are law abiding, compliance with an adverse ruling cannot be assumed. Several disputes have required recourse to arbitration or a return to the panel on issues of compliance where the respondent has been reluctant to conform, so that the complainant has to be prepared to see the case through to retaliation and sanctions – if it is able to do so.

All these factors might suggest that the system is more accessible to some countries than others. The large developed nations have figured as complainants over the developing countries (the ratio is 3:2); they are more likely to be respondents too (10:7). This difference was stronger in the first years; latterly, the large developing nations, such as Brazil and India, have become more assertive. We would need to analyse the record closely to see whether the LDCs are bringing any complaints or whether the smaller countries are bringing complaints in their own right (rather than only joining complaints from bigger countries). So we can assume a selection effect that colours any further analysis of dispute settlement patterns – some countries do not show up.

Most of the litigation has been brought under the GATT 1994 (1947) and agreements regulating the use of trade remedy or import relief measures. So it can be seen as an expression of old-fashioned trade competition. Also notable are the cases testing the disciplines of the new SPS and TBT agreements. In the early TRIPs disputes, developed countries were on both sides arguing minor infractions. The key rulings so far, addressing the exceptions to patent and copyright infringement, have involved these countries too. The US brought complaints against developing countries but these disputes were settled out of court and, since Seattle, a virtual moratorium has applied to TRIPs disputes, apart from the case the US and Australia has brought against the EC over its administration of its geographical indications protections. The lack of benefit from TRIPs is one explanation why developing countries have not been complainants. The grace periods are a reason why they have not been respondents, though the calculation of political costs seems uppermost, suggesting restraint is being exercised by the developed countries. The Doha Declaration on TRIPS and Public Health is the high-water mark of this approach. Now the US has notified a complaint against China.

GATS litigation is slighter. The fact that most members only committed their extant measures (a standstill position) means there was little to test. The focus has turned to the new round of negotiations over commitments. One of the two major cases, the United States against Mexico, concerns the new telecommunications obligations. The other is helpful in testing the GATS listing approach and the limited exceptions that are allowed. It was brought by the tiny country of Antigua and Barbuda against the US, though rumour has it the complaint was supported by a disaffected off-shore American business.

Such idiosyncrasies remind us that the formal patterns only say so much about disputation. Given the overlaps in trade and investment flows, the cross-national as well as the international dimensions of these case coalitions can be informative. This intricacy is certainly true of big cases such as *EC–Bananas* (partly about GATS) and *EC–Asbestos Products*.

Negotiated solutions

Of those complaints that do enter the system, a majority are not going to a panel ruling. The WTO Agreement and the DSU encourage the members to find a negotiated solution. The extent to which complaints should be settled out of court raises competing considerations – processing efficiency, furthering the liberalisation of trade, producing a case jurisprudence, access to justice, and the observance of legalities. Already, the Appellate Body has placed some procedural checks on the conduct of consultations and the Review has attracted proposals to stiffen the procedures. Some settlement out of court is healthy for the system, yet procedural legalities are valuable too. One such consideration is that the stronger parties do not exploit the system to obtain less – or for that matter more – compliance than the WTO agreements require. Vigilance has the virtue of protecting the weak and safeguarding the public interest in the integrity of the system.

What does the evidence of negotiated solutions suggest?[42] While the majority of complaints do not go to a ruling, fewer are classed as settled out of court. Others are dropped or remain inactive. Explaining the negotiation of solutions brings into play the practical considerations we identified above with initiation. In some cases, such as the early TRIPs complaints, full concessions were obtained quickly because non-compliance was clear from the agreement. In some cases, partial compliance is possible, so a compromise middle ground can be found. However, TRIPs and GATS disputes are not as amenable to this solution as disputes over monetary measures such as tariffs: strictly, either the law conforms or it has to be changed. Sometimes, too, the parties may wish to go to a ruling to obtain an interpretation and have a principle established. But in others, it should be appreciated that they wish to avoid the political costs that come with forcing a ruling.

Who benefits from negotiated solutions? Overall, the pattern is that complainants do well; indeed it is at this stage that they gain their greatest concessions.[43] In 2003, Busch and Reinhardt found that developing countries were doing better from settlements than they did out of

the old GATT, but the developed countries had obtained more concessions again, many from the developing countries. The successful developing countries were the larger ones, leading the researchers to conclude that, even in a rule-based system, with formal equality for all before the law, the command of technical legal resources is important to access to justice.[44]

Whether in this success the complainants are obtaining more liberalisation than the agreements require is harder to say. The DSU permits countries to reach a solution that is mutually acceptable to them and consistent with the covered agreements. Complaints could just be carefully chosen but we know that information asymmetry and uneven bargaining power is relevant to settlements at the domestic level. The suggestion has been made that TRIPs did not necessitate the settlements the US obtained under TRIPs from developing countries.[45] Does the WTO exercise oversight? DSU Article 3.6 says that mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions shall be notified to the DSB and the relevant councils and committees, where any member may raise any point relating thereto. But notification is not mandatory and the WTO's own figures distinguish disputes settled without notification for various reasons. The DSB does not examine the solutions notified to it for their legality.

Rulings

One of the legal virtues of the WTO system over the GATT is access to a panel ruling. If consultations do not produce a solution within a set time, the complainant may request that a panel be established. While it seems complaints can be kept indefinitely on the books, the respondent may simply hold out and insist that the complainant be put to its proof. Around 100 of the 316 complaints have to date reached a ruling.

The charge made to the panels is to preserve the rights and obligations of the members under the covered agreements and to provide security and predictability to the multilateral trading system. So the panels' job seems very much to uphold the law. All the same, we know enough from the jurisprudence and socio-legal studies of the domestic courts to appreciate that the judges must make certain choices about their interpretive practices. The DSU anticipates that they will need to clarify the existing provisions of the agreements, in accordance with the customary rules of interpretation of public international law, though they cannot add to or diminish the rights and obligations

provided in the agreements. These choices will include how legalistic they will be in their approach. Such choices attend the Appellate Body too, even if it is understood to have a narrower brief than the panels, in being confined to the issues of law covered in the initial panel reports and the legal interpretations developed there by the panels (Article 17.6). The Appellate Body has many opportunities for influence. The majority of panel rulings are being appealed, though we should note that the parties have withheld some key TRIPs panel rulings from it.

The panels and the Appellate Body engage in policy making most directly in their choice of interpretations of the provisions of the agreements, more broadly in delineating the sphere of influence relative to the measures of the national members and the norms of other international law.[46] They also do so in their choice of procedure. Despite their best efforts, it has been hard for them to avoid political controversy, sometimes about the legal approach itself that should be taken, including a legal approach that was meant to distance them from politics. The members bring their own contrasting legal cultures to dispute settlement such as the contrast between common law and civil law systems.

I think we can identify among those choices whether to take an open or closed approach to outside voices, literal or purposive approach to interpretation of the agreements, an insistent or deferential approach to national measures, and a narrow or broad approach to the surrounding international law. If we put this together, we might say the question is the extent to which the DSB tribunals let in consideration of sources beyond the words of the substantive provisions.[47]

Listening to voices

This receptivity starts with whom the tribunals choose to hear, indeed the background of the members themselves, for some participants are likely to provide a broader or more alternative view than others in the inner circles. The formalities tell us from whom the panellists may be drawn, but little empirical analysis has been done of the composition of the panels. The Appellate Body members have been chosen, most successfully on the whole, from experienced judges and academics in different geographical regions. Instead, the flashpoint has been whether the tribunals should listen to NGOs and global civil society. Greg Shaffer shows how member government cases have taken soundings from various domestic and other industry constituencies and have even received material help in their preparations. Without much fuss, the

tribunals have obtained written information from other official international organisations. The Appellate Body has read the DSU to allow the tribunals the freedom to receive submissions directly from external, non-government sources, even if they come unsolicited. But this reception lies within the discretion of the tribunals and the AB itself has refused to consider *amicus curiae* briefs in several wide-ranging environmental and health disputes. In late 2000, an extraordinary meeting of the WTO General Council was called to express dissatisfaction with the AB decision in *EC–Asbestos Products* to allow them to be filed. Most member governments are adamant that proceedings be strictly intergovernmental.

Finding meaning

As law students, we are taught that the most legalist approach to the text is a literalist one, taking the words at face value and giving them their ordinary meaning. But the language that finds its way into the WTO agreements is likely to be vague and pliable. A more active approach to interpretation calls upon the intent or purpose behind the enactment to cast light on its meaning. The Appellate Body has accepted that the customary rule of interpretation of public international law includes the Vienna Convention on the Law of Treaties. The Convention says that a treaty should be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose. So the starting point is the ordinary meaning of the words but the reference points include context and purpose.

Those terms might include the whole of the treaty, not just the substantive provisions with immediate application to the dispute. Given this scope, the Appellate Body has been criticised for encouraging an excessively legalistic approach.[48] The front-line use of standard dictionaries is evident in *Canada–Pharmaceutical Patents*, the TRIPs panel ruling on exceptions to patent infringements. Instead of looking in dictionaries for the meaning of single words, it is argued, the tribunals should look to the preambles to the agreements and the statements of objectives and principles to give a purposive interpretation to general terms. A case in point is Articles 7 and 8 of the TRIPs agreement which arguably encapsulate the balance struck between protection and access. They signal that protection is meant to work for the benefit of all members and that members are to retain the scope to pursue domestic regulation. In *Canada–Pharmaceutical Patents*, the

Panel declined that approach. It took the view that the words of Article 30 themselves reflected the compromise the drafters had made and that Articles 7 and 8 could not be invoked to argue for a liberal interpretation.

Judging national measures

After construing the requirements of the WTO provision itself, the other main task of the panels is to determine if the national measure under complaint complies with the provision so invested with meaning. A key issue is how much scope the panels allow the national measures before it is decided that they do not conform with the agreements. Faced with a complaint, the panel will be offered the respondent's own characterisation of the national measure as being consistent with the provision. To what extent should it defer to that characterisation or at least allow it a margin of appreciation – sometimes called the standard of review. For example, the respondent might put a position regarding the extent to which it meant to commit its measures to liberalisation when it drafted its schedule of commitments to the GATS. As we see from *US–Gambling Services*, the schedules are sketchily written and require interpretation. Or the respondent might say it formed a judgement that its measure was necessary to achieve a regulatory purpose and thus an allowable exception to the commitment made.

There have been weighty arguments for deference that go, as we shall see, to governance, for instance the appropriate level (expertly and democratically) at which decisions should be made.[49] Legally speaking, the Appellate Body points out that the tribunals' role is to exercise oversight. Naturally they will take into account the member's view. The test of necessity, for example is interested in the value the member places on achieving the objective. But finally the measures must be assessed objectively against the WTO requirements. Only the Anti-Dumping Agreement actually provides for a degree of deference. In this event, the accommodation of national difference will depend more on the leeway the panels read into the substantive requirements of the agreements themselves. For example, whether they accept that the test of necessity permits the member a range of reasonably available alternatives or whether there must be a strict search for the least trade restrictive measure.

A related issue is the weight to be given the evidence of state practice, that is, that other members have maintained such a measure

themselves. The Vienna Convention says this source is a supplemental means. Such a practice might be measures making exceptions to infringement of patents or copyright. This practice was given short shrift in *Canada–Pharmaceutical Patents*; again the real issue was whether the measures complied objectively.

These examples concern the substance of compliance. The manner can also be in issue, including as we saw above, the legal form of the measure. A question has arisen where the member endeavours to comply by way of administrative action rather than legislative reform. The member might adopt this strategy because of a separation between the executive and the judiciary and the difficulty the executive faces in getting the legislature to adjust the law. The US is the obvious case, but the issue arose for India in the early pharmaceutical patents dispute. If administrative action is a permissible form of compliance, then will the tribunals accept the respondent's assurance that it applies the measure administratively in a manner that is consistent with the WTO requirement? Furthermore, some members might say that their judge-made common law contains the necessary protections and that legislative enactment is not required. A possibility is the requirement to protect undisclosed information from unfair commercial use. Australia for instance reported in this fashion to the WTO on its manner of compliance with TRIPs.

Considering international law

The tribunals must consider the relationship between the WTO agreements and the wealth of international law that might inform the context in which the WTO operates. The most difficult issue is when there is a direct clash between the requirements of the WTO agreement and the requirements of the other international law.[50] More commonly, the question will be the use the WTO tribunals make of the other international law for its own purposes.

We should see from the preceding two sections of this discussion about dispute settlement, that such use could still be extremely important to the fate of national measures. The choice has broader implications too, for the health of that other international law too and international regulatory coordination, given that often the WTO agreements are harder international law by comparison. In this regard, the panels face a choice whether to view the WTO agreements as a closed, self-contained book or whether to find ways to accommodate, and thus promote, the standards being set in other international

forums. This certainly holds for TRIPs and the GATS. The tribunals' choice is made easier if the WTO agreement making builds in the link to the other international law. The clearest instance is the incorporation within TRIPs of Articles from Berne and Paris. In a way the tribunals will not be going outside to interpret these Articles, though it has, in *US – Section 211 of the Appropriations Act*, reached through to the *acquis* of the Berne Convention and other Berne background material.

The potential for clash between the WTO agreements and other international law has been perceived most sharply in the overlap between trade and environment regulation. The Vienna Convention's general principle is that, where treaties deal with the same subject matter, the treaty later in time takes precedence. However, it also counsels the tribunals to seek an interpretation that reconciles one treaty with the other. In most cases, there will not be a direct clash because few multilateral environment agreements actually require adherents to apply sanctions against trade. Conceivably, there could be other clashes, where compliance with both the WTO agreement and the other international law was not possible. But increasingly the treaties contain 'cohabitation clauses': the Biosafety Protocol and the UNESCO Cultural Diversity Treaty have recently done so, both mindful of the WTO agreements. In another version, the substantive principles are written to respect the values of the other treaty, as the CBD does for intellectual property (see Chapter 7 below).

Instead, the relationship will be more subtle and the choice will be whether the WTO gives weight to the other international law as an interpretive guide. Bartels comments: The codified nature and special subject matter of the WTO agreements means that in most cases "other" international law will be used, if at all, in the interpretation of provisions in the covered agreements, or as evidence of a party's compliance with its obligations under these agreements. Nevertheless, if that is the case, then the WTO tribunals could choose to pay attention to all manner of international laws, some softer, less multilateral, and more remote, than others. Vienna Convention Article 31(3) instruction is that 'there shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties'. The Appellate Body has accepted that this encompasses all generally accepted sources of public international law, which is to say: (1) international treaties, (2) customary international law, and (3) general principles of international law. Each

of these categories has an identity in international law and the law which a member seeks to enlist may not qualify for example as customary law. Any such law must additionally be applicable in the relations between the parties. In *EC–Biotech Products*, the Panel was of the view that the tribunals are not obliged to take the international law into account unless the members who are parties to the dispute are bound by that law. They should, for instance be signatories to that treaty or have ratified it. Indeed, the Panel wondered whether the obligation should arise unless all members of the WTO are covered by the treaty, given the shared interest they have in the WTO agreements being observed.[51]

If such coverage does not obtain, then the tribunals might choose to take the other law into account. Relevance to the interpretation of the WTO provisions would appear to be the criterion here. In *EC–Biotech Products*, the Panel suggested that the other treaties might cast light on the ordinary meaning of the words in the WTO agreements in the same way that dictionaries are consulted. (In that case, it did not consider the Biosafety Protocol or CBD had anything relevant to offer at all.) In *US–Section 110(5) of the Copyright Act*, the Panel took into account the exceptions provision of the 1996 WIPO Copyright Treaty in giving definition to the scope of the exceptions provision within TRIPs (Article 13) together with the exceptions provision within Berne (Article 9(2)) that was incorporated in TRIPs. Indeed, it sought an interpretation that aligned the three provisions as far as possible.[52] This was despite the fact that the WIPO Treaty had not been ratified by sufficient countries to have come into force. The Panel placed stock in the fact there was overlap between the WTO members and the WIPO signatories and took the view that they were part of the same corpus of multilateral intellectual property protection. In this vein, one could anticipate reference being made to UPOV (see Chapter 7) if the subject of interpretation was an effective *sui generis* system for the protection of plant varieties. But which UPOV would that be, the 1978 or 1991 version? What too of the CBD?

As we saw above, in the intersection between trade and environment regulation, WTO respondents have sought to enlist the help of other international law to argue that their ban on trade should qualify as one of the exceptions recognised by the GATT in Article XX (the exception for measures necessary to protect human or animal life or health or for measures relating to conservation of an exhaustible natural resource). Such public policy exceptions are included in TRIPs and

the GATS too. Again the tribunals' task will be easier if the WTO agreement builds a link directly to another international law, for example by saying that compliance with a nominated international standard will provide a safe harbour for the national measure. Otherwise, the concerns and requirements of the international law can only be indicative. While on occasions the tribunals have been prepared to listen to this argument, in the end they have not been swayed. Their focus has quite clearly been with the demands of the WTO provision.

Reaching limits

How ready should the DSB be to develop a jurisprudence of WTO law? The most immediate question is an internally oriented one, the preparedness of the tribunals to rule on issues that are not strictly necessary to dispose of the dispute before them. For example, when asked to rule whether a national measure qualifies under the three-step test as an exception to copyright or patent infringement, should they say which other measures might also be encompassed?

The bigger move would be to fill the gaps in the agreements where they fail to offer an answer to the parties' dispute, so developing a common law of the WTO. Countries with a common law tradition might be more ready to accept the tribunals doing so than those with a civil law code approach. But all sorts of countries take the view that the limits and lacunae we find in the agreements have been placed there deliberately. They represent the conscious compromises over the legitimate reach of the WTO. In *US–Section 211 of the Appropriations Act*, the Panel found that TRIPs did not provide an answer to the issue between the parties of ownership of the trade name.

Some have been arguing that the tribunals should have recourse to equitable principles in interpreting the agreements. They should ensure that the rights members enjoy are exercised fairly and in good faith, especially towards the developing countries, which have in the past been given allowances of special and differential treatment.[53] There is little indication of this leaning in the dogged applications of the WTO provisions. The focus is on rule integrity. Such leeway would need to be found in the wording of the provisions themselves. Otherwise, perhaps, some procedural slack might be cut for the LDCs (DSU Article 24). Instead, the consideration for the developing countries should be found elsewhere in the processes of the WTO such as the Doha Development Agenda. It is not the role of the tribunals to moderate the impact of the provisions.

Proceedings for implementation and enforcement

The formal legal dimension is whether the agreements are 'self-executing' and the local courts and tribunals will give force to those WTO undertakings which the member governments have failed to implement. At its most fundamental, this impact depends on a judicial system in which a constitutional position overrides domestic politics and foreigners enjoy access to local courts. In most national legal systems, treaties are not self-executing; for local effect, they must be turned into legislation. So too, those private persons who wish to claim the benefits of the agreements, predominantly the international traders and investors, do not have their own right of recourse directly to an international court or tribunal against the state, they must rely on governments to prosecute non-compliance at the WTO and obtain a ruling.

Arguably, the system becomes more compelling once legalities have been declared. Overall, the compliance rate is good but it has been the sticking point in some disputes. In deciding how to implement a ruling, the DSB should prefer a solution that is mutually acceptable to the parties but also consistent with the covered agreements (Art. 3.4). The parties may have recourse to arbitration or return to the panel for the resolution of arguments over compliance with a ruling. These proceedings elongate a dispute, testing the less resourceful members. In the last resort, as we know, if a respondent fails to come into compliance, the DSB may authorise the complainant to retaliate. However, it is a genuine concern that many members do not start with markets that are sufficiently lucrative to make sanctions a real threat. Unless they can count on the respondent being law abiding, they might even be deterred from bringing complaints in the first place.[54] In the review of the DSU, proposals have been made to expand their remedies, for example to obtain compensation rather than strive for conformity and to pool their sanctions to maximise their retaliation.[55] Some proposals were included in the Chairman's Text.[56]

On the other hand, all countries experience difficulty achieving compliance, with some complying with some part of the WTO regime. This uncertainty goes well beyond the legalities of the dispute settlement system. Overall in political terms, the WTO still depends greatly on the member governments to implement the agreements and specifically the DSB rulings within their own jurisdictions. It is a weakness, unavoidable perhaps, that the WTO is usually several levels removed from these crucial domestic forces and it must urge the national

government members to negotiate the acceptance of its requirements and rulings.[57]

How readily can national governments secure compliance domestically? The respondents are allowed a reasonable time to comply with the rulings. Different domestic political systems are a factor. Regarding compliance with rulings, the US Administration has undertaken in several disputes merely to use its best endeavours to work with Congress to achieve compliance. In *US–Section 110(5) Copyright Act*, it still has not complied to bring its copyright legislation into conformity with the panel ruling. Instead, it has done a bilateral deal with the complainant, the EC, to pay compensation. Yet compensation is meant to be only a temporary solution to non-conformity, and Australia, a third party to the dispute, has pointed out that it should be non-discriminatory. After all, the TRIPs requirements are there for the benefit of nationals of all members. The US has also been given an indefinite reprieve from implementing the rule in the *Cuban Rum* case.

Attitudes to dispute settlement

A review of WTO operations suggests that the dispute settlement system has been the most active, certainly the most productive, arm of the institution since 1995. It is a natural focus for those interested in the nature of international trade law and the globalisation of law generally. For a broader constituency, the system can become the key to trade liberalisation, or social regulation, even political stability. Primarily, it is likely to be judged by the substance of its solutions and rulings. However, if its fortunes are not to rise and fall with particular outcomes, then the way it operates becomes the key. Any tribunal has a caseload to manage, it has to be effective, but ultimately its fate depends on its legitimacy. But how is legitimacy achieved if it must contend with competing expectations: for legality, access to justice, responsiveness and democracy?

The attitudes to the system begin with the premium placed on legality. What is meant here is legalism in the approach to substance and procedure. Legalism would ensure rule integrity and rule compliance. It would promote security and predictability in trade relations between governments. The first contrast was between law and politics or diplomacy; the second was between forms of law. WTO law would be at the harder end of the spectrum. The agreements would produce rules and the job of the dispute settlement system would be to apply those rules to identify non-conformity and obtain compliance.

This expectation is in keeping with the measures that the international relations scholars have arraigned to argue optimistically that legalisation is on the upsurge. In Chapter 2, we noted that international law scholars laid out three criteria by which to gauge legalisation: obligation, precision and delegation.[58] When judging the WTO against these benchmarks, some go to the constitution of the institution and the character of the agreements. The measure that relates most closely to the dispute settlement system is delegation, though clearly the work of the system also contributes to obligation and precision. The scholars then elaborated delegation along three dimensions: independence, access and embeddedness. Much of the dispute settlement system's promise is identified with these qualities.

The experience we have just reviewed shows that the system does make a contribution to their realisation. But the approach they took was rightly criticised for its preoccupation with such qualities of formal law and there are good reasons why a softer, more informal, even more political, approach might enhance dispute settlement.[59] However, the evidence suggests that the system preference is to leave these approaches to other parts of the WTO and for the tribunals to conclude that their legitimacy lies in practising legalism and eschewing politics, indeed avoiding any overt consideration of the policy choices they must make. Persuasively, Picciotto characterises the Appellate Body's operating style this way.[60]

The main thrust of that legalism is the literal approach to interpretation of the texts of the agreements. It has too a procedural counterpart in the development of prescriptions for pleadings, the burden of proof, legal representation, which are drawn principally from the WTO Agreement and DSU but are also based on the Appellate Body's authority to regulate its own procedures. This quality attracts interest from lawyers and in turn this scholarly work helps formulate a procedural jurisprudence, such as the rights of the respondents to know the case against them in a timely fashion.[61] It also harvests proposals for tightening procedures within the ongoing Review of the DSU.

Like literalism, proceduralism encounters concern that it could turn dispute settlement into a kind of civil litigation where parties take legal objections and exploit legal technicalities. Thus it would militate against early effective settlement. This is already happening. On the strength of such concerns, there has to be some doubt about whether formalisation can secure the legitimacy of the system. From the start, some thought the WTO would be better to maintain the flexible,

consensual style of the GATT.[62] It would prove more viable if member governments remained free to forge deals pragmatically. Within the dispute settlement system, the parties should be free to make compromises. This leeway is all the more important if the members cannot make progress on modifications to the WTO agreements. Already, among the members, or at least those with bargaining power to wield, there is nostalgia for the old diplomatic style of the GATT.[63] Some frustration is evident at the enthusiasm with which the tribunals have sought to assert the agreements, especially in relation to the control of trade relief measures. Interestingly, the accusation has been one of judicial activism. The largest members have felt the edge of rulings against them. Yet, without the exercise of discretion, the developing countries would certainly feel the full weight of agreements like TRIPs. They cannot realistically expect to enforce observance of the agreements; they must rely on others for assistance. Could improvements to the procedure, such as legal aid and third-party rights, increase their access to justice?

At the same time, it is not clear that mere formalisation will satisfy the WTO's expanding external constituencies. Legalism is a check against the destructive forces of protection and the power-driven relations that marred trade, certainly before the GATT was formed. Yet formalism excludes substantive conceptions of justice from consideration. For legitimacy, the WTO must develop a concept of justice and democracy that gives voice to a broader array of social interests and stakeholders.[64] This concept would invite open dialogue regarding the costs and benefits of trade policy and democratic processes for resolving conflicts. Such a prescription for a kind of deliberative or cosmopolitan democracy goes well beyond the WTO's dispute settlement system, but what are its immediate implications?

The expectation could see some minor changes to increase the transparency of the system. The WTO has moved in that direction, making much information available publicly about the progress and outcomes of dispute settlement. It has recently run a trial to give outsiders access through video to the hearings of the *EC–Biotech Products* case. Yet even in this respect competing considerations are at work, such as the reluctance to make the submissions of the parties and the interim reports of the panels available for comment.

This concept might suggest that the tribunals exercise the choices identified above in favour of greater receptivity to external voices such as the views of NGOs and the values represented in other international

law. It might recommend loosening the process up, such as selection of panels from a wider range of expertises and even standing for NGOs to intervene in panel proceedings. In the broader process, the voices from civil society would include public advocacy networks, indigenous peoples, community groups, volunteer aid and charity agencies and research institutes, already active behind the scenes. Of course, they would also include the producer, trader, investor and farmer associations.

In all this, it is possible to see the dispute settlement system itself producing encounters between legalities. In fashioning its own *modus operandi*, the tribunals are obliged to negotiate the interactions, sometimes the clashes, between the various discursive and procedural legalities the members bring to the forum. For example, a procedural issue – whether to allow *amicus curiae* briefs from NGOs – may represent a difference between the legal cultures of North America and the rest of the world.[65] It picks up a model employed in the US for public interest litigation of administrative decision making. But looking more broadly, it represents a legality about governance, perhaps about constitutionalism – whether the WTO should remain strictly an inter-governmental institution or become a more transnational and cosmopolitan forum. Specifically, should the dispute settlement system operate more democratically or confine itself to a conservative, legalist style?[66]

THE CONTENT OF THE NORMS

Measures affecting trade

The norms of the WTO agreements must be considered against the backdrop of the kinds of measures or effects which they will subject to such scrutiny. Conventionally, the target of trade norms has been the measures taken by national governments who are the parties to the agreement or the members of the organisation. Thus the dominant perception has been that governments are the source of the barriers to free trade and open markets. The goal then has been negative or deregulatory, to lift those government measures which act as barriers. Consistent with this view has been a disinclination to require governments to intervene in the market place to discipline non-government or private sector 'barriers to trade'.

All the same, the GATT itself was mindful that government measures were not confined to the formal legislative measures of

the national government. The GATT applied its norms of non-discrimination to laws, regulations and requirements. We appreciate that governments employ a range of measures to further the protection of local industries or to extract concessions from foreign suppliers. Some of the most effective of these measures may be buried in the administrative practices of the operating agencies. They often extend to the provision of assistance or the grant of favours. We should note that the ability of the GATT to comprehend measures like this was tested in a dispute over conditions expressed in contracts let to foreign suppliers by the Canadian government.[67] The GATT was to take the view that such purchase undertakings could be regarded as requirements. The government's patronage was conditional on the foreigner meeting the conditions which were attached. Of course, certain types of measure have attracted the attention of specialist agreements; subsidies are the most notable example.

In keeping with this approach, the GATS defines the measures to which its norms apply to include any law, regulation, rule, procedure, decision, administrative action or any other form (Art. XXVIII(a)). We can already see that this definition goes wider again than the GATT. It is likely to catch various kinds of administrative guidance which government gives to the private sector, provided of course that it transgresses the substantive norms of the agreement. Consideration of the question of subsidies has however been postponed.

The TRIPS approach is more traditional for applying its norms to national legislation primarily. Nonetheless, its provisions for effective enforcement recognise that administrative practices can substantially determine the real strength of protections. So again it reveals the tendency to extend the scrutiny of the norms deeper into the legal cultures of the locality well beyond the surface layer of legislative enactments.

The GATS also realises that the obstacles and expectations which foreign suppliers encounter may be located at the regional or local government level (Art. I:3). Indeed, they may be displaced to these levels as national measures are disciplined. The evidence is that globalisation tends to pick and choose certain regions and certain cities over others, distributing its benefits across national lines. Thus, 'sub-national' legalities are drawn into a mediated relationship with foreign legalities. But compliance is rendered more problematic if the parties to the trade agreement are not the same as the targets of the norms. The agreements continue to rely on the nation state members for their

implementation. So the GATS obliges the member nations to use their best endeavours to ensure these sub-national legalities conform.

The GATS definition extends to measures taken by non-government bodies in the exercise of powers delegated by central, regional and local governments (Art. I:3). Such an ambit brings into contention the relationship between member government measures and the private sector practices which are seen as impeding market access by foreign suppliers. To what extent will trade agreements place the onus on government members to remove private barriers to trade? The GATS extension is cautious. It envisages a situation in which the non-government body is acting on behalf of the government. In that sense, the government remains the source of the non-conforming measure. Responsibility is extended out through the obligations concerning monopoly and exclusive service suppliers. The GATS says that where governments formally or in effect create monopolies or oligopolies, the governments are bound to ensure that they do not act in a manner inconsistent with the commitments which the governments have made to national treatment or market access (Art. VIII). Generally, it should be ensured that they do not abuse their monopoly rights. In the case of basic telecommunications carriers, the obligations imposed by the GATS are more specific. Members must ensure that foreign suppliers are given access to, and use of their services on reasonable and non-discriminatory terms.

We shall suggest in Chapter 8 that the telecommunications access responsibility is spreading responsibility further afield. It obliges member governments to regulate the practices of those carriers which it requires to offer services to the public generally. The carrier need not be a state-owned or controlled corporation and it is not clear that a government measure has to be the source of its power to control access. I think this kind of provision is mindful that the trend to corporatisation and privatisation is blurring the public/private sector divide. But it might still be possible to think in terms of purely private domestic arrangements and relationships which exclude foreign suppliers from access. If these 'measures' were to be challenged, the trade norms would be calling to account government inaction. As we shall soon see, government failure to enforce competition laws may be what the regulatory reform agenda has in mind. But the agenda need no longer be confined to that legality.

It is important to remember that such a re-regulatory demand would not be novel. In essence, the TRIPS agreement is demanding that

members take action against private practices, such as free copying, that are considered deleterious to foreign traders. In most countries, governments are not the main sources of disrespect for intellectual property, it is the conduct of local users, distributors and producers that so worries the foreign suppliers.

Transparency and form

The WTO agreements also make certain demands on members regarding the form in which they embody and administer these measures. It would be tempting to say that the WTO is promoting the western notion of the rule of law. However, there is much more bound up in this concept than is required here. It is observable that the export of capitalism or the spread of a global market may be compatible with a range of legal institutions and practices residing at the national level.[68]

The way the core norms are expressed lends credence to this view. The GATS sets up standards by which government measures can be appraised. The standards are for the benefit of foreign nationals but they are not written as individual personal rights or freedoms, to the same extent, for example, that they are in the Treaty of Rome. The way the individual national commitments to these norms are to be expressed also leaves much scope for ambiguity. It would be difficult for the national legislatures and courts to determine how individuals could invoke them directly if the member state had failed to translate them into local law. TRIPs pushes harder in this direction by requiring members to afford rights to foreign nationals. But it is still an obligation imposed on the state; one might still argue that the TRIPs prescriptions are not written with sufficient precision for it to be self-evident how they would translate into private law.

On this view, the primary objective of both agreements is to establish public law or government to government obligations. The initiative to achieve compliance lies with these national units, the member countries, through the WTO's own dispute settlement processes. In this vein, the agreements do not create transnational legal institutions for the assertion of private rights and obligations, despite the increasing difficulties that globalisation creates for the identification of the appropriate national jurisdiction in which laws are to be legislated, adjudged and enforced. Again, a contrast might be made with the draft MAI which was written to give aggrieved investors rights of access to international arbitration tribunals as well as the courts of the countries with which they are in dispute.

The agreements are perhaps most rule of law or rights-like in their prescriptions for the form which national implementation should take. Both agreements require members to provide transparency by documenting, translating and publishing the measures they are either required or permitted to maintain. TRIPs is most prescriptive in specifying that members must institute procedures and remedies for the effective enforcement of protections (Art. 41–61). Several of the prescriptions require government agencies to act to provide protection directly, but others are designed to afford private property holders access to administrative and judicial avenues at the national level so that they can enforce the protections which the member states have had to institute. Here TRIPs begins to specify the form in which protections must be advanced.

If the GATS is primarily intended to eliminate various national measures, it also lays down certain requirements for the domestic regulation which members may choose to retain. These requirements include a requirement to maintain judicial, arbitral or administrative procedures which provide service suppliers with avenues of review and remedy of administrative decisions affecting trade in services (Art. VI:2). Reviews are meant to be objective and impartial.

At the same time, both agreements contain concessions to differing legal traditions. GATS Article VI on domestic regulation says that members are not required to institute procedures inconsistent with their constitutional structures or the nature of their legal systems. Arguably, TRIPs is less forgiving of different traditions, but it does say that members do not have to put in place judicial systems distinct from those for the enforcement of law in general (Art. 1:1). Nor does it create any obligation with respect to the distribution of resources between the enforcement of intellectual property rights and the enforcement of law in general.

TRIPs however is seeking to create positive measures of protection. The form in which the member state institutes them may be part of the issue of compliance. The WTO's decision on the complaint by the US against India certainly suggests so. In part, the US complaint concerned the way India had 'complied' with the provisions of TRIPs requiring a mail-box system to be set up for the filing of patent applications (Art. 70.8).[69] The system was to ensure that applications had priority over other applications and the novelty of the invention was safeguarded, when the time came for India to give substantive patent protection to pharmaceuticals and agricultural chemicals. As a developing country, India enjoyed a period of grace (see Chapter 6).

The panel held that the administrative arrangements which India had made for the mail-box system did not meet its obligations under TRIPs. It was true that Article 1 of the agreement said members were free to determine the appropriate method of implementing the provisions within their own legal system and practice. But the arrangements created legal insecurity and unpredictability about the treatment which the patent applications would receive when the time came for India to decide on the substantive issue of patentability. It failed to provide a sound legal basis. Legislative measures were required if compliance was to be adequate. Otherwise, the administrative regime could be challenged for inconsistency with India's patent statute.[70] Article XVI:4 of the WTO Agreement requires each member to 'ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'. The panel also held that the arrangements did not meet the obligation of transparency. Thus, the panel made significant statements about the nature of the rights to be enjoyed under TRIPs and the form of law which the member countries would have to adopt. On this score, the Appellate Body has since upheld the panel's report.[71]

Nullification or impairment

Issues concerning the reach of the norms may find expression in the peculiar GATT concept of nullification or impairment. We should take the trouble to identify this concept. Nullification or impairment is a test of a member's compliance with the agreements which surface in the dispute resolution process. To use the language of the law, it links breach with damage.

The DSU derives the concept of nullification or impairment from the GATT. Under the GATT, nullification or impairment of the benefits of an agreement could come about in three ways: through violations, non-violations and situations. The most clear-cut is a violation of the provisions of an agreement. Article XXIII of the GATT 1994 first enables members to bring a complaint where another member takes a measure that violates an obligation or commitment under an agreement and this violation results in a benefit accruing under the agreement being nullified or impaired. In the GATT context, a clear example would be a measure imposing a tariff at a level higher than the level conceded in a member's schedule.

Such a concept can be translated into the context of the GATS or TRIPS. We shall see that both the agreements give recognition to such

complaints. Under the GATS, for instance, a member might have made a commitment to allow foreign lawyers to give advice to local clients on their home country law. Subsequently, the government decides to reserve that activity for local lawyers. Under the TRIPS, a member is obliged to provide copyright protection for computer programs. Now the government decides that locals should be free to make copies of foreign computer programs for certain purposes, such as interoperability, whether the rightful owner of the copyright authorises the copying or not.

We can readily accept that the text of the agreement will not always identify violations clearly. The meaning of the text can be argued in the dispute settlement process. But the GATT also envisaged a second category of complaints, called non-violation complaints. Members may complain of measures that nullify or impair benefits without cutting across the text of the agreement. The GATT had in mind measures that thwart or counteract the benefits of the agreement. For example, a member offsets the value of a tariff concession to a foreign trader by providing a subsidy to a local producer. The relevant jurisprudence speaks of unanticipated measures that undermine the legitimate expectations of the foreign trader by upsetting the competitive relationship with the local producer.[72]

In the jurisprudence of the GATT, the principle of legitimate or reasonable expectations helps determine the benefits of the agreement. The principle has been explored by a number of GATT panels.[73] We can readily see that the expectations of the complaining party will have been frustrated if the provisions of the agreement are directly contravened by a government measure. The principle could also arguably be of assistance as an aid to the interpretation of the provisions where their requirements are not entirely clear. Interestingly, the panel in the dispute between the US and India over patents applied it to the resolution of a violation complaint under the TRIPs agreement. However, the Appellate Body was at pains to say that it was to have a very limited role in relation to violation complaints under TRIPs. Violation was essentially a question of India's conformity with the express obligations of the agreement.[74]

Non-violation complaints

So the principle has most relevance to determining whether the benefits – some would say the 'balance' of rights and obligations or commitments and concessions under the agreement – have been

undermined by a measure that does not violate the text of the agreement. Not every measure will frustrate such expectations. It should be a measure that was not reasonably forseeable at the time the expectation arose, normally the time that the agreement was reached. Interestingly, the source of such expectations need not be the text of the agreement. It can run to the statements made during the negotiations, for instance, or the prior conduct of the respondent party. Much of this approach is familiar to those of us who are interested in the construction of contracts.

Under the GATT, the expectation has largely been of the benefits of a tariff concession. Now it could be the benefit of a certain level of intellectual property protection or a degree of liberalisation of market access for service supply. However, it is important to reiterate that the agreements are not promising that the foreign traders will achieve sales. Rather, the expectation goes to the conditions of competition within a national market, specifically the competitive relationship with the traders from other countries and with the local traders.

On its face, a non-violation complaint would seem more difficult to substantiate than a violation complaint, which after all is a breach of the letter of the agreement rather than the spirit. The photographic film and paper dispute indicates that the onus of proof will also have an influence over the outcome in such cases. Where there is an 'infringement of the obligations assumed under a covered agreement', the DSU says there is *prima facie* a nullification or impairment (Art. 3:8). It places the onus on the infringing party to rebut the presumption that the breach of the rules has an adverse impact on the complaining party. Because of the difficulties involved in establishing the impact of a violation on trade in a factual way, the GATT panels tended to treat the presumption as conclusive.[75] Where a non-violation complaint was laid, the onus was cast on the complaining country to establish the effect. As we noted above, the understanding now requires the complaining party to present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement (Art. 26:1). The onus of proof will create a substantial burden for those who complain that lack of competitiveness is the result of the government measure in question.

The most recent jurisprudence we have is the contribution of the panel report in the dispute between the US and Japan over Japanese measures affecting consumer photographic film and paper.[76] The panel considered a non-violation complaint of nullification or impairment of

a benefit under the GATT agreement, namely a tariff concession for imported film and paper. But the complaint was not against something as directly related as a subsidy given to the local competitor. Instead, the US complained of a number of measures the Japanese Government had taken in relation to local distribution systems. Specifically, it targeted measures taken to rationalise distribution structures and processes, the provisions and administration of the Japanese Large Retail Stores Law, and the regulation of promotional activities such as prizes and discounts. For this reason, it is worth noting the panel's ruling.

The panel ruled against the US complaint. The report was significant in several respects. First, it continued the trend to take an expansive view of the concept of 'government measures'. The complaint challenged the acts of executive and administrative bodies that ranged from the Japanese Cabinet, MITI and the Fair Trading Council through to government industry bodies such as the Manufacturers' Council and the Retailers' Council. In each case, the panel was prepared to regard the acts as government measures. While the measures were, legally or formally speaking, non-mandatory, the panel found that the government had held out sufficient incentives or advantages for them to take effect.

The measure spanned a number of years. So a real obstacle to the success of the complaint was the fact that American importers were on notice about the measures when they began to trade. In other words, their expectations were conditioned by the presence of the measures or, in some cases, the anticipation that they would be introduced. But the most important issue in the end was that of causality. The panel was not convinced that the uncompetitiveness of the imported film was attributable to these measures rather than to a range of other factors. Impact or effect was the issue here, not the intent which lay behind the measures. Still, the onus of proof was a heavy one. Being an exceptional remedy, the burden lay with the complainant to provide a detailed justification in support of its contention. This, the US failed to do.

In relation to the rationalisation measures, the panel placed stock by the fact that the measures were directed equally at domestic and foreign products. They sought order in the market for all. Of course, it was possible to say that a policy which was formally neutral could still be applied in a way that upset the competitive relationship between foreign and local products. But the US failed on the basis of causality: it had not shown that the private distribution system would break down

in the absence of the government measures. Similar arrangements for distribution were evident in the US itself.

Japan's Large Retail Store Law has long been a target of US bilateral initiatives.[77] It places restrictions on the establishment of shops beyond a certain size in the city neighbourhoods, including conditions that agreement must be reached with local councils, existing small shop owners, and consumer groups. It also regulates the hours such shops can open and the holidays they must take. Again, the panel noted that the policy was on its face neutral as to products and their origins. But the US argued that large stores carried more imported products and were less susceptible to pressure from local manufacturers. The panel held that the policy carried no explicit or implicit disadvantage and was of the view that there is 'nothing intrinsic in the nature of imports that renders them less capable of competing in a marketplace where a diversity of retailing outlets is promoted'.[78]

Such a decision puts a dampener on non-violation complaints. The record shows that some ninety per cent of complaints in the past have been violation complaints. Overall, there have been fourteen non-violation complaints considered, with four proving successful.[79] But if the non-violation complaint still targets governments measures, the GATT also conceived of countries bringing 'situation complaints'. Under this head, they may allege that benefits are nullified or impaired by a member allowing the existence of any other situation (which may not be the result of government actions). Thus, depending on how it is interpreted, the concept provides potential for members to be required to act on private barriers to trade. It seems no complaints so far have sought to invoke this ground.

Nonetheless, it is further worth noting that the members can also bring any of these three types of complaint under the GATT where a measure impedes the attainment of any objective under the relevant agreement. GATS and TRIPs contain a number of aspirational or indicative statements that range beyond the specific obligations they impose on members.

Complaints under GATS and TRIPs

The negotiators appreciated that the non-violation and situation complaints would have somewhat different and uncertain implications for compliance with the TRIPS and GATS agreements. After debate, it was resolved not to allow these complaints to be taken under TRIPS (see Art. 64). Reconsideration was scheduled for the year 2000, but so

far, the members have chosen not to pursue this issue. It might be argued that non-violation and situation complaints were not really relevant to TRIPs. The agreement requires governments to provide substantive levels of protection for intellectual property and backs them up with procedures for enforcement against infringements. The real question is whether national legislation matches up to these standards. However, we might still envisage circumstances in which delay or obfuscation on the part of government authorities might undermine the protections which were promised in the national legislation.[80] But again we should note however that TRIPs is meant to protect against acts of misappropriation such as unauthorised copying of the works. It is not the role of TRIPs to guarantee the success of any intellectual property in the sense of market access and the level of sales and other custom which it attracts.

On this approach, non-violation or situation complaints are not needed for protection to be effective; the availability of such complaints would only undermine the security and predictability of the agreement for those seeking a limit on the protections. Yet, one interpretation of Article 64 is that members are already free to bring such complaints, now that the five-year period is up. In any case, members have applied a moratorium, preferring to conduct a conversation within the TRIPs Council about whether to let them into TRIPs. While the US is an advocate, other developed countries have shown sympathy for the concerns of developing countries. The caution may reflect the general inclination, after Seattle, to avoid disputation over TRIPs.[81]

Some countries also thought the GATS was not ready for such complaints. In the end, these complaints were allowed (Art. XXIII:3) in relation to the general obligations and the specific commitments (national treatment and market access) made under the agreement. At least one of the several disputes relating to the GATS which has been notified to the WTO involves a non-violation complaint; we shall mention this dispute in Chapter 4.

Non-violation and situation complaints really expand the range of injuries for which members can seek remedies. Before leaving this issue, it is worth noting that the WTO remedies for breach do not work like injunctive relief in the equity jurisdictions of the common law. An infringing party is not permitted to argue that the impact on its economy or its wider society of removing a measure would be more serious than the nullification or impairment of benefits experienced by the complaining country. However, it is true that the infringing party

can choose to pay compensation rather than withdraw or modify its measure.

Most-favoured-nation treatment

Most-favoured-nation treatment, known as MFN, is a principle of non-discrimination. It is well known to the GATT where it applies to the treatment of goods or products from other countries, particularly for the purposes of applying tariffs. It has become a general obligation within both the GATS and TRIPS agreements. In this ground-laying chapter, we should first note that the MFN has a direct concern with the conditions of trade. It requires a country to accord to the products, services or nationals of any other country no less favourable treatment than it accords to the counterparts of any other country. The concept of no less favourable treatment is a complex one. It is shared with national treatment and we shall deal with it in most detail in the sections given over to national treatment both in this chapter and in Chapter 4. But basically we can say that it requires that a member country's measures must not place foreigners at a competitive disadvantage when they seek to trade. In the case of MFN, the point of comparison is the treatment of the 'like' products of other foreigners; in the case of national treatment, the point of comparison is the treatment of the 'like' products of the member's own nationals.

MFN is claimed to take a neutral stance on the content of a member's local measures, provided that they do not discriminate between the nationals of different countries. It should also be noted that MFN is not a choice of law rule. It does not determine which country's law is to apply. It says that if a host country's law does apply, it should not be discriminatory. So it does not resolve the problem of differences in substantive standards. Nor does it promote the liberalisation of markets as such by favouring certain types of measures over others. Another way of putting this point is to say that the obligation takes on more force when it is coupled with the neo-liberal reform agenda of secure access to markets.

However, the obligation is crucial to the ways conditions of treatment may be obtained by home countries and, correspondingly, may be conferred by host countries. If MFN is unconditional, then treatment cannot be based on material reciprocity, that is to say it cannot take the form of favours granted to the nationals of those countries which are prepared to respond in kind. So treatment obtained say in bilateral bargaining must be extended to the nationals of other countries.

Furthermore, countries that are subject to the obligation cannot give preferential treatment to selected other countries as part of a regional agreement.

At this point, we should note two other dimensions. The MFN obligation is breached if a country imposes trade sanctions to single out another country for special treatment. If that other country is itself in violation of the trade agreement, the agreement may authorise the suspension of the first country's obligations or commitments by way of retaliation. We saw that the WTO's own dispute settlement processes empower this step to be taken. In the case of goods, such trade-based remedies have extended to the protection of local producers from the 'dumping' of foreign products. Anti-dumping procedures and remedies have become a very substantial part of the practice of trade law. But they have not yet been authorised in the case of trade in services or intellectual property.

At this juncture, we should note too that trade sanctions may be imposed because a country objects to the political, social or environmental policies of the country in which the trade originates and wants to change those policies. For instance, it may be concerned with the spillover effects of those policies. Again, unless exceptions are made or waivers granted, we shall see that such trade sanctions contravene the MFN obligation. Sanctions might be permitted if the objective is to protect an interest which is recognised by the trade agreement or if it is to support compliance with agreed international standards. However, the discussion of exceptions below will indicate that these let-outs remain tightly restricted.

GATS and TRIPs MFN treatment

The WTO aims to promote multilateralism broadly. The obligation is taken to the point where it applies to all the measures of the member within the purview of the relevant agreement. It is not confined to the minimum protections required by the TRIPs (Art. 4) or the actual commitments obtained under the GATS (Art. II). So it could encompass concessions made to countries that are not part of the WTO. Nonetheless, in order to reinforce the incentives to join the WTO, MFN is made conditional in the sense that the obligation to multilateralise only relates to the treatment of the nationals of the other members of the WTO.

During the life of the Uruguay Round, countries such as the US very actively deployed the threat of closing off their large home markets in

order to prise concessions from targeted countries towards intellectual property protection and access to services markets. A framework of MFN is meant to give more powerful countries less scope to press unilaterally for extra concessions. It affords less powerful countries the benefit of concessions they would not otherwise be able to obtain. In this vein, it will be important to the integrity of the WTO that it deals sensibly with unilateral initiatives, such as the use of the United States special trade legislation.

Both the GATS and TRIPS allow certain exceptions to their MFN obligations. For example, they provide space for some pre-existing reciprocal agreements. In a concession most significantly to the European Union, the GATS also permits preferential regional agreements to be maintained under certain conditions (Article V). But perhaps the biggest qualification to the multilateralism of the WTO agreements is how they seek to reconcile the obligation with the demand of the more powerful countries that the agreements achieve a balance between rights and obligations or commitments. We should appreciate that the way the TRIPS takes care of this demand is to impose the same substantive standards on all members. But the GATS response was less clear-cut.

As we already know, the GATS permitted countries to vary their level of commitments to national treatment and market access. This bargaining structure threatened to undermine the multilateral character of the WTO. The provision for MFN exemptions played a special role here (Article II:2). The agreement placed no legal restrictions on the circumstances in which the exemptions could be taken. As we shall see, the US in particular employed the threat of an exemption for the purpose of gaining leverage in the negotiations. Most spectacularly, it threatened to take wholesale exemptions in the basic telecommunications and financial services sectors and leave itself free to operate exclusively on a bilateral and regional basis. It argued that, unless many members were more forthcoming in their offers, it would be obliged to extend its commitments to countries that were not reciprocating materially. In order to placate the US, the negotiations in these sectors were extended beyond the conclusion of the Round. But it was by no means clear that the GATS required negotiations to produce a 'balance of commitments'. We return to this issue in Chapter 4.

Now, as we shall identify below, the US has been pursuing FTAs to obtain agreement from partner countries bilaterally to institute more extensive protection of intellectual property. These agreements

interact with the TRIPs MFN requirements so that if they come within the scope that TRIPs gives to the 'protection of intellectual property' for this purpose, the partners must extend the benefits to the nationals of all members of the WTO. The GATS has a similar impact. Commitments made to partners must be extended to the services and suppliers of all other members so long as they concern measures affecting the supply of services.

National treatment

As a long-standing principle of liberal internationalism, national treatment is the other main norm of non-discrimination. It requires countries not to take measures that discriminate against, foreign products, services or nationals such as service suppliers or property right holders again depending on the subject matter of the agreement. The norm is very much concerned with trade. Its point of comparison is the treatment given to local counterparts. It is concerned with the conditions under which foreigners can expect to compete with locals. In the GATT, it was concerned with taxes and other measures that sought to discriminate against foreign products once the barriers at the border had been lowered and access to the local market obtained. We argue that, through the GATS and TRIPs, its implications will be more far reaching.

In identifying the reach of such a norm, we should start by saying what it does not purport to do. It is not a choice of law rule. It comes into operation where the host country's measures apply. So it does not help international traders, or national governments for that matter, with conflict of laws issues. For example, it does not resolve the kind of issue presented when trade in cyberspace creates points of attachment to a number of jurisdictions, and maybe facilitates rapid switching between jurisdictions according to the balance of legal convenience. Therefore, it does not deal with a threat to national sovereignty which is arguably as big as any requirement that foreigners be treated like locals.[82]

It follows that national treatment is in some respects a very old-fashioned principle. Yet it remains a significant mediating device in the sense that it manages how local legalities should respond to foreign legalities, once the two have necessarily come into contact. To what extent does it constrain the scope of the local legality? National treatment has been said to take a neutral stance on the question of the content of local legalities. When governed by the norm, a country

remains free to strike its regulatory standards at any level it sees fit. The proviso is that it does the same in effect for foreigners as it does for locals.

Constraints on local legalities

Thus the advocates of national treatment say that it is in truth a very simple and unobjectionable principle. Countries can maintain any regulatory policy they wish to pursue. For instance, they can limit the extent to which the supply of certain services is opened up to private competition. They can control the number, concentration and market share of individual participants. Or they can restrict the business forms in which they may operate. The proviso is that these kinds of measure do not discriminate against foreigners. To use an example, it follows that a country can still choose not to privatise a public service. But, if it does decide to do so, it must allow foreign private operators competitive opportunities equivalent to those allowed to locals. Depending on the type of trade to which the norm applies, we may be talking about the purchase of shares in a privatised corporation, the obtaining of licences to operate as a service supplier in a market open to private competition, or the receipt of contracts, grants, subsidies or other concessions to provide services.

In truth, the norm can have profound implications for the content of local regulatory legalities. It is important enough because many countries continue to see good reasons for protecting local industries from foreign competition or bolstering them with assistance in order to meet that competition. For example, national governments have identified sensitive sectors in which they restrict foreign ownership or limit the participation of foreign providers. As we shall see, professional services are among such sectors, so too are audio-visuals and basic telecommunications services. The motive has not only been to shore up local economic interests. Providing a space for local voices may be designed to safeguard political independence or cultural identity. The case studies are intended to give life to these legalities.

Another reason for discrimination has been regulatory competence. While they allow foreigners to compete, national authorities may wish to apply different kinds of requirements to them because those differential requirements are needed to ensure that the regulations can be effective. If effective decision-making power or financial resources are located off-shore, special requirements may be imposed to create an attachment to the local jurisdiction and thus to give some purchase to

the regulatory regime. For example, in the financial services sector, the supplier might be required to incorporate locally rather than simply operate as a branch of the head office overseas. In this way, it acquires a local legal persona. A stronger requirement would be to meet a prescribed level of capitalisation locally. These requirements tend to restrict the foreigner's choice of mode of service supply.

Requirements may be applied not so much to provide redress against harm as to extract a positive return from the foreign supplier to the locality. For example, withholding tax may be imposed so as to hold some of the revenue from the foreigner's operation within the country. Regulations may require that local and offshore companies from within the international group conduct transfer pricing at arm's length. Conditions may be attached to approvals or grants that technology be licensed out or supplies sourced locally. These kinds of performance requirements are designed to ensure that benefits flow back to locals from the access which the country has allowed the foreign operators.

What scope does the norm allow to a neo-liberal agenda for regulatory reform? We can see that, strictly speaking, it does not require a country to liberalise market access for services or secure investments in intellectual resources. It can continue to deny both locals and foreigners these privileges alike. Member countries may maintain non-discriminatory regulation. However, if a country decides to liberalise unilaterally, as many countries are currently doing, then it must extend the opportunities and facilities to foreigners. In many sectors, especially when we add in personal services and intellectual resources, the result may be to let in not just a greater number of competitors, but competitors who are far better resourced and more experienced than the locals. And, in the absence of material reciprocity, or multilateral content standards, a country may find that it is offering more to foreigners as a host country than its nationals enjoy in the foreigners' home countries.

Allowances for foreign legalities

More scope is being created because trade law is saying that formally identical treatment may be less favourable treatment. On this basis, it is not enough for the local legality to make the same requirement of foreigners as it does of locals. The foreigner's peculiar circumstances may make the same requirements harder to meet. These circumstances might include the foreigner's own home legality. In terms of mediation between two legalities, the consequence is that the local legality must make allowances for the foreign legality. The foreigner's disadvantage

may lie in its need to satisfy two sets of conflicting requirements, one at home and one in the host country. This view may push the host country into accepting the regulatory standards which the foreigner has met at home.

The host country's ability to maintain what it sees as appropriate standards is undermined by this kind of allowance. For instance, a country's regulatory policy may say that nationality or citizenship is not a precondition for admission to the legal profession. Foreigners are free to apply. But admission may be offered on the condition that the applicant has obtained a local educational qualification and acquired local practical experience. A country may take the view that the quality of the services made available to its citizens is enhanced, or indeed the legal system is supported, if lawyers are steeped in such locally specific knowledge. The foreigner may argue that it is easier for the local competitor to meet these requirements. If the norm applies, then the host country may have to take the foreigners as they are or at least give them credit for the requirements they have met back home. We shall also see that in some situations the norm creates an impetus for regulatory coordination to reconcile the disparities between the two legalities. A process for mutual recognition is the most common response. But occasionally it leads to standardisation which is, after all, the surest way to overcome conflict of laws problems. We shall discuss this potential later in the chapter.

Under the GATT, no less favourable treatment has conventionally been limited to products which are 'like'. Thus some differential treatment is permitted provided it is not discriminatory. Such treatment may be representing the fact that the two products are not alike. But obviously a crucial question is what is regarded as like? The GATT dispute settlement process has had to grapple with this issue. In the case of products, the subject matter of the GATT, it has been possible to look to the physical qualities of the goods in question. A more general approach considers whether the consumers of the products regard them as substitutable.[83] Yet the common law process of reasoning by analogy tells us that similarities always exist alongside differences. For instance, if a country places a tax on the sale of trucks but not on the sale of cars, and trucks are all imported while cars are largely locally produced, has the country failed to accord national treatment to a like product? The national authorities may say that the tax is imposed differentially because trucks pollute the air more and do greater damage to the roads than cars. They are not like products. In the field of services, a

zoning policy might ban standardised fast food outlets from residential neighbourhoods but permit independently owned and operated cafes or street stalls to establish.

Under the GATT, the scope for argument encouraged a tendency for the panels to defer to the categorisations made by the national authorities.[84] But the test has become more objective with the line of Appellate Body rulings. In *Japan–Alcoholic Beverages* and *EC–Asbestos Products*, the Appellate Body has drawn together four criteria for analysing likeness, though it insists that they only provide a framework and that they must be applied on a case-by-case basis. The four criteria are: (1) the properties, nature and quality of the products, (2) the end-uses of the products, (3) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products, and (4) the tariff classification of the product. *EC–Asbestos Products* is notable for accepting that the inherent health risks of the asbestos products were a factor in distinguishing then from the local PCG fibre based products, not the least in consumers' minds.[85]

Those in favour of freer trade are now advancing an argument that the likeness limitation on the norm should be dropped. The idea has been raised by officials from the WTO;[86] it also had its supporters at the negotiations over the text of the MAI. They suggest that it is difficult to operate and, besides, it produces perverse effects. If likeness is found, the member's measure may not make any distinctions that are less favourable to the foreigner; if likeness is not found, it may maintain any distinctions, no matter how restrictive of trade. The latter point is perhaps an exaggeration: national regulation may well be subject to other WTO requirements and disciplines such as those of the SPS and TBT agreements. Here, members would be required to justify their differential treatment according to one of the legitimate purposes for which the trade agreements concede that non-conforming measures may be maintained; measures could discriminate against foreigners so far as it was 'necessary' to do so.

GATS and TRIPs national treatment

Both the GATS (Art. XVII) and TRIPs (Art. 3) embody the principle of national treatment. The principle of national treatment is one of the main thrusts of the GATS. A potentially large and increasingly significant global field has thus been subjected to this kind of mediation on the strength of the argument that the regulation of supply of services is trade related.[87] As we shall see in Chapter 4, the GATS took an

expansive view of the range of service sectors that could be exposed to the norms. Furthermore, it encompassed all possible modes of service supply, not just the cross-border mode of supply which is most clearly trade related, but also supply through the presence of national persons and through a commercial presence in the territory of another member country. Only the scope of supply through a national presence was limited categorically; it was declared that the agreement did not apply to measures affecting access to employment markets or regarding citizenship or residence. The wide scope of commercial presence was particularly portentous. In extending to the acquisition or maintenance of a juridical person, it introduced the issue of foreign direct investment into a truly multilateral framework.

The impact also depends upon the scope read into the principle itself. For example, we shall see that the GATS gives broad scope to the principle by adopting a realist test of discrimination (Article XVII:2). But it is only applicable in the case of likeness. For services, an approach similar to the GATT is used, the comparators being local and foreign services or service suppliers. Yet Krajewski asks whether the nature of services and the inclusion of the suppliers might make some difference to the decisions.[88] In particular it seems difficult to maintain the PPM distinction between products and their sources. The US FTAs have employed a different comparison, asking after the supply of the services in like circumstances.

At the same time, the agreement's decentralised, discretionary approach to making commitments affords a means to manage its impact. National treatment (and market access) could potentially apply to a broad range of national measures. But it only ultimately applies in those service sectors which members actually list or 'inscribe' in their individual schedules of commitments. In these listed sectors, they have a further option to limit their commitments by listing or 'entering' non-conforming measures. The case studies will reveal that all members chose not to inscribe certain sectors at all and to enter both across the board limitations and sector-specific limitations on modes of supply in the sectors they did inscribe. Economic protection might often have been a reason for these reservations but the limitations also represented a view that certain types of services were not to be treated simply as economic transactions. Professional services and communications services were among these services.

Therefore, national treatment is more accurately to be described as a goal of the agreement rather than an obligation. All the same, one can

anticipate situations in which measures shall be subjected to the scrutiny of the principle, perhaps through the dispute settlement process. For instance, a member might have failed, for instance, to enter a measure as a limitation on national treatment in a sector that it had nonetheless inscribed. We shall look at the little case law in Chapter 4.

The principle seems less significant in the case of TRIPs because at the same time it requires members to provide quite substantive levels of protection to the nationals of other members. These foreigners can demand the same substantive protections as the locals and of course they can expect to find them within all the countries of the WTO. Furthermore it does not apply subject to a likeness test to treatment generally but rather Article 3.1 says that national treatment must be given with regard to the 'protection of intellectual property'. Nonetheless, it retains some import, for (with certain exceptions) it applies at a more extensive level of intellectual property protection than the agreements' own requirements. As we shall see in Chapter 6, this point of comparison for the treatment given to locals and the treatment given to foreigners is still quite broadly cast. So it has an important role to play in managing the remaining diversity of regulation.

Market access for services

Perhaps the most profound norm, certainly of the GATS, will turn out to be that of market access (Article XVI). But its full implications also remain to be explored. If it operates narrowly within the GATT tradition, it will be concerned with restrictions that are placed at the border on the passage of foreign services into domestic markets. Such restrictions inevitably single out foreigners for discriminatory treatment. Thus, market access has much in common with national treatment. But the concept of market access can also be read in a broader sense. If foreigners are to enjoy effective access to domestic markets, non-discriminatory restrictions will also have to be lifted.

There are indications that the GATS norm proposes reductions in this kind of domestic regulation. Some regulation restricts the opportunities for both foreigners and locals to enter markets and engage in market activities. As we shall see, the language of the GATS is by no means conclusive. In relation to the negotiation of specific commitments, it speaks of 'effective market access' for instance but also of submitting restrictions on 'trade' to the scrutiny of this norm (Article XIX). Insight into its intent is offered by the Article enumerating measures

that cannot be maintained, once a sector is inscribed and exposed to the disciplines of the agreement (Article XVI:2). The list includes measures that discriminate against foreigners, placing limits on levels of foreign investment. It extends to measures that may or may not discriminate, restricting the type of entity which may be used to supply the service. It adds measures that clearly affect both local and foreign suppliers, that for instance, limit the number of suppliers permitted to operate in a services market.

If this wider ambit is the objective of the agreement, then market access has the potential to further the neo-liberal program of privatisation and competition. It requires existing markets to be liberalised where regulatory schemes have restricted participation, say by licensing a fixed number of entrants or by drawing lines around the participants' spheres of activity. If it applies to non-discriminatory qualitative limitations, then it requires markets to be created where they have not been permitted, say because a country places a ban on the sale of certain services or it chooses to provide them by way of a public monopoly supplier. It is concerned with the scope of market activities as well as the conditions of entry into existing markets.

In rolling back these types of controls, the GATS appears to clear the way for private 'regulation' to operate more freely. But, despite its focus on certain types of public regulation, the norm of market access may not remain entirely content with the kinds of regulatory relationships which are constructed by the 'private' sector. It begins to challenge the way governments employ various kinds of regulatory schemes, including competition law, to foster and guide internal domestic arrangements such as export cartels, producer–distributor alliances, merger rationalisations and research and development consortia. It begins to insist on non-discriminatory enforcement of the law already on the books.[89] It should then begin to open up the field to the possibility that the restrictive business practices of the powerful transnational suppliers can be regarded as restrictions on market access. Our analysis will look for any hints that this constructive re-regulatory approach is supported by the GATS and TRIPs.

Protection for intellectual property

The WTO TRIPs agreement is the clearest indication that the catalogue of norms includes security for certain kinds of investment as well as the freedom to trade. This strand of the agreements might also be characterised as regulatory protection from excessive or unfair

competition. To further this norm, the WTO must demonstrably do more than insist that its member states relax and remove measures that affect trade, it requires them to impose regulatory measures on the kinds of private sector/free market activities which threaten their property. So it goes further than the investment treaties which have included intellectual property among the investments they have protected from government discrimination or expropriation.

To advance this protection, TRIPs spreads its reach wide across the world. It applies its frame of reference to the regulation of the knowledges, techniques and signs which circulate across the borders of the member countries. It also reaches deep behind the border. The Uruguay Round's connection with intellectual property began with a concern on the part of several producer nations that counterfeited or pirated goods, such as clothing, videos, discs and games, were being traded across borders. But, as we shall see, the agenda strengthened considerably when it embraced the view that inadequate treatment and enforcement of intellectual property rights generally caused distortions to trade. This view implicated dealings with products meant for domestic markets such as generic drugs, processes internal to industrial production such as chemical processes, and localised practices such as the sowing of crops or treatment of the sick.

It chose to regard lack of protection as the barrier to trade. In the short term at least, intellectual property rights might be seen to exclude others from the use of resources that seem naturally to be public goods. The justification for such restrictions on access to critical resources is the contribution intellectual property makes in the longer term to productive or dynamic efficiency. On this basis, security encourages investment in innovation. So, in the long run, protection benefits users and consumers as well as producers. However, this call for heavy regulatory intervention has a certain irony. It is difficult to see why these regulatory restrictions can be justified in the case of knowledge capital, if industrial workers are not entitled to protections that safeguard their investment in their 'human capital' or indigenous peoples in their cultural capital. Protection, it has to be said, is partly a function of value preferences. Protection is justified, but competition is 'unfair'.[90]

The TRIPs agreement also has an extremely wide range because it binds countries that clearly import far more of the protected goods and services than they export. It implicates economic practices which, as end users and secondary producers, they might not regard as unfair. In

certain countries, the case for protection encounters a deeper layer of cultural or social resistance. Where intellectual endeavours become commodities or at least are tied to instrumental uses, intellectual property rights may become associated with inroads into the domains of sociality, spirituality and the natural environment. So certain social movements may act to maintain limits on appropriation. Their objective might be to allow local producers free access to essential facilities, to keep resources in the public domain as part of a common heritage, to encourage freedom of expression and learning, or to assert non-market values such as moral or ethical concerns.

On the other hand, just as fragmentation at the national level reveals secondary producers and end users who question the benefits of strengthening protection, even in the exporting states, the global operators do not always find themselves in favour of blanket and exclusive rights. The property interests of authors, artists and publishers may diverge from those of the industrial firms which seek freely to acquire, reconstitute and distribute content in packages and services. Likewise, some producer groups have become attracted to the idea of using intellectual property to assist indigenous peoples to assert their claims to genetic materials or to cultural artefacts. We shall use the studies below to test this potential.

We should note that the TRIPs agreement is by no means the first international instrument for the protection of intellectual property. Indeed, in the Paris and Berne conventions, intellectual property provided one of the earliest occasions for multilateral agreement. Still, we shall see in Chapter 6 that TRIPs is significant for the range of subject matter which it subsumes within intellectual property protection. It brings fresh categories such as confidential information to the international level, as well as enveloping core categories such as patents, copyright and trademarks (see Articles 9–39). In categories such as patents and trademarks, it is more wide ranging than many national systems and more prescriptive than the existing international conventions.

However, its role in this respect is not all radical. In the copyright field, where those conventions were already more substantive, its main function is to incorporate their existing provisions and give them the backing of a large trade organisation. At the same time, it omitted to address the issue of intellectual property in the realm of the online media. In other categories too, it left spaces for national variations to run or for other international agreements to re-enter the field. For this

book, another case in point is the ownership of generic materials. This tentativeness also provides scope for the WTO dispute settlement process to supervene in an interpretive role.

BILATERAL FREE TRADE AGREEMENTS

There have been bilateral intellectual property and services agreements for some time now. But, in mapping the field since the operation of TRIPs and GATS, it is necessary to note the role that the contemporary bilateral free trade agreements (FTAs) are playing in international law making and their relationships with the WTO agreements. Like any international trade agreements, their immediate impact is upon the national measures of the two partner countries. However, they also supplement, some would say complicate, even undermine, the law making at the WTO. Consistent with our theme of legal pluralism and inter-mediation, we shall not be uncomfortable if we find variety and fluidity in the character of the FTAs and this book is not the place to record all their contents. As our interest is their connection with the WTO, they will be most relevant if they are driving intellectual property and service regulation in a particular direction.

FTAs containing substantial intellectual property and service chapters are rapidly growing in number. The main protagonist of this kind of FTA is the US and FTAs are largely made with developing countries. But these topics are addressed even in the FTAs between developed countries (eg, the European Union, Canada and Australia), especially as the FTAS begin to feed off each other.[91] They can be explained primarily in terms of the relations between the two partners – the two countries might just be formalising what is already a close trading partnership. Some of these agreements seem to have symbolic aspects – many are made between geographical neighbours, while others are struck between political and military allies. Nonetheless, one of the reasons that have been given for the recent proliferation of the treaties is that multilateral liberalisation has stalled. The FTAs are about liberalising trade. They attract transaction costs, they redirect trade flows, and it may be difficult to contain their benefits to the two countries involved. But countries are concerned about being left out of the preferential or discriminatory arrangements that they obtain. Their dynamic is competitive liberalisation.[92]

Even if the FTA is between developed and developing, big and small nations, there will be benefits on both sides. We have already begun to

note the ways service trade is diversifying; foreign investment too is going in different directions; even intellectual property categories offer potential for alternative producers, conservers, performers, artists and designers. All the same, some countries are stronger exporters from the capital-intensive high-technology industries. Because there are tradeoffs with other sectors, inducements such as grants of aid and military support, even neglect and indifference, the FTA may significantly enhance the freedoms and protections of their traders and investors. The intellectual property chapters of the US FTAS are notable for this thrust.[93]

If the WTO's main mission is to further trade liberalisation, its characteristic *modus operandi* is multilateral. Multilateralism gives something back to those prepared to concede. It means a negotiated consensus between a wide diversity of countries. The WTO fashions compromises between trade liberalisation and domestic regulation designed to support local producers, maintain public services and safeguard non-trade values in culture and environment. Furthermore, the WTO converts those compromises into legal rules, so that members with little bargaining power and political clout (even technical resources) can obtain the security and predictability of the benefits to them. From the discussion of law so far we know not to exaggerate these claims. Still, an interesting development is the willingness of WTO critics to recognise the virtues of this system over bilateral bargaining and dispute resolution.

The concern here is not simply the exposure of vulnerable countries to tough deals; clearly choices are being made strategically as we can see from some of the partners selected to sign on to WTO-plus standards. Rather, it is that they are undermining the multilateral accords that the WTO agreements have reached. They have implications for international law making beyond the two partners. This concern suggests that a strategy is being pursued effectively. It is both substantive – to ratchet up the level of freedoms and protections for traders and investors from the WTO give and take, and procedural – to shift the forum for negotiations and interpretations from the collective WTO process. It is being suggested that this strategy will play back on the WTO, creating new benchmarks for liberalisation, making it difficult to build coalitions and fashion consensus to maintain the flexibilities and counterbalances involved in TRIPs and GATS.[94]

The FTA phenomenon has become so profligate that it might be impossible to generalise much about the impact in our two fields. Certainly, some FTAs are formed without intellectual property chapters,

others are content just to affirm the WTO requirements, a few take an alternative path to protect for instance traditional knowledge and genetic resources. Likewise, there are some that do not broach services, some again that rest with the GATS commitments, others that give a lot of attention to arrangements for the movement of workers between two countries. The institutional features vary too. For example, the dispute resolution over interpretation and enforcement might be confined to government-to-government consultations, a panel system like the WTO is established, or access is given to direct investor–state arbitrations from ICSID or UNCTAD. Once we have identified the particular provisions of the GATS and TRIPs, we consider the impact of the FTAs upon them (see Chapters 4 and 6 respectively).

SCOPE FOR NATIONAL REGULATION

Exceptional national regulation

If the WTO agreements concede space to variations in national regulation by restraining the scope, specificity and compulsion of their norms, another, explicit concession is that certain legitimate regulatory purposes justify exceptions being made to compliance with those norms. Regulatory measures which on their face would seem to cut across the norms can be maintained if they are attributable to these purposes and comply with certain disciplines regarding the means of regulation.

The scope for counter-balancing regulation concerns the fundamental issue of whether the WTO agreements are purely interested in trade liberalisation, that is the rolling back of barriers and restrictions, or even indeed a neo-liberal agenda of regulatory reform producing domestic policies not just with competitive neutrality between locals and foreigners but deregulatory openness or libertarianism regarding private providers. In my reading, the WTO is pushed to mediate between liberalisation and national business and social regulation, if not to lend its support to public goods and non-trade values such as universal service.

Much of the leeway for, even the rapprochement with, national regulation is to be discovered by working through the requirements of the agreements, in particular the gaps they left in their prescriptions and the deference to decision making in other places. That the GATS did so is widely appreciated, but recently, the talk has been of the TRIPs 'flexibilities'.[95] On one characterisation, the balance between the two

is the essence of the WTO agreements. However, in another, national regulation is definitely on the back foot: it is only tolerated to the extent it finds a safe harbour in the agreements' provisions for exception. The wording of the exceptions is crucial to the scope and, even within their own terms, these provisions require that consideration be given to the rights of traders, especially in the manner that the regulation may proceed.[96]

The biggest concession the GATS makes is in its listing approach. It may be to further certain particular regulatory purposes or, as proposed above, to preserve a general regulatory competence, that members have listed non-conforming measures or decided in fact to withhold sectors from the disciplines of the agreement altogether. But, in addition, in different places in the agreement, the GATS enumerates a number of exceptional purposes itself, sending signals about the local economic, political and cultural concerns that are to be regarded as remaining legitimate. For the GATS, these purposes include public morals, public order, the protection of life and health, the orderly movement of persons over borders, the prevention of deceptive or fraudulent practices, prudential supervision, the quality of professional services, and the collection of services taxes.

Generally the GATS does not carry a re-regulatory agenda directly, while TRIPs does so emphatically. The GATS did, however, begin to prescribe national regulatory standards for sectors that service suppliers, and indeed businesses generally, will need to be able to use, if they are to operate effectively. Basic telecommunications and financial services were the first to receive this attention under the GATS. The annexes are concerned with ensuring access to the services, but they also conceded that national regulation might have other regulatory objectives. In basic telecommunications, those objectives include technical standards, and universal service obligations; in financial services, prudential supervision, temporary safeguards and public finance (see Chapters 4, 5 and 8).

TRIPs is much less explicit about the nature of the regulatory purposes that it considers legitimate when it allows members (through their national legislation) to provide for conditions, limitations, exceptions and reservations to the rights it prescribes. Only national security receives direct recognition (Art. 73). At stake are national exceptions allowing fair use for the purposes of research and study, criticism and review, or the opportunity to prepare derivative products such as generic drugs for production and marketing (see Chapters 6, 7 and 8).

The exceptions can be characterised as the TRIPs' limited contribution to access rights. The other concession is the provision for government non-voluntary licensing (see Chapter 6). Such licences authorise people to deal with the intellectual property in ways that would otherwise amount to an infringement of the property holder's rights if the holder's permission to do so was not obtained. Concerning copyright, some countries have elaborate systems, for example, allowing secondary uses of sound recordings on radio and television or the multiple copying of literary works in educational institutions and libraries, subject to the payment of equitable remuneration. Concerning patents, governments are more likely to use non-voluntary licensing in individual cases to invoke technology transfer and the local working of an invention. Licences to manufacture generic drugs are a case in point (see Chapter 7).

Disciplines applied to exceptions

When recognising the need of members to maintain such regulation, the trade agreement will often impose disciplines upon their use of the exceptions. Strictures are applied so that the regulation is exposed to scrutiny to determine whether it is a bona fide exercise of the exception and whether it involves the least interference with trade in doing so. In this vein, the disciplines can demand that the measures not be a disguised barrier to trade, do not act as an arbitrary or discriminatory restriction on trade, can be objectively and technically justified by the purpose, adopt the least trade disruptive solution, and are no more burdensome than the purpose demands.

Together with the nature of the norms of trade themselves, the use of such open ended and value laden disciplinary criteria creates a lot of scope for mediation. It affords the dispute resolution bodies in particular influence over the 'balance' which is to be struck between free trade and national regulation, such as regulation for the protection of consumers and the natural environment. Even if the decision makers do accept a place for local regulation, they can begin to mould the kind of regulatory modalities from which the national governments may choose if they are to further a regulatory purpose. The ethos of such agreements lends support to the view that they will plump for those modalities which the neo-liberal philosophy finds most compatible with the market. For example, we might expect disclosure of information to consumers about the sources and contents of services to be favoured over outright prohibitions or even substantive specification or

performance standards which these products and services should meet.[97] Once again, tax measures may be preferred to regulatory directives.

The necessity test

In deciding whether the exceptions are met, the first requirement is that the measure be directed genuinely to the objective represented in the exception. Then the choice of instrument or method to achieve this objective is subject to the necessity test. The necessity test has become the shorthand for the discipline that is imposed on national regulatory measures. Note that the test varies a little with the provision. For instance, some of the GATT Article XX exceptions ask that the measure relate to the objective. In the GATS Article VI, the discipline applicable to the so-called qualitative limitations comprises three specifics (see Chapter 6).

The nature of the necessity test has been the subject of GATT and WTO panel rulings. Over time, the jurisprudence has been refined and the Appellate Body has remoulded the plasticine in recent decisions. Those swimming in the WTO policy circles, international officials, member country delegates, academic consultants, have contributed to the regulatory conversation. Krajewski can foresee it developing into an international administrative law standard; more demanding because it is concerned not just with trade restrictiveness but with a proper proportion between the objective and the means chosen to achieve it; more complaisant because it is prepared to allow the regulating member a range of methods.[98]

The basics of the current test were articulated in *Korea–Beef* and employed most notably in *EC–Asbestos Products*.[99] The measure will be acceptable if broadly there is no reasonably available, less WTO-inconsistent, alternative means of obtaining the objective. The test does not insist any longer that the member show that its measure is the least trade restrictive means when set against the full range of measures that can be theorised. An alternative measure that is impossible to implement (not just administratively difficult) is not reasonably available. But furthermore, in deciding what a member could reasonably be expected to employ to achieve its objectives, three competing considerations are to be weighed and balanced against each other: (1) the relative importance of the interests or values when furthered by the measure, (2) the contribution of the measure to the realisation of the end pursued, and (3) the restrictive impact of the measure on

international trade and commerce. A less trade restrictive measure could end up taking too much away from the achievement of the objective. The more important the interests or values pursued, the easier to accept as necessary a measure designed to achieve that end.

EC–Asbestos Products is instructive for demonstrating the limit to reasonably available alternative measures, the Appellate Body finding that France could not reasonably be expected to employ any alternative to a ban on the products such as limited exposure, insulation or ventilation safeguards or warnings to consumers. Some say *EC–Asbestos Products* was an easy decision given the clear threat to life of any exposure to chrysotile asbestos.[100] So too, the risk is carried through to the end product; it does not resolve the issue of objections to the way products are harvested or manufactured (PPMs).[101]

The TRIPs provisions for exceptions to be taken are couched in a more specialist terminology. Already, the panels have ruled on the scope of the copyright (Art. 13), trademarks (Art. 17) and patent (Art. 30) infringement exceptions (see Chapters 6, 7 and 8 for the relevant case summaries). The common theme of these provisions is a requirement that they are confined to special or limited cases, they do not conflict with a normal exploitation of the subject matter and that they do not undermine the legitimate interests of the right holder and possibly others too. In common parlance, this is the 'three-step test'.[102]

INTERNATIONAL REGULATION

National regulation and international concerns

One issue regarding the legitimacy of regulation illustrates the tendency of the agreements to favour free trade over what might be seen as equally valid international concerns. Conventionally, a country seeks to apply its regulatory legality to a foreign supplier on its home ground. But, as we recognised in Chapter 2, it is in the nature of globalisation that activities which are conducted in a location off-shore, nevertheless have an effect on conditions at home. For example, a country may want to say that products reaching its shores are being manufactured or harvested in ways that conflict with the standards which it applies at home.

We have noted that this particular inter-legality results in a clash with the other countries, whose own laws are meant to apply to the activities in question and which are inconsistent with the first country's standards. They may refuse to cooperate with the policy the

first country is seeking to promote. Even if the importing country can find a point of attachment to the activity among its own nationals, say as operators of businesses off-shore or consumers of products from outside, it may encounter resistance. Its nationals may not be willing parties to what they see as their government's attempt to further a foreign policy. Yet, at the same time, it is possible that the off-shore practices are creating 'unfair' competition for local producers who have to meet more exacting standards. Pressure is thereby generated to relax local standards. More directly, they may be causing spill-over effects such as the despoilation of a common social or natural environment.

We should acknowledge the complexity of these issues, in terms both of how these processes operate in practice and the appropriate policies to adopt. In the context of this book, we confine our inquiry to whether such regulatory legalities run counter to the norms of the agreements. One such way is for a country to make the entry of the products into its territory the point of attachment to its regulation. It could place an embargo on such goods. Of course, it is not my intention to underestimate the practical problems of doing this. For instance, globalisation provides the opportunity to hide or confuse the origins of goods. For certain kinds of services and intellectual property, such as those provided over the internet, it can be difficult to establish the fact that they are entering the country in some way at all.

These kinds of trade sanctions have received the attention of the GATT panels. In two high-profile cases, the panels heard complaints against a US conservation policy that banned the import of tuna products. The policy was aimed at tuna which had been harvested with the use of drift nets. This harvesting method caught and killed everything in its path, including the blue nose dolphins which shared the sea with the tuna fish. Mexico complained that the ban discriminated against its imports into the US. As we have noted, the relevant Articles of the GATT required MFN and national treatment to be extended to 'like products'. Despite the particular way the tuna was fished, the panels thought the tuna in the can was like tuna harvested by other dolphin-friendly methods. The ban also contravened the injunction in GATT Article XI against applying prohibitions and quantitative limitations to imports.

If the ban breached the GATT requirements, it had to be founded in one of the explicit exceptions (Article XX). Given the impact of the fishing method, could it be considered necessary for the protection

of animal life or health (Article XX(b)) or could it relate to the conservation of exhaustible natural resource (Article XX(g))? Even so, they must pass the test of the 'chapeau' to Article XX which requires that measures should not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or place a disguised restriction on trade.

The difficulty with the ban was that it did not just have a domestic impact. Most traditionally, it was seen to be employing a strategy that sought to influence activities beyond the territorial jurisdiction of the US. However, both panels thought that it was not clear from the text of the GATT that the exceptions were confined to measures operating within a country's territory. So there might conceivably be situations where extra-territorial reach was tolerated. But, with this ban, the US had gone further. It had let it be known that the embargo would be lifted if the Mexican government outlawed drift-net fishing within its waters.

Both panels were concerned with the way the international environmental concern of the US was prosecuted. The 1991 panel was of the opinion that other diplomatic options had not been exhausted and it was preferable for the US to pursue its environmental objective through the medium of an international agreement.[103] The 1994 panel thought that the US was trying to force another country to change its policy with respect to the conduct of persons within that country's own internal jurisdiction. To single out a country in this way was to upset the balance of the multilateral framework for market access.[104]

A WTO panel report largely adopted this GATT jurisprudence.[105] In a similar sort of case, the panel examined a US measure striking against imports of shrimp products where the shrimp had been harvested in a manner harmful to sea turtles. The panel found against the measure, seeing it as a threat to the multilateral trading system, which would undermine the security and predictability of trade relations. The measures made market access conditional on the adoption of certain policies (eg, conservation policies) by the exporting nation. Exporters would be faced with multiple conflicting requirements. The panel made a special note that the US was not taking the measure to apply a multilateral environmental agreement.

Such strictness presents a dilemma. A multilateral agreement is a desirable outcome, but multilateral environmental agreements are hard

to achieve – especially agreements with real teeth like trade sanctions. What of the survival of the turtles in the meantime? In *US–Shrimp/Turtle*, the Appellate Body's approach is more discerning.[106] Greg Shaffer suggests it is more interested in how the member country actually applies the particular import ban than in categorical denunciations.[107] The US still loses this case because the way it applies its policy is easier on Caribbean and West African countries than the South-east Asian countries that bring the complaint. It was clear too that the US had not made a serious attempt to negotiate with the complainants to find a solution, by say offering technical and financial assistance so their fishing industries could employ the turtle excluder devices that were available. Following the ruling, the US did deal cooperatively with the complainant countries. When Malaysia held out, the arbitration panel ruled that the US does not have to keep negotiating.

We know that the US has employed the unilateral strategy of trade sanctions to further other sorts of policy. It has applied sanctions to products from countries such as Cuba whose political systems it abhors. Other countries have been the subject of US trade boycotts and embargoes, for example Iraq and Burma who have been the recent target of sanctions. From the WTO point of view, difficult issues of aggressive unilateralism or compatibility with other international laws have been avoided by the fact that members have refrained from prosecuting complaints under the dispute settlement system. So too, WTO obligations have been waived to allow sanctions to be applied, for example to allow members to resist the 'blood diamond' trade from Africa.

International regulatory competition

In formal terms, it remains true that the content and strategy of a country's regulatory policy are only called into question if they involve measures that cut across the trade norms. So countries are free to adopt their own regulatory standards as long as they remain consistent with those norms. This makes regulatory autonomy – or national sovereignty as some characterise it – a matter for the construction and interpretation of those norms. Nonetheless, we should appreciate that this formal approach belies the secondary or indirect effect which trade agreements have on regulatory competence. They smooth the path for those forces which can undermine the competence of national regulation and they set countries on a course of regulatory competition.

In such circumstances, governments increasingly have to rely on global 'markets for regulation' to produce the necessary demands for high standards. As we noted in Chapter 2, there is some optimism that competing up is a viable unilateral strategy.[108] Certain jurisdictions may be able to attract and sustain economic activities on the strength of high-quality regulatory regimes. Among these standards are sound prudential supervision for investments placed in the financial sector, fair dealing and quality control for the consumers of professional services, and physically safe and social amenable conditions for tourists and business visitors. But we should understand that regulatory competition also transmits incentives to countries to consider skimping on local standards, while at the same time offloading the responsibility onto other countries to provide relief if things go wrong – markets in vice rather than markets in virtue as John Braithwaite characterises them when writing about international tax competition.[109] The fall-out from the failures of financial institutions such as the Banco Ambrosiano provided another pointed example.[110]

The dynamics of regulatory competition are very complex and it is stressed again that the aim is not to try to capture them here. Many variables are at work in decisions to locate. For instance, Chapter 2 argued that suppliers are not simply free to chop and change location as they wish. Various factors endogenous to the regulatory regime influence their decisions. Here, we are confining ourselves to noting ways in which the trade agreement itself might mediate the competition. Thus, the trade agreement's legitimation of exceptional social measures provides a little space for those countries who feel that they have the economic strength, political clout or legal jurisdiction to regulate unilaterally. For countries that are weakening under the pressure, the trade agreements might at least enjoin them from relaxing their own existing domestic standards to create favourable conditions for export industries (eg, in special export processing zones). Labour and environmental clauses in some regional and bilateral FTAs bear this injunction.[111]

International regulatory coordination

For many countries, regulatory coordination is needed if they wish to control such competition. In this regard, Chapter 2 suggested that competition could occur broadly in relation to three basic legal functions: legislation, adjudication and enforcement. Such competition is most directly expressed through comparisons made between

substantive standards. But we have said that it may also be pursued by means of competitive conflict of laws criteria. Such criteria signal that the country's own standards will be applied in preference to others. Along these lines, regulatory coordination may begin with cooperation that is designed to ensure that each country's enforcement measures are effective. Countries cooperate on the investigation of breaches or the execution of judgments. But such cooperation may need to involve acceptance of the other country's right to adjudicate. Partly, this cooperation is a matter of resolving jurisdiction, but it may also lead back to the question of legislation (ie, to the choice of the law which is to govern the conduct or the person targeted by the regulation).

We can identify mutual recognition as a formalised government-to-government choice of law principle that mediates differences between national legalities. At the same time, it reduces the costs for international operators of multi-country compliance where requirements conflict. Some trade agreements adopt such a principle of mutual recognition. We shall see some limited support for this approach in the GATS. It is most common for this approach to allow foreigners access to host markets on the strength of their compliance with home country requirements. Yet we should entertain the possibility that mutual recognition does not eliminate regulatory competition. Indeed, it can become a channel for transmitting incentives to differentiate, especially for those operators who do have the ability to manipulate their 'location' between home and host countries. To obviate such tensions, the parties to the mutual recognition arrangements find that they must reach agreement on a core of minimum standards. These standards establish bands of individual national discretion, drawing boundaries round the tolerance to difference. So they endeavour to combine the cohesion of a core with the freedom to individualise and localise.[112]

So we shall see that the GATS allows for recognition of standards to be achieved through harmonisation between countries or to be based on multilaterally agreed criteria (Article VII). We might also see a preference for multilateralism in the GATT panel reports we have discussed above. They recommend that members seek international agreement on environmental standards. Thus, the trade agreement would be prepared to allow the observance of accepted international standards to act as an exception to its norms. The international standards become a 'safe harbour' for national regulation. Several of the existing international environmental agreements go so far as to call on

their signatories to invoke trade sanctions in order to ensure that protection is made effective; a ban on trade in rare and endangered species comes to mind. Such an allowance is helpful to the extent that it would signal that the trade agreement will not get in the way if the members manage to settle on standards.

However, some observers fear that the same approach will produce a pressure to reduce standards to a lowest common denominator. Members will not be able to insist on more exacting requirements for fear of transgressing the trade norms. Such a concern has been expressed about the WTO's new Agreement on Sanitary and Phytosanitary Measures (SPS agreement). The SPS agreement nominates the Codex Alimentarius Commission as a reference point for international standards. Critics accused the Commission of being unduly influenced by industry interests. It has been suggested that some fifty per cent of the standards which it recommends are below the present levels adopted in the US.[113] Therefore, there was much interest when the WTO Appellate Body ruled on the US complaint against the restrictions the EU had been placing on meat products derived from animals that have been administered with genetically engineered growth hormones.

The Appellate Body upheld the right of members to establish a higher level of sanitary protection in matters relating to human health.[114] That right was an important and autonomous right of governments, and not merely an exception to the general SPS obligation to base measures on prevailing international standards. We should note however that the Appellate Body ultimately ruled against the measures the EU was applying. The Body took the view that the measures did not satisfy the disciplines imposed in the SPS agreement on allowable national measures. In particular, the EU did not satisfy the Appellate Body that the measures were justifiable against an objective and scientifically assessed standard.

Such disciplines are imposed to prevent members deploying arbitrary sanitary and phytosanitary measures as a trade barrier in disguise. But they have a very discouraging effect in cases like growth hormones. These substances are new and not all the evidence is in regarding their hazards, certainly about illnesses that might only emerge very gradually. Such disciplines place the onus on those seeking to regulate rather than those seeking to trade. Specifically, the regulators carry the 'burden of uncertainty' regarding the indirect and long-term hazards of such substances; it seems they cannot apply the 'precautionary principle'.[115]

Furthermore, we should appreciate that risk assessment is not just a technical exercise. Inevitably, the assessment will involve elements of what is socially and subjectively acceptable as a risk. Objectification tends to give prominence to what is acceptable to a particular type of expert.[116]

If, within such strict limits, members retain some freedom to apply their own preferred standards at home, what of their concern about the standards being observed among their trading partners? Could the trade agreements provide positive support for international regulatory coordination, rather than simply tolerating the efforts of countries individually to respect it? We know that, at times, trade produces its own dynamics for countries to standardise. The minimisation of conflicting requirements may appeal to some traders. More substantially, core social standards may be seen as a means of controlling the excesses of competition. Some competition is characterised as unfair in the sense that countries give producers who locate with them an unfair advantage by enabling them to 'undercut' on social or environmental standards.[117] The terminology of 'social dumping' has been used in an attempt to create a link with the established anti-dumping provisions. On this basis, trade sanctions would be permissible if the goods or services were produced under conditions that did not respect the social standards.

Just as there is dissatisfaction with the use of traditional anti-dumping remedies, some see such moves for a 'social clause' as a new form of protection. Rather than getting into arguments about why countries vary standards, the WTO might legislate a benchmark set of core standards – in the way it has been prepared to do for intellectual property protection. Vogel saw the trade agreement as giving impetus to countries with high standards to persuade other countries to agree to take them on board.[118] They should obtain multilateral agreement to their higher standards. There are messages of this kind to member countries in the dispute settlement rulings noted above about how best to take up the exceptions to the trade norms. We also mentioned earlier that the WTO agreement authorises the institution to forge links with other international organisations that set such standards.

However, the recent international experience suggests that it is not going to be easy to obtain agreement on such standards in the social fields. The ILO has been working hard to update and focus its role, but the proposal to put the WTO's weight behind its core labour standards has been unable to obtain a consensus. So too, despite the seriousness of

the risks to the natural environment, it has proved difficult to get all the major economies to give their support to multilateral environmental agreements, certainly to agreements that call for trade restrictions to be applied. If an agreement is forged, it runs the risk of being trumped by the WTO agreements.[119] Formed under the aegis of the CBD, the Biosafety Protocol placed the issue of genetically modified organisms (GMOs) within an alternative frame of reference.[120] Recently, the US shifted forum to the WTO bringing the complaint against the EU for the moratorium it has applied to the import of GMOs. In deciding that the delays of the Communities in processing GMO imports do not conform with SPS requirements, the Panel in *EC–Biotech Products* found nothing of relevance in the Protocol to its determinations.

COMPETITION REGULATION

The question of international social regulation is becoming more critical. It is not for lack of concern that the discussion will be curtailed here. But, to concentrate resources, this book will plump for the issue of international competition regulation as a litmus test. It seems to me that competition regulation is the next item on the neo-liberal regulatory reform agenda. Certainly, it is receiving a good deal of intellectual support from trade policy experts, some of whom are officials or consultants to international organisations such as the OECD and the WTO itself, others who are more academically detached. The Singapore meeting of ministers agreed to study issues relating to the interaction between trade and competition policy, including anti-competitive practices, to identify any areas that may merit further consideration in the WTO framework.[121] While, for various reasons, many members remain extremely wary about entering into negotiations over a competition agreement, the WTO Working Group on Competition Policy has advanced the discussion constructively. So, the book will consider the ways in which the WTO might conceivably shape the international competition regulation agenda.

Of course, part of the purpose of this inquiry is to gauge the positive potential in such an emerging policy for a range of independent and alternative producers to gain access to the rules and resources of globalisation. If this competition policy is unable to provide such potential, it will leave us with the conclusion that we are in need of other kinds of international regulatory reform, other kinds of international legality.

If globalisation does reduce the capacity of national governments to regulate independently, it would be naive not to expect that some business operators would misuse their market power. Already, our analysis reveals that countries are being pressed to lift their traditional controls on the exercise of market freedoms, such as their industry-specific regulation and foreign investment regulation. At the same time, they are being asked to strengthen the security of the global operator, in particular through the provision of intellectual property protection.

National treatment and competition policy

At the end of Chapter 8, we will return to the WTO agenda for competition policy. At this point, we need to indicate how competition policy sits with the more established norms of international trade law. We begin by observing that the advocates of free trade often say that it leads to greater competition. It exposes domestic producers, suppliers, investors and workers to competition from their foreign counterparts. So trade regulation is concerned in its own way to eliminate the impediments which national legalities create for foreigners when they seek to compete with locals. In particular, we have seen how the norm of national treatment translates into a requirement that national legalities maintain equivalence in the opportunities to compete.

The focus of this trade norm has been government regulation at the national level. On this basis, a national competition law should not be cast in such a way that it accords less favourable treatment to foreigners. Competition laws must satisfy the norm like any other national measures. A concern here might be that the national authorities deny like foreign firms the advantages allowed to domestic firms such as restrictive trade practices, mergers and acquisitions, or participation in consortia and cartels. Or they may make demands on foreigners, such as that they license out intellectual property, which are not made on locals. Of course, the very purpose of the authorities may be to bolster the position of domestic firms because they are encountering rivalry from better equipped foreign firms within the sphere of import markets. In addition, certain firms may be looked upon as national champions abroad on export markets.

Nonetheless, the motives behind competition regulation can be hard to discern. For example, the even-handed application of competition criteria may have the same effect as a protectionist policy. Import

competition increases the number of market players, making mergers among locals companies less likely to result in a dominant position. In any case, economies of scale and scope may be regarded by authorities as pro-competitive. As a leading expert concedes, the national systems vary in their characterisations of competitive behaviour.[122] Economic theory fluctuates: the attitude taken to the uses of intellectual property is a case in point. Such arguable interpretations make the task difficult for any trade agreement that seeks to discern the motive behind national regulation.

In the application of competition law, the favouritism shown to local companies may not be reflected so much in the explicit criteria of the system, such as its carve-out of block immunities or the nomination of benefits which may be taken into account when deciding whether to tolerate a restriction on competition. It may instead be buried in the administrative practices of the responsible authorities. Not only do the legislative criteria leave themselves open to varying interpretations, but the authorities develop working policies for prioritising offences, granting clearances and accepting undertakings. We have seen in this chapter how the trade agreements are extending their scrutiny to these kinds of regulatory legalities by broadening their definitions of the government measures which are subject to their norms.

Moreover, even if the rationale of this informal regulatory legality is not to disguise favouritism, another trade norm, transparency, militates against the maintenance of administrative flexibility. It first demands that the authorities publish their policies. If it goes further, and requires them to embody their policies in legal rules, then it constrains dramatically the ways in which competition policy is often pursued. Competition policy may call for situation-specific judgements about the merits of the conduct, as well as experiments with compliance strategies in order to fit them to the characteristics of the firms which are being regulated. Transparency may also insist that an administrative scheme allow foreigners access to a review of its decisions.

If the national competition law transgresses the norms of the trade agreement in any of these respects, then it must be brought within one of the explicit exceptions which the agreement allows. Even then, it must meet the disciplines which are applied to the measures which take these exceptions. In our detailed analyses of the agreements, we shall find that the GATS and TRIPs both make some allowance for

government measures which aim to deal with practices that restrain competition and hence restrict trade.

Competition policy and market access

Here we see a hint that competition law will be assigned a role in expanding market access. The agenda is not content to see equal treatment for foreign sourced products, investments and services. As we have recognised, the norm of market access places pressures on members to make commitments to roll back their non-discriminatory regulation of markets. It applies to regulation that specifically limits foreign participation within sensitive sectors. But it goes further by targeting regulation that, for foreigners and locals alike, places restrictions on market entry and limits the form participation may take.

We might see why free trade enthusiasts feel that competition law complements this approach. When industry-specific regulation is phased out, the disciplines of competition policy are applied to sectors that once enjoyed immunities. For instance, public sector instrumentalities are exposed to competition from private firms; professions lose their monopolies over certain types of service; and controls on the number of market participants are lifted. On this approach, the pressure is kept on governments to roll back their own measures which provide a protective space for local producers.

Yet we might also see that the trade agreement's concern with market access generates a demand that governments act to open up the private relationships which domestic producers, financiers, distributors and users have struck. Complainants perceive an unwillingness on the part of the member government to take action to break up long-standing exclusive dealing relationships between local producers, distributors and retailers. Here we see how foreign suppliers become frustrated with the resilience of the local private relationships, styled by some as a contrasting relational form of capitalism or even as a cultural cohesion which appears beyond the reach of the market.

When the government's role is placed under scrutiny in such situations, the finding might be that it is using its various administrative, commercial and personal influences with the industry to foster these relationships. In the dispute over the distribution of Kodak film and paper products in Japan (discussed above), it seems the main US complaint was the role it saw the Japanese government agencies played in strengthening vertical distribution and single brand distribution channels to the advantage of local producer Fuji.

However, it is possible to conceive of a situation where inaction might be the only government contribution to the barriers. A direct attack on these embedded relationships would generate a demand that national authorities enforce the competition laws which they have placed on their books. In its structural impediments initiative, the US made such a claim about Japan. But, in this regard, Professor Malaguti has argued that a mere omission to enforce legislation would not be enough to ground a complaint under the current provisions of the GATT.[123] A simple failure to act on private barriers to trade would not seem to be sufficient, except where the agreement in question had placed the member under a positive obligation to take measures against such barriers. As many countries do not have competition laws at all,[124] the agenda is likely to turn to the institution of such laws. Thus, the further reaches of the norm of market access and, more explicitly, requirements that competition policy prescriptions be applied, can be seen as part of a neo-liberal regulatory reform project.

The implications could be far reaching. Apart from any interest in shielding or bolstering their domestic industries, national authorities have of course a whole host of other political and cultural reasons for placing regulatory controls on market activity. Competition law may contain some recognition of the value of these controls. But it has to be said that its focus is essentially economic. So we should appreciate that this agenda is not only pushing harder at the kind of support government might give local industry. The depth of this complaint is further evidence of how trade norms are challenging the political, social and cultural foundations of the regulatory controls placed on certain types of market activities. Thus, while the Japanese Large Retail Store Law is used for protectionist purposes, it also reflects powerful cultural and environmental attitudes. Undermining the law will affect the way urban areas are configured and lead to changes in social relationships too.

At this juncture, we should note also that trade law has produced its own counterbalance to out and out competition in international markets. Commonly, the agreements provided for members to apply trade sanctions to counter the dumping of goods. These procedures have been well used by the developed nations, in part to placate their domestic producer constituencies. But their use has caused friction with the other countries which seek to export into these markets. The WTO has been hesitant about building such remedies into the TRIPs and GATS agreements. At the same time, it has been

suggested that these trade-specific measures should be replaced with general competition regulation, which of course would be accessible to foreigners as well as locals. Instead of dumping, for instance, we could consider predatory pricing. But the standards of competition law do not coincide squarely with those of anti-dumping and countervail. On the whole, competition law is more difficult for the injured party to invoke.

Competition policy and transnational business practices

Breaking down national regulatory barriers certainly extends the breadth of markets beyond the confines of the national jurisdictions. It enhances the opportunities for transnational corporations and alliances to implement globally coordinated strategies of production and distribution. Decisions taken off-shore can more readily produce effects within national segments of what have become global markets. Simply by rolling back national government impediments to market access does not ensure that real competition will occur. Indeed, a laissez-faire approach to liberalisation and privatisation may result in further concentrations of market power. Paradoxically, liberalisation may encourage and spread cartels. For example, Scherer warns that informal understandings, strategic alliances and mergers between multilateral firms may attempt to divide up world markets into spheres of influence and to place restraints on international diffusion of technological know-how.[125] Thus, it has been said that: 'Competition policy complements liberalisation where the market has an oligopolistic or monopolistic structure'.[126]

Now that national controls are under challenge from free trade regulation, some of its more thoughtful advocates are calling for a more balanced and comprehensive approach to multilateral disciplines.[127] The calls are reminiscent of the concerns which were expressed by third world critics of freer trade and which led to the moves within the United Nations for codes of conduct that would apply to the restrictive business practices of transnational corporations. Looking ahead to the WTO, Raghavan counselled: 'Equal attention must be paid to those aspects of the behaviour of the TNC's – restrictive trade practices, restrictions on the free flow of technology, market-sharing agreements, etc ... Any equitable multilateral arrangements must then also include acceptance by TNC's and the governments of the developed countries of their own responsibilities'.[128]

The early proposals for international codes of conduct were informed by the sense that many smaller countries lacked the legal jurisdiction and the political power to apply controls to the transnationals on their home ground.[129] Even if trade agreements left them space for industry-specific regulation and foreign investment regulation, they were not in a position to effect performance requirements. They would require the cooperation and reinforcement of larger countries where the corporations made their home bases or enjoyed their biggest markets. But globalisation has stepped up the competition between countries to offer inducements that attract and retain the transnationals. Global mobility and reflexivity also allow the corporations far greater opportunities to circumvent the bilateral agreements which have been struck between countries that do wish to cooperate.

In this more complex and interdependent world, some countries have crafted sophisticated criteria by which they attach their jurisdictions to these restrictive practices. They use multiple aspects of the conduct in question or the 'persons' involved as the way to establish a nexus with their territory. In particular, they do not accept the separate entity conceptualisation of the corporation. But the idea that the effects or impacts of corporate activity are sufficient to attract jurisdiction, an idea with currency in the US for instance, continues to meet resistance. Where the more powerful countries did endeavour to give 'extra-territorial' reach to their own unilateral policies, they encountered, as we have noted, resentment among the private firms which were asked to carry the responsibility abroad. Extra-territoriality also provoked clashes with other governments who wanted to guard their own sovereignty over competition policy. It produced blocking statutes. Furthermore, as we sought to show in Chapter 2, this kind of regulation often needs practical support from other jurisdictions, if it is actually to enforce the judgments it thinks are appropriate to make. However, it will not attract support unless its regulatory standards are respected by these other countries.[130]

So a different argument for the international standardisation of competition regulation – an international code – is the need to override these constraints on the efficacy of national regulation. In the succeeding chapters, we must look for signs that the two WTO agreements give support to this internationalisation. We shall also ask whether the WTO is prepared to take on a new responsibility for coordination. Before the Singapore meeting of ministers, there were signs of acceptance in the remarks of the Director-General: 'If the international

community seeks to negotiate agreements that require countries to give rights to foreign companies, it is almost inevitable that the issue of international cooperation to deal with possible abuses of those rights will also arise'.[131] Recently, it has been proposed that the WTO galvanise its members, especially the larger developed country home states, to deal with hard-core export cartels (see Chapter 8). Such action would be a sign that competition policy can work beneficially for members internationally.[132]

Yet, as the study will reveal, many member nations and NGOs remain sceptical about the WTO's preparedness to tackle problems associated with the restrictive business practices of transnational corporations. Moreover, we should appreciate that the issues go much wider than the concerns of competition regulation. Venda Shiva argues that the global debate is not simply about technology transfer from the North to the South, it is about inter-cultural dialogue and respect.[133] Rather than dwell on competition policy, the WTO will have to give its support to more appropriate codes of conduct. It should match the new rights of global traders with the obligations of their global citizenship.

In Sol Picciotto's terms, this would be a positive linkage, saying that freedoms and protections would not be made available unless the home governments of the traders and investors had committed to the international regulatory safeguards such as prudential supervision or tax integrity.[134] Indeed, their entitlements would be conditional on compliance with international codes of conduct such as the OECD Guidelines. It is a positive rather than a negative linkage, because the regulation is not just on the defensive, trying to find a space to operate safely. If anything, it makes the benefits of trade liberalisation subject to meeting responsibilities embodied in other international compacts and treaties. As we shall see in Chapter 8, some are taking this approach further. They feel that public goods frameworks should be elevated globally above trade freedoms and protections. The onus is reversed: the trade freedoms and protections may be implemented and exercised where it can be shown they are compatible with these essential public goods, whether they are economic development, public health, decent work, access to knowledge, cultural diversity, human rights or environmental sustainability. The query is whether this approach is feasible given the legal strength lies with trade. The adjustments might be made instead in the mediations of global governance and global politics.

CONCLUSIONS

The role of this chapter was to identify the basic institutional and normative elements of the WTO agreements. Analysis of the specifics of the GATS and TRIPs agreements is to follow, supplemented by the assessment of their impact in the three case studies. Overall, it seems as if the WTO is advancing a neo-liberal regulatory reform agenda that has already gained considerable momentum around the world. But it is doing so within a particular institutional and normative framework. This chapter identified its firming framework for decision making, including the processes for the negotiation of commitments and the settlement of disputes. Now, with a record of implementation to show, the chapter evaluated the efforts at the WTO to deal with its changing political conditions and in particular to enable trade negotiations to go forward. Of particular interest was the operation of the dispute settlement bodies and the nature of their choices between a more legalistic and more open approach to interpretation of the agreements.

The chapter began to identify the potential reach of its norms. It looked first at the nature of the measures to which the WTO applies its norms in the concepts of 'measures affecting trade' and 'nullification or impairment'. Turning to the content of the norms, the apparently innocuous principles of MFN and national treatment are given fresh meaning when they are related to the supply of services and the conduct of intellectual endeavours. But the agreements extend their prescriptions further into the substance of local regulatory measures. The norm of market access places the onus on quantitative limitations which do not discriminate against foreign suppliers. Protection for intellectual property moves to the other side of the equation by requiring governments to re-regulate and provide suppliers with security from 'unfair' private competition.

It remains to be seen how accommodating this re-regulatory approach might be to different perspectives. For those concerned about the risks associated with open trade and free markets, it raises the issue whether the WTO should be pressed into becoming more politically accountable and taking positive responsibility for 'social' regulation. The chapter indicates that such agreements make allowance for certain national regulatory objectives. But their disciplines restrict the members' choice of regulatory strategy and moderation of the necessity test was important here. A key to the future is their attitude to regulation that expresses international concerns, such as

concerns about the environment. The WTO suggests that such regulation be supported by multilateral agreements if it is to gain exemption from its trade norms. But at this stage the WTO does not feel itself competent to promote such agreements.

The chapter focused on the case of competition regulation. Depending on how it is conceived, it is the kind of regulation that can cut across the norms, that can be seen to further the norms, or that might effectively express some of the international concerns abroad about abuses of power in a globalised economic sphere. While the first perspective is now common place, and the second is being discussed, the WTO is yet to show the resolve to make the third perspective real. It leads into the crucial issue about the kind of business regulation the world will need to ensure that global trade and investment are really of widespread lasting benefit. Will the WTO be able to contribute to recognition for traditional knowledge and public-private partnerships for health care, or access to media platforms for small producers and freedom to operate?

NOTES

1. Address by Renato Ruggiero to the XII Meeting of the Common Market Council at the MERCOSUR Heads of State Summit in Asuncion, see WTO Press Release PRESS/74, 19 June 1997. These press releases are available at the WTO website www.wto.org or from the Information and Media Relations Division in Geneva.
2. Address to the Herbert Quandt Foundation, Bonn, see WTO Press Release PRESS/15, 22 June 1995. See the extended view of the current Director-General, Pascal Lamy, The Place and Role of the WTO (WTO Law) in the International Legal Order, Address before the European Society of International Law, 19 May 2006, Sorbonne, Paris; WTO News: Speeches – DG Pascal Lamy, at www.wto.org.
3. Ruggiero, MERCOSUR.
4. For a short history, see S. Reisman, The Birth of a World Trading System: ITO and GATT. In O. Kirshner (ed.), *The Bretton Woods – GATT System: Retrospect and Prospect After Fifty Years* (Armonk: ME Sharpe, 1997).
5. For background, see B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* (Oxford: Oxford University Press, 1996); now see B. Hoekman and P. Mavroidis, *The World Trade Organization: Law, Economics and Polity* (New York: Routledge, 2007).
6. For the relevant texts, see WTO, *The Results of the Uruguay Round: The Legal Texts* (Cambridge: Cambridge University Press, 1999). I shall cite

Articles from the agreements in the text, nominating the particular agreement only when it is not evident from the text.

7. The making of the commitments is discussed in Chapter 4. For a record of the commitments, see WTO, *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (Geneva: WTO), vols 28–30. The commitments can be searched also at www.wto.org.
8. These declarations and decisions are also set out in WTO, *Legal Instruments*.
9. C. VanGrasstek and P. Sauve, The Consistency of WTO Rules: Can a Single Undertaking be Squared with Variable Geometry?, *Journal of International Economic Law* 9 (2006), 837.
10. H. Katrak and R. Strange (eds.), *The WTO and Developing Countries* (Basingstoke: Palgrave Macmillan, 2004).
11. For insights, see F. Jawara and A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations: Lessons of Cancun* (New York: Zed Books, updated edition, 2004).
12. A. Narkilar, *International Trade and Developing Countries: Bargaining Coalitions in the GATT and WTO* (London: Routledge, 2003).
13. P. Drahos, When the Weak Bargain with the Strong: Negotiations in the World Trade Organization, *International Negotiation* 8 (2003), 79.
14. P. Drahos, Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines, *Liverpool Law Review* 28 (2007), 11.
15. R. Blackhurst and D. Hartridge, Improving the Capacity of WTO Institutions to Fulfil Their Mandate, *Journal of International Economic Law* 7 (2004), 705; A. Narlikar, *The World Trade Organization: A Very Short Introduction* (Oxford: Oxford University Press, 2005).
16. X. Yi-chong and P. Weller (eds.), *The Governance of World Trade: International Civil Servants and the GATT/WTO* (Cheltenham: Edward Elgar, 2004).
17. A prolific debate, see the writings of E. Petersmann, for example, The WTO Constitution and the Millennium Round. In M. Bronckers and R. Quick, *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000); Constitutionalism and WTO Law: From a State-Centered Approach towards a Human Rights Approach in International Economic Law. In D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002).
18. A. Von Bogdandy, Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization. In S. Griller (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Economic Order* (New York: SpringerWien, 2003).
19. P. Drahos and J. Braithwaite, Hegemony Based on Knowledge: The Role of Intellectual Property. In J. Chen and G. Walker (eds.), *Balancing Act:*

Law, Policy and Politics in Globalisation and Global Trade (Sydney: Federation Press, 2004).

20. G. Shaffer, Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts, *Journal of International Economic Law* 7 (2004), 629 (Mini-symposium issue).
21. R. Howse, Adjudicative Legitimacy and Treaty Interpretation in International Trade Law. In J. Weiler (ed.), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford: Oxford University Press, 2004).
22. S. Picciotto, Private Rights and Public Standards in the WTO, *Review of International Political Economy* 10 (2003), 377.
23. F. Abbott, Distributed Governance at the WTO–WIPO: An Evolving Model for Open-Architecture Integrated Governance. In Bronckers and Quick, *New Directions*.
24. David Held has been one of the most energetic proponents of this concept; for instance D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1994).
25. A. Capling, The Multilateral Trading System at Risk? Three Challenges to the World Trade Organization. In R. Buckley (ed.), *The WTO and the Doha Round: The Changing Face of World Trade* (The Hague: Kluwer Law International, 2003); R. Baldwin, Key Challenges Facing the WTO. In M. Moore (ed.), *Doha and Beyond: The Future of the Multilateral Trading System* (Cambridge: Cambridge University Press, 2004); J. Stiglitz, *Fair Trade for All: How Trade Can Promote Development* (New York: Oxford University Press, 2005).
26. See WTO Press Release PRESS/107, 16 July 1998.
27. See Third World Network website report: Democracy, Transparency don't Exist at WTO, 27 August 1997.
28. For example, P. Drahos, Global Property Rights in Information: The Story of TRIPs at the GATT, *Prometheus* 13 (1995), 6.
29. For insights from an insider, see H. Broadman, The Uruguay Round Accord on International Trade and Investment in Services, *The World Economy* 17 (1994), 283. Broadman was Assistant United States Trade Representative for Services, Investment and Science and Technology.
30. Director-General, These Negotiations Are in Trouble, WTO News: Speeches – DG Supachai Panitchpakdi, 8 July 2005.
31. WTO NEWS, PRESS/229, 28 June 2002; also see GATS – Fact or Fiction, 3 September 2003, at www.wto.org: Services Gateway.
32. A. Mattoo, Services in a Development Round: Three Goals and Three Proposals, *Journal of World Trade* 39 (2005), 1223.
33. For a graphic portrayal of that process, see Drahos, Global Property Rights.
34. C. Arup, TRIPs: Across the Global Field of Intellectual Property, *European Intellectual Property Review* 26 (2004), 7.

35. GATT, *Analytical Index: Guide to GATT Law and Practice*, 6th edition (Geneva: GATT/WTO, 1994). Now see *WTO Analytical Index – Guide to WTO Law and Practice*, at www.wto.org.
36. See in particular T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992) Volume II: Commentary* (Boston: Kluwer, 1994) and J. Croome, *Reshaping the World Trade System: A History of the Uruguay Round* (Geneva: WTO Publications, 1995).
37. There are now Working Procedures for the Appellate Body, which can be consulted at www.wto.org.
38. J. Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (London: Cameron and May, 2002); D. Palmeter and P. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge: Cambridge University Press, 2nd edition, 2004); G. Sacerdoti, A. Yanovich and J. Bohanes (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006); and R. Yerxa and B. Wilson (eds.), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge: Cambridge University Press, 2005).
39. Work pioneered by Robert Hudec, for discussion see M. Busch and E. Reinhardt, Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement. In Kennedy and Southwick, *Political Economy*.
40. Annual Overview of the State of Play of WTO Disputes, at www.wto.org, under Dispute Settlement: The Dispute Settlement Body.
41. G. Shaffer, Recognising Public Goods in WTO Dispute Resolution: Who Participates? Who Decides?, *Journal of International Economic Law* 7 (2004), 459; M. Busch and E. Reinhardt, Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement. In E. Petersmann and M. Pollack (eds.), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford: Oxford University Press, 2003).
42. C. Arup, Perspectives on WTO Dispute Settlement: Negotiated Solutions. In Department of Foreign Affairs and Trade, *Ten Years of WTO Dispute Settlement: Australian Perspectives* (Canberra: Commonwealth of Australia, 2006).
43. J. Greenwald, WTO Dispute Settlement: An Exercise in Trade Law Legislation?, *Journal of International Economic Law* 6 (2003), 6.
44. M. Busch and E. Reinhardt, Developing Countries and General Agreement on Tariffs and Trade Dispute Settlement, *Journal of World Trade* 37 (2003), 719.
45. E. Ghanotakis, How the U.S. Interpretation of Flexibilities Inherent in TRIPs Affects Access to Medicines for Developing Countries, *Journal of World Intellectual Property* 7 (2004), 563.
46. J. Trachtman, The Domain of WTO Dispute Resolution, *Harvard International Law Journal* 40 (1999), 333.
47. C. Arup, The State of Play of Dispute Settlement 'Law' at the WTO, *Journal of World Trade* 37 (2003), 897.

48. J. Weiler, The Rule of Lawyers and the Ethos of Diplomats – Reflections on the Internal and External Legitimacy of WTO Dispute Settlement, *Journal of World Trade* 35 (2001), 191.
49. Eg, M. Trebilcock and D. Solway, International Trade and Food Safety Regulation: The Case for Substantial Deference by the WTO Dispute Settlement Body under the SPS Agreement. In Kennedy and Southwick, *Political Economy*.
50. J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003).
51. Report of the Panel, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, 29 September 2006.
52. Report of the Panel, United States – s.110(5) of the US Copyright Act, WT/DS160/R, 15 June 2000.
53. M. Footer, Developing Country Practice in the Matter of WTO Dispute Settlement, *Journal of World Trade* 35 (2001), 55.
54. D. Ierley, Defining the Factors Influencing Developing Countries Compliance with and Participation in WTO Dispute Settlement: Another Look at the Dispute over Bananas, *Law and Policy in International Business* 35 (2002), 615.
55. For analysis, see the chapters in F. Ortino and E. Petersmann (eds.), *The WTO Dispute Settlement System 1995–2003* (The Hague: Kluwer Law International, 2004).
56. See WTO, Dispute Settlement Body, Report of the DSB Chairman, WTO DOC. TN/DS/9 (2003).
57. See Capling, Three Challenges to the World Trade Organization (2003).
58. R. Keohane, A. Moravcsik and A. Slaughter, Legalized Dispute Settlement: Interstate and Transition, *International Organization* 54 (2000), 457 (Special issue dedicated to legalisation).
59. M. Finnemore and S. Toope, Alternatives to 'Legalization': Richer Views of Law and Politics, *International Organization* 55 (2001), 743.
60. S. Picciotto, The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance, *Governance* 18 (2005), 477.
61. Eg, A. Mitchell, Fair Crack of the Whip: Examining Procedural Fairness in WTO Disputes Using an Australian Administrative Law Framework. In Department of Foreign Affairs and Trade, *Ten Years*.
62. M. Kahler, *International Institutions and the Political Economy of Integration* (Washington: Brookings Institute, 1995).
63. See Weiler, Rule of Lawyers (2001).
64. D. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford: Oxford University Press, 2005).
65. See Weiler, Rule of Lawyers (2001).
66. M. Krajewski, Democratic Legitimacy and Constitutional Perspectives of WTO Law, *Journal of World Trade* 35 (2001), 167.

67. See GATT Panel Report, Canada – Administration of the Foreign Investment Review Act, DS23/R, adopted 19 June 1992, BISD 30S/40. GATT panel reports are also available from www.wto.org, click on Dispute Settlement. They are reprinted in the supplements of the GATT series, *Basic Instruments and Selected Documents* (BISD).
68. Note the interesting discussion in C. Jones, Capitalism, Globalization and the Rule of Law: An Alternative Trajectory of Legal Change, *Social and Legal Studies* 3 (1994), 195.
69. Report of the Panel, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, 5 September 1997.
70. Interestingly, the administrative approach resulted because the Indian Parliament was blocking the amendments to patent legislation necessary to enact the TRIPs provisions, see J. Kelsey, Global Economic Policy-Making: A New Constitutionalism?, *Otago Law Review* 9 (1999), 535.
71. Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, 19 December 1997.
72. The jurisprudence is analysed by A. Chua, Reasonable Expectations and Non-Violation Complaints in GATT/WTO Jurisprudence, *Journal of World Trade* 32(2) (1998), 27.
73. For a summary, see GATT, *Analytical Index*, from p 609.
74. Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, p 18.
75. On matters of procedure and proof, see C. Thomas, Litigation Process under the GATT Dispute Settlement System: Lessons for the World Trade Organization, *Journal of World Trade* 30(2) (1996), 53.
76. Report of the Panel, Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, 22 April 1998.
77. A close account is provided by F. Upham, Retail Convergence: The Structural Impediments Initiative and the Regulation of the Japanese Retail Industry. In S. Berger and R. Dore (eds.), *National Diversity and Global Capitalism* (Ithaca: Cornell University Press, 1996).
78. Report of the Panel, Japan – Measures Affecting Photographic Film and Paper, p 436. The complaint against the measures regulating promotions also failed to establish causality.
79. Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, p 15.
80. An accusation levelled against the Japanese patents system in the past, see A. Wineberg, The Japanese Patent System: A Non-Tariff Barrier to Foreign Business?, *Journal of World Trade Law* 22 (1988), 11.
81. Haochen Sun, Reshaping the TRIPs Agreement Concerning Public Health: Two Critical Issues, *Journal of World Trade* 37 (2003), 163.
82. A criticism made by P. Geller, Conflicts of Law in Cyberspace: International Copyright, *Copyright Bulletin* XXXI(1) (1997), 3.

83. On this point, see Report of the Appellate Body, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, 1 November 1996, comparing Japanese shochu with whisky, cognac and vodka.
84. A useful review is provided by F. Roessler, Diverging Domestic Policies and Multilateral Trade Integration. In J. Bhagwati and R. Hudec (eds.), *Fair Trade and Harmonization: Prerequisites for Free Trade?*, 2 vols. (Cambridge: MIT Press, 1996), Vol. 2.
85. Report of the Appellate Body, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 12 March 2001.
86. See A. Mattoo, National Treatment in the GATS – Corner-Stone or Pandora's Box?, *Journal of World Trade* 31(1) (1997), 107; Mattoo is with the Trade in Services Division of the WTO; see further A. Mattoo and P. Sauve, Domestic Regulation and Trade in Services: Looking Ahead. In A. Mattoo and P. Sauve (eds.), *Domestic Regulation and Service Trade Liberalization* (Washington: World Bank, 2003).
87. Drake and Nicolaidis relate how this idea caught on. W. Drake and K. Nicolaidis, Ideas, Interests and Institutionalisation: 'Trade in Services and the Uruguay Round', *International Organization* 46 (1992), 37.
88. M. Krajewski, *National Regulation and Trade Liberalization in Services* (The Hague: Kluwer Law International, 2003). See further M. Cosy, Determining 'Likeness' under the GATS: Squaring the Circle?, WTO Staff Working Paper, September 2006, at www.wto.org.
89. Analysing NAFTA, Stoyer provided a handy typology; A. Stoyer, Market Access and the North American Free Trade Association, *Transnational Law and Contemporary Problems* 4 (1994), 133.
90. An observation made early on in the Round by H. Ullrich, Industrial Property Protection: Fair Trade and Development. In F. Beier and G. Schricker (eds.), *GATT or WIPO?: New Ways in the International Protection of Intellectual Property* (Munich: Max Planck Institute, 1989).
91. For a recent survey of FTAs, see R. Fiorentino, L. Verdeja and C. Toqueboeuf, The Changing Landscape of Regional Agreements: 2006 Update, WTO Discussion Paper No 12, September 2006, at www.wto.org.
92. E. Mansfield and H. Milner, The New Wave of Regionalism. In P. Diehk (ed.), *The Politics of Global Governance: International Organisations in an Interdependent World* (London: Lynne Rienner Publishers, 2001).
93. A. Capling, *All the Way with the USA: Australia, the US and Free Trade* (Sydney: University of New South Wales Press, 2005).
94. P. Drahos, Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution, *Journal of World Trade* 41 (2007), 191.
95. C. Lawson, 'Flexibility' in TRIPs: Using Patented Inventions without the Authorisation of the Rights Holder, *Australian Intellectual Property Journal* 15 (2004), 141.
96. See Krajewski, *National Regulation* (2003).
97. See for example, GATT, Report of the Panel, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R, adopted

7 November 1990, which is discussed in GATT, *Analytical Index*, from p 522. See further Report of the Panel, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R, 20 May 1996.

98. See Krajewski, *National Regulation* (2003).
99. Report of the Appellate Body, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, 11 December 2000.
100. M. Footer and S. Zia-Zerifi, Case Note: EC – Measures Affecting Asbestos and Asbestos-Containing Products, *Melbourne Journal of International Law* 3 (2002), 120.
101. R. Hudec, The Product-Process Doctrine in GATT/WTO Jurisprudence. In Bronckers and Quick, *New Directions*.
102. C. Senftleben, *Copyright, Limitations and the Three-Step Test* (The Hague: Kluwer Law International, 2004).
103. GATT, Report of the Panel, United States – Restrictions on Imports of Tuna, DS21/R, unadopted, BISD 29S/91. The text of the report is reproduced in *International Legal Materials* 30 (1991), 1594.
104. GATT, Report of the Panel, United States – Restrictions on Imports of Tuna. The text of the report is reproduced at *International Legal Materials* 33 (1994), 839.
105. Report of the Panel, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, 13 February 1998.
106. Report of the Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998.
107. G. Shaffer, United States – Import Prohibition on Certain Shrimp and Shrimp Products, *American Journal of International Law* 93 (1999), 507.
108. For arguments to this effect, see J. Braithwaite, Transnational Regulation of the Pharmaceutical Industry, *Annals of the American Political Science Society* 525 (1993), 12; see further D. Esty and D. Geradin (eds.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford: Oxford University Press, 2001).
109. J. Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford: Oxford University Press, 2005).
110. For commentary, see S. Picciotto, The Regulatory Criss-Cross: Interaction Between Jurisdictions and Global Regulatory Networks. In W. Bratton, J. McCahery and S. Picciotto (eds.), *Regulatory Competition and Co-ordination* (Oxford: Clarendon Press, 1996).
111. G. Griffin, C. Nyland, and A. O'Rourke, Trade Promotions Authority and Core Labour Standards: Implications for Australia, *Australian Journal of Labour Law* 17 (2004), 64.
112. Another version of this approach is the EU principle of 'subsidiarity'.
113. For the criticism, see L. Wallach, Hidden Dangers of GATT and NAFTA. In R. Nader *et al.*, *The Case Against Free Trade: GATT, NAFTA and the Globalization of Corporate Power* (San Francisco: Earth Island Books, 1993). By the same token, the standards would be higher than those of some other countries. Now see J. McMahon, National Regulation and the WTO: One Step Forward, One Step Back. In Chen and Walker, *Balancing Act*.

114. Report of the Appellate Body, European Communities – Measures Affecting Meat and Meat Products (Hormones), WT/DS26/AB/R, 13 February 1998.
115. See now Report of the Panel, Measures Affecting the Approval and Marketing of Biotech Products, regarding 'undue delay' in making assessments under the SPS agreement. With this focus on delay, the WTO has avoided a clash with other international organisations over the precautionary principle.
116. D. Winickoff, S. Jasanoff, L. Busch, R. Grove-White and B. Wynne, Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law, *Yale Journal of International Law* 30 (2005), 81.
117. For a version of this characterisation, see S. Charnovitz, The World Trade Organization and Social Issues, *Journal of World Trade* 28(5) (1994), 17.
118. D. Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge MA: Harvard University Press, 1995); R. Carruth (ed.), *Global Governance of Food and Agriculture Industries: Transatlantic Regulatory Harmonization and Multilateral Policy Cooperation for Food Safety* (Cheltenham: Edward Elgar, 2006).
119. J. Macdonald, It's Not Easy being Green: Trade and Environment Linkages Beyond Doha. In Buckley, *Doha Round*.
120. See J. Mayr and A. Soto, Balancing Biosafety and Trade: The Negotiating History of the Cartagena Protocol. In R. Melendez-Ortiz and V. Sanchez (eds.), *Trading in Genes: Development Perspectives on Biotechnology, Trade and Sustainability* (London: Earthscan, 2005); F. Franconi and T. Scovazzi (eds.), *Biotechnology and International Law* (Oxford: Hart Publishing, 2006).
121. The Declaration is reproduced in WTO *Focus*, No 15, January 1997.
122. B. Hawk, Antitrust Policy and Market Access, *OECD Observer* 201 (1997), 10.
123. M. Malaguti, Restrictive Business Practices in International Trade and the Role of the World Trade Organization, *Journal of World Trade* 32(3) (1998), 117.
124. See the survey at the time by B. Hoekman, Competition Policy and the Global Trading System, *The World Economy* 20 (1997), 383. But also note the findings of S. Sell, Intellectual Property and Antitrust in a Developing World: Crisis, Coercion, and Choice, *International Organization* 49 (1995), 315.
125. F. Scherer, *Competition Policies for an Integrated World Economy* (Washington: Brookings Institute, 1994).
126. Nicolaides, a consultant to the OECD; see P. Nicolaides, For a World Competition Authority, *Journal of World Trade* 30(4) (1996), 131.
127. From within the Trade Directorate of the OECD secretariat, see C. Falconer and P. Sauve, Globalisation, Trade and Competition, *OECD Observer* 201 (1997), 6.
128. C. Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World*, (London: Zed Books, 1990), p 157.

129. For background on these codes, see C. Cabanellas, *Antitrust and Direct Regulation of International Transfer of Technology Transactions*, IIC Studies in Industrial Property and Copyright Law (Munich: Max Planck, 1984) and M. Blakeney, *Legal Aspects of the Transfer of Technology to Developing Countries* (Oxford: ESC Publishing, 1989).
130. A problem for the United Nations codes, see F. Nixson, Controlling the Multinationals?: Political Economy and the United Nations Code of Conduct, *International Journal of the Sociology of Law* 11 (1983), 83.
131. R. Ruggiero, The Fourteenth Paul-Henri Spaak Lecture, Harvard University – see WTO Press Release PRESS/25, 16 October 1995.
132. B. Sweeney, Export Cartels: Is There a Need for Global Rules?, *Journal of International Economic Law* 10 (2007), 87.
133. V. Shiva, *Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology* (London: Zed Books, 1995).
134. S. Picciotto, Rights, Responsibilities and Regulation of International Business, *Columbia Journal of Transnational Law* 42 (2003), 131; see also S. Picciotto and R. Mayne (eds.), *Business Regulation: Beyond Liberalization* (London: St. Martin's Press, 1999).

PART II

SERVICES

CHAPTER 4

THE GENERAL AGREEMENT ON TRADE IN SERVICES

The immediate aim of this chapter is to lay out informatively the provisions of the GATS agreement. The GATS provides both a set of norms for trade liberalisation and a structure for successive rounds of negotiations over commitments to such norms. The initial negotiations took place within the Uruguay Round. Another round started up in the year 2000 and still proceeds.

The chapter underlines the significance for globalisation of a multilateral services agreement. Services have the potential to carry globalising messages far into the reaches of the locality, challenging their domestic arrangements for supply and undermining their competence to regulate for social purposes. The GATS mediates relationships between foreign suppliers, who are often carrying more favourable legalities from their home bases, and local legalities of supply. But the GATS also takes a position on content. It challenges industry-specific regulation and promotes market-oriented regulatory 'modalities' such as contract law and possibly competition law.

The status and format of the GATS are the chapter's first concerns. The chapter recognises that a key mediation technique is the way the negotiations over commitments have been structured. This chapter investigates the listings approach of the GATS: the way national governments were permitted to control the exposure of their regulatory measures sector by sector. The course of the negotiations is also characterised. The chapter shows how this process gave expression to a range of reservations about liberalisation and it notes the overall outcome of negotiations within the Uruguay Round. It reports on the

outcome of the commitments in one of the sectors where negotiations carried over after the conclusion of the Round – the financial services sector. Commitments in several other key sectors are assessed in Chapters 5 and 8. Since 2000, a new round of negotiations has been running and this chapter reports on the obstacles that have been encountered in obtaining fresh commitments to liberalisation. Meanwhile, the dispute settlement bodies have decided a major case concerning the interpretation of the scope of a member's existing commitments.

A major task of this chapter is to assess the strength and substance of the GATS norms. It starts with the familiar principle that government measures should not discriminate against foreign services and service suppliers. To promote the GATS as a multilateral compact, one component of this principle, most-favoured-nation treatment, is a general obligation. It means that commitments could not be conditional on reciprocity. But the chapter highlights how provision was made for members to take exceptions and the use they made of this allowance. The other component of non-discrimination is national treatment. In the GATS, members must make specific commitments to national treatment – it is not a general obligation. Nonetheless, it has power as a norm when the agreement takes an expansive view of services and embraces all possible modes of supply, including commercial or natural presence within the territory of a member. The chapter considers the extent to which commitment to the norm allows a member to treat foreigners differently; the foreign services must be 'like services' for the norm to be applicable. A twist in the tail is the specification that formally identical treatment of locals and foreigners may amount to less favourable treatment.

The chapter goes on to highlight the implications of the norm of market access for regulation in services sectors and particularly its potential to advance the neo-liberal agenda of regulatory reform. It remains consistent with national treatment for members to restrict the free play of markets, provided they do so for locals as well as foreigners. Chapter 4 gauges the extent to which the norm of market access is intended to put pressure on the non-discriminatory regulation of services markets. Again, the dispute settlement ruling is relevant to this question.

The chapter then appraises the scope of the agreement's recognition of regulatory objectives. Certain objectives enjoy the status of limited, legitimate exceptions to these norms. But the space explicitly conceded

by the GATS comes at a price. The chapter notes that the disciplines applied to this regulation tend to narrow the members' choice of regulatory instrument. The dispute settlement ruling is relevant. The chapter looks too at the Article VI work around disciplines for domestic regulation in the new round of negotiations.

The main thrust of the GATS is deregulatory; it attacks non-conforming national government measures. Finally, the chapter looks for indications that the agreement will provide support for re-regulation. As government measures are rolled back, trade norms increasingly focus on private barriers to market access. The trade norms begin to develop a more demanding notion of how private barriers receive government support, including the support of government inaction. But the current norms carry limited potential for this agenda. Instead, it could be that competition law will be enlisted as a means to break down (what foreign suppliers tend to see as) collusive and closed domestic producer relationships. Does such an agenda open up the possibility that competition law will play a positive role for small and independent producers in disciplining the restrictive business practices of transnational suppliers?

EMERGENCE OF THE GATS

A trade agreement for services

The idea of a services trade agreement was raised first in the Tokyo Round. With industry encouragement, the US initiated a fully fledged campaign. The proposal was adopted at the GATT Ministerial Meeting in November 1982, enabling preparatory work to be undertaken. The 1986 Punta del Este Declaration included trade in services, carefully identifying three objectives: a multilateral framework of principles, progressive liberalisation, and respect for the policy goals of national government and regulatory autonomy. Developing countries were still generally opposed to an agreement but they were distracted from putting up a fight by negotiations over other agreements. From the Negotiating Group, the Chairman produced his own draft and it was swept up in the Dunkel Package of agreements.

The General Agreement on Trade in Services (GATS) is a significant WTO agreement. Not only do services comprise a growing proportion of international trade overall, but the ways in which services are supplied provides potential to undermine the economic sufficiency, political sovereignty and cultural identity of the locality. Services,

particularly those with intellectual content, carry far deeper messages than goods. They traverse fields clearly connected with social relations, professional, financial and communications fields that are likely to shape the structure of a global society. Services provide means to introduce fresh, foreign perspectives, construct cross-border transactions and affiliations, question the value of parochial knowledge and custom, and undermine the competence of local regulation.

Yet many services retain distinctive geographical, temporal and personal features. While international suppliers will use various strategies to try to overcome these particularities, the provision of services is likely to remain tied into their local contexts. In many services sectors, effective supply still depends on being able to establish a presence in the locality, to be there at the right time, and to demonstrate familiarity with the local ways of doing things. But the suppliers who seek to obtain competitive conditions of access behind the border encounter a host of regulatory legalities that run counter to their own legalities of operation. As a consequence, both the suppliers and the locals become involved in attempts to reconcile these legalities.

Trade in services has already been mediated by a web of bilateral, regional and sectoral arrangements.[1] However, the GATS is the first fully fledged multilateral agreement on services. Services were to be a new field for the GATT which, as we have seen, was previously occupied with barriers to trade in goods. Furthermore, the essential approach taken by the GATT was to assimilate those trade barriers to a common measure of tariffs and then to seek reductions in these quantitative impositions on trade in goods. Services can be incorporated in goods, but often the heart of services is the relationship between providers and users.[2] So it can be more difficult to keep track of services supply than it is trade in goods. Certainly, there is a wider ambit to the domestic measures which might be implicated by the application of trade norms. Transparency of regulation is difficult to obtain. Such lack of comparability between trade in goods and trade in services was to provide an argument why a trade agreement should not be made for services. It was also to raise questions about the suitability of extending many of the GATT concepts to the GATS; one such example is the provision for anti-dumping procedures and remedies.

Yet the objections to a services agreement were not just technically minded. The GATS produced a broad framework for negotiations over the liberalisation of trade in services. The agreement embraces all but a narrow category of services and actually leaves the definition of services

at large. It comprehends all possible modes of service supply, not just cross-border supply but also supply through a commercial presence or presence in person within the territory of another country. It then subjects the regulation of these supply activities and modes to the norms of national treatment and market access. Regulatory arrangements, operating deep behind the border and representing all sorts of economic, political and cultural concerns, may become barriers to trade. For one practised commentator, such inclusiveness dramatically changed the political economy of multilateral trade liberalisation.[3]

In these circumstances, we should ask why countries were prepared to expose their services sectors to the norms of a multilateral trade agreement. In gauging the scope of the agreement, it is handy to note some suggestions why they did so, before identifying ways in which the agreement allowed them to limit its scrutiny. We might begin by saying that all countries reveal strengths and weaknesses, confidences and sensitivities, when they contemplate exposing their services sectors to the competition of international trade. As a general rule, we might expect the developed countries of the north to be favoured by liberalisation. But this bias depends a great deal on which sectors are included. Would they include those sectors which are labour intensive or culturally diverse as well as those which are capital intensive and technology based?

Liberalisation of trade in services

Certainly, countries that have been losing their advantages in the trade of manufactured goods, like the US, see knowledge based services as an opportunity to redress trade balances. But the range of countries which identify prospects in services is broadening: India's strength in computer software provides an example. So too the enhanced transportability of services allow labour factors to come into play. For example, new technologies enable services such as information processing and call centres to be provided off-shore. A broad multilateral agreement provides an opportunity for concessions in one service sector to be traded off against advances in another. Of course, within the compass of the Uruguay Round overall, the negotiations involved the extra leverage of linking access to services markets with access to markets for various types of goods.

Nonetheless, as hard headed as the negotiations often were, the GATS is also the product of an idea which gained legitimacy. Enough countries came to accept the idea that services could be

regarded as a commercial activity amenable to international trade.[4] Perhaps the receptivity of many countries was enhanced by their own domestic programs of liberalisation. The stimulus for these programs is to be found within the countries themselves, along with the initiatives of their trading partners and, in some instances, the prescriptions of international organisations such as the World Bank and the International Monetary Fund. Latterly, such national reform programs have shifted their attention directly to the service sectors, advocating the privatisation of public monopolies, the removal of statutory immunities, and the application of competition requirements. From this perspective, services are seen as major cost items for the operation of domestic industry; they are also increasingly regarded as a source of exports growth in their own right.

Yet we might expect many countries to retain reservations about wholesale liberalisation. For example, they might see that concessions could be made on home territory without any real guarantee of access being obtained to markets overseas. Even where government restrictions are rolled back, the close relationships between local businesses or the cohesion of local cultural practices can act as effective barriers. At the same time, concessions volunteer up controls at home that are not so much concerned with economic protection as with aspects of political autonomy and cultural integrity. Furthermore, even where countries do decide to afford access to foreign suppliers, they may wish to retain the freedom to apply regulatory measures to them. They remain concerned to safeguard local conditions or to obtain benefits locally from the foreign participation. For example, cautious governments might prefer to moderate incrementally the interface between local development and foreign participation, especially, if at the same time, they are managing a major transition to a market economy and possibly a more liberal society politically and socially. Liberalisation of services supply is not just about markets in services; it is connected to the development of markets in corporate governance, financial trades, investment decisions, tax avoidance, and gambling and other consuming passions.[5]

So the design of the architecture of the agreement was crucial too. The GATS contains features to accommodate this natural caution about concessions and commitments. We shall see that the agreements' own norms lack specificity. While GATT jurisprudence helps to cast light on the norms, it is perhaps only when they are applied to specific services measures that their implications will be properly appreciated.

Moreover, the agreement's particular approach to the making of commitments allows considerable scope for restrictions to be maintained. This positive listings approach to the national schedules of commitments permits members to withhold sectors from the scrutiny of the norms. In the sectors which they do inscribe, they may enter non-conforming measures as limitations on national treatment and market access. In the Uruguay Round itself, countries were to take advantage of both these options.

Yet the same process enables countries to bargain hard with other countries for commitments. They have had opportunities to hold out, if they do not think the balance of commitments is right, if they think for instance that they are offering more than they are being given in return. Once a country has submitted a sector, it is true to say that the agreement is multilateral and they must take what each other country has been prepared to commit. But it is notable that certain countries, such as the US, pursued the opportunity to take exemptions from the agreement's MFN obligation as a way of pushing along other countries which it thought were not sufficiently forthcoming. It had some success with this strategy. Negotiations in several key sectors were extended beyond the end of the Round and further commitments to liberalisation resulted.

Furthermore, we should appreciate that the agreement has an in-built momentum towards liberalisation. Already, the members have undertaken to engage in successive rounds of negotiations, the first of which commenced in the year 2000 (Article XIX), together with a work programme regarding disciplines for domestic regulation. In the meantime, the dispute settlement process has afforded an opening for a member to argue an expansionist interpretation of the norms, for example in relation to the kind of government measures (or possibly non-measures) that fall foul of them. We foreshadowed this possibility in Chapter 3. But we shall pursue it again here as we work through the agreement.

STATUS AND FORMAT OF THE AGREEMENT

This introduction begins to indicate how the particular structure of the agreement exerted an influence over the negotiations. In analysing the structure of the agreement, we need first to clear some formalities. The GATS is styled as a multilateral trade agreement in its own right. But, unlike the side codes which were formulated in the Tokyo Round,

which were the first of the GATT moves behind the border, it is not a voluntary optional agreement. As Annex 1B, it is an integral part of the WTO Agreement and hence, like other such multilateral agreements and their associated legal instruments, it is binding on all members of the WTO. That is to say, it is a condition of membership of the WTO. So membership of the WTO requires acceptance of the general obligations which are set down in the GATS.

Membership also depends on annexing a schedule of commitments to the GATS itself. Those countries which took part in the Uruguay Round and signed up for membership of the WTO have already submitted such schedules. Article XX of the GATS provides for each member to set out in a schedule the specific commitments it undertakes under Part III of the GATS. After the last minute adjustments to offers, the close of the Round was succeeded by a period of ratification and verification, leading up to the meeting of government representatives at Marrakesh to sign the Final Act. This procedure permits us to treat the annexed schedules as an authoritative record of these commitments. The members' commitments are to be found in the schedules of specific commitments which have now been collected in volumes 28–30 of the *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*.[6]

We should also note that, now it is in force, the GATS has become difficult to alter. Generally, amendments to the GATS take effect on acceptance by two-thirds of the members, with amendments to Part II and III and the respective annexes taking effect only for those who accept the amendments. Amendments to Article II:1 dealing with the MFN obligation must be agreed by all members. It is also worth noting that it is difficult to resile from the individual national commitments which have been made under the GATS. Schedules of commitments may only be modified after three years and, on giving notice of modification, members may be required to make compensatory adjustments to other members (Article XXI). These adjustments should maintain the general level of mutually advantageous commitments which pertained prior to the modifications. Such adjustments must also be made on a most-favoured-nation basis.

Scope and definition

The GATS is divided into six parts. But first it provides a preamble that may assist with the interpretation of the directive provisions. The preamble contains aspirational statements which emphasise the goal

of progressive liberalisation of trade in services. But they acknowledge the right of members to regulate in order to meet their national policy objectives. The particular needs of developing countries are recognised, though, in keeping with the outlook of the agreement, it is suggested that these needs include increasing participation in trade and expansion of exports through the strengthening of the capacity, efficiency and competitiveness of their various service sectors.

The first substantive Part addresses the agreement's scope and definition. Here, it contains important indications of the services, the modes of supply of services, and the measures by members, which fall within the scope of the agreement. Article I:1 states that the agreement applies to measures by members affecting trade in services. All 'services' are encompassed by the agreement, except services supplied in the exercise of governmental authority (Article I:3(b)). While many kinds of services may be linked to government (eg, the practice of law) the delineation of this exclusion is minimalist: services supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Interestingly, the base point concept of 'services' is not otherwise defined. This really leaves the actual scope of the agreement at large. For instance, with the WTO joining the enthusiasm for e-commerce, it has been considering whether to place electronic transmissions under the cover of the GATS rather than the GATT. Nonetheless, for most practical purposes, the course of the negotiations and the schedules of commitments were largely to determine which sectors were exposed to the agreement. We remember that the key national treatment and market access norms only apply in those sectors which members inscribe in their schedules. The GATT's own sector classification list helped to mark out these sectors within the national schedules of commitments.[7] The list also received recognition in the Dispute Settlement Understanding (DSU) where it deals with cross-sector retaliation for non-compliance (Article 22:3(f)).

For the purposes of the agreement, trade in services is defined as the supply of a service by one or other of four modes of service supply (Article I:2). The modes are: (a) supply from the territory of one member into the territory of another member; (b) in the territory of one member to the service consumer of any other member; (c) by a service supplier of one member, through the commercial presence in the territory of any other member; and (d) by a service supplier of one

member, though presence of natural persons of a member in the territory of any other member. Later, we shall have something to say about the ways in which the agreement elaborated or confined these modes of supply.

The agreement applies its standards to measures by members affecting trade in services. Measures by members means measures taken by central, regional or local governments and authorities; but also by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities (Article I:3). As we have already begun to appreciate, the concept of measures is an expanding one. Article XXVIII defines it to mean any measure by a member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form. Again, we should see how this expansive approach increases the significance of the prescriptive provisions.

Substantive and procedural requirements

The second Part lays down the agreement's general obligations and disciplines. The most significant of these is the requirement of most-favoured-nation treatment (MFN) in Article II. As we have acknowledged, MFN treatment is an obligation with a GATT pedigree. We identified the content of the norm in Chapter 3 and here we must consider its application to measures which affect trade in services. We must also consider what it means to say that the obligation is a general one, given the discretion which members enjoy to decide whether to make commitments to national treatment and market access. Part of the consideration is the allowance made for the listing of exemptions from the MFN obligation (Article II).

Part II follows up with an obligation that measures be made transparent (Article III). The remainder of Part II is largely concerned with recognising exceptions to the norms of the agreement and placing disciplines upon the non-conforming measures which members maintain. We shall also examine these exceptions and disciplines below.

At the heart of the agreement, in Part III, lies a structure for the process by which members are to make specific commitments to national treatment and market access. At the same time, the agreement provides definitions or, more precisely, indicators of the standards of national treatment and market access which the members are to meet in making their commitments. Unlike NAFTA or the European Treaty, for instance, the agreement does not impose obligations of a

general nature to provide national treatment or market access. Legally, it is within the individual member's discretion in the negotiating process to decide the extent of its commitments. The less prescriptive concept of the 'norm' can best capture this approach.

Nevertheless, there is interplay between the normative structure of the agreement and the process of commitment. While the commitments can be described as essentially voluntary or discretionary, as we shall attempt to illustrate below, the agreement has a thrust to it. Where a member decides to enter a sector, it submits many of its measures to the requirements of the agreement. A range of non-conforming measures must be listed. These requirements bear on all service sectors which are inscribed but they are augmented in respect of certain key sectors by the elaboration of special annexes to the agreement.

The tenor of the agreement

This brief outline begins to reveal the dualistic nature of the GATS. It has appealed to some countries because it appeared to place liberalisation within the framework of a multilateral rule-based system. All members must respect the obligation of most-favoured-nation treatment and work towards the liberalisation of national treatment and market access. On this basis, the smaller countries could expect to enjoy the benefits that had been offered and obtained by the major players in the negotiations. The commitments would be specific and binding. They could look forward to an orderly process of implementation. Even where liberalisations were not forthcoming, they could gain valuable intelligence about the extent of restrictive measures in other countries. At the same time, they could in a sense legitimise their own restrictive measures.

However, the degree to which the agreement 'juridifies' the process of liberalisation is yet to be determined. As we shall see, its approach to the making of commitments works against the development of a jurisprudence. Such flexibility and proceduralism may have been important to the acceptance of any framework at all; they are certainly in keeping with the style of the GATT in the past. They allow members room to move, so that much of the real substance of the interface is constructed, sector by sector, in a fluid and ongoing process. Nevertheless, the potential for further juridification might be detected in several quarters; the tentative attempts at elaboration of norms within the GATS itself, the availability of prototypes from the experience with other

agreements such as the European Treaty, the institution at the WTO of a more emphatic disputes settlement procedure, and ultimately the successive rounds of GATS negotiations which have been foreshadowed.

GATS listings approach

Before considering the content of the norms, some observations on the process of making commitments to them is appropriate. The agreement's approach to the listing of commitments has been characterised as a hybrid one. Members first choose which sectors to list positively in their schedule of commitments. Within the sectors they have inscribed, they must then decide which limitations on national treatment and market access to list negatively. The agreement is at its most voluntary, formally speaking, at the initial point of deciding whether to list a sector in a schedule of specific commitments. In comparison to other agreements such as NAFTA and CER, or the recent US FTAs, there is no initial inclusion of sectors, whereby the onus is cast on countries taking part negatively to delineate the scope of the sectors they wish to reserve from the scrutiny of the agreement.[8] In other words, sectors are not caught up by default, failing an express exclusion. Such an approach would cast the onus upon the members to delineate very carefully the sectors they wish not to expose and countries might therefore be inclined to 'carve out' broad reservations to keep their regulatory options open.

Of course, a positive listing approach may encourage caution in its own way; the scope of the sectors which are committed might be circumscribed in a conservative way. For once a sector is inscribed, the member country is meant to be held to the limitations which it actually lists. The Guide to the schedules states that:

> When making a commitment a government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict access into the market or the operation of the service. Specific commitments thus have an effect similar to a tariff binding – they are a guarantee to economic operators in other countries that the conditions of entry and operation in the market will not be changed to their disadvantage.[9]

It follows that, even if a country was prepared to go to the trouble of listing all its existing limitations, that is to make a 'stand-still commitment', it might prefer to keep its regulatory options open for the future.

A decision not to inscribe a sector would express a preference to remain free to move on changes in the sector with new regulations. One reason is that the global carriers may well afford suppliers the capacity to bypass the technology and industry-specific controls which the members have had in place.

Such a concern is evident from an inspection of the individual country schedules. Certain sectors such as legal services were withheld from the listings entirely. Where some offer of a sector was made, we find that the description of the sector is used to limit the scope of the activities in which the foreign suppliers may engage. A column for 'additional commitments' sometimes elaborates on this circumscription. The columns for national treatment and market access then list the specific limitations on the availability of some or all of the four different modes of supply with this sector scope. Hence, a commitment might say that foreign lawyers can advise on their home law but then require that they do so by establishing a presence in the member's territory.

Once a sector is inscribed, the listing becomes more of a formal obligation. Article XX prescribes that each member sets out in a schedule specific commitments it undertakes to provide for market access and national treatment. With respect to sectors where such commitments are undertaken, each schedule shall specify: (a) terms, limitations, and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertakings relating to additional commitments; (d) where appropriate, the time frame for implementation of such commitments; and (e) the date of entry into force of such commitments. So, in listing a sector, a member attracts an onus to provide intelligence about its remaining regulations. It should also have to determine which of those regulations it wishes to retain as a matter of policy.

Notwithstanding this onus, it is evident that members availed themselves of the negative listing option. Certain entries are cast as horizontal limitations, that is, limitations across all of the sectors inscribed in the schedule. For example, a member might reserve a review and conditioning procedure for any direct foreign investment in its country. Other entries represent sector-specific limitations. In many cases, they listed their existing limitations, that is, they made stand-still commitments. The actual format of the schedules allowed the members further leeway. Instead of being required to itemise all the limitations they wished to retain, the Guide suggests that members were permitted to

choose to indicate a limited commitment by describing what they were offering rather than the limitations they were listing. This option was combined with an entry that commitments were otherwise 'unbound', that is to say 'the member wishes to remain free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment'.[10] While often employed in relation only to a particular mode of supply, and especially to supply through the presence of natural persons, this approach tempered the force of the process. It blunted the pressure that would have been generated by a 'list it or lose it' requirement.

Dispute settlement

What processes are established to ensure compliance with obligations and commitments under the GATS? The benefits of its obligations and commitments are extended to the services and service suppliers of other members and these beneficiaries are identified in the definitions within Article XXVIII. But the agreement is of course addressed to the national governments of the member countries. While Article VI seeks to afford suppliers 'standing' to obtain review where they are affected by an administrative decision, it does not say whether they may invoke directly the obligations of the agreement or the commitments made under it in such proceedings. No provision is made for access to an international tribunal. As a source of rights to private persons, the agreement depends on how national legislators translate the terms of this inter-governmental public law into domestic law. In some countries, it is possible to talk of treaties as being self-executing. In others, domestic courts may choose to draw on international standards which have not been legislated into local law, if they see them as capable of constituting individual rights. Largely, however, compliance with the GATS agreement is likely to be a function of the WTO's own government-to-government dispute settlement process.

We know that the Uruguay Round produced an intensive effort to bolster the sanctioning power of the WTO. The new Understanding on Rules and Procedures Governing the Settlement of Disputes was adopted. The Understanding staggers the process of dispute settlement and builds in various checks and balances, but we have noted that the essential change to the GATT process is the introduction of an element of 'automaticity' into the procedure for consideration of the dispute and the provision of remedies for non-compliance. The process was described in Chapter 3.

Articles XXII and XXXIII link the GATS to the Understanding. Specifically, Article XXII:1 provides support for consultations over matters arising under the agreement. Article XXIII:1 provides that any member which considers that another member has failed to carry out its obligations or specific commitments under the GATS may have recourse to the Understanding with a view to reaching a mutually satisfactory solution. Article XXIII:2 empowers the Dispute Settlement Body to suspend the application of a member's obligations or specific commitments if it considers the circumstances are serious enough to justify such action.

The GATS allows non-violation complaints. Article XXIII:3 allows recourse to the Understanding if a member considers any benefit it could reasonably have expected to accrue is nullified or impaired by the application of a measure which does not conflict with the provisions of the agreement. The Article specifies that, if there is nullification or impairment, the member will be entitled to a mutually satisfactory adjustment which may include the modification or withdrawal of the offending measure. In the event an agreement cannot be reached, suspension can be authorised. In Chapter 3, we mentioned that the Understanding envisages the possibility of cross-retaliation, that is, the suspension of concessions or other obligations pertaining to other sectors within the same agreement, or to other covered agreements, and not just to the sector in which the nullification or impairment has been experienced. In the case of the GATS, the developing countries argued against cross-retaliation and there was talk of postponing this connection between the GATS and the other agreements. For non-compliance with the GATS, the Understanding confines retaliation to sectors within the GATS itself (see Article 23:3(g)(ii)).

United States – Gambling Services

United States – Gambling Services was the first dispute settlement case to focus squarely on the interpretation of the members' obligations and commitments under the GATS.[11] In this dispute, the tiny state of Antigua and Barbuda challenged the US federal and state law prohibiting its citizens from taking up gambling and betting services off-shore electronically, in other words accessing Antigua and Barbuda websites from within the US. Antigua argued that the US had entered such services in its schedule of commitments and placed no limitations on the mode of cross-border supply. Once it inscribed, it was obliged to list its prohibition as it was a market access limitation falling within

Article XVI:2. The US opposed these claims and also argued that its limitations qualified as one of the exceptions allowed in Article XIV. Antigua failed to establish a *prima facie* case regarding the state laws so the case proceeded on the national measures.

Whether the US made a commitment with respect to gambling services depended on the interpretation of its schedule entry. One of its entries was 'other recreational services (other than sporting)'. The Appellate Body interpreted the US schedule as a part of the GATS agreement itself. As per Article 31(1) of the Vienna Convention on the Law of Treaties, it should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. The Appellate Body thought the ordinary meaning of other recreational services could include gambling and betting services, while on the other hand the ordinary meaning of sporting services would not.

The Appellate Body was offered various aids to interpretation. It would not compare the entries other countries had made because there were too many different approaches to draw inferences. Neither would it take instruction from the 1993 Scheduling Guidelines as part of the GATS context because they had not been agreed, nor the 2001 Guidelines because they were only for prospective use. However, given the ambiguity in the terms of the schedule, the Appellate Body could avail itself of supplementary means. As part of the *travaux preparatoires*, the 1991 Services Sectoral Classification List (W/120) incorporating the UN CPC and the 1991 Scheduling Guidelines became relevant. The Appellate Body thought it significant that the US had been advised by the Guidelines to disaggregate services to make its intentions clear. Also, the CPC classification for sporting services did not include gambling services.

URUGUAY ROUND LISTINGS

Level of commitments

By the end of the Round, members had completed their schedules for all but a couple of sectors. It is difficult to assess the commitments made. A proper judgement would require information about the level of the restrictions which have been lifted when compared with those remaining. We would also have to think in terms of the economic and social values of the service activities affected. The assessment of the commitments has tended to be somewhat formalistic. We know that

some ninety-seven schedules were submitted, involving 106 member countries.[12] The number of sectors inscribed ranges from one or two up to the whole of the 155 sectors on the GATT's own sector classification list.[13] Among the developing countries overall, slightly less than one-fifth of all these sectors were inscribed while, for the developed countries, the proportion rose to around two-thirds. Goode estimates that, in economic terms, these listings comprised 15 and 53% of all services respectively.[14] There were to be significant omissions, even in the case of the largest developed countries. Perhaps the greatest reservations about the benefits of participation were to be seen in the schedules of the dynamic, emerging economies, the newly industrialising countries, especially those of South East Asia.

Where commitments were made, they largely represented what has been called a stand-still position. Members undertook to keep measures at their present level though, occasionally, they would leave these commitments 'unbound'. Making distinctions between modes of supply, the limitations were both horizontal and sector-specific. Altinger and Endes found that limitations were placed on the presence of natural persons in 92% of the entries and on commercial presence in 70%. Limitations were less prevalent in the case of cross-border supply and consumption abroad, but then again these modes were more likely to be ruled out altogether. The combinations reflected the developing countries interest in foreign direct investment. They sought local establishment but wished at the same time to place controls on the form which the establishment took. Developed countries were freer with the form of investment but wanted to retain the right to give local firms subsidies, for instance for research and development. Developed countries were comfortable with intra-corporate transferees but all countries restricted access by natural persons and especially by self-employed service providers.

The MFN exemptions were also significant, running to 350 entries.[15] Some represented the fact that bilateral arrangements had already been made. But in important sectors they were to represent a challenge to the multilateral rule-based ethos of the agreement.[16] They were efforts to gain leverage in the negotiations and insist on material reciprocity.

Ultimately, any assessment of the commitments depends on whether we support liberalisation or not. From the free trade standpoint, the responsibilities of participation in the agreement had the appeal of providing national governments with a rationale for making commitments that would counter domestic opposition and lock in

liberalisation initiatives at home. Nonetheless, this perspective is inclined to say that the positive listing approach allowed an opening for the expression of divisions at the national level. Such an approach boosted the importance of domestic political factors. Negotiating positions were to be influenced by the perception of sector-specific gains and losses, perceptions shaped by the particular configurations of the communities or networks of industry representatives, public officials and government ministers.

Supporters of free trade portray this process as giving expression to national interest group politics, at considerable expense to those constituencies who would benefit by generalised or principled liberalisation. Free traders tend to point to the aggregate benefits of liberalisation, especially for the consumers of services. Nonetheless, if we are to understand how the process operated, we should appreciate that liberalisation is criticised for having negative consequences for local populations. It has been argued that small business suppliers, workers in both public and private sectors, and those dependent for services on nation states and local communities, can all lose out to foreign competition.[17]

Sources of reservations

If this perspective carries weight, then one reason why certain sectors were not inscribed was a desire to nurture a local service industry. Countries might see little benefit in liberalisation, if their own suppliers were not yet able to compete effectively, either in the domestic market or in export markets. Such sensitivity is most readily attributable to the developing countries, though we have made the point that all countries have service industries which they wish to protect.

Across the board, the Uruguay Round revealed less willingness on the part of the developed countries to afford the developing countries the special and differential treatment which has been associated with the GATT in the past. In the case of the GATS, the listings approach provided scope to maintain protections on a case-by-case, rather than a categorical basis. Recognition of this outlet is to be found in Article XIX which foreshadows the successive rounds of negotiations to obtain specific commitments. It allows for the process of liberalisation to take place with 'due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors' (Article XIX:2). Embodying a form of words that was offered by Canada and the Nordic countries,[18] it envisages that 'there shall be

appropriate flexibility for individual developing country members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV'.

This final clause refers to Article IV which urges members to negotiate specific commitments to increase the participation of developing countries. Here, the agreement has in mind participation in an international economy for services. Their industries can be strengthened by access to technology, through access which is on a commercial basis. Access to distribution channels and information networks will also enhance participation, together with liberalisation of access in sectors and modes of supply of export interest to them. So, the ways in which developed countries fashion their own commitments are meant to lend assistance. These countries are also meant to provide technical cooperation such as information about their own markets. However, it has to be said that these provisions are essentially declarations of good intentions on the part of the members. Article IV recognises that the developing countries need more than open access to export markets. They need access to resources that are in private hands. Here, as we have identified, a key issue is the attitude of the developed countries to the restrictive business practices of the service suppliers themselves.

Beyond economics, cultural and social reservations can also be read into the schedules. Other agreements such as NAFTA and the OECD Codes have provided explicitly for such reservations. The GATS contains no provision for such a 'cultural exception', despite the suggestions made early in the Round to include one by countries as diverse as India, Canada, Egypt and members of the EU. Cultural sensitivities are evident in the omission of whole sectors from the schedules, such as the audio-visuals and legal services sectors. Such sensitivities are also registered in the horizontal or across the board limitations which many countries applied to the sectors which they did list, especially the limitations they placed upon the entry of natural persons or direct foreign investment. Of course, they might also appear in the sector-specific limitations and the case studies in following chapters are designed to elicit such information. In other words, the desire to retain freedom to impose restrictions or requirements was not simply a desire to protect the economic interests of local industry. The sensitivities are

perhaps most readily recognised in the concerns expressed within certain Middle-Eastern and Asian countries. In extremis, this perspective sees liberalisation as a new, cultural form of imperialism or as neo-colonialism. However, even in the west, countries like France, Canada and Australia expressed concern about the potential for the US media industries to dominate their local markets.

Another reservation about liberalisation stems from the desire to maintain regulatory competence. As the EU appreciated, in opposing the early US initiative for a negative listing approach, disaggregation enabled the negotiations to attend to the divergent specificities of each sector. On this view, each sector was seen to represent different issues. The special annexes which were produced for sectors such as financial and telecommunications services represent the high point of this approach, though it should be noted that arguments for special annexes in some sectors, notably audio-visuals and legal services, were resisted. But we should appreciate that the concern with competence runs beyond the integrity of the sectors themselves. It is apprehensive that liberalisation of services flows will undermine the effectiveness of regulation across a broad range of national objectives. The impact of freer financial and professional services on the capacity to collect taxes is a good example.

Some of those commentators who support greater liberalisation have expressed regret about the way the commitments were permitted to be listed. In particular, they identify the decision to permit the schedules to split commitments among the four modes of supply. In part, this criticism is based on the observation that the modes are complementary rather than alternative for some service suppliers; it can even be difficult factually to distinguish between the modes being adopted. Moreover, they sensed that this format made it easier for members to pick and choose between modes of supply. In the extreme, a member could choose to restrict that mode which seemed to suit the foreign supplier over the local supplier. From the standpoint of trade liberalisation, a more purposeful approach would have been for service suppliers to seek guarantees about the combination of modes which best met their needs.

Yet we should realise that member governments wanted to maintain distinctions between supply modes out of a concern for regulatory competence. Of course, the presence of natural persons often emerged as a sensitive mode but, interestingly, it was cross-border supply as much as commercial presence and thus foreign direct investment,

which encountered limitations. Sauve suggested that some countries saw *requirements* of establishment as affording greater regulatory oversight and strategic bargaining power.[19] So, while, the listings approach means that the agreement provides no right of establishment, equally, suppliers enjoy no right of non-establishment. Some of the US FTAs have sought to counter this.

THE MFN NORM

Article II:1 states 'with respect to any measure covered by this agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable that it accords to like services and service suppliers of any other member'. The discussion in Chapter 3 considered the broad nature of the norm. It also indicated that its coverage can vary. Here, we should appreciate that it is for the benefit of the services and service suppliers of the member countries only. But, at the same time, the obligation is not confined to treatment under measures pertaining to the sectors or modes of supply which countries choose to list in their schedules or to which they make specific commitments. The obligation is a general one in the sense that members must multilateralise all measures of which the agreement has cognisance – those covered measures are any measures affecting the supply of services. So it differs in this way from the agreement's 'obligations' regarding national treatment and market access.

Nonetheless, this general obligation has sat uncomfortably with the actual process of negotiations over national treatment and market access. While in spirit a multilateral and multi-sectoral process, the settling of specific commitments was still to be in Broadman's words a function of 'iterative bilateral request and offer negotiations conducted seriatim on a country by country basis'.[20] We might also say on a sector-by-sector basis. Countries displayed reluctance to make offers without knowing the value of concessions forthcoming from other countries. Unless a way was found to involve them, there was a temptation for countries to hold out in negotiations, only to 'free ride' on the commitments made by others. Yet many countries had legitimate reasons for being cautious about exposing their service sectors to foreign competition. In Chapter 3, we began to discuss the content of the no less favourable treatment that must be afforded under this obligation; we shall do so again below in the discussion of national treatment.

MFN exemptions

At the same time, provision was made for member countries to take exemptions from the MFN obligation (Article II:2). There was an obvious reason for this provision. Prior to negotiations, countries might have already arranged special reciprocal rights with other countries that they wished to honour. The elaborate pattern of air traffic landing rights was expressly conceded in the Annex on Air Transport Services. A more *ad hoc* instance comprises the arrangements which have been made for co-production of films in the audio-visual services sector.

Provision for MFN exemptions was however to have a more profound impact on the pattern of commitments. Legally speaking, members were permitted to maintain measures inconsistent with the MFN obligation simply by listing them. Again, there were some limits bound up with the decision to make commitments under the agreement. The MFN exemption was not meant to detract from the commitments which a member did make in its schedule. The Guide states:

> Where countries are entered, therefore, the effect of an MFN exemption can only be to permit more favourable treatment to be given to the country to which the exemption applies than is given to all other Members. Where there are no commitments, however, an MFN exemption may also permit less favourable treatment to be given.[21]

So, where the entry of some commitments is considered worthwhile, the MFN exemption provides scope to reward another country on the basis of material reciprocity by making further concessions to it. The result can be characterised as a base line of MFN with a top-up of material reciprocity. Yet, while the MFN obligation is meant to be a general one, this approach to exemptions allows a member, by choosing to make no commitments, to continue to operate exclusively on a bilateral or regional basis.

Feeling that its commitments would be generous compared to others, the US in particular expressed concern about lack of reciprocity, though some, uncharitably perhaps, attributed its reservations to doubts about the competitiveness of some of its own service sectors. Specifically, it threatened to withhold commitments and take a broad MFN exemption in both the basic telecommunications and financial services sectors. Its argument was that the GATS negotiations were not giving it enough in return for the multilateralisation of the commitments it was being asked to make in its own markets. It had certain countries in mind. Yet Trebilcock and Howse argued that, so long as

they are taking steps in the right direction, Article XIX:2 concedes that the developing countries may offer less than the developed countries.[22] A lesser level of commitment would not be a justification for an MFN exemption. At the same time, Article XIX speaks of a process of negotiations taking place with a view to promoting the interest of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

Whatever might have been the legitimate scope for exemptions, the threat of a wholesale MFN exemption was to become a form of leverage. It was used to extract further commitments from recalcitrant members. Coping with the threat of an MFN exemption was a key reason why negotiations in several key sectors were extended after the conclusion of the Round. Later this chapter, we shall use the example of financial sectors to indicate how the WTO sought to manage the uses made of the exemption.

We should also note some formalities here. When the deadline for agreement is reached, measures inconsistent with the MFN obligation have to be listed in, and meet, the conditions of the Annex on Article II exemptions (Article II:2). The exemptions are entered into lists that are attached to the Annex itself in the treaty copy of the WTO agreements and its related agreements. The conditions relate to the review and termination of exemptions.

The provisions of the Annex are also concerned with their review and termination. The newly established Council for Trade in Services is to review all exemptions granted for a period of more than five years, before they run over that time. The exemptions are meant to have a terminating date and in principle they are not to exceed ten years, while being subject, in any case, to negotiation in the successive rounds of liberalisation. New exemptions can be applied for after the entry into force of the WTO agreement but they will have to obtain the support of three-fourths of the members as a waiver of the provisions of the agreement. As noted, special provisions were made for the taking of exemptions in the sectors in which negotiations were outstanding at the end of the Round.

Accommodation of regional agreements

In this context, we should also note the explicit provision made in relation to economic integration and labour markets integration agreements. These regional agreements may involve a compromise of broader MFN obligations. In Article V, the GATS sets standards for

the kind of agreement it will accommodate. Generally, the agreement must be an agreement liberalising trade in services among its parties. It must have substantial sectoral coverage in terms of the number of sectors, the volume of trade affected and the modes of supply. It must provide for the absence or elimination of substantially all discrimination in the sense of national treatment. The regional agreement must also extend its benefits to third country suppliers who are established as juridical persons under the laws of a party to the agreement and who engage in substantial business operations in the territory of the party to the agreement.

In supporting its norm of MFN, the condition of the GATS is that the regional agreement does not raise the overall level of barriers to trade in services for members of the WTO who are outside such an agreement, when it is compared to the level applicable prior to such an agreement. This condition suggests that greater access can be given to parties to the agreement in the sense of preferential rather than non-discriminatory treatment but only as long as it is not at the expense of the access which members outside already enjoy. Of course the Article had in mind such agreements as the EU and NAFTA. But it is a potential constraint on new regional agreements such as APEC which are grappling with this issue of treatment of insiders and outsiders. Article V is more tolerant of agreements to which developing countries are party. Provision is also made to keep a check on the progress of such agreements and a member's commitment to them.

In Chapter 3, we noted the impact of the recent wave of bilateral FTAs on the GATs. The preferential access they give to services from the partner country has not received MFN exemptions. Under Article II:2, they must be multilateralised to all other members if they are measures affecting the supply of services.

THE NATIONAL TREATMENT NORM

National treatment is a norm well within the ken of international trade law, including the GATT, but it carries distinctive implications for the service sectors. Article XV:1 states that: 'in the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each member shall accord to services and service suppliers of any other member, in respect of all measures affecting the supply of

services, treatment no less favourable than that it accords to its own like services and service suppliers'.

We can start by saying that this norm creates both a goal and an obligation. It is a goal in the sense that each round of negotiations is meant to work towards commitments to national treatment. But it is also an obligation in the sense that members must accord national treatment in respect of all measures affecting the supply of services in the sectors inscribed in their schedules and subject to any conditions or qualifications set out therein. Members can thus prevent the operation of the norm by declining to inscribe sectors. But where a sector is inscribed, all such measures are caught by the norm unless and to the extent that conditions and qualifications have been listed.

So in identifying the scope of the norm, we need to think first in terms of measures affecting the supply of services. Earlier, we noted how 'measures' were defined broadly by the agreement. We should also note that 'the supply of a service' is defined to include the production, distribution, marketing, sale and delivery of a service (Article XXVIII(b)). We should further recall that the agreement enumerates four possible modes of supply of a service. The agreement's prescriptions for these modes of supply were examined above. At this point it is worth saying that the inclusion of all such modes was designed to enhance the foreign supplier's freedom to choose the supply modes which suit its particular style and purpose. But ultimately of course that freedom is dependent on the schedule of commitments each member was prepared to make.

Less favourable treatment

If we know which measures we must keep in mind, we must then try to establish which of these measures is not going to conform to national treatment. What does the norm of national treatment demand? It demands that foreign services and service suppliers be accorded no less favourable treatment than is accorded to local counterparts. We have a general sense of this standard from our discussion in Chapter 3. To translate it now into the specifics of the GATS, we should note first that Article XVII:2 indicates that a member may meet this requirement by according to foreign services and service suppliers either formally identical or formally different treatment to that which it accords to its own like services or service suppliers. Such formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service

suppliers of the member compared to like services or service suppliers of any other member (Article XVII:3). In opting for such a test, the agreement has made connections with the jurisprudence of the EU and of course the earlier jurisprudence of the GATT itself.

So the test may be practical or realistic.[23] It is not necessarily whether foreigners and locals are given formal equality, or what some commentators term facially non-discriminatory treatment, but what the treatment means effectively for the competitive relationship between them. The foreigner should enjoy equivalent opportunities to compete. At the same time, the member is not under an obligation to ensure that the foreigner enjoys success in the market place. It is only the opportunity to compete which should be equivalent, so far as it is affected by government measures. Foreign suppliers meet all sorts of 'natural' obstacles to successful supply. They face difficulties, for example, in storing certain services. They meet resistance from business and household consumers for a variety of private, market based reasons. Accessibility, familiarity, prejudice, loyalty, come-back, are all factors that can influence consumers to favour local services. Such factors are usually beyond the influence of the host government's own measures. In this respect, a footnote to Article XVII cautions that: 'specific commitments assumed under this Article shall not be construed to require any member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers'.

Still, as it is specified, the norm has a broad catchment. First of all, we should realise that countries do set out to treat foreign suppliers less favourably in an overt way. They have reasons for wanting to afford locals opportunities which are not available to foreigners. We shall find examples in each of the sectors we examine. The measures may involve limits being placed on foreign participation by all or any one of the four modes of service supply. Thus, foreigners might be barred from supplying a particular service at all. They might be prevented from supplying it from an off-shore location or by way of investment in a local business. The measures may involve impositions or demands being placed on foreigners exclusively when they supply services. They may involve favours or subsides being granted to locals exclusively. Case studies are the best way to illustrate the many variations on this theme.

It follows that identical treatment, that is, treatment which is not overtly or 'facially' discriminatory, may constitute less favourable treatment. The measures may make the same demands of foreigners. But the

demands put the foreigners at a competitive disadvantage because they create a more onerous burden for them.[24] Such complaints extend the reach of the norm and require the member to accommodate the legality of the foreigner. It seems clear from the footnote that the foreigner cannot simply argue that the disadvantage lies in being unfamiliar with the local requirements. But instead the argument might be that the requirements come on top of requirements met at home. The foreigner may have met technical requirements at home and must now convert or embellish the service in such a way that it meets the requirements of the host country. For example, it must convert the service to another computer language or interface standard. The foreigner might have established a certain business structure at home and does not want to have to duplicate it abroad. For example, it might have to meet a requirement of capitalisation, establish a separate office or a local company, or take residence and deliver the service in person. Finally, the foreigner might be grounded in a home culture but now must prove versed in the host country's knowledges and practices. The foreigner must, for example, acquire a local educational qualification, perhaps in another language.

Like services

However, the host country may have arguable non-trade reasons for imposing these requirements on foreigners and locals alike. Indeed, in some cases, it may have good reasons for insisting that it is only foreigners who must meet such requirements. There may be greater concern about the foreigner's ability to satisfy the regulatory objectives. So, extra measures are needed to assert regulatory competence over the foreigner. It is important to appreciate that differential treatment is not necessarily less favourable treatment. The norm only requires the comparison to be made with the treatment accorded 'like' local services or service suppliers. In Chapter 3, we first identified this issue and saw briefly how the GATT panels decided that products were like. Where products are involved, the physical qualities can be compared. But is this approach applicable to services? Another approach which looks to whether consumers think the services are competing for the same market, whether, most liberally, they are substitutable, could be applied to services. But if we recall the unwillingness of the GATT panels to allow the measure to discriminate on the basis of the way the product was manufactured or harvested, we shall need to ask where a service ends and the nature of its inputs and its style of operation begin. In the

case of services the distinctions are not likely to be so clear-cut. Furthermore, the norm also calls for comparison of the treatment of like service suppliers.[25]

In Chapter 3, we also saw that the distinction is under pressure. Notably, an official from the WTO's Trade in Services Division has argued that a different approach be taken.[26] He suggests that, even services should not be regarded as like, the onus should remain with the member country to justify its measure. It would do so by demonstrating that the measure was intended to further one of the regulatory objectives for which the agreement allows an exception. This approach would enable the WTO to query the motive behind the distinction. It would also require the member to demonstrate the necessity of the treatment and choose the least trade restrictive way to achieve its regulatory objective. Such an approach would further narrow the members' regulatory options. We shall see that the list of exceptions is short and the disciplines tend to narrow the choice of instrument.

Yet we should not forget that the GATS listings approach ultimately affords the member discretion. It may retain those measures it thinks are essential to its regulatory objectives. The agreement permits the members for instance to distinguish between modes of services supply when making specific commitments. Earlier, we noted the argument that this discrimination be disallowed. It means that a member may put a foreign service at a disadvantage by refraining from making commitments to national treatment for that mode which particularly suits the foreigner. But we should appreciate that the member might distinguish between modes to assure regulatory competence.

It is worth noting the US has now raised a largely national treatment GATS complaint against China, see *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1, 16 April 2007. The complaint concerns: (1) measures that reserve to Chinese state-owned enterprise trading rights with respect to imported films for theatrical release, audio-visual home entertainment products, sound recordings and publications; and (2) certain measures that restrict market access for, or discriminate against, foreign suppliers of distribution services for publications and foreign suppliers of audio-visual services for audio-visual home entertainment products. These latter measures include requirements of joint ventures with Chinese nationals, and discriminatory requirements concerning equity shares, levels of capitalisation and operating terms. The US has requested consultations.

Government procurement

Governments are also large consumers of services. A good example is their demand for information and communications services. Sometimes, they do not operate as private consumers are meant to act in an 'economically rational' way. They deploy their procurement powers to give preference to local suppliers or to extract concessions from foreign suppliers in the furtherance of a range of legitimate policies. They include industry and employment promotion policies. In the Tokyo Round, government procurement became the subject of a voluntary side code. Many countries guard these powers jealously and the code had limited success. The Uruguay Round has constructed an agreement on government procurement as a plurilateral trade agreement. This agreement remains optional. But the GATS is more abstentionist again. In Article XIII, it declares that its MFN, national treatment and market access articles shall *not* apply to laws, regulations or requirements governing the procurement by government agencies of services purchased, for governmental purposes, and not with the view to commercial re-sale or with the view to use in the supply of services for commercial sale. At the same time, it promises multilateral negotiations on government procurement in services, within two years from the date of entry into force of the WTO agreement.

THE MARKET ACCESS NORM

Article XV:2 states that: 'with respect to market access through the modes of supply identified in Article I, each member shall accord services and service suppliers of any other member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule'. In what ways can we talk about market access as a norm of the agreement? Like national treatment, it is recognised expressly as a goal in the sense that Article XVI envisages specific commitments being made with respect to market access through the modes of supply identified in Article I. Furthermore, Article XIX:1 foreshadows successive rounds of negotiations over commitments 'to be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access'.

We also need to give the norm some content. The question remains as to whether the agreement gives any obligatory content to the norm, certainly as a norm distinct from non-discrimination such as national

treatment. Another way of putting this question is to ask whether the purview of market access is confined to measures preventing entry into national markets from abroad – measures which clearly discriminate against foreigners. In this division of functions, national treatment has a limited role too. Its domain of operation is to be found behind the border, that is, in relation to measures that apply post-entry and post-establishment. Its purpose is to prevent measures being applied here that would frustrate the benefit of the concessions made on tariffs and other restrictions on market access in the traditional GATT sense of this norm.

The proscribed measures

The norm of market access is not defined in the GATS agreement. The clearest indication of the intention of the agreement is to be found in its identification of measures that are considered to obstruct market access. Article XVI:2 contains a list of measures which a member shall not maintain or adopt in sectors where market access commitments are undertaken, unless they are otherwise specified in a schedule. From this wording, it can be seen again that the agreement does not mandate the avoidance of these measures; rather it puts the onus on members to take up one of three options: withhold a sector from its schedule, specify limitations on the commitments which are made, or satisfy explicit exceptions.

In Article XVI, the 'proscribed' measures include limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. Countries place limitations on foreign ownership as a way of bolstering commitment to the locality and providing opportunities for local earnings and local voices. Such a measure, which is still very common, is clearly a discrimination against foreign supply which uses direct investment as a means to acquire a commercial presence. It is a very significant inclusion because it is arguable that the acquisition of equity in a local enterprise is not really a mode of service supply as such. We would want to know what followed from that acquisition. Indeed, it could have the opposite effect if the investor were then to restrict the enterprise's supply activities.

The proscribed measures also include measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service. Such measures may be directed at foreigners, for example to make effective regulation of those suppliers

whose 'loyalties' lie outside the jurisdiction. To this end, the regulation might require local incorporation, allowing subsidiaries to operate but not branches. But choice of legal form is also regulated for various non-trade reasons. A good example is the requirement placed on legal professionals to practise either singularly as natural persons or in partnerships, denying them permission to operate in the guise of a corporation. The proscription of such measures begins to suggest that the norm of market access does not equate – four square – with norms of non-discrimination such as national treatment. But it also suggests that, as they apply to services, the domains of market access and national treatment overlap. Our earlier discussion of national treatment provisions tends to back this interpretation.

The other proscriptions advance this interpretation. Their concern is quantitative limitations. Article XVI:2 specifies limitations on the value of service transactions or assets, service operations or service output, together with limitations on the number of natural persons that may be employed in a service sector or by a service supplier, where any such limitations take the form of numerical quotas or the requirement of an economic needs test. Perhaps, the major proscription concerns restrictions on the number of service suppliers who may operate. In this respect, Article XVI:2 (a) specifies: 'limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test'. If this proscription was truly obligatory, then members would need to remove measures that gave support to monopolistic or exclusive arrangements. Such arrangements might favour a local supplier, perhaps one owned or controlled by the state. But the norm is also reaching beyond non-discrimination. It would not be discriminatory to restrict the number of licensees operating in a sector, provided foreigners were accorded equivalent conditions under which to compete for the licences which were available.

The reach of the norm

Thus, in his appraisal of the agreement, Hoekman suggested that: 'The GATS is the first multilateral trade agreement to recognize that non-discriminatory regulatory regimes may nonetheless act to restrict access to markets.'[27] The norm of market access begins to insist that markets must be exposed to private competition across the board. Liberalisation increases the commercial opportunities available to foreigners as well as locals. Members should remove barriers to entry into markets and

restrictions on the scope of activities within those markets. If this interpretation is accepted, it is clear that market access carries profound implications for domestic industry structures and economic relationships overall. Thus, market access, as a norm of trade relations, reinforces the process of liberalisation of domestic markets. While this process is occurring unilaterally in many countries around the world, the presence of such a norm within a trade agreement will condition the capacity of each country to control the course of liberalisation according to its own national circumstances.

We should see that the scope given to the norm will affect the kinds of legalities which a member may maintain. A range of measures can be hypothesised to test its implications. Some measures would appear to be clear transgressions, certainly in terms of Article XVI:2. The norm challenges the kind of industry-specific regulation we identified in earlier chapters. It would be a clear case for a member to ration the number of licences available for the broadcasting of television programs. Please note that we are not considering here whether the member has legitimate non-trade reasons for applying such a limitation, which it might well do. But what if a member imposes restrictions of lines of business or geographical spheres of operation? Here, the member might bar a supplier which operates in one sector from participation in another, while allowing other suppliers free access to this second market.

So the characterisation of the measure as a limitation on market access may be arguable. A member might reserve the provision of certain legal services to accredited practitioners. Anyone who qualifies may practise in this sector, but the professional association administers an admission examination which is very difficult to pass. The numbers who enter practise are thus controlled. Another example involves a securities or futures exchange that limits the numbers of seats available to brokers. Exchange trading may be serviced from other locations but a seat at the exchange makes supply much more effective.

Quantitative and qualitative limitations

Once we move away from the focus on quantitative limitations, the implications of the norm are even less determinate. At the outer limits of scrutiny is a ban which a member places on the supply commercially of certain services such as sexual or gaming services. After all, every jurisdiction sets boundaries to the scope of markets, that is, what is to be appropriate and tradeable at all, even if those settings are not always

effective in practice. Such a ban would not allow access by any supplier, whether as a monopoly or otherwise. Is market access denied if no market is allowed to exist? In any case, such a ban would not seem to be encompassed by Article XVI:2. A milder version would be a government's bar on the advertising of a service, which is a restriction on the way certain commodities may be marketed, as well as the closure of an immediate market in advertising services. Consider here too the status of a public fund which is to be the sole source of insurance cover against liability to pay compensation for work or transport injuries.

In this kind of speculation, we also need to take into account our point from Chapter 3 that the concept of nullification or impairment can embrace non-violation and situation complaints. Thus, it has been argued that the absence of basic legal infrastructure might frustrate effective market access. We have mentioned competition law. A similar point has been made about decisions to withhold the legal support necessary to establish or enforce property and contract rights, so that business must rely upon its capacity to resort to extra-legal measures if it is to secure its commercial interests against those who will not pay for its services.[28] The implications for the kinds of legal approach which members have observed are potentially far-reaching. But the text of the agreement does not really let us say how far this potential will reach. Article XIX speaks of 'effective market access'. Eeckhout describes this language as a compromise. It moved the multilateral negotiations beyond national treatment but still talked of the reduction or elimination of the adverse effects of measures, on *trade* in services, as the means of providing effective market access. Perhaps, the ultimate impact of the norm is bound up with the scope of that linkage to trade. The question becomes the nature of trade in services and the measures which affect it adversely.

Of course, the greatest inhibition on speculation about the normative import of the agreement is the listings approach. Members can avoid the scrutiny of the norm by deciding not to inscribe sectors. In the sectors which they do inscribe, they may list limitations. Here, the role of Article XVI:2 is intriguing. In sectors where market access commitments are undertaken, it requires the member to specify any measure that falls into the categories it has proscribed. Does this mean that members are not obliged to list any measures that limit market access other than those which Article XVI:2 has identified? The Guide's comment is suggestive: 'Article XVI:2 of the GATS lists six categories of restriction which may not be adopted or maintained

unless they are specified in the schedule. All limitations in schedules therefore fall into one of these categories'.[29] The language could just be infelicitous. But the WTO official, Mattoo, seems to accept this reading when he observes: 'a Member could maintain, without being obliged to schedule, a high non-discriminatory tax on a particular service which severely limits market access'.[30] Such a tax does not fit any of the Article XVI:2 categories. We can take this reading further: the GATS only intended the norm to apply to quantitative limitations, though the members could still enter additional commitments if they really wished. Certainly, the kind of measures envisaged by Article XIV, the Article on domestic regulation, were separable for the time being.[31]

In *US–Gambling Services*, the US measures placed a total prohibition on the supply of gambling services online from off shore. The AB agreed with the Panel that the total prohibition on the means of delivery came within Article XVI:2(a) and (c) as limitations on the number of service suppliers and service operations. The AB placed no stock in the qualification to (a) 'whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirements of an economic needs test'. Limitations having the same effect could be included. It was a quantitative limitation then, limiting the number by this means of delivery to zero. Otherwise, the AB declined to draw the line between quantitative and qualitative limitations, despite the importance to our understanding of Articles XVI and VI. Yet the Panel made a significant decision. Joel Trachtman criticises the AB's readiness to characterise the ban as a quantitative limitation, suggesting it could catch all sorts of qualitative limitations with quantitative effects. He also rounds on the Appellate Body for separating out a particular means of delivery, which does not amount to a GATS mode of supply, in order for it to say there was a limitation to zero.[32]

THE MODES OF SUPPLY

The agreement encompasses all four major modes of service supply. It is important to appreciate that the agreement is doing so largely in a descriptive fashion. Most of the time, its impact on the modes of supply depends on the extent of the commitments which the members are prepared to make. Yet such inclusiveness has both symbolic and procedural significance. Where a sector is being entered into negotiations, it requires the member to give consideration to the measures which

affect each mode of supply. But we should also note that, occasionally, the agreement becomes prescriptive about modes. To ensure that commitments are effective, it requires that certain conditions of supply are met.

Cross-border supply

The agreement starts with perhaps the most obvious mode, cross-border supply. In Article I:2(a), the GATS describes this mode as supply of a service from the territory of one member into the territory of any other member. Transfers across border lines may carry services directly to the consumer or provide the resources needed to support other modes of supply such as a personal or commercial presence. Often, the different modes operate in tandem rather than as alternatives. Services may be carried in a range of mobile media such as goods, paper or money transactions. A notable development is their abstraction in the symbolic medium of information which can be transmitted electronically. Data processing is of course a major service industry in its own right; insurance and airline companies, for example, now have data processed in overseas offices and sent back home. But lawyers and other professionals construct transactions between metropolitan headquarters and off-shore financial centres and tax havens, which have broad consequences for national regulatory policies. In proposing more concerted commitments in the new Round (see below), Mattoo suggests that many more services are amenable to this mode of supply now.[33] The WTO held a symposium to explore the possibilities.[34]

While the mode provides its own advantageous opportunities for trade, it also creates special regulatory problems for member countries. A key objective for international suppliers is to obtain conditions of freedom and security for their private trans-border data flows. Seeing them as crucial conduits for the supply of all manner of services, the GATS is notable for imposing obligations on members to facilitate these flows. For instance, its Annex on Telecommunications requires members to ensure that service suppliers may use public transport networks and services for the movement of information within and across borders, including movement for the conduct of intra-corporate communications of such service suppliers and for access to information contained in databases or otherwise stored in machine-readable form in the territory of any member (see further Chapter 8).[35] Another significant example of the agreement's promotion of cross-border

supply is the Understanding on Commitments in Financial Services.[36] Its provisions disavow measures that prevent transfers of information, including transfers by electronic means, where such transfers are necessary for the conduct of the ordinary business of the financial services supplier.

At the same time, the GATS is called on to support the security of these private flows. There is a general allowance for members to impose measures for the protection of privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts (Article XIV(c)). The Annex on Telecommunications permits members to take such measures as are necessary to ensure the security and confidentiality of messages. But how are these allowances to be squared with the legitimate regulatory objectives of the members? The Annex on Financial Services reveals the GATS confusion. It allows members to attach measures to financial services for prudential reasons. But it goes on to say that nothing in the agreement shall be construed to require a member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

Discussion of data flows already brings in financial flows. Transnational transfers of funds and movements of capital are often another support facility for the supply of various kinds of services. However, they also represent a major international sector in their own right which has huge ramifications for national economic and social policies. They represent portfolio investments and speculative transactions in financial instruments such as securities and derivatives; they also comprise longer-term foreign direct investment in business enterprises. We shall argue that the GATS is not an investment agreement as such. It deals with foreign direct investment so far as that investment is concerned to obtain a commercial presence and that presence is a mode of supplying a service (see below). It does not deal with speculative transactions, except in the sense that the structure of the financial services sector itself, and in particular the openings provided for access by foreign services suppliers, influence the patterns of such activity. We shall note the negotiation of commitments in this sector later in this chapter.

Here, the GATS deals with those transfers and movements which are conducted in support of trade in services to which commitments have been made. In Article XI, the GATS prevents members from

applying restrictions on international transfers and payments, which are for the purpose of current transactions relating to its specific commitments in any service sector. Article XII elaborates an exception for restrictions to safeguard the balance of payments. Likewise, a member is under an obligation not to impose restrictions on any capital transactions, inconsistently with its specific commitments regarding such transactions, except under the balance of payments exception or at the request of the International Monetary Fund.

Another very significant facilitative provision is contained in a footnote to Article XVI:1 which deals with market access. It states that, if a member undertakes a market access commitment in relation to cross-border supply, and if the cross-border movement of capital is an essential part of this service itself, that member is thereby committed to allow such movement of capital. Similarly, if a member undertakes a market access commitment in relation to supply of a service through a commercial presence (see below), it is thereby committed to allow related transfers of capital into its territory.

Consumption abroad

Article I:2 (b) describes this mode as supply of a service in the territory of one member to the service consumer of any other member. The preferred mode of supply of many services is in person, and international trade in services thus involves the movement of foreign persons into national spaces. One high volume flow of people is the movement of consumers to the site of delivery of the service. This mode is commonly associated with tourism, though it is also part of the delivery of such services as medical treatment, health care and formal education. This movement is generally treated favourably by host countries because of the economic benefits it provides. Nevertheless, movements of this kind are sometimes regulated as a result of a concern that they will have a deleterious impact on the locality in terms, for instance, of culture, safety or environment. Some countries place limits on the purposes for which their own nationals may consume services elsewhere. For example, financial, legal and other business services may be 'consumed' off-shore in an effort to escape the application of regulatory controls 'at home', though often this consumption is often combined with cross-border supply. Again, I do not think we should try to elaborate all the possible cases. The sheer range is indicated by the recent attempts in some countries to limit their nationals' consumption of sex or gambling 'services' abroad.

Presence of natural persons

The reverse flow is the movement of the service supplier to the site of the consumer. The movement of natural persons supplying services activates sector-specific host country concerns, for example about their competition with locals for business and employment. It may also touch on general or 'horizontal' migration policy concerns. It is likely to encounter an elaborate national regulatory domain of temporary visas, work permits, grants of residence and programs of settlement. It is also the subject of bilateral and sometimes regional arrangements. In the main, of course, such regulation is restrictive. However, we should note that, for the supply of certain services, such as legal services, the national regulation may actually require presence in person, that is, if supply by foreigners is permitted at all (see Chapter 5).

Article 1:2(d) recognises the supply of a service 'by a service supplier of one member, through presence of natural persons of a member in the territory of any other member'. However, the liberalisation of measures affecting this mode of supply was to prove sensitive, really to all countries.[37] To assuage concerns, a special Annex to the agreement was devoted to movement of natural persons supplying services under the agreement. Essentially, it sought to limit the agreement's impetus to movements temporary and specific in nature. Proposals had been made by developed countries to confine the scope of liberalisation to movements of business visitors (fly in, fly out mode), the senior personnel of multinational corporations (intra-corporate transferees), and technical and professional experts on assignment (contractual services providers), many of whom provide services in person as an adjunct to a commercial presence. Such a restriction was opposed by developing countries like India, Mexico, Thailand, Argentina, and Egypt. They saw it as favouring suppliers of capital-intensive and knowledge-based services over such service suppliers as construction, tourist, hospitality and domestic workers.[38] Why, conceptually, could any distinction be made between the different groups of service workers, or, for that matter, between free markets for labour and free markets for other services?[39]

The Annex states that members may negotiate specific commitments that apply to the movement of all categories of natural persons supplying services under the agreement. It goes on to say that natural persons who are covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment. But, within their schedules, many countries were to apply limitations,

both across the board and sector-specific, to the entry of natural persons into their territory. Horizontal entries often merely listed the exceptions to general controls on entry; sector-specific entries declared that this mode of supply was unbound.

The agreement recognises the members' interest in screening those who enter their territory. In this regard, the Annex declared that the agreement was not to prevent a member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders. The Group of Ten were able to obtain a proviso that such measures should not be applied in such a manner as to nullify or impair the benefits accruing to any member under the terms of a specific commitment. However, a footnote made it clear that the sole factor for requiring a visa for natural persons of certain members but not for others should not be regarded as nullifying or impairing benefits under a specific commitment.

The bigger issue was the movement of people to find work. There have been large-scale migrations for economic reasons. Migrant workers have been attractive to employers in the agricultural, manufacturing and service sectors of the developed world. But recession, changes in modes of production and the movement of capital off-shore, have latterly reduced this demand. As we shall see in Chapter 5, the movement of professionals such as lawyers and doctors, especially if they are seeking permanent work, also meets resistance in a range of countries, though governments do make use of this source to remedy local shortages on an economic needs basis and there is a long-standing 'brain drain' issue between the developing and the developed worlds.

The Annex sought to keep this issue out of the negotiations by stating that the agreement would not apply to measures affecting natural persons seeking access to the employment market of a member. Nor would it apply to measures regarding citizenship, residence or employment on a permanent basis. The Annex was said to apply only to measures affecting natural persons who are service suppliers of a member, and natural persons of a member who are employed by a service supplier of a member, in respect of the supply of a service.

Some developing countries were unhappy about the exclusion of the question of migration for work from the ambit of the GATS, though problems surrounding intra-regional movements of workers between these countries suggest just how sensitive the issue can be.

A developing country lobby, that included India and the Philippines, also sought to keep the migration issue on the agenda as a counter to the calls by certain developed countries such as the US and members of the EU for a social clause. The social clause would require a commitment to core labour standards at home as the quid pro quo for market access abroad. Comparative labour standards seem most in contention where manufactured goods are traded. But they can also become a factor when services are tradeable. We mentioned earlier that services like data processing are now being provided across borders. Where service workers, such as construction, agricultural or domestic workers, travel to the site of the consumers, at issue may be whether home or host labour standards are to apply.[40]

The migration issue was also to provide a counterweight to the negotiations over financial and telecommunications services which were carrying over beyond the end of the Round. At Marrakesh, a decision was taken to extend the negotiations over measures affecting the movement of natural persons.[41] The preamble to this decision seemed to acknowledge the interests of the developing countries in augmenting their exports of labour-intensive services. A group was established to negotiate further liberalisation of movements with a view to achieving higher levels of commitment. It was to conclude its work and produce a final report no later than six months after the entry into force of the WTO Agreement. The developed countries dug in their heels, and in 1995 the negotiations produced few further commitments to entry. Only Australia, Canada, the EU, India, Norway and Switzerland extended their commitments.[42] Like cross-border supply, the mode has received special attention in the preparations for the new Round because it has something to offer developing country members (see below). In 2004, the WTO ran a seminar concentrating on what could be learned from the experience of governments in managing the movement of people under mode 4, dealing with issues of interest to both trade and migration authorities.[43]

Commercial presence

The other mode of supply which engages national regulation deep behind the border is the mode envisaged by Article I:2(c), supply by a service supplier of one member, through commercial presence in the territory of any other member. Here, the agreement broaches the issue of direct foreign investment. We appreciate that foreign investment is regulated for a variety of reasons. Some government measures are

designed to protect local industry from foreign penetration or control. As more countries adopt an outward-looking economic strategy, seeking to attract capital and expertise from abroad and to connect into international networks, the remaining prohibitions on foreign direct investment are likely to represent broader economic, political and cultural concerns. For example, the preservation of national sovereignty and identity is a strong concern in industries such as the media, agriculture and defence.

Whatever the objective, many countries retain regulatory schemes that enable them to screen investment proposals. The services sectors are among the sectors where these measures are applied. They may limit the level of foreign investment in certain sectors. More generally, they impose performance requirements that are intended to derive some benefit from the foreign presence for the host country. The benefits they have in mind are joint ventures, technology transfer, local commerce and taxation revenue. In some situations, to ensure that foreign suppliers can be regulated effectively, they may insist on a local presence and go on to prescribe in detail the form that presence must take. As Chapter 5 will indicate, professional services are sectors where this discrimination is evident, both as to the structure the foreign business can adopt and the manner of associations with locals.

In such a context, how much impetus does the GATS give to the liberalisation of investment? We start by saying that the GATS deals with direct foreign investment in a roundabout way. It gives recognition to foreign investment in its role as a facet of one of its modes of service supply, the mode of commercial presence. Article XXVIII(d) defines commercial presence to mean any type of business or professional establishment within the territory of a member so long as it is for the purpose of supplying a service. It includes the constitution, acquisition or maintenance of a juridical person or the creation or maintenance of a branch or representative office. In turn, a juridical person is defined to mean any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, whether privately owned or governmentally owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

Many countries would regard each of these means of obtaining a commercial presence as a foreign investment. The foreigner might constitute a legal entity through which to run a business and hold shares or some kind of non-equity interest in it. It might be joined by other investors, including some of local origin. Significantly, the

agreement recognises that the foreigner might acquire an existing legal entity. It might then take over a local corporation. Now we know that corporations are constituted and acquired for a variety of reasons; some we might regard as primarily financial. In this light, the scope of the GATS might be read down. It contemplates investment where the foreigner's object is to supply a service and the foreigner's target is a business or professional establishment. Nonetheless, this definition provides a major opening, especially in relation to the forms of foreign participation which are envisaged.

At the same time, we should stress once again that the GATS listings approach provides no guarantees regarding the liberalisation of this mode of supply. A contrast might be made with the NAFTA treaty. An exception to this voluntary approach was the Understanding on Commitments in Financial Services. But, as we shall see in a moment, the Understanding was to have very little influence over the commitments which the members made in this sector. We know from the discussion of market access above that the measures proscribed by Article XVI:2 relate very much to commercial presence. But we also know that the effect is not to ban them, but to create an onus on members to list such limitations if they apply in a sector for which the members have made market access commitments. Commercial presence remains very much of interest to the major developed countries with corporate interests wishing to set up business in developing markets (see below). These services extend beyond the focus of the Uruguay Round (finance and telecommunications) to the privatisation of services such as education, health, energy and water.

DOMESTIC REGULATION

Legitimate regulatory objectives

The agreement explicitly recognises certain regulatory objectives. These objectives may justify non-conforming measures, that is, they act as exceptions where conformity to the norms is required. The exceptions which the agreement specifies separately are for emergency safeguard measures, restrictions to safeguard the balance of payments, and security exceptions (Articles X, XII and XIV*bis*). Each of these objectives is a well recognised and explored category within the GATT. Here, in the GATS, their availability is carefully circumscribed. In particular, the security exception is defined narrowly. National security has of course been the rationale for a range of

regulatory measures, such as sponsorship of local industry, limits on foreign investment, and controls on exports. Even countries which do not readily admit to a policy of national economic planning or industry support invoke national security for these purposes.

The GATS also includes a list of general exceptions which enjoy a GATT pedigree (Article XIV). To begin, the agreement permits the adoption or enforcement of measures necessary to protect public morals, to maintain public order, or to protect human, animal or plant life or health (Article XIV (a) and (b)). A Decision on Trade in Services and the Environment has charged a new committee to examine and report on the relationship between services trade and the environment, including the issue of sustainable development, in order to determine whether these exceptions should be modified to take account of measures necessary to protect the environment. The Committee provided its first report in time for the Singapore Meeting of ministers.[44] But progress has been lacking.

If environmental hazards increasingly fail to respect national borders, the other general exceptions begin to recognise the challenges to national regulatory competence of physically mobile or electronically dematerialised economic flows. A legitimate regulatory objective concerns assurance of the quality of services supplied. The GATS exceptions allow measures that are necessary to ensure compliance with rules or regulations relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts (Article XIV(c)). There is also recognition of the quality concern in the Article on domestic regulation of measures relating to qualification requirements and procedures, technical standards and licensing requirements (see below and Chapter 5).

The freer flow of services internationally enhances opportunities to engage in tax avoidance. The GATS allows measures inconsistent with the Article on national treatment, provided the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members (Article XIV(d)). In acknowledging examples of the measures which members have taken to protect their tax bases, a footnote to this exception provides an insight into the complexity of the arrangements in the field. But it must be appreciated that the exception only applies to the collection of taxes which are imposed on the services themselves or their suppliers. It does not acknowledge the broader role service suppliers such as professionals play in constructing tax

avoidance and money laundering schemes and the need to regulate services supply on this basis.

The agreement also recognises measures inconsistent with the MFN obligation, provided the differences in treatment are the result of an agreement on the avoidance of double taxation (Article XIV(e)). The integrity of double taxation agreements is also protected by a later provision that prevents national treatment objections to a measure that falls within the scope of an international agreement relating to the avoidance of double taxation. But the double taxation agreements were forged largely to obviate the conflicting requirements which were experienced by those operating in more than one country. It is clear that globalisation is intensifying tax competition between countries.

Again, the GATS gives limited recognition to a regulatory problem with huge international spillovers. The Annex on Financial Services recognises the need for members to take measures for prudential reasons, including the protection of investors, depositors, policy holders or persons to whom a financial duty is owed, or to ensure the integrity and stability of the financial system. Again, this provision is essentially permissive. Later, we shall see that there is some mild support for regulatory cooperation between members.

Disciplines applied to the exceptions

At the same time as it allows these exceptions, the agreement applies disciplines. When members take up the exceptions, they must keep within the limits allowed. The GATS disciplines carry over tests of acceptability from the GATT which appear to represent a mixture of concerns. One concern is to ascertain the genuineness of the motives behind the taking of the measures. Another is to limit the effect of the genuine measure on trade.

Thus, the chapeau to the Article of the GATS which provides the general exceptions, Article XIV, lays down provisos: the member's measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail. As well, they should not be a disguised restriction on trade in services. In keeping, a footnote to the paragraph that allows non-conforming measures to protect public order states that the exception can be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. Furthermore, each one of these general exceptions requires that the measure be necessary to the attainment of the objective.

We noted some of the GATT jurisprudence on this test of necessity in Chapter 3. The *United States–Gambling Services* ruling is instructive for its application of the necessity test to exceptions established in the GATS. We saw in Chapter 3 that the Appellate Body took up the more nuanced test that had come through *Korea–Beef* and *EC–Asbestos Products*. Hence GATT and WTO jurisprudence from other agreements could be enlisted to interpret Article XIV. In keeping, the measure first had to be devoted to one of the purposes recognised by the exception. Here the purpose was to protect public morals. Specifically, the US submitted, the law was concerned with organised crime, money laundering, fraud, under age gambling and pathological gambling. The Appellate Body found that the law was clearly motivated by these concerns. This decision is positive for national regulatory options and some have suggested that the reference to public morals can bring into consideration a range of public concerns (including human rights).

But was the measure to ban the services necessary? To answer that, the Panel should compare the alternatives taking into account the factors in the test. A measure is necessary if there is no reasonably available, more WTO-consistent, alternative means to achieve the respondent's purpose. But reasonably does not mean theoretically available – the respondent does not have to explore and exhaust all conceivable alternatives. The Panel was entitled to consider whether, for instance, the alternative would impose an undue burden or fail to preserve the right to achieve the desired level of protection. In particular, the Appellate Body held that the US was not obliged as a matter of course to meet a procedural requirement of consulting the complainant Antigua – this promised too uncertain an outcome. The Appellate Body noted as well that Antigua did not posit any reasonable available alternative in the proceedings. The US argued that given the nature of the internet (its speed and accessibility, the anonymity of use), nothing short of a ban was feasible. The Appellate Body was willing to consider this argument, but it still had the demands of the chapeau to consider. On this count, the US measure failed. While the US laws did not, on the face of it, discriminate between foreign and domestic remote suppliers, it was possible they did so for betting on horse racing online. Yet curiously Antigua had not pursued a denial of national treatment in its substantive grounds of complaint.

So the US had to bring its laws into conformity with the GATS and the US measures in response have since been subject to a compliance

panel report, which the DSB adopted in May 2007. At the same time, the US announced its intention to modify its services concessions and exclude gambling and betting services from its initial agreement. In other words, it would withdraw a commitment following the procedure in Article XXI. The US volunteered it had initiated the procedure to bring its obligations into line with its policy on gambling as a public order and public morals issue. India and Brazil joined with Antigua in expressing systemic concerns about the implications for dispute settlement if the US responded in this way. They urged the members to press for compensation from the US. The EU felt the US had to follow this procedure if it wanted its policy to stand.[45]

Article VI disciplines

The listings approach of the GATS means that each member is able to maintain measures that do not have to conform to the norms of the agreement and hence do not have to fit within one of these exceptions (particularly the qualitative limitations on market access that fall outside the embrace of Article XVI). Offsetting this freedom, the GATS Article on domestic regulation, Article VI, develops rationales and mechanisms for attaching disciplines to these measures too.

Article VI requires members to ensure that measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. To bring this about, the agreement reaches beyond the layer of law to be found in the statute books and deeper into the disparate legal cultures of the member countries. It requires each member to maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. It goes on to say that, where such procedures are not independent of the agency entrusted with the administrative decision concerned, members must ensure that the procedures in fact provide for an objective and impartial review. Another provision calls for decision making and notification of decisions within a reasonable period of time.

How far does this requirement reach? It should be noted that Article VI does allow for administrative or arbitral rather than judicial tribunals and procedures. Moreover, it states that the provisions for review should not be construed to require a member to institute such procedures or tribunals where this would be inconsistent with its

constitutional structure or the nature of its legal system (Article VI:2(b)). In any case, the disciplines may only apply in sectors where specific commitments are undertaken.[46]

Nonetheless, the requirement should be linked with the agreement's general provision for transparency. To further transparency, Article III assigns an obligation to each member to publish all relevant measures of general application. They must also inform the Council for Trade in Services of any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services covered by their specific commitments.

A particular concern of Article VI is that measures 'relating to qualifications requirements and procedures, technical standards and licensing requirements' do not constitute unnecessary barriers to trade in services. The Council for Trade in Services is charged to develop disciplines that aim to ensure such requirements are, in part: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service (Article VI:4). We shall look at the Council's work in Chapter 5. We noted in Chapter 3 that, in sectors where it has undertaken specific commitments, the member's obligation is immediate. If their requirements nullify or impair the commitments they have made, they must ensure that the requirements comply with the three criteria (Article VI:5).

The GATS also seeks to promote international coordination of these regulatory requirements. A small step in this direction comes again from Article VI. It states that in determining whether a member is meeting the three criteria, account shall be taken of international standards of relevant international organisations which are applied by the member. A major step is Article VII which allows members to recognise the education or experience obtained, requirements met, or license or certifications granted in another country. It applies a discipline to that process of recognition. Recognition should not be accorded in a manner which would constitute a means of discrimination between countries or a disguised restriction on trade in services. But the Article is also concerned to promote the multilateralisation of recognition agreements and arrangements. Members are to afford adequate opportunity for other interested members to take part.

In Article VI, the agreement signals that recognition may be achieved through harmonisation or otherwise. So the Article concedes

that recognition might defer to the other country's standards and so standards would remain disparate. However, the Article also states that, where appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, members are to work in cooperation with relevant intergovernmental and non-governmental organisations towards the establishment and adoption of common international standards and criteria for recognition, also of common international standards for the practice of relevant services trades and professions.

FINANCIAL SERVICES NEGOTIATIONS

Uruguay Round carry-over negotiations

In relation to three sectors, maritime transport services, basic telecommunications, and financial services, as well as one mode of supply, movement of natural persons, negotiations were extended beyond the end of the Round. These negotiations were the subject of decisions at Marrakesh. We shall not deal with maritime transport services where, in any case, the negotiations broke down and were suspended.[47] The results of the negotiations over the movement of natural persons were noted earlier in this chapter and the results for basic telecommunications are to be examined in Chapter 8. Briefly, here, we mention the negotiations in the globally significant sector of financial services.

It is trite to say that the financial services sector represents activities which have a huge impact upon the conduct of national monetary, fiscal, industrial and social policies. A phenomenon that has gathered pace globally, the liberalisation of financial flows, such as flows across borders, raises issues far greater than the practices of its supporting services sectors. But it is a two-way process: the complexion of financial services – who for instance may deal in different instruments and markets – has an effect on the pattern of capital movements, the placement of funds for investment, the effectiveness of controls over volatility and risk in the financial markets, even the structures of industries in general and the capacity of national economies to pursue a variety of regulatory purposes such as taxation or the control of crime. A good example is control over the investment decisions for the huge pension and superannuation funds; currently, the hedge funds provide another nervous case.

It follows that measures regulating a choice of intermediary, whether a foreign or local bank or other institution, including the choice of

disintermediation, affect access to different kinds of financial instruments and markets. Indeed, in many cases, these services are so closely bound up with the financial activities themselves that measures are common to them both. Notwithstanding that most governments around the world have decided not to try to control financial flows, either inwards or outwards, they still regard the control of services supply as highly sensitive. Countries are concerned to regulate aspects such as ownership and control, the forms of participation in the sector, the modes of supply, and the range of activities in which various types of supplier may engage. Some such measures target foreign suppliers directly; others such as the segregation of services along business lines have the effect of impeding market access by foreign suppliers.

Scope of the financial services negotiations

The GATS provided broad coverage of the sector. The Annex on financial services included all insurance and insurance-related services and all banking and other financial services within its definition of financial services. The list of banking and other financial services extended to 'trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise'. The objects of such trade included the new financial instruments such as money market instruments, foreign exchange, derivative products and transferable securities. The list of services also included participation in issues of all kinds of securities, money broking and asset management.

The agreement's only containment was to translate the general exclusion on services supplied in the exercise of governmental authority into the specifics of this sector so as to mean: '(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; (ii) activities forming part of a statutory system of social security or public retirement plans; and (iii) other activities conducted by a public entity for the account or with the guarantee of using the financial resources of the government'; though the second and third activities were brought back within purview if they were conducted competitively.

In the course of the Uruguay Round, the negotiation of sector-specific commitments met resistance from many countries. In Chapter 3, we recognised how the US threatened to take an MFN exemption, saying it was not prepared to multilateralise its commitments to liberalisation unless other countries were willing to make more commitments. It would rather pursue bilateral arrangements.

We should also note that the financial services sector in the US has been the subject of intricate regulation and the federal government was facing a major domestic reform task if it chose to be party to the liberalisation of access.

A Decision on Financial Services was taken to extend negotiations beyond the close of the Round. The Decision sought to accommodate the US position. Despite the deadlines written into the agreement, it was allowed to continue negotiating without prejudice to its right to take an MFN exemption. During the extension, members remained free to improve, modify or withdraw all or part of the specific commitments they had made without offering compensation. They also remained free to list measures inconsistent with the MFN obligation when the period allowed for the extension ran its course. However, in an attempt to control the leverage which the exemption gave, the Decision said that, during the negotiations, they were not to apply any exemptions they had already listed which were made conditional upon the level of commitments undertaken by other participants or upon exemptions by other participants.

A second Annex on Financial Services was added to the agreement. Then, at Marrakesh, the ministers adopted an Understanding on Commitments in Financial Services that was an attempt to give substance and specificity to the commitments to liberalise the sector. In particular, it prescribed commitments relevant to market access, including commitments on monopoly rights, cross-border trade, commercial presence, new financial services, temporary entry of personnel and non-discriminatory measures. It did likewise for national treatment. Interested members were to inscribe in their schedules specific commitments conforming to the approach set out; any conditions, limitations and qualifications to these commitments were to be limited to existing non-conforming measures. While in several of these respects the approach was circumspect, the understanding pushed countries on commercial presence, entry of personnel and the cross-border purchase of services in another country. Furthermore, the provisions on national treatment began to elaborate the kind of issues we raised above. National treatment was to extend to membership of, or participation in, or access to, a self-regulatory body, securities or futures exchange or market, where it was requisite to supply on an equal basis or where privileges and advantages attached. According to this Understanding, the significant adverse effects of non-discriminatory measures were also to be avoided. However, it seems the understanding was all but

abandoned by the key countries within the OECD when the negotiations became earnest.[48]

Outcome of the financial services negotiations

Understandably, a number of developing and newly industrialised countries saw the sector as strategically sensitive. They sought to retain their existing measures, even, in some instances, to retain the freedom to strengthen measures controlling foreign investment in local suppliers and measures restricting entry by foreign suppliers into certain markets. Countries in south-east Asia were a notable source of resistance, though many of these countries were to be parties to the agreement which was eventually struck.

Permission was obtained to keep the negotiations open beyond the original deadline with all improved offers left on the table. Ultimately, in July 1995, an agreement was reached with the US remaining outside. Of the seventy-six countries who made commitments at the close of the Round, around thirty were party to this subsequent agreement. These countries included members of the EU, Japan, Australia and Canada, together with a number of countries from Asia. The WTO's reading of the results was upbeat.[49] It reported increases in the number of licences being made available to foreign suppliers, the levels of foreign equity which would be permitted, and the participation of foreign-owned banks in cheque clearing and settlement systems. Nationality or residence requirements for members of boards were also being liberalised. The agreement would lead to more foreign banks, securities firms and insurance companies, a greater availability of banking, securities and insurance services sold across borders by companies overseas, and the provision of asset management and other financial services by wholly or partially foreign-owned companies. However, the WTO itself conceded that limitations on foreign equity and exclusions from certain financial services activities were still very much in evidence.

This 1995 financial services agreement was to be implemented for an initial period running to 1 November 1997. At this point, members were again able, for sixty days, to modify or increase their offers and to take MFN exemptions. The Protocol to which these new schedules of commitments are annexed was laid open for acceptance until 30 June 1996 and was to come into force thirty days after the last of the parties accepted it.[50] The new commitments were embodied in supplements to the relevant members' schedules, designed to replace their initial entries for the financial services sector.

The US was to withdraw most of its initial offer and take an MFN exemption in respect of all financial services and all countries. Its exemption maintained: 'Differential treatment of countries due to application of reciprocity measures or through international agreements guaranteeing market access or national treatment'. It contended this reservation was needed: 'to protect existing activities of US service suppliers abroad and to ensure substantially full market access and national treatment in international financial markets.'[51] In the spirit of multilateralism, the countries which were parties to the agreement agreed nonetheless to extend to the other parties any commitments they may make with the US bilaterally. In late 1994 and early 1995, Japan had made commitments to the US in both insurance and other financial services sub-sectors which included commitments relating to trade in derivatives and management of pension funds.[52] The US also worked out a reciprocal accord with the European Union.[53] The WTO leadership hailed the progress made by the deal but expressed regret about the US withdrawal recording concern about the effect of this withdrawal on the outstanding negotiations over basic telecommunications.[54] The US had signalled a similar approach to this sector late in the Round (see Chapter 8).

However, in April 1997, the WTO restarted the negotiations, with the aim of extending the commitments further and bringing the US back into the agreement. A further agreement was concluded on 12 December 1997. The agreement was laid open to acceptance until 20 January 1999. It become the fifth Protocol to the GATS.[55] This time seventy countries made commitments.[56] Expressing support for multilateralism, the US came into the agreement late in the piece. The commitments related to foreign investment, the liberalisation of the modes of supply including cross-border fund raising, forms of participation such as permission to operate as branches rather than as subsidiaries, and allowance for other suppliers to enter markets previously reserved for banks. It has been suggested that a number of countries in Asia and Latin America were now experiencing a great deal of pressure from the IMF to liberalise their financial services sector and let in foreign suppliers.

GATS AND FTAs

Chapter 3 drew attention to the proliferation of bilateral and plurilateral trade agreements. Some of these agreements do not address

services trade at all but the US FTAs are doing so. In certain respects, such as the approach to listing limitations on liberalisation and setting standards for domestic regulation, these FTAs do display greater intensity or more determination than the GATS. So are they GATS-plus? This assessment depends on the changes to national measures they produce, but also on one's view of the nature of the GATS compact/accord.[57]

In these FTAs, the basic concept of services is again not defined. Modes of supply are identified and this delineation involves a modification to the GATS approach. Much more so than the WTO TRIMS agreement or the older bilateral investment treaties (see Chapter 8), these FTAs contain provisions promoting freedom to invest. They go well beyond investment in services vehicles, but it means that the commercial presence mode has the benefit of the FTA investment chapter. With this articulation, cross-border trade in services gains its own chapter too and this elevation leads to a general prohibition on requirements of commercial presence for service supply – a right then of non-establishment though, like the investment freedoms, the right is subject to the limitations or reservations the partner applies in the listings approach. The modes also include natural presence. However, like the GATS, migration for employment is likely to be excluded up-front from the thrust of the agreement.

The impetus for liberalisation begins with the specification of the norms of national treatment and market access. Fundamentally, they have the same content as the GATS norms. If the FTAs create further momentum, it will primarily be through the listings approach. We have noted already that the GATS adopts a positive listings approach. The foreign service suppliers really only enjoy the benefit of the norms to the extent that the member country lists commitments sector by sector and mode by mode in its schedule. In some FTAs, the partners retain this listings approach. Whether the FTA becomes GATS-plus depends on whether the partners list commitments above and beyond the GATS commitments. The FTA can be the occasion to target sectors that are of particular trade interest to the two countries. If the parties are being conservative, they might simply incorporate their GATS position by reference, though that presumably exposes these commitments to the dispute resolution procedures of the FTA.

In its FTAs, the US presses for a negative listings approach. Potentially, this approach accelerates the impetus for liberalisation. Now the partner's measures are subject to the requirements of national

treatment and market access, unless the partner has successfully reserved the measures within the annexes to the agreement. Given the limited commitments most members made in the Uruguay Round, this surrender could be substantially GATS-plus. The party must list the existing non-conforming measures it wishes to retain against the requirements of the agreement. For foreign investment, these requirements include the agreement's injunction against attaching performance requirements. But the party has an alternative avenue: it may describe the sectors, sub-sectors or activities for which it wishes to retain existing measures or adopt new or more restrictive measures. This approach has the benefit of keeping the party's options open to introduce further measures, perhaps in response to changes in conditions.

In both cases, the onus falls on the party wishing to retain regulatory authority to specify the reservations. Otherwise, their regulatory policy will be subject to the full force of the agreement's requirements for liberalisation. At the very least, the party must come up with a description that comprehensively carves out the space it wishes to retain. The same must be done for foreign investment restrictions as for restrictions on cross-border service supply.

The force of this closure is softened in two ways. The FTAs follow the GATS and distinguish between quantitative and qualitative limitations on market access. Only the quantitative limitations have to be the subject of reservations. Second, based on experience, it seems that the parties may use broad wording to reserve space for measures, such as a reservation for all measures at state or provincial level. While the US seeks greater access to the markets of its partner for its stronger suppliers, like all countries, it too feels sensitivities at home to competition from foreigners. Much of its own services regulation is at the sub-national level of the states and it cannot marshal all these governments for a liberalisation push every time it makes an FTA. Certainly, this proves true for legal services (see Chapter 5). Additionally, it carries its own long-standing regulatory traditions and current public policy concerns (such as public morality and national security) that it wishes to safeguard.

The listings onus will be strictest where the partner country is negotiating hard to have the existing measures tied down precisely. It is also substantial where the country is finding it difficult to foresee the boundaries of the space in which it needs to keep its options open. The culture or media sectors present such a challenge because they are in a

state of flux and their configuration is hard to predict. For example, the old local content quota requirements might seem redundant given the profusion of new electronic interactive outlets. But will the majority of people use the new outlets? Will their content be parasitic on that of the old mass media? Might regulation be needed to ensure that small suppliers and users have genuine access to the technology and service platforms of the new media (see further Chapter 8)?

Nonetheless, even if a negative listings approach is adopted, the agreements expect there will be domestic regulation of service supply. Hence, the FTAs contain a section similar to the GATS disciplining domestic regulation with administrative law type standards. Foreign investments also have the benefit of fair treatment provisions. The generality of these standards have frustrated some countries. To gain greater certainty, the country seeking access for its suppliers might prefer to seek specification in the partner's commitments or reservations of the way in which the particular measure will operate. Like the GATS, the FTAs elaborate special annexes for those sectors which are considered essential to the conduct of international business generally (including services supply in other sectors). For the GATS, these provisions for access to essential business services went farthest for basic telecommunications. The FTAs step up the prescriptions for financial services and add in electronic commerce.

The FTAs also establish their own dispute settlement processes and we shall consider their relationship to WTO dispute settlement again in Chapter 6, with discussion of the FTA's intellectual property chapters.

NEW ROUND NEGOTIATIONS 2000–2007

Negotiations for commitments

In this last section, we consider how the scope of the GATS may be extended in the future. Of course, the biggest change would occur if the new round of negotiations pushed liberalisation beyond the standstill positions. But these negotiations are still caught up in the fate of the Doha Round overall (see Chapter 4).

The Round started up slowly in 2000. In 2001 through the Council for Trade in Services the WTO formulated the Guidelines and Procedures for Negotiating on Trade in Services (S/L/93, 29 March 2001). The fresh negotiations proceeded initially again by bilateral

request and offer. Initial offers were due 31 March 2003. Some countries have kept their offers confidential, while others have been prepared to make them public where they can be consulted at the WTO website in the TN/S/O document series.[58]

The services negotiations were taken into the Doha Development Round. The Doha WTO Ministerial Declaration has stated that negotiations on trade in services should be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries.[59] This goal was affirmed in the General Council's post-Cancun Decision,[60] and then again in the Hong Kong WTO Ministerial Declaration.[61] By the Hong Kong Meeting, the WTO was urging that the sectoral and modal coverage of commitments should be expanded and their quality improved, with particular attention being given to sectors and modes of supply of export interest to developing countries. At the same time, there should be appropriate flexibility for individual developing countries and small economies; LDCs would not be expected to undertake new commitments.[62] The WTO has also been reassuring members of their right to regulate and to introduce new regulations on the supply of services.[63]

The aim of those favouring further liberalisation was to avoid reproducing the pattern of the Uruguay Round negotiations, where some countries hardly participated at all and all countries were selective about sectors to enter and modes of supply to commit.[64] In characterising the WTO trade negotiations overall in Chapter 3, we mentioned the low yield from the offers in this new round so far. This infertility is partly the product of the single undertaking; the services negotiations have been caught up in the deliberations over liberalisation of agriculture. But it is also due to the members' attitudes to services. The offers tend to be coming from the same countries that participated during the Uruguay Round and they are increments on the liberalisations they then made.[65] Yet, domestic reforms and global dynamics are restructuring services markets. For example, at the May 2005 deadline, only eleven members (the EC as one) had tabled offers regarding financial services. Some of these offers just confirmed the existing limitations. Few committed to liberalising mode 1 or 2, the biggest omission from the Uruguay Round and increasingly important given electronic banking.[66]

To avoid disappointment, the WTO has extended deadlines and invited new and revised offers. At the Hong Kong Ministerial, a

concerted effort was made to give momentum to these Track 1 negotiations. But members have resisted any suggestion of compulsion; after all, commitments are for each country to decide. In Annex C, the Hong Kong Declaration nominated objectives, approaches and timelines. While bilateral request–offer negotiations would remain the main method of negotiation, negotiations should also be pursued on a plurilateral basis. Key countries volunteered to coordinate plurilateral negotiations, for instance Canada, financial services, Singapore, telecommunications services and India, the movement of independent professional services providers.

The objectives were carefully crafted. For mode 1, the objectives were the removal of existing requirements of commercial presence and the making of commitments at existing levels of market access on a non-discriminatory basis. The objectives for mode 2 were parallel to mode 1. For mode 3, commercial presence, they sought enhanced levels of foreign equity participation, reduction of economic needs tests and greater flexibility on types of legal entity permitted. While mode 3 had previously been the focus of developed country exporters, now mode 4 was given attention, nominating new or improved commitments on the categories of contractual services suppliers, independent professionals and others, delinked from commercial presence. Such commitments should include reduction in economic needs tests and indications of prescribed durations of stay and possibility of renewals. But again only intra-corporate transferees and business visitors were specifically mentioned.

Negotiations over domestic regulation

These mode 4 concerns show how trade liberalisation is connected with reform of domestic regulation. In this regard, some members are asking others to make commitments. If a member wants to minimise or regularise a particular restriction, it might seek an undertaking from the other member to put the measure in a particular form. In the GATS listings approach, such undertakings will appear in the schedules as additional commitments. Thus, members have been encouraged to address overly burdensome visa eligibility requirements, transparency and procedures for processing, and to participate in mutual recognition agreements.

Of practical moment to the alignment between trade liberalisation and domestic policy flexibility is the application of the necessity test. Annex C urges members to develop disciplines pursuant to the

mandate under Article VI:4. After the disciplines were introduced quite quickly for the accounting sector, this work has become fraught. To overcome the complications of each sector, Hong Kong promotes the idea of bringing it together in Track 2 negotiations by means of a consolidated text of disciplines for licensing procedures and qualification requirements. But some members are opposed to such a categorical constraint. If they question whether such generalisations can be made across sectors, they also wish to retain the right to decide when the disciplines would be attracted. Presently, the disciplines only apply in the sectors in which the individual member has made commitments. Even there, they do not apply to measures that are the subject of scheduling requirements of Articles XVI and XVII, that is, they only apply to the qualitative limitations and not to discriminatory measures generally or to the quantitative market access limitations. On this score, Australia has proposed that the Article VI:4 criteria be extended.

The Working Group on Domestic Regulation has not reached a consensus view. The Chair of the Working Group on Domestic Regulation issued a draft text in July 2006. Member country responses have varied. The US has emphasised transparency standards, while the EC is interested in disciplining the licensing procedures that suppliers must traverse to establish a commercial presence. Some developing countries remain opposed to disciplines on regulatory autonomy. However, others would like to see qualification requirements and procedures disciplined to facilitate temporary movement abroad.

Competition regulation

Writing in 1990, Grey anticipated that the GATS was not likely to compel private controllers of services to supply those services should the competitive disciplines of the global market provide insufficient incentive for them to do so. Now, a broader view of WTO responsibilities would confront the restrictions which foreign suppliers place on access to their services, especially on the producer services which other suppliers need if they are to be genuinely competitive. Competition law concepts such as abuse of dominant position and the denial of access to essential facilities might be put to good use here.

In this regard, the most substantive obligation relates to monopolies and exclusive service suppliers. Article VIII requires members to ensure that monopoly service suppliers do not act in a manner that is inconsistent with the commitments members have made to national treatment and market access under the agreement. To this end, members are

also to ensure, when a monopoly supplier competes outside the scope of its monopoly rights, that the supplier does not abuse its monopoly position. This language is reminiscent of the traditional competition policy approach to the use of intellectual property rights. But the concept of monopoly rights is not defined by the agreement.

The responsibilities extend to exclusive service suppliers. For the purposes of the Article, the GATS identifies a service supplier to be an exclusive supplier, where a member formally or in effect authorises or establishes a small number of suppliers and substantially prevents competition between them (Article VIII:5). One imagines that these provisions had publicly owned or controlled suppliers in mind, especially in the case of monopoly suppliers. But, for a variety of reasons, a member government may seek to limit the number of private suppliers which may operate in a particular sector.

As we shall see from the study in Chapter 8, this possibility is clearly envisaged by the GATS Annex on Telecommunications. It requires members to ensure that foreign services suppliers are afforded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms. Public services are defined as any service required explicitly or in effect by a member to be offered to the public generally. We know that it is the tradition in certain countries for the 'common carriers' to be in private hands. Privatisation of public instrumentalities is spreading that phenomenon. At the same time, a greater understanding of how these markets work is expanding the sense of what a common carrier might be. If it first has application to various telecommunications carriers, we shall see in Chapter 8 that it has been suggested that Microsoft's control over the computer platform makes it a common carrier for Internet services, a provider of essential facilities. So the scope of the Annex is important.

Those members who participated in the carry-over negotiations decided to take the issue of regulatory design further. The Telecommunications Reference Paper which the negotiations produced adopts the competition law approach, though it remains quite general and permissive in its approach. Fifty-five members adopted the paper as part of their additional commitments. We shall give the Paper detailed attention in Chapter 8 as the book is brought to a close.

More generally, Article IX:1 of the GATS embodies a recognition by members that certain business practices of service suppliers may restrain competition and thereby restrict trade in services. Thus, it

envisages that members may wish to take measure against those practices – without, however, making it clear what level of exemption those measures should enjoy themselves from the demands of the trade norms. We noted in Chapter 3 that competition laws count as government measures just like any other laws. If it contains an implicit exemption for competition laws, nevertheless, Article IX is doing little positively to promote the application of competition laws. Its tenor is permissive and it does not require members to take measures. We know that members rely on the cooperation of other members to act effectively against restrictive business practices. The GATS merely obliges members, at the request of other members, to enter into consultations with a view to eliminating such practices (Article IX:2).

It is clear that such provisions of the GATS are helping to expand the notion of the government measures which might contribute to trade barriers. Liberal interpretations by WTO panels also contribute. As we noted in Chapter 3, the panel report in the photographic film and paper dispute took a very liberal view of the Japanese measures which fell within this ambit. In this dispute under the GATT, the complaint of the US targeted the Japanese Large Retail Store Law. A dispute notified to the WTO under the GATS has done so too.[67] But the photographic film and paper dispute indicates how difficult it is to prove a non-violation complaint of nullification or impairment, even where the government is actively involved in encouraging the exclusionary private practices. Mere failure to act on such practices is less likely again to ground a complaint, unless the agreement in question has placed the member under a positive obligation to take measures against such practices.

Other business regulation

Chapter 3 began to acknowledge the case being made to marshal international support for other kinds of business regulation. The difficulties which global markets present to governments which want to tax effectively are slowly being appreciated.[68] Likewise, the failures among financial institutions in a number of countries seem finally to be moving world leaders to take the coordination of prudential supervision seriously. One would be right in saying these issues are not new, but freer access to internationalised services is boosting the capacity to avoid regulatory controls. Cross-border facilities of financial intermediation are drawing funds into unregulated areas, including those which are so hard to locate in cyberspace.

We saw above that the GATS most openly acknowledges these concerns by conceding spaces for national regulatory measures, provided they represent certain legitimate objectives and satisfy the disciplines of the necessity test. Thus, its general exceptions provide openings to members that feel confident they can regulate. The specialist annexes also give hints that the negotiating parties had started to think about the stresses on domestic regulation when services flow more freely across national borders. Thus, the sector-specific Annex on Financial Services provides a prudential regulation 'carve-out' and allows a member to recognise the prudential measures of any other member in determining how its measures relating to financial services are to be applied. However, the Annex gives no support to the international standards which for example the Basel Committee has established for capital adequacy requirements under the aegis of the International Bank for Settlements.

Simply allowing members exceptions to the norms does little for regulatory competence. Really, as we shall see from the case studies (Chapters 6 and 8), the GATS is skirting around serious issues of international regulation that are inextricably bound up with its push to free up the flow of services. Ultimately, the WTO must be pressed to take more responsibility than this. In its present state, the GATS does very little directly to require any coordination or standardisation of regulation in the service sectors. Faced with the hesitancy to make new commitments, Mattoo makes the suggestion that members might feel more comfortable with liberalisation if they could count on a common regulatory regime at the same time.[69] Hong Kong did move, rhetorically at least, to recognise that members need support for 'proper flanking policies' and 'regulatory preparedness' so that they can make the most out of liberalisation. Those regulations would include competition policies and laws, domestic supply capacity and human capital, and transfer of technology.

Reporting on the new round of negotiations in financial services, Gkoutzinis presents an interesting situation. On the one hand, some members want to discipline the space that the prudential carve-out has allowed national regulation. What is prudential? How do the Article III requirements of transparency and the Article VI disciplines of proportionality, necessity and suitability use this space? Currently, there is disagreement, developed countries prefer the space to be narrow, developing countries want it broader. Then, on the other hand, some members want the WTO to clarify its relationship with

the work in other standard setting bodies such as the Basel Committee and IOSCO. The processes of financial liberalisation and soft international regulatory convergence are mutually reinforcing but ought to remain independent. Yet developing countries are not happy at being the recipients of standards set by others and will make WTO commitments only if they have input into standard setting elsewhere too.[70]

CONCLUSIONS

This chapter has offered a detailed analysis of the first multilateral and multi-sector agreement on services. But it has also been interested in the significance of the GATS for the globalisation of law. In terms of its definition of the field, the range of the GATS is wide indeed. It subjects to the norms of open trade and free markets a wide range of activities carrying messages about economies, politics, culture and social life. As the discussion suggests, financial, professional and media services can transmit powerful intellectual, organisational and personal content. The GATS draws all but a very narrow category of services within its ambit and it applies its scrutiny to each of the major routes of service supply. Cross-border supply, the consumption abroad, the movement of persons and commercial presence, are all embraced. Commercial presence has attracted the most interest, but the WTO is now stressing the other modes in an effort to engage the developing country members.

Through its norms of MFN, national treatment and market access, the GATS proposes a neo-liberal agenda for services supply. However, it is clear that, in order to attract the participation of a broad variety of countries, it had to provide leeway. We might say it had to mediate as well as discipline. So, the GATS offers a multilateral framework for the regulation of services trade. An attraction for those countries whose service sectors are not powerful is that they receive the benefits of access to other countries without necessarily providing full material reciprocity. But the GATS has also allowed the opportunity to enter MFN exemptions. We have noted the difficulties which the WTO has experienced, especially in the context of the negotiations which extended past the Round, in disciplining the strategic use of this avenue.

Likewise, the chapter explores the broad scope of the national treatment norm in this field. It challenges measures that discriminate against foreigners, whether the measures are taken to protect local suppliers or to further a country's general regulatory competence over

those who supply from a base off-shore. Furthermore, it says that the measures need not be overtly discriminatory. It is their effect which matters. In questioning formally identical treatment of foreigners, it will require local regulators to make certain concessions to foreign standards. But, in any case, the agreement goes further. Its norm of market access places on the defensive non-discriminatory controls on participation in markets.

Nonetheless, the analysis reveals the tendency of the GATS to leave the full impact of the norms to the process of implementation. The definitions of modes of supply show some hesitation, particularly in respect of free participation in labour markets. The norms are expressed in largely general terms and they have now attracted some interpretation through the dispute settlement process, particularly the distinction between quantitative and qualitative limitations on market access. The necessity test has been relaxed a little. Overall, the main site for mediation remains the GATS two-fold listings approach. It turns the spotlight on the process of negotiations between members, first within the Uruguay Round, and now in the succeeding round that commenced in 2000. The listings approach has allowed a space for countries to hold back whole sectors from the scrutiny of the agreement, as well as to preserve non-conforming measures in those sectors which they do expose. In various sectors, and across all countries, this opportunity has been utilised. The dispute settlement ruling shows however that the members must take care in delineating the scope of their commitments. The services chapters of some FTAs reverse the listings approach and place more pressure on parties to get their reservations right.

In liberalising supply in sectors like finance, law and communications, together with modes such as the movement of people and direct foreign investment, the WTO is altering the balance in favour of transnational businesses. Though efforts are being made, a question mark hangs over its preparedness to support the kind of re-regulation needed to ensure that these businesses do not close off access to services privately. It remains very much to be seen just who will have access to that regulatory potential. At present, the GATS makes only a gesture in the direction of support for competition regulation and other global business regulation too, such as the crucial financial services regulation, despite the regulatory resources that are available to it if it could find the institutional will to connect. At the moment, members seem to interpret such issues in terms of short-term advantages and disadvantages and a static view of the way in which the WTO should be part of global governance.

NOTES

1. For a good pre-GATS survey, see R. Grey, *The Services Agenda* (Halifax: The Institute for Research on Public Policy, 1990).
2. J. Rifkin, *The Age of Access: How the Shift from Ownership to Access is Transforming Capitalism* (London: Penguin Books, 2000).
3. B. Hoekman, Services and Intellectual Property Rights. In S. Collins and B. Bosworth (eds.), *The New GATT: Implications for the United States* (Washington: The Brookings Institute, 1994). A prolific writer on trade regulation, Bernard Hoekman is from the World Bank.
4. W. Drake and K. Nicolaidis, Ideas, Interests, and Institutionalisation: 'Trade in Services and the Uruguay Round', *International Organization* 46 (1992), 37.
5. C. Arup, Experimenting with Regulation: Liberalisation of Professional Services in the PRC, *Australian Journal of Asian Law* 8 (2006), 1.
6. WTO, *Legal Instruments Embodying the Uruguay Round of Multilateral Trade Negotiations* (Geneva: WTO), vols 28–30. The schedules are set out in tabular form country by country. The columns run through the sectors or subsectors which the country has inscribed, listing the limitations on market access and national treatment under each mode of supply, with an extra column for additional commitments. The schedule may also include 'horizontal' commitments, which apply in every sector included in the schedule.
7. WTO, Services Sectoral Classification List, MTN.GNS/W/120.
8. It is called a bottom up rather than top-down approach, see, eg, H. Tuselmann, The Multilateral Agreement on Investment: The Case for a Multi-speed Convergence Liberalization, *Transnational Corporations* 6(3) (1996), 87. Note now M. Roy, J. Marchetti and H. Lim, Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?, WTO Working Papers, September 2006, at www.wto.org.
9. See Guide to Reading the Schedules of Specific Commitments and the Lists of Article II (MFN) Exemptions, *Legal Instruments*, Vol 28, Introduction, p ii.
10. Guide, *Legal Instruments*, Vol. 28, Introduction, p iii.
11. Report of the Appellate Body, *United States–Measures Affecting* the *Cross-Border Supply of Betting and Gambling Services*, WT/ DS285/AB/R, 7 April 2005.
12. Early appraisals were made in H. Broadman, The Uruguay Round Accord on International Trade and Investment in Services, *The World Economy* 17 (1994), 283; also B. Hoekman, Market Access through Multilateral Agreement: From Goods to Services, *The World Economy* 17 (1994), 707 and P. Sauve, Assessing the General Agreement on Trade in Services: Half-Full or Half-Empty?, *Journal of World Trade* 29(4) (1995), 125. A more systematic analysis is to be found in L. Altinger and A. Endes, The Scope and Depth of GATS Commitments, *The World Economy* 19 (1996), 307.

13. The WTO has made a table available at its website. For each member country, it shows in which of twelve broad service sectors they made specific commitments. See www.wto.org/services/websum.htm. A country-by-country breakdown according to a list of 149 service 'activities' can be found in Altinger and Endes, GATS Commitments.
14. W. Goode, Services. In K. Anderson (ed.), *Strengthening the Global Trading System: From GATT to WTO* (Centre for International Economic Studies, University of Adelaide, 1996). Walter Goode was a senior official with the Australian Department of Foreign Affairs and Trade.
15. See Altinger and Endes, 'GATS Commitments' for a catalogue.
16. In this regard, note the concerns expressed by the Director-General, Renato Ruggiero, Address to the Business Council, Williamsburg, WTO Press Release PRESS/24, 13 October 1995: 'Bilateralism politicizes trade. Negotiations emphasise power-based relations over rules-based relations ... Commitment to international cooperation is weakened, and international agreements become less stable.' The Director-General was hinting at US approaches to the carry-over negotiations on financial services and basic telecommunications.
17. For such a critique, see G. Dunkley, *The Free Trade Adventure* (Melbourne: Melbourne University Press, 1997).
18. According to the report on the negotiations in T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992) Volume II: Commentary* (Boston: Kluwer, 1994).
19. Sauve, Half-Full. Here again, because the negotiations were not made public, it is necessary to rely on insiders for insights.
20. Broadman, Uruguay Round, p 285.
21. Guide, *Legal Instruments*, vol. 28, Introduction, p iv.
22. M. Trebilcock and R. Howse, *The Regulation of International Trade* (New York: Routledge, 1995).
23. In *EC–Bananas III*, the Appellate Body held that the same was true of the MFN treatment, see Report of the Appellate Body, *EC–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997.
24. For a helpful technical analysis in the European context, see P. Eeckhout, *The European Internal Market and International Trade: A Legal Analysis* (Oxford: Clarendon Press, 1994).
25. For further discussion, see M. Krajewski, *National Regulation and Trade Liberalization in Services* (The Hague: Kluwer Law International, 2003). Now M. Cossy, Determining Likeness under the GATS: Squaring the Circle, WTO Working Paper, September 2006, at www.wto.org.
26. See A. Mattoo, National Treatment in the GATS – Corner-Stone or Pandora's Box?, *Journal of World Trade* 31(1) 1997, 107. See now A. Mattoo and P. Sauve, Domestic Regulation and Trade in Services: Looking Ahead, in A. Matto and P. Sauve (eds.), *Domestic Regulation and Services Trade Liberalization* (New York: World Bank, 2003).

27. Hoekman, Services, pp 87–8.
28. See R. Burnett, *The Law of International Trade* (Sydney: Federation Press, 1994).
29. Guide, *Legal Instruments*, vol. 28, Introduction, p iii.
30. Mattoo, Pandora's Box, p 109.
31. Further to this issue now, see M. Krajewski, *National Regulation and Trade Liberalization in Services*. The new scheduling guidelines suggest the same: WTO, Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services, S/L/92, 28 March 2001.
32. J. Trachtman, United States – Measures Affecting the Cross-Border Supply of Betting and Gambling Services, *The American Journal of International Law* 99 (2005), 861.
33. A. Mattoo and S. Wunsch-Vincent, Pre-Empting Protectionism in Services: The GATs and Outsourcing, *Journal of International Economic Law* 7 (2004), 765.
34. WTO, Symposium on Cross-Border Supply of Services, 28 April 2005, at www.wto.org under Services Trade.
35. The various annexes form part of the GATS and are included in the WTO publications, *Legal Texts* and *Legal Instruments*.
36. The Understanding was adopted at Marrakesh, see WTO, *Legal Instruments*, for the text.
37. Saskia Sassen's writing, now see *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).
38. See Stewart, *A Negotiating History*.
39. An argument put by the renowned trade theorist, J. Bhagwati, Comment on Hoekman. In Collins and Bosworth (eds.), *New GATT*.
40. For insight into the European experience, see Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (London: Lawrence and Wishart, 1995).
41. See WTO, *Legal Texts*, p 402.
42. These commitments comprise a Third GATS Protocol: Schedules of Specific Commitments relating to Movement of Natural Persons. See www.wto.org at Documents: Legal Texts: Post-1994 GATs Protocols.
43. WTO, Managing the Movement of People, Joint IOM/World Bank/WTO Seminar, Geneva, 4–5 October 2004, some papers available at www.wto.org through the Services Gateway.
44. WTO, Committee on Trade and Environment, Report, WT/CTE/1 (Geneva: WTO, 1996).
45. WTO News Items, 22 May 2007. Further, WTO News Items, 21 December 2007 – The complainant may retaliate – with TRIPs suspensions.
46. For further analysis, see P. Delimatsis, Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour through Article VI of the GATS, *Journal of International Economic Law* 10 (2007), 10.
47. See WTO Press Release PRESS/51, 1 July 1996.
48. As reported by Sauve, Half-Full.

49. See WTO Press Release PRESS/18, 26 July 1995; also WTO Focus, No 5, August–September 1995.
50. Second GATS Protocol: Revised Schedules of Commitments on Financial Services, available from the WTO as a separate publication.
51. See Second GATS Protocol.
52. See WTO Focus, No 3, May–June, 1995.
53. Australian Financial Review, 28 July 1995.
54. See Ruggiero, Address to the Business Council, Williamsburg, WTO Press Release PRESS/24, 13 October 1995.
55. Fifth GATS Protocol: Schedules of Specific Commitments and Lists of Exemptions from Article II concerning Financial Services, available from www.wto.org at Documents: Legal Texts: Post-1994 GATS Protocols.
56. See WTO Focus, No 25, December 1997. A summary of commitments, country-by-country, was made available at www.wto.org/wto/new/sumfin.htm.
57. Eg, Roy, Marchetti and Lim, *Preferential Trade Agreements*.
58. At www.wto.org under Services Negotiations.
59. WT/MIN(01)/Dec/1, 20 November 2001, paragraph 15.
60. The 'July package', see Decision Adopted by the General Council on 1 August 2004, WT/L/579, 2 August 2004.
61. WT/MIN(05)/DEC, 22 December 2005.
62. See Hong Kong Declaration, paras. 26 and 27. See also Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, 3 September 2003 (WTO, Press Release PRESS/351).
63. Doha Declaration, para. 7; also Press Release, PRESS/299, 28 June 2002, Director-General of WTO and Chairman of WTO Services Negotiations Reject Misguided Claims that Public Services Are under Threat.
64. See eg, M. Kono and ors, Opening Markets in Financial Services and the Role of the GATS, WTO Special Studies, No 1, available at www.wto.org at Resources: Economic and Research Analysis: Research Reports.
65. R. Adlung and M. Roy, Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change, *Journal of World Trade* 39 (2005), 1161.
66. A. Gkoutzinis, International Trade in Banking Services and the Role of the WTO, *The International Lawyer* 39 (2005), 877.
67. *Japan – Measures Affecting Distribution Services*, complaint by the United States, WT/DS45. The current status of the dispute is still pending consultations.
68. See for example the report by the OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998).
69. A. Mattoo, Services in a Development Round: Three Goals and Three Proposals, *Journal of World Trade* 39 (2005), 1223.
70. Gkoutzinis, Banking Services, at p 911. See further L. Panourgias, *Banking Regulation and World Trade Law: GATS, EU and 'Prudential' Institution Building* (Oxford: Hart Publishing, 2006).

CHAPTER 5

THE CASE OF LEGAL SERVICES

Chapter 5 is the first of the case studies. Its subject is a notable global carrier, the supply of legal services internationally. The object of this first case study is to examine the evidence of the impact of the WTO, and specifically of the GATS, on the inter-legalities that arise out of the provision of legal services internationally. The chapter is the first field test of the interpretations we have placed on the WTO's relationship between globalisation and the law. In this case, the test material is law itself, articulated at the very particular level of the activity we might call legal practice or legal services. With the book's interest in globalisation and law, a good starting point is the identification of a new international, possibly transnational, style of lawyers' work. The chapter suggests how this kind of lawyers' work may project around the world a distinctive brand of transaction-based and market oriented legality (based on private contract and commercial arbitration). This legal service has the potential to cut global relations loose from the regulatory specifications and cultural ties of the locality. Its style is reflected in the ways these lawyers conduct themselves in their dealings with their clients and other parties, including the ways they site and organise their work.

The chapter argues, however, that these lawyers' own legalities fail fully to negotiate the rich texture of local legal rules and practices. The inevitability of inter-legality bolsters the need to provide services locally, giving attention to the time and place of law. Effective provision of legal services requires relationships to be formed, not just with commercial clients, but also with fellow lawyers, government bodies

and local communities. Chapter 5 recognises that the demands of the lawyers' own 'product markets', or in the terms of the book, the nature of the economic, political and cultural milieus in which they operate, contribute to this reliance. But they are reinforced by the extensive direct local regulation of the supply of legal services. The foreign suppliers of legal services encounter legalities of supply modes which diverge from their home country legalities and, if they are becoming truly transnational, their own preferred 'private' ways of organising and operating.

So a consideration of trade in legal services provides insights into the broad phenomenon of the globalisation of law. But the relation which the competition between lawyers bears, to the broader competition between types and locations of law, is not a straightforward one. The supply of legal services exhibits its own economic, political, cultural – and legal – features. There are inter-legalities peculiar to the supply of legal services, which provoke attempts at mediation. The chapter describes the detailed and prescriptive ways this regulation controls the modes of supply of foreign legal services, and the purposes that lie behind such controls. The modes of supply range from disembodied provision across borders to supply by natural presence in the jurisdiction, either temporarily or on a continuing basis. It also includes supply via a commercial presence. Commercial presence may be established through a local office, employment and partnership with locals or, conceivably, financial acquisition of existing local firms. Local regulation still limits the choice of supply mode.

A particular feature of the interaction between service supply and local regulation in this sector is the basis on which foreigners may gain admission to the profession and thereby access to the work which is reserved exclusively for the profession. Increasingly, the content of educational qualifications is the key to this admission. Failing admission, the issue becomes the scope of the activities permitted outside this monopoly, say, as a registered foreign law consultant. Yet another issue might overtake these controls, liberalisation of the business structures available for the provision of legal services. If the structures are liberalised, to allow multi-disciplinary partnerships, and incorporated legal services, foreign layers, indeed non-lawyers, could participate in these businesses without qualifying as local professionals.

Returning to the WTO, the chapter identifies the impact of the GATS. It notes the implications of the agreement's norms for local regulation, it then proceeds to assess the outcome of the negotiations

over commitments within the Uruguay Round. In particular, it examines the commitments that Japan, the US, and the members of the EU were prepared to make to liberalisation of their regulation to further national treatment and market access.

The outcome of the Round was a very guarded and tentative move in the direction of liberalisation. Even in the North, much of the local profession remains apprehensive about foreign lawyers and governments too have reservations of a political or social kind about opening up entirely. Yet each location has an interest in showing that it has the necessary combination of producer or business services to be an attractive node within the networks of the global economy. The chapter investigates whether the most recent round of GATS negotiations is yielding any further commitments to liberalisation. It also evaluates the commitments to legal services a new WTO member, the People's Republic of China, made on accession. In China's case especially, the issue is not simply foreign participation but acceptance of the whole idea of private sector legal services.

Further deregulation of traditional controls on competition may have a radical effect on professional practices and the GATS may be challenged to provide a new basis for observance of standards in this globalising field. Protocols for mutual recognition of qualifications do not necessarily resolve the issue of substance. Will the answer be found in an international competition law or will positive codes of conduct be required, if cross-cultural understandings are to be fostered, and ethical practices which are respectful of local conditions, are to be observed? In a major update towards the end of the chapter, the study examines the experience of the Council on Trade in Services and the Working Group on Domestic Regulation in fashioning disciplines for professional services regulation, most recently in the Track 2 negotiations of the Doha Round. Especially instructive have been the obstacles to involving professional associations as well as member governments in settling disciplines considered appropriate to the legal profession and promoting international standards of conduct.

STYLES OF SERVICES SUPPLY

Demands of international clients

While not a major trade sector in terms of volume or revenue, legal services form part of the business or producer services that are so important to the internationalisation of trade in goods, finance,

knowledge, investments and other economic flows. As we have noted, such flows contribute to the breakdown of national economic, political and cultural differences, widening and deepening the reach of globalisation. Of course, legal services are not alone in performing this role. Often they are allied with other services such as accountancy and financial services in importing economic demands and exporting economic resources. Nonetheless, it is tempting to think that lawyers operating globally might be among the key carriers and even constitutors of new, worldly ideas and practices. In their study of international commercial arbitration, Dezalay and Garth suggested that international business lawyering is now a major challenge to state sovereignty and the governance of the economy, law and the legal profession, precisely because such legal services involve the making of law as well as its application.[1] Lawyers are involved not just in the markets for legal services but in the markets for law.

We might start with a supposition that trade in legal services is promoted by the globalisation of the activities which lawyers service. These activities include the operation of financial markets, the coordination of manufacturing systems and the provision of consumer products. By so linking legal services to the developments occurring in their 'product markets' or the demands of their customers, we could trace how certain lawyers have followed their home country multinationals into foreign locations. They have facilitated sale of goods transactions, construction and natural resources extraction projects, manufacturing ventures and increasingly the placement of direct foreign investments.

With the radical innovations being made in international financial and securities markets, together with the stepping up of merger and acquisition activity in the markets for companies, lawyers gathered further work. They are putting together transactions, guarding against risks, and dealing with regulatory requirements. Privatisation of government instrumentalities has given this kind of work another major spurt. An ongoing source of work is regulatory arbitrage and the construction of off-shore legal arrangements for the purpose of minimising various liabilities faced by wealthy individuals and corporate clients (such as taxation).

Now foreign lawyers are eyeing the domestic markets of growing economies. Giving advice on home country law, they seek to capture the business of local corporations that are looking outward, to trade, invest and speculate. They may aim even to tap into the domestically

oriented custom of small or medium-sized business and household clients, taking advantage of the commoditisation of more routine legal services.

Much of this legal work rides on the back of domestic policies liberalising financial markets, floating private business and privatising state enterprises, in some cases creating primary markets for the first time. New commercial markets stimulate markets for legal services. Yet some have the potential to override local settings. In this context, Chapter 2 identified an emerging legality to be a new supra-national and possibly a-national type of business law, sometimes called the new *lex mercatoria*. Business operators not only express preferences between national jurisdictions, they promote types of law that are not dependent on assimilation into national schemes. The clearest examples are the large-scale but exclusive contracts that are fashioned to regulate special projects such as minerals exploitation or hotel and office construction. In addition to the actual terms devised for these contracts, the determinations made through commercial arbitration help to define norms and procedures that are suited to the requirements of global business. The exploitation of legal structures like the trust and company buries cross-border dealings inside multinational groups. Governments experience difficulties comprehending the relations in these groups for the purpose of regulating for instance transfer pricing.

Conventionally, the study would proceed on the basis that the lawyers who are successful in providing these services are responding in an instrumental fashion to the demands of their clients. Their strategies are determined by the fields of economic activity in which they operate. Yet the relationship between lawyers and capital is better seen now as a reciprocal one.[2] Recent work attributes a proactive, formative role to lawyers. They are given an important role in the social construction of world markets and not just in markets in legal services. International business lawyers are involved creatively in the production of symbolic forms.[3] Thus, lawyers are involved in the construction of market subjects (such as corporations), exchange commodities, forms of security, and media of exchange, as well as the necessary bonds of social solidarity for economic activity to be maintained, such as trust, legitimacy and morality, and the avenues for dispute resolution.[4] A good example of their role in constructing markets is the innovation of legally tradeable financial instruments such as securities and derivatives; another is the creation of special devices to effect management buy-outs and other forms of corporate takeover.

Entrepreneurial legal services

If this activist role is acknowledged, we can see that the provision of legal services involves a competition between lawyers with differing styles and values. For instance, Dezalay and Garth identify a competition in which, to their mind, the aggressive, technocratic style of the big Anglo-American firm is prevailing over the more gentlemanly, almost aristocratic traditions of Europe or the family and school-based legal elites in other parts of the world. If this trend is true of international business law generally, then, to think of lawyers in terms of institutional economics, these firms are taking advantage of their scale, scope and speed economies. We know that already there are international firms with hundreds of partners and offices in many locations. Less tangibly, these lawyers gain advantages by practising proactive deal making and conflict management skills. These skills build on their learning from home country experiences and their early movement into foreign work. Theirs is both a professional and organisational technology. This competition has consequences for the way that economic and other social relations are conducted. It seems to suggest more law and more litigation, generating more work for certain kinds of lawyers. For example, in corporate law, it seems to suggest that more innovative and adversarial methods will be used to determine mergers and acquisitions, rather than the informal resolutions of the family connections and 'old boys' networks.

The introductory chapters recognised the force of the contention that globalisation would push national governments in the direction of generic business types of law. Localised legal differences would be reduced and law even stripped of its diverse political and cultural associations altogether. But that contention was counter-balanced by the sense that differences are still sustainable. In particular, it was recognised that a transnational field of business, if it were to be built on the strength of contractual accords, would not be able entirely to overcome the claims of national jurisdictions. Contract laws themselves, as well as what might more conventionally be called regulatory laws, express local resistances too. Even where localities are trying to attract foreign trade and investment with openings and assurances, the legalities they take on board are adapted to take account of local conditions.[5] Despite the availability of international mediation and arbitration services, the parties themselves resort to the local courts if they can see an advantage to doing so. The influence of arbitration

might be exaggerated, the parties willing to resort to the ordinary courts if they are not happy with the outcomes.

Externalising lawyers also seek to attach their fortunes to a particular model of law. They benefit from the export and internationalisation of distinctive models. These models are not necessarily stateless. In choice of law situations, Silver observes how UK firms seek to counter the momentum of the US firms by tying finance contracts to English law and their City of London location rather than New York law.[6] In response, the US firms establish branches in London and buy into firms on the continent where they are permitted to do so. Given the different organisational forms of capitalism around the world, transnational legal links will be forged across other cultures too. Evidence for this is to be found in the case of Singapore lawyers, who are now operating in locations like Hong Kong, Vietnam and China. In China's case, it should be remembered that an important part of the trade and investment is with Chinese businesses and families abroad, as well as with countries in the South, in Asia, Africa and Latin America.

The effect of this pluralism on the supply of legal services remains complex. The transnational lawyer may still prosper because of his or her unique capacity to compare, select and package these regulatory differences – to provide 'one stop shopping'. Lawyers make informed choices in routing components of an overall legal package between various locations. A trend in this direction is the demand for lawyers who can manage such differences, not across the board, but in specific areas of practice like intellectual property licensing, securities markets, product liability or tax minimisation. But, if this is the case, the expertise becomes of necessity an expertise in differences as well as an expertise (or enterprise) in convergence.[7] A one-stop service need not be a full service but it must be multi-locational; it must be capable of operating across a range of legal jurisdictions and legal cultures. Technical legal skills are vital to handle this complexity but the firms also need organisational and social skills, command of languages, cross-cultural sensibilities, and local networks.

Relations with states, civil societies, communities

So, even in their role in the making of markets, lawyers must be involved with the state and its expectations. But lawyers are often involved in the construction of politics itself. Their skills can contribute to the strengthening of state institutions. In this role, they have on occasions been linked with authoritarian states. In some countries,

business is still conducted within close corporate and client relationships. Providing effective legal services does not depend simply on the mastery of rules and assertion of rights; rather insider skills associated with networking, brokering and lobbying are vital resources.

However, they display a particular affinity with western political liberalism in their promotion of constitutionalism and the separation of powers, in particular the idea of an independent judiciary and a private legal profession. In acknowledging such a contribution, it is worth noting that political liberalism is not always to be equated with economic liberalism. Indeed at times political or legal liberalism may place a check on the excesses of economic liberalism, while lawyers active in promoting markets may severely undermine the legitimacy of the nation state and even the liberal legal system itself. The experience in Eastern European countries and especially in Russia highlights the risks.[8] This tension surfaces in the dualism which lawyers themselves exhibit. On the one hand, they are ready to proclaim themselves unsentimentally and fiercely competitive in furtherance of the interests of their clients. On the other hand, they affirm the legitimacy of their calling through their devotion to national, and now to international, public service of various kinds.

Yet lawyers also contribute to the creation and maintenance of civil society, which we appreciate to be not just a function of autonomous market institutions but depends on a range of voluntary associations, intermediate bodies and citizenship rights. Moreover, if their focus is often on core civil and property rights, historically there have always been lawyers who champion the cause of those who are experiencing economic and social injustice. In some cases, foreign lawyers may be more able to intervene effectively between the local subject and the powerful state, or at least be able to give support to the local lawyers who are trying to do so.

Of course, it remains an open question how central the work of lawyers has been to the advancement of these causes. Some of us are familiar with the 1960s critique that lawyers divert these causes into unproductive channels and even help to legitimise the systems which create the injustices. Today, attention is again being paid to the role of lawyers in societies undergoing transition.[9] Bryant Garth suggests that the lawyers active in NGOs, transnational advocacy networks and international organisations (eg, promoting human rights), are cut from the same cloth as their corporate counterparts.[10] Theirs is a parallel career path, indeed there is overlap as the big firms develop

pro bono programmes and major philanthropic foundations are funded out of corporate profits. This is not to be critical of such efforts, and we are seeing that progress in reducing world poverty or environmental harm needs commitment from the North, just to note the reservations expressed about northern NGOs making prescriptions for those in the South. Here they help to understand why foreign lawyers might receive a mixed reception.

Finally, following in this vein, it can be recognised that lawyers take part in building communities. These communities can be informal personal networks stretching across national borders, like those in the field of international business law or ecclesiastical law. But they can also be deeply and perhaps resiliently embedded in local communities and regional economies, even within towns, inside associations or around courts (Silbey). Lawyers can thus act as reservoirs of local legal cultures and they can help bring resolution back to the local level. Arguably, these types of law lend themselves far less again to the kind of abstraction and homogenisation which makes the foreign lawyer's entree or the international lawyer's detachment easier. The existence of such differences again suggests that local knowledge and local contacts can prove an advantage. Thus, in a study of the use of lawyers' knowledge in a field relevant to this book, computer law, Phillip Lewis finds again that the lawyers' expertise is fundamentally one of translating the clients' needs into an acceptable legal language. As well as exporting and borrowing models from elsewhere, this expertise must build on already existing local forms. Even law that looks like it is part of a neo-liberal global agenda, such as competition law, displays these features too.

Foreign or local lawyers

The arrival of foreign lawyers can provoke fiercely protective policies. But foreign lawyers are not excluded simply to preserve the markets of local lawyers. Political and cultural sensitivities continue to inspire policies that are designed to shield certain areas of law and lawyering from foreign influences in an inward looking way. If there is strength in the state's authority, the bureaucracy's autonomy or the organisation of civil interests, liberal legality may be resisted. Such factors certainly influence the degree to which such law is actually implemented.[11] But they may also influence the position adopted on the foreigner's right to practise. Thus, governments may say that greater access for foreign lawyers is incompatible with political traditions of decision making or

cultural practices of conflict resolution. It may be argued that foreigners lack empathy with local customs, introducing a style of lawyering (such as litigiousness) that will sour government, business or social relations. Or it may be stressed that lawyers are officers of the court and must show commitment to the local administration of justice, even in some states to national political institutions. On this basis, bans on family law, land law, testamentary or criminal law work show up regularly in restrictive policies, as well as prohibitions on representation and associated court work.

The argument that the practice of law is not just a business fuels resistance to what is cast (stereotypically perhaps) as an Anglo-American style of lawyering. As the Common Market developed, Whelan and McBarnet detected a tension developing between the claims of professionalism and commercialism.[12] Commercialism was being seen as a threat to the traditional professional ethics of collegiality, independence and public service. Conservative practitioners viewed with disfavour the prospect that more and more legal practice would be driven by private market forces, oriented to high paying corporate clients and commercial work. Baxi identifies a similar contrast being made, while appreciating that the critics are often idealising past practices.[13] So, for example, there may be suspicion of foreigners who do not seem to put something back into the development of the local profession or the provision of legal aid. To locals, such lawyers may seem detached from a traditional sense of 'noblesse oblige' or from a commitment to the welfare state. Consumer protection is often given as a more down to earth reason for distrust of foreign lawyers. It is said that foreign lawyers lack the necessary understanding and competence to serve local needs properly, locals have no effective means of redress against the mobile foreigner, and the foreigner does not feel bound by the domestic standards of professional conduct.

Whatever the reasons given, it is clear that the impacts of lawyers on state, civil society and community are also borne in mind when the policies towards foreign lawyers are being formulated. In this way, independent lawyers can be seen as a threat to the power of the state and to the corporate relationships it may have enjoyed with certain economic interests. These interests are often local elites, but they might include those foreign suppliers and investors who have obtained the inside running. Lawyers can also be seen as threats to the associations of civil society and community, a salutory example being the self-searching in the US over competitive lawyering, rights talk and resort to litigation.

However, it would not do to exaggerate the degree of unity at the national level. We have made the general point that global pressures aggravate national disjunctures. We might make a rough contrast here between the large firms and the sole practitioners, between internationally oriented and locally dependent practices, between, as it were, the modernisers and the traditionalists. Transnational lawyering will appeal to those lawyers who wish to cut loose from the constraints of their locality and tap into the opportunities of a global economy. It is likely that the main opposition to international competition will be found amongst the many smaller scale members of the profession. So, the internal characteristics of the local legal culture, the structure of the profession, its links with the state, all play a part in the competition. The extent of internationalisation then depends on whether the profession is organised along lines receptive to outside influences.

However, this competition may range wider than the legal profession. If, for instance, the local profession is not well organised and cohesive, or its legal monopoly is not widespread and entrenched, it can be easier for foreigner lawyers, or other professionals such as accountants for that matter, to gain access. As Dezalay and Garth indicate, the impact of globalisation depends on the position of law in the national field of state power.[14] In some countries, other disciplines and professions are more influential than lawyers and judges. Law graduates can be influential, but they might make their mark in government and business roles rather than as private practitioners. Such positions are strengthened by the local tendency not to resort to law, either to implement regulatory policies or to resolve disputes in the courts. Paradoxically, an emphasis on legal professionalism, possibly new found, can close off the opportunities to achieve functional convergence in service provision, for example through multi-disciplinary partnerships and multinational practices. In the US, the strong professional opposition to multidisciplinary partnerships is based on ethical concerns (about independence and confidentiality) but it is also sensitive to the threat of competition from other professions and indeed from parvenu lawyers.[15]

LOCATIONS FOR LEGAL WORK

Cross-border supply

Up to this point, the discussion has focused on the complex relationship which competition between lawyers bears to the competition

being experienced between certain types of law. The location of law making also affects the relative advantages enjoyed by global and local lawyers. The globalisation of communications media for instance might render it unnecessary to be present in a particular locality in order to provide a legal service. Law's capacity to be conveyed abstractly and symbolically seems suited to this media; such ideas have no natural physical boundaries. Qualitatively speaking, some of the biggest legal influences have been transmitted through very small numbers of key individuals and transactions. Entrepreneurial and diplomatic lawyers have used their skills to engineer major changes in legislative regimes around the world. Today, once again, these kinds of consultants are abroad, rendering advice to the many countries which are undergoing the transition to market economies, in some cases through the sponsorship of an exporting state, a multinational corporation, a philanthropic fund or an international organisation. Such an influence can also be obtained by the students of law travelling to the site of the supplier. In certain countries, the best students tend to gravitate towards the metropolitan centres for an advanced legal education and for practical legal experience.

Could more conventional legal services be supplied in a similar way? A major service activity has been the competitive offering, in some small jurisdictions, of forums of convenience, especially for the construction of financial and accounting transactions. These services have ridden on the back of money flows which governments have found difficult to control. We have already noted that the electronic media may make such services accessible to a wider range of people. Such an online mode of supply will be difficult to police. Does it matter then whether presence in the jurisdiction is regulated, if services can be sourced electronically?

So, for the state that wishes to maintain distinctive regulatory standards, the issue becomes the power of its location to pull these service flows down to earth. Do the suppliers and customers enjoy unfettered freedom to move from one place to another or to construct paper and electronic relationships across territorial spaces? Or are they still tied to a certain extent to a physical site or perhaps attracted to one which can offer a competitive service that is based on individuality, quality and security? In the realm of legal services, the question can be explored in several ways, each of which is connected, I think, with whether effective supply depends on such advantages as proximity and familiarity.

The power of presence

At this point, we should entertain the possibility that the tradability of legal services might be overestimated. To think again in terms of industrial economics, recent studies have detected clusterings of international industries on a regional basis. These clusterings represent networks of researchers, suppliers, manufacturers, distributors and customers. In these analyses, place still matters: these configurations build on their historically and geographically determined strengths. So Sassen, for example, locates the design, financing and management functions of the international economy in a few 'global cities' (such as New York, London, Frankfurt and Tokyo), together with associated producer services such as lawyering.[16] The hierarchy might extend down to some regional sub-centres. These centres become the targets for international lawyering, which is a reason why Tokyo's barriers have been such a concern. It is quite correct to call such cities 'centres', yet they are still spatially based and they continue to exhibit local differences.

These cities are centres for a certain kind of legal service, partly of course because this is where the product market is concentrated, and, if this is true to some extent for financial markets, then we can expect it to hold for more traditional markets, for example in goods, and maybe even for new products such as information technology. But it is a two-way flow: producers gather here because of the agglomeration of services. In this respect, it is not so much the high degree of specialisation in legal areas as the ability to put together packages of services which often spill over the conventional bounds of legal services and which make the accounting firms for example such genuine rivals to the law firms. In this global competition to attract business, a locality can gain an advantage by the way it regulates these services. If it was right to say earlier that the attractiveness of a location as a site for a product market is not just a function of deregulation then, at this level, good quality regulation of lawyers and the provision of legal services, a balance between competitive and cooperative practices, may also prove encouraging to consumers. For those locations that do want to become nodes in these global networks, the extent to which they liberalise the provision of professional services, for example to permit multidisciplinary partnerships, is not an easy judgement.

Notwithstanding the importance for everyone of the kind of services which are being provided in these global cities, most lawyers continue to be associated with the conduct of business in domestic, home

markets. These businesses need to be close to their customers and suppliers if their demands are to be met responsively. The desire for face-to-face relations remains a strong force. It is often said that legal services depend on personal contact with the client and knowledge of local customs and conditions. In such ways, lawyers are immersed in their local spatial communities. The local advantage draws its strength from the richness of local legal knowledge and professional practice. Such operating imperatives can most clearly apply in the case of appearances in court, together with the practical consideration of the availability of witnesses and other evidence. Much of this knowledge is tacit; success depends on social or relational capital too. And here, proximity and familiarity are not just spatial attributes, they may depend upon having the time to wait on local procedures and absorb them.

These advantages are also bolstered by formal conflict of laws criteria which tend to allocate jurisdiction to the place where cases can conveniently be tried and make the applicable law the law of the *lex fori*. Venues tend to diverge along procedural as well as substantive lines, such as their styles of argumentation. Another version of this constraint is the need to deal face to face with regulatory agencies that exercise discretion and develop unwritten law in government centres, whether regionally (say in Brussels) or more locally (Beijing). Shapland contends that: 'A lawyer's corporate practice and usefulness to clients may depend much more upon the solidity of its alliance with the state than upon lawyers' creative ability to solve clients' problems'.[17] As Chapter 2 suggested, even where the client is an international one, clearance for an activity or pursuit of an infringement may require localisation of the process and connections with state officials such as guanxi. More generally regulatory studies show how compliance is a negotiation between state agencies, business enterprises and professional advisors.[18] Local regulatory strategies and ethics influence how lawyers operate.[19]

In such circumstances, provision from another country or through temporary visits by travelling lawyers may not prove attractive; a real presence is advantageous and it may be necessary to work through locals. The often close regulation of relations between foreign and local lawyers becomes important. This observation is especially apposite to domestic markets. But even externally oriented business clients can be hard to attract if they have a tradition of close informal links with the local profession, as for example in Germany or the City in

London. A foreign lawyer complained of the Japanese market: 'Japanese businesses just don't know how to utilize foreign lawyers efficiently while spending a lot of money on those lawyers who have their continuing relationships'.[20] The organisational style of the local lawyers comes into play, even if they are outwardly oriented. Consider, for example, the tendency of European lawyers in the past to connect up through networks and clubs of independent practitioners rather than merging into large-scale firms.

At the same time, it is said that younger lawyers are prepared to travel anywhere and adapt to local conditions. Perhaps mobility and reflexivity are general attributes of that class of workers now typed as 'symbolic analysts', but the attractiveness of living conditions in different locations is still a subtle and influential consideration. Generally, we need to say that labour's mobility in a global economy has been far less pronounced than that of capital. Besides, some markets simply do not justify the expense of the establishment of a local branch office. Yet, working through locals, in a network of referrals or affiliations, may not provide the capacity to control from the centre. While there are efforts to make legal transactions standard and routine to perform, so that the work can be delegated to non-legal staff, franchised to local lawyers or outsourced to off-shore lawyers, some aspects remain highly skilled in a tacit, person-specific, way.[21]

Foreign and local lawyers

Nevertheless, the implications for the regulation of foreign lawyers are not predictable. As we have said, if the availability of services which are expert in certain global types of law is necessary to attract international business, the national government may be prepared to sacrifice the local profession. It shows itself willing to break down the monopoly of a seemingly insular profession, creating a single market where sub-national or functional divisions existed, letting in foreign lawyers, possibly liberalising the business structures for the supply of legal services to include other professionals and investors. Increasingly, then, legal services are assimilated to a model of industry and competition rather than government and civics.

Yet the aim, even of an externally oriented government, may be to give an indigenous ('infant') legal industry time to develop the strength to compete in international law markets, especially for the custom of home-based clients. The result may be a green light to increase the number of local lawyers, the amalgamation of firms, and the

establishment of branch offices. Reforms may also be made to local legal education, including the development of research and teaching in the realms of comparative and international law. In these circumstances, multilateralisation becomes an uncertain strategy. Will the benefits for domestically based firms outweigh the losses from increased foreign competition?

The desire to enhance the competitive capacity of local lawyers also refines the particular regulatory strategy adopted towards foreign lawyers. Governments are most likely to grant limited rights of practice, often confined to their home country law to foreign lawyers. Relations with local lawyers are also closely regulated. For example, foreigners may be allowed to work for local lawyers in the belief that they will impart skills or transfer technology to them. At the same time, they might not be permitted to employ local lawyers or form partnerships with them, out of concern that they might control the locals' practices, buy up the best talent or siphon off their revenue. Likewise, the foreign lawyers may do work for foreign, but not local, clients.

However, in certain categories or locations for law, national authorities still make the judgement that the international services are not worth the risk to local legal culture. The authorities continue to fear that, if they are afforded a presence, foreign lawyers will insinuate their way into home country work, despite the formal controls placed on the scope of their activities. They fear that the presence of foreign lawyers will encourage undesirable practices among local lawyers or indeed in the economy and society generally. Indeed, the reforms necessary to accommodate the foreigners will unsettle the whole profession. As a Japanese lawyer was to comment when entry was being relaxed in 1994, why make such big changes to the profession just for a few foreign lawyers?

NATIONAL REGULATION

This discussion indicates that, to move into the impersonal language of the GATS, international legal services assume various modes of supply. In turn, we shall see that each mode seems to attract the interest of national regulation. As we discuss the modes of supply and the national measures which regulate them, we should keep in mind what we have said in Chapters 3 and 4 about the GATS norms of national treatment and market access. The modes subject to control range from disembodied provision across borders to supply by natural presence in the

jurisdiction, either temporarily or on a continuing basis. They also include supply via a commercial presence. Commercial presence can be achieved by different means such as a local office, employment and partnership with locals or, conceivably, the financial acquisition of existing local firms. A particular feature of the interaction between service supply and local regulation in this sector is the basis on which foreigners may gain admission to the profession and thereby access to the work reserved exclusively for the profession. Failing admission, the issue becomes the scope of activities that are permitted outside this monopoly, say as work in the capacity of a licensed foreign law consultant.

Modes of supply

Despite the freeing up of financial and like transactions, we find that some limits may also be placed on consumers taking advantage of legal services supplied from abroad. Restrictions may certainly be placed on the free movement of natural persons into the national territory, such as temporary visits made by travelling professionals. Countries have used entry regulation such as visas and work permits to screen foreign lawyers and to ration opportunities and limit stays, according to the perception of local needs, even in the case of limited consultancy activities. Bars to the acquisition of permanent residence or national citizenship are significant too, most directly where they remain pre-requisites for practice as a member of the local profession proper.

Likewise, obstacles may be placed in the way of establishing a commercial presence. Lawyers may seek to establish a presence by setting up a representative office, branch or subsidiary of their home firm. Regulation of establishment takes a variety of forms. Establishment may of course be barred or perhaps limited in some way, say to a representative office or to a single branch. Paradoxically, if some supply is allowed, establishment may be preferred over cross-border supply – there may be no right to non-establishment. Establishment may thus be demanded, though a variation is to insist on natural presence. For example, consultants may be limited to natural persons who must satisfy minimum residency periods. They must be able to show their experience in home country law and practice. The firm may not be recognised, or it may not be allowed to use its home country name despite the considerable cachet it carries. Such obligations inhibit the foreigner's capacity to compete with locals. But they are said to be necessary to ensure responsibility to local consumers, benefits to the domestic economy and the capacity of the host state to supervise.

The form of establishment may also be regulated. Unlike the policy adopted in other service sectors, such as accountancy services, foreign lawyers may not be permitted to form joint ventures with locals or employ them (Arup, 2006). Similarly, the acquisition of local firms or taking a majority equity interest in such a firm might be blocked.

Practice of foreign law

Regulation commonly limits the scope of activities of foreign lawyers; in other words, it circumscribes the service sub-sectors in which they may operate. As noted above, certain areas, especially court work, may be completely off limits. Advisory work may be confined to advice on home country law and perhaps to international law, though even then it may be restricted to public rather than private international law. It might not include third country law. Here again, in the highly refined nuances of these regulatory nets, we see the national authorities trying to limit exposure to foreign influences to those situations in which its expertise is essential. Thus too, the foreign lawyers may be limited to working for foreign clients; they may be allowed to work for local clients off-shore only; they may be permitted to provide documentary and representational assistance in international fora so long as the fora are convened outside the host state; or they may present in alternative forms of dispute resolution such as arbitration on-shore but not in the ordinary courts.

At the same time, the regulation may seek to make the foreign lawyers accountable to local constituencies. In order to operate, foreign legal consultants may also have to meet certain requirements for registration, such as qualifications and length of experience in the home country or other law. Host country rules of professional conduct may be applied. We should remember that the local profession often has highly developed, if variable, ethical standards. Such rules can be a means to make the foreign lawyers accountable, not simply to the lawyers' clients, but to the locality as it is constructed in various ways, such as the profession, public institutions, customs and traditions, maybe some concept of the 'law' itself. These kinds of rules may also impose financial responsibilities, including requirements to take out insurance locally or contribute to a guarantee fund.

Admission to the local profession

These controls on activities may deal with foreign lawyers specifically. But they work in the shadow of the general controls on those who may

provide legal services. National (or in some cases, sub-national) regulation is likely to give those admitted to the legal profession a proper monopoly over certain core types of work to the exclusion of the claims of various professional competitors. Within the OECD, a survey identified these controls as representing the main barrier to trade in legal services.[22]

Increasingly, as nationality controls are lifted, the nature of the educational qualifications is the key to this admission. Entry to the profession may be restricted, if not by official or unofficial quotas, then by the requirement for recognised, usually locally acquired, education and training qualifications. Numbers can be controlled in various ways, for example by limiting the places in law schools or controlling the pass rate for bar examinations. Again the reasons for doing so might not be simply industrial, as we have suggested, in some countries a long-standing concern is the impact of lawyers on economic interest intermediation, political decision making and community dispute resolution. These kinds of restrictions are often not preoccupied with foreign influences but reveal a wider distrust of lawyers. Nor are the local education and training requirements merely protective of incumbent professionals, local knowledge can be seen as enhancing the quality of service to the clients and the level of respect for local institutions.

In addition, the ways in which the profession may organise and operate is often closely regulated. Such regulation may include restrictions on business structure (especially the corporate form), restrictions on association with non-lawyers (such as multi-disciplinary practices), restrictions on size, and restrictions on the number and location of offices which may be maintained throughout a jurisdiction.

As Chapter 4 has indicated, the reasons for these restrictive practices go well beyond a concern with foreign competition. But they may well prove to present an extra burden for foreigners to meet, even though they are not openly discriminatory in the way that nationality requirements tend to be. For example, if the foreigners' home country qualifications are not recognised, they must then face the hurdle of passing local professional examinations and possibly serving local apprenticeships too. If the mere failure to recognise the foreign qualifications does not constitute a denial of national treatment, then the way the local examination is styled might do so. For instance, conduct of an oral examination, especially in a different language, might frustrate the legitimate expectations of a foreign applicant. Furthermore, it may be argued that some controls, even if they do not treat foreigners less

favourably, impede market access. Thus, quotas that were placed on admission would act as quantitative limitations, affecting access by foreigners as well as locals.

Likewise, the restrictions placed on business structures for the practice of law, and especially the exclusion of other professionals or economic investors, reveal a wider concern about lawyers' independence. Conflicts of interest and breaches of confidentiality are considered more likely if lawyers are answerable to non-lawyers. Yet the restrictions do have the effect of limiting market access for foreign suppliers. The availability of multi-disciplinary partnerships and corporate provision of legal services would provide a means of participation that undermined the distinction between local and foreign lawyers and even alleviated the need for the foreigner to qualify for the local profession.

IMPACT OF THE GATS

In such a field, when global flows are met by an array of behind the border regulations, the assistance of a mediating device might prove attractive to some 'traders' in legal services. In Chapter 4, we acknowledged the significance of the GATS submission of services regulation to the norms of trade liberalisation. Trade in legal services was to be a prominent agenda item during the Uruguay Round. The GATS was notable for rejecting the argument that legal services are so closely tied to the exercise of government functions that they should be excluded from trade talk altogether, an argument that also failed at the time of the formation of the Treaty of Rome though it was still to restrain the course of actual liberalisation (see below).[23] Once embraced, the GATS carried serious implications for legal services regulation because, as we know, it encompasses all modes that are important to effective supply, including commercial and natural presence in the territory of another country.

GATS norms

The GATS norms have major implications for legal services regulation too. We should first note the implications of the general obligation to provide MFN (Article II). Another feature of the national regulation of foreign services has been an insistence on material reciprocity. Where access is made available to the nationals of other countries, it is on condition that the host country's nationals are granted access to the

home country market in return. We shall see from the country studies below that such a condition has been common. The MFN obligation militates against these arrangements.

Of course, the national treatment norm puts pressure on regulations that discriminate in favour of local lawyers (Article XVII). At this point, it is useful to reiterate the point that national treatment is not necessarily satisfied by according foreigners formally identical treatment; the test is said to be the effect on their opportunities to compete with locals. What national measures will be seen as placing foreigner lawyers at a competitive disadvantage? National measures that single out foreigners, like controls on entry to the jurisdiction or nationality and citizenship requirements for admission to practice, are clearly within the purview of the norm. But, as we began to identify above, the interrogation soon extends to measures, such as a requirement of a local presence or a local educational qualification, that apply both to foreigners and locals. Measures that on their face do not discriminate may impose an additional burden on foreigners.

We have observed that the national treatment norm will not be breached if entry into a services market is restricted, or for that matter prohibited, for locals and foreigners alike. But we know that the GATS goes on to encourage members to negotiate over commitments to 'market access'. If market access is to be effective, countries may be pressed to lift non-discriminatory regulations and liberalise competition across the board. Support for this message was derived from the agreement's 'proscription' of certain measures (Article XVI:2). We have seen, in those sectors a member exposes to the agreement, that there are certain measures the member shall not maintain, or rather may only maintain if they are listed.

Those measures include limitations on the participation of foreign investment in a services sector. They also include measures that restrict (or require) the specific types of legal entity or joint venture through which a service supplier may supply a service. In many countries, these types of measure are employed to regulate the structure of the local profession overall; good non-trade reasons are given for doing so. For example, members of the profession may be required to practise as individuals or in partnership. They may not practise in the guise of a corporation. This is said to promote personal accountability to the clients of the service and to the institutions of law such as the courts. Of course, the two kinds of control interact. As we have signalled, corporatisation makes it easier for non-practitioners, such as people

abroad, to own and control legal services. Article XVI:2 further proscribes limitations on the number of service suppliers, transactions, operations, output or employees. Again, this proscription is applicable to legal services. We could ask here whether it extends not just to official quota systems but also to local arrangements that limit the number of students in law courses or a fixed failure rate for examinations.

We should note that the agreement did provide exceptions for some non-conforming measures (Article XIV). These exceptions allowed for measures necessary, for example, to protect public morals or to maintain public order, to secure compliance with laws, to prevent fraudulent or deceptive practices, to protect privacy of individuals or to ensure collection of service taxes. Some of these exceptions could be invoked to justify specific regulatory measures within the legal services sector. The agreement did not however provide scope for a general cultural clause to be invoked in defence of local regulation.

GATS commitments

The strongest antidote to speculation about the reach of the norms is the listings approach of the GATS. We know that the members were allowed to decide the extent to which they exposed their measures to the norms of the agreement. At the end of the Uruguay Round, the schedules of commitments to legal services liberalisation were restrained, reflecting the reservations about access to this sensitive sector which continue to be held in many countries. One strategy was to leave the sector out of their offer entirely; many of the newly industrialised and developing countries adopted this position. This is not to say that these countries necessarily exclude foreign lawyers entirely. But they were concerned that entry into the multilateral negotiations and the making of binding commitments under the GATS would limit their freedom to impose and adjust regulations. The decision not to inscribe the sector also withholds information about the nature of these countries' regulations. Another strategy was to limit the sub-sector in which commitments would be made, say, to advice on home country and public international law; a related strategy was to confine the commitments to a particular mode of supply. Where commitments were made and a sub-sector and/or mode of supply were exposed to the norms, a further strategy was to enter specific limitations explicitly on national treatment and market access.

In the Uruguay Round, some forty-five countries (including twelve from the European Communities) made commitments in legal services.[24] Nearly all these countries made commitments in the home country and international law sub-sectors, though half of them confined them to advisory services, excluding representational work. About half the countries which made commitments made them in relation to host country law, here including representational work as well as advisory work. In these cases, where sub-sectors were exposed, the most common limitation on national treatment was a residency requirement. The most common limitation on market access was a restriction on the style of legal entity that the legal service supplier could assume, the limitation requiring supply to be by a natural person or in some cases a partnership. Furthermore, six countries did not commit to cross-border supply, six did not commit to commercial presence, and the majority of the commitments to supply by a natural presence were 'unbound'.[25]

Significantly, the advanced industrial countries, and especially those in the Triad, were prepared to submit legal services to the negotiations. They resolved not to enter MFN derogations that would insist on material reciprocity from individual countries. Nonetheless, the norms of national treatment and market access created quandaries for these countries as well as others. Because their general regulatory policies for entry of natural persons and direct foreign investment are implicated, such countries notified 'horizontal limitations' in their schedules, that is, restrictions which apply across the board to those modes of supply. Where sub-sectors were exposed, specific limitations were also listed. The study now considers the positions the countries in the Triad adopted, before returning to the general terms of the agreement and the new round.

COUNTRY PRACTICES

Japan

We start with Japan. Japan is interesting because it combines a major role in international trade with strong local cultural traditions. It is said to have barred foreign lawyers for some thirty-one years before the Law of 1987. Such a characterisation is however subject to the kinds of qualifications we made above, for instance in this case the fact that non-lawyers could compete in certain areas of work. The lawyer's monopoly has not been tight. Still, the Law of 1987 was significant

for institutionalising and perhaps liberalising the access of foreign lawyers to the Japanese market. If we speculate on the reasons for this change, economic factors might have had influence, such as the demand for foreign (and especially US) law expertise with the expansion of Japanese corporations abroad. So too, foreign corporations trying to penetrate Japanese markets have felt a need for access to lawyers with local knowledge of often very subtle public and private regulatory relationships. More directly, the US Trade Representative had been pressing the Japanese Government for concessions from the early 1980s. Lack of access for US lawyers had been the subject of a section 301 watch listing. By 1985, market access was on the Uruguay Round agenda and the Japanese Government seemed prepared to override the concerns of the Japanese Federation of Bar Associations (JFBA).[26]

While visas for short visits were available, the 1987 Law continued to place restrictions on establishment. Admission to the profession with the right to practise as a bengoshi was not a realistic proposition for most foreigners. Nationality/citizenship was no longer a condition of that admission but the need to pass the national examination in Japanese law was an effective barrier. However, was this discrimination? It has been extraordinarily difficult for Japanese students to pass the examination and the numbers entering the profession have been controlled. There was no recognition of foreign diplomas or provision of special tests.

Instead, foreigners could seek registration as consultants. As such, their activities were limited to advice on home country and public international law; bans included advice on host or third country law and court or commercial arbitration work in Japan. They were not to employ or partner bengoshi, though bengoshi could be engaged on a one-off transactional basis. To be eligible for registration, the consultants would need to show five years' experience in home country law. In addition, they would have to maintain both a commercial presence and a natural presence, including residence for 180 days per year. They would have to operate primarily in their individual rather than their firm's name. The impact of some of these restrictions was obvious, while others were felt indirectly. For example, the measures limited flexibility to rotate staff. They added to operating costs by requiring a separate office to be maintained in locations like Tokyo. The policy also made access conditional on material reciprocity, which only some US and Australian states, together with the United Kingdom, were regarded as providing.

One can speculate about the reasons for this policy. One possibility is economic protection for the domestic profession, especially for those practising in international law, at least until such time as they had developed the necessary expertise themselves. But cultural considerations are also evident and the authorities have drawn a contrast between a Japanese style of consensus seeking and alternative dispute resolution and a US tendency to litigiousness and lawyer dependence.

Foreign lawyers found access difficult (registrations reached into the low hundreds) and, in addition to further bilateral approaches, Japan's legal services market was targeted in the Uruguay Round negotiations. The JFBA resisted relaxation of controls but the Government set up a Study Commission in preparation for making a commitment. Serious negotiations took place at a meeting in Evian and, despite scepticism in certain quarters, the US Ambassador fashioned a deal at the last gasp of the Round.[27] In keeping with the multilateral process, the Japanese Government did not pursue a reciprocity requirement. But, within the negotiations, its willingness to commit was conditioned by the offers that EU and US representatives could themselves make (see below). Here we see an illustration of the ambivalent nature of the GATS.

Japan's schedule of commitments limited the sector to 'consultancy on law of the jurisdiction where the service supplier is a qualified lawyer'.[28] Its sectoral limitations on national treatment and market access listed requirements of supply by a natural person and a commercial presence, while horizontal limitations confined a stay by natural persons to five years. Work preparing for juridical procedures in courts and other government agencies was still barred and other restrictions applied. Representation in commercial arbitration was permissible, provided that the applicable law was the law which the service supplier was qualified to practise in Japan. However, a further Study Commission was to put the issue of arbitration on hold. The practice of international law was permitted, again with a proviso that it was the law in force in the jurisdiction where the supplier was qualified. But only Japanese lawyers were to be free to advise on host country law or third country law. Providing some access to foreigners was making the national regulation more complex.

By way of implementation, a new Law was introduced in 1994, which allowed a limited form of association between foreign and local lawyers – a joint enterprise in which fees could be shared. The joint firm would be permitted to act under Japanese law but only if the case involved other countries' laws as well and only if the case was not confined to

Japanese nationals. But the Japanese lawyers would need to maintain independence and the enterprise would have to be a contractual venture rather than an integrated entity. The law conceded that two years of the foreign lawyer's necessary experience could now be in Japan.

In the wake of the liberalisation, a few more foreign law offices were opened and two joint enterprises were established. However, by February 1995, the *Japan Law Journal* was headlining: 'Exodus of foreign lawyers has begun, Japanese legal market not lucrative'. Instead, a government committee on regulatory liberalisation was reported to be considering allowing more local candidates to pass the bar examination. There were signs that some Japanese law firms were remodelling along Anglo-American large firm lines and this trend has since accelerated.[29] The International Lawyer round-up reported that in 2005 around 210 foreign lawyers were registered with the JFBA.[30]

In 2004, Japan amended its Foreign Lawyers Act to permit joint enterprises between Japanese practising attorneys and licensed foreign lawyers; licensed foreign lawyers could also be permitted to employ Japanese attorneys. However, the amendments would continue to ensure that the foreign lawyers and their employees did not stray into legal affairs outside their authority, that is, into host country or third country law. The Japan Government has made a Revised Offer as part of the new round of GATS negotiations.[31] The restrictions on the foreigners' scope of activities remain the same. The offer continues to insist on foreigner lawyers establishing commercial presence or meeting a residency period. Joint enterprises with Japanese lawyers are permitted, but not the foreigners' employment of local lawyers.

The European Union

The EU provides another interesting test of the resilience of local diversity. It is of course a big market within the world economy and increasingly it responds to 'outsiders' as a single economic and political unit. Yet, as it is constituted itself by a trade agreement, it is internally the most developed source of jurisprudence on free trade, for instance in the supply of services.

The liberalisation of market access internally would in theory put the EU in a good position to negotiate for commitments from other parts of the world. But of course the degree of unity in internal policy should never be exaggerated. Furthermore, liberalisation within the EU might be coupled with a defensive attitude externally, for example in

encouraging combinations of lawyers across Europe so that they could match the strength of competitors from the US. However, this is not the place to attempt a history of the implementation of the Treaty's principles in the legal services sector.[32] Briefly, it should be noted that a 1977 Lawyers' Services Directive addressed the issue of freedom of movement for the provision of services on a temporary or travelling basis. In terms of commercial presence, it allowed the host state to regulate the scope of the foreigner's activities so as to reserve certain areas including advice on host country law; yet litigation work was to be allowed if performed in conjunction with a local practitioner.

A realistic right of establishment was seen to depend on admission to the local bar. Some basic discriminations such as citizenship or single office requirements were soon disallowed, but the really significant step was the 1988 Directive on Mutual Recognition of Diplomas, which required host countries to take account of home country qualifications. However, if the qualifications in the two countries substantially diverged in length or content, they were permitted to impose one of three requirements. The requirements were: a period of professional experience in the home country; an adaptation period (supervised practice in the host country together with assessment); or a test of aptitude for host country law. In this way, the reference point continued to be the extent of local knowledge.

The experience with this Directive reveals the existence of reservations within Europe about free access to the local legal profession, even for the nationals of other member states. Notably, France enacted a new law in 1990 to comply with the 1988 Directive. It collapses the post 1972 category of conseil juridique, which had provided an opening for foreign lawyers, so that all must apply to be avocats. Lawyers from other member states were given the option of sitting a special examination to gain admission. But France was accused of manipulating this option in failing to draft a written examination. Also, the examination was conducted in French, which favoured applicants from countries such as Belgium and Luxembourg.[33]

At the same time, the law raised the hurdles for non-EU lawyers. They would now need to show a French or equivalent EU qualification as well as sitting the special examination. And this avenue was only open to nationals from countries that reciprocated materially. All non-French lawyers would have to adopt the French forms for professional association, meaning no branch offices, but association with French lawyers was permitted.

Despite its vigorous pursuit of Japan, the EU felt inhibited by these kinds of national reservations when it came to make its own commitments. It notified general horizontal limitations on commercial presence, particularly the establishment of branches, and, for some member states, on foreign investment in local enterprises. The presence of natural persons was 'unbound', countries retaining the freedom to introduce measures inconsistent with national treatment and market access, except for commitments to entry and a temporary stay by certain limited categories of service suppliers.

In its sector-specific commitments, the EU listed the sector as 'legal advice home country law and public international law (excluding EC law)'. In respect of cross-border supply, it notified national treatment limitations by France, Portugal and Denmark and market access limitations by France and Portugal; in respect of commercial presence, national treatment limitations by Denmark and market access limitations by Germany and France; the presence of natural persons was generally unbound, with Greece, Luxembourg, France and Denmark entering additional specific limitations.[34] In these respects, Grondine suggests that the EU did not back the US requests at Evian that Japan lift partnership and employment bans. The smaller European bar associations, away perhaps from the centres of international business lawyering such as London, were themselves apprehensive about being swamped by more resourceful foreign firms.

We should note developments since the completion of the Round. A further Directive on establishment was long in the process of negotiation, presenting the possibility that requirements of local qualifications would be lifted altogether, along with restrictions on associations with local lawyers or the establishment of branch offices, so that truly multi-state firms would be a realistic proposition. A Directive on lawyers' establishment was approved with implementation scheduled for the end of 1999.[35] Under the Home Title Directive, lawyers are able to practise host country law in another EC member state by showing that they are already registered to practise in one Union country. After three years practice in the host country, they may register permanently to practise under their home country professional titles or seek admission to the local profession. Both the Diplomas and the Home Title Directives depend on implementation in the host member country to which the nationals of other member countries seek access and obstacles can still be raised in practice.[36]

In recent years, European lawyers and law firms have been subject to some scrutiny according to their national government competition policies and the European Commission has pursued a Services Directive that would mean in part more co-ordinated regulation of services to consumers. But the policy regarding internationalisation still varies with the members' positioning in the global economy as much as local traditions of the profession. British governments have pushed most for competition, given that its large City firms are major players in the markets for international services, though with resistance from other quarters of the profession.[37]

The European Communities have made a conditional revised offer on legal services as part of the new round of GATS negotiations.[38] The offer retains the emphasis on legal advice in home country law and public international law (excluding EC law), while listing the various limitations individual member countries place on the different modes of supply within this sub-sector or scope of activities. Natural presence remains largely unbound except for the cautious horizontal commitments the EC has made towards entry and temporary stay for independent professionals and contractual services suppliers. An interesting feature of the EC offer is the need to accommodate the positions of its expanded membership.

The United States

In the US, traditionally regulation of legal services has been a sub-national, state by state concern. We noted that the GATS requires members to make reasonable efforts to address sub-national as well as national measures. Still, such a political division limits the capacity of the federal Government to negotiate agreements with other countries, even if it favours liberalisation of markets. As we shall see this constraint affected the Uruguay Round agenda and it still applies today.

Among the American states, New York took the initiative in 1974. Foreigners from 'common law' countries were permitted to sit the bar examination, but no credit was given for home qualifications. Civil lawyers faced additional hurdles. Provision was made for foreign legal consultants. New York's ground breaking rules excluded representation in court and certain other work. It allowed consultations on home country law, international law and third-country law, even on host country law after advice was taken from a licensed local attorney. Some other states also established the consultant category, for example

California and Washington DC, though not necessary providing the same scope of activities. To obtain a licence, recent experience in home country law might be required; also residency and an in-state office. New York permitted association or partnership with local lawyers but other states might not; on the other hand they might allow employment of local lawyers. To further integration, the American Bar Association proposed a set of model rules for licensing foreign consultants.[39] It is not hard to see why the states we have mentioned have liberalised. However, we would expect the many more parochial states to act cautiously.

The story of the actual negotiations is intriguing. According to Stewart, the US Government was prepared to lay down legal services like a sacrificial lamb on the Uruguay Round negotiating table.[40] Granting access to foreign lawyers at home in the US would be offered as a trade-off, not only for US lawyers to gain access abroad, but exporters in other more important sectors too. It signalled it would make commitments both in respect of practice as or through a qualified US lawyer and in respect of consultancy on law of the jurisdiction where the service supplier was qualified as a lawyer. Towards the very end of the Round, the legal services negotiators were under the impression the offer would be withdrawn because the Japanese were resisting making concessions in its legal services market. But legal services were finally included, reportedly to extract a Japanese undertaking regarding patent protection.

The end product was a commitment to bind the rules of the states that had made provision for foreign access. This position meant that, for many states, commitments to market access, through either commercial presence or presence of natural persons, were to be limited or even unbound.[41] The US claims on other countries were initially broad,[42] but its approach to other countries had to be tempered on account of its own domestic reservations.

The US has made an offer in the current round of GATS negotiations. Again, it is to bind the allowances of each state.[43] Some states have further liberalised but essentially the conditions of access remain a patchwork quilt. Some states for instance let common law foreign lawyers sit the bar examination for admission to the local profession without undertaking the three year local JD degree.[44] More states have made provision for foreign legal consultants, while continuing the restrictive conditions on their scope of activities. For such foreign law practice, some states require an in-state office, not permitting advice on

a fly-in, fly-out basis. Some permit partnership with or employment of local lawyers.

The People's Republic of China

Many other countries were to be even more cautious in their commitments. The diversity of responses could only be done justice in a country-by-country survey, and it is really not possible for this study to work its way through all of the commitments. Nevertheless, it is worth noting that few of the ASEAN countries listed the sector. In keeping with the analysis above, the reasons for this position will vary. In some developing countries, foreign involvement will be viewed sceptically and market access may even give rise to fears of 'neo-colonisation'. Mexico's position of scepticism on the question of trade in legal services within NAFTA is also revealing here. Others such as Singapore will be thinking of giving the local profession time to build capacity to meet the demands of the new economy at home, even with a view to creating a platform to export services.

The Peoples Republic of China provides a contrasting case. When it gained entry to the WTO in 2000, it made commitments similar to many developed countries. Nonetheless, with economic liberalisation uneven and political liberalisation slow, foreign participation is bound up with the issue how much encouragement to give to the development of a private legal profession.

Recalling Dezalay and Garth's inquiry about the place of law in the field of state power, it is not so long ago lawyers were denigrated as litigation tricksters. Subsequently, they were designated state legal workers and most worked somewhere inside the government, including the state-owned enterprises. The latter have recently been re-designated from enterprise legal advisors to corporation lawyers. The number of lawyers has been growing and the Government's Lawyers Law has sought to strengthen the profession with requirements for tertiary qualifications, bar examinations, reserved areas of practice, personalised business structures, professional associations and codes of conduct.[45]

Increasingly, legal practices are operating independent of the state as co-operatives or partnerships, some three-quarters of the 10,000 or so local firms. But most are small and localised.[46] Furthermore, their operation is still conditioned by the indeterminacy of legislative instruments, the discretion afforded executive and administrative officials at different levels of government, the lack of respect for legal education

even in the courts, and the obstacles to obtaining binding, independent rulings from the courts.[47] This means skills associated with networking, brokering and lobbying are vital, such as exploiting the power of guanxi in complicated government–industry overlaps and localised decision making.

The professionalisation of legal work could make it more difficult for foreign lawyers to operate. A nationality requirement bars foreigners from admission to the local profession. Liberalisation of the economy saw regulations in 1992 to permit foreign firms to apply for licences to establish representative offices. The Ministry of Justice rationed the licences one per firm and confined to Beijing and the eastern coastal cities. By 1993, 103 firms had licences, the Ministry concerned to see not only the international firms but others too such as Australia were represented. The scope of activities was limited to advice on home country law and international treaties; representational work was prohibited, though arbitration work was allowed if it was based on home country or public international law. Foreign lawyers were not permitted to go into partnership with local registered practitioners or to employ them unless the locals gave up their right of practice.[48]

On accession to the WTO, the PRC's GATS Schedule gave commitments to liberalise the practice of foreign law. China relinquished its reciprocity requirement. Regarding scope of activities, its entry specified 'Legal Services (CFC excluding Chinese legal practice)'. Foreign lawyers may thus advise on home country law, arguably on third country law and public international law. The commitments say they may advise their clients on the impact of the Chinese legal environment but they are barred from practising in Chinese legal affairs. In implementing regulations, the Government delineated the boundaries of Chinese legal affairs. They include engaging in any litigation in China and giving legal opinions for specific issues in any contracts, agreements, articles of association or other written documents with respect to the application of Chinese law.

Regarding modes of supply, China placed no limitations on cross-border supply or consumption abroad. It continued to limit commercial presence to representative offices but made it clear they can be profit making. It undertook to place no geographical or numerical limitations on licences. Half-year residency requirements were retained; so too the insistence that the head of the office be a partner at home. The firms would be able to employ Chinese lawyers; however a difference

between the Chinese and English language texts threw into doubt whether the Chinese lawyers would have to give up their local practitioner rights.[49] The firms could enter into long-term relations to entrust Chinese legal affairs to Chinese firms. But they could not take a majority share in a local firm.

Here we see a familiar ambivalence. The Government wants the benefits of the foreigners' expertise, so long as they do not dominate the nascent local profession or interfere with local legal institutions. In this regard, China's commitments are much like those of the developed countries we surveyed above. The commitments are particular, but, unless WTO dispute settlement ruled the situation, they give the PRC administration room to move. Mode 4 remained unbound except for horizontal commitments to business executives, leaving visa policy a practical obstacle to access. While further licences have been issued, the licensing process for commercial presence still lacks transparency. Licensing is slow and it seems the Ministry of Justice is applying an economic needs test, contrary possibly to its commitments to market access. A new national administrative licensing law seeks to rein in discretion and the People's Supreme Court has afforded a private right of action to sue Chinese authorities over licence-related decisions. But who would challenge the Ministry of Justice? In the latest round, China's offer remains confidential, so we cannot say if these issues have been addressed.

NEW NEGOTIATIONS

What pattern is the liberalisation and regulation of international legal services likely to take in the future? Legal services have received some attention and commitments to legal services are among the offers that members have made in the new round of GATS negotiations.[50] However, at this moment, the GATS negotiations have stalled. As we have noted, the Hong Kong Ministerial declaration assures us that the members are determined to intensify the services negotiations. It seems the GATS Track 1 Chair's report identifies objectives or 'jobs' for legal services negotiations. The list addresses the scope of commitments and the limitations that should be priority for reduction or elimination.[51]

With nationality requirements relinquished in some instances, commitments might conceivably extend to the full range of services associated with membership of the local legal profession. Nonetheless, the

foreigner must generally meet the local entry requirements that include the demanding local education qualifications. For most members making commitments at all, the limited license foreign law consultancy remains the most accessible opportunity to supply any legal services. We can expect new offers to comprise extensions of that model. Yet even this limited licence model can be controversial. To encourage countries to make commitments, Australia and Japan have argued for the adoption of a set of sub-sector definitions or classifications. With these precisions, countries could feel more confident just how far they were committing. The set makes clearer the distinctions for instance between home and host country law, advisory and representational work. Other members, notably in the EU responded cautiously. They are concerned to ensure the system if adopted is strictly neutral in the sense that members remain free to choose how they make use of the 'terminology'. One reason is the contrast between the primarily Anglo-Saxon consultancy model and the French adherence to the demand for full integration within the local profession (see above).

Cross-border supply and supply from home

By what modes may foreign lawyers supply such services? In the Uruguay Round, some members committed to modes 1 and 2 quite freely.[52] Possibly they thought the modes had little relevance to legal services supply; possibly they wondered what governments could do to stop the use of such services. A regulation targeting the mode of supply would be something like a restriction on the cross-border outsourcing of legal work, say from the US to India. However, some members maintain a general requirement of commercial presence for the supply of legal services; in other words there is no right of non-establishment. The new round offers do not appear to change that position.

Certainly, it is true that lawyers and other professionals are involved in facilitation of cross-border transfers of goods, money and people; even the manipulation of legal forms like contracts and corporations to select and perhaps to evade national regulation. Often, the regulation here concerns the activities which the lawyers service more so than the mode of supply itself. We should note though that the public interest regulation is furthered if obligations are placed on the professionals, such obligations as disclosure and reporting of suspect client transactions. Again, the relationship between markets in law and markets in legal services becomes blurred. We shall deal with this consideration

below in the matter of the disciplines to be applied to professional services regulation.

Movement of people

In the legal sector, as in most others, freedom of movement of natural persons remains a delicate issue. Chapter 4 noted that the GATS gave this particular mode of supply attention across the board by providing a specific Annex on Movement of Natural Persons Supplying Services under the Agreement. Part of its intention was to hive off issues of entry and temporary stay from the broader and more sensitive issues of access to employment markets and citizenship, residence and employment on a permanent basis. The developed countries had a particular interest in assuring the passage of business visitors and intra-corporate transferees. We noted in Chapter 4 that other countries were not so ready to accept this demarcation.

As we noted in Chapter 4, the movement of professionals is an interest for some of the countries making requests in the recent round of negotiations. In their Uruguay Round commitments, many members left mode 4 unbound. The availability of visas has surfaced as a concern. The denial of visas prevents individuals from making short-term visits to provide their foreign law services. Where a commercial presence is allowed, it may become the practical obstacle to its establishment; similarly where admission to the local profession is at least in theory possible. In their offers so far, some members have been prepared to make horizontal commitments, extending beyond intra-corporate transferees to independent professionals and contractual services providers. But they still seek to control the numbers, and the access may still be subject to sector-specific limitations, for example tying visa access for lawyers to a commercial presence or a residency period. We cannot say at this stage what the round will produce.

Commercial presence

As acknowledged already, the GATS is significant for embracing foreign establishment and investment within the framework of a multilateral trade agreement. It defines the commercial presence mode of supply in an expansive way. Yet for the legal sector the outcome of negotiations was that countries continued to place limitations on the scope and manner of the presence. Some countries now want to see those controls relaxed a bit more.

The focus is the controls on the limited licensing of the foreign consultancy mode of supply. In part it is to expand the scope of activities available within this mode, for example, to make clear it includes third country and public international law. The freedom to associate with locals is another target. In the current round, Australia is requesting that no limitations or special requirements be placed on the number and types of voluntary commercial associations between foreigners and locals, including fee-sharing arrangements and employment of locals by foreigners (though subject to its own limitations in the smaller states of South and Western Australia).

Within the full practice of the local legal profession, firms generally need to be owned and controlled by the local legal professionals. As well as overt controls on foreign investment, the restrictions on the business structure available for the practice of law present an obstacle to the provision of legal services transnationally. One commentator argued that 'the very strict rules intended to maintain the necessary independence of lawyers and ensure that the practice of law remained a liberal profession ... have also prevented the establishment of large multi-speciality law firms, especially in the field of corporate law, despite a clearly growing demand from businesses'.[53]

The most obvious case is the multi-disciplinary partnership. Liberally drawn, multi-disciplinary partnerships would obviate the need for foreigners to qualify as lawyers if they wished to associate with locals. This structure would provide openings for foreign lawyers who were not admitted locally as well as other professionals such as accountants. Multi-disciplinary practices could be geared much more functionally to specific services markets than organised along professional lines, leading to a blurring of the boundaries between law and business. Some jurisdictions have already embraced multi-disciplinary partnerships, several of the Australian states for instance. But many jurisdictions, including eighteen of the twenty-five OECD members, maintain the prohibition on multi-disciplinary partnerships. In the US and Japan, for example, opposition remains strong.

A more radical change is the corporation that provides legal services along with conducting other businesses. In the full-blown version, non-lawyers may become directors and shareholders of these corporations, possibly constituting the majority. The Chairperson of the GATS Working Party on Professional Services observed that mutual recognition of firms would disconnect the practice of the professional activity from the ownership of the capital, allowing for a freer flow of capital

among the professional community.[54] It would also have the potential to let in investors from outside the sector, as it has done in the health services sector where for example doctors work for fast food corporations. Again, Australia is in the vanguard of this change and already one medium-sized firm has been floated on the stock exchange.

Mergers and acquisitions are already occurring at the national level in the legal sector; most likely, liberalisation would add a transnational dimension to this activity. Whelan and McBarnet found that the liberalisation of the European market was intensifying such activity. Now we are seeing moves from the much more internationally organised accounting firms to take over legal firms, checked only perhaps by these firms' own problems with corporate accountability.[55] So we can expect more pressure to liberalise business structures.

PROFESSIONAL STANDARDS

Especially if foreign access is to reach to the full range of legal activities, then national standards regarding professional qualifications and conduct are implicated. Mediation of national, sub-national and regional regulation would of course have the benefit of overcoming the cost of compliance with multiple and differential requirements. But there is a substantive issue here too, very much connected with the competition between modes of lawyering. What standards of preparation and conduct should prevail? For example, the US and the EU have been proceeding informally to bring their requirements into line. They find much in common, but a contrast has been made between the Union's equal stress on the lawyer's obligations to the client, the courts, the legal profession, and the general public and the US attitude, drawn from its common law tradition, which gives greater prominence to the lawyer's obligations to the client. Even if business structures are relaxed, a continuing concern is how to ensure the lawyers in these organisations still have the independence and responsibility to maintain professional standards.

The issue of standards for lawyers is also connected to the broader question of codes of conduct for their international clients, such as the multinational enterprises and financial markets. A focal point might be the responsibilities international lawyers should owe to the governments and societies that are playing host to their clients. In this regard, the lawyers' sensibilities might be enhanced if some comparative law study component was a requisite for mutual recognition of

qualifications, as well as the increasingly common study of international law. Ultimately, the process of standardisation will need to address the question of the appropriate standards for professional practice. Most obviously, these standards include the kind of respect to be shown to members of the local host profession. However, their concerns might range wider. For example, the International Commission of Jurists became interested in the role which one Australian legal firm had played in Papua New Guinea. It was alleged that the firm had drafted legislation for transmission directly to the national parliament; the legislation aimed to outlaw the taking of legal action against the firm's client, an Australian multinational company, for pollution of farm and village lands.[56]

Does the GATS offer potential to link the liberalisation of legal services supply with international regulation? The basic consideration is our abiding one whether a trade organisation is the appropriate forum to resolve issues of professional qualification and practice. The most likely thrust is for the trade agreement to push countries to pare back their regulation of the professions. This trajectory works generally through the norms of liberalisation and specifically through requirements that the remaining national regulation satisfy a necessity test. Yet the agreement's comprehension of multi-jurisdictional or transnational legal practice provides a forum for the pursuit of international regulation. We can now gauge this potential by looking at the response, especially from the national regulators and professional associations, to the idea of the WTO developing disciplines on domestic regulation in the professional services sectors.

First, we should note that over half those countries making legal services commitments in the Uruguay Round actually included domestic regulatory measures in their schedules of commitments. Unsure of their obligations, members might enter such measures to make sure they are saved. In some cases, members enter them at the request of other members seeking a commitment to control domestic regulation. In this sector, most of these measures related to licensing and qualification requirements. Nonetheless, as the WTO's background note points out, scheduling such domestic regulatory measures is not strictly necessary: 'Both home country law qualification requirements and home/third country law qualification requirements are domestic regulatory measures according to the GATS and therefore not subject to scheduling under Articles XVI and XVII'.[57]

Accounting sector disciplines

We saw in Chapter 4 how GATS Article VI establishes standards for domestic regulatory measures. It deals broadly with the so-called qualitative limitations, the kinds of measures that do not have to be listed under national treatment or market access limitations in the members' schedule, where of course they have exposed a sector or sub-sector to these requirements of the agreement by inscribing it in a schedule. Article VI pays special attention to measures relating to qualification requirements and procedures, technical standards and licensing requirements. It acknowledges these national measures, while at the same time linking them with certain disciplines. In part, these measures should be based on objective and transparent criteria, such as competence and the ability to provide the service, not more burdensome than necessary to ensure the quality of the service, and in the case of licensing procedures, not in themselves a restriction on the supply of the service. In sectors that have been exposed, these disciplines apply immediately to domestic regulation to prevent a nullification or impairment of the commitments that have been made. For domestic regulation more broadly, the Council for Trade in Services is to work to develop collective or horizontal disciplines that all members should have to respect.

We should also note at this point that Article VII enables members to recognise the education or experience obtained, requirements met, or licences or certifications granted in another country. Recognition could be based on agreements or arrangements with other countries, and third-party countries were to have an opportunity to negotiate accession or to negotiate comparable ones. Where appropriate, recognition was to be based on multilateral criteria and members were to work in cooperation with relevant intergovernmental and non-governmental organisations on common international standards for the recognition *and* practice of relevant services, trades and professions (Article VII:5).

Now we shall examine the experience with the development of collective disciplines. At Marrakesh, the Decision on Professional Services set in train a Working Party that was assigned the accountancy sector as its first priority. In May 1997, the Council for Trade in Services produced Guidelines for Recognition of Qualifications in the Accountancy Sector.[58] Much of the Guidelines were preoccupied with the procedural standards (such as transparency), which should apply to the making of agreements between members to provide recognition.

But, at the same time, they allowed for members to safeguard local integrity. For example, they conceded the place for additional requirements ('compensatory measures') such as knowledge of local law, practice, standards and regulations. Thus, the value of local specificity was given some support.

The Guidelines also acknowledged requirements, apart from qualifications, such as establishment or residency requirements, or compliance with the host country's ethics (eg, independence and incompatibility). But the Guidelines did not seek to take on the question of the content of such standards at all, in the sense of formulating common standards at the international level. Elsewhere, the Chairperson of the GATS Working Party has sounded a note of caution: 'Such an approach would obviously bring in a very high level of liberalisation but could likewise present a risk to the protection of the public interest. In the absence of any proper harmonisation of laws and regulations in a number of areas, this approach will have to be used with the greatest prudence'.[59] In other words, without an attempt at harmonisation, mutual recognition might lead to a lowering of standards. But the Chairperson added that this was no reason to drop the idea at the outset.

In December 1998, the Council produced a set of disciplines on domestic regulation in the accounting sector.[60] The disciplines are applicable to the measures of members who have scheduled specific commitments for accounting under the GATS. In addition, all members have agreed to take no new measures that would be inconsistent with the disciplines. At the same time, it should be noted that the disciplines do not apply to measures that are the subject of scheduling by virtue of Articles XVI and XVII of the GATS. These measures are to be addressed through the negotiation of specific commitments.

The disciplines deal with licensing and qualification requirements and procedures. Their general thrust is to impel members to choose measures that are no more trade restrictive than necessary to fulfil a legitimate regulatory objective. So a test of necessity is invoked. The disciplines recognise as legitimate objectives (*inter alia*) the protection of consumers, the quality of service, professional competence and the integrity of the profession. Of the more pointed of their demands, the first is for transparency. Licensing requirements are to be pre-established, publicly available and objective. More substantially, the member countries are urged to consider measures less restrictive than a residency requirement. Requirements relating to qualifications should

take account of qualifications acquired in the home territory on the basis of equivalence in education, expertise and/or examination requirements. Procedures for qualification should be timely, with examinations held regularly. The disciplines make no mention however of language requirements. Generally speaking, they are very tentative. With their release, the Working Party was to move on to develop disciplines for professional services generally.

Legal sector disciplines?

When we say the WTO is member driven, this usually means the trade ministry representatives of the member governments based in the Geneva missions or communicating and visiting from the home capitals. Professional services are often regulated by domestically oriented ministries and in the case of the legal profession a ministry of justice. In liberal polities at least, the independence of the profession is a consideration. The ministry provides a statutory framework. The civil society associations of the profession can enjoy some autonomy in regulating professional practice and the public and consumer interests are represented along with the profession in a specialist statutory body at some distance from the ministry. Again in conjunction with the profession, the universities and the judges regulate the content of the qualifications for admission to the profession.

In the WTO context, these functional regulators and professional associations have expressed concern that the disciplines might override or at least circumscribe their discretion to shape the standards of professional qualifications and practice, all for the sake of the small layer that is multi-jurisdictional and transnational legal services. This objection was raised domestically when the different sections in the member governments met; also through the professional associations which have become part of global civil society. After the institution of the GATS, and the series of conferences the OECD ran to promote liberalisation, the international law associations decided to convene their own forum.[61] Organised by the ABA section of the IBA, the CCBE and the JFBA around a theme of transnational practice for the legal profession, the Paris Forum was well attended. While this grouping produced no resolution, the WTO and OECD interventions stimulated the IBA to think hard about the principles that should survive any deregulation. Its discussions produced the Core Values Resolution in 1998 and the Resolution Statement of Standards and Criteria for Recognition of Professional Qualifications in 2001.

The WTO Secretariat sensed the need for the professional associations to become involved in deliberations if further disciplines were to be obtained. Arguably Article VII:5 gave the go-ahead to consult. The initiative became an issue of authority and legitimacy. It was to take the WTO three years to agree to the contents of a letter and a list of organisations to which to send it. It would seem part of the resistance was the assertion of the members over the secretariat. It was also due to the uncertain standing NGOs enjoyed at the WTO. Accordingly it was stressed the list should be member driven. The list should be limited to international organisations that are open to the relevant bodies of all the members of the WTO, not purely regional organisations for example. Members would need to consult with domestic associations themselves individually and then inform the WTO. The Canadian and US governments cautioned that direct consultations with international professional organisations should not cause misunderstandings.

While some international associations were wary of engaging the WTO, the IBA was already pushing strongly. In a familiar refrain, the IBA argued the legal profession was special and not just another service sector. Considerations unique to legal services are bound up in the character requirements, the fitness to be a member of the profession, the heterogeneity of the substantive knowledge that should be learnt, and the responsibilities that attach to the role, it was contended. The IBA sought to build a conceptual framework that will enable liberalisation to be accomplished in a manner consistent with core values. To this end, the IBA decided to hold one of its meetings in Geneva in 2002; it convened its own WTO Working Group mixing lawyers from different geographical and private practice backgrounds; in July 2002 it ran an education seminar in Geneva for the trade representatives of the member countries.

When the IBA finally received the official consultation letter from the WTO in 2003, it convened another forum. Forty-nine bar associations spanning six continents were to be involved. The forum put together a resolution that formulated the kind of amendments that were needed to the accountancy sector disciplines if they were to be appropriate in the legal sector.[62] The amendments would operate by way of clarifications. They make the point that, in the case of the legal profession, ethical rules and rules of professional conduct form an essential part of the qualification and licensing requirements.

The main clarification is to insert within the section elaborating legitimate regulatory objectives a statement that reflects the social role

of the legal profession in protecting rights and the rule of law and the integrity of the legal system. The IBA is concerned here too with the stringency of the necessity test, an issue we identified in Chapter 4. For example, the fact that several countries have broken ranks and accepted the MDP is a cause for concern. The concern (shared by the CCBE, ABA, JFBA and CBA) is that this departure will be used to argue the prohibition is not necessary to achieve regulatory objectives. The statement of legitimate objectives would include: the protection of the independence of the profession, the protection of confidentiality and the professional secret, the avoidance of conflicts of interest and the integrity of the profession.

The annotations have now been forwarded to the WTO. An IBA officer followed up with a paper given at the workshop on domestic regulation that the WTO held in Geneva in July 2004. They have since been incorporated in a proposal that Australia has communicated to the WTO.[63]

International regulation

The case of legal services represents the dilemma facing national governments generally when they are asked to guarantee both the freedom and the security of trans-border data flows. Freedom of access is coupled with an expectation that the confidentiality or privilege of the lawyer's communications with clients will be preserved. However, this package, of freedom for information flows combined with data security, detracts from government capacity to exercise regulatory oversight, for example in relation to tax avoidance practices and criminal activities such as money laundering.

The two legalities may be difficult to reconcile. The Clinton Administration's proposal for the government to hold an encryption key in escrow highlights this quandary. Now we see that huge corporate frauds have led to reform of US laws, the Sarbanes-Oxley Act being the most notable. The war on terrorism has pushed neo-liberal governments to strengthen measures against money laundering; having introduced its third directive on money laundering, the EU offers perhaps the best example of international hard law practice.

The tensions are to be found within the GATS too. In Chapter 4, we have seen how the GATS allows for certain non-conforming measures which further regulatory objectives such as the prevention of fraud or the protection of national security. Yet, in its provisions for basic telecommunications and financial services, the GATS conveys the

expectation that transfers of information will be both free and secure. Once again, the member's most obvious strategy, if it wishes to retain the discretion to rework its regulation at a later date, is to withhold a mode of supply that is of uncertain quantity from its commitments altogether. The US gambling dispute reveals the drawbacks of committing categorically to the liberalisation of the agreement. A sizeable proportion of members still make no commitments under the GATS. Some members have committed to commercial presence but left cross-border supply unbound. Somehow, the WTO needs to make members feel confident they can come into the GATS and commit to liberalisation without losing all their regulatory options.

Moreover, the GATS provides little impetus to link members to international regulation. In Chapter 8, we come back to this basic point. For now we shall say that, in a world of porous physical borders and ethereal electronic communications, permissions to apply national measures are all very well. International regulatory coordination is vital. Professionals are legitimate subjects of such regulation; they are active devising means to avoid national regulation. Siphoning public monies offshore, for example, often relies on the complicity and ingenuity of lawyers as well as other professionals. The professional associations often resist these added social responsibilities. The outer limits of client confidentiality and professional privilege are challenged, but the professional associations remain very protective. In some member countries, the national bar associations have opposed the implementation of the EU money laundering directives and the CCBE has counselled less haste on the third directive.[64]

Yet the GATS does not respond positively to this need. Rather, the concern is that, if it develops its own disciplines for regulation in the legal sector, they might cramp such initiatives. The professional associations are ambivalent. They wish to retain the freedom to regulate their profession, but they would prefer not to be regulated by the state. The IBA amendments stress the confidentiality and privilege of the client's communications, the professional secret as it were. If they wish to retain their professional status, they might need to show some interest in the corrupt transnational activities of their members, actively pursuing their own codes of conduct at this level (eg, see the CCBE Code of Conduct). The alternative is to shift the focus away from the professional mode, treat legal services as part of business, and think more broadly in terms of international corporate social responsibility. A model might be the codes of conduct applied to banking

services and pension funds when they support investments in resource projects in the third world.

Competition regulation would deal with little of this concern. As we shall learn from Chapter 8, further liberalisation of foreign investment could be a spur to the formation of an international competition policy. Reichman supposed that small and medium-sized firms might realise a common interest cross-nationally in the right sort of competition policy disciplines.[65] But it has to be said that competition policy is likely to be viewed with ambivalence in sectors such as legal services. Its main impact might well be to prize open the controls that the local profession continue to apply for a variety of reasons to competitive practices. In any case, despite their implications for the nature of legal services, few mergers would be likely to achieve the high thresholds of market power which must be met before the scrutiny of conventional competition laws is attracted. It would depend in part on how markets were defined and whether the accumulation went the way of accountancy where internationally a small number of very big firms dominate. If such firms were able to achieve dominance in one market, or control essential services, competition law might be on the watch for attempts to leverage that power and force patronage of related services. It seems one argument against greater access for the accountancy firms to the legal sector is that they might tie their in-house legal services in with the supply of their accountancy and audit services.[66] Yet competition policy focuses on economic outcomes and the greater availability of services will not of itself ensure that social responsibility is exercised.

At Hong Kong, the GATS Track 2 Chair's report says that the members do want to develop disciplines by the end of the Doha Round. In July 2006, the Chair of the Working Party on Domestic Regulation issued a draft text of disciplines for domestic regulation of qualification and licensing requirements generally (not just legal services).[67]

CONCLUSIONS

The case of cross-national legal services and the reception given to foreign lawyers provides a useful indication of the complexion of globalisation. This chapter has acknowledged the spread of a certain contemporary kind of global lawyer. It is identified most strongly in the studies with a competitive Anglo-American style based on transactions and disputes. Globalisation of this style proceeds somewhat under its

own steam and it has not been my intention to play down its significance. In giving shape to a transnational field of private business justice, its impact may be profound. But a range of economic, political and cultural differences suggest why, at the same time, it encounters local defences. Legal practice remains subject to restrictions and requirements. In part, they represent the evident desire of nation states to maintain their own different laws and the jurisdiction to apply them; in other words, not only lawyers make law. But the free flow of these global lawyers is also hampered by factors particular to the supply of legal services themselves. There are limits to the tradability of legal services. For many kinds of legal services, local presence, proximity and familiarity still provide advantage. Lawyers must work closely, not only with business clients, but with state agencies, courts, civic organisations and local communities, including local professional legal groups. Global legal services must negotiate the national regulations which reinforce those advantages and indeed make it difficult to acquire them.

A brief examination of regulatory arrangements, even in the countries most generally disposed towards open trade and free markets, shows how sensitive this sector remains. Strong concerns are held about direct competition from legal businesses in the other northern countries, as well as the entry of individual lawyers from around the world into their domains of professional practice proper. The concerns extend beyond economic protection into a host of cultural and social reservations about the accessibility of foreign lawyers and legal services.

Where unilateral and bilateral arrangements for transmissibility have foundered, the GATS has become a crucial device to mediate the encounters of global services with local policies and practices. These local policies and practices will increasingly be shaped by their relationship to the global pressures for open trade and free markets. The GATS circumference is wide enough to promote all modes of supply of legal services and begin to scrutinise the full range of relevant government measures. Included here are regulations that do not directly discriminate against foreign services, but which make prescriptions regarding the structure, competence and conduct of the local profession for non-trade reasons too.

However, the GATS listings approach was to provide the opportunity for countries to hold the line, if they saw fit, against global supply. The evidence indicates that many did so. The concessions were minor. Nevertheless, we can expect that 'horizontal' economic connections

will continue to promote the global flows of legal services, making changes, as it were, over the heads of the national regulators. It looks as if multi-disciplinary practices will be a spearhead. Successive rounds of GATS negotiations, commencing with the Doha Round, might possibly advance these inroads. In these circumstances, the need to internationalise professional standards is likely to grow. The GATS contains some recognition of this need, but it remains to be seen whether it will provide an impetus for the kind of regulation which can fill the void created by the challenge to national regulation. The experience with legal sector disciplines demonstrates the difficulty of the task. Now, if it wants to make any ground, it looks as if the WTO has to deal with a host of contrasting perspectives and interests, including trade ministries, justice department regulators, large firm exporters of legal services, supervising judiciaries, locally based professional associations and possibly representatives of consumers. Yet it is not institutionally predisposed to engage all these stakeholders. Meanwhile it continues to press for further liberalisation and, even if many countries remain conservative about making commitments, shifts in markets for law and legal services are moving above them.

NOTES

1. Y. Dezalay and B. Garth, *Dealing In Virtue: International Commercial Arbitration and the Construction of a Transnational Order* (Chicago: University of Chicago Press, 1996).
2. For an exploration of this theme, see D. McBarnet, Legal Creativity: Law, Capital and Avoidance. In M. Cain and C. Harrington (eds.), *Lawyers in a Postmodern World: Translation and Transgression* (Buckingham: Open University Press, 1994).
3. See for example the study of corporate takeover work in M. Powell, Professional Innovation: Corporate Lawyers and Private Lawmaking, *Law and Social Inquiry* 18 (1993), 423.
4. I owe this rounded view to Terry Halliday, Lawyers as Institution Builders: Constructing Markets, States, Civil Society, and Community. In A. Sarat, M. Constable, D. Engel, V. Hans and S. Lawrence (eds.), *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (Chicago: Northwestern Press, 1998).
5. See for example the experience with privatisation law; M. Moran and T. Prosser, *Privatization and Regulatory Change in Europe* (Buckingham: Open University Press, 1994).
6. C. Silver, Globalization and the US Market in Legal Services, *Law and Policy in International Business* 31 (2000), 1095.

7. W. Becker, M. Herman, P. Samuelson and A. Webb, Lawyers Get Down to Business, *The McKinsey Quarterly* 2001, No 2, 45.
8. For such comments on the East European experience, see M. Krygier, The Constitution of the Heart, *Law and Social Inquiry* 20 (1995), 1033. A. Politkovskaya, *Putin's Russia: Life in a Failing Democracy* (New York: Metropolitan/Owl Books, 2004).
9. See for instance M. Kessler, Review Essay: Lawyers and Social Change in the Postmodern World, *Law and Society Review* 29 (1995), 769; S. Scheingold and A. Sarat, *Something to Believe In: Politics, Professionalism and Cause Lawyering* (Stanford: Stanford University Press, 2004).
10. B. Garth, Noblesse Oblige as an Alternative Career Strategy, *Houston Law Review* 41 (2004), 93.
11. T. Waelde and J. Gunderson, Legislative Transplants in Transition Economies: Western Transplants – A Shortcut to Social Market Status?, *International and Comparative Law Quarterly* 43 (1994), 347.
12. C. Whelan and D. McBarnet, Lawyers in the Market: Delivering Legal Services in Europe, *Journal of Law and Society* 19 (1992), 49.
13. U. Baxi, Life of Law among Globalization. In C. Arup and L. Basser (eds.), *Cross-Currents: Internationalism, National Identity and Law* (Melbourne: La Trobe University Press, 1996).
14. Y. Dezalay and B. Garth, *The Internationalization of the Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002).
15. Y. Dezalay and B. Garth, The Confrontation between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility, *Law and Social Inquiry* 29 (2004), 615.
16. S. Sassen, *The Global City: New York, London, Tokyo* (Princeton: Princeton University Press, 2nd edn, 2001).
17. J. Shapland, How Do Lawyers Accomplish Trans-National Lawyering?. Paper presented to the Joint Meeting of the Law and Society Association and the Research Committee on the Sociology of Law, University of Strathclyde, Glasgow, July 1996.
18. S. Picciotto, Constructing Compliance: Game-Playing, Tax Law and the Regulatory State, *Law and Policy* 29 (2007), 11.
19. J. Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford: Oxford University Press, 2005).
20. See *Japan Law Journal*, February 1995.
21. H. Kritzer, The Professions Are Dead: Long Live the Professions: Legal Practice in a Post-Professional World, *Law and Society Review* 33 (1999), 713. In some cases, the locals may lack the kind of expertise and organisation necessary for international work.
22. See generally OECD, *International Trade in Professional Services: Assessing Barriers and Encouraging Reform* (Paris: OECD, 1997).
23. However, we would expect countries to argue that 'service providers' involved in the administration of justice, such as judges and state advocates, are excludable.

24. For a summary, see WTO, Council for Trade in Services, *Legal Services*, Background Note by the Secretariat, S/C/W/43, 6 July 1998.
25. See Chapter 4 for an explanation of the architecture of the GATS and the meaning of these terms.
26. Again, to some extent, I have to rely on insiders' accounts, see S. Kigawa, Gaikoku Bengoshi Ho, Foreign Lawyers In Japan: The Dynamics Behind Law No 66, *Southern California Law Review* 62 (1989), 1489.
27. See the report by R. Grondine, Foreign Law Firms in Japan Thwarted, *International Financial Law Review* 13(7) (1994), 11.
28. See WTO, *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (WTO: Geneva) Vol 29, pp 24040–5.
29. See the study by Ryo Hamano in W. Alford and S. Miyazawa (eds.), *Raising the Bar: The Emerging Legal Profession in East Asia* (Cambridge: Harvard University Press, 2005).
30. R. Lutz *et al.*, Transnational Legal Practice Developments, *The International Lawyer* 39 (2005), 619.
31. WTO, Council for Trade in Services, Special Session, Japan, Revised Offer, TN/S/O/J/Rev.1, 24 June 2005.
32. A good history is provided by R. Goebel, Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice. In M. Daly and R. Goebel (eds.) *Rights, Liability and Ethics in International Legal Practice* (New York: Transnational Juris Publications, 1995).
33. My source is I. Jacobs, The Theory and the Practice of Implementation of the Mutual Recognition of Diplomas Directive, *New Law Journal*, 3 June 1994.
34. See WTO, *Legal Instruments*, Vol 28, pp 23568–9.
35. EC Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a member state other than that in which a qualification was obtained [1998] OJ L077, 14 March 1998.
36. For the experience, see I. Katsirea and A. Ruff, Free Movement of Law Students and Lawyers in the EU: A Comparison of English, German and Greek Legislation, *International Journal of the Legal Profession* 12 (2005), 367.
37. R. Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press, 2003).
38. WTO, Council for Trade in Services, Special Session, Communication from the European Communities and its Member States, Conditional Revised Offer, TN/S/O/EEC/Rev.1, 29 June 2005.
39. For the rule, see American Bar Association, Model Rule for the Licensing of Legal Consultants, *International Lawyer* 28 (1994), 207.
40. T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992) Volume II: Commentary* (Boston: Kluwer, 1994).
41. See WTO, *Legal Instruments*, vol 30, pp 25269–88.
42. See the exposition by R. Self, Legal Services and the Emergence of a Service Economy: Practical and Theoretical Considerations. In B. Garth *et al.* (eds.), Issues of Transnational Legal Practice, *Michigan Yearbook of International Legal Studies* 7 (1985), 269.

43. WTO, Council for Trade in Services, Special Session, Communication from the United States, TN/S/O/USA, 9 April 2003.
44. For a comprehensive survey see C. Silver, Regulatory Mismatch in the International Market for Legal Services, *Northwestern Journal of International Law and Business* 23 (2003), 487.
45. C. Arup, Experimenting with Regulation: The New Regulation of Professional Services in the People's Republic of China, *Australian Journal of Asian Law* 8 (2006), 1.
46. A. Subrahmanyan, Growth and Change: The Diverse Challenges Facing Chinese Law Firms, *China Law and Practice* 18(5) (2004), 17.
47. R. Peerenboom, *China's Long March to the Rule of Law* (New York: Cambridge University Press, 2002).
48. C. Arup, WTO Membership and Professional Services in D. Cass, B. Williams and G. Barker (eds.), *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge University Press, 2003).
49. R. Guo, Piercing the Veil of China's Legal Market: Will GATS Make China More Accessible for US Law Firms?, *Indiana International and Comparative Law Review* 13 (2002), 147.
50. M. Grosso, Managing Request-Offer Negotiations Under the GATS: The Case of Legal Services, OECD Trade Policy Working Paper No. 2, Working Party of the Trade Committee, Trade Directorate, OECD, TD/TC/WP(2003)40/FINAL, 14 June 2004.
51. L. Terry, Current Developments Regarding the GATS and Legal Services: The Hong Kong Ministerial Conference and the Australian Disciplines Paper, *The Bar Examiner*, February 2006, 26.
52. S. Cone, Legal Services and the Doha Round Dilemma, *Journal of World Trade* 41 (2007), 245.
53. S. Nelson, Legal Services. In OECD, *Professional Services*, p 47.
54. R. De Sola Sauvel, Proposals Advancing Liberalization Through Regulatory Reform. In OECD, *Professional Services*, p 111.
55. B. Garth, Introduction: Multidisciplinary Practice after Enron: Eliminating a Competitor but not the Competition, *Law and Social Inquiry* 29 (2004), 519.
56. The incident is reported in a history of one of the law firms involved in the litigation, see M. Cannon, *That Disreputable Firm . . . The Inside Story of Slater and Gordon* (Melbourne: Melbourne University Press, 1998).
57. WTO, *Legal Services*, p 18; see further L. Terry, But What Will the WTO Disciplines Apply To? Distinguishing Among Market Access, National Treatment and ArticleVI:4 Measures When Applying GATS to Legal Services, *The Professional Lawyer* 2003 Symposium Issue (2004), 83.
58. See WTO Press Release PRESS/73, 29 May 1997. The Release appended the Guidelines.
59. See De Sola Sauvel, Proposals, p 111.
60. WTO, Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, see WTO *Focus* No 36, December 1998 or available at www.wto.org.

61. L. Terry, Lawyers, GATS, and the *WTO Accountancy Disciplines*: The History of the WTO's Consultation, the *IBA GATS Forum* and the September 2003 IBA Resolutions, *Penn State Dickinson International Law Review* 22 (2004), 695.
62. IBA, Communication to the World Trade Organization on the Suitability of Applying to the Legal Profession the WTO Disciplines for the Accountancy Sector. Adopted at the IBA Council Meeting, San Francisco, September 2003.
63. WTO, Trade in Services, Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors, S/WPDR/W/34, 5 September 2005.
64. See Lutz, Transnational Legal Practice Developments.
65. In an upbeat report for UNCTAD, see J. Reichman, The 'TRIPS' Agreement and the Developing Countries, *UNCTAD Bulletin* 23 (1993), 8.
66. See WTO, *Legal Services*, p 14.
67. Services: Domestic Regulation Leaps Forward, Market Access Stands Still, *Bridges Weekly Trade News Digest* 10(26), 19 July 2006. Members are divided. See Chapter 4 for further analysis. The drafts are posted at the IBA website at www.ibanet.org under barassociations/WTO-Working group.

PART III

INTELLECTUAL PROPERTY

CHAPTER 6

THE AGREEMENT ON TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS

Like Chapter 4, Chapter 6 has a modest aim of informing the reader. After recounting briefly how the Uruguay Round brought them into existence, it lays out the provisions of the TRIPs agreement for consideration within the context of the book. It notes further the DSB rulings of general import for the agreement, and identifies how the re-regulatory requirements of intellectual property protection have become an essential component of the WTO's interface. Thus, the regulatory reform agenda is not confined to the deregulation of those national legalities which are identified as barriers to liberalisation. It can involve the enactment and enforcement of a set of proactive international standards.

Working though the agreement, the chapter notes how the principles of non-discrimination require that members are to give foreigners no less favourable treatment in their protection of intellectual property. In this respect, the agreement is not much of an advance on existing conventions. In making standards of protection multilateral rather than bilateral obligations, the MFN obligation has the most significance. In the dispute settlement rulings, the standard of national treatment has also received attention. The chapter appreciates that the real potency of TRIPs lies in its requirement that members guarantee high levels of substantive protection to foreigners. Taking each of the agreement's categories of protection in turn, Chapter 6 indicates the nature of the subject matter which they make amenable to protection as intellectual property. It identifies the uses or activities over which the property holder receives control rights. The chapter takes most interest

in the categories of copyright and patents, as they are central to the case studies pursued in Chapters 7 and 8. Chapter 6 also acknowledges the detailed prescriptions which TRIPS makes in an attempt to overcome differing national administrative and judicial approaches to the enforcement of protections.

This analysis of the agreement's substantive provisions begins to reveal how far reaching its impact is on different legalities. It specifies the nature of legal protection where products are shipped across national borders and they encounter unsympathetic legalities of copying and borrowing; it also lends support where foreigners seek to manage production processes inside the territories of member countries. But the agreement is not comprehensive. It draws on the rules and resources of the established intellectual property conventions which are administered by the World Intellectual Property Organization (WIPO). At the same time, it leaves spaces to be filled, first by various government and private legalities within the member countries, subsequently perhaps by other international agreements. Again, the generality of the norms leaves room for divergence. But the spaces also result from the agreement's hesitation in covering certain new types of subject matter and use rights. The intellectual property chapters of the US free trade agreements have become significant.

The agreement also makes concessions to alternative legalities by explicitly allowing in the text for members to take exceptions and to apply limitations. Now, for copyright, patents and trademarks, these exceptions have received interpretation in the major dispute settlement rulings. The chapter identifies tendencies in TRIPs to promote the kind of regulation that counter-balances the market power which it has helped to settle on global suppliers. The circumstances in which the agreement will permit fair use and non-voluntary licensing are considered. The chapter identifies the limited extent to which the agreement supports competition policy's approach to disciplining the abuses of intellectual property power. Again, one aim here is to set the scene for the case studies which follow.

THE URUGUAY ROUND

The course of events

Like the GATS, the TRIPs agreement is an integral part of the Agreement establishing the WTO, comprising Annexe 1C to that Agreement. As one of the multilateral trade agreements, it is binding

on all members and hence also a condition of membership for countries that have not yet joined the WTO. Such a condition proves a significant one for countries seeking to join the WTO, such as the People's Republic of China. Implementation and compliance with its provisions have also proved onerous for many of the initial members of the WTO. Where it is faithfully applied by the members, the TRIPs agreement makes a major contribution to the international rules and resources available for the protection of intellectual property. The agreement has broader symbolic significance as well. It is by far the most emphatic substantiation of the security dimension of the concept of secure access, exemplifying the fact that the WTO interface involves re-regulatory as well as deregulatory requirements. So far as it requires members to provide a high level of substantive protection for intellectual property, it is an exemplary instance of standardising regulation in this field right across the world.

For most of its life, the GATT's interest in intellectual property was marginal. It did recognise that local procedures for intellectual property protection could act in a discriminatory way. The GATT agreement afforded special permission for measures necessary to secure compliance with laws or regulations relating to the protection of patents, trade marks and copyrights. The US had twice run into trouble with the GATT norms for offering domestic holders of patents more accessible procedures for enforcement than foreign holders. In the first of these disputes, the procedures were saved by the exception.[1] But in the second dispute, the procedure was held to be in violation.[2]

Lack of intellectual property protection on the other hand did not begin to surface as a trade issue until the Tokyo Round, the round preceding the Uruguay Round. During this Round, the US flagged trade in trade-marked counterfeit goods as an issue of concern. Here we see the origins of the idea that intellectual property protection was pro-trade, rather than a necessary evil which was to be tolerated in some circumstances because it promised its own benefits. Failure to provide adequate and effective protection for intellectual property was to be seen as a barrier to free trade or rather perhaps as a form of unfair trade. In other words, traders expressed their interest in obtaining security for their products and processes as much as freedom. Once they had obtained market access, they were not going to rely solely on economic advantages such as earlier innovation, superior quality or cheaper prices, when faced with competition from local secondary producers.

No agreement was reached in the Tokyo Round, but the US continued to pursue the issue informally with the fellow members of the Quad, the European Community, Japan and Canada. It also began to deploy in earnest the sanctions of its own trade legislation (such as ss 301 and 337) in order to obtain bilateral concessions towards greater intellectual property protection. This omnibus legislation has elaborated circumstances in which the Office of the United States Trade Representative was to take action to safeguard the intellectual property of US producers. This action commenced with the placement of countries on a watch list for failure to provide adequate and effective protection. They could be upgraded to the priority watch list. Countries that did not institute satisfactory protection faced trade sanctions. The main targets of the legislation were to be the newly industrialising countries such as Thailand, South Korea, Taiwan, India, Brazil, the Philippines and the Peoples Republic of China.[3] However, all sorts of countries were to be placed on notice, including countries with well developed intellectual property regimes such as the members of the EU and Australia. The US acted on any derogation from the rights which it felt were appropriate to intellectual property and not just the situations in which basic protection was lacking.

Agenda setting

To return to the Uruguay Round, it is worth recounting the main stages of the negotiations, for they cast light on the nature of the eventual agreement. Trade in counterfeit goods was included in the works program for the Round which was settled at the ministerial meeting in 1982.[4] However, at this stage, some of the developing countries, notably Brazil and India, questioned the competence of the GATT to regulate intellectual property protection. Consultations were ordered with the traditional international body, the World Intellectual Property Organization. But, at the same time, the US intensified the pressure of its strategic bilateral initiatives. Its own multinational industries were lobbying hard for action, particularly on counterfeiting and the piracy of contemporary consumer goods such as fashion, sound and video recordings, films, and software. Protection for brand name pharmaceuticals and chemicals was to become another key objective. Counterfeiting and piracy were considered widespread practices in certain markets, with the losses in terms of sales of legitimate products calculated by US industry to be running into many billions of dollars per year.[5]

Through 1985–1987, again largely on the initiative of the US, the intellectual property agenda broadened beyond trade in counterfeit goods to embrace the trade distortions resulting from the inadequate treatment and enforcement of intellectual property rights generally. The general economic and ideological origins of this convergence on an international intellectual property code have already been considered by others.[6] The references here are intended to serve the purpose of understanding the agreement itself. In terms of the specific events which led to its formation, we should note that the US made representations to a special session of the contracting parties in 1985 and to the committee preparing the ground for the launching of the Uruguay Round of the negotiations. After initial disinterest, the EC and Japan aligned with the US on the basic issue, and some of the NICs softened their opposition to the TRIPs agenda at this stage. As a result of the good offices of the Swiss and Columbian ambassadors to the GATT, a text on TRIPs was adopted for inclusion in the Punta del Este ministerial declaration of the terms of reference for the Uruguay Round.

The mandate given by the declaration to the negotiating group on trade-related aspects of intellectual property rights was expressed in composite terms. It recognised the interest in furthering protection, while conceding concerns about the restrictive uses of intellectual property: 'In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines'.[7]

Yet the agenda still seemed to be quite narrowly drawn: 'Negotiations shall aim to develop a multilateral framework of principles rules and disciplines dealing with international trade in counterfeit goods taking into account work already undertaken in the GATT'. It also established a link with other international bodies: 'These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters'.

Little progress had been made on TRIPs by the time of the mid-term review of the Uruguay Round in 1988. Two opposing positions had emerged. One was supportive of a general agreement on intellectual property within the framework of GATT. The other, however, sought

to confine any agreement strictly to the 'trade-related' aspects of intellectual property, leaving the substance of intellectual property rights to be resolved in their traditional domain of the World Intellectual Property Organization. The mid-term review did nonetheless resolve to proceed with TRIPs and, over the period 1989–90, many countries made submissions on various aspects of the issue.[8] In 1990, the European Community was first to come forward with a draft of an agreement, the US, Japan, Switzerland, and then India on behalf of fourteen developing countries, following suit. Several countries, including the Nordic countries, Canada and Mexico, are reported to have interceded at this stage to try to bridge the gaps between the positions. The chairman of the negotiating group produced a composite draft agreement, but several important matters remained outstanding.

Notably, there were differences among the developed countries as well as the basic contrast with the position of the developing nations. These differences included patents for plant and animal varieties; the first-to-invent/ first-to-file choice for patent recognition; the term of protection for patents; the scope of protection for computer software; the choice of copyright or related rights for performers, the producers of sound recordings and broadcasters; moral rights; the term of protection for sound recordings; the level of protection for industrial designs; the strength of rights over lay-out circuits; inclusion of coverage for undisclosed information; and the extent of provision for geographical indications.[9]

Other supra-national bodies were endeavouring to influence the intellectual climate during this period. The Science, Technology and Industry Directorate of the OECD had expressed a concern for the adequacy of intellectual property protection of the new technologies for some time.[10] Its Trade Directorate now also turned its attention to intellectual property and particularly the problem as it saw it of international piracy.[11] At the same time, two United Nations bodies, the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Centre on Trans-National Corporations (UNCTNC) continued to express reservations about further international protection.[12] Their concern appeared to lie with the restrictive business practices which might be built upon increased intellectual property power, particularly in terms of their impact upon the developing nations.

Of course, the international organisation most directly affected by the Uruguay Round agenda was the World Intellectual Property

Organization. As we noted in Chapter 3, WIPO is responsible for the administration of a number of long-standing intellectual property conventions, the main two being the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. According to Australia's Attorney-General's Department, WIPO was rather taken by surprise by the TRIPs agenda.[13] It was presented with a novel situation in which some countries were seeking to shift the focus of initiatives in international protection to a trade body. Other countries responded by arguing that it should remain the forum for determining any matters of substance regarding intellectual property protection. A potential for rivalry opened up. However, we know now, after the event, that a relationship has developed between the WTO TRIPs agreement and WIPO's own conventions and treaties. At this stage, WIPO was to take up an offer of observer status within the Round.

Reaching agreement

Late 1990 saw the introduction of a comprehensive draft document by the negotiating group. Negotiations on the text took place in 1991. At this point, the developed nations seem to have buried their differences. Despite lingering reservations, many of the newly industrialising countries and the developing nations also withdrew their categorical opposition. Of course, it would require a thorough investigation to identify the reasons for the successful conclusion of the agreement. This task cannot be attempted here, but a few of the reasons which have been given are acknowledged.

As the consideration of the implications of the agreement will reveal, TRIPs hazards costs and benefits for various countries. The agreement had obvious attractions for producer nations such as the US. In a globalising economy, when other countries were undercutting its traditional commodities, and trade imbalances had developed with certain developing countries, high technology and popular culture were seen as a vital source of competitive advantage. Perhaps, as the catalogue of differences reveals, other developed nations saw the benefits of protection as far less clear cut and uniform. However, for the larger northern nations, especially those in the Triad, extensive cross-investments and strategic alliances create pressures for convergence of legalities in intellectual property and related fields. In addition, some of the smaller countries, particularly those beginning to innovate and export in a commercial way themselves, saw virtue in a multilateral

regime. Multilateral rules seemed preferable to the bilateral pressures which countries such as the US had been applying so vigorously. If a country was already adopting high standards of protection, the agreement would be an effective way to obtain them from others. Such smaller countries could not expect to rely on diplomatic offices or trade sanctions as a way of obtaining reciprocal protections for their own nationals.

Yet many such countries still wished to be selective about the sectors in which they advanced protection. So we might need to look for other reasons why countries were prepared to accept such a comprehensive multilateral agreement. One reason refers to the calculation of their material interests. For the many countries which are net importers of intellectual property, TRIPs seems contrary to their overall interests. But it is to be remembered that intellectual property protection was part of an overall Uruguay Round package of agreements. Countries were offered market access in other sectors of the international economy as the trade-off for swallowing TRIPs whole. General acceptance also signified the power of an idea. Affirmation of intellectual property protection was an indication that they were prepared to participate in a global economic system. The northern delegations used their powers of persuasion, expertise and authority to get this idea across.

We turn now to the provisions of the agreement. The implications of the agreement may be pursued under three broad heads. First, the agreement establishes the general principles which are to apply such as the norms of national treatment and most-favoured-nation treatment. Secondly, the agreement raises the level and extends the scope of substantive protection for intellectual property. Thirdly, the agreement introduces new methods of dispute settlement and redress for non-compliance into the international area.

GENERAL PROVISIONS AND BASIC PRINCIPLES

After its preamble, the agreement makes general provisions and establishes basic principles.[14] The WTO's Analytical Index includes a section on TRIPs. The first concern the nature and scope of the obligations arising under the agreement. Article 1:3 requires members to accord the treatment provided for in the agreement to the nationals of other members. It goes on to say that those nationals are to be understood as those natural or legal persons who would meet the criteria for eligibility for protection provided under the Paris

Convention, the Berne Convention, the Rome Convention or the Treaty on Integrated Circuits.[15] We should note here that the benefits of the protections are meant to be given to private persons. In other words, when implemented, the protections are meant to give rise to enforceable private property rights. But those persons must be nationals of the members of the WTO. However, with so many countries becoming members of the WTO, the need to determine nationality will not be a big issue except in cases of MFN and national treatment.

We have said that one of the most interesting features of the TRIPs agreement is the use it makes of the established intellectual property conventions. In this respect, TRIPs identifies the Articles of the conventions it wishes to apply, but it does not actually set them out in its text. Reference must be made to the conventions themselves. This opening part of the agreement prescribes that members comply with Articles 1 to 12 and Article 19 of the Paris Convention (1969) (see Article 2:1). Later, in the section specifically concerning copyright standards, it requires members to comply with Articles 1 to 21 of the Berne Convention (1971), save for Article 6*bis*. They should also comply with the appendix to the convention (see Article 9:1). We shall return to these provisions in our examination of the different categories of protection.

National treatment

Article 3:1 of the agreement concerns national treatment. It requires members to accord – to the nationals of other members – treatment no less favourable than it accords to its own nationals with regard to the protection of intellectual property. We know that national treatment permits countries, provided they do not discriminate between foreigners and locals, to vary the level of protection they give to intellectual property according to what they see as their needs at any one time or in any one sector. Yet, to the country which does provide protection, it may seem like an onerous requirement if one's own nationals do not receive the corresponding level of substantive protection in the foreigner's home country.

The TRIPs agreement moderates this effect by standardising levels of protection between the members. Still, it is important to appreciate that the TRIPs requirement of national treatment extends beyond those 'matters affecting the use of intellectual property rights specifically addressed in the agreement'. It applies to protections which a member country offers its own nationals generally 'affecting the

availability, acquisition, scope, maintenance and enforcement of intellectual property rights' (fn to Article 3:2). There will be many ways in which a member's protections might run beyond the terms of the agreement. We should remember in particular that Article 1:1 envisages members implementing more extensive protection than is required by the agreement, provided that such protection does not contravene the provisions of the agreement. Those extensions might be made unilaterally, or as a result of a bilateral agreement with another country (see Chapter 3). Nevertheless, we should appreciate that this treatment need only relate to protection of intellectual property. For the purposes of the agreement, Article 3:2 defines intellectual property to refer to the categories for which the agreement specifically provides standards. There are categories in national law with which the agreement does not deal.

In addition, an explicit exception to this broader coverage for national treatment is made in respect of the rights for performers, producers of phonograms and broadcasters. Here, national treatment only applies in respect of the rights provided under the agreement. In contention here are the rights which some countries grant to receive a share of the revenue from payments of equitable compensation. These payments are made where there is non-voluntary licensing, for example of the public performance or broadcasting ('secondary use') of sound recordings.

Among the provisions of the Paris and Berne conventions which TRIPs applies are their principles of national treatment. We should appreciate that they have their own complex idiosyncrasies which have been explored over time.[16] They do not entirely correlate with the way TRIPs itself prescribes national treatment. Article 2:2 states that: nothing in the substantive parts of the agreement (compared to the dispute settlement provisions) shall derogate from the members' existing obligations under the four nominated conventions. So we must try to look at things in a cumulative way. In particular, we should understand that the conventions create 'points of attachment' for national treatment other than nationality. For example, the benefits of protection may be available if a work is published in a union country, notwithstanding that the author is not a national of a union country.

In addition, Article 3:1 makes the TRIPs requirement subject to the national treatment exceptions which are already provided in the four WIPO conventions the agreement has identified. However, Article 3:2 limits the availability of the exceptions which they have

accommodated in relation to judicial and administrative procedures. Relevant, for example, is the Paris Convention's reservation of national laws relating to judicial and administrative procedures, to jurisdiction and to requirements of representation (Paris, Article 2(3)). In language redolent of the GATT provisions, Article 3:2 says that these exceptions can only be used where they are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of the agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade. Especially in relation to patents, foreigners have developed suspicions that the delays and complications they encounter within administrative and judicial procedures conceal discrimination. However, to what extent should members have to make allowances for the extra difficulties foreigners experience negotiating within unfamiliar political, legal and possibly language systems? Furthermore, the imperatives of regulatory competence may demand that foreigners be treated differently. Evans provides the example of a requirement that foreigners deposit a certain sum as security or bail for the costs of litigation.[17]

DSB rulings

The Panel Report in *EC–Geographical Indications* is the most recent of three DSB rulings regarding the TRIPs national treatment requirements.[18] The ruling also addresses the relationship within TRIPs between the protection of trademarks and geographical indications, given they have a potential to clash. In doing so, the Panel casts light on the TRIPs provision for limitations to be placed on the rights of the trademark holder. As geographical indications may be attached to foodstuffs, the ruling heard a complaint as well alleging inconsistency with the GATT 1994 and the Agreement on Technical Barriers to Trade.

The circumstances of the dispute indicate that the benefits of intellectual property protection may be distributed in different ways. As the representative of (some) 'old world' countries, the respondent is the strongest proponent of protection for geographical indications. It has been pressing the review of TRIPs provisions to extend the per se protection beyond wine and spirits, that is, the ownership of the names whether competitive uses cause consumer confusion or not. Additionally, it is arguing for TRIPs amendments to require members to establish registrations systems. We have noted that some developing countries have shown an interest in geographical indications such as

India. But new world developed economies such as the US and Australia, which house industries in competition with the EC, for example in wines, would have to give up inherited names and would have few of their own to assert.

The US first notified a complaint against the EC's own registration system in 1999. Initially, the complaint fixed on the differential treatment given the nationals of other WTO members in the EC system. A separate claim was the less than full protection the EC was prepared to give trademarks if they were identical with or similar to geographical indications. In 2003 the US sent an additional complaint to the DSB, beefing up its objections to the EC regime. The same month Australia notified its own complaint along broader lines again. Argentina, Brazil, China, Columbia, Guatemala, Mexico and Turkey joined Australia's complaint along with Canada and New Zealand. The US complaint had attracted third parties too, including several countries in Eastern Europe. A panel was established to hear all the complaints.

The Panel had to deal with the complex issues. Its report released March 2005 is not ground breaking jurisprudence, but it is a careful application of TRIPs and other WTO agreements to the EC measure. The Panel found that the EC Regulation did not conform to the requirements of Article 3:1 in that it gave less favourable treatment to the nationals of other WTO members than it gave to the nationals of the EC countries with regard to the protection of intellectual property. Principally, this was because the EC insisted it would only extend protection if the home countries of the foreign nationals had instituted their own systems equivalent to and reciprocating with the EC system. The foreign nationals were denied procedural rights too. No other country had had a system approved and no national had made an application under the EC system, but Australia was contesting the EC system 'as such'. Interestingly, Australia has been party to a wine agreement with the EC and the Australian wine makers have had to give up the use of names like champagne, burgundy, chablis and cognac, even if they used the right method of manufacture and affixed the qualifier Australian to their products.

A detailed report, perhaps the ruling's main value lies in its reading of the national treatment obligation. To determine the complaint, the Panel had to construe the EC Regulation and decide if it applied in a discriminating way. The EC contended that the Regulation was without prejudice to international agreements (including TRIPs) and it only discriminated against geographical indications from countries

outside the WTO. The Panel did not accept this interpretation. In the process, it underscored the general principle of WTO interpretation that the Panel must make its own objective interpretation factually of the national measure in question to determine if it is consistent with WTO requirements.

What did TRIPs national treatment require? Interpreting Article 3:1, the Panel affirmed it meant no less favourable treatment for foreign nationals with respect to the protection of intellectual property. As we saw earlier, TRIPs delineates both protection and intellectual property for this purpose. Here it became the availability of intellectual property rights for geographical indications located in WTO member countries. Such intellectual property protection was for the benefit of nationals of other WTO member nationals, so the Panel needed to consider how this eligibility criterion was defined by TRIPs and then whether it was the basis for the less favourable treatment in the EC Regulation.

The Panel accepted the now well established jurisprudence that the discrimination may be formal or practical, that is, *de jure* or *de facto*. The question in the end was whether the treatment denied an effective equality of opportunities in respect of the application of laws. This involved a careful analysis of the contested measure and its implications for the marketplace, that is, the thrust and effect of the measure. Under TRIPs, that means its legal impact; an assessment of its economic assessment was not required. Still, the treatment of locals and foreigners could be formally identical yet give less favourable treatment to foreigners. In this case, though, the discrimination was actually in formal terms too.

The source of the second dispute relevant to national treatment, *US–Section 211 of the Omnibus Appropriations Act*, is rather special. In this ruling, the Appellate Body also cast light on the TRIPs national treatment requirements and the substantive trademarks protections.[19] For political reasons, or as the US government would say, human rights and democracy imperatives, the US maintains a boycott on trade relations with Cuba. In this case, the expression of the policy was the refusal to register or renew a trademark for Cuban rum (Havana Club). The US law denied protection to a trademark, trade name or commercial name that was the same or substantially similar to one that was used in connection with a business or assets that were confiscated after the Cuban revolution, unless the original owner or the bona fide successor-in-interest had expressly consented.

The Appellate Body held that this special requirement violated the national treatment requirements of Article 3:1, also the national treatment obligation of the Paris Convention. It treated designated nationals (Cuban nationals) and their successors-in-title less favourably than US nationals. It also violated the MFN obligation in Article 4 because they were treated less favourably than non-Cuban nationals. This violation of national treatment and MFN extended to their treatment with regard to the protection of trade names too. Trade names protection was included because of the coverage of the articles of the Paris Convention that were incorporated in TRIPs.

The dispute is significant further for its reflection on the capacity of the DSB to ensure implementation of dispute settlement rulings. The US Administration has pleaded the difficulties of getting Congress to pass the appropriate statutory measures. The matter has been strung out, with the US submitting status reports to the DSB saying it is continuing to engage the Congress with a view to finding a solution to the dispute. The complainant, the EC, seems tolerant, agreeing on several occasions now to a further extension of the reasonable period, while Cuba was left on the outer urging implementation. The DSB has accepted the extensions, so that the complainant and respondent are left to decide whether compliance is necessary.

A low profile ruling on TRIPs national treatment formed part of a 1996 dispute between the US and Indonesia.[20] The main body of the US complaint concerned the GATT 1994 and the TRIMs agreement. But the US also alleged that Indonesia breached the requirement of national treatment under TRIPs in demanding that the trademarks to be used in association with locally produced cars needed to be sourced from an Indonesian owned company. In a brief analysis, the Panel held this was not discriminatory. The measure was applied both to local and foreign car manufacturers.

Most-favoured-nation treatment

In Article 4, the agreement embodies another principle or norm characteristic of the GATT. With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of other members.

Again, this principle mediates against discrimination, in this case between nationals of different states. So this requirement aims to 'multilateralise' the benefits extended to the nationals of a particular

country. They cannot be confined, for instance, to those whose governments have offered protections in return. Under Article 4, this obligation to multilateralise extends to the benefits granted to any other country and not just members of the WTO, though the obligation itself is only owed to nationals of the members. Moreover, like national treatment, it applies to a member's protection of intellectual property generally and not just those matters affecting the use of intellectual property rights specifically addressed in the agreement.

Some exceptions are made in Article 4. The most notable exception are benefits deriving from 'international agreements' relating to the protection of intellectual property which entered into force prior to the TRIPs agreement. An example might be the semi-conductor agreement which the US has made with countries like Japan, though we would still expect members to have to comply with the substantive protections TRIPs demands in such categories. As well, TRIPs attaches a general proviso to the exception that the agreements do not constitute an arbitrary or unjustifiable discrimination against the nationals of other members.

A more specific exception recognises benefits granted under the provisions Berne or Rome make for material reciprocity. In addition, freedom to base extra protections upon reciprocity is permitted in respect of the rights of performers, producers of phonograms and broadcasters so far as they are not provided under the agreement. Again, rights to share in equitable remuneration are a case in point. In particular, the EU has only been prepared to give US audio-visuals exporters a share if the US has a scheme which reciprocates. The US is not a signatory to Rome. Australia has held the line on this matter in its FTA with the US, which raises the point whether the FTA's own requirements are consistent with the TRIPs national treatment and MFN requirements.[21]

COPYRIGHT AND RELATED RIGHTS

The heart of the agreement is the prescription of standards concerning the availability, scope and use of intellectual property rights. By standardising protection, the agreement seeks to manage the issue of conflict and competition between national laws directly. Thus, the issue of jurisdiction loses its edge. Countries have much less opportunity to decide whether it suits their situation to offer high or low levels of protection. In some cases, they must substantially rework their specific

intellectual property laws or even their general legal traditions in order to comply.

The standards start with copyright and related rights. This category bears most relation to the cultural content which is carried around the globe through various media as well now as having application to what we might call carrier technologies such as computer software. It will form a major part of the case study in Chapter 8 of the online media. Here, we shall analyse the basic TRIPs provisions, by first looking at the connection it makes to the Berne Convention and then identifying the protections it introduces directly.

Protection for works

TRIPs is making use of the resources of a well established international convention. The Berne Convention was formed back in 1885. It has experienced several revisions since that time and TRIPs is applying the convention as it was last revised in 1971. Berne has nearly as many members as TRIPs, though not all of those states have subscribed to the most recent revisions to the Convention. As well, its provisions have not been entirely attractive to some countries and we should note that the United Nations, through UNESCO, formulated another convention, the Universal Copyright Convention, where the protections required were milder.

What is the substance of the Berne provisions which TRIPs applies? TRIPs omits the Berne provisions relating to the machinery, the internal workings, of the convention and the union it establishes. The most substantive provision which TRIPs omits is the provision (Article 6*bis*) for authors of works to claim moral rights rather than economic rights. Otherwise, it applies the substantial copyright protections which Berne provides. It is not possible to give a fulsome and precise account of those Berne provisions here. The reader is advised to consult the estimable scholarly literature.[22] Briefly, it should be said that the Convention requires protection primarily for literary and artistic works (Berne Article 2). These works are to include every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression. The Convention goes on to offer an illustrative list of such works which does not run to some of the more modern media, though cinematographic works are embraced by the Convention. For explicit protection of the modern media of sound recordings and broadcasts, we need to look elsewhere, such as the Rome Convention (see below).

We should understand, nonetheless, that these modern media put original works, such as musical scores, the plots and dialogues of books and the images of paintings, to new uses. Regarding the scope of Berne, the issue here is the nature of the rights which are to be exercised over the 'underlying' works. For literary and artistic works, Berne now recognises explicitly the right to authorise reproduction of the work in any manner or form (Berne Article 9(1)). Other rights have longer standing. Rights of translation and adaptation recognise that the works will not necessarily appear in their original guise. Rights concerned with immaterial disseminations of works have included the right to authorise the broadcasting of works, the communication of the work to the public by any other means of wireless diffusion, or the communication of the work to the public by wire (Berne Article 11*bis*(1)). We can see that these rights are tied to specific media. The right to control public performance is more generic.

If the copyright provisions of the TRIPs agreement were confined to these articles of Berne, it would carry over the uncertainties which surround the Convention's potential to cover the new kinds of subject matter and new kinds of exploitation which are bound up in the current wave of technological and organisational innovations. The TRIPs agreement proceeds explicitly to require that computer programs, whether in source or object codes, be protected as literary works under the Berne Convention (Article 10:1). Nonetheless, in this area, as in others, such a general requirement leaves open all sorts of issues concerning the precise extent of protection which national copyright affords to software. Article 9:2 does attach the basic proviso that copyright protection is to extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. But how to make the problematic idea/expression distinction work in the case of computer programs remains a matter for national jurisprudence.[23] Perhaps the WTO dispute settlement bodies will be asked to have a say at some stage.

Under the agreement, protection is also to be afforded to compilations of data or other material, whether in machine readable or other form, if they, by reason of the selection or arrangement of their contents, constitute intellectual creations (Article 10:2). Such protection is to be without prejudice to any copyright subsisting in the data or material itself. This provision appears to pick up on the provision in Berne, Article 2(5). As we shall see in Chapter 8, certain functional or utilitarian data bases are not likely to meet these criteria and would need to be given their own category of protection internationally.[24]

Under Berne, the beneficiaries of the rights which its protection confers are the authors of the works. By relying largely on Berne, the TRIPs agreement has also made the author the starting point for the holding of rights. So much is done today under conditions of employment or commission from industrial corporations that it was thought this concept might have been bypassed. Of course, the work often leaves the author and enters an elaborate network through which it is reproduced, recombined and diffused. Commercially, it becomes important that the author assign or license the rights to others by way of marketplace contractual transactions. In speaking throughout of 'successors in title' and 'other right holders', it would seem that the agreement envisages 'free' transferability of rights in the marketplace. It also envisages that those holders may be legal as well as natural persons. Moral rights, on the other hand, would have placed some limitations on the author's alienation of the works in the marketplace.

Use rights

Which rights does the holder enjoy in controlling access to the works by potential competitors and consumers? We have noted the rights on which the agreement insists by applying Berne. But innovations are of course presenting ever more opportunities to exploit works apart from making and selling hard copies. We are thinking here in particular of the other ways in which works may be distributed. As Chapter 8 will show, these rights also have particular relevance to control of the new digital online media as does the definition of reproduction when works and other subject matter is cached and browsed transiently as well as stored and put back into hard copy. In this respect, the TRIPs agreement has already been characterised as 'backward looking'.[25] Its caution has given a spur to the formulation, under the aegis of a Diplomatic Conference, of two new WIPO treaties, the Copyright Treaty and the Performances and Phonograms Treaty. We shall discuss these treaties in Chapter 8.

Still, the TRIPs agreement broaches this field by providing for rental rights. The agreement states that, 'at least' in respect of computer programs and cinematographic works, the parties shall provide authors and their successors in title with the right to authorise or prohibit the commercial rental to the public of originals or copies of their copyright works (Article 11). What constitutes a rental is not indicated. In the case of cinematographic works, this provision was to be an advance on the rights conferred by Article 14(1) of Berne. We shall deal with the

limitations and exceptions which TRIPs allows to these and other rights later in this chapter.

Applying Berne, the term of the copyright protection is the life of the author plus fifty years. Article 12 goes on to say that, wherever the term is calculated on a basis other than the life of a natural person, it will be fifty years from the date of publication or, failing publication, from the date of making of a work. In the US, the term has been extended out to seventy years and this term is a requirement of recent US FTAs.

Related rights

In Article 14, the agreement explicitly requires protections to be given to performers, producers of sound recordings and broadcasting organisations. Some countries have chosen unilaterally to offer them copyright protection. In the TRIPs agreement, their rights are cast instead as rights which are related to copyright. This approach is consistent with the Rome Convention, but the provisions of the Rome Convention are not applied directly like the Berne provisions. It is worth noting that the Rome Convention has not attracted as many signatories as Berne.

The protection offered to performances is the mildest. The agreement states that performers are to have the possibility of preventing (when undertaken without their authorisation) the fixation of their unfixed performance and the reproduction of such a fixation (Article 14:1). Here, the agreement has in mind the practice of bootlegging, which is the unauthorised taping of live performances and the subsequent sale of copies. TRIPs extends its protection to control over the broadcasting by wireless means and the communication to the public of live performances. However, in speaking of the possibility of preventing, the protection seems weaker than the clear property rights given to the authors of works. Furthermore, it does not afford performers control over reproduction of their performances, once they have authorised the first fixation of the performance. Here, the interests of performers as authors of a performance may run up against the interests that the producers and distributors of audio-visuals have in easy access to such content resources. Performances are embodied in such media as sound recordings, films, broadcasts and CD Roms, which are then exploited in a number of ways. In Chapter 8, we shall see that these practices have remained an issue at WIPO.[26]

The agreement requires that producers of sound recordings shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their sound recordings (Article 14:2). But it does not adopt the

other rights enumerated by Rome such as the right to control the broadcasting of recordings. Commercial rental rights are extended explicitly to the producers of sound recordings and other right holders in sound recordings, though with provision at the same time for non-voluntary licensing (again see below). Again, sound recordings were to be the subject of the WIPO Treaty, the 1996 Phonograms and Performers Treaty.

Broadcasting organisations shall have the right to prohibit (when undertaken without their authorisation) the fixation, the reproduction of fixations, and re-broadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same (Article 14:3). The agreement states that, where parties do not grant these Rome type rights to broadcasting organisations (making the provisions permissive?), they shall provide the owners of the copyright in the subject matter of the broadcasts with the possibility of preventing such acts, subject to the provisions of Berne. As we shall note in Chapter 8, WIPO has been discussing a Treaty for Broadcasting Organisations for some time now.

The term of protection available to performers and producers of sound recordings is to be at least fifty years; the term for broadcasting organisations at least twenty years.

PATENTS

Patents represent the second category of intellectual property which we shall treat as important to the global carriers. They form a major part of the case study in Chapter 7. Patents started with industrial technologies but now extend into agriculture and service sectors such as health care. In doing so, they are offering a point of control over the processes of reproduction of life and specifically the genetic codes of plants, animals and humans. Again, the object here is to analyse the essential TRIPs provisions.

The provisions for patents commence with the application of the Paris Convention in Article 2:1. The Paris Convention dates from 1883 and it has undergone several revisions. Today, more than 100 states are party to its union. As we shall see, the Convention deals with other categories of intellectual property too, namely utility models, industrial designs, trade marks and trade names, geographical appellations and unfair competition. In regard to patents, we should appreciate that the Convention does not require countries to provide substantive

protection. Instead, through requirements of national treatment and independence of protection, it obliges them to offer whatever level of protection their laws demand to foreigners as well as to locals. The Convention also establishes a very valuable procedural facility. If an application for a patent or utility model is filed in one state of the union, it is to enjoy priority in the other states of the union too for twelve months.[27] For industrial designs and trademarks, we should note that the corresponding period is six months.

Patentable subject matter

In contrast to Paris, the key Article of the TRIPs agreement, Article 27:1, requires members to make patents available for any inventions, whether products or processes, in all fields of technology.[28] So, apart from the categories to which the agreement itself allows exception, members must not distinguish sectors where patents will be granted. To attach such a broad scope to patentable subject matter signified a major extension in international protection, especially in the sectors where many countries have maintained gaps. These sectors include pharmaceuticals, foodstuffs and chemicals.

The agreement uses the concept of the invention to identify patentable subject matter. Furthermore, it attaches the provisos that the inventions be new, they involve an inventive step and that they are capable of industrial application. To take account of the variations in the way these criteria are cast by countries with patent systems, a member is permitted to deem the term 'non-obvious' synonymous with 'inventive step' and 'useful' synonymous with 'capable of industrial application'. Of course, these eligibility criteria are stated at a very high level of generality and it will remain necessary to fill them out through local jurisprudence and practice. However, it is important to note that the Paris Convention did not contain such criteria and they import into the international field the kind of criteria which rewards the science and technology in inventions. We shall find that this orientation is relevant to the competing claims for control of genetic codes and medicines especially pharmaceuticals (see Chapter 7).

TRIPs permits members to exclude inventions from patentability on broad grounds of public order or morality (Article 27:2). There follows a familiar but significant exclusion for diagnostic, therapeutic and surgical methods for the treatment of humans or animals. For the purposes of our case study, we should highlight the final exclusion. Article 27:1(b) permits members to exclude: 'plants and animals other

than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes'. However, this Article adds that members must provide protection for plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. Then, the whole provision is earmarked for review four years after the date of entry into force of the WTO Agreement. These allowances were hard fought and their significance is explored in depth in the chapter on genetic codes together with the fate of the review.

Use rights

The agreement specifies the rights which patent owners are to enjoy exclusively. To employ the language of the agreement again, they are said to be: (a) where the subject matter is a product, to prevent third parties from making, using, offering for sale, selling or importing for these purposes, the product; and (b) where the subject matter of the patent is a process, to prevent third parties from using the process or from using, offering for sale, selling or importing for these purposes, at least the product directly obtained by that process.

The right to control importation is a significant one. As we shall see, effective protection of a process may require control over products, especially if they are imported from a country that does not prevent infringements of the process. But what is the direct product of a genetically engineered wheat plant, just the flour or also the bread? Still, overall, these rights are substantial and we should note now that the right to prevent others importing, as well as making or using locally, has implications for the economic relationship between developed and developing nations. It needs to be reconciled with any requirement a member may impose for local working of a patent, when the rights holder wishes to rely on importing the product. It also has to be reconciled with the provision members make for 'parallel importation', that is, to allow distributors and consumers to import versions that the rights holder has put up for sale in other countries and regions. Those versions might be available earlier or cheaper than the products the rights holder will make available in the local market. In this regard, TRIPs Articles 27 and 28 need to be reconciled with Article 6.

The agreement is markedly silent on the issue which has divided the US and other industrial countries as to whether to recognise the first to invent or the first to file. It seems that the US backed away from insistence on its approach which has been first to invent.[29] This

difference complicates efforts to coordinate the processing of applications, just at a time when more inventors are identifying a need to secure their markets across a range of countries.

As we know, patents rely on a grant being made in the individual case after an application is made to the authorities. In contrast, in most countries, copyright does not depend on registration for its validity. Article 5(2) of Berne says that the enjoyment and exercise of its rights shall not be subject to any formality. However, Article 2(1) of the Paris Convention specifies that the foreigner must comply with the conditions and formalities which are imposed on locals. TRIPs includes a general provision that is designed to discipline the procedures and formalities which members may require as a condition of the acquisition or maintenance of intellectual property rights (Article 62). Procedures for grant or registration are among those disciplined. Broadly, the procedures must be timely and final administrative decisions must be subject to review. They are also governed by the general obligations of Article 41 (see below). As well, we should note that TRIPs insists that members make judicial review of any decision to revoke or forfeit a patent available (Article 32). Another provision which is favourable to the holder is Article 34. It places the burden of proof in infringement proceedings regarding process patents on the defendant.

TRIPs makes the term of protection of a patent a minimum of twenty years (Article 33). This period has to be seen as an increase for many systems, including those in the developed countries. At the same time, it makes no provision for utility models. Utility models and their variants offer an alternative to inventors where it does not seem feasible to make the investment involved in securing the full patent. The requirements are generally less demanding but the protection is also less fulsome. The term of protection is short. They may appeal for instance to the small, local inventor. In a number of national jurisdictions, utility models are made available alongside patents and the EU published a proposal for a directive on the protection of inventions by utility model.[30]

OTHER CATEGORIES

Trademarks

We turn now to the agreement's other categories of protection. These categories are complex and significant but we shall not be able to give

them the same attention, either here or later, as we do copyright and patents. We begin with trademarks. We should appreciate that trademarks become desirable objects of protection as the global economy is increasingly built upon signs, styles, images, associations and brands.[31]

TRIPs applies the provisions of the Paris Convention regarding trademarks. These provisions demand more substantive protection than they do patents. In particular, they expect protection to be afforded to certain types of mark, namely well-known marks, service marks and collective marks (see Paris Convention, Articles 6*bis*, 6*sexies* and 7*bis*). They require countries of the EU to protect marks which are registered in other union countries (Paris, Article 6*quinquuies*). The protection is to include the seizure of imports which infringe (Paris, Article 9).

TRIPs elaborates on the convention substantially.[32] In particular, it provides a definition of the term 'trademark'. The definition is broad: any sign capable of distinguishing the goods and services of one undertaking from those of other undertakings shall be capable of constituting a trade mark and shall be eligible for registration (Article 15(1)). It goes on to say that such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of signs, shall be eligible for registration as trademarks. It also says that, where signs are not inherently capable of distinguishing the relevant goods or services, parties may make registerability depend upon distinctiveness acquired through use. However, Article 15(2) states that all this is not to be understood to prevent a party from denying registration of trademarks on other grounds, provided they do not derogate from the provisions of the Paris Convention. Provision must also be made for opportunities to oppose registrations and to petition to cancel registrations.

The agreement substantiates the trademark owner's position in regard to use of the trademark. The parties may make registrability dependent upon use but actual use shall not be a condition for filing an application, and an application shall not be refused solely on the ground that that intended use has not taken place for less than three years from a date of application (Article 15(3)). Furthermore, if use is required to maintain registration, registrations may be cancelled only after an uninterrupted period of at least three years and only if valid reasons based on obstacles to that use do not exist (Article 19). The Paris Convention has said that, where use is a condition of registration, it may be cancelled only after a reasonable period (Article 5C(1)).

The registration of trademarks is to be renewable indefinitely, for periods of no less than seven years at a time (Article 18). The use of a trademark in commerce is not to be unjustifiably encumbered by special requirements (Article 20). Certain conditions may be placed on the licensing and assignment of trademarks (see below), but TRIPs says that the compulsory licensing of trademarks shall not be permitted (Article 21).

Trademark owners are to have the exclusive right to prevent all third parties from using in the course of trade identical or similar signs, for goods or services which are identical or similar to those in respect of which the trademark is registered, where such use would result in the likelihood of confusion (Article 16). This provision is similar to the Paris Convention. Article 6*bis* of the Paris Convention is extended (in certain circumstances) to services; also, subject to certain provisos, to goods and services which are not similar to those in respect of which a trade mark is registered.

At this point, we should note that the agreement also applies the Paris Convention's prescription concerning unfair competition. Countries of the union are bound to assure effective protection against unfair competition. Paris, Article 10*bis* identifies any act of competition contrary to honest practices in industrial or commercial matters to constitute an act of unfair competition. Such a standard is very open ended. Article 10*bis* goes on to require three specific kinds of act to be prohibited. They include the sort of conduct which 'passes off' goods as being those of another. Enjoining such conduct is a way of protecting the investment made in a sound reputation as a manufacturer.

In the contemporary, media driven economy, some national laws have given much wider support to the commercial value of reputation. In these cases, deception and confusion may not be essential elements of an offence. It may be considered unfair to trade on the broad recognition and positive associations which certain real-life or even fictional characters enjoy among consumers, at least without paying licence or royalty fees. Or to use them in a way that dilutes their value in trade and commerce, say by associating them with down-market products or demeaning messages. However, the trend in protection gives rise to concerns that commercial interests might be able to commandeer symbols which form part of the common language or popular culture. Artists should be free to parody icons of style such as Marilyn Monroe or Barbie. At the same time, where commerce is

hungry for new materials, religious and ethnic groups may object to the use of their traditional symbols in unsanctioned ways (see Chapter 7). These issues can be resolved in different ways. For example, we might say that the second party is not using the sign in a commercial, competitive way, rather than giving the first party a veto on any use.

The TRIPs provisions do not deal with some issues. For example, in *United States–Section 211 of the Appropriations Act*, the Appellate Body ruled that the US measure had not failed the TRIPs trademark protection requirements. Section 211 was a measure related to ownership of marks. While TRIPs Article 15 specified the qualities of the mark that are to be recognised and Article 16 specified the rights that are to be attached to the mark, they left the question of who owned the marks to the discretion of the individual member at the level of national law.

Geographical indications

The TRIPs agreement makes clear provision in favour of protection of geographical indications. Much of this is in line with the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration,[33] but all of it is stated in express terms. Such protection was strongly sought by the European countries, particularly in its application to trade in wines, spirits and foodstuffs. An example which comes to mind is the French names for certain wines and cheeses.

The agreement says geographical indications are indications which identify a good as originating in the territory of a member or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (Article 22). Protection is to provide interested parties with the legal means to prevent either any use that misleadingly indicates or suggests that goods originate in a geographical area other than their true place of origin, or any use that constitutes the act of unfair competition within the meaning of Article 10*bis* of the Paris Convention.

Provision is also to be made for refusal to register a trademark if the use of the indication in the trademark for goods would mislead the public as to the true place of their origin. We can see here a particular application of the concern with passing off. The relationship with pre-existing trademarks was considered in *EC–Geographical Indications* on

the point whether protection for geographical indications could form an exception to protection for trademarks (see below). Then, Article 24 recognises several of the concerns we noted in relation to trademarks. Members are not to be required to proscribe indications which have been in continuous local use for a certain period of time or which are customary in common language as the common name for the goods or services.

Additional protection is to be provided for geographical indications identifying wines and spirits (Article 23). A legal means to prevent use of a geographical indication is to be provided, even if the true origin of the goods is indicated or the use is accompanied by expressions such as kind, type, style, imitation or the like. In other words, these indications are to have protection even if there is no deception or confusion among consumers. We all know the power of recognition and association bound up with the use of the magic word 'champagne'. On this basis, reliance on passing off laws may not be sufficient compliance.

Furthermore, under Article 24, the members agreed to enter into negotiations aimed at increasing the protection of individual geographical indications. The Council for Trade-related Aspects of Intellectual Property Rights began preparation for these negotiations in 1997.[34] The stronger protection afforded geographical indications for wines and spirits came with an undertaking to consider its extension to other products; also for each country to establish a register for geographical indications (Articles 23 and 24). This in-built agenda item has already fuelled much discussion at the WTO, particularly in the TRIPs Council. Representing the 'old countries', the EU was favoured by the privileged position given to wines and spirits. Europe was interested in extending such protection to products like cheese and ham. Some developing countries have suggested that such property protection should be made to work for their flagship products too; (eg, Basmati rice). Such countries have to make a difficult judgement about whether to invest resources, including legitimacy, in an intellectual property protection strategy. The result might be that other countries will invoke the various defences in Article 24, such as the argument that an indication has become a common name, while requiring extended protection for their own products. Furthermore, while generally pro-property, new country producers, including Australia and the United States, have been unenthusiastic about further protection. Positions differ too on whether a register should serve merely

as a database or create some obligation to protect the indications domestically.

Proponents of extended protection argue that (legally induced) product differentiation will sharpen competition. Australia has argued the economists' case that such protection would act as a barrier to market access as well as adding to administrative costs. As we have seen, Australia was sufficiently exasperated with the EC position to bring a complaint to the DSB about the even-handedness of its current regime, together with the respect it gives to trademarks. The US has joined, having laid a similar complaint several years ago. While the dispute has been decided, the negotiations over amendments to TRIPs continue.[35]

Industrial designs

In a bald statement, the Paris Convention requires EU countries to protect industrial designs (Paris, Article 5*quinquies*). In contrast to the large amount of discretion this allows such countries, the protection required by the TRIPs agreement is substantive. Generally, the parties are to provide protection for independently created industrial designs that are new or original (Article 25:1). A patent-like requirement of inventiveness or non-obviousness is not required. Parties may provide that designs are not new or original if they do not significantly differ from known designs or a combination of known design features. An issue troubling some jurisdictions has been the extent to which design law should provide protection for functional features.[36] The agreement permits the parties to provide that protection shall not extend to designs dictated essentially by technical or functional considerations.

The owner of a protected industrial design is to have the right to prevent third parties from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes (Article 26:1). Filling another gap in the Paris Convention, the agreement specifies that the protection available shall amount to at least ten years (Article 26:3).

Despite these prescriptions, the agreement largely avoids tying down the key concepts, which remain subject to differing interpretations in the various countries. It makes no mention of a system of registration. Nor does it address the relationship which is to be struck between copyright protection for designs and the *sui generis* industrial design law, except in relation to textile designs.

Layout-designs (topographies) of integrated circuits

Notwithstanding the Washington Treaty on Intellectual Property in respect of Integrated Circuits, the leading producer countries and especially the US have preferred to adopt a strategy of obtaining reciprocal protection through bilateral agreements. The TRIPs agreement requires members to provide protection in accordance with Articles 2 to 7, except for Article 6(3), together with Articles 12 and 16.3 of the Treaty. The agreement adds that the members must consider unlawful (if they are performed without the authorisation of the right holder) the acts of importing, selling or otherwise distributing for commercial purposes protected lay-out designs (Article 37). The protection extends to the circuits which incorporate them and the articles which incorporate those circuits in so far as they continue to contain an unlawfully reproduced layout design. Exceptions are to be made, however, for certain innocent acts. The term of protection is to be no less than ten years, but protection may lapse after fifteen years (Article 38).

One reason which has been given for the decision of certain countries to bypass the Washington Treaty was its provision for compulsory licensing powers. TRIPs does not apply the relevant provision of the Treaty (Article 6(3)). However, in its own Article 37:2, TRIPs both concedes that non-voluntary licensing will occur and applies the disciplines which it has formulated to control the compulsory licensing of patents (see below).

Undisclosed information

A major development in international intellectual property was the inclusion in TRIPs of protection for 'undisclosed information'. It introduces the potential to end the run of the specific categories which presently delineate intellectual property. It seems that even some of the developed countries, such as Japan and Australia, have doubts about the need for its inclusion. But it was to be a key objective of the US.

Despite its significance, we shall confine ourselves to noting the provisions of the agreement. The agreement says that members shall protect undisclosed information in the course of ensuring effective protection against unfair competition under Article 10*bis* of the Paris Convention (Article 39:1). In keeping, Article 38:2 states that natural and legal persons are to have the possibility of preventing information within their control from being disclosed to, acquired by, or used by others without their consent, provided it is done so in a manner contrary to honest commercial practices.

To attract such protection, the information is to be secret, is to have commercial value because it is secret, and is to have been subject to reasonable steps under the circumstances to keep it secret (Article 39:2). These provisions appear to be modelled on the US uniform trade secrets legislation. Secrecy is a constituent but we should appreciate that it may not be enough on its own to justify protection. By employing the concept of a manner contrary to honest commercial practices, the agreement seems concerned at the same time with the way the information is treated by others, that is with the propriety of the conduct of the defendants.

A footnote indicates that 'a manner contrary to honest commercial practices' is to be taken to mean at least practices such as breach of contract, breach of confidence and inducement of breach, and to include the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition. Thus, the protection can be established by the obligations which parties have been able to secure through such relational dealings as contract. It tends to make the benefits very much a function of the power which parties can exercise in the marketplace. But the scope of the protection remains unsettled. We should recognise, for instance, that some jurisdictions have tried to draw a line around the concept of information itself. For example, they ask whether information can be separated out from the general knowledge and skill-set of an individual or perhaps a group, so that it can be said to be codified and appropriated by another.[37]

Article 39:3 requires members to protect certain data submitted to government agencies. It is confined to data submitted as a condition of approving the marketing of pharmaceutical or agricultural products which utilise new chemical entities. The data should be undisclosed test or other data the origination of which involves a considerable effort. Article 39:3 requires this information to be protected primarily against unfair commercial use. It is also to be protected against disclosure unless this is necessary to protect the public or unless steps are taken to protect it against unfair commercial use. The main relevance of this provision is the allowance members make for generic drug makers to base their submissions for regulatory health clearance and marketing approval on the original producers' test data. Some countries give the original producers a period of 'data exclusivity' and the US has been arguing that TRIPs demands this protection as well as making it a requirement of its bilateral agreements (see Chapter 7).

ENFORCEMENT PROVISIONS

Part III of the TRIPs agreement is a major addition to the international provisions for intellectual property protection. The Berne and Paris Conventions do say that those persons entitled to their protection should have legal remedies, but, with a few exceptions, they do not specify those remedies. In contrast, the elaboration within TRIPs is striking. All members will need to make adjustments. In terms of general procedural legalities, the obligations will not be regarded as so onerous for countries with liberal legal systems such as Australia. But their impact on the administrative and judicial infrastructures of the developing nations may be profound. It is interesting then that the agreement attaches some qualifications. It makes it clear that the members do not have to put into place a judicial system for the enforcement of intellectual property rights distinct from the system for enforcement of law in general (Article 41:5). Nor is any obligation created with respect to the distribution of resources between enforcement of these rights and the law in general.

The agreement starts by imposing a general obligation on the members to make enforcement procedures available under their national laws so as to permit effective action against infringements (Article 41:1). They are to include expeditious remedies to prevent infringements, together with remedies which constitute a deterrent to further infringements. At the same time, these procedures are to be applied in a manner so as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. Such procedures are to be fair and equitable and are not to be unnecessarily complicated or costly or entail unreasonable time limits or unwarranted delays (Article 41:2). On the other hand, they must meet certain natural justice or due process standards, including the opportunity for judicial review (Article 41:4). We should note that these standards are to be for the benefit of all parties to the proceedings. Some jurisdictions can become rather zealous in their endeavours to prosecute infringements.

More specifically, the members are to make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by the agreement (Article 42). But, at the same time, prescriptions are made regarding the access of all parties to a hearing and to legal representation. The agreement then proceeds to put some compunction into the procedures. Article 43 concerns the compellability of evidence. The following articles specify the remedies

which the judicial authorities should be empowered to order. They authorise injunctions against the infringing party or imported goods (Article 44), compensatory damages where the infringer knew or had reasonable grounds to know he was engaged in infringing activity (Article 45) and disposal of infringing goods non-commercially (Article 46). The authorisation is to extend to provisional measures so as to prevent infringements or to preserve relevant evidence (Article 50). Procedural powers and corresponding safeguards are specified in some detail. It is clear from these articles that the drafters have gone to some trouble to ensure that the protections are backed up. However, we should note that the agreement does not actually require a member country's judicial authorities to provide an individual right holder with these remedies against infringement. The authorities retain discretion; the remedies are not as of right.

Even so, the agreement is not finished with enforcement. Special requirements are laid down relating to border measures (Articles 51–60). For instance, right holders who have valid grounds for suspecting the importation of counterfeit trademark or pirated copyright goods are to be enabled to apply for suspension by customs authorities of the release into free circulation of such goods. This avenue of redress extends to goods which involve other infringements of intellectual property rights. Right holders are to be required to produce evidence and the authorities are also to have the power to require a security. The duration of any suspension of import or export channels is regulated; so too is *ex officio* action by the authorities.

In a notable development, the agreement provides that criminal procedures and penalties shall be applied, at least in cases of wilful trade mark counterfeiting or copyright piracy on a commercial scale (Article 61). Parties are permitted to provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights.

Interestingly, the enforcement provisions have hardly been litigated, despite the practices of infringement in virtually every country. In *United States–Section 211 of the Omnibus Appropriations Act*, the Appellate Body ruled that the US measure did not violate the requirements for adequate and effective enforcement of rights. While Cuban nationals faced the extra procedural hurdle regarding the conditions of ownership, they still had access to the civil judicial procedures available to them in accordance with Article 42. Any DSB complaint must be directed against the failure of other member governments to take

action. In the early days of implementation, members might have thought there were better ways of obtaining measures than litigating at the WTO. The complainant would need to put up proof of the problem in the other country and the government's neglect, if not its complicity.

Now the US has notified a complaint and requested consultations regarding China's measures for the protection and enforcement of intellectual property rights.[38] The complaint alleges non-conformity in four main ways: (1) the thresholds in Chinese law for criminal procedures and penalties to be applied to trademark counterfeiting and copyright piracy, (2) the requirements before goods confiscated by customs authorities are disposed, (3) the denial of copyright and related rights to works and other subject matter that the Chinese authorities are considering censoring (this is also a national treatment complaint), and (4) the unavailability of criminal procedures and penalties for unauthorised copyright reproduction or distribution. It is interesting that the complaint challenges measures of the courts and administrative agencies as well as statutory provisions. For some time it was unsure whether the US Administration would respond to the industry lobby for this initiative. But the trade deficit with China is large and infringement supplies both the Chinese market and reaches abroad. In Chapter 4, we noted the US had also brought a complaint under GATS regarding access to distribution services.

SPECIAL AND DIFFERENTIAL TREATMENT

Another principle which is familiar to the GATT is the principle of special and differential treatment. Such treatment has largely been included as a means of accommodating the needs of developing countries. The TRIPS agreement has highlighted the difficulties which the developing, and indeed the smaller industrialised, nations experience when they reform their approach to intellectual property. On the one hand, the evidence suggests that protection for intellectual property is necessary to encourage leading foreign producers to provide sophisticated goods, investment in local industry, and engage in technology transfer. Intellectual property protection may also become a condition of access to rich northern markets at a time when encouragement of local innovation and an export strategy holds out more economic promise than imitation at home. However, we should appreciate the expert literature debates about the importance of intellectual property

protection to investment decisions.[39] We should also acknowledge that high technology is not always a boon to the people of the developing world. Without greater wealth and infrastructure, they may not be in a position to prosper from it.[40] In this respect, a divide is opening up between developing countries. We also appreciate the environmental harm associated with some high technology industries.[41]

In the short term at least, protection carries costs as well as benefits for importing countries. Instead of releasing foreign technology and encouraging local working, with all the important spin-offs for domestic capability, local protection might be deployed to cover imports and keep technology in-house. Certainly, it remains the case that much foreign intellectual property is not worked locally. Where intellectual property is worked locally, conditions may be applied which restrict research, production and sales by local subsidiaries or external licensees. Market partitioning might be used to keep locally based firms out of export markets. It can also work directly to delay access or add to the price of certain products on the local market. India, Brazil and Peru were among the countries which expressed concerns about protection during the Uruguay Round.

We noted earlier that the WIPO conventions have in many respects been sufficiently non-prescriptive to allow developing nations leeway in how they cast their domestic arrangements for protection. To a certain extent, the arrangements could fit with their perception of their economic needs and cultural values. Poignantly, Dhanjee and De Chazournes note that the western nations, including the US, maintained gaps in their own intellectual property protection which were commensurate with their stage of local economic and cultural development: 'Thus this freedom has been used by states to promote their national technological and industrial development. In order to do so they have attempted to find a proper balance between the encouragement of creativity, and the maximization of social welfare arising from the diffusion of the fruits of that creativity, and from free competition and trade. Such a balance underlies all national legislation on IPR's'.[42]

In its established rules for freer trade in goods, the GATT itself has provided for special and differential treatment for developing countries. The TRIPs agreement is significant for providing an allowance in terms of time to comply rather than the level of compliance. Under Article 66, 'least developed' countries were relieved of the requirement of applying the substantive norms of the agreement (but not the national treatment and MFN principles) for effectively eleven years.

For pharmaceutical products, that period has now been extended out to 2016. A category of 'developing countries' were entitled to delay the same implementation up to five years from the date of the application of the agreement (Article 65:2), with an extra five years grace conceded for product patent protection in those areas of technology which had not previously been protected (Article 65:4).[43] The period of grace is extended to members that are in a process of transformation from a centrally-planned economy to a market, free-enterprise economy and that are undertaking structural reform of their intellectual property system and facing special problems in the preparation and implementation of their laws and regulations (Article 65:3). The agreement went on to charge developed countries to provide these categories of country with technical cooperation (Article 67). For most countries, the period of grace has now run its course.

One of the sticking points is likely to be the definition of least developed and developing countries. In the past, the GATT has essentially allowed countries to categorise themselves. It has been suggested that the main object of the TRIPs initiative is the newly industrialising countries which have moved to a stage of development where they are both exporting successfully and offering attractive markets for imports. Other countries may be implicated because they represent a base for the worldwide copying and transmission which the new technologies make so much easier. But protection provides a means to control access to intellectual resources. By confining differential treatment to transitional time limits, the agreement is really casting into relief the stringency of its substantive standards. It will be necessary in the discussion below to see whether the agreement places any counter-balancing obligations upon right holders. This inquiry is doubly apt, given that we are suggesting that the issue relates not just to the contrast between developed and developing nations, a spatial dimension, but to the general balance between right holders and other scientific researchers, industrial competitors, supplier intermediaries and end user groups. Just as there are constituencies in the developing nations which identify with protection, counter-constituencies can be found in the developed countries. The case studies should bear this assertion out.

DISPUTE SETTLEMENT

One of the major attractions for supporters of the TRIPs agreement was the weight it would lend to the implementation of protection. But, at

the same time, the use of trade norms to identify and sanction breaches will add a new dimension to the international law of intellectual property. As part of a Uruguay Round package, intellectual property protection comes into play with the regulation of trade in goods and services.

Transparency

The agreement begins to assure compliance by requiring transparency. Again, this obligation has the potential to require members to conform to a rule-based system of intellectual property. The agreement requires the publication of all laws, regulations, final judicial decisions, and administrative rulings of general application (Article 63:1). If publication is not practical, they must be made publicly available. To further the monitoring of member compliance, all such laws and regulations are to be notified to the Council for TRIPs. The Council was to consult with WIPO on the establishment of a common register and this item is now a subject of the cooperation agreement between the two organisations.

Determining non-compliance

To return to Article 1, we can see that the agreement places the burden on member countries to give effect to the provisions of the agreement. Thus, it is these members' actions which will be the measure of compliance. Strictly, the question is whether they implement the provisions of the agreement. The substantive provisions generally do not specify the method, with the agreement containing a general provision which says that 'members shall be free to determine the appropriate method of implementing the provisions of this agreement within their own legal system and practice' (Article 1:1). Upfront this seems like an important concession to the forms which different legalities favour. Implementation might generally be expected to take the form of legislation. Certainly, this would be the most direct and transparent method. But the members have various legal traditions and cultures; even in the north, the contrast between the civil and common law styles is significant. For example, common law countries might contend that their courts already provide the protection which TRIPs seeks. However, the choice of implementation strategy may not be wide open. The rulings in the dispute between the US and India over patent protection indicate that the chosen form should lend legal certainty and predictability to the protections (see Chapter 3).

Likewise, because the agreement is addressed to governments, we might argue that its provisions are not cast in terms of the kind of individual rights and obligations which can be directly activated in the courts. Furthermore, while its substantive provisions are cast to a large degree in imperative terms, they are still often expressed in generalities rather than specifics. Perhaps inevitably, they leave scope for the members to decide how to fill out the details of the criteria for protection. Therefore, we can expect legitimate differences to arise as to whether local protection is sufficient to amount to implementation of the agreement. Accordingly, it will not be a simple matter of comparing local law directly with the provisions of the agreement to determine whether members have made compliance. Nonetheless, we should not forget that the ultimate objective of the agreement is to promote private property rights. The primary obligation imposed on members is to accord the requisite treatment to the nationals of other members (Article 1:3). Many provisions speak expressly of making rights available to individuals.

There is a further complication emanating from the GATT's traditional focus on the reduction of barriers to trade in goods. Where it was established, would a textual disparity between the requirements of the agreement and a member's national laws be sufficient to found a 'nullification or impairment' of the benefits of the TRIPs agreement? Or would an adverse effect upon trade need to be established in actual fact? Any need to demonstrate an adverse effect upon trade or injury to industry provides further room for argument about compliance. In an economic analysis, the impact attributable to the lack of intellectual property protection may prove controversial. For example, when will it be possible to say that the consumers would have brought more of the legitimate item if counterfeit or pirated versions had not been available? So too, given that other assets such as speed of innovation or manufacturing and marketing capability may provide a competitive advantage, when will it be possible to say that lax conditions of appropriability were the telling factor in a producer's lack of success?

Article 64:1 of the TRIPs agreement applies the provisions of Articles XXII and XXIII of the GATT agreement 1994, as elaborated and applied by the new Dispute Settlement Understanding, to consultations and the settlement of disputes under the agreement. In Chapter 3, we saw that the GATT process first entertains 'violation complaints'. Where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to be a

case of nullification or impairment of the benefits of the agreement (Understanding Article 3:8). In the case of TRIPs, the violation would be the failure to institute the necessary re-regulatory legal protections. We should also note here that the protections are protections against infringements of intellectual property rights such as unauthorised copying. TRIPs is not directly concerned with the opportunity to sell products competitively, though one imagines this concern was one of the rationales behind its provisions. The really testing cases for TRIPs would come from non-violation and situation complaints. But the agreement chose to place a five-year moratorium on these complaints (Article 64:1). It charged the TRIPs Council to make recommendations to the Ministerial Conference about the scope and modalities for complaints of these types (Article 64:3). The Review has been postponed indefinitely.

Chapter 3 outlined the WTO's general dispute settlement pathways in some detail. While the efficacy and legitimacy of this process remains subject to challenge, member countries can see there is a means of direct recourse against other countries for failure to implement the requisite intellectual property protections. Already, TRIPs has been the subject of successful complaints. Arguably, this facility contrasts with the WIPO conventions which have provided the more remote and formal International Court of Justice for members. Under the Berne Convention, for example, countries can declare that they will not be bound by the Court's jurisdiction (Berne, Article 33(2)). Recently, however, WIPO has established a conciliation and arbitration service. It has also been working on a treaty to establish dispute settlement procedures, a Treaty on the Settlement of Disputes between States in the Field of Intellectual Property. But this prospect has raised an interesting issue. Where the TRIPs agreement substantively overlaps with the WIPO conventions, alternative procedures might produce conflicting interpretations of the parallel provisions. There are already understandings concerning the WIPO conventions. It has been suggested that one of the hesitations over the new WIPO Treaty concerned its relationship with the WTO dispute settlement process.[44] In Chapter 3, we noted the potential for clashes with the dispute settlement provisions in the proliferating FTAs.

Trade sanctions

Once intellectual property protection is fed into the general dispute settlement processes of the WTO, it is liable to be associated with trade

sanctions. There are two sides to this association. Trade sanctions might be used to ensure the protection of intellectual property. We would anticipate that most disputes will be settled by compliance. However, it can lead to the complaining party being authorised to suspend its own obligations or commitments. The main issue here is whether retaliation for failure to implement the agreement is to be confined to the corresponding intellectual property protection. The Understanding says that retaliation starts there but can move on to other categories of intellectual property rights covered within the TRIPs agreement. However, it cannot move across other agreements (see Article 22:3(g)(iii)). The other side of this coin is the possibility that members might seek to suspend their intellectual property protections as an ultimate sanction against non-compliance by another member in some other area of trade such as trade in goods. Observers were very taken with Ecuador's plans to do this to obtain the EC's compliance with the rulings in the *Bananas* dispute.

It remains to be seen how TRIPs will fit with the other dimensions of the WTO. Yet, despite its problems, it may prove to be a valuable testing ground. We have acknowledged that intellectual property protection involves positive re-regulation. It provides a foretaste of the kinds of issues that will become commonplace if the WTO were persuaded to take on some responsibility for regulatory standards elsewhere, say in relation to work and labour.

NATIONAL ACCESS REGULATION

While said to be an important incentive for investment in the production and release of intellectual resources, paradoxically, intellectual property rights have the propensity to work against free trade at times. The GATT recognises this dual quality. Intellectual property rights can contribute to market power, enabling anti-competitive practices to be effected. Why, one critic asked, should government protection for intellectual property be treated as an essential part of the framework for international trade, unless the same is to done for the regulation of restrictive business practices?[45] We have suggested that the TRIPs agreement is concerned as much with 'fair' trade as with free trade. If it is fair to provide protection from excessive or unfair competition, such as the competition of unauthorised copying or derivation, fairness might also demand that property rights be 'balanced' against competing claims for easier access. We find that such an outlook is indeed reflected

within the body of the different national intellectual property laws. It also finds expression in their external regulatory regimes such as foreign investment review, industry-specific regulation and competition law.[46]

Within the body of intellectual property laws, this concern to find a balance is pursued in several ways. We should appreciate that the boundaries drawn round the subject matter which is to be appropriable represent a concern to leave certain intellectual resources in the public domain. Limiting the term of protection is another such way to do so. Furthermore, explicit exceptions may be made. So, in relation to copyright, Article 9:2 of the agreement states that protection shall not extend to ideas, procedures, methods of operation or mathematical concepts as such. The exceptions to patentability are on the other hand permissive, for example, members may exclude plants and animals from patentability (Article 27:3). A second approach is to demand a concession in return for the property right. So the agreement charges members to require that patentable inventions be disclosed to the public (Article 29:1). However, we shall see that publication is not a condition of copyright.

In each category of protection, there is a general allowance for members to provide limited exceptions to the rights which are conferred. But the allowances share a proviso that the exceptions do not unreasonably conflict with the normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the right holder. The application which this discipline is given will be crucial in determining the extent to which the exclusive rights are counter-balanced. The wording is borrowed from Article 9(2) of the Berne Convention. But TRIPs is generalising the discipline at the same time as it is requiring it to be translated differentially into the specifics of the use of each category of intellectual property.

For each category, a set of inquiries will be demanded. First the exception will have to be identified as a special case or limited curtailment. Then, it will be necessary to determine what constitutes a normal exploitation of the subject matter and which practices might conflict unreasonably with it. For instance, normal exploitation might commonly be to promote high volume sales of the products in which the subject matter is embodied. Wholesale copying of those products provides an obvious conflict. It will then be necessary to identify the legitimate interests of the right holder and which practices unreasonably prejudice them. For instance, the legitimate interest may be a financial return on the sales. Failure to pay a licence fee or a royalty to

the right holder prejudices that interest. In these circumstances, it might be possible to argue that isolated, non-commercial uses do not infringe the proviso. But what if the exploitation lies in making sales to researchers? What, moreover, if the interest is in exclusivity and not just financial returns? The use of general criteria like this leaves scope for interpretation.

Copyright and related rights

Let us start with the copyright category. We should note first that the TRIPs agreement applies several provisions of the Berne Convention for specific exceptions. Berne Article 11*bis*(2) permits countries to determine the conditions under which authors of literary and artistic works shall enjoy control of the broadcasting or communication to the public of their work. So they may authorise non-voluntary licensing, subject to the proviso that equitable remuneration be payable for such use of the work. Berne Article 13(1) envisages reservations and conditions being placed on the right of the author to authorise a sound recording of a literary or artistic work.

The most general provision makes it a matter for national legislation whether to permit reproduction of the works. But Berne Article 9(2) confines the permission to 'certain special cases'. It goes on to attach the proviso we identified above. Article 13 of TRIPs adopts the language of Berne, the 'three-step test', while at the same time extending this allowance for exceptions to each of the rights which it affords, not just the right of reproduction.[47]

What sort of practices might this allowance accommodate? First we can say, right holders want to eliminate copyright piracy. The literal and wholesale copying of successful products, such as books, programmes, sound recordings and films, may drastically undermine sales. The copying may be done by secondary producers for commercial trade. It may be done by consumers for home use. Copying by home users has proved difficult to eliminate and producers have sought to attach liability to intermediaries and those who provide copying technology. So, in some situations, the non-voluntary licensing schemes benefit producers by raising revenue they could not otherwise collect. We should also appreciate that, in some situations, it is arguable that the users would not purchase the authorised copy, even if there was no other way of obtaining a copy. Or the users are the ones who go on to buy copies and recommend them to others. So it may be arguable that non-voluntary licensing, especially if it is coupled with a financial levy,

will not undermine sales. Discussing music file sharing, Suthersanen suggests that the major producers have until recently been more interested in litigating such issues than embracing a new business model.[48]

Beyond piracy, copies are made for more legitimate purposes. Fair use or dealing might be allowed without charge. A copy might be made for example for the purposes of research and study or criticism and review. What though if libraries and educational institutions make multiple copies available? The copy may be made, more purposefully, with the intention of producing a better version of a particular product. In certain sectors, de-compilation and the reproduction of interfaces can be necessary to ensure that related products are inter-connectable and interoperable with a core technology. We shall consider these situations of competitive derivation in our case studies below. We can say that access is important to further innovation, especially if the right holder is refusing to licence the property altogether. But what if the right holder is simply seeking to charge a fee for use of the material? We pursue these questions in Chapter 8.

A further issue in this complex area concerns the freedom with which media developers and distributors can exploit a whole range of original materials which are found in music, text, images and performances. Exploitation takes on an extra dimension when the materials can be transmitted online. For instance, the commercialisation of these materials may include taking bits of them, recombining them in new media, and distributing them further afield. If such acts do not involve reproduction of the works, they may cut across other rights that are being extended under the banner of copyright. But it may prove costly for the distributors to obtain clearance every time they wish to use original material, however transient the use may be. We can see that Berne Articles 11*bis*(2) and 13(2) relate to these practices. TRIPs allows exceptions to its rental right for cinematographic works 'unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction' (Article 11).

The related rights given to performers, record producers and broadcasters are also affected by these practices. TRIPs allows members to provide conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention (Article 14:6). Rome allows non-voluntary licensing of the use of recordings in broadcasting or communications to the public, provided equitable remuneration is made payable (Rome Article 12). Exceptions to infringement may also be made for private use, the use of short excerpts in connexion with the

reporting of current events, ephemeral fixation as part of a broadcast, and use solely for purposes of teaching or scientific research (Article 15). We can identify in this allowance a mixture of motives for allowing exceptions to infringements.

United States – section 110(5) Copyright Act

The TRIPs really substantial ruling so far concerns the three-step test for the application of the general exception to infringement of the rights of the copyright holder. The Irish music industry (not just Bono) urged the European Communities to challenge the allowances made in the United States Copyright Act for eating, drinking and retail establishments to play music on the radio or television – without first obtaining the copyright holders' permission and without making equitable remuneration. There were two exemptions from copyright, one for 'mom and pop' establishments based on the nature of the equipment they used (essentially ordinary radios and televisions) and the other for business establishments turning on either the nature of the equipment they used (at the most ordinary sound systems) or their restricted floor space. The home-style exemption was confined to dramatic music works, while the business exemption concerned non-dramatic music works.

It was accepted that the playing of the music in public (secondary uses of the music works) infringed rights granted copyright holders. Specifically, they permitted infringements of the Berne rights Article 11*bis*(1)(ii) communication to the public of the performance of a work (by wire or cable), and 11*bis*(1)(iii) public communication by loudspeaker or analogous instrument of the broadcast of a work (wireless or airwave). These rights had been incorporated in TRIPs.

TRIPs Article 13 provides that members shall confine limitations or exceptions to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Interpreting and applying this three-step test, the Panel upheld the home-style exemption but ruled against the business exemption.

The Panel first dealt with the requirement that exceptions be confined to certain special cases. It said that these cases had to be both clearly defined and narrow in scope and reach. This depended on how the national measure drew them; they had to be limited in their field of application or exceptional in their scope. So they needed to have a specific policy objective. At the same time, however, Article 13 did not require the Panel to pass judgment on the legitimacy of the objective as

a matter of public policy. The US had claimed the exemptions were justified. The home-style exemption protected mom and pop businesses that play an important role in the American social fabric because they offer economic opportunities for women, minorities, immigrants and welfare recipients to enter the economic and social mainstream. The business exemption fostered small businesses and prevented abusive tactics by collective rights management organisations.

Both the home-style and business exemptions were clearly defined. Looked at quantitatively and qualitatively were they too narrow? The home-style exemption was limited to a very small percentage of users and it was confined to dramatic musical works. So it had a quite narrow scope of application in practice. On the other hand, the business exemption encompassed a major part of the users, a substantial majority of the eating and drinking establishments and close to half the retail establishments, together with a wider range of music.

So the business exemption failed the first hurdle and the Panel did not have to consider the next two criteria. But it was inclined to do so because its job was to make recommendations that would assist the DSB to find a positive solution to the dispute. Therefore, it would be a false judicial economy to decline. For the home-style exemption, it had to consider the other criteria and it would do so individually rather than in some sort of merged test to give effect to the treaty.

For the second test, the benchmark was exploitation, that is, the use of the exclusive rights, but a normal use, which was less than full enjoyment of those rights; otherwise there would be no room for exceptions. The Panel should look at the conflict with each of the copyright holder's rights, as well as the overall effect, because an exception might have a small impact on all the rights combined. The impact of the conflict was both empirical/quantitative, (the actual impact now) but also normative/dynamic, (ie, the potential for conflict given evolving uses by new technology becoming available).

Conflict would come from those uses that entered into economic competition with the ways the right holders normally extracted economic value from the rights. It would deprive them of significant or tangible commercial gains. The measure was market displacement, the collection of remuneration foregone, but among both actual and potential users of the works. It was not to be a question of exactly who would use if they had to pay or who could be made to pay. Again, the percentages of establishments told against the business exemption but worked in favour of the home-style exemption.

For the third test, the benchmark was interests. They were not purely the exercise of the holder's legal rights, but the economic gains from the rights. It was agreed these economic interests were legitimate. The prejudice to these interests would be measured by an unreasonable loss of income, again among both actual and potential users. In particular, it would not do to condone any lack of effective or affordable means of enforcing the rights in the past, because this would undermine the scope and the binding effect of the minimum standards under TRIPs. Very much like the second test, the business exemption failed this test, but the home-style exemption qualified.

As if they did not want anything too definitive or precedential to emerge, neither party saw value in appealing the Panel's rulings. Furthermore, rather than bring its legislation into compliance, the US sought to deal with the EC using compensation, which, under the DSU, is meant only to be a temporary measure. The amount of compensation was submitted to arbitration. The arbitrator took the view that the compensation figure should be reduced to allow for the reality of a certain degree of unauthorised and uncompensated use.[49] The deal was also controversial for shutting out third parties. As a source of popular music too, Australia was concerned that compensation should be paid on a non-discriminatory basis. It made representations to the US Government. But why should each member have to deal bilaterally? If the US had brought its law into compliance with TRIPs, the nationals of all members would see the benefit.

Already, we have begun to note, the Panel's view of the general principles of interpretation that were to be followed in such cases. The report is interesting for the Panel's approach to the provisions of Berne. Like the panel in *Canada–Patent Protection for Pharmaceuticals*, it ruled that it did not have to decide how to apply the Vienna Convention's approach to other treaties because Berne had actually become part of TRIPs. Nonetheless, it had to deal with some possible internal inconsistencies. Berne has its own provisions for exceptions. Some such as Article 11*bis*(2) were not applicable to the US measures. The Panel was greatly interested in the Berne 'minor exceptions' doctrine which is part of the Berne *acquis* rather than its express provisions. Finally, the Panel resolved that the Berne *acquis* was part of TRIPs and that the doctrine gave support to the home-style exemption. Berne Article 9(2) provides a three-step test for exceptions, but only to infringement of the right of reproduction, and then curiously not in exactly the same words as TRIPs Article 13. The Panel held that Article 13 was not limited to

the rights newly established in TRIPs (such as the rental rights). It applied to all exceptions. It could not add to the exceptions, but it should be applied in a way that reconciled it with Berne to clarify and articulate the exceptions rather than narrow them.

The Panel was also disposed to reconcile the WCT with Berne and TRIPs. Though strictly of limited relevance, as it was not under Vienna a subsequent treaty on the same subject matter, it was part of the same corpus or overall framework of multilateral intellectual property protection. The contracting parties greatly overlapped with the WTO members (though few countries had actually ratified the Treaty at this point including the parties to the dispute). In particular, the Panel enlisted the agreed statement to Article 10(1) the WCT exceptions Article to argue for the continuity between the treaties.

Patents and other industrial property

The TRIPs allowance made for exceptions to the protection of industrial designs is in very similar terms to copyright (Article 26:2). However, it introduces into consideration the legitimate interests of third parties. Limited exceptions are allowed to infringement of trademarks, provided they take account of the legitimate interests of the owner and of third parties (Article 17). But we noted that compulsory licensing of trademarks is not permitted (Article 21).

Again, in respect of patents, limited exceptions have been permitted (Article 30). But, because the subject matter of patents is inventions, we might expect the discipline to operate in a different way. Sales will not necessarily be the normal exploitation of an invention, nor revenue the main interest of the holder, though the situation becomes complicated when the invention and its product merge. The holder may wish to prevent others from using the invention altogether, such as competitors gearing up to produce an improved version or to put a rival product on the market when the term expires. The beneficiary of a compulsory licence might be a local manufacturer, such as a maker of generic drugs, or another kind of producer/user, such as the farmer who re-sows the seeds from a genetically engineered plant. The Paris Convention has allowed countries to licence compulsorily, to prevent abuses of rights, such as failure to work the patent (Paris Article 5(2)).

TRIPs imposes stricter and more detailed disciplines on any national law that allows for use without the authorisation of the right holder (Article 31). For example, an attempt must first be made to obtain a licence from the patent holder on reasonable commercial terms. Partial

relief from such conditions is given if, for example, the use is a response to a national emergency or other circumstances of extreme urgency. (We examine the WTO's experience with Article 31 and generic drugs specifically in Chapter 7.) Greater freedom is also allowed if the licensing is ordered in judicial proceedings to remedy anti-competitive practices. But we should accept Reichman's argument that the licensing in contemplation is not confined to these grounds. In particular, he adduces Article 8:2 in support.[50] Here, the agreement recognises that appropriate measures, provided that they are consistent with the provisions of the agreement, may be needed to prevent the 'abuse' of intellectual property rights by right holders or the resort to practices 'which unreasonably restrain trade or adversely affect the international transfer of technology'. Again, we return to this issue in Chapter 7.

Canada – Patent Protection for Pharmaceuticals

The EC complaint concerned a Canadian measure (the Patent Act) that allowed secondary producers of pharmaceuticals, producers of generic drugs, two situations in which to work patents before the twenty-year term expired. The first was a regulatory review exception that authorised the drugs to be made up so they could be tested and submitted for health clearance. The benefit to the secondary producer was the time saved: if it had to wait until the end of the patent term to develop the drug, approval and marketing would be delayed beyond the term. Evidence suggested it took the generic between three and six-and-a-half years to gain approval. A related allowance was for the producer to get the drug made up off-shore by a foreign manufacturer. The second was a stockpiling exception, again to allow the secondary producer to prepare for marketing as soon as possible after the term expired. Here the Act allowed manufacturing and storage to start six months before expiration, not to prepare samples but to accumulate multiple copies that could then be released on the market.

The EC argued that the Canadian law ran counter to the exclusive rights that TRIPs required for the patent holder, the rights to control the making, using, offering for sale, selling and importing of the invention that was the subject matter of the patent. This was accepted but, in defence, Canada sought to invoke the allowance of Article 30 for members to provide limited exceptions to those rights, so long as the exceptions did not unreasonably conflict with a normal exploitation of the patent and did not unreasonably prejudice the legitimate interest of the patent holder, taking into account the legitimate interest of third

parties. This allowance is a variation on the three-step test applicable to exceptions to copyright infringement in the Berne Convention, Article 9(2).

The Panel took the view that the first step was not concerned with the actual economic impact of the exception, rather how far on its terms the national law curtailed the legal rights of the patent holder. The Panel acknowledged that the most important right was the right to make commercial sales to the ultimate consumer. The Canadian law did not curtail this right, but it did permit infringement of other rights. The effect on each right should be considered. Still, on this test, the regulatory review exception was quite narrowly bound. The stockpiling exception removed entirely the right to control the making and using of the invention; six months was enough to do so.

Thus, the stockpiling exception failed the first hurdle, so the Panel now had to decide whether the regulatory review exception made the second and third steps. Again, as the exception did not affect the patent holder's commercial sales during the term of protection, could there be any conflict with the normal exploitation of the patent? The EC argued that given the lengthy delay the patent holder itself experienced in obtaining regulatory approval for the original drug (estimated at eight to twelve years), it was entitled to a *de facto* extension of the period of protection. It would get that if the generic producer had to wait until the end of the term. But could that be considered part of the normal exploitation? The Panel said it could consider the impact of all forms of economic competition that detracted significantly from the economic returns the holder could expect from exclusivity. However, the benefit of an extra period of exclusivity, on account of the competitor having to wait for regulatory approval, was not to be regarded as a normal expectation.

Reaching the third step, did the infringement unreasonably prejudice the legitimate interests of the patent holder? The Panel ruled that these interests were not simply to prevent the impairment of its legal rights, they were any justifiable interests. Nonetheless, the *de facto* extension of the exclusive marketing period was not such a compelling or widely recognised interest that it could be regarded as legitimate, even if it was to make up for the holder's own delay.

A further issue for the Panel was whether Canadian law cut across the injunction in Article 27.1 that patents be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally

produced. The Panel ruled that Article 30 was subject to Article 27.1, as was Article 31 (the compulsory licensing provision, which Canada did not invoke in this dispute). However, it found the law did not discriminate on its face and a realistic test of discrimination (what happened in practice) was not, for lack of evidence of the effects, applied.

The Panel ruling exemplifies many of the issues that surround the interpretive practices of the WTO panels. They include the choice of literal or purposive approaches, the resort to dictionary definitions, the status of preambles and objects clauses (such as Articles 7 and 8), the relevance of the negotiating 'histories' of the agreements, the relationship to other treaties as well as the special position of the incorporated conventions (the Berne and Paris Conventions) and the applicability of GATT jurisprudence. Following the ruling in *Japan–Gasoline*, the Panel felt able to rely on Articles 31 and 32 of the Vienna Convention on the Law of Treaties for guidance as to the customary rules of interpretation of international law.

We have noted above that the Panel was not prepared to take into account Articles 7 and 8 to give a liberal interpretation to the exceptions that may be granted under Article 30, despite Vienna Article 31.1 specifying that the context for the purpose of the interpretation of a treaty shall comprise the (whole) text including its preamble and annexes. The Panel offered that the balance between rights and access had already been struck in the terms of the substantive provision. It then proceeded to interpret the requirements of the words of Article 30, seeking assistance in dictionaries with the interpretation of the qualifying words 'normal' and 'legitimate'.

Vienna Article 31.3(b) says that any subsequent practice in the application of the treaty which establishes an agreement of the parties regarding its interpretation shall be taken into account. Canada pointed out that four countries had introduced such an exception since TRIPs, but the Panel said this was not relevant because they were not parties to the dispute. Article 31.3(c) adds into the account any relevant rules of international law applicable in the relations between the parties. In this dispute, the Panel did not feel it needed to pursue this source. It was interested in the interpretation of Article 9(2) of Berne, but that provision was relevant as a part of TRIPs itself.

This early ruling is instructive because the Panel held that the negotiating history of TRIPs could be consulted. Vienna says there

may be recourse as a supplementary means of interpretation to the preparatory work of the treaty and the circumstances of its conclusion. The drafts of Article 30 were used to decide what was meant by limited exception. However, the fact that the US already had a well known exception for regulatory review (the Bolar exception), when the negotiations took place, was not treated as relevant. There was no reference to it in the record of the negotiations. Yet it has been suggested that the Panel would have been extremely reluctant to invalidate the US exception in effect by ruling against the Canadian law.

Trademarks

TRIPs Article 17 provides that members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties. In *EC–Geographical Indications*, the Panel was required to address the difficult issue of the potential for a conflict between trademarks and geographical indications protections. The clash is perhaps inevitable, at least without clear differentiation, because both are signifiers. Geographical indications are place names with long pedigrees but their protection is advancing only now, so the trademark may also have been in existence for a while. The Panel had to decide whether the TRIPs trademarks protection was qualified by its protection for geographical indications, so that the EC Regulation's derogation from trademark rights was inconsistent with TRIPs. The Panel held that Article 16:1 required members to make rights available to trademark holders against the use of geographical indications. However, Article 17 accommodated the EC inroads.

The trademarks limitations clause is expressed somewhat differently from its patents and copyright counterparts. It is like the patents clause in allowing only limited exceptions. They must be narrow exceptions, not those that undercut the body of rules on which trademark protection is made. The test is the curtailment of the holder's legal rights, again not an economic assessment. The right in question was the right to prevent confusing uses of the mark. The clause required consideration of the legitimate interests of the trademark holder, which were the preserve of the economic value of the distinctiveness of the mark. The EC regulation did so. The legitimate interests of third parties were to be taken into account as well. Normally they were the consumers, but here they were the users of geographical indications, whose interests were

after all legitimate because they were recognised by TRIPs. On this basis, the limitation on the trademark rights was justified.[51]

Restrictive trade practices regulation

The patent provisions would suggest that one interest of TRIPs is the relationship between intellectual property practices and competition policy. In national systems, this interface has not proved an easy one. We can make the general observation that the present regulatory systems display difficulty in reconciling the thrust of the two policies. Their relationship fluctuates, in part with the economic theories and legal currents which prevail at the time. Explicit exception from the proscriptions of the competition law is often made for the intellectual property rights per se. Of course, on this approach, opinion may vary as to what is to be regarded as within the legitimate scope of the right and what is to constitute an illegitimate extension of its power. Increasingly, this kind of categorisation is giving way to a judgment in the individual case. Authorities then face decisions about which uses of the right are to be treated (as they may) as pro-competitive rather than anti-competitive and which anti-competitive uses are to be regarded as providing benefits that outweigh their costs. Such ambiguity and ambivalence lead to disparities in national practices. This phenomenon will be explored in some depth during the case study of online communications media (see Chapter 8).

One genuine concern about the prospect of a TRIPs agreement was that it would alter the balance between the two policies (or legalities to use our preferred terminology). The agreement insists on backing for property rights without prescribing competition standards at the same level. However, the agreement contains a section of relevance which is headed 'control of anti-competitive practices in contractual licences'. Here, in Article 40:1, it states that: 'Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology'. Interestingly, this statement links competition back to trade and technology transfer.

The agreement next focuses on competition by providing that: 'Nothing in the agreement is to prevent members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market'. Article 40:2 goes on to permit the parties to adopt appropriate measures to prevent

or control such practices. The measures must remain consistent with the other provisions of the agreement which leads back to the issue of identifying what constitutes an abuse of the rights as compared with a mere use. It is salient that the members were only able to agree on a short list of examples of such practices. Article 40:2 says they: 'may include for example exclusive grant-back conditions, conditions preventing challenges to validity, and coercive package licensing'. National competition laws have recognised many more examples of restrictions. In particular, the cases extend beyond conditions which are included in licences to contemplate refusals to licence at all or decisions to licence on an exclusive basis.[52]

In any case, the TRIPs provision is a permissive rather than a directory one. It can do little to deter regulatory competition between countries. As we suggested in Chapter 3, some countries may wish for stronger pressures to be placed upon all members to cooperate in mutually reinforcing regulatory regimes. The TRIPs agreement merely obliges the parties to give full and sympathetic consideration to requests from other parties for assistance to deal with the anti-competitive practices of their nationals (Article 40:3). Its language is very respectful of the autonomy of each member's jurisdiction. Intriguingly, it is the intellectual property rights of the TRIPs agreement which offer us the strongest example of international regulatory coordination. In the case studies of Chapters 7 and 8, we ask after the capacities of international competition law to provide some counter-balance to this global intellectual property power. As the book has been urging, this question is all the more pressing because the trade agreements, especially agreements on services and investments, are at the same time chipping away at the alternatives to generalist competition law, such as industry-specific regulation and foreign investment review. And beyond any counter-balance, which after all only creates a little space, is the prospect of fashioning positively cross-country and public-private partnerships for development.

TRIPs AND FTAs

In Chapter 3, we made mention of the new wave of free trade agreements. Their main interest here is their modification to the TRIPs provisions. We shall also note some particulars in the following chapters of the book, especially in the case studies regarding pharmaceutical data and patents where the modifications are the pushiest.

Here, to characterise the strategy, we can say that the US has been producing packages of intellectual property protections for export to other countries. The US selects partners carefully and negotiates hard for them to take the chapters on board. For the intellectual property campaign, the initial targets were political and philosophical allies in different parts of the world, such as Jordan, Singapore and Chile, before moving on to the small developed nation, Australia, and bigger ambitions such as four Central American countries, South American countries such as Peru and Colombia, and South Korea. Only the massive Free Trade Agreement of the Americas (FTAA) has proved too big to pull together.[53]

The first mover countries are not the US's biggest trading partners, but they are attracted by the prospect of access to the US markets in other sectors and, while they are net importers of intellectual property, their governments do not seem especially concerned about the finer points of protection. This starts to change with countries that are concerned about the cost of imported pharmaceuticals, textbooks and software and the freedom for local research, creative industry and service industries to operate.

Commentary has captured how detailed the specifications in the intellectual property chapters have become.[54] The text varies a little from one FTA to another, but it is fair to say the US is developing a script here that is progressively refined with experience to stiffen protection. The Australian chapter is clearly a carry-over from the Singapore and Chile agreements.[55] The USTR devotes considerable resources to honing the provisions in the light of producers' wishes, previous negotiations and dispute settlement decisions, together with politics at the WTO and other multilateral organisations. So what do the chapters specify?

First, they seek to commit the partners to acceptance of the established multilateral agreements including TRIPs itself. They reach to treaties that are only in the process of being adopted and here they link to moves in other forums, notably WIPO, to strengthen and expand intellectual property protections. Australia agreed to implement treaties it was still deciding to ratify and to support treaties that were still under consideration.

Through this link to other international agreements, also by their own expressly elaborated provisions, the FTAs include categories of intellectual property that are not to be found in TRIPs. An example is protection for technological anti-circumvention measures. In various

respects, they extend the use of rights and periods of protection beyond TRIPs and indeed beyond the provisions of the other treaties such as the 1996 WIPO Treaties. For example, they do so for copyright reproduction rights, patent import and export controls, the basic copyright term and extensions to the patent term. They may particularise the manner in which protection is to be given. In the case of copyright third-party liability, they do this elaborately for internet service providers.

Furthermore, partners agree to relinquish and forego most of the flexibilities that TRIPs affords them, such as the periods of grace for instituting patent protection, the exceptions they make take to patentability for plants and animals, the choice of the *sui generis* system of protection for plant varieties, the range of grounds for granting compulsory licences and the use of pharmaceutical and chemical test data by secondary producers.

The chapters also drive the partners to step up their enforcement of intellectual property protections. They specify the ways in which enforcement should be strengthened, especially in regard to trade mark counterfeiting and copyright pirating on a commercial scale. They extend the criminalisation of infringements and add to the responsibilities of government agencies to police infringements. One wording of the FTAA goes so far as to say that no party is to use the distribution of resources for the enforcement of law generally as an excuse for not complying with the intellectual property requirements of the agreement.

Stricter protections are backed with an FTA government-to-government dispute settlement system. While some FTAs rely on consultations to address compliance, the US FTAs include panel systems. Where FTA specifications overlap with the TRIPs provisions, the FTAs purport to give the complainant country the choice between the two forums. The FTA format departs from the model of TRIPs dispute settlement in significant respects and some commentators are counselling countries entering these agreements with a strong partner to take care both with their agreement to bilateral procedures of dispute settlement and to their use of the procedures when disputes arise. The partner needs to judge whether they will meet on equal terms when it comes to pursuing – and contesting – compliance. While the WTO system does not provide access to justice perfectly, it might compare with the chances of obtaining – and enforcing – a legally correct ruling against a more powerful FTA partner.[56] There is more compensation

for a lack of legal resources and bargaining power in the WTO system. For example the WTO offers opportunities for coalition building and institutional supports for obtaining compliance.

Consequently, the FTAs bear a complex relation with the TRIPs agreement, partly supportive, partly supplementary, but arguably competitive in certain respects too. They are most supportive where they simply ask the partners to affirm their commitment to TRIPs, though, given most countries are already bound by TRIPs, the FTAs are not really needed here. They are clearly supplementary where they add categories or rights to the battery of protections, which they also do to the requirements of other treaties, such as the 1996 WIPO Treaties.

The relationship becomes more problematic where the FTAs remove the flexibilities of TRIPs. They can do this in several ways. It may be by omission: the FTA simply does not include the exception that TRIPs explicitly included. The FTA may fill a gap – it specifies the shape or manner of protection, where TRIPs left the choice to the level of national law. These interventions lead to the very real question of whether TRIPs permits these 'supplements'; more precisely, whether the FTA provisions actually add to TRIPs rather than compete with and detract from it. We should see that the FTAs restate select TRIPs provisions such as those for patent protection. In this process, the wording is altered somewhat. The object appears to be to tighten the protections and narrow the allowances for the sake of greater certainty or more pointedly to obtain the most favourable statement where TRIPs has proven to be ambiguous or flexible. In other words, what is TRIPs-plus and what is TRIPs-minus?[57] Crudely, the question can be reduced to this: is any qualification that has the effect of stiffening protection consistent?

TRIPs Article 1:1 advises that members are legally free, on an individual basis, to institute more extensive protection than is required by the agreement, provided such protection does not contravene the provisions of the agreement. This sends the message that TRIPs is a floor of rights, a set of minimum protections. It is not a code or compact controlling the extent of protections, especially for the benefit of members that wish to retain spaces free of protection and do not want to become involved in a regulatory competition to bid up protection.

How might that regulatory competition work? In securing the commitment of the partner, the initiating or demanding partner exploits the opportunity to obtain greater protections in one other jurisdiction

for its own nationals. Then, in an interaction with TRIPs itself, the partner offers those protections to the nationals of all other members of the WTO. The FTA might include its own MFN obligation, but, even if it does not do so, Articles 3 and 4 require members to provide those more extensive FTA protections to the nationals of other members. The only check on this is that the extensions relate to the 'protection of intellectual property' as those concepts are defined by TRIPs.

In the interaction with TRIPs, the FTAs create a further momentum for dissemination of the more extensive obligations. The countries which offer these protections to the nationals of all members might then wish to obtain the same for their own nationals when they are involved in negotiations with other countries. It can be argued that NAFTA is one reason Mexico has become a strong intellectual property supporter. This effect is less certain, for the US partner will need to consider whether the insistence on higher protection endangers its objectives in other sectors of trade. Following the commitment to AUSFTA, the Australian Trade Minister said Australia would become a beachhead for stronger intellectual property protection in Asia.[58] But in negotiations for an FTA, the PRC Government describes Australia's agenda as ambitious. The attractions of an FTA with the US might motivate a country to break with its traditional allies where they have maintained the flexibilities together. The partner has to weigh the political costs. This dilemma has caused ructions in the Andean Community – Peru and Columbia have parted company with Ecuador and Venezuela.[59]

Article 1:1 carries the proviso that the extensions do not contravene the provisions of the agreement. Some import should be given to this proviso, at least where the FTAs modify the provisions rather than add something completely new. In certain respects, the flexibilities should not be regarded as mere hedges on protection that any member can simply give away permanently. Instead, they can be seen as positive provisions giving members the assurance that they can choose the extent of protection – they are an essential part of the balance of rights and obligations that TRIPs has struck between the property holders' rights and the competing need for public access from time to time. For example, could an FTA requirement of plant patentability or UPOV 1991 protection for plant varieties cut across Article 27.3(b) – freedom to choose a *sui generis* system of plant variety protection? Could an FTA control on importing or exporting pharmaceuticals negate the space afforded members by Article 6 – or indeed the consensually negotiated

Doha Declaration and the TRIPs amendment for trade in generic drugs under compulsory licence? Are the Article 31-recognised grounds for granting compulsory licences (which incidentally are not meant to be exhaustive) a necessary counterbalance to the TRIPs consolidation of patentability without discrimination?

Similar to the substantive protections, the FTA dispute settlement avenues raise questions about WTO compatibility. The basic issue is the choice of forum. Additionally we can anticipate that competition will occur when interpretations are being made in two places. Article 23 of the DSU presses the members to use the WTO system for redress where they allege that another member's measures are not compliant with the WTO agreements. Yet the DSU also encourages the parties to engage in consultations and reach a mutually acceptable solution. We have already identified the danger that the WTO consultations might compromise observance of the WTO law. However, at least, the WTO has a safeguard in that a member may insist on a panel ruling. In *Mexico – Taxes on Soft Drinks*, the parties were bound by both NAFTA and the relevant WTO agreement, the GATT 1994 (1947). The Appellate Body upheld the panel's decision that it had no discretion under the DSU to decline its jurisdiction in a case properly brought before it.[60]

The substantive concern is that the FTAs will generate a narrow jurisprudence on the counterpart TRIPs provisions. It might find its way back to the WTO as evidence of state practice, a consensus between members, or just a suggestive reading. The immediate issue is how those rulings would be handled if an overlapping dispute goes to the WTO. More broadly, they might colour interpretations that the WTO DSB puts on TRIPs provisions. Taubman wonders whether it would be a bad thing. It would be another version of building regulatory conversations or interpretive communities, taking the adversarial heat out of disputes.[61] Really it is open to any member to argue this point. The Appellate Body has said it will look at how representative these other international forums are. In *Mexico–Taxes on Soft Drinks*, it reiterated that its primary duty was to preserve the rights and obligations of the WTO agreements, not enforce other agreements.

The other side of this equation is the extent to which the FTA panels will respect the WTO jurisprudence when they come to make rulings on TRIPs counterpart provisions. This concern can be overstated: we might expect *ad hoc* panels to look to the WTO body of law for assistance. However, the FTAs are very particular in their specification of the sources of law that are to be available. AUSFTA says the panels

shall consider the provisions of the FTA itself (foremost) in accordance with the applicable rules of interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1996). Such panels will have to make use of Vienna Article 31(3)(c) to open up to WTO law, as well perhaps as the FTA's express affirmation of TRIPs.

CONCLUSIONS

This chapter has proffered an analysis of the provisions of an emphatic multilateral trade agreement. The formation of the TRIPs was fiercely contested but, despite the appreciable reservations held in many quarters, it has become a feature of the new public international law. An examination of its provisions indicates how it embraces the full range of western intellectual property categories. Yet, TRIPs is not the first multilateral convention on intellectual property. It draws substantially on existing conventions and notably on the Berne copyright convention. So it provides an example of the kind of cross-referencing we identified in the introductory chapters. This reliance on the existing conventions helps the WTO to mediate the cognitive and normative demands being placed upon it by inter-legality.

Nonetheless, TRIPs has firmed up the protection being made available for high technologies and commercial products. In areas such as patents and trade marks, the coverage has been strengthened. In addition, the agreement has confirmed protection for such key resources as computer software and secret information, which could previously only be assimilated under very general provisions for international protection. Moreover, TRIPs is resolute in requiring members to provide effective means of enforcing the rights which it has nominated. Furthermore, in order to ensure that members respect their obligations, it is backed by the WTO's government-to-government system for dispute settlement. Questions of interpretation and redress for non-compliance are accordingly to be considered from within the trade perspective of the WTO.

It is fair to say that the TRIPs model of intellectual property is very much one of individual property rights freely assignable in the marketplace. On this view, it would seem that TRIPs had little to offer secondary producers and end users, even independent local inventors, developers, artists and performers, who are not necessarily antagonistic to the notion of property rights. Nonetheless, a close analysis reveals that the TRIPs left spaces to cater for national sensitivities regarding,

for example, the ownership of plants and animals or rights to control online communications. It left openings for other international forums, such as WIPO, UPOV and the Biodiversity Convention, to re-enter the field.

So too, TRIPs makes concessions to counter-balancing access regulation. It allows national legislatures to attach limitations and exceptions to the rights. In the past, these kinds of allowance have been utilised to afford access for such purposes as research, criticism and education, and for some non-commercial household type uses. The availability of these allowances mediates the clash between differing attitudes to the use of intellectual resources, the incentive for producers to innovate and distribute and the need to ensure access for fair use. We now have the benefit of some dispute settlement jurisprudence, which has given cautious support to the use of these provisions for exceptions. Generally, it says that the scope is narrow. At the same time, the bilateral FTAs are not only filling out TRIPs protections but are chipping away at the flexibilities the WTO members agreed to allow.

For importing and developing countries, one crucial objective has been technology transfer and the local working of the intellectual property. TRIPs became an opportunity to discipline the national use of compulsory licensing. Yet unilateral regulation is a risky proposition when trying, at the same time, to attract foreign investment and link locals into international production and distribution networks. Having bolstered market power, TRIPs seems weak on international regulation of the restrictive practices of the transnational corporations. It is true to say that the costs and benefits of intellectual property are not so neatly distributed today. All the same, if the WTO is asking all countries to provide protection, it may still have to give something more in return. We shall need to look to the case studies below (Chapters 7 and 8) for the evidence that it does.

NOTES

1. Report of the GATT Panel, *United States–Imports of Certain Automotive Spring Assemblies*, adopted 26 May 1983, reproduced in *Basic Instruments and Selected Documents*, Supplement 30, p 107.
2. Report of the GATT Panel, *United States–Section 337 of the Tariff Act of 1930, The Case of Certain Aramid Fibre*, adopted 7 November 1989, BISD 36S/345.

3. For a catalogue of action taken, see for example A. Gutterman, The North–South Debate Regarding the Protection of Intellectual Property Rights, *Wake Forest Law Review* 28 (1993), 29.
4. The 'legislative history' comes from T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992) Volume II: Commentary* (Boston: Kluwer, 1994); see further D. Gervais, *The TRIPs Agreement: Drafting History and Analysis* (London: Sweet and Maxwell, 2nd edn, 2003). In June 2001, the WTO posted the documents of the TRIPs negotiations in the Uruguay Round at the WTO website: www.wto.org. There is some argument whether these documents can stand as an official negotiating history.
5. A figure often cited at the time, see, eg, an Article by an official with the OECD Trade Directorate, E. Dohlman, International Piracy and Intellectual Property, *OECD Observer* 154 (1988), 33.
6. See P. Drahos, Global Property Rights in Information: The Story of TRIPs at GATT, *Prometheus* 13 (1995), 6; also P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002); S. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (New York: Cambridge University Press, 2003); D. Matthews, *Globalising Intellectual Property Rights: The TRIPs Agreement* (London: Routledge, 2002).
7. As set out in S. Golt, *The GATT Negotiations 1986–90: Origins, Issues and Prospects* (London: British-North American Committee, 1988).
8. See the GATT's own report in *GATT Activities 1991* (Geneva: GATT, 1992).
9. As nominated by the United States Federal Trade Commission, *The Effects of Greater Economic Integration within the European Community and the United States, Third Follow-up Report*, reproduced in K. Simmonds and B. Hill (eds.), *Law and Practice under the GATT*, loose-leaf updated (Dobbs Ferry: Oceana Publications, 1991).
10. See for example, the report by the OECD, *Biotechnology and Patent Protection* (Paris: OECD, 1985).
11. See for example the Article by a senior official, J. De Miramon, The International Interest in Intellectual Property, *OECD Observer* 163 (1990), 4.
12. See the papers published at the time; UNCTAD, *Uruguay Round: Further Papers on Selected Issues* (New York: United Nations, 1990) and UNCTNC, *New Issues in the Uruguay Round of Multilateral Trade Negotiations* (New York: United Nations, 1990).
13. See Review of Developments in International Trade Law, in the Department's publication, *Eighteenth International Trade Law Conference* (Canberra: AGPS, 1991).
14. For further reading on TRIPs law, see C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPs Agreement* (New York: Oxford University Press, 2007); UNCTAD, *Resource Book on TRIPs and Development* (Geneva: UNCTAD, 2005); T. Cottier, *Trade and Intellectual Property Protection: Collected Essays* (London: Cameron May, 2005).

15. The proper names being the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, and the Treaty on Intellectual Property in respect of Integrated Circuits.
16. For a useful analysis, see G. Evans, The Principle of National Treatment and the International Protection of Industrial Property, *European Intellectual Property Review* 18 (1996), 149.
17. See Evans, National Treatment.
18. Report of the Panel, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290/R, 15 March 2003 (also covering the US complaint, WT/DS174).
19. Report of the Appellate Body, United States – Section 211 of the Omnibus Appropriations Act of 1998, WT/DS176/AB/R, 2 January 2002.
20. Report of the Panel, Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS59/R, 2 July 1998.
21. C. Arup, The United States–Australia Free Trade Agreement – the Intellectual Property Chapter, *Australian Intellectual Property Journal* 15 (2004), 205.
22. In particular, S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2nd edn, Vols I and II, 2005).
23. For a discussion of national variations at the time TRIPs came into operation, see Note (student author) Global Limits on 'Look and Feel': Defining the Scope of Software Copyright Protection by International Agreements, *Columbia Journal of Transnational Law* 34 (1996), 503.
24. See M. Davison, *The Legal Protection of Databases* (Cambridge: Cambridge University Press, 2003).
25. See the evaluation by J. Reichman, Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement, *International Lawyer* 29 (1995), 345.
26. See further, O. Morgan, *International Protection of Performers' Rights* (Oxford: Hart Publishing, 2002).
27. It is complemented by the Patent Cooperation Treaty which WIPO also administers.
28. N. De Carvalho, *The TRIPs Regime of Patent Rights* (The Hague: Kluwer Law International, 2nd edn, 2005).
29. According to H. Wegner, The Many Faces of Patent Harmonization, *European Intellectual Property Review* 15 (1993), 3.
30. For a survey around that time, see U. Suthersanen, A Brief Tour of 'Utility Model' Law, *European Intellectual Property Review* 20 (1998), 51.
31. N. Klein, *No Logo* (London: Flamingo, 2000).
32. See N. de Carvalho, *The TRIPs Regime of Trademarks and Industrial Designs* (The Hague: Kluwer Law International, 2006).
33. Again, a WIPO administered treaty.
34. See *WTO Focus*, No 17, March 1997.

35. G. Evans and M. Blakeney, The Protection of Geographical Indications after Doha: Quo Vadis?, *Journal of International Economic Law* 9 (2006), 575.
36. The issue was canvassed in J. Lahore, The Herschel Smith Lecture: Intellectual Property Rights and Unfair Copying: Old Concepts, New Ideas, *European Intellectual Property Review* 14 (1992), 428.
37. For a discussion, see C. Arup, *Innovation, Policy and Law* (Cambridge University Press, 1993). Further, see W. van Caenegem, *Intellectual Property Rights and Innovation* (Melbourne: Cambridge University Press, 2007).
38. *Request for Consultations by the United States, China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1, 16 April 2007. A Panel has since been established.
39. Generally, K. Maskus and J. Reichman (eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005); S. Alikhan and R. Mashelkar, *Intellectual Property and Competitive Strategies in the 21st Century* (The Hague: Kluwer Law International, 2004).
40. A point that was well made by Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (London: Sweet and Maxwell, 1996), appendix. See further M. Plaplinsky, *Globalization, Poverty and Inequality: Between a Rock and a Hard Place* (Cambridge: Polity, 2005).
41. F. Pearce, *When the Rivers Run Dry: Water, the Defining Crisis of the Twenty-First Century* (Boston: Beacon Press, 2006).
42. R. Dhanjee and L. de Chazournes, Trade Related Aspects of Intellectual Property Rights (TRIPS): Objectives, Approaches and Basic Principles of the GATT and Intellectual Property Conventions, *Journal of World Trade* 24(5) (1990), 5 at 10.
43. So for these (seventy or so) countries, the deadline was the year 2000.
44. For this suggestion, see F. Abbott, Commentary: The International Intellectual Property Order Enters the 21st Century, *Vanderbilt Journal of Transnational Law* 29 (1996), 471 at 474.
45. C. Raghavan, *Recolonisation: GATT, the Uruguay Round and the Third World* (London: Zed Books, 1990).
46. My own work has examined this regulation, see Arup, *Innovation*.
47. Regarding the test, see S. Ricketson, *The Three-Step Test, Deemed Quantities and Closed Exceptions* (Centre for Copyright Studies, Strawberry Hills, NSW, 2002); also M. Senftleben, *Copyright, Limitations and the Three-Step Test* (The Hague: Kluwer Law International, 2004).
48. U. Suthersanen, Technology, Time and Market Forces: The Stakeholders in the Kazaa Era. In M. Pugatch (ed.), *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Cheltenham: Edward Elgar, 2006).
49. R. Owens, TRIPs and Fairness in Music Arbitration: The Repercussions, *European Intellectual Property Review* 25 (2003), 49.
50. J. Reichman, Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the

GATT's Uruguay Round, *Brooklyn Journal of International Law* XX (1993), 75.

51. We should note here that, in its recent FTAs, such as AUSFTA, the US has sought to strengthen the position of trademarks over GIs.
52. F. Abbott, Are the Competition Rules in the WTO TRIPs Agreement Adequate?, *Journal of International Economic Law* 7 (2004), 687. Yet, the guidelines which national authorities issue are an indication that their policies towards licensing practices rarely take a categorical stance. Attitudes depend on the situation-specifics and in particular whether the right holder is in a position of market power (see Chapter 8).
53. M. Oliva, Intellectual Property in the FTAA: Little Opportunity and Much Risk, *American University International Law Review* 19 (2003), 45.
54. D. Vivas-Ergui, Regional and Bilateral Agreements and a TRIPs-plus World: The Free Trade Area of the Americas (FTAA), *TRIPs Issues Papers* (Geneva: Quaker United Nations Office, 2003).
55. C. Arup, United States–Australia Free Trade Agreement: the Intellectual Property Chapter, *Australian Intellectual Property Journal* 15 (2004), 205.
56. P. Drahos, Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution, *Journal of World Trade* 41 (2007), 191; C. Arnett, Comment: The Mexican Trucking Dispute: A Bottleneck to Free Trade, *Houston Journal of International Law* 25 (2003), 561.
57. F. Abbott, The TRIPs-Legality of Measures Taken to Address Public Health Crises: Responding to USTR State-Industry Positions that Undermine the WTO. In D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002); D. Endeshaw, Free Trade Agreements as Surrogates for TRIPs-Plus, *European Intellectual Property Review* 28 (2006), 74.
58. *The Australian*, 1–2 January 2005.
59. World Intellectual Property Report, 2006, Issue 3, p 3.
60. Report of the Appellate Body, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R, 6 March 2006.
61. A. Taubman, Collective Management of TRIPs: APEC, New Regionalism and Intellectual Property. In C. Antons, M. Blakeney and C. Heath (eds.), *Intellectual Property Harmonisation within ASEAN and APEC* (The Hague: Kluwer Law International, 2004).

CHAPTER 7

THE CASE OF GENETIC CODES

Chapter 7 selects as its global carrier the essential life force of the genetic code. It considers how control of the code may exercise a powerful influence over the plants produced across the world. Just as importantly, it may shape the pattern of the benefits that stem from their production, such as farming livelihoods, food sustenance, medicines and health care. Links are made to the manipulation of genetic codes in animals and humans, partly because the technology now crosses over directly, partly because the legal issues have increasingly become the same.

In keeping with the general approach of the book, this chapter offers reasons why the technology is not all powerful and legal control matters. The dynamics of the technology do not allow entirely for production to cut loose from the ties of the locality and protection still relies on a legal foundation rooted in the national legalities of intellectual property. In this field, from a WTO perspective, the main means for legal control is the patent. Legal pluralism stems from the differences in the patent criteria for recognition of genetic codes worthy of protection. By way of illustration, the chapter takes up the example of differences to be found in the application of the distinction between discovery and invention.

Some of the industrialised countries of the North continue to make explicit exceptions from patentability on public policy grounds. Such exceptions have provided a space for environmental and moral interest groups to intervene and express opposition to the technology. The chapter recounts the debate over the retention of the limited EU

exception for plant and animal varieties. Yet, when high technology producers seek to protect their contributions to genetic codes across the world, they encounter even more diverse legalities. The lack of patentability in some countries of the south created a major inter-legality when trade in genetic codes stepped up. With the implementation of TRIPs, this difference is disappearing, to be replaced, as we shall see, by a more complex relationship. The exceptions to patent infringement become crucial to the retention of flexibilities.

Previously, legalities in the south sought to maintain a space outside the field of appropriation for a common natural heritage. Chapter 7 recognises how globalisation is stimulating a positive assertion of national interests and, in some instances, the interests of those local communities and indigenous peoples who have conserved and managed the essential resources for the genetic codes. Those interests are seeking new legal means to obtain material rewards for their contribution to the resources, perhaps the right to prevent incompatible uses.

If patents are not fitted to providing recognition to these contributions, then support might be sought in other forms of property. We examine the experience with a form specific to plants, the plant breeder's right. The right has achieved international status through the International Convention for the Protection of New Varieties of Plants (UPOV) Convention. Globalisation is provoking searches further afield to broaden the positive re-regulatory potential of intellectual property. We assess the progress which the Convention on Biodiversity (CBD), the Food and Agriculture Organization (FAO) and the World Intellectual Property Organization (WIPO) have made in developing alternative forms that might give better recognition to the knowledges, practices and innovations of local communities and indigenous peoples.

The chapter brings the study around to the TRIPS agreement. The agreement strengthens patent protection, but the need to mediate saw the insertion of its own exception for plants and animals. The scope of this exception is considered. In respect of plant varieties, take-up of the exception is made conditional on the institution of an alternative system of protection and in this regard the relationship between TRIPs and UPOV (which itself has undergone revisions) was left indeterminate. Since 2000, the TRIPs exception has been under review and we inquire whether progress has been made to clarify the relationships between the two treaties. This update is also an opportunity to see if the review has encouraged a dialogue between the WTO, CBD,

FAO and WIPO regarding the recognition and reward of traditional knowledge.

While significant at least symbolically, recognition for traditional knowledge will not alone be the solution to the threats which face many in the world – disease, poverty, environmental damage and the destruction of traditional ways of life. Our study should consider the potential in the high technology–local practice interface to help the South develop viable infrastructure and beneficial participation in the global economy. Can a framework built around intellectual property do this or should we construct a broader framework on principles of access to knowledge, competition and co-operation, public-private partnerships and global philanthropy?

Finally, though, it cannot be denied that the patent is strengthening its grip on essential life forces like seeds and medicines. If the patent is a stimulus to high technology innovation, it is also an immediate control on access for researchers, farmers and health carers. This chapter looks at the ways the WTO has endeavoured to mediate this current clash, particularly through the issue of compulsory licensing of pharmaceutical production and the trade of pharmaceuticals during emergencies. This story is one of life and death; incidentally it reveals much about the WTO's deeper engagement these last six years with the mediation of inter-legalities. Intriguingly, the issue has drawn the WTO, out of character perhaps, into the construction and possible administration of a regulatory system for access to essential medicines.

CODING FOOD AND MEDICINES

Global carriers

We might begin the case study with some remarks on the capacity of the technology to put such codes to use. We know that, from the time cultivation began, people have been selecting, swapping and nurturing seeds and cuttings. They have been using these materials to grow foods and make medicines. However, the application of scientific and industrial techniques has far greater potential to alter the balance between labour and capital, between the local and the global, even between nature and humankind. At the beginning of the twentieth century, the techniques extended to systematic cross-breeding, combining favoured characteristics of sexually compatible plants within the same variety or species. In the second half of the century, with the innovation of genetic engineering, they moved to the laboratory. Here, they began

to work at the level of the micro-organism, the cell and the gene sequence. Through the application of techniques such as tissue culture, somatic cell fusion and gene splicing, genes can be introduced into sequences or removed much more directly. The process bridges the gap between varieties or species, overcoming the obstacle of sexual incompatibility. Spider genes have been inserted into cotton to make it stronger; human genes have been placed in mice to make them more susceptible to cancer.

Such genetic engineering has clearly enhanced the techniques available for use in food production. We can acknowledge that the techniques will be used for a whole host of utilitarian purposes. To list a few, they can increase crop yields through greater growth; strengthen resistance to insects, weeds, adverse weather or disease; build up tolerance to chemicals used, for example as fertilisers, herbicides or insecticides; make crops more amenable to mechanised harvesting; enhance food quality and taste; manipulate colour and other appearance; or improve storage capability.

Nonetheless, we should appreciate throughout this chapter that the genetic codes of plants are also being explored and altered for other purposes. In particular, there is renewed interest being shown in the medicinal qualities of plants. One estimate is that a third of modern medicines and pharmaceuticals contain ingredients from plants. In turn, plant foods are being engineered to carry supplements of antibiotics, vitamins and minerals. This interest crosses over into the genetic engineering of animals and humans. We shall see that the legal issues overlap too. Genetic engineering is able to make this instrumental approach much more applicable to the higher levels of life, indeed, human genes have been introduced into animals. Now, a comprehensive mapping of the human gene is pointing to the location of genes that influence, not only health, but also a range of other attributes including performance and appearance. Already, we hear of athletes taking growth hormones. Thus, the genetic codes embody ideas and practices that carry profound implications for society worldwide.

Could the technology contribute to the globalisation of food and medicine production? We can note that the potentialities of biotechnology have inspired reorganisation of research and development increasingly on a global scale. Scientists have taken part in large-scale, cross-national research programs. Multinational companies have established a presence, sponsoring and licensing work in the public sector and buying into small private companies.[1] Now, more

research is being brought in-house, as well as being centralised in the Triad countries (the US, Japan and the EU). Research is further geared to commercial success such as elite expensive and boutique foods, with these undertakings tempted to do little work elsewhere except to introduce the products into local markets. Likewise, research is devoted to finding cures for the widespread afflictions of the affluent north while the pernicious diseases of the south remain under-researched.

Technology impacts the organisation of production. An OECD report identified the high rate of structural change occurring in agriculture.[2] This change is proceeding along the lines of greater integration among sub-sectors down the food chain as well as further links between sectors. In the process, the farmer is linked more closely to the suppliers of industrial inputs, such as machinery, chemicals, know-how and capital. So too, largely through the medium of production contracts, the farmer is joined to food processors and retailers.[3] The technology plays a role in creating that relationship by supporting two basic strategies, appropriation and substitution.[4] Within appropriation, technology tends to favour those plants which are most compatible with the industrial inputs, such as a soybean that is resistant to chemical weed killer.[5] Here, the seed becomes the 'delivery system' for a mode of production favouring farms that are technically sophisticated and capital intensive. While achieving certain efficiencies, farming becomes further detached from its traditional state of autonomous reproduction.

Such industrialisation of agriculture may produce uneven distributional effects. As well as favouring high technology farms, it produces a broad split between developed and developing countries. Developed countries tend to specialise in the production of low value, high volume basic grains and cereals with the use of capital-intensive methods. On the other hand, developing countries farm more labour-intensive produce for local and foreign middle-class markets such as fruit, flowers, eggs, vegetables, milk, pork, fish and poultry, both as fresh produce and as constituents within processed foods. This organisational structure – of centralised large-scale production of generic foodstuffs and flexible consumer-segmented production of high value items – also assumes a distinctive geographical pattern. These developments also promote a wider range of differences within each sector and locality as well as across the world. Successful farmers connect up to agro-food networks, while others, and especially the family farm, move to the margins. As countries permit more foreign investment, farm holdings assume an international form.

However, the second strategy, substitution, attenuates this process. Traditional natural foods and medicines are replaced by the synthetics made in the factory and the laboratory, allowing production to be clustered in the advanced industrial regions. The replacement of natural sugars with artificial sweeteners is just one example.

The social and environmental consequences can be mixed. We should acknowledge that yields might be increased, making more food available to poorer consumers. At the same time, however, a central source of work for many people, and even a vital space outside a capitalist economy, is lost. While by no means providing the only reason, this development contributes to the huge population movements into the cities, which the world is currently trying to accommodate. Furthermore, if yields are increased, the technology increases the risks of crop failure. It has been suggested that monoculture may make food sources more vulnerable to the devastation of disease, pest or weather.[6] While more efficient, the individual plants tend to lack versatility. In addition, product specialisation and large-scale farming dedicate whole areas to one crop. Over-farming and the use of chemicals threaten environmental problems such as soil erosion and hazards to human health and wildlife. Forest clearing in Brazil for soybean production will have global effects.[7] Of course, the engineering of animal and human life is seen to raise even more fundamental questions about the extent to which we should try to alter nature.

Strength of local resources

However, it would be premature for us to conclude that food production has become detached from the ties of the locality. We should understand that the development of technology often involves high risk and large-scale investments with long lead times for commercialisation. Gene transplanting is in its early stages and it appears that not all crops are taking to new genes from alien sources or responding to cloning. Limits on the technology also impedes progress towards appropriation. For example, some plant varieties have resisted hybridisation, particularly where the aim is the production of sterile plants (ie, plants that do not produce their own seed). Recently, this strategy has attracted social protests and regulatory controls. Monsanto's use of the patented 'terminator gene' has borne the brunt of the protests and the company has agreed not to proceed with this strategy for the time being.

In these circumstances, suppliers must try to control the use of seeds and progeny down the line, if they are to obtain an adequate return on

their investment. Such a strategy is likely to be problematic in a sector where the technology is so easily replicated. In addition, potential users may be too dispersed or divergent in their practices to hope to contain them through the use of licence contracts or infringement suits. Yet Monsanto has pursued litigation against farmers for patent infringement in a number of jurisdictions, most notably a case in Canada; it has also lobbied governments like Brazil to establish a compulsory royalty collection system.[8]

We should note that consumer demand creates a variable too. While there is much interest now in the production of cheaply priced staples, longer term, it is suggested, both local and international consumer tastes will become more discerning. Paradoxically, segments of more affluent middle-class markets already seek out natural foodstuffs and medicines, such as free range, organic, fresh and environmentally sound produce. As we saw in Chapter 3, a major issue now is the extent to which the presence of genetically modified organisms should be identified by product labelling, indeed whether genetically modified organisms should be prohibited entirely, on the basis of the precautionary principle, until such time as they are proven safe.

Release of the organisms into the environment also faces regulatory controls. Here too social protests have been encountered, and environmentalists have taken direct action to destroy genetically modified plants. In the South, the trade takes on a harder edge, with GE soybeans being smuggled into Brazil to circumvent a government ban, people killed in the process.[9]

These issues come directly under trade law. May countries place controls on the entry of genetically modified organisms into their domestic markets according to their own health and environmental standards? After efforts to deal with such issues in another forum, these measures are the target of the US's successful complaint at the WTO against the European Communities (see Chapter 3). The Cartagena Protocol does not regulate trade to the exclusion of the WTO agreements; it merely contains a 'cohabitation clause' encouraging interpreters to find ways to reconcile the treaties. The decision lies with the WTO tribunals.

We can say that substitutions are also limited because certain crops can still only be produced in specific climes and habitats. Accordingly, local knowledge and cooperation remain important ingredients in successful farming. This hints at a far broader mutual dependence between North and South. Much of the high technology draws on

the genetic pool of wild and indigenous plants sustained on the ground by local farming and indigenous communities. The gene rich regions of Latin America and west central Asia have been major contributors to this pool. Today, scientists are systematically prospecting for genes throughout such natural plant habitats. Their 'finds' extend to animals such as periwinkles and frogs and indeed to native peoples whose gene lines seem to carry resistance to the diseases which afflict those in the urban industrial north. The prospect of finding a cure to the terrible diseases of the nervous system, cancer or AIDS, gives a powerful stimulus to this work.

Paradoxically, this inter-dependence sets up another trade issue. Could these countries use these resource bases to participate in the global economy? Access to genetic resources can depend on cooperation from knowledgeable locals and host states. The balance is also gently shifting because the larger developing countries are becoming markets for industrialised foods and medicines. The spread of higher education combined with lower wages makes locating laboratory, production and health care facilities in these countries more attractive. Both some smaller developed economies and developing countries have had a go at kick-starting local biotechnology sectors; promising initiatives are evident in a range of countries such as Australia, China, Cuba, Malaysia and India.[10] Some analysts suggest that countries like China and India will eventually overtake the US in these sectors.

Yet the demands of commercialisation may still drive the researchers into the arms of the large chemical and pharmaceutical companies through the medium of company acquisitions and the sale of intellectual property, even the migration of the individual researchers to the metropolitan centres. Currently a major complaint is bio-piracy. Northern scientists are accused of prospecting surreptitiously through the gene pools of the South and removing resources without providing any return at all.[11]

It seems we find our way back to international issues of direct investment, intellectual property and trade in services. The evidence points to the need for a rapprochement within the legal system that gives strength to the large corporations. But of course, while this will be our focus, we cannot lay the blame for this dependent relationship simply at the feet of the large, successful enterprises. We should note that, in some countries, lack of capital, inequality, gender discrimination, corruption, crime and war are more fundamental obstacles to development than an imbalance in legal endowments.[12]

INTELLECTUAL PROPERTY REGULATION

We must consider what role intellectual property has to play in the pattern of production and use of the genetic code. The evidence suggests that technical and economic strategies will not always be enough to capture the benefits of this trade in technology. Consequently, the suppliers are likely to seek positive legal control of the code sequences. In the field of biotechnology, the most relevant category of intellectual property is the patent, though we should think in terms of other categories such as the plant varietal right as well. Across industries, the importance of intellectual property is often debatable but, in the biotechnology field, the commercial interest is demonstrable. Intellectual property offers a form of security against those who would reproduce the technology directly or use it to develop derivative products. By discouraging unfair competition, it permits a return to be obtained on the investment made in the innovation. Thus, intellectual property enables the right holder to charge a price for purchase of the technology, even to control its use by others where they might compete. In this way, it provides an economic incentive to research, release and commercialise inventions.

Role of property rights

Within the biotechnology field, it is again useful to appreciate that intellectual property serves not merely as a protective, exclusionary device; it is often employed as a negotiating and organising tool.[13] For example, intellectual property agreements can act as a medium to communicate preferred lines of research between industrial sponsors and research institutes. Furthermore, cross-licensing agreements may be structured to combine specialised assets and coordinate operations amongst industrialists. Likewise, external licensing allows quality and quantity controls (as well as other specifications) to be applied downstream to assemblers, distributors and users, such as farmers.

These controls have various purposes, some more positive and benign than others. After all, we should expect some control rights to come with the grant of property. However, it would remain a concern if the intellectual property rights were to be used, say for the purpose of suppressing genuine competition or denying access to those in need. Certainly, licensing practices have been deployed in an attempt to inhibit the progress of research and development by potential rivals or to make end users dependent on the one source of technology. Thus,

considerable concern has been expressed about the dangers of patenting genes if this grant gives control of the basic building blocks and that control is used to block further research and development. As a more general effect, the drive to patent every small addition or advance creates what has been termed 'a patent thicket'.[14] According to a US Federal Trade Commission study, negotiating the thicket and securing cross-licences consumes around 20–25 per cent of expenditures on biotechnology research and development.[15]

In the realm of plant and animal production, the extent of the rightholder's control takes on a special complexion. Simply growing the plant or animal infringes the right to make or work the invention. In other words, the technology is bound up with its products in a special way. Long-standing practices and relationships are disrupted when the farmers need the permission of the supplier to save and re-sow the seed. Replication may also be necessary for the conduct of research and development on further strains and varieties of biological organisms.

As Pavitt observed, these arguments about the proper reach of intellectual property power were previously conducted within the confines of the nation state and the discipline of industrial economics.[16] But now they carry with them a whole range of international, cultural, social and environmental dimensions. Furthermore, they need to be appraised within the context of the other pressures to open localities to global trade and investment flows (ie, the localities are relinquishing many of the traditional regulatory controls they endeavoured to apply). For example, countries are encouraged to introduce private land titling and facilitate the alienation of resources that were once held to be part of their rural and wilderness commons. We are also aware of the strong push for public sector research laboratories and extension bureaus to sell their intellectual property to the corporate sector or indeed for their entire operations to be privatised, as happened with the successful Commonwealth Serum Laboratories in Australia.

Again, this privatisation assumes an international dimension. Liberalisation pushes back the barriers many countries have placed before foreign investment in their farm supply and services sectors, food processing and retailing sectors. Even the core farm ownership and operation sectors are being opened up to foreign investment in some countries. Moreover, we realise that the Uruguay Round itself, even without a comprehensive agreement on investment, brought the many controls which countries apply to trade in agricultural products within

the purview of WTO. McMichael suggested that bringing agriculture into the WTO was a crucial way of promoting world market integration, precisely because of farming's identification with place and nation.[17] More recently, agriculture has been the sticking point for completion of the Doha Round and one theme running through the debate is a concern about the impact of liberalisation on food security and local culture.

New issue linkages seem to be complicating decision making rather than acting as circuit breakers. Members with threatened farm interests have tied trade liberalisation to the strengthening of food-related intellectual property protections such as geographical indications.[18] We should appreciate that the opposition to intellectual property protection is not confined to the developing countries. The possibility that the traditional farmer might be priced out also creates a lobby in the developed countries too. As we have noted in Chapter 6, the new world countries, Australia and the US, brought a complaint against the EC's existing regime for geographical indications. They have characterised the Communities' efforts to strengthen TRIPs protection as over-protective and anti-competitive. Yet some developing countries have been attracted to geographical indications as a means to claim their own traditional foodstuffs and branding their space.[19]

Support for property rights

If we are to think in terms of the costs and benefits of property rights, then our reference point ultimately is the innovations they help to promote. Within this study, it is the impact of the production of new foods and medicines. In much more direct and immediate terms, property rights confer benefits on those who hold them. With this interest in mind, studies of patent holdings suggest that in the past the major sources have been in the northern countries like the US, the UK, Germany and Japan.[20] Such a pattern reflects the focus of the patent on the contribution of science and industry to technologies such as biotechnology. Research and development has been concentrated in these countries.[21] Again, the main destination for patent registrations has been the 'Triad' countries – countries where the competition commonly takes place.

Where biotechnology is concerned, however, patent protection becomes important to the prospects for commercialisation in other parts of the world too. We have acknowledged that the developing countries are already significant locations for production; potentially

they are also large markets for new foods and medicines. We can think in terms of the technology being imported into such countries. But it is technology often easily replicated through such activities as the re-sowing of seeds or the manufacture of generic drugs. So recognition for patents in these places becomes important to protection too. Argentina's dispute with Monsanto provides an example. The majority of the patents registered in these countries are foreign owned.

In the northern countries, we can identify a variety of contributions to the technology, ranging from public research centres to private start-up firms. Yet a characteristic of the patent is the right to assign or licence it in the marketplace. The patent might end up in private hands, not just because private firms are active in research, but because well-endowed companies can sponsor public sector research in exchange for property rights, acquire patents on the open market, or take over the institutes and small firms when they go searching for the large-scale capital needed for commercialisation. Thus, a growing trend has been for the independent seed centres and companies to be acquired by agricultural chemical and fertiliser conglomerates.[22] A uniform system of patents helps such corporations spread their acquisitions around the world; otherwise they must try import and export controls to prevent the 'copies' getting back into the most lucrative markets.

However, we should not be too quick to set up a dichotomy. It is also true that certain local interests within the importing countries identify with the virtues of intellectual property protection. Especially in middle-income countries, such as the newly industrialising countries, we would expect a direct identification to be made by those whose role it is to act as local distributors, compilers and servicers of technology imports. Protection also offers those local inventors, public and private, something with which to bargain. More countries appear to be submitting to the weight of the argument that it is necessary to offer intellectual property protection, if direct foreign investment and technology transfer are to be encouraged. Long-time sceptics such as the United Nations organisation, UNCTAD, have begun to advocate a more moderate line, a balanced approach to intellectual property. A move to high technology farming provides opportunities for local capitalists who, to quote the Indian Minister for Agriculture, are product, surplus and export orientated.[23] In countries such as India, Chile, Argentina and Mexico, local leaders often give emphatic support to such strategies of economic liberalisation and privatisation.

Whatever the net material gain to a particular country might be, whether it is crucial to attracting investment or not, intellectual property protection is increasingly viewed as the symbolic price to pay for participation in a global economy. A commitment to its protection acts as an indication of a country's goodwill to abide by the rules.[24] On this basis, World Bank and IMF funds have been made available to developing countries on condition that their programs of structural adjustment and good governance include the institution of intellectual property and other liberal legal provisions.

In Chapter 6, we noted how the newly industrialising countries, notably those in south-east Asia and Latin America, were met with the threat of trade sactions from the US, if they did not provide intellectual property protection for high technology. Patent protection (eg, for agricultural chemicals and pharmaceuticals) was a key objective of those bilateral pressures.[25] Despite the achievement of TRIPs, the United States FTAs have continued this pressure. We saw how they induced some partners to forfeit the grace periods for the implementation of patent protection conceded in TRIPs. They have foregone the right to make exception to patentability for plants and animals; they have hedged their freedoms to permit acts that infringe the rights of patent holders.

If industrialising countries increasingly produce subject matter that fits the northern intellectual property categories, software and films in India for example, it is now being asked whether intellectual property might carry additional potential for countries that usually receive high technology. Not only will they receive valuable products from the north, they might also capitalise on the fundamental contribution they have made to the technology. Just as they do for copyrightable subject matter – clothing, music, performance – northern producers borrow genetic resources for food, cosmetics, medicines and gardens. This pool of genetic resources has long been treated as part of a common heritage, a free gift of nature. Now it is recognised that much insight, care and effort have been devoted to the identification and conservation of wild plants and the shaping and strengthening of primitive cultivars and land races. On this view, it would be unfair for their value to be appropriated without acknowledgement or recompense.

In pursuit of this objective, reference may be made to the internal criteria of patents law, or other forms of intellectual property with western origins such as plant varietal rights, to see whether they can

recognise and reward these particular contributions to genetic resources. However, they are unlikely to fit the criteria. Another strategy is for the state in the gene-rich regions to assert dominion or sovereignty over flora and fauna resources. Yet this strategy leaves in question the contributions of non-state entities, such as local cultivating communities and indigenous peoples who have sustained the genetic materials.[26] Lately, the very great interest in this contribution has stimulated efforts at fashioning *sui generis* forms of intellectual property for traditional knowledge (see below).

Much of the drive is to put this knowledge in a form that facilitates access by those who would put it to use in high technology (see below). Contracts can then serve as the medium for granting rights to industrialists. Possibly, the owners of the traditional knowledge will see a return in a share of royalties, even participation in the research. If an economic value can be attributed to the traditional practices, they can perhaps better match up against the pressure of competing uses, such as tree felling to plant cash crops.[27]

Reservations regarding property rights

Yet some doubt whether patent rights and market forces alone have the capacity to produce genuine technology transfer or to promote applications that translate the technology into farming methods, ecological practices and health care suitable for local conditions.[28] With the public sector resiling from its involvement in farm extension work, the OECD recognised that these market forces were all the more central. It counselled that new institutional procedures were needed to ensure that technology transfer occurred through the private sector. Otherwise, there was a risk that the differences in agricultural wealth between the developed and the developing countries would widen.[29] The OECD also noted that commercialised biotechnology is less likely to find an application in the more marginal, smaller-scale spheres of activity where, for example, the farmer saves seeds for the following season, or otherwise the market is not seen as especially valuable to industry.

Likewise, the market alone may not provide enough incentive to research and produce drugs for diseases that afflict only the poor or a small minority of people. Indeed, some scientists feel the lure of intellectual property and commercial returns reduces sharing of research results.[30] Without, at the very least, appropriate safeguards, intellectual property becomes simply an instrument of privatisation.[31] In response,

one group of scientists has resolved to place their findings on the human genome immediately in the public domain by posting them on the internet. The global open software movement is well developed; now a network is promoting the free exchange of bio-informatics.

Moreover, some members of indigenous groups, joined by ecological and ethical movements in the north, remain opposed to the application of any kind of economic property rights to natural genetic materials or higher life forms.[32] This ethics debate is ultimately about the direction of scientific research and the uses to which its results are put by industry and the service sectors. One might say there is nothing special, certainly nothing crucial, about the ownership dimension.[33] Ownership can even confer the necessary control to empower choices about industrialisation and commercialisation. These days, university researchers may argue they must patent, otherwise somebody else will do so. Indigenous groups vigorously claim native title to flora and fauna. Governments (like Iceland) reap the economic value of the unique medical data their agencies have collected over the years.[34]

Nonetheless, it seems that public concerns have found a convenient forum in the property issue. In Europe and the US, also India, for instance, the issue of patentability has provided a point of entry to the debate for environmental and other non-government groups. There have been third-party interventions in patent proceedings and lobbying in the legislatures over amendments. Indigenous peoples have opposed economic property rights, pointing out that the materials have spiritual and cultural significance bound up with the meanings, traditions and customs of the group as a whole. Like their scientist counterparts in the north, the locals may be as much interested in moral as in economic rights, collective as in individual rights. They argue that market-orientated rights lead to the alienation of the material, with very little return and perhaps much disruption to the community.[35] Gibson points out that their interest is often not so much in the object of property itself, as in the ability of the community to control it and the relationships that such control builds. They help define the identity and integrity of the community. This legal sensibility is very hard to reconcile with a perspective focused on exploiting economic resources.[36]

If the local regimes contain 'flexibilities', they operate within a framework of intellectual property protection. The pharmaceuticals experience below shows how hedged those flexibilities may be. When the intellectual property framework shows a limited capacity to support

exceptions, or to accommodate unconventional claims, a new framework is needed. Intellectual property will have a role, but that role is to be gauged according to its contribution to the greater goals of access to knowledge, health, education and environment. Intellectual property has to find a place within this framework consistent with the encouragement of public investment, private philanthropy and ethical practices, now operating on a global scale.

It is for these reasons that we can expect to find legal pluralism in this field too. Let us look now at the evidence of national difference, beginning with patent law, then moving to other, possibly complementary forms of intellectual property law. At the same time, we should investigate how the international treaties mediate the national differences and, in a field of this complexity, how the treaties themselves articulate and interact so they might work to bring the forms together in a positive way. Our head treaty is of course TRIPs, but our interest is in the potential for reconciliation. In concluding his study of global piracy, Ikechi Mgbeoji at 197, offers this proposition:

> No single state is wholly independent and self-sufficient when it comes to plant life forms. This compels international cooperation, good faith, and, more important, a reconciliation of the parallel and discordant legal regimes on plant life forms and TKUP instituted by the CBD, the FAO, and the WTO. It would be unhelpful to maintain a gladiatorial state of affairs between the regimes created by these international institutions.[37]

But this is an extremely ambitious, one might say, idealistic goal. How, as Anthony Taubman proposes, can we create a 'functional vector', that ensures justice is done to local producer norms while meeting legitimate user interests, so that it forms a global basis for local protection?[38] Is it possible to do this across a global field or do we have to be satisfied with tentative moves, small advances and retreats, a mixture of inconsistent measures? Could a TRIPs form of intellectual property settle this issue satisfactorily?

THE CONCEPT OF INVENTION

While many countries now have patent laws on their books, they have significant differences in their coverage and strength. The space for differentiation can be opened up in several ways. As we shall see, the defensive responses include: to employ strict criteria for the recognition

of patentable subject matter, oppose grants in individual cases, maintain categories of exception to patenting or patent infringement as a matter of public policy, prefer milder specially tailored *sui generis* forms of intellectual property for some claims, and provide for compulsory or non-voluntary licensing in certain circumstances.

Variations are to be found in the texts of the national legislation. Less transparently, they are shaped by the practices of the administrative offices and the decisions of the ordinary courts. Sell finds that, even where countries have responded to pressures to institute protection, implementation and enforcement of rights have lagged behind.[39] Of course, we should appreciate that such policies do not always signify opposition to intellectual property. Sometimes, they are evidence of a lack of technical resources or a preference for other strategies such as informal arrangements with potential transgressors.[40] Once again, it would be too ambitious to try to capture the full extent of this legal diversity here.[41] Instead, we shall focus on a couple of key aspects. The first involves the viability in patent law of the distinction between a discovery and an invention.

The discovery/invention distinction

If patents are to operate in an instrumental fashion, to serve the purpose of stimulating innovation, the law should apply the kind of criteria that can identify whether applications do in fact constitute inventions. For a long time, the threshold requirement that claims comprise an invention was read to restrict patents to the products and processes of secondary manufacturing. But in acknowledging developments in science and economy, the concept has been relaxed in many northern jurisdictions to embrace the commercially valuable technologies which are employed in the agricultural and service sectors. Did such liberalisation empty the concept of all its content? Biotechnology is notable for employing processes and products that are alive. Patent law has allowed that inventions can be living things. But at the same time a distinction between naturally and non-naturally occurring products or processes came to the fore. Yet selective plant breeding and genetic engineering cannot help but involve the interaction of natural and non-natural elements. The law is then called to decide when the role of human agency is enough to transform a living thing from a discovery into an invention, to distinguish something found in nature (like the bark of a tree) from something made by man. Understandably, such a distinction can be hard to make. How ready the patent offices and the

review courts are to do so is an important indicator of national divergence.

In certain jurisdictions, patent law is highly developed. We should note several features here, while conceding that anything we say will only be a crude summary. First, it is worth appreciating that, in seeking to identify real innovations, the office or court may break the claim for a patent into constituent steps or parts. So a patent may cover a process, product, use or application. In biotechnology, a process may be invented to constitute a product (from composite materials) that in turn is incorporated in another product or employed in another process, all with uses and applications in mind. Disaggregation along these lines allows the patentable to be divided from the non-patentable, though the decision makers naturally may resist too much discernment of this kind. One example is the product by process patent. In this category, the product is deemed patentable because the process by which it is made satisfies the criteria.

On the other hand, patent law may extend the reach of rights if it is to ensure that its protection is effective. Because the rights of the patent holder are meant to encompass the making, use, selling and maybe even the importing of an invention, the rights may reach to control over the kinds of materials and products that embody the invention. In the case of plant technology, control issues run to the seeds, fruits, flowers, leaves, meal, foodstuffs and medicines, which contain the product or process, and which in some cases enable the re-making of it.

Patenting genes

Given these possibilities, it might not matter to science and industry whether the basic genetic material is patentable. The focus will be on the 'value-added', the processes employed in extracting and recombining these materials, together with the end products that are so constituted, and the uses or applications to which they are put. But it seems unlikely that patenting would be so selective unless the law insisted and the evidence is that the claims do extend to the genes and gene sequences themselves. One immediate reason for the interest in the patentability of the genes is that the attendant processes and products are, in becoming more routine and predictable, unable to satisfy the criteria and anchor the claims in their own right.

In this respect, we should consider the criteria the patent systems of the north have developed for identifying patentable subject matter. We

might characterise these criteria as internal and technical criteria. They are internal in the sense that they do not set the boundaries to the subject matter. Rather, they tend to judge the eligibility of the individual claim. They are technical in the sense that they are interested in the quality of the scientific input into the claim and its relation to the prior art. These criteria are said to reflect the system's concern with encouraging or rewarding only true innovation. The criteria are novelty, inventiveness (or, in some systems, non-obviousness) and utility (or industrial application). Crudely put, novelty requires that the invention not be already known to the public, in the sense that someone skilled in the science would be in a position to replicate the invention. An invention involves an inventive step if it amounts to something more than the skilled practitioner could have worked out how to do. In turn, utility requires the invention to be developed to the point that it demonstrates a practical application of economic value.

We might see how these science and industry oriented criteria do not readily recognise indigenous knowledge. Yet they could also serve to put a brake on their appropriation by biotechnology from the north. For example, it may be hard to say that something which has existed in nature and has been put to use by local people remains novel. The pro-technology response is to look for the human technical intervention that transforms a discovery into an invention and to say that the characteristic way in which biotechnology intervenes fits the bill. Specifically, the response is to say that the ingredients of novelty, inventiveness and utility, which are involved in the isolation and purification of a gene sequence, render it an invention.

Evidence of this approach is to be seen in early patents office guidelines for applications. The guidelines seek to carve out a category for the science that is working so ingeniously with these natural materials. For example, European patent office guidelines once advised that it would be considered a mere discovery to find something freely occurring in nature; Japanese guidelines indicated that the inquiry was whether the materials are still as they would be in nature without interposition of artificial means; the US system granted patents for the pure cultures of organisms if they subsist in nature only in an impure form.[42] Accordingly, claims have tended to recite a formula of a substantially isolated and purified form, rather than simply 'read on' the genetic sequences.[43] The result is that a number of patents have been granted for genes.

Judicial responses

As we know, patent office practice faces review by the courts when proceedings are taken to restrain infringements of the patent. In this area, an issue for the courts is whether to treat the concept of an invention as having any real content beyond the requirements of what we have called, for convenience sake, the internal, technical criteria. A threshold concept of invention gives greater expression to the policy behind granting patents. However, where the legislation simply posits a general concept like 'invention', we might expect the effective standard to depend on the content of judicial decision making. Reference will now be made to the early cases, to indicate how movement to this level can sustain pluralistic national jurisprudence. Yet, when the parties are major industrial corporations and social movements, interested in patenting worldwide, such divergence between jurisdictions becomes an international inter-legality worth resolving.

Where the process of arriving at the genetic code was not itself inventive, UK courts have acknowledged the possibility that they would be patenting a discovery. The early cases reveal the quite genuine struggle of the judges to fit the new technology with the legal concepts. A key case concerned Genentech's attempt to enforce a patent to a DNA sequence coding for an enzyme that dissolved blood clots.[44] Here, the Court of Appeal had found that the method of arriving at the sequence had become routine; it had also said that the product was to be regarded as known and obvious. There being nothing new in the claims, apart from the use of the sequence, at least one of the judges took the view that the claims were founded on the ascertainment of an existing fact of nature, in other words a discovery.

In contrast, the Court of Appeal was able to rule in favour of Chiron's patent over a sequence that encoded a polypeptide providing antigens to Hepatitis C.[45] It characterised the invention as finding and sequencing the initial clone of the virus. If the court thought the inventions had in common the essence of discovery, it would not entertain the argument that the patent claimed a discovery as such. However, this favourable decision was followed by a ruling against Biogen's claim to a sequence coding for proteins displaying antigen specificity to Hepatitis B.[46] The Court of Appeal said that, as the process of arriving at the sequence had not been inventive, but had just searched at random for DNA segments, the cloned molecule did not constitute an invention. The process could not make the product

patentable. However, it is significant that, in parallel proceedings, the European Patent Office's Technical Board of Appeal was satisfied that the same method was inventive and that there was an invention.[47] Yet, subsequently, the House of Lords was to uphold the Court of Appeal decision against Biogen on the ground that its application involved no inventive step.[48] Yet, in passing judgment, Lord Hoffman was of the opinion it was unlikely that anything which satisfied the internal criteria would not also be an invention. While in theory there might be such cases, the present case was not one.

The US courts have overcome the uncertainty the UK courts have experienced by emphasising the distinction between the natural and cloned genes. A good example comes from the Federal Circuit ruling on Amgen's claim to a sequence encoding a protein that stimulates the growth of red blood cells.[49] The court pointed out that the claimants did not invent the gene as such, their claim was to the novel isolated and purified sequence. This sequence could be regarded as novel because 'you had to clone it first to get the gene sequence'. This decision was followed by, among others, the decision in *Re Deuel* supporting a patent for a sequence encoding the production of human and bovine heparin binding growth factors.[50] Here, the court felt that the method of isolation was not inventive. However, the sequence itself was novel because prior knowledge of the protein was at too general a level to identify the sequence before it was extracted. Analogs could not be used because ultimately each sequence is to be regarded as structurally different.

The viability of the distinction

This focus at the level of court decisions shows how differences remain possible. The choice of jurisprudence is a critical one from a policy point of view too. We can readily concede that the isolation of the genes involves more than mere recognition of a natural resource. But can we say that the technical human intervention really alters them? In a critical piece, Looney argued that the Amgen approach confuses the threshold and technical criteria of patentability or, more precisely, it squeezes out entirely the policy layer represented by the threshold criterion of an invention. She comments: 'The interpretations draw a distinction where none may exist – an object of nature (a gene), unaltered by human innovation, does not necessarily lose its status as such simply because it is outside the body and has an identified function.'[51] Equally critically, Ducor argued that the *Re Deuel* approach

turns non-obviousness into nothing more than novelty. In any case, even if the precise structure of the DNA molecules is never fully known until they are isolated, that is, assuming they do not have structural analogs, they may well express the same informational content and operative function. While the isolated DNA is always different from the natural DNA, because it drops off redundant material, such differences might also be viewed as insubstantial or incidental.[52]

On the other side of this important debate is the understandable desire to provide reward, and so to give encouragement to the considerable degree of research activity and expenditure that goes into discoveries. For example, Karet criticised the decision in Biogen: 'as difficult for the biotechnology industry because the production of known targets having new levels of purity has often represented an immense research effort . . . The work that has gone into making these previously identified but scarce products will not, under this decision, be patentable unless a patentee can show surprising research results or the development of a new and non-obvious method'.[53] In the past, some of the greatest contributions to medicine have come from the inquiries and insights of the natural scientist. But Ducor argues that the explicit purpose of the patent system is to single out the exceptional activity of invention. He argues that a *sui generis* form should be instituted if useful scientific or industrial work is to be recognised.

A related debate concerns the breadth of individual patent grants. An applicant may have invented a process that is capable of many applications, in the future; likewise, a product may suggest a number of analogues, complementary sequences, allelic variations, or similar species. It is not hard to see how a patent over the basic genetic starting material could be used to block researchers down the line. The US office in particular has been criticised for granting very wide and sometimes overlapping claims. Crespi comments: 'In a high proportion of biotechnology patents the broad product claims are in effect directed to the objectives of the research or the results of research and do not pinpoint the actual inventive solution of the problem'.[54]

The NIH claims

The difficulty of this issue was highlighted when the National Institutes for Health (NIH), together with their employee, Craig Venter, applied to patent sequence tags that are used to mark the location of gene sequences coding for basic human brain functions. The tagging of these sequences was the result of participation in the human genome project,

a multi-million dollar, cross-country effort to map the human genome. Rejection of the NIH's sequences, on the ground that they were products of nature, would bring down other patents issued to the biotechnology industry. But the scientific community was concerned that such patents would obstruct applied research work down the line. Collaborators in the public project from other countries, including Britain, France and Italy, regarded the applications as a breaking of ranks.[55]

The US Patent Office rejected the applications on the basis that they failed to meet the internal technical criteria. The requirement of novelty presented one problem for the Office because, at the level disclosed, some of the sequences were already recorded in existing data bases. The Office also took the position that the applications used a method obvious to others, did not identify any non-obvious properties of the sequences, and did not solve a problem in a way not previously recognised. The main objection mounted to the applications was lack of utility or industrial application. The applicants were said to be seeking patents when the uses of the genes were still unknown. On this objection, patent systems should only be used to reward those who have invented a use for the material; the grant can then be limited to that use and others afforded scope to devise further uses. The Office did not accept the applicants' argument that the tags were already being used in research work as genetic markers or tissue probes.[56]

Ultimately, the rulings were not to be tested in the courts, for the applicants withdrew the claims. Craig Venter was permitted to move out of the NIH, form the company Celera, and contract with the pharmaceutical company, WR Grace, for the development of the technology. Here, we see the dilemmas for science highlighted. Paradoxically, it is possible that the grant of a patent to the NIH would have provided the public sector with an opportunity to obtain a return on its huge investment of taxpayers' monies. As Cohen and Boyer (and their universities) were prepared to do in the case of the basic gene splicing technology, the NIH might have been prepared to license all comers at a modest fee. Craig Venter continues to work energetically on the mapping of the genome. Celera has made many applications for patents, but it has also sought to widen its strategy and earn money by providing genetic information customised to clients.

In recent years, the US Patents and Trademarks Office, Japanese Patents Office and the European PO have networked patent administration through the Trilateral Cooperation Project. Based on memoranda

of understanding and regular meetings, much of the coordination at this level has been in matters of procedure, though procedural standardisation also continues to achieve formalisation at the treaty level, the Patent Law Treaty now added to the Patent Cooperation Treaty. However, in several respects, the three offices have also brought their substantive policies on biotechnology patents into line. One, the requirement of utility, has led to a tightening of policy. Japan and the EC have adopted largely parallel policies to the US requirement for specific, substantial and credible utility, following concerns patents were being granted for genes a long way removed from any industrial application.[57] Utility would now seem to be the main control on patentability. The three offices' joint policies have readily accepted that cloned genes meet the requirements of novelty and inventiveness.[58]

EXCEPTIONS TO PATENTABILITY

Plants, animals, people

Given the complexity of the internal, technical criteria, we might not be surprised to see that the focus of opposition often turns instead to the availability of any public policy grounds for denying patents. But in recent years, the offices and courts have shown an understandable reluctance to take on the large economic and moral arguments involved in these kinds of objections to patenting. In the landmark *Chakrabarty* case, for instance, the US Supreme Court was most emphatic in its deference to the legislature as the arbiter of public policy in such matters.[59]

The appeal bodies in Europe also tried not to take sides in these debates. However, the activism of environment groups have obliged them to rule on objections expressed in terms of morality and *ordre public*.[60] For example, in opposing the Plant Genetic Systems application (see below), Greenpeace raised arguments based on common heritage, free access to genetic material for plant breeding, and biological diversity. So too, the Green Party questioned the morality of the use of women's bodies for a technical process when it opposed a patent for human relaxin gene. Proceedings in relation to the patent for Harvard University's Onco-mouse had to be extended due to opposition from some seventeen ecological and animal welfare organisations, together with over 1,000 individuals. A large hall had to be hired to hear all the objections.

At the same time, environmental groups, as well as local industrial interests, have pressured the legislatures to maintain or to extend the explicit statutory exceptions. It should be noted that many countries have maintained exceptions for processes or products in which these natural resources are being incorporated or employed. These exceptions include pharmaceuticals and methods of human treatment. What of the genetic materials themselves? Perhaps because the technology was not anticipated, few statutes make explicit exception for human genes and life forms, though this issue is now on the agenda of certain legislatures. When it arose in Australia, for instance, the national parliament chose not to adopt an exclusion relating to genes but instead excepted: 'human beings and the biological processes for their generation'.[61]

The most directly relevant exception has been made for categories of plants and animals and for processes for their production. In his survey, which was reported in 1991, Lesser found that fifty-two countries (out of 115), ranging from very low to high income countries, excluded plant and animal varieties; forty-two excluded essentially biological processes.[62] Of the main locations for systematic cross-breeding and genetic engineering, the US and Japan have been notable in not maintaining such exceptions. As a location for high technology innovation, the EU carries perhaps the most well known exception. But, at the time of the survey, other countries were also reported to have excluded plant and animal varieties from patentability, including Argentina, Brazil, Canada, Israel, Mexico, Switzerland, Taiwan, and China.

Experience with the European exception

More recently, some of those countries have been modifying such exceptions or removing them from their patent law. The pressure for change comes partly from domestic interests; as we noted above, exceptions have also been given away to obtain a free trade agreement with the US. The exception contained in the European Patent Convention has been the focus of much contention. Again, the object here in this study will be to use it as an illustration of the scope for divergence as well as convergence.

The exception provides that patents shall not be granted in respect of plant or animal varieties or essentially biological processes for the production of plants or animals. However, this provision is then said not to apply to microbiological processes or the products thereof.

Arguments have been made that the courts should read it down restrictively. For instance, it has been argued that it does not apply to individual plants and animals where they do not in themselves constitute a variety. Nor is it meant to encompass the basic genetic constituents, at least so long as they do not provide by themselves the means to reproduce the variety. Furthermore, it has been suggested that little human intervention is needed to render a process non-biological and, in any case, biotechnology really produces plant and animal varieties by microbiological processes.

Despite the momentum in these contentions, which saw a European patent granted for the Harvard Onco-mouse, a 1995 decision by the European Patent Office's Technical Board of Appeal gave the exception new vitality.[63] Again, this decision is explored, not to provide a statement of the settled law but rather to indicate the variation that is possible. In this case, Greenpeace opposed a claim by Plant Genetic Systems to a gene that coded for a protein that worked to nullify the effect of a herbicide on a range of broad leaf plants (including potatoes, sugar beet and tomatoes). The Belgian company also claimed the process for transferring the gene and the 'resulting' cells, plants and seeds.

The Board ruled that plant cells could not be considered to fall under the definition of a plant variety. But the claim to the plants and seeds was a claim that encompassed or embraced a variety and could only be allowed if they were the product of a microbiological process. It conceded that the initial microbiological process step, the transformation of the plant cell, had a decisive impact on the final result. It was by virtue of this step that the plant acquired its characterising feature that is transmitted through generations. However, the Board considered that the subsequent steps of regenerating and reproducing the plants also had an important value and contributed to the final result. Hence, the multi-step process could not be regarded merely as a microbiological process. The case went to an enlarged Board of Appeal that took the view that the claim was directly to a variety: the genetic modification, which rendered the plant distinctive and stable through several generations, made it a variety.[64]

Greenpeace regarded the decision as a success. But, interestingly, Plant Genetic Systems, which held the patents with Biogen of Cambridge, Massachusetts, said that it was also happy with the ruling. Anyone who wanted to sell plants that were resistant to the herbicide would still have to use the company's gene and its technology for

inserting the gene. Selling seeds from one year's crop to be sown the next year was not a realistic option because the plants from the second-generation seeds were vastly inferior to those sold by the company.[65]

European Biotechnology Directive

At this time, the pro-patent groups were entitled to expect the exception to be removed from the Convention. Indeed, since the 1980s, the European Commission had sought to introduce a Directive that would clarify and strengthen patent protection for biotechnology. In doing so, the Commission's executive bodies were responding to arguments that European industry would be placed at a competitive disadvantage if adequate protection was not to be available. For example, companies would be inclined to fund research and transfer operations to jurisdictions such as the US where such exceptions were missing. Foreign producers had also made representations to these bodies. In these ways, we can see how the position on exceptions produces another expression of inter-legality.

In early March 1995, the European Parliament voted to abandon the Directive. Elements of the Directive were opposed by local economic interests, such as the farming lobby in some of the member states. Advocacy groups, including Greenpeace, the Genetics Forum and Genetic Resources Action, had run campaigns. In its tortuous path, amendments were introduced in the Parliament to exclude from patenting parts of the human body as well as to retain the current exception for plant and animal varieties. The Parliament was unable to reach agreement on changes. Environmental groups described the result as a victory for 'conscience over capital'.[66] But the Bioindustry Association also expressed relief. It had been concerned about the ambiguity of the compromises in the Directive. The woolliest it said had been the attempt to draw a distinction between human genes and cells removed from the body – which were deemed unpatentable – and synthetic versions of those genes produced in the laboratory – which the draft directive suggested could be patented.

However, the story of the Directive was not to end there. In December 1995, the Commission issued a fresh proposal. After several further revisions, it was given a preliminary approval by the Parliament in July 1997. The Draft Directive declared that plants and animals may be patented if the practicality of the invention is not technically confined to a particular plant or animal variety. It also provided that the human body, at the various stages of its formation and

development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions. But an element isolated from the human body or otherwise produced by means of a technical process, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element. The Directive was subsequently confirmed.[67]

Exceptions elsewhere

Other countries have also revisited their patent laws.[68] The trend has been notable in Central and South America, yet each law reveals its own slight variation. The Andean Group, Bolivia, Columbia, Ecuador and Peru, together with Chile, Brazil and Argentina, have strengthened their patent protection. For instance, in Mexico, the 1991 law already admitted the possibility of patenting plant varieties; its new laws encompass biotechnological inventions. However, in Argentina and Chile, the new laws carried exclusions for plant varieties and essentially biological processes for their obtention.[69] Brazil included exclusion for substances that already exist in nature, while, interestingly, the exclusion which the Andean Community of Nations (CAN) agreed extended to those substances which replicate them. Argentina's law also excluded both pure biological and genetic material, as it exists in nature, and their 'replica', as well as the biological reproduction process.

Bilateral approaches from the US, leading in some cases to FTAs, are placing even these limited exceptions under pressure.[70] As a result of its FTA with the US, Chile has now dropped the exception for plant varieties. The FTA with the four Central American countries also eliminates the exception. Peru and Ecuador have now negotiated FTAs with the US.[71]

So too the prospect of membership in an expanded NAFTA and now the formation of an FTAA have complicated national strategies. Drafts of the FTAA allow an exception for plants and animals. But they also expand the scope of patents to include any biological material derived through multiplication or propagation of the patented product, or directly obtained from the patented process. Furthermore, where patents protect a specific gene sequence or biological material, the protection will cover any product that includes that gene sequence or material expressing that genetic information. This subtlety could mean certain plants and animals will be drawn into patentability.[72]

The fate of this plurilateral agreement hangs in the balance because of difficulties of obtaining enough political support in South America.

EXCEPTIONS TO INFRINGEMENT

A further source of the pluralism in this field has been the provisions of exceptions to infringement, so that other producers may deal with the invention in certain ways without attracting liability. A more direct intervention is for government to license production without the authorisation of the patent holder, usually called compulsory licensing in the case of patents. Compulsory licensing powers may be built into the intellectual property scheme itself. Licensing may become the condition for a foreign investment approval or the subject of a remedy in competition law.

Categories of exception

We noted above that researchers infringe when they conduct experiments with patented material in order to make advances on the technology. Most of the western European countries already make explicit statutory exception for experimental use. In the US, the courts have entertained the idea of reading such an exception into the legislation, so long as such use is not regarded as depriving the patent holder of the commercial benefits of the invention. Because the research sector may itself be regarded as a commercial market for biotechnology inventions, the courts have not been supportive. An express exception would seem to be needed. We saw above, for example, that Venter and the NIH claimed the sequence tags could be used as genetic markers or tissue probes.

In this field, borrowing from the approach taken within plant breeders rights regimes (see below), amendments to the European Directive sought to establish a 'farmer's privilege'. Farmers would be entitled to use the seeds from a genetically engineered plant to sow another crop, though all but the small farms would be required to pay a royalty. Then the revised version of the Directive extended the idea of a privilege to animals, proposing a right to use patented livestock for breeding purposes on one's own farm. In recognition of the same small farmers' lobby, proposals for a farmer's privilege have been put before the US Congress. Courts in the US have taken the view there is no freedom implicit in patent law to save and replant seeds (see *Monsanto* v *McFarling*, 2002). As patent law encroaches, developing countries

have been concerned with these exceptions too, given the impact on the traditional practices of their many small-scale farmers. When the patented materials come predominantly from the north, agricultural livelihoods and food security are basic reasons for wishing to maintain this freedom.

Government support for the production of generic drugs involves making exceptions to infringement and, in extraordinary circumstances, granting compulsory licences. Exceptions allow secondary producers to make preparations for marketing the generic versions. They are given permission to make samples to submit to regulatory authorities for health clearance, in the process possibly exporting constituents to have the drug made up. More controversially, they are allowed to stockpile copies for release as soon as the patent expires. The secondary producers are also authorised to make (limited) use of the patent-holders' own test data when they submit their copies to the regulatory authorities for marketing approval.

Compulsory licences

Extraordinarily, governments would grant compulsory licences to deal with a health crisis. If the patent holder is rationing supply or charging prohibitive prices, government might see the need to license a local producer to provide copies quickly and cheaply. If local firms do not have the manufacturing capacity, the government will need to go abroad in search of generic supplies.

Rather than simply responding to a crisis, governments might strive to build up local industry capacity. Operating on a case-by-case basis, governments have sometimes made local working and technology transfer the condition of foreign investment approvals. For example, countries that largely take imports invoke compulsory licensing powers to require local production. Such a requirement might be needed because the product is being withheld entirely from the local market. Where imports have been made available, local working is thought to generate business for local industry, as well as increasing competition in the product market. Price to the consumers is then another consideration.[73] Local working might lead to more lasting benefits such as the transfer of technology to indigenous firms and local workers becoming skilled in the development of technology centred on local needs. Where foreign producers seek to locate in a host country, industry policy may mandate external licensing and joint ventures; such policies respond to a concern that the foreign producers will keep the technology in house.

Licensing requirements are sometimes the subject of a remedy in competition law, where refusals to license local firms at all or the grant of licences exclusively to affiliates, are treated as being anti-competitive. Licences granted to 'outsiders' can also be hedged in with all sorts of restrictive conditions, such as requirements to license back any improvements made to the technology, or promises not to challenge the validity of the patent itself. Litigation of 'infringements' can be designed to tie up or scare off rivals. In the developed jurisdictions, the authorities sometimes place controls on such tactical uses of patents.[74]

Competition policy is ambivalent though about refusals to license and many of the licence conditions. Nor has competition policy halted the take-overs of small biotechnology research, seed or drug companies. It requires considerable technical sophistication and resourceful determination to pursue misuses in the varying circumstances of each case. Most developing countries are only implementing western-style competition regimes now.[75] While it is good at privatising public instrumentalities, competition law has difficulty grappling with these structures of transnational private power. In its 2002 report, the US Federal Trade Commission (FTC) found that relentless patenting was creating a thicket of controls that rendered competitors' freedom to operate uncertain and expensive to resolve. But it did not think that the situation justified general reform. The FTC intervened most frequently in the pharmaceutical sector, where private litigation became an abuse of process.[76]

In the past, some countries attached performance requirements directly to approvals for major investments projects. As, from one direction, trade and investment liberalisation attacks these national instruments of policy, it becomes increasingly important that the international agreements provide a coordinated counter-balance to the abuses of property power. Later in this chapter, we consider the TRIPs provisions for exceptions to patent infringement and for compulsory licences; we shall assess the WTO's more general flirtation with international investment and competition policy in Chapter 8.

PLANT VARIETY RIGHTS

We should compare now another form of property, plant variety rights (the PVR). While conferring much of the familiar bundle of rights, the PVR can be attractive to a wider range of countries than the patent.

Formulations have attempted to balance the owners' rights against the need of other groups to have access to the varieties for research and recycling purposes. It has also seemed to offer something more positive to those breeders – and cultivators – whose contribution largely go unrecognised by the high technology focus of the patent. Could it be the form to accommodate the concept of a traditional variety?

The UPOV Convention

The formulations display national differences. The disparity between the PVR and the patent gives another twist to the inter-legalities in this field. Moreover, the national PVR is a form over which an international treaty, UPOV, has exercised influence, almost from the beginning. The pioneers of this form, the European countries, were instrumental in the 1961 establishment of the Convention. Most countries have joined later and the membership continues to grow. Meanwhile, the Convention has gone through revisions (1978 and 1991) that have moved it further in the direction of a fully blown property right.

Countries are allowed to choose which version of the Convention to sign. By 1991, there were eighteen signatories to the 1978 version, all of them industrialised economies of the north.[77] Around fifty states participated in the 1991 conference, along with a range of inter-governmental and non-governmental organisations. Spurred on by the TRIPs agreement, that is, the demands of Article 27.3(b), other countries are now instituting their own PVR schemes. They include African, Eastern European, Latin American and East Asian countries. Recently, the Convention had attracted fifty-nine signatories, fourteen of them developing countries. Yet, it is significant that many of the countries coming on board, especially the developing countries, have preferred to adopt the 1978 version over the 1991 version.[78]

So the Convention has created a framework for national law, while contributing itself to differences. The differences are not just in the extent of PVR protection; they also concern the relationship between the PVR and patent. This relationship is part of the TRIPs agreement too of course. Furthermore, the US FTAs have gained their partners' agreement to dispense with the exception from patentability for plants and animals and to subscribe to the 1991 version of UPOV.

The relationships may range wider. At the CBD and WIPO (see below), countries have explored ways to give recognition to the traditional knowledge on which the value of the variety is founded. In the

regulatory criss-cross, regional agreements, for example the south-south agreement of the Andean Community, have developed their own models for recognition.[79] The PVR, as well as the patent, might be a source of support for this recognition rather than a competitor.

Plant breeding

Let us now analyse the PVR, endeavouring to keep track of the 1961, 1978 and 1991 versions of UPOV. We should begin by saying that the subject matter of the PVR is much more specific than the patent. It is settled on new plant varieties. It is thus available only for a product and not for the processes of arriving at it. Moreover, it subsumes into ownership only the whole plant, and not its constituent parts such as its genetic make-up. The 1961 Convention also allowed countries to exclude certain types of plant from the coverage of their national scheme. But the 1978 Act set minimum numbers and the 1991 revision requires protection to be given to all genera or species within five years, new members doing so within ten years. In part, the aim of this stipulation is to move more member states to protect varieties that are not grown locally but are imported from states which do not confer PVR protection. As this happens, it is possible to see the terminology 'bio-piracy' gaining in currency. Barry Greengrass (when, fittingly, the Vice-Secretary General of the UPOV Convention) offered an example: 'thus far, the UK, as an importing country, has probably been uninterested in the protection of bananas. This will now change.'[80]

In order to say that a plant variety has been established, it must prove to be distinct, homogenous and stable. These requirements call on characteristics that mark off the variety from existing plants and these characteristics must be sustainable across generations. These criteria are struck at such a level of generality that they allow room for differential recognition and practice. For example, Lesser felt that the Europeans were more rigorous than the Americans in running field trials, the American PBR Office accepting whatever distinctions are claimed by the applicant. But how should a variety with such characteristics be obtained? The crucial question is whether it demands inputs akin to those required by patent law for an invention. It would seem the variety should display novelty. Yet, the 1978 Convention was to equate that quality simply with lack of commercialisation. On this basis, the variety was to be regarded as novel if it had not been offered for sale (with the breeder's agreement) prior to the application for the right. The 1991 Act altered this criterion slightly, to specify that the

propagating or harvested material should not have been sold or otherwise disposed of with the breeder's consent. But it also said that the variety had to be distinct from varieties whose existence was already a matter of 'common knowledge'.

We should remember that the right is increasingly styled as the right of the plant breeder and the 1978 Act did require that a variety originate with the applicant. However, it is relevant to our discussion to note that it is quite possible for a variety to be discovered in nature and meet the general criteria of novelty, distinctiveness, homogeneity and stability. The indeterminacy of the convention left the question to national legislation. For example, Jarvis thought that the criterion of origination in the Australian legislation – where a person carries out activities in relation to plants in the hope that a variety would originate by natural process – was not enough to catch plants found in nature.[81]Correa cited Argentina, Chile and Peru as countries where PBR legislation explicitly provided that discovered varieties have been protectable.[82] More recently, other countries have embraced this option, both Malaysia and Sri Lanka employing the PVR in part to give recognition to traditional knowledge.[83] However, the 1991 Act defined the breeder as a person who bred, discovered and developed a variety. The attachment of the word 'developed' complicates the picture; evidently the original proposal to the conference did not include it.[84]

Breeders' rights

In the 1978 version of the Convention, the plant breeder obtains the right to control production of the plants of the variety and the reproductive or vegetative propagating material (such as seeds and cuttings). This is for the purpose of commercial marketing. Such protection seemed to be aimed against those who deal competitively with the breeder in selling the variety as a commodity to users. But what of the farmer who generates reproductive material from the use of the variety? Significantly, the model left a gap in the rights. It allowed national legislators to afford farmers the privilege of using reproductive material to grow another crop, so long as the crop would be sold for food, fuel, fibre or some other secondary product, rather than sold as a plant for others to grow. Giving seeds to another farmer would seem also to have been permissible.

In addition, the 1978 model made provision for a breeder's privilege. A protected variety and its reproductive material were to be usable as

an initial source of variation, where the purpose was to originate other varieties. But of course ultimately the variation would have to be distinguishable from the original variety; otherwise its production would involve the reproduction of the original variety. The 1978 Act also allowed for compulsory licensing.

The 1991 Act strengthens the breeder's rights over access to the resource. In a significant change to the onus of protection, it adopts the general position that any production, reproduction (multiplication), marketing, exporting or importing shall require the breeder's authorisation, whatever the purpose. The 1991 Act also affords the owners' protection greater bite by extending control to the harvested material and the products made directly from this material. Both importing and exporting can now be proscribed, allowing members to attach material or product that is going to or coming from countries that do not confer protection.

Yet Greengrass points out: 'the very widely differing natures of the agricultural industries of UPOV member states and the varying political situations in these states made it essential nonetheless to provide states with the option of excepting the planting of farm saved seed. Accordingly, member states may restrict the right in relation to any variety so as to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest obtained by growing on their own holdings'.[85]

At the same time, the 1991 Convention provides that the member states may only grant this privilege within reasonable limits and subject to safeguarding the legitimate interests of the breeder, such as the payment of royalties. From Chapter 6, we see how this proviso mirrors a form of words increasingly prevalent in international parlance. Furthermore, the Convention counsels the parties to consider the merits of doing so on a variety-by-variety basis. The conference recorded formally the understanding that the provision not be read to extend the practice to sectors in which such a privilege has not been a common practice. In this way, the allowance for a farmer's privilege is formalised, but it is at the same time heavily circumscribed.

Acts done for experimental purposes and acts done for the purpose of breeding other varieties are permitted by the 1991 version. But the 1991 model prohibits exploitation of an 'essentially derived variety' unless authorisation from the breeder of the original variety is obtained. This breeder cannot be compelled to do so, and generally the convention only allows compulsory licensing where the public interest justifies

it and, in that case, the member state must ensure that the breeder receives equitable remuneration.

In terms of mediating inter-legality, the UPOV Convention is also extremely interesting because it has prohibited members from extending both PVR and patent protection to a plant variety. As we noted, the US and Japan have not provided exceptions for plant varieties in their patent law and the prohibition was not applied to them when they joined the Convention. In any case, the 1991 Act lifts that ban on double protection, providing opportunities, in those countries that now choose to allow both, to circumvent the limitations of the PVR.

PROTECTION FOR TRADITIONAL KNOWLEDGE

Unilateral and bilateral initiatives

Who ends up with access to rules and resources in this fluid and multi-faceted pattern of law making? In the developed countries, it is fair to say that intellectual property is moving to embrace the powers of nature directly. In the key biotechnology producing nations, the conceptual inhibitions are being relaxed. But the powers of nature are said to be appropriable only so far as they are transformed through human technical intervention into artificial processes and products. Thus, the internal criteria of the patent systems apply their own limitations to the capture of natural genetic resources. This means the patent and even the PVR are not available to the discoverers, keepers and transmitters of the natural materials. It is consistent with this approach to select out the contribution of science and industry. But if the appropriable element is that layer added by technical intervention, others continue to enjoy access to the starting materials for other purposes. We might sense that this balance begins to tilt, if the isolation and purification of the genetic material, its separation into transferable bits, with industrial application, becomes enough to attract a patent. In such a way, the patent rewards those who are ingenious enough to abstract and standardise the material.

From the evidence above, it is clear that one response to this firming of intellectual property protection is a defence of local spaces. The clearest example is the reservation for national law of the authority to maintain exceptions to patentability. So far the international conventions have continued to provide such national freedom, though member countries are encountering pressures from other directions, such as the bilateral FTAs, to surrender it. However, we now appreciate how

this defensive response does not necessarily realise the value of local and indigenous resource conservation. As we have acknowledged above, a movement is growing to give such knowledge recognition through some kind of property law regime. But, without a doubt, this movement has opened up a hugely complex and sensitive issue. It is not easy to see how a property right can cope with all these aspirations, especially if its tendency is to render the knowledge into a saleable form that is amenable to the individualised exchanges transacted in the marketplace. A *sui generis* form of protection may be more suited to the task of assimilating the knowledge bound up with the situation-specifics of local communities and natural environments.

Even if it were achievable, such a form would still present issues about control, both within the communities and in their relations with outsiders such as the nation states and the customer corporations. These issues are in starkest relief when the state assumes property in the resources and licenses bio-prospectors and extractive industries. Within such contractual arrangements, conditions may be imposed to obtain royalties or the promise of assistance in kind such as technology transfer and opportunities for local research. Conditions may also be imposed for the safeguarding of natural habitats and environmental integrity. Already, this approach has been explored, the Costa Rican government most notably fashioning an agreement with the drug company, Merck. In return for prospecting and extraction rights, the agreement provides money for conservation, equipment and local training, together with a share in any profits from intellectual property and the grant of licences to work the intellectual property locally.[86]

We can readily appreciate that, if they are to be successful, such agreements depend on the bargaining power of the state. They also rely on the strength of its resolve to safeguard the interests of local communities, indigenous peoples and the natural environment.[87] Perhaps the NGOs may need to provide support services to assist in the making of the agreements, though some question how appropriate it is for the northern NGOs to advise. However, even if local people are involved in the construction of these agreements, control issues are likely to remain. For example, such property systems may give rise to disputes as to who among such people has the right to represent or make commitments.[88]

What will be the benefit of such agreements? In contrast to biopiracy, they have the virtue of giving recognition to traditional knowledge and obtaining consent to its use. The simplest agreement will also

provide monetary compensation for the use of the genetic material. It will be far more challenging, and ultimately more beneficial perhaps, if agreements can be constructed that contribute to the long-term capacity of the locals to participate in these global agriculture and service sector networks. This is especially so if it can be done in ways that are compatible with cultural and environmental traditions. We can suggest that the scale and structure of ventures are important considerations here.

Fitting property forms on traditional knowledge not only changes relations within these communities. It provides another means for the high technology producers to gain access to the genetic materials; indeed, it might give that access added security and legitimacy. Consequently, access cannot be decoupled from a relationship with the high technology forms of intellectual property. Combining concerns for the protection of traditional knowledge with the benefits of high technology becomes a very test of the mediating powers of the global frame of reference. On this basis we judge the success of the recent strategy to tie patentability to recognition and reward for traditional knowledge and the observance of codes for the conduct of relationships with the local and indigenous providers (see below).

Furthermore, notwithstanding this attention to the conditions of exchange, there will be occasions when local peoples wish to place a veto on certain objectionable uses of the material. For, as we have noted, the material may bear spiritual and moral connotations as well as hold economic value. How can this attachment be represented when the private or state property holder wishes to licence the rights to an economic developer and make the resource available to users? There is potential for a clash here, one that is very difficult to mediate.

Convention on Biological Diversity

In keeping with the idea of the interface we have been pursuing, other international agreements might be linked with TRIPs in an effort to broaden out the vision and to find a means to align values. In recent years, several international declarations have recognised the question of indigenous property rights.[89] However, while providing symbolic capital, most have remained instances of soft law. With signatories from some 157 nations and already over seventy parties, the United Nations Convention on Biological Diversity carries perhaps the most weight.[90] However, an examination of the experience with the implementation of the Convention suggests that reconciliation is proving

difficult to achieve. The Convention's language is symptomatic of this problem; it makes efforts to accommodate the conflicting legalities, postponing implementation.

One attempt the Convention makes is to reconcile intellectual property rights with access to technology. It states that the developing countries are to be provided with access to and transfer of technology under fair and most favourable terms – where mutually agreed. Recalling the language of TRIPs, the Convention insists that this access and transfer should be on terms that recognise and are consistent with the adequate and effective protection of intellectual property rights. For their part, the developed countries are obliged to take legislative, administrative or policy measures to ensure access and transfer of technology (which is protected by patents and other intellectual property rights) takes place on mutually agreed terms. In particular, they are to do so for those developing countries providing genetic materials. Furthermore, the parties to the Convention are obliged to cooperate, in the fields of patents and other intellectual property rights which are subject to national and international law, to ensure that such rights are supportive of the Convention's objectives such as conservation, sustainable use and biological diversity.

The Convention signifies a shift away from the ethos of common heritage. It recognises the sovereign right of states to exercise control over the biological resources within their territories. The Convention requires these states to grant access to the resources within their control on reasonable terms. Access requires prior informed consent on mutually agreed terms. The country providing the resources is entitled to benefit from the commercial use of its resources. Access is also subject to appropriate utilisation of the resources and to a fair and equitable sharing in the benefits deriving from them. Then, most pertinently for this inquiry, the Convention seeks to acknowledge the interests of local non-state groups. Article 8(j) places requirements on the states controlling resources to respect, preserve and maintain the knowledge, innovations and practices of indigenous communities.

In her critical evaluation of the Convention, Shiva questioned whether third world countries really received enough from it to match its recognition of the intellectual property rights of the developed world.[91] Also in her view, not enough was done to assert the intellectual and ecological rights of indigenous peoples and local communities to conserve and make use of biodiversity. Moreover, the Convention did not take on the issue of appropriate compensation

for the substantial genetic resources already stored in gene banks. These banks are under the control of the developed countries, rather than the appropriate United Nations agency, the Food and Agricultural Organisation. Shiva was also critical of the Convention for failing to give guarantees to third world farmers or public breeding institutes about access to the materials covered by intellectual property rights.

After fifteen years, how substantial have these criticisms proved to be? Since its inception, the Convention's Conference of the Parties (COP) has convened a series of meetings to pursue the implementation of the CBD. Progress has been slow. The focus of the COP has been on facilitating access to biological genetic resources. With the adoption of the Draft Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits at the sixth meeting in 2002, the meetings have become more committed to practical measures. The COP has developed models to assist those states wishing to enter into partnerships with users.

Nonetheless, at the seventh meeting, the COP resolved to elaborate and negotiate an international access regime. For the eighth meeting, the Ad Hoc Open-ended Working Party on Access to Genetic Resources and Benefit-Sharing went a step further in producing a draft decision. However, at this stage, we should appreciate that it has plenty of square brackets, indicating contested wording.[92] We must wait for the next COP, which is scheduled for 2008.

An obstacle to a resolution is the preference of the US for purely contractual arrangements. Under a Republican administration, the US Government refused to sign the Convention on the ground that intellectual property rights could not be compromised and that technology transfer should be implemented according to terms agreed solely through the free market process. It also pointed out that the Convention's language seemed hollow, for many developing countries had (at the time) no intellectual property protection for biotechnology whatsoever. The Clinton Administration subsequently did sign on to the Convention. But it also circulated a letter of interpretation, urging the parties to establish adequate and effective legal protection of intellectual property in inventions based on genetic resources and to secure voluntary acceptance of conditions for the distribution of advantages as well as for the transfer of technologies. The US did not become a party and it attends the implementation conferences as an observer.

How has the COP sought to reconcile the interest of indigenous communities in traditional knowledge? The third conference, in late

1996, took up the question of implementing Article 8(j). However, its main action was to commission a set of case studies into the relationship between current intellectual property rights systems, access to genetic resources, technology transfer and the knowledges, practices and innovations of indigenous and local communities. Regarding Article 8(j), the issue of substance would seem to be whether and how to give support to a *sui generis* system for the protection of traditional knowledge.[93] Such a system could involve a range of measures, including intellectual property rights, contracts, traditional resource rights such as land tenure rights, incentive measures, and the recognition of customary laws. In 1998, the fourth COP established a Working Group on Article 8(j) and its programme continues today. It includes the development of elements of *sui generis* systems, as well as elements of an ethical code to ensure respect for the intellectual and cultural heritage of indigenous and local communities.[94] The draft decision on the access regime indicates that protection for traditional knowledge is an element to be considered for inclusion in an international regime. Clearly, though, it is to be considered alongside the rights of sovereign states and the interests of resource users.

The FAO

During this period, the Food and Agricultural Organisation has managed to do further work on conditions of access to the seed and flora banks within its remit. It placed a moratorium on the patenting of materials drawn from its banks after donor countries expressed concern. Its 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) worked the theme of access without patentability. The System for Access to Plant Genetic Resources for Food and Agriculture is more mindful of intellectual property, yet it still seeks to keep its role circumscribed. The FAO initiatives have been important determinations given the value of the resources within its holdings.

World Intellectual Property Organization

As the most substantial international intellectual property organisation, WIPO's interest in traditional knowledge is welcome. WIPO has been careful, however, to style its intervention as a cross-cultural initiative, giving global institutional support to national schemes and picking up on norms and protocols relevant to indigenous communities. Thus, it has confined itself to an advisory role, giving assistance with the design of national laws, contributing ideas to the international

dialogue. The US has stressed it would only participate if the process was not to end in a binding treaty.

WIPO's initial focus was on appropriate *sui generis* intellectual property systems for traditional knowledge. It gathered information and promulgated models. Recent sessions have been concerned with reconciliation or harmonisation, showing for instance how the attributes of intellectual property might help support the recognition of traditional knowledge, (ie, the relationship between customary understandings and modern intellectual property). This work has involved inter-treaty mediation as well as fostering cross-country public–private partnerships.

WIPO has worked closely with the COP of the CBD on ways of implementing Article 8(j). It has fed material into the discussions over possible links between the CBD and TRIPs. It has been most active in finding ways of facilitating access to genetic materials in the form of vehicles for commercialisation. WIPO started quite tentatively with operating principles for commercial agreements. Arguably it has strengthened its resolve in later sessions, looking to define and document traditional knowledge substantively as a form of intellectual property.

By the Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICIPGRTKF), the deliberations were including indigenous community representatives (within the national delegations) and connecting with the UN bodies devoted to indigenous issues. The discussion was starting to recognise the customary and communal aspects of traditional knowledge. The 2006 drafts take that recognition further and they are sophisticated documents, identifying a range of possible forms for TK, including proprietary or non-proprietary forms, non-intellectual property, existing intellectual property, *sui generis* property, and positive and negative defensive measures.[95]

Notably, the drafts do not commit to a form of international law. Rather, they list the options to include binding international instruments, a declaration, other forms of soft law, guidelines or model provisions for national legislation, and authoritative or persuasive interpretations of existing instruments. They recommend that the WIPO instruments should complement existing instruments such as the UNESCO Cultural Diversity Treaty, the UNESCO Treaty on Intangible Cultural Heritage, the CBD and the FAO ITPGRFA.

Recently, WIPO has itself experienced controversy. With NGO support, some developing countries have challenged the hard law/soft

law division of topics. Since 2004, a fourteen-strong Friends of Development (FOD) coalition (including Brazil) has been trying to tie further consideration of the intellectual property treaties before WIPO to a development agenda. The main target is the formulation of the Substantive Patent Law Treaty; the Broadcasting Organizations Treaty was also linked (see Chapter 8). The FOD demand is that WIPO considers the impact of extending intellectual property rights on the developing economies, giving attention to the protection of the public domain and access to knowledge, genetic resources and traditional knowledge, and the incorporation of competition rules.

WIPO established a Committee to explore the agenda. The FOD initiative attracted support from the African and Asian Groups; but it was opposed by the Developed Group B countries. To achieve a resolution, the Chair devised a draft text, but it attracted criticism from FOD for filtering out key issues. Work on the Substantive Patent Law Treaty stalled. But in the midst of all this the Drafts emerged. Now the Broadcasting Organizations Treaty is provisionally scheduled for a Diplomatic Conference. In February 2007, member state negotiators agreed on a first set of recommendations for the Development Agenda to go to the WIPO General Assembly later in the year.[96] Already then the WIPO drafts make a very positive contribution to the protection of traditional knowledge. However, it is too early to say what form they will take and what effect they will produce. If they are not the foundation for a WIPO Treaty, they might still inform rule making in the WTO or CBD.

TRIPs patentable subject matter

What contribution does the WTO make to the recognition of traditional knowledge? We should start with the terms of the TRIPs agreement. Through the requirements for patent protection, their focus is on the high technology layer. In this respect, Article 27:1 requires members to make patents available for any inventions, whether products or processes, in any field of technology. This requirement is supported by the prescription that patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether the products are imported or locally produced. Such a comprehensive standard was seen as a major gain for the high technology producers, especially in relation to products such as medicines. When their initial positions are considered, it was to be a major concession by many of the developing countries, even if they enjoyed a period of grace.

Article 27:1 gives members the scope to take an expansive view of the criteria for grant of a patent. Picciotto regrets that the agreement offers no control for over-lax interpretations of the concept, such as low thresholds of inventiveness and grants with broad coverage.[97] Likewise, critics are arguing that a WIPO Substantive Patent Law Treaty should concentrate on 'patent quality'. Patents shall be available for 'inventions', provided they are new, involve an inventive step and are capable of industrial application. It can be argued that the agreement expects, by importing the concept of an invention, for a threshold to be met. Thus it gives support to a distinction between discovery and invention. Some substances 'found in nature' might be denied patenting. However, nowhere is the concept of invention defined. Such a shortfall must inevitably leave space for the kinds of differences in the case law we have identified above.

Article 27:1 also institutionalises what we have termed the internal, technical criteria of the northern patent systems. The criteria are used to distinguish one claim from the prior art base, the knowledge and science that has gone before. The criteria are crucial to areas like this where the advances have become incremental. Likewise, the national patent administrators might take the view that some substances are lacking novelty, because they have been 'known' in the past by indigenous peoples or local communities. But, again, realistically speaking, the agreement cannot, at such a level of generality, operationalise such criteria. Much depends, at least in casting the onus to carry the argument short of litigation, on how ready the patent offices are to grant claims. The WTO does not coordinate this practice. The policy and practice of the offices in the different jurisdictions are a common concern within the global communities of researchers, industrialists and consumers. If it does not fuel regulatory competition, such a lapse in the international treaty will shift the focus to another level of coordination.

TRIPs exceptions to patentability

For the purposes of this discussion, the key allowance is to be found in Article 27:3(b). It provides: 'Members may also exclude from patentability: ... (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes'.

We should also note here Article 27:2, the more general allowance for exclusion on the basis of *ordre public* and public morality. Members

may exclude from patentability inventions, the prevention of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment. This allowance is likely to be the basis for refusals to grant patents for human life. By force of Article 27:3(b)(i), members may also exclude diagnostic, therapeutic and surgical methods for the treatment of humans or animals from patentability. It too is relevant to uses of biotechnology. The technology is producing diagnostic kits for medical conditions, enabling earlier and more accurate diagnoses. Gene therapy techniques might then repair faults in genetic codes. Vaver and Basheer note that we are starting to see some discussion of the scope of this Article.[98]

Any such iteration of the permissible exceptions limits the members' legislative options. Nonetheless, to the extent the clauses elaborate, it also gives them support if they wish to take an exception. At the close of the Round, Scalise and Nugent even suggested these allowances were such a major defeat for the biotechnology industry that some of its elements would have been happier if the agreement had not come to pass at all: bilateral initiatives would obtain more protection.[99]

The US, Japan, the Nordic countries and Switzerland all submitted by way of their draft texts that no exclusions should be made for plants or other living organisms.[100] But the EU's text sought space within the agreement to maintain its own particular exception. The European position would appear to be one of necessity and we have already seen the pressures subsequently to ditch it. However, Europe was not alone. Exceptions were also sought for instance in a communication from a group of developing countries that included Argentina, Brazil, Chile, China, Columbia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay.

The text of the exception for plants and animals was to be in issue right up until the close of negotiations. The wording represented a curious compromise. It is perhaps significant that the exception is not worded exactly as the European Patent Convention (see above). In its coverage, the exception is wider than the European Convention in that it is for plants and animals as such rather than for varieties – a category as we have noted that has been read restrictively in Europe. In making micro-organisms an exception to the exception, it is clearer than the Convention category of the products of micro-biological processes but arguably narrower. Like the European version, essentially biological processes for the production of plants and animals are also excluded,

but in the TRIPs text, this exclusion is limited by the qualification 'other than non-biological as well as microbiological processes'.

The TRIPS provision differs markedly from the European Patent Convention in its force. It does not require member countries to make this exception to patentability; it just gives them the freedom legally to do so. As we can see from subsequent developments, more countries may take the view that local industry will now benefit from protection being available. Yet neither does the provision protect countries from external pressures to forego the exception. Above we saw how some members, when they sign FTAs with the United States, agree not to take up this option.

In the case of plant varieties, the TRIPs choice is not so open anyway. The other side of the Article 27.3(b) compromise is the requirement that 'members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof'. This requirement seems designed to spread the PVR, at least where countries continue to choose not to make patents available for plant varieties. The evidence for this is the use of the term 'plant varieties' when the exception speaks of 'plants'. As well, no similar protection is required for animal varieties.

Yet, at the same time, the text made no explicit mention of the UPOV Convention. Certainly, it did not lend its powerful backing to the UPOV Convention in the explicit way it did elsewhere, for instance, to the Berne Convention on copyright. The absence of any final insistence on the patenting of varieties reflects the fact that a consensus was lacking among the developed countries. But the lack of prescription of the UPOV Convention as an alternative is more mysterious. Above, we noted that few developing countries had at this stage granted varietal rights or were members of UPOV. Reportedly, a major source of concern in the drafting stages of the agreement was whether writing in a requirement of UPOV (as an alternative to patents) would apply the 1978 or 1991 versions of the Convention.[101]

The result was to leave countries room to develop their own 'effective *sui generis* systems'. The vagueness of the prescription also raised the possibility that the WTO dispute settlement system would be brought into play to determine what is an effective system of protection. Here, it might be argued that any system must have the flavour of the protections the agreement has conferred throughout. Should it therefore confer protection on the basis of a private property right? The requirement has not been litigated at the WTO. Instead, the TRIPs Council

has been collecting information from the members about the systems they do have in place. Perhaps those members who favoured protection thought it politic to pursue their agenda within the review of Article 27.3(b), rather than put others offside by litigating.

The review revives the basic question whether the exception should be dropped and patents be made available worldwide for plants and animals. The situation is more complicated because patents regarding humans are much more of a prospect now. Within the Council, some countries have asked that moral and ethical issues be addressed. In regard to plant varieties, the review raises the question of whether members should be working to persuade the WTO to prescribe its own *sui generis* system. Thus the review becomes a point at which member countries can stress the virtues of various kinds of *sui generis* forms for the protection of plant varieties, including the different versions of UPOV. Moreover, it has been an opportunity to commence a dialogue about recognition and reward for the contribution of traditional knowledge. Maybe the concept of a *sui generis* form already allows for traditional knowledge to be valued. If an amendment is necessary, to ensure that the protection of traditional knowledge is consistent with the requirements of TRIPs, where will the model be sourced?

The protection of traditional knowledge presented an opportunity for the WTO to make constructive links with other international organisations. The goal would be to show how TRIPs could also benefit producers in the developing world. The weight of TRIPs is a consideration, not just to ensure conformity, but possibly to harness its force. Might TRIPs be amended to spread protection of traditional knowledge around the world?

The role of the review

The COP of the CBD was already disposed to a connection. At its third meeting, a coalition of countries, including South Africa, Ghana, the Philippines and Norway, stressed the need for the WTO to take the objectives of the Convention into account, particularly when reviewing Article 27:3(b) of TRIPs. The Conference declaration embodied a decision to work with the WTO.[102] The WTO Committee on Trade and Environment assisted the Secretariat of the Convention with the preparation of a document entitled: Biological Diversity and Trade-Related Intellectual Property Rights: Synergies and Relationship. The Convention's Executive Secretary was given observer status at the Committee on Trade and Environment.

Then, not long after the review of Article 27:3(b) had commenced, the Doha Ministerial Declaration charged the TRIPs Council directly to examine the relationship between the CBD and TRIPs. Specifically, its brief is to consider whether TRIPs should be amended to take account of the CBD (and the FAO ITPGRFA) in recognising traditional knowledge, as well as farmers' rights and safeguards against anti-competitive practices (specifically those that threaten food sovereignty). During the review of Article 27.3 (b), proposals have been put to make the patentability of plants and animals conditional first on disclosure of the original genetic material, then proof of informed prior consent to use, and finally, arrangements for benefit sharing. We can see the influence of the CBD here, both in ensuring defensive protection and in regulating the conditions of access.

The core proposals have come from a group of developing countries that include Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela. This group was prepared to accept the patenting of plants and animals. Other members, such as those in the African Group, remain opposed to patenting. On the other hand, the US has advocated patenting, while arguing that recognition and benefit sharing can be left to contracts in the market place. Other countries doubt the strength of a contractual form to deliver and insist that a rule base is necessary.[103]

It is too early to predict the WTO's response, but it is proving hard to get consensus on new rules. A requirement of disclosure has the best prospect of being adopted, though even the models for disclosure differ. Furthermore, should consensus be achievable, members might still be wary of pursuing an amendment to TRIPs.[104] Some members are concerned about TRIPs protection being reduced; others are thinking that their efforts are better placed elsewhere, for example at WIPO. However, given the strength of the TRIPs provisions, both in terms of substance and machinery for enforcement, reconciliation cannot be avoided. Perhaps the way the members have mediated the issue of essential medicines is the way forward.

ACCESS TO MEDICINES

The biggest single intellectual property issue for the WTO in the last six years is the struggle to match patents for pharmaceuticals with access to essential medicines. The issue has to be understood within a richer, deeper context than the WTO perspective can possibly allow.

That context involves the nature of health problems around the world, education and care for health, research and trialling of new drugs, scaling up and commercialisation, industry structure, marketing, user needs, government funding and purchasing, availability of treatment professionals and clinics, philanthropy, and aid to the third world. Many of these features are technological and economic considerations, yet culture and religion, even superstition, corruption and celebrity, play a part in the production and consumption of pharmaceuticals.

There are no simple solutions to the problem. Perhaps that is why so much of the focus has been on the response to 'emergencies'. Certainly, the issue is much more than the scope of intellectual property rights, and their qualifications, nonetheless the TRIPs provisions have become a flashpoint. Materially so because they did change the global equation: they compelled all member states to provide full patent protection to pharmaceutical products when a number of developing countries did not do so and many other countries had retained the freedom to determine the limits they would place on the patent holders' rights. The developing countries were allowed a grace period of ten years to implement protection, which has made the beginning of 2005 a reckoning point for legal regimes. The LDCs have had their period of grace extended to 2016.

We appreciate now that the issue has become a test (symbolically too) of the WTO's capacity to reconcile – or at least to mix – the perspectives and interests of the technocrats and investors in the North with the needs of the poor and sick in the South, just when the WTO as an institution came under public scrutiny. It has also stimulated potentially positive formulations of the issue, such as rights of access to knowledge like essential medicines and recognition and reward for the contribution of traditional knowledge. Yet, even if the policy response is being determined objectively and selflessly, the appropriate solution would not be straightforward.

Industry conditions

Generally, there is recognition that patents (and other forms of intellectual property such as confidential information) provide important security for investment in research, trialling and commercialisation, especially in this sector where the scale of the investment is high, the risks of failure great, and the lead times for patent grants and regulatory clearances long. On the other hand, copying is relatively cheap and easy, though the producers of generics face challenges too as we shall see below.

Thus, the operation of intellectual property law should be seen in a complex relationship with industry structure, including the command of other assets that provide product and market power. Globally, the sector is dominated by a small set of large pharmaceutical companies with bases in the US and some European countries. The sector also depends on contributions from public research institutes, small start-up companies, support services and government regulatory agencies; it becomes more complex as it reaches out to biotechnology enterprises, seed companies, and the original sources of genetic materials.

That much of the original research is done in the public sector (such as universities and hospitals) has not moderated these economic imperatives. Government now demands that the public agencies recover costs and generate income, which forces them to seek returns in the marketplace and, in the smaller economies at least, to go off-shore to court the very large corporations, so that their inventions can be commercialised. Yet the significance of public funding does entitle policy makers to query the extent to which the industrialists should capture the value of these inventions; so too the contribution made by local communities and indigenous peoples. Immediately, attention turns to the qualifications that should attach to the privilege of the property right. Such conditions might express a range of policies, including industry policies (eg, requirements of local working) or health policies (see below). Longer range, the questions include the conditions of participation in the industry, the selection of research priorities, the location of production capacity, the viability of markets, and the distribution of benefits.[105]

One such question is the incentives driving researchers. Under market conditions, much of the research goes into the search for drugs to treat the ailments and afflictions of the affluent markets. Only a small proportion of total expenditure goes to diseases of the developing countries.[106] Around ten per cent of new drugs are meant for tropical diseases.[107] Another legacy of a market-driven system is the phenomenon of 'orphan drugs', drugs for serious illnesses that only a small minority will suffer. Their research is likely to rely on public funding such as the Global Fund or the generosity of corporate philanthropy, notably the Gates Foundation.

A second question as we have seen is the recognition and reward to be given to traditional knowledge. Possibly, half of the major drugs today are based on plant extracts; gene technology is also making use industrially of strains in animals. Regions of the South such as Latin

America and East Asia are the most gene rich; some forty per cent of Western pharmaceuticals may contain Asian plant extracts. As they search for new ingredients, the pharmaceutical companies are making agreements to tap into the purer genetic strains of isolated human races. As we have seen above, this connection is not for the developing countries merely a means to receive royalties; at least potentially it is the avenue for partnerships to be formed between companies, states and local people, so that scientists, biologists, cultivators and industrialists can share knowledge and research.

A third question, the subject of the recent debate, is the viability of the generic or secondary producers. Though parasitic, generic production has been vital to reducing down the costs of medicines and bringing them within the reach of poorer people. Only the developed countries and a few bigger developing countries (such as India, Brazil, Thailand, Argentina and China) have the manufacturing capacity to play a part in this production. India (through local companies like Cipla and Ranbaxy) has been the supplier for half of the 700,000 in the developing world who are receiving HIV/AIDS treatments.[108] With the grace periods expiring and Article 27.1 coming into operation, this production has become more precarious. Generic producers are likely to have to rely on compulsory licences or wait until clearly the patents have expired. Failing a rapprochement with the brand name producers, they will no longer enjoy the scale or security to maintain an industrial base.[109] Already, the brand names have bought into the generic producers.

Such big structural issues are difficult to resolve. The focus of the recent debate has been on access to essential medicines for those who are suffering debilitating and terminal diseases, specifically those who cannot pay the market rates for drugs that have been protected by patents. Here, rather, it becomes the issue of control rights: when in particular the original producer may control access to an existing drug. The precise extent of these rights shapes the nature of competition between the producers and thus crucially the price at which the drug is available. We know there are commonly key points in the progress of this competition, including the first claim to the invention of the drug, the provision of test data for regulatory approval, release of the drug onto the market, sale in different geographical and customer markets, exceptions and compulsory licences, expiry of the patent, possible product refinements, and the entry of secondary or generic producers into the market. At each point legal issues arise, which may be played out in adversarial form.

TRIPs patentable subject matter

First, the claim to the medicine must meet the criteria for patentability. We noted above that TRIPs keeps to the general criteria for patentability. It is possible that some natural substances that are used pharmaceutically will not qualify as inventions, though as we have seen already the discovery/invention distinction is not clear-cut. Turning to the technical criteria of novelty, inventive step and industrial application, the patent office must determine whether the applicant has done enough scientifically to move the claim on beyond the prior art. In certain respects, the legislature might intervene to give direction. For example, the Australia–US Free Trade Agreement requires the parties to concede that patents are available for new uses of existing substances. The Australian Government took the view that the courts had already interpreted the general criteria in such a way as to allow for this possibility. In a field so competitive and lucrative, these small differences may matter. One way to get round a rival's patent is to claim new uses, reformulations or new methods of administration as a new invention. The original producer may make such claims with the aim to extend the protection for a drug and keep generic producers from entering the market – a practice sometimes called 'evergreening'.

Administration of the patentability criteria includes the process for evaluating the individual claims such as the requirements made of the applications and the provision for opposition proceedings. On the one hand, the process should not be delayed for lack of resources or more devious reasons (such as disguising a barrier to trade). The time taken to decide applications (as well as obtain regulatory health clearances) has led to demands for extensions to the patent term for pharmaceuticals. For example, the Australian Government has responded to overtures from the US to institute such a legislative provision. On the other hand, the danger is that lack of resources and possibly an eagerness to please mean that applications are not going to be scrutinised rigorously. The developing countries need technical assistance to equip their patent offices to maintain the limits on patentability.[110]

Even in the established schemes of the developed economies, the cast to procedures affects outcomes. TRIPs went to the length of prescribing the onus of proof in revocation proceedings; the US FTAs specify such detail too. In this respect, it is not enough to say that the validity of doubtful claims can be resolved in litigation. Litigation is a game for the richest and toughest players, largely the big companies. It is possible for litigation to be employed strategically to delay and

intimidate potential competitors. Otherwise, it establishes a relationship to extract licences or devise cross-licensing arrangements. Relying on the courts to determine the key clashes and settle policy overall makes its own demands on the resources of the state also.

TRIPs exceptions to patent infringement

By virtue of Article 28, members must afford patent holders the rights to prevent others from making, using, offering for sale, selling or importing (for these purposes) the invention. For access to medicines, the key issue is the ease/speed with which secondary producers can enter the market with generic lines. These producers seek to make up and test their version, post submissions to obtain marketing approval (in different countries), and manufacture copies, while the patent still applies. As these activities work the invention, they require exceptions to be made to the patent holder's control rights. Thus, the secondary producers are said to springboard off the intellectual property of the original producers. The issue becomes the exceptions which the member may make to infringement of the patent holder's rights. As we saw in Chapter 6, these exceptions must fall within the terms of TRIPs, primarily Articles 30 and 31, or run the risk of challenge in the dispute settlement system. We should note here too that a member's take-up of these Articles might be subject to bilateral bargaining and to TRIPs-plus FTA provisions.

In this respect, we recall that Article 30 permits members to provide limited exceptions to the patentee's rights. It attaches a proviso that such exceptions must not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, while taking into account the legitimate interests of third parties. In the key case considering the scope of Article 30, the WTO Panel upheld the Canadian provision authorising secondary producers to make up the drugs in order to submit the copies to the authorities for regulatory approval. But the Panel ruled against the measure enabling the producers to manufacture and stockpile multiple copies of the drugs (in anticipation of the expiry of the patent term and immediate release on to the market).

In Article 31, the TRIPs agreement deals directly with compulsory licensing powers. We know that compulsory licensing was an aspect for which the Paris Convention made substantive provision. For the exporting nations, TRIPs became a means to apply new disciplines to the uses of such national powers.[111] Article 31 lays down a number of

safeguards, such as the efforts that must be made to obtain the authorisation from the right holder on reasonable commercial terms and the provision of adequate remuneration for the right holders. Another significant requirement is that use shall be licensed predominantly for the supply of the domestic market of the member authorising the use. So the licensing should be predominantly to meet domestic needs, not to supply drugs to other countries that do not have their own generic producer industry.

TRIPs is prepared however to allow national legislatures to determine the grounds for granting such licences – for allowing other use without the authorisation of the right holder. Article 31 refers to such grounds as public non-commercial use, national emergencies, anti-competitive practices, and dependent patents. Furthermore, it says that the requirement to make efforts to obtain the authorisation of the right holder may be waived in case of a national emergency or other circumstances of extreme urgency. So too it does not have to be met where the use is permitted to remedy a practice deemed after judicial or administrative process to be anti-competitive. Nor, in this later case, is there a requirement that the use be predominantly for the supply of the domestic market.

Correa argues that the grounds identified in Article 31 are not meant to be exhaustive.[112] So, other grounds might be envisaged, such as food security, environment protection or most pertinently to our immediate inquiry, the safeguarding of public health. Or, as we shall see below, the threats to these conditions might be treated as cases of national emergency. When an epidemic threatens, governments might want to invoke the power to intervene directly to ensure essential drugs are available to those who are unable to pay the market price. If the patent holder does not make the drugs available, the governments should be able to licence someone else to do so. For example, when the anthrax scare hit the country, the US Government prepared to invoke its powers of compulsory licensing. The powers have been contemplated once again to ensure access to Tamiflu, should the avian flu spread between humans. Recently, the Thai Government has provoked controversy by proceeding with the compulsory licensing of generic versions of heart disease and HIV/AIDS treatment drugs. Then governments in other countries or consumers directly might want to import batches of the drugs made under compulsory licence. The Brazilian Government has said it will import a generic version of a Merck anti-retroviral drug from India.

The patent holder's Article 28 rights include the right to control the importing. Article 27 says too that patent rights are to be enjoyable without discrimination as to whether products are imported or locally produced. In an early analysis, Correa suggested two interpretations of these provisions are possible. One is that a country cannot require local working if the patent holder is prepared to import, while the other reading allows the national law to target lack of local working if it would equally target lack of importation.[113] Of course, lack of importation might also be an issue, if transfer is delayed altogether according to a worldwide strategy for production and distribution. But markets are also partitioned in order to practise price discrimination.

These considerations relate to the situation in which the patent holder is making the drug available in another country, possibly in greater quantities and at a cheaper price. TRIPs Article 6 is also relevant to this trade, for it seems to say that Articles 27 and 28 cannot be invoked in WTO dispute settlement to challenge a member's provision for parallel importation. In particular, the Article 28 right to prevent others from importing products bears a footnote. The footnote states that this right, like other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6. A member might allow parallel importation to give users access to products that the right holder has released onto markets in other countries; those products may not be available at all or only at higher prices in the domestic market. However, patent holders say they will not be able to afford to discount prices in the poorer countries, if those drugs find their way to the affluent markets; likewise if drugs subsidised under government health schemes are purchased by foreigners.[114] The US has argued that Article 6 is not substantive, it just keeps issue of exhaustion of patent rights, and the legality of importing copies first sold in a market elsewhere, out of WTO dispute settlement. In substantive terms, parallel importation is subject to the patent protections of Articles 27 and 28. But other countries contend it means that members may authorise parallel importation.[115]

TRIPs use of undisclosed test data

In some jurisdictions, the other main concession that generic producers obtain is the use of the test data which the original producer has prepared and submitted to obtain regulatory clearance. The original producer is likely to have kept this data confidential, so that allowing

the generic manufacturer to use it and avoid duplication of test results qualifies its exclusivity. TRIPs Article 39.3 raises the question of whether such use is an unfair competitive use.

The requirements of Article 39:3 do not appear to go as far as the main producer nations in mandating data exclusivity.[116] For example, the US does not permit such secondary 'spring-boarding' use for a period of five years, while the EC holds out for ten years. Instead, TRIPs requires governments to protect undisclosed test or other data against unfair commercial use. This obligation applies to data submitted for products utilising new chemical entities. It does not appear to apply to data for products involving reformulations, different methods of administration or new uses. We should note that the use of test data was among the WTO complaints the US levelled at Brazil and Argentina. Strictures have also been built into the FTAs the US has been making. They require the periods of data exclusivity.

We should also note that, in keeping with US domestic practice, they seek to limit the action that the secondary producers may take on the strength of the approvals they obtain with the use of this data. In particular, they impose a constraint on marketing the generics if there is a claim to a patent.[117] Such intellectual property protection draws the regulatory health authorities into patent administration. Depending on how the approval system is cast in the particular jurisdiction, the existence of a patent claim may be enough to delay the approval. In the US itself, it affords the patent holder an automatic 24-month extension on the term; in a recent study, the Federal Trade Commission has said that producers are 'gaming' the procedure.[118] So too, though this effect is contested, the evidence suggest that it encourages the practice of evergreening and the pursuit of patent infringement proceedings.[119] For popular drugs (such as arthritis or blood pressure medications), the extra time can bring substantial rewards.

TRIPs disputes

The HIV/AIDS epidemic has been the catalyst for a struggle which led to a North-South accord to make Article 31 workable, the Doha Declaration on TRIPs and Public Health in 2003, and two years later, to the involvement of the WTO in an administrative system for ordering the import and export of generics made under compulsory licence.

It began with litigation to assert an interpretation of TRIPs that ran counter to compulsory licensing initiatives in South Africa, Brazil and Argentina. First, the drug companies challenged South African

legislation in its domestic courts as inconsistent both with the South African Constitution and TRIPs. After public protests, this litigation was settled out of court.[120] The drug companies agreed to discount the price of the crucial three-drug package of anti-retrovirals that impede the transition from HIV to AIDS. We should appreciate once again that this was by no means the end of the local story, the South African Prime Minister's preference for natural remedies in particular calling into question the Government's support for effective health care.

In the same period, the US notified complaints against Brazil and Argentina at the WTO. Other countries were threatened with complaints.[121] The US Administration eventually withdrew these complaints, but only after the respondents made concessions that perhaps the TRIPs provisions did not require. In the case of Brazil, the US notified a complaint citing legislation that empowered compulsory licensing if the patent holder did not work the patent locally within three years. However, the new political climate surrounding the WTO was to keep the issue out of court. In return for the US withdrawing its complaint, Brazil agreed it would consult the US if it considered invoking its legislation. In turn, Brazil withdrew a complaint it had laid against a US requirement that patents derived from government funded research be worked locally.[122] Several drug companies offered to discount the price of their anti-retroviral drugs to Brazil. What are we to make of this deal? While the US compromise might have been inviting, Shanker argues that Brazil was softened up by the ruling in the *Canada–Pharmaceutical Patent Protection* case.[123]

Yet it is no coincidence that the multi-faceted US complaint against Argentina was also kept from adjudication.[124] This complaint alleged lack of protection for test data, exclusion of subject matter from patentability including micro-organisms, inadequate civil procedures, lack of safeguards for granting compulsory licences, and lack of mailbox protection. Again, both political and legal reasons have been given for the US decision to ease off Argentina.[125]

The Doha Declaration

In this period, the lead-up to the Seattle meeting of Ministers, developing countries were reporting difficulties implementing the TRIPs requirements. Moves were made for a further extension of time. With the collapse of the meeting, such a proposal could not be put. But the WTO Secretariat gained support for the African Group's proposal that the developed countries exercise restraint in bringing complaints

of non-compliance. At this delicate moment, the WTO leadership could see that such disputes threatened the political fabric of the Organisation.

By the Doha Meeting of Ministers, in December 2001, the issue of access to medicines brought the members to a collective solution. The Declaration on the TRIPs Agreement and Public Health seeks to free the use of key TRIPs allowances from challenge. It states that each member has the right to grant compulsory licences and the freedom to determine the grounds on which such licences are granted; furthermore, each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDs, tuberculosis, malaria and other epidemics, can be so.[126]

The Declaration also reinforces Article 6 in stating that each member is free to establish without challenge its own regime for the exhaustion of rights. This inclusion suggests the members were aware that access to medicines would involve international trade in the patented lines too, not just in generics made under compulsory licence. We have noted above that distributors might trade in original brand name lines where the producers differentiate the prices of the drugs they release onto the market from country to country, or governments run benefit schemes to assist local consumers with the cost of drugs.

While expansive, the Declaration has weaknesses. Immediately, its legal status is uncertain. It is not an authoritative interpretation of the kind the WTO Agreement enables in Article IX:2. Sceptics suggest that it is dependent on member country goodwill; it does not preclude a challenge being brought under WTO dispute settlement. A panel would be expected to take notice of its contents, but arguably it would need to identify the Declaration as an aid to interpretation in line with the sources recognised by the Vienna Convention. Would that aid have to be characterised as subsequent state practice?

TRIPs system for trade in licensed drugs

Moreover, the Declaration left some matters unresolved. At Doha, the TRIPs Council was charged to find a solution to the problem for those members who lack local capacity to manufacture drugs. Could the Council identify conditions under which they might import generic drugs that were made under compulsory licence in another country? The stumbling block was the specification in Article 31(f) that compulsory licensing should be 'predominantly for the supply of the

domestic market of the Member authorizing such use'. Broadly, three proposals were put forward in response. One was for a moratorium to be observed, again informally, against bringing complaints for non-compliance with Article 31(f). The US was prepared to accept this approach, provided that the patent holders received compensation. The second was for an authoritative interpretation that would allow the trade to serve as an exception falling within the scope of Article 30. This proposal had solid backing from the African Group, Brazil, China, India and the Like-Minded Group, as well as other developing countries and Group of 20. The third was for a waiver of the requirement in Article 31(f), pending an amendment to TRIPs itself.

Regarding the substance of the trade, the US and the European Communities wanted the importing countries restricted to LDCs and low-income DCs; other countries should have to make a special case and the developed economies should not be the recipients of compulsorily licensed generics. The US also made a case against the developed countries participating as exporters of generics. It argued that their preclusion would encourage investment in production in the developing countries. Yet was it realistic to expect industries to survive on the strength of compulsory licences?

The US also argued that the diseases should be limited to those which are specified in the Doha Declaration, that is, HIV/AIDS, tuberculosis and malaria. It was concerned that the general phrase 'other epidemics' might be used to expand the system and take in chronic conditions such as high blood pressure, arthritis and obesity. Other members were in favour of keeping the list open. To be sure, an open class would invite conflicting interpretations, creating uncertainty; yet a closed class would eliminate the flexibility needed to respond to new threats. The US lobbied the African Group for support and the European Communities expressed its concern about an open class. Also in issue was whether the drugs would be limited to their active ingredients.

On 16 December 2002, in an effort to break the deadlock, the Chair of the TRIPs Council put forward a draft resolution. It based the trading system on a waiver of Article 31(f). On 20 December, the US blocked this proposal by walking out of the Council, unhappy that the scope of the diseases was not restricted and that the high-income developed countries were not precluded from participation. On 7 January 2003, the European Communities attempted to find a compromise, offering a list of tropical diseases, combined with a link to the WHO as a

reference point for any further additions to the list. But this move failed to satisfy the opposing camps. In June 2003, the new WTO Director-General stepped in to admonish the members, arguing that the credibility of the WTO was at stake. The Cancun Ministerial meeting was looming. The US then shifted from its position on diseases, a new Council chairman took over, and a meeting was convened embracing the US, Brazil, South Africa, Kenya and India. A draft was put before the General Council on 30 August 2003 and an agreement was adopted.[127]

The agreement needed to be converted into an amendment to TRIPs, a big step for the members after ten years of implementation. The amendment was finalised towards the end of 2005.[128] Even then the members struggled over the form the amendment would take. Members differed over whether the substance of the scheme should be incorporated within the substantive provisions of TRIPs or be contained in an annex. A major point of friction was the status to give the statement the Chairman had read out at the time the agreement was made in August 2003. That statement promised a very conservative use of the scheme. The US wanted that statement incorporated with the amendment. Instead, it maintains an uncertain status, being read again at the time the amendment was adopted.

The agreement had included safeguards against the generics being re-routed to affluent markets in the North (such as special colouring and labelling requirements). The statement says governments must take all reasonable steps to prevent and discourage medicines produced under compulsory licence from being diverted and they must undertake expeditious reviews within the Council if complaints are made. The new flexibilities should not be used as an instrument to pursue industrial or commercial policy objectives.

What of participation in the trade? Within the terms of the amendment, no country is excluded from the category of importer. The LDCs are classed as eligible importing members. It is accepted they meet the criteria; but other countries must make them out. At the time of agreement, twenty-three developed countries had volunteered that they would refrain from using the scheme as importers. These countries are listed in the amendment. This list includes some countries with little local capacity, content then to buy the patented lines if they are available. Even in the US, members of Congress raised queries about opting out. The decision of the European Communities to opt out was also criticised, given the poverty experienced in some of the member

states. Another eleven countries have said that they will not use the system as importers, except in situations of national emergency or extreme urgency.[129]

Again, no country was ruled out of the category of exporter. We have recognised, however, that inclusion depends on practical capacity to manufacture drugs. So long as they did not have to observe Article 27.1, several developing countries were major exporters of generics, notably India. Now, with markets shrinking, it is likely they will have to form alliances with patent producers. It is unlikely they will be able to survive merely on compulsory licences. Since the amendment, some countries have passed regulations to enable export on humanitarian grounds. For instance, Canada passed legislation as a pledge to Africa; even so the authorisation is hedged with restrictions, for example regarding the list of medicines. It is reported that China will grant licences for export in the event of public health crises caused by epidemic diseases. In late 2005, the European Communities adopted regulations to enable compulsory licensing related to public health.

The legal niceties of the amendment suggest that the members will need to be able to call on technical resources if they are to navigate disputes over compliance with the system. Assessing the 2003 agreement, Drahos and Braithwaite felt that the provisions revealed a familiar pattern: 'Developing countries are drawn into complex juridical webs that they do not have the resources to disentangle and that ultimately do not serve them'.[130] How ready will members be to take up the facilities of the system? Yet it should be conceded that the scheme is a significant step for the WTO. The WTO is drawn into administration of trade, not just the judicial oversight of adherence to the rules. It represents a much finer grained mediation of the competing interests. Where it gives the members trouble, the WTO might well be led even further into management of the trade.

Yet, on a broader front, some governments and some activists are beginning to query the huge efforts that have been invested in realising these guarded exceptions to patent infringement. They say a better strategy is to build a framework within which intellectual property rights would have to be justified according to a higher goal. Articles 30 and 31 take the form of an allowance given the members to exercise, if they feel confident to do so. As well as the legal uncertainty that surrounds the use of these flexibilities, the countries have to weigh heavily the political economy of qualifying the producers' property rights. A more constructive approach is likely to be the building of

public–private partnerships between governments, companies and NGOs for drug production and distribution.[131]

Does competition policy offer one framework of this kind? After all, competition policy enjoys some recognition in Article 31; paragraph (k) concedes members the space to employ compulsory licences to remedy anti-competitive abuses of patents. The TRIPs general competition policy Article is permissive too. In jurisdictions such as the US, the authorities do use compulsory licences for this purpose. But the general observation we shall make in Chapter 8 holds true: the smaller developing countries especially need technical resources and political support to make competition law work like this.[132] In Article 66:2, TRIPs asks the developed countries to provide incentives to enterprises and institutions within their territories: 'for the purpose of promoting and encouraging technology transfer to least developed country members, in order to enable them to create a sound and viable technological and viable base'. So far, the TRIPs Council has simply referred this initiative to a working party. It has focused on collecting and communicating information about the members' efforts in this regard.[133]

CONCLUSIONS

This study has provided one of the most substantial chapters of the book. As embodied, for example in the plant, genetic codes carry messages about the organisation of fundamental social activities on a global scale. The new technologies provide opportunities for science and industry to appropriate, even in some instances to replace, the materials which have been used in the settings of diverse natural and communal environments. But global interdependence means that such strategies could not be wholly effective. Even if it were the aim, it would prove difficult to control access, and indeed the industries of the north must also rely on input from the knowledge, innovations and practices of the peoples residing in the gene-rich south.

In the North, patent laws are tending to give recognition to that layer of technical intervention which isolates and 'purifies' the genetic materials. However, to varying degrees, the relevant judicial decisions and legislative provisions still hesitate to make the criteria for patentability wholly technical. We can see evidence of reservations being expressed through the distinction between discoveries and inventions, as well as the categorical exclusions, for example in relation to plants and animals. Various research, environment and moral interest groups

maintain opposition to patentability. In the South, the doubts have often been more fundamental. In this sphere, patent laws have been non-existent or heavily circumscribed.

The TRIPs agreement became a means to promote a strong and comprehensive standard of patent protection for the increasingly valuable contribution made by science and industry. But, at the same time, it conceded a space to members, in which they could prefer *sui generis* systems for the protection of plants and animals. That space was left largely undefined. It seems that the concurrent strengthening of property rights within a related convention, the UPOV Convention, discouraged cross-referencing.

Encounters with northern intellectual property law appear to have stimulated initiatives for international recognition and reward of indigenous property rights to traditional knowledge. In part, the shift away from the ethic of common heritage is motivated by a desire to obtain some recompense for the contribution made by local farming communities and indigenous peoples. But it might also be seen as a means to assert controls over the uses to which materials may be put. The materials may also bear social, ecological and spiritual significances. How to reconcile access with respect for the customs and practice, indeed the community survival, of the indigenous producers? Such a desire will be more difficult to mediate. While it looked like the Convention on Biodiversity would give the most emphatic international recognition to traditional knowledge, its implementation progress has highlighted all the difficulties of reconciling the two perspectives. It looks as if it needs the aid of the WTO, not merely to avoid contravening TRIPs but also to enlist its support for traditional knowledge. So the review of Article 27:3(b) can be regarded as an important test of the WTO's capacity to mediate. Perhaps WIPO will help out with a suitable text.

In the meantime, the issue of access to essential medicines has claimed the attention of the WTO. Global initiatives are being taken to get medicines to those in need. They tend to be *ad hoc* and informal interventions, spurred by public campaigns, politicians, celebrities and philanthropists. The unavoidable slog by dedicated company professionals, volunteer NGO health workers and local community leaders will need ongoing institutional support. The WTO has become quite closely involved in this issue. In the Doha Declaration, it has relaxed its controls on compulsory licences. Furthermore, it has devised an administrative system for trade licensed generic drugs. While inevitably its

response is compromised, and its fate depends on the interplay of many global and local economic, political and cultural factors, its involvement remains a very positive sign of engagement in necessary regulatory issues.

NOTES

1. A useful analysis of trends was provided by Margaret Sharp, from the prestigious Science Policy Research Unit at Sussex University; see M. Sharp, David, Goliath and the Biotechnology Business, *OECD Observer* 164 (1990), 22.
2. OECD, *Agricultural Policies, Markets and Trade: Monitoring and Outlook 1994* (Paris: OECD, 1994); OECD, *Agricultural Policies in Emerging and Transition Economies 2001: Special Focus on Non-Tariff Measures* (Paris: OECD, 2001).
3. See for example the appraisal by P. McMichael, World Food Restructuring under a GATT Regime, *Political Geography* 12 (1993), 198; J. Madeley, *Hungry for Trade: How the Poor Pay for Free Trade* (London: Zed Books, 2000).
4. These are recognised in the work of Geoff Lawrence, Genetic Engineering and Australian Agriculture: Agenda for Corporate Control, *Journal of Australian Political Economy* 25 (1989), 1.
5. For the Latin American experience, see C. Chiarolla, Commodifying Agricultural Biodiversity and Development-Related Issues, *Journal of World Intellectual Property* 9 (2006), 25.
6. Venda Shiva issued this warning about developments in India; see *Cultivating Diversity: Biodiversity, Conservation and the Politics of the Seed* (Research Foundation for Science, Technology and Natural Resources Policy, 1993).
7. M. Lopes, M. Sampaio, E. Cap, D. Chudnovsky, A. Lopez and E. Trigo, Approaching Biotechnology: Experiences from Brazil and Argentina. In R. Melendez-Ortiz and V. Sanchez (eds.), *Trading in Genes: Development Perspectives on Biotechnology, Trade and Sustainability* (London: Earthscan, 2005).
8. See Chiarolla, Commodifying Biodiversity.
9. See Lopes, Approaching Biotechnology.
10. C. Correa, From Biotech Innovation to the Market: Economic Factors Driving the South's Competitiveness in Biotechnology. In Melendez-Ortiz and Sanchez, *Trading in Genes*.
11. I. Mgbeoji, *Global Piracy: Patent Plants, and Indigenous Knowledge* (Vancouver: UBC Press, 2006).
12. E. Kapstein, *Economic Justice in an Unfair World: Toward a Level Playing Field* (Princeton: Princeton University Press, 2006).
13. A point stressed in my earlier work; see C. Arup, *Innovation, Policy and Law* (Melbourne: Cambridge University Press, 1993). See B. Andersen

(ed.), *Intellectual Property Rights: Innovation, Governance and Institutional Environment* (Cheltenham: Edward Elgar, 2006).

14. K. Maskus and J. Reichman, The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods. In K. Maskus and J. Reichman (eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005). See R. Eisenberg, Bargaining over the Transfer of Proprietary Research Tools: Is this Market Failing or Emerging? In R. Dreytriss, D. Zimmerman and H. First (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (New York: Oxford University Press, 2001).
15. Federal Trade Commission, *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy* (Washington: Federal Trade Commission, 2002), ch. 3; see further OECD, *Genetic Inventions, Intellectual Property Rights and Licensing Practices: Evidence and Policies* (Paris: OECD, 2002).
16. K. Pavitt, Introduction. In G. Bertin and S. Wyatt, *Multinationals and Intellectual Property: The Control of the World's Technology* (Hemel Hempstead: Harvester Wheatsheaf, 1988), xii.
17. See McMichael, World Food. The WTO *Bananas* dispute has epitomised how trade brings different farming methods and established social allegiances into conflict. The US complained of European favouritism for the small-scale producers of their old Caribbean colonies. On the WTO debate, see further K. Anderson and W. Martin (eds.), *Agricultural Trade Reform and the Doha Development Agenda* (Washington: World Bank, 2006).
18. W. van Caenegem, Registered GIs, Intellectual Property, Agricultural Policy and International Trade, *European Intellectual Property Review* 26 (2004), 170.
19. R. Coombe, S. Schnoor, and M. Ahmed, Bearing Cultural Distinctions: Informational Capitalism and New Expectations for Intellectual Property. In F. Grosheide and J. Brinkhof (eds.), *Articles on Crossing Borders between Traditional and Actual* (Antwerpen/Oxford: Intersentia Molengrafica series, Intellectual Property Law, 2004).
20. A good overview is to be found in the paper by two officials of the OECD's Science, Technology and Industry Directorate, see L. Auriol and F. Pham, What Pattern to Patents? *OECD Observer* 179 (1992–3), 15. WIPO publishes figures for patents, broken down for instance by country of origin and country of destination, see WIPO, *Industrial Property Statistics*, an annual publication in two parts, abridged and final. These statistics can also be downloaded from www.wipo.org.
21. The OECD produces useful industry surveys; see for example OECD, *Biotechnology, Agriculture and Food* (Paris: OECD, 1992); OECD, *Innovation in Pharmaceutical Biotechnology: Comparing National Innovation Systems at the Sectoral Level* (Paris: OECD, 2006).
22. See J. Kloppenburg, *First the Seed: The Political Economy of Plant Biotechnology 1492–2000* (New York: Cambridge University Press, 1988).

23. See the business periodical, *India Today*, 15 January 1994.
24. Michael Blakeney noted early that it had become a standard bearer for regional trade agreements; see M. Blakeney, The Role of Intellectual Property Law in Regional Commercial Unions in Europe and Asia, *Prometheus* 16 (1998), 341.
25. For a record of the experience prior to TRIPs, see A. Rotstein, Intellectual Property and the Canada–United States Free Trade Agreements: The Case of Pharmaceuticals, *Intellectual Property Journal* 8 (1993).
26. C. Antons, Traditional Knowledge, Biological Resources and Intellectual Property Rights in Asia: The Example of the Philippines, *Forum of International Development Studies* 34 (2007), 1.
27. M. Finger and P. Schuler (eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington: World Bank and Oxford University Press, 2004).
28. Critiques were recently gathered together in Maskus and Reichman, *International Public Goods*, (eg, M. Blakeney, Stimulating Agricultural Innovation; also see M. Pugatch (ed.), *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Cheltenham: Edward Elgar, 2006).
29. See OECD, *Biotechnology*.
30. M. Nedeva and R. Boden, Changing Science: The Advent of Neo-liberalism, *Prometheus* 24 (2006), 269.
31. M. Blakeney, Agricultural Research and the CGIAR System. In P. Drahos and R. Mayne (eds.), *Global Intellectual Property Rights: Knowledge, Access and Development* (Basingstoke: Palgrave Macmillan and Oxfam, 2002).
32. P. Drahos and M. Blakeney (eds.), *IP in Biodiversity and Agriculture: Regulating the Biosphere* (London: Sweet and Maxwell, 2001).
33. For a spirited defence of patenting, see S. Crespi, The Wicked Animal Must Defend Itself, *European Intellectual Property Review* 17 (1995), 431.
34. OECD, *Creation and Governance of Human Genetic Research Databases* (Paris: OECD, 2006).
35. R. Wynberg, Rhetoric, Realism and Benefit-Sharing – Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant, *Journal of World Intellectual Property* 7 (2004), 851.
36. J. Gibson, *Community Resources, Intellectual Property, International Trade and Protection of Traditional Knowledge* (Aldershot: Ashgate, 2005).
37. See Mgbeoji, *Global Piracy*, at 197.
38. A. Taubman, Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge. In Maskus and Reichman, *International Public Goods*.
39. S. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* (Albany: State University of New York Press, 1998).
40. See C. Antons (ed.), *Law and Development in East and Southeast Asia* (London: Routledge Curzon, 2003).
41. OECD, *Genetic Inventions*. Further, OECD, *Guidelines for the Licensing of Genetic Inventions* (Paris: OECD).

42. These examples are drawn from S. Bent *et al.*, *Intellectual Property Rights in Biotechnology Worldwide* (New York: Macmillan Stockton Press, 1987).
43. The notes were set out in D. Nichol, Should Human Genes be Patentable Inventions under Australian Patent Law?, *Journal of Law and Medicine* 3 (1995–1996), 231.
44. *Genetech* v *Wellcome* [1989] IPC 147.
45. *Chiron* v *Murex* (*Hepatitis C Virus*) [1995] FSR 4.
46. *Biogen* v *Medeva* [1995] RPC 25.
47. [1995] EPOR 1.
48. *Biogen* v *Medeva* (1996) 3 IPR 438.
49. *Amgen* v *Chugai Pharmaceutical*, 18 USPQ 2d 1016 (Fed. Cir., 1991).
50. *In Re Deuel*, 34 USPQ 2d 1210 (Fed. Cir., 1995)
51. B. Looney, Should Genes Be Patented? The Gene Patenting Controversy: Legal, Ethical and Policy Foundations of an International Agreement, *Law and Policy in International Business* 26 (1995), 23.
52. P. Ducor, *In Re Duel*: Biotechnology Industry v Patent Law?, *European Intellectual Property Review* 18 (1996), 35.
53. I. Karet, Priority and Sufficiency, Inventions and Obviousness: UK Court of Appeal Decision in *Biogen* v *Medeva*, *European Intellectual Property Review* 17 (1995), 42 at 45–6.
54. P. Crespi, Opinion: Biotechnology, Broad Claims and the EPC, *European Intellectual Property Review* 17 (1995), 267 at 268.
55. For reports, see R. Eisenberg, Genes, Patents, and Product Development, *Science* 257 (1992), 903.
56. See J. Strauss, Patenting Human Genes in Europe – Past Developments and Prospects for the Future, *International Review of Industrial Property and Copyright* 26 (1995), 920.
57. L. Davies, Technical Cooperation and the International Coordination of Patentability of Biotechnological Inventions, *Journal of Law and Society* 29 (2001), 137.
58. D. Schertenleib, The Patentability and Protection of DNA-based Inventions in the EPO and the European Union, *European Intellectual Property Review* 25 (2003), 125.
59. *Diamond* v *Chakrabarty*, 447 US 303 (1980).
60. For a summary, see Strauss, Human Genes in Europe.
61. Patents Act 1990 (Cth), section 18(2).
62. W. Lesser, *Equitable Plant Protection in the Developing World: Issues and Approaches* (Christchurch: Eubios Ethics Institute, 1991).
63. [1995] EPOR 357. For discussion, see M. Llewelyn, Article 53 Revisited: Greenpeace v Plant Genetic Systems NV, *European Intellectual Property Review* 17 (1995), 506.
64. For a report, see [1996] 3 EIPR D-90, the news section of the *European Intellectual Property Review*.
65. See *New Scientist*, 4 March 1995, p 5.
66. See *New Scientist*, 11 March 1995.
67. Legal Protection of Biotechnological Inventions – Directive 98/44 [1998] *Official Journal of the European Communities* (OJ) C108/6.

For commentary, see G. Van Overwalle, Legal and Ethical Aspects of Bio-Patenting: Critical Analysis of the EU Biotechnology Directive. In P. Drahos (ed.), *Death of Patents* (London: LawText Publishing, 2005).

68. The WTO has been collecting information about exceptions for the review of Article 27.3(b).
69. Again, see regular reports in the *World Intellectual Property Report* and the *European Intellectual Property Review*.
70. For detailed analysis, see D. Vivas-Ergui, Regional and Bilateral Agreements and a TRIPs-plus World: The Free Trade Area of the Americas (FTAA), *TRIPs Issues Papers*, (Geneva: Quaker United Nations Office, 2003).
71. The US–Peru FTA has an interesting Biotechnology Annex.
72. M. Oliva, Intellectual Property in the FTAA: Little Opportunity and Much Risk, *American University International Law Review* 19, (2003), 45.
73. C. Correa, Can the TRIPs Agreement Foster Technology Transfer to Developing Countries? In Maskus and Reichman, *International Public Goods*.
74. Federal Trade Commission and Department of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Washington: FTC, 2007).
75. M. Garcia and F. Todorov, New Brazilian Draft Competition Law Sent to Congress, *European Competition Law Review* 27 (2006), 64.
76. FTC, *Competition and Intellectual Property*.
77. See Lesser, *Equitable Protection*.
78. Including the US and the People's Republic of China. These country-by-country developments are noted in the World Intellectual Property Report and the European Intellectual Property Review. WIPO lists states which are party to the various Acts of the Convention in its monthly publication: *Intellectual Property Laws and Treaties*.
79. M. Ruiz, The Andean Community Regimes on Access to Genetic Resources, Intellectual Property, and the Protection of Indigenous Peoples' Knowledge. In C. Bellman, G. Dutfield and R. Mendez-Ortiz (eds.), *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainability* (London: Earthscan, 2004).
80. B. Greengrass, The 1991 Act of the UPOV Convention, *European Intellectual Property Review* 13 (1991), 466 at 468.
81. R. Jarvis, Plant Patent, Plant Variety Right or Both?, *Australian Intellectual Property Journal* 4 (1993), 211.
82. C. Correa, Biologiocal Resources and Intellectual Property Rights, *European Intellectual Property Review* 14 (1992), 154.
83. I. Azmi, The Protection of Plant Varieties in Malaysia, *Journal of World Intellectual Property* 7(6) (2004); K. Kariyawasam, The Recent Law Reforms and Plant Intellectual Property Law in Sri Lanka: Compliance with TRIPs and CBD, *Australian Journal of Asian Law* 7 (2005), 169.
84. I rely on Greengrass, '1991 Act', for these insights.
85. Ibid., 469.

86. J. Carlson, Strengthening the Property-Rights Regime for Plant Genetic Resources: The Role of the World Bank, *Transnational Law and Contemporary Problems* 6 (1996), 91.
87. Rajagopal cites the example of the (Indian) courts, see B. Rajagopal, Limits of Law in Counter-Hegemonic Globalization: The Indian Supreme Court and the Narmada Valley Struggle. In De Sousa Santos and Rodriguez-Garavito, *Law and Globalization from Below*.
88. R. Brown, *Who Owns Native Culture?* (Cambridge MA: Harvard University Press, 2003).
89. M. Blakeney, Hans Christian Andersen and the Protection of Traditional Cultural Expressions. In H. Porsdam (ed.), *Copyright and Other Fairy Tales* (Cheltenham: Edward Elgar, 2006).
90. First formulated in Rio de Janeiro in 1992: United Nations Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993). The Convention is administered by a secretariat associated with the United Nations Environment Programme (UNEP).
91. V. Shiva, *Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology* (London: Zed Books, 1995).
92. Conference of the Parties to the Convention on Biological Diversity, Report of the Eighth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/8/31 (pp. 128–35), Decision VIII/4.
93. S. Verma, Protecting Traditional Knowledge: Is a Sui Generis System an Answer?, *Journal of World Intellectual Property* 7 (2004), 765.
94. Conference of the Parties to the Convention on Biological Diversity, Report of the Eighth Meeting (pp. 154–6).
95. WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICIPGRTKF), The Protection of Traditional Knowledge, Draft Objectives and Principles, WIPO/GRTKF/IC/10/5, 2 October 2006. The counterpart is WIPO, ICIPGRTKF, The Protection of Traditional Cultural Expressions/Expressions of Folklore, Draft Objectives and Principles, WIPO/GRTF/IC/10/4, 2 October 2006.
96. WIPO, Member States Make Significant Headway in Work on a WIPO Development Agenda, Press Release PR/478/2007, Geneva, 26 February 2007.
97. S. Picciotto, Defending the Public Interest in TRIPs and WTO. In Drahos and Mayne, *Global Intellectual Property*.
98. D. Vaver and S. Basheer, Popping Patented Pills: Europe and a Decade's Dose of TRIPs, *European Intellectual Property Review* 28 (2006), 282.
99. D. Scalise and D. Nugent, International Intellectual Property Protection for Living Matter: Biotechnology, Multinational Conventions and the Exception for Agriculture, *Case Western Reserve Journal of International Law* 27 (1995), 83.
100. The history is in T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992) Volume II: Commentary* (Boston:

Kluwer, 1994). See also D. Gervais, *The TRIPs Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 2nd edn, 2003).

101. Interview with Mr Matthijs Geuze, Legal Affairs Officer, at GATT Secretariat, July 1993.
102. See World Intellectual Property Report 1996 (11), 20.
103. Communications containing the proposals are available at www.wto.org, see TRIPs Issues – Article 27.3b, Traditional Knowledge, Biodiversity. Members' Documents Circulated under the 2001 Mandate of the Doha Development Agenda.
104. See WTO TRIPS Council, The Relationship between the TRIPs Agreement and the Convention on Biological Diversity, Summary of Issues Raised and Points Made. Note by Secretariat, Revision, IP/C/W/369/Rev.1, 9 March 2006. The latest progress is reported in Brief TRIPS Council Gives Way to Informals, *Bridges Weekly Trade News Digest*, Vol 11, No 6, 21 February 2007, p 1.
105. Commission on Intellectual Property Rights, *Final Report, Integrating Intellectual Property Rights and Development Policy* (London: CIPR, 2002), available at www.iprcommission.org/y.
106. Rimmer suggests 5% of $44 billion, see M. Rimmer, The Race to Patent the SARS Virus: The TRIPs Agreement and Access to Essential Medicines, *Melbourne Journal of International Law* 5 (2004), 335.
107. Commission on Intellectual Property Rights, *Integrating IPRs and Development Policy*.
108. *Guardian Weekly*, 11–17 April 2006; generally see S. Chaudhuri, *The WTO and India's Pharmaceuticals Industry: Patent Protection, TRIPs and Developing Countries* (New Delhi: Oxford University Press, 2005).
109. D. Matthews, WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?, *Journal of International Economic Law* 7 (2004), 73.
110. D. Matthews, TRIPs Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements, *European Intellectual Property Review* 28 (2005), 420.
111. For analysis of Article 30 and related provisions, see N. De Carvalho, *The TRIPs Regime of Patent Rights* (The Hague: Kluwer Law International, 2nd edn, 2005); C. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPs Agreement* (Oxford: Oxford University Press, 2007).
112. C. Correa, Pro-Competitive Measures under TRIPs to Promote Technology Diffusion in Developing Countries. In Drahos and Mayne, *Global Intellectual Property Rights*; see also C. Lawson, Flexibility. In TRIPs: Using Patented Inventions without the Authorisation of the Rights Holder, *Australian Intellectual Property Journal* 15 (2004), 141.
113. C. Correa, Implementation of the TRIPs Agreement in Latin America and the Caribbean, *European Intellectual Property Review* 19 (1997), 435.

114. B. Kuhlik, The Assault on Pharmaceutical Intellectual Property, *University of Chicago Law Review* 71 (2004), 93. US seniors cross the border to buy drugs in Canada.
115. F. Abbott, The TRIPs-Legality of Measures Taken to Address Public Health Crises: Responding to USTR State-industry Positions that Undermine the WTO. In D. Kennedy and J. Southwick (eds.), *The Political Economy of International Trade Law: Essays in Honour of Robert Hudec* (Cambridge: Cambridge University Press, 2002).
116. Correa, Pro-Competitive Measures. See further J. Reichman, The International Legal Status of Undisclosed Clinical Trial Data: From Private to Public Goods? In P. Roffey, G. Tansey and D. Vivas-Ergui (eds.), *Negotiating Health: Intellectual Property and Access to Medicines* (London: Earthscan, 2006).
117. For an Australian version of this story, see P. Drahos, B. Lokuge, T. Faunce, M. Goddard and M. and D. Henry, Pharmaceuticals Intellectual Property and Free Trade: The Case of the US–Australia Free Trade Agreement, *Prometheus* 22 (2004), 243.
118. Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration*, an FTC Study (Washington: FTC, 2002).
119. Vaver and Basheer, Popped Pills.
120. H. Klug, Campaigning for Life: Building a New Transnational Solidarity in the Face of HIV/AIDs and TRIPs. In Santos and Rodriguez-Garavito, *Law and Globalization from Below*.
121. For an analysis of US strategy during this period, see E. Ghanotakis, How the U.S. Interpretation of Flexibilities Inherent in TRIPs Affects Access to Medicines for Developing Countries, *Journal of World Intellectual Property* 7 (2004), 563.
122. Brazil–Measures Affecting Patent Protection, WT/DS199, notified 30 May 2000; United States–Patent Code, WT/DS224, notified 7 February 2001.
123. D. Shanker, The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPs Agreement, *Journal of World Trade*, 36 (2002), 721. See also P. Champ and A. Attiran, Patent Rights and Local Working under the WTO TRIPs Agreement: An Analysis of the US–Brazil Patent Dispute, *Yale Journal of International Law* 27 (2002), 365.
124. Argentina–Certain Measures on the Protection of Patents and Test Data, WT/DS196, notified 30 May 2000; see also the earlier complaint, Argentina-Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals, WT/DS171, notified 6 May 1999.
125. See K. Czub, Argentina's Emerging Standards of Intellectual Property Protection: A Case Study of the Underlying Conflicts Between Developing Countries, TRIPs Standards, and the United States, *Case Western Reserve Journal of International Law* 33 (2001), 191; also S. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (New York: Cambridge University Press, 2003).

126. WT/MIN(01)/DEC/2, 20 November 2001.
127. See WTO News, PRESS/350, August 30, 2003; WTO Doc, WT/L/540 (2003).
128. WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Proposal for a Decision on an Amendment to the TRIPs Agreement, IP/C/41, 6 December 2005.
129. Hong Kong, Israel, Kuwait, Macao, Mexico, Qatar, Singapore, South Korea, Taiwan, Turkey and the UAE.
130. P. Drahos and J. Braithwaite, Hegemony Based on Knowledge: The Role of Intellectual Property. In J. Chen and G. Walker (eds.), *Balancing Act: Law, Policy and Politics in Globalisation and Global Trade* (Sydney: Federation Press, 2004) at 220. Further P. Drahos, Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines, *Liverpool Law Review* 28 (2007), 11. Rwanda is the first country to notify the WTO that it will use the August 2003 Decision to import anti-retroviral drugs made under compulsory licensing, see *WTO News*, 20 July 2007 at www.wto.org. Canada has notified the WTO it will export the drug to Rwanda. See *WTO News*, 5 October 2007.
131. R. Widdus, Product Development Partnerships on 'Neglected Diseases': Intellectual Property and Improving Access to Pharmaceuticals for HIV/AIDS, Tuberculosis and Malaria. In Roffey, Tansey and Vivas-Ergui, *Negotiating Health*.
132. J. Berger, Advancing Public Health by Other Means: Using Competition Policy. In Roffey, Tansey and Vivas-Ergui, *Negotiating Health*.
133. WTO, Council for Trade-Related Aspects of Intellectual Property Rights, Implementation of Article 66.2 of the TRIPs Agreement, IP/C/28, 20 February 2003.

PART IV

CONVERGENCE

CHAPTER 8

THE CASE OF COMMUNICATIONS MEDIA

Chapter 8's case study is the new online communications media. The chapter detects a broad trend towards global integration of the media. But the openness of the technology itself, the conflicting economic interests which the participants bring to bear (including contradictions within their own positions), and the varying cultural mores of production and distribution, all suggest that pluralism is unlikely to be eliminated.

The chapter attempts to relate three legalities that shape most directly the pattern of the flows through this media. It identifies complex and shifting relationships between industry-specific regulation, intellectual property and competition law within the context of trade liberalisation. The chapter suggests how each of these legalities has been employed, both to stimulate the flows and to capture their value. Two connected issues are pursued to illustrate the significance of the different legalities. The first issue is the freedom to communicate various kinds of content online; the second is the conditions of access to the service and technology platforms needed for its communication. The nature of the field provides an opportunity to consider the influence of the two WTO agreements in conjunction. So this chapter brings each of the strands of the book together.

Globalisation is undermining the competence of the kind of industry-specific regulation that national governments have favoured in the past, such as public monopolies, licensing schemes and local content quota. Chapter 8 examines the role which the GATS has played in

obtaining commitments to roll back this regulation where it would deny foreign service suppliers national treatment and market access. It is clear that many countries regarded the communications sector as sensitive. The chapter notes the reluctance to make commitments in the audio-visual sector; it relates how the negotiations over basic telecommunications were extended beyond the Uruguay Round in an endeavour to obtain more concessions. The WTO has since started another round of negotiations over services without reaching agreement on liberalisations.

As industry-specific regulation is gradually undermined by globalisation, a market-oriented legality like intellectual property regulation is allowed more play. If content, service or technology providers can secure property rights around the world, they have power to exercise in the marketplace. Pursuing the two issues nominated above, Chapter 8 discusses the convergences and divergences between the various national intellectual property legalities. The focus here is on their provision for copyright protection. The chapter then refers to the provisions TRIPs made for copyright in this field. But the study is alert to the hesitations and ambivalences evident in the WTO's approach. The chapter draws into the discussion the initiatives of WIPO in relation to content online; the WIPO Copyright Treaty and Performances and Phonograms Treaty is discussed here. The field is able to provide a very good example of the interaction between two sources of international norms. These Treaties also postponed several issues and the intellectual property has since split into strands that are running in quite different directions. Some countries are using free trade agreements (FTA)s to obtain agreement to tighter property controls, extending beyond copies of the content to control of the access to the technologies of communication. Others are sceptical of further controls unless they can be shown to further global public goods such as access to knowledge and cultural diversity.

Yet, in turn, intellectual property gives way to the legalities of a market-based organisation of the media. The big 'players' in the market employ organisational forms, such as strategic alliances and functional integration, to assert control. Chapter 8 considers the national approaches of competition policy to the use of these organisational forms. It concentrates on the requirements they make to enable access to 'essential facilities' that are so controlled. The fluidity of the media right now makes selection of these facilities risky. The

essential facilities under consideration here are computer platforms, telecommunications networks and iconic content material. Even so, how to identify where control might lie? The difficulty is that the media changes shape again and the requirements may end up giving advantages to other players who are now more resourceful than the incumbents. For example, the focus lately has been on the rise of the internet search engines, interactive websites and mobile multiple pay devices. Such requirements have the virtue of specificity, yet we need competition regulation that is flexible enough to comprehend how power comes with shifting combinations of content, services and technology resources.

The chapter asks whether the WTO agreements are providing independent and alternative producers, here of content, services and technology, with the necessary rules and resources to benefit from global online media. It finds a little support in the intellectual property provisions, primarily with the protection their creations may be offered, but also the freedom through fair dealing allowances to make use of other material. The final inquiry of this kind concerns the potential which lies in their support for competition policy. Here it finds that the support is tentative. As we have noted, the TRIPs and GATS agreements make general acknowledgements of the need for members to control anti-competitive practices. However, the WTO does not set standards itself, even though weaker jurisdictions might need this support. The GATS telecommunications access obligations provide the most substance. They are to be found in the Annex on Telecommunications and in the Reference Paper resulting from the subsequent negotiations over basic telecommunications. They have received interpretation in one of the few substantial dispute settlement rulings regarding the GATS. However, they might just reveal the negotiators' preoccupation with the power of national public instrumentalities.

Once again, it is necessary to ask whether competition law can be expected to offer much potential in this regard or whether the WTO should now develop more sympathetic legalities, such as positive codes of conduct for transnational operators. The chapter closes by gauging the tenor of the most recent debate over the WTO's competition and investment agenda. As members vacillate over the direction of this policy, the WTO risks wasting an opportunity to create a prototype for the kind of re-regulation needed to counterbalance global economic power.

MEDIA FREEDOM AND CONTROL

Globalising effects

There is clearly common ground among a variety of theoretical perspectives in assigning a central role to communications media in the process of globalisation.[1] The global role of such media is most evident in the capacities they provide traders, financiers, industrialists and suppliers to overcome the spatial and temporal limitations of the locality and operate in a coordinated and reflexive fashion across the world. Such capacity proves valuable in the communications sectors or industries themselves. Today, it is really possible to project communications into almost every corner of the globe, whether it be by medium of a mobile phone linked to a satellite, an MP3 player stocked with internet downloads, or a website for posting personal text messages and clips.

The new online electronic media is expected to step up this process of de-territorialising and de-materialising the communications between us. In so doing, they present a challenge to the economic independence, political sovereignty and cultural integrity with which the locality seeks to regulate the communications media itself. The media provide their own means for resourceful suppliers and users to circumvent the boundaries which have been drawn around the various sub-sectors of communications with a view to protecting local industries. Indeed, many localities may have to decide whether they can maintain communications industries of their own at all such as equipment, content, infrastructure and services industries. They are tempted to relinquish their protections and open up to the international networks. It is argued that their businesses and consumers will receive the benefits of the economies of scale, scope and speed, investment and expertise, and other assets, which these networks command. It is claimed such assets are needed to keep traditional industries viable and to participate in the new sectors of electronic discourse and commerce.

In a rapidly destabilising environment, it is hard to make these decisions about economic strategy. The challenge is to capture a share of the benefits which are to be generated through transport charges, intellectual property royalties, sales commissions, subscriber fees and taxation revenue, while giving up many traditional instruments of national policy such as public instrumentalities and other ownership controls. However, control over communications and information structures is increasingly central to the fate of societies.

Communications media carry cultural and social messages, which challenge traditional certainties of ideology, allegiance and identity. That is why we see controls based on social moralities (eg, anti-pornography) and political sensibilities (eg, anti-Nazi).

A more material message is their challenge to regulatory competence. The media provide opportunities for more producers and users to shop for sympathetic national regulation, manipulating the concepts traditionally used to attach conduct and entities to particular locations. The regulation in question can range from product standards, gambling controls, fair trading practices and financial supervision, to taxation measures and forms of industry assistance. As we saw in Chapter 4, when we looked at the nature of scheduling commitments, one main dispute settlement ruling concerned the measures the US has taken against online international gambling services. A more sordid example of the practices which are emerging comes from the international market for phone sex. It is reported that a company incorporated in Delaware, directors and investors unidentified, is headquartered in the Virgin Islands, and takes calls from American consumers via the Guyanese national telecom system which the company has recently bought out.[2]

As we first saw in Chapter 2, in some scenarios, this electronic trade breaks free of any connection to national jurisdictions. The communications media enhance the capacity of trade to float freely above the nation state, in self-regulating fields of commerce connected horizontally as spaces of flows. Current discussions about jurisdiction in cyberspace posit a world in which communications cannot be sensibly localised, whatever point of attachment is pursued, whether it be country of origin, country of transmission, country of reception or country of infringement. Such communications can never be satisfactorily fixed to a particular point in time or a place on the ground.

Global communications do not simply create conditions for competition between countries; they expose divisions within nations too. Communications enhance direct link across national boundaries, not just within transnational corporate groups, but also between global cities where design, financing, management and associated services (such as legal services) are concentrated. For example, voice and data transmission circulates through intra-corporate telecommunications circuits, which are in turn connected to public and international networks. One proliferating private link takes the form of the intranets being constructed on the platform of the Internet, the network of networks.

Thus, globalisation both connects and fragments. Paradoxically, communications infrastructures reveal a spatial configuration, yet the configuration which emerges is uneven, both cross-nationally and sub-nationally. The supply of infrastructure and equipment is thickest in the metropolitan centres of the north. At the same time, in many countries, most people still do not enjoy access to a simple telephone line. Technologically, satellite and mobile telephony might present a solution, but again, just for the wealthier strata. Even in the relatively affluent north, there are homes without a connection to the Internet.[3] Thus, we are also presented with the possibility that certain locations will be by-passed by the global flows or relegated to a marginal position. The configuration raises the prospect of a new kind of inequity based on uneven access to information and technology resources, a digital divide.

Access to the media

Those who are optimistic about the media suggest that it provides its own solution to this problem.[4] The media of the previous eras have allowed distributors to capture and exploit economies of scale and scope. At times, the state has assisted them with this project. But the new converging and interactive media are set to lower barriers to entry dramatically. The huge expansion in carrying and processing capacity will enable anybody to be a user or indeed a producer.[5] With the prospect of interchangeable alternative routes, satellite for wire, cable for television, network for computer, mobile hand-held for fixed desk top, there will be no incentive for distributors to bottle neck traffic and exclude non-affiliated content providers or small-time users.

So, for example, intellectual property, which has been one way for distributors to control channels, again with state support, will assume a different complexion. While perhaps in the transition to the new media, some core content will be rationed, such as major news and sporting events, popular movies and iconic images, the emphasis will ultimately shift to releasing, translating and reconstituting content as widely as possible – especially where it is possible to obtain payments for small uses of a work. This begins with data and moves to music; with sufficient carrying capacity, it accommodates visual images.

Thus, the new media offer ways to break loose from the political controls or cultural insularities of certain localities. But they provide the means to surmount the economic limitations of the one-to-many communication channels, in which intelligence is controlled from the

centre and a lowest common denominator product distributed to 'dumb terminals'. In this scenario, the new media finally provide the means to cut out the middleman. Independent content producers and service providers will be able to connect up directly with empowered, interactive users, all around the world. Success in the creative economy lies in network economics, knowledge spill-overs and cumulative innovation.[6]

The Internet is the medium carrying perhaps the most hopes for providing alternative channels for information flows, the sending of messages and exchanges of dialogue.[7] For instance, emphasising political discourse, the Institute for Global Concerns contends: 'The development of communications technologies has vastly transformed the capacity of global civil society to build coalitions and networks. In times past, communication transaction clusters formed around nation-states, colonial empires, regional economies and alliances ... today new and equally powerful forces have emerged on the world's stage – the rain forest protection movement, the human rights movement, a campaign against the arms trade, and planetary computer networks'.[8]

So, for example, Kathy Bowrey identifies the rise of alternative internet cultures with an ethos of sharing peer-to-peer information.[9] They build up their own protocols and customs regarding acceptable conduct online. The best known are the music file sharing networks facilitated by Napster, Grokster and Kazaa. But information of all kinds is being freely shared in digital form, as the success stories of Linus (software kernel), Wikipedia (encyclopaedia) and Craigslist (sales system) testify. A recent phenomenon are the very popular websites for posting personal statements and productions in the form of text, music and videos such as MySpace, YouTube and FaceBook.[10] Even ordinary consumers increasingly expect real-time access and inter-activity, as well as place and time shifting facilities. Uma Suthersanen suggests that peer-to-peer architecture and digital sharing make much more efficient use of growing distributed processing and storage capacity of networked computers.[11] They are the source of new technologies, alternative business models and future product innovations.

Control of the media

Yet, this early optimism has given way to scepticism in some quarters. One source of scepticism about this emancipating potential is the nature of the media itself. Far from putting people in touch with solid information sources again, or with like-minded communities, the

electronic media is substituting a hyper-reality, which has the perverse effect of disguising the very absence of reality.[12] How interactive is it? Disallusionment comes with the revelation that the popular home video girl is a scripted actress. On a more practical plane, it is doubtful whether the electronic media can provide a complete substitute for face-to-face personalised and localised relations. Tacit knowledge, trust and understanding remain critical to the conduct of social discourse, even to the success of trade and commerce.

We must question whether the horizontal, private configuration of the communications sector can ever entirely detach itself from the ties of the locality. For the time being, local cooperation is needed to overcome the physical obstacles which the local terrain presents to the building, operation and maintenance of the infrastructure. Local terrestial lines, large satellite receiver dishes, even computer terminals, provide a point at which controls can apply restrictions to transmission or reception. We see the concessions that News Ltd, Microsoft, Yahoo and Google have all made to the Chinese Government over control of political content.

More subtly, a presence involving collaboration with locals may be essential if communications are to be adapted, not just to the many resilient traditional cultures and moral majorities, but also to fashion appeal to post-modern audiences which split into many specialist, expressive styles. 'International broadcasting satellites, not anchored in a national broadcasting culture and targeted at no audience in particular, have been a commercial graveyard'.[13]

Yet the biggest threat to access may lie in the way society chooses to configure the media. Might another – as yet indistinct – means emerge to capture this transactional space?[14] If, for instance, as Esther Dyson has argued,[15] property in content will no longer be central to supply, might value be captured by those who can lock-in users and exclude non-affiliates by integrating service and technology systems in a functionally effective fashion? In particular, could those who control the fibre optic wire or the computer software platform exploit their position, using intellectual property power, as well as other strategies such as acquisitions and alliances, to control access to essential facilities? Likewise, if content is king?

They might build on this strategic position to become the systems integrators and offer not just equipment but a range of services to those many producers and users who do not have the time or expertise to construct and operate their own networks. Such services may be

targeted at the users, but they might also be designed to attract the support of content producers, service providers and product advertisers who are seeking to identify and reach a constituency. Of necessity, many participants will continue to turn to others to provide a speedy, facile, reliable and secure flow. For instance, they will want someone to filter, authenticate, check and customise messages for them. At the risk of ingratiating myself with my publisher, I note that the author and the reader will still need the services of a good editor!

Convergence might present opportunities to assume this position. Convergence has been characterised as technical, functional and organisational.[16] If even the largest firms today do not attempt to adopt a 'stand-alone' position and provide the whole system, they seek to design exclusive arrangements with allies and affiliates. Vertical integration, running through production and distribution facilities, is a long-standing practice in the media sector.[17] A feature of the current field is the exploratory alliances formed horizontally between media giants across previously separate markets, telecommunications and entertainment, computing and telecommunications, computing and information services. Another strong feature is the acquisition of smaller firms with the specialised assets the large companies need to incorporate in these systems such as back catalogues, software programs and internet websites. Thus, recently, News International Ltd has bought MySpace and Google acquired YouTube in an effort to keep up with the websites that attract Generation Y.

If economies of scale, scope and speed can still be exploited, the systems integrators might be tempted not to act merely as neutral 'air traffic controllers'. As 'gate-keepers', they will use their position to favour their own services and those of their affiliates, at the expense of independents.[18] The more general trend here is to commoditise or, given the real-time service supply and relationship-building character of the businesses, to commercialise internet culture. Rupert Murdoch is quoted in *The Economist* as saying: 'MySpace has been run by creative types who have not thought much about earnings and who are frightened about being corporatised, but now their job is not just to grow but to monetise traffic'.[19] So the broader issue is whether regulation can preserve spaces for non-commercial, open source communications to flourish. Again, the media may have its solution: once sites go corporate and commercial the users will simply move on. Yet is this confined to the margins, the activities of minority, avant-garde groups? We should not discount the urge in popular culture to want to do the

same as others, the power of identification with one particular brand, the well-known mark. And the large commercial concerns now have social anthropologists out on the street to spot trends and bring them in-house as quickly as possible.

Legal and other controls

We should keep in mind here the possibility that the outcomes do not depend primarily on the nature of legal regulation. Producers experiment with various technological and commercial strategies in their endeavour to attract users and channel online media. In Lawrence Lessig's influential configuration, law is one of a number of sources of regulation. It is to be placed alongside the market, social custom and architecture (code).[20]

The focus of the following analysis is on three types of legal regulation: industry-specific regulation, intellectual property regulation and competition regulation. But of course these legal types interact with the other sources of regulation in a variety of patterns. We might think that the dominant trend now is to maximise market transactions in online media, yet sometimes the strategy is to control access, even to make a product exclusive. Certainly it is to limit access to those who can pay the price of entry or the tariff of traffic. Perhaps Lessig's most noted insight is the role that code plays in regulating access. Yet law may be needed to back that strategy, for example to criminalise the efforts to circumvent the digital technology controls on access. Even those who prefer to rely on social custom to regulate open networks must fall back occasionally on legal safeguards to prevent corruption of their ethos.

INDUSTRY-SPECIFIC REGULATION

It is clear that the global reach of the new online media puts many localities on the defensive. Paradoxically, it is undermining confidence in the traditional means by which many countries provide access to local and less powerful voices, such as public carrier monopolies, media ownership controls, local content requirements and universal service obligations. In the recent past, the approach of the nation state has been to regulate competition on a categorical basis. Thus, local industry was protected from foreign competition, for instance through limits placed on the level of direct foreign acquisition or establishment in sectors regarded as sensitive. Restrictions have also been placed upon cross-border supply, by way of private telecommunications circuits or

satellite services departing from nationally organised and often publicly owned grids.

Of course, communications has long involved a cross-national dimension but it has largely taken the form of the division of the market between national monopolies. In relation to supply both through telecommunications and satellites, such partitions have lately come under stress. Thus, Canadian and Mexican controls of this kind were a target in the NAFTA negotiations.[21] Another form of local protection consisted of the limits placed upon imports of personnel, programs and signals. The EU's local content quotas for television have attracted the displeasure of the major exporters, mainly from a home base in the US. France was unable to obtain its partners' agreement to extend the quotas to the new interactive audio-visual media.[22] Likewise several countries, for example South Korea, have come under pressure for insisting that cinemas show a proportion of local films.

Not all controls have targeted foreign competitors directly. Incumbents were further shielded by general cross-media ownership controls and lines of business restrictions. Moreover, in some sectors, whether by region or otherwise, licensing restricted the number of competitors overall. Governments also of course have supported public ownership, in some sectors in a monopoly position. But latterly, in both television and telecommunications sectors for instance, these governments have allowed in more participants and privatised state-owned incumbents.

From a free market perspective, such industry-specific national regulations have been characterised as protections from competition. The protections were justified on the basis that investments were high and resources were scarce (such as frequency spectrum or advertising revenue). But it should be remembered that, as well as guaranteeing the viability of the operators, the state had an interest in favouring a limited number of local operators. Licensing created a point at which to extract concessions towards local equipment or content purchase, the carriage of certain public good contents or services, and the cross-subsidisation of indigent users. Not all sectors benefited from this kind of direct protection. But we can argue that intellectual property provides an analogous, probably milder, sort of state security against competition for others such as those in book, record and software publishing sectors. Again, in return, the state considers whether to extract certain concessions from the property holders such as fair use allowances.

Of course, another rationale for the immunities was that the absence of such regulation would lead to more concentration rather than less. Public power would be replaced by private power. Given the role of the communications media, this power could even comprise a threat to democratic forms of local decision making and outlets for expression of cultural diversities. So governments are understandably reluctant to jettison these traditional instruments of public policy. Feeling sympathy, the World Bank has suggested that for the time being developing countries should refrain from privatising their national telecommunications instrumentalities.[23] Further concentration is the danger governments face too when they are pressed to relax cross-media ownership controls. Cross-media ownership will allow the synergies in convergence to be exploited. But will it simply squeeze out the smaller contributors who benefited from a sheltered market?

IMPACT OF THE GATS

If unilateral liberalisation can be hesitant and partial, the expansion of world trade and investment is adding another dimension to the framework for policy formation. As we have noted, bilateral and regional agreements start this process. But the multilateral WTO agreements and specifically here the GATS are also influential in shaping the framework.

Audio-visual sector

In the communications service sectors, the GATS places the onus on national governments to defend or relinquish their industry-specific regulatory measures. The general message is that this regulatory legality should give way to whatever legality of association and distribution the international operators find most rational. Let the market find its own form of ordering. As the analysis in Chapter 4 established, submission to the norms and procedures of the agreement opens up to scrutiny a range of local arrangements. In the 'audio-visual' services sector, limits on foreign ownership, refusal of work permits to foreign artists and technicians, local content requirements for programming, and production subsidies for local ventures, may be regarded as discriminating against foreign suppliers.[24] Or the regulatory arrangements may simply have the effect of restricting market access for foreigners. Controls on concentration of media ownership, licensing restrictions on market entry, and bans on certain kinds of programs or advertisements, may be viewed this way.

However, the negotiations revealed that many countries regarded this sector as extremely sensitive. As the agreement allowed, their commitments to national treatment and market access were markedly conservative. An inspection of the schedules reveals that a significant number of countries chose not to inscribe their audio-visual sector in their schedules at all. These countries included developed countries, such as Australia, Canada and members of the EU, particularly France, which felt exposed to the economies of scale and cultural imprecations of the American entertainment industries. Partly, this choice of response was a strategic one. Even a stand-still agreement would have limited a member's measures to its existing modes and levels of regulation. It would have restricted its choice of regulatory strategy in the rapidly developing new media sectors.

Nonetheless, the resistance ran deeper. In France, a member of the right-wing parliamentary parties was to assert that cultural goods, which carry our cultural identity, like the agricultural goods, which carry our territorial identity, were not goods like others. It was not surprising that this resistance greatly exercised the US industry lobby. In part, the other countries were trying to preserve a space for local industry to survive, even to act as a launching pad for exports into other markets of the local product. But it was not helpful to look on the reaction as simply a case of disguised industry protectionism; the dispute exposed cross-cultural static too. The opposition feared there would be no room left for locals to hear their own stories told, to see their own characters portrayed.

Telecommunications sector

Telecommunications was to be another sensitive sector. By the end of the Uruguay round, forty-eight countries had scheduled commitments on telecommunications. Most were given over to the valued-added subsectors, though twenty-two countries inscribed basic telecommunications and made limited commitments, for instance in relation to mobile and cellular telephony.[25] Yet, like audio-visuals, many countries chose not to inscribe telecommunications sectors in their schedules at all. After all, we know that inscription opens up to scrutiny the restrictions which many countries still place on foreign ownership and operation of services and the controls they apply to the circumvention of public switched networks.

Nevertheless, a decision was taken at Marrakesh to continue negotiations on basic telecommunications on a voluntary basis.

Negotiations were to be comprehensive, with no basic telecommunications to be excluded categorically. A closing date of April 1996 was set for these negotiations. Negotiations were reported to be addressing all modes of supply, including cross-border supply and supply by re-sale, and the establishment of a commercial presence through foreign direct investment and the ownership and operation of networks.

Yet the US continued to express concern about the value of the market access offers being made by the other participants, including Asian countries such as Malaysia, India, Indonesia and Thailand. Their restrictions on foreign ownership were being targeted. Chapters 3 and 4 identified the effects of permitting countries to take exemptions from the general obligation to accord MFN treatment. The basic telecommunications sub-sector was one in which the US had threatened to apply an MFN exemption across the board. Now the EU was worried that it would exclude international services from the agreement. The US was said to be concerned that other countries would seek to free ride on the cheap international connections which competitive markets such as its own and those in Europe had made available. Yet the WTO Director-General stressed the futility of maintaining a bilateral approach. He argued that national boundaries were being abolished and national monopolies rendered obsolete.[26]

Just before the deadline, the negotiations froze. The Director-General of the WTO successfully proposed that the participating countries preserve the offers they had made and re-examine them during a thirty-day period that was to begin on 15 January 1997.[27] This further 'window of opportunity' produced offers of further liberalisation, representing fifty-five schedules of commitment and sixty-nine countries.[28] It finalised a Fourth Protocol to the GATS, which came into force at the beginning of 1998.[29] It is reported to have led more countries to relent on foreign ownership and control of basic services, including the US itself. However, it is clear that the issue remains a sensitive one for many countries, especially in regard to local services. The Protocol also includes a list of nine MFN exemptions that members had taken.

These post-Uruguay round negotiations also stimulated work on conceptual, technical and regulatory issues. The regulations under consideration included those which might constitute barriers to trade. Interestingly, in the light of what we have said about market access, non-discriminatory limitations on the number of providers were mentioned here. But the work was also to do with the character of the

national regulations which were seen as necessary to safeguard liberalisation. The topics included: licensing, frequency and numbering, standards and type approval, tariffs and accounting rates, termination services, rights of way, and universal services. Given the continuing role of regulation in this sector, transparency and impartiality were regarded as key issues. High on the agenda were the terms and conditions for interconnection between telecommunications and other service suppliers, together with the nature of the safeguards required to prevent abuse of power by dominant network operators. The case study returns to this aspect of the GATS work in its discussion of competition law below.

Progress in the new GATS Round

In Chapter 4, we noted the slow progress with GATS negotiations over further liberalisation. The offers have largely been improvements in the commitments members made back in 1994 during the Uruguay Round. In few cases have members offered to include additional sectors in the coverage of their schedules. Adlung and Roy report that business telecommunications is one sector in which offers are being made.[30] But audio-visual services remain a very sensitive sector. Whether the Round will yield much more at all remains a moot point.[31]

In Chapter 4, we also noted that the recent US FTAs contain chapters on cross-border service supply as well as investment. While bilateral rather than multilateral, their negative listings approach places the onus on parties to retain their limitations, even to carve-out sectors in which they wish to maintain their regulatory options, because for example they are not sure how the sector will change. Drafting these reservations is hazardous, but even countries like Australia have endeavoured to do so for the cultural industries.

For the time being, we should underline the point that the work on legalities is not simply deregulatory. We can concede that national governments are increasingly reluctant to invest funds directly in communications infrastructure, or to contain rivalry amongst operators on a categorical basis. Yet the risks, which private developers perceive in an uncertain and volatile environment, still lead them to call upon the state's power to protect them from excessive or unfair competition. As we have seen, that power was represented in various kinds of industry-specific regulation, but increasingly it means the power of intellectual property law and the power of competition law itself.

For instance, when the public carriers are privatised, they become concerned that the authorities do not set terms and conditions of access that allow their competitors a free ride on their infrastructure. Without a protected return, they will be reluctant to invest in maintaining and extending the infrastructure. The demands of their new shareholders for dividends sharpen their dilemma. At the same time, the regulators should be concerned that the independent producers and users have genuine access to the new media platforms. When the private networks move into new channels of distribution, such as internet service provision and mobile communications, they become concerned to secure rights over content; supply of key content might be the hook by which they can lock the consumers into their media. But securing control at key points in the distribution systems, (ie, the bottlenecks in the movement of the traffic) might also hold the key.[32]

So we are reminded that liberalisation does not necessarily mean libertarianism.[33] The OECD report remarked: 'Where there is perfect competition, the regulator may even be put out of a job, but that day has not yet arrived in the communications industry. On the contrary, the job of the regulator seems set to become more involved and more detailed than ever before.'[34] Globalisation requires regulators to compare and co-ordinate national legalities that cut across each other. But they must also mediate between legalities with markedly differing contents. Here, they must finesse the balance between industry-specific regulation, intellectual property and competition policy. We look now at their approaches to intellectual property and competition policy.

INTELLECTUAL PROPERTY REGULATION

This section identifies the issues that online media present for national intellectual property legalities and considers the efforts of the WTO and other international organisations to mediate them. We might start with a general observation that the intangible and indivisible character of intellectual resources makes it difficult for producers to contain them materially. Ideas know no natural physical bounds. As we have begun to identify, the media, which embody these ideas, present opportunities to capture their value in various ways. However, the same media can create new ways to gain access and make copies, without the need to obtain the producer's authorisation. So, when technical and economic strategies prove inadequate, intellectual property might be seen as a necessary means of protection for one's investment.

At the same time, the innovations in the media expose both conceptual and practical gaps in the coverage of the existing national intellectual property legalities. Attempts to fit the new media to the established categories prove unsatisfactory and modifications have to be considered. So Plowman and Hamilton commented: 'Current changes in technology are producing new patterns, with traditional services being combined in unexpected hybrid shapes and uses, in defiance of the established categories.'[35]

Earlier waves of innovation, such as photography and cinematography, were the spur for law reforms. At each turn, we would not expect national legalities to respond in exactly the same ways. Building on the observations made in Chapter 2, it is worth mentioning that the responses are not likely to be determined solely along economic utilitarian lines, though where a country fits into an increasingly global structure of producers and users, exporters and importers, is likely to be influential. Aesthetic and moral judgements, themselves shifting with the times, influence responses too. Intellectual property engages a range of views regarding, for instance, what is authored and the value of originality and imitation rather than emulation and parody. Sampling in music is a current flashpoint. It is a bigger issue again when the media crosses cultures.[36] Views differ too about when resources should be freely available rather than subject to payment for access and use. An example pertinent to our study is the open licence movement, represented by the Linus software which is made available for experimentation, improvement and use as a collective activity. It is only one example of the interactivity and sharing that makes it difficult to isolate the contribution of a single author or producer for reward.

Today, national governments are being pressed to adjust their intellectual property legalities to 'catch up' with the new media. The requests come from foreign exporters of intellectual value, whether that is embodied in finished consumer goods, industrial technologies or, as here, online transmissions. As we shall see below, the home countries of those foreign exporters may take up their claims through bilateral initiatives. At the same time, we might expect local secondary producers and perhaps end users, especially in countries that predominantly receive intellectual property from elsewhere, to press governments to contain or qualify those protections. They may be seeking strong fair use provisions for education and research. Yet the local lobby might also be an economic interest that profits from trading in counterfeits and copies.

Yet determining a position to take on intellectual property protection can reveal considerable ambivalence. Many producers borrow heavily from existing resources when they invent and originate. The author of a book provides a good example. If the division between perspectives is classically cast as a clash between producer and user, a significant inter-legality today is the difference between the interests of authors, musicians and performers, and their publishers, on the one hand, and, on the other hand, the industrial firms which are involved in the acquisition, adaptation, commercialisation and distribution of the works, often in a reconstituted version.

So once again, we find that the claims surrounding copyright law are much more subtle than a simple dichotomy between straight-out support and opposition. They deal with such specifics as the scope of the subject matter to be embraced by the category, the uses which are to be controlled, the freedom with which the rights may be alienated and acquired, and the provision for non-voluntary licensing and fair dealing. Consequently, they generate legal pluralism between the national arenas, even within the countries that are large exporters.

If arbitrating between these conflicting domestic claims is not a hard enough task, the nation state is faced today with an enormous challenge in gauging the 'net' consequences of making one kind of regime rather than another available for the new online media. De-territorialisation and de-materialisation make it more difficult to devise a policy that can reflect the values, or deliver the benefits of, intellectual property to a particular locality. As has been my contention above, the global carriers provide so many points of attachment that it is extremely difficult for any one locality to monopolise jurisdiction. If national laws differ in their substantive content, there is also competition between locations over whose laws are to apply.

Copyright

Intellectual property has attracted strong philosophical justification. Yet it does not enjoy the assistance of a unifying principle in the sense of a core criterion that can determine whether new subject matter and new uses are entitled to its protection.[37] Again, to do justice to national traditions, we should acknowledge that some countries have striven harder for a synthesis than others. But, overall, we can say that countries are particularistic and instrumental in their approaches. So the new intellectual resources must be matched with the criteria of the

established categories. We would find that a range of categories, such as patents, trade secrets and confidential information, trade marks and the expanding forms of protection for business reputation, character merchandising and image association, are all relevant to online media. Patents have become important to software protection; domain names are a valuable resource within the online media. However, for communications media generally, it is safe to say that copyright is the most common category. Its substance and legitimacy place it at the centre of the debate again today. Thus, copyright is the main category for those seeking intellectual property in the new media, whether by way of assimilating the media to the well recognised copyrightable works and uses or by obtaining copyright protection for new subject matter and uses.

Copyright has displayed a capacity to adapt to changes in technology. It has extended its reach, from its initial concern with 'works' such as musical scores and literary texts, to the new media of cinema films, sound recordings, wireless broadcasts and computer software. Yet even as it made this progression, divergences became apparent. In particular, some countries have thought it more appropriate to afford 'neighbouring' or 'related' rights to these modern audio-visual media, usually providing a lesser level of substantive protection.[38] The same has been true of artists' performances. Other new media have again attracted *sui generis* forms of protection instead. The *sui generis* form provides more of an opportunity to tailor the protection to the circumstances of the particular media. It is a live consideration in the discussion of protection for unoriginal data bases.

In any case, copyright has not conceded every use which the holder might wish to control, whether it be by excluding others from the resource or by licensing subject to conditions of various kinds being met (such as the payment of a fee). So, another way in which copyright has been limited is through the bundle of rights which its subsistence attracts. Arguably, the primary right it has been prepared to confer is the right to control the copying or the reproduction of the subject matter. This right makes an issue of the nature of infringement. What is a copy? For example, if it is to be susceptible to reproduction, some countries have said that the subject matter must be fixed in a material form. So to store a poem in one's memory or to read it out loud has not been an infringement of the copyright, unless the law broadens out the definition of reproduction or adds in further rights that can catch these activities. Some jurisdictions have legislated the rights to control

performance in public or the broadcast or communication to the public of certain subject matters. But these extensions reveal variations too.

In this regard, it is useful to think of the online media as an activity in which many people are engaged, transforming material, storing it and making it available. The constitution of the online media differs from the original materials on which it draws or which, it is sometimes said, underlie it. For example, we can often think of it as a multi-media product. So the law must decide whether its product can be fitted to an existing subject matter of copyright such as a computer program, cinematographic work or wireless broadcast.

However, as it becomes more truly online, the media is more of a service activity.[39] Its special value lies in making the existing material accessible in a particularly convenient and useful manner and indeed in drawing the users into ongoing, interactive, experiential relationships. It is made available to be searched by users, transmitted to them, and modified by them. So it is dealing with the existing subject matter in a particular way. We should appreciate here that this activity could involve a number of service providers. There are firms to provide the carriage of the material, to provide the hardware facilities including the personal computers, to provide the operating or systems software, to provide the applications software such as search engines, publishing and processing programs, to provide content in various packages, to handle the transactions. In some relationships, the users now contribute material too, not necessarily all their 'own' creations. In these activities, they will seek to be inter-operable. One question the law must decide is whether the existing rights allow them to use each other's facilities.

The users are interested in the conditions under which they obtain access to the products and services of the online media. They are not necessarily interested in reproducing in hard copy the material which they access on-line. They may be content to browse it on screen or listen to it through speakers. Public access providers such as libraries and schools register an interest here too. So the producers of the underlying material will be concerned with the new uses which the service providers and the end users are making of their content; the service providers in turn will be concerned to control the uses which the end users make of their services. The law must decide whether the uses attract the control of the existing rights. If the existing rights do not cover these aspects of the online media, the law must contemplate making changes.

Software interfaces

By way of illustration, we take a technology that is crucial to making the media functional and attractive. Firms seek copyright protection from those who would pirate their software. We understand pirating to be the direct or literal copying of the whole of the software, without payment of a licence fee to the producer. Some countries have been reluctant to provide copyright protection for computer software even against this kind of copying. But firms also want to build on existing programs to produce improvements or enhancements. An issue for software copyright protection is whether the secondary producers may make any derivative use of the original program. Such a use can still involve the reproduction of a part of the original program.

Where countries do offer copyright protection, one way the law resolves this possible infringement of the reproduction right is to look for 'substantial similarity'. Another more searching way to cast the criterion is the level at which the expression is being reproduced. Copyright is meant to protect the form of expression of a work rather than its underlying ideas and information. If it is possible to write variations on the form in which a code is expressed, we can ask whether the second program performs the same function as that part of the original program. But would that amount to a protection of the idea behind the program, the conceptualisation of the problem of function it was to address and its solution to it? Even protection of the expression might do so, if there was only one feasible way of expressing an underlying idea. The idea/expression distinction has proved difficult to make. Consequently, in key jurisdictions, the courts have oscillated between giving protection to the original producers and allowing freedom for the secondary producers. This jurisprudence has been a significant source of the national divergence in copyright legalities.[40] While actively litigating in a number of jurisdictions, the major international suppliers have not been able to resolve the issue.

A special version of this issue has been the legality of reproducing a copyright holder's software interfaces. Reproducing software interfaces for the purpose of inter-operability may be treated as an infringement of the reproduction right, if the holder is not prepared to license that activity. Even the activity needed to discover these interface specifications may infringe, if the holder is not prepared to release the codes. The interfacing device might simply be designed to enable circumvention of the original program and gain access to content for free. We know smart cards are available to activate access without payment, for

example to satellite television. However, the purpose of the reproduction may rather be to make the particular application work with the core operating facility. The competitor wants to make its own products or services competitive with the copyright holder's own add-on or plug-in applications.

By asserting copyright, among other strategies, the holder may well be seeking to extend its power into related markets.[41] The consumers are locked into the core technology; it becomes the industry standard and it enjoys the prime position when new uses emerge. There are several variations on this theme, exploiting a combination of code, market and law such as intellectual property law to leverage a dominant position. Dominant MP3 players are formatted so they do not readily play files coming from competing suppliers of tunes and videos; game consoles will not even play copies of the supplier's own games sold more cheaply in other regional markets.[42]

In the following section of this chapter, we shall see that competition law may be brought into play to discipline such use of the intellectual property right (and indeed the use directly of code architecture or market contract for such a purpose). But within the body of copyright law, a statutory exception to infringement is a way of recognising the competing interest. Such an exception is a limited instance of the provision for non-voluntary licensing of intellectual property. It might be a particularised exception; otherwise the infringers need to find support within the more general categories of fair dealing or fair use such as the category of research and study.

This instance provides us with a pertinent example of inter-legality. We can refer to two encounters in particular. A major flashpoint was the lobby by the US government, along with key producers, to dissuade the EU from building an exception into its software protection directive, which would have allowed reproduction for the purpose of interoperability.[43] The exception was ultimately confined to the purpose of reverse engineering the software to identify the interface specifications. When the exception was contemplated in Australia, the US Trade Representative placed the country on its 'watch list'. In 1996, it appears a combination of Microsoft, IBM and Novel was successful in persuading the Australian Government not to adopt a recommendation from an expert committee that an exception be allowed for decompilation.[44] However, in April 1999, a subsequent Government found the nerve to amend the Copyright Act 1968 (Cth) and provide a decompilation right.

Online content

The reproducibility of software interfaces is a very important issue in practical terms. But we shall see that the transmission of content material online has created a far bigger conceptual and policy challenge to copyright. We are well aware that material copyright in a hard form is being made available for free over the Internet. Sometimes, the transmission is for commercial purposes, sometimes it is styled as emancipating. Content producers want to ensure that sales of such popular items as books, videos, compact discs, and software programs are not undermined by this practice. The new media is providing more and more effective means to make unauthorised copies and distribute them widely. In some sectors, we can legitimately question whether copying has been at the expense of sales, for the consumers may very well not be able to afford the authorised version, or the sampling may lead to purchases of copies or patronage of another source of revenue such as performances and souvenirs. However, in other areas, such as academic publishing and music recording, the concern is very real and it is feared that the online media will aggravate the problem. When digitalisation and bandwidth can deliver recordings with great speed and fidelity, record companies are especially apprehensive; films and videos will be next.

So the extension of copyright into the online media may be needed to provide the original authors and publishers of the underlying content with a means to protect their sales and licence revenues from erosion. In particular, it would give them something with which to bargain for the payment of a royalty or a share of the revenue from online custom. Yet it is difficult to enforce the law against the end users of the media, especially if they are household rather than commercial users. It may be a better strategy for the content producers to sue those who provide the facilities for the material to be posted and carried to the users. But such legal redress requires an extra step to infringement to be established. If the carriers are not themselves engaging directly in one of the infringing activities, they may instead have to be joined as third parties. They are liable because they contribute to or authorise an infringement by another.

In the past, such a case has been run against those who provided photocopying machines or video recorders. But the service providers and equipment suppliers are understandably not enthusiastic about being cast in this responsible role by the content producers. Initially, proposals to stiffen third-party liability met with opposition in the US.

It was said to have held up the passage of the revisions to the Copyright Act.[45] So too, writing on events in the UK, John thought that the distributors were driving the copyright agenda rather than the authors.[46] However, the content owners have kept up the pressure and the law has gradually stiffened the obligations of the intermediaries, with a major target being the internet service providers (ISPs), especially because in some relationships they are doing more than providing the physical facilities for others to transmit material they have copied or will copy.

National law makers have developed criteria for attributing liability, working from the knowledge and control the intermediary exercises over the infringements by others. US law now particularises the protocols that the ISPs must observe if they are to find a safe harbour free of liability, including the obligation to respond to 'take-down notices' that may even be computer-generated privately rather than the result of a deliberate judicial order. This model is being transmitted to other countries through the intellectual property chapters of the US FTAs.[47]

Recently, copyright infringement litigation led to the shut-down of the Napster music file swapping service. Major record company litigation has extended to services like Kazaa, who argue they do not store copyright material at a central location, just put users in contact with each other.[48] Napster has since entered into licensing arrangements with record companies such as Sony to supply music downloads for a fee. Such legalisation might centralise the traffic flows back to alliances between the big content owners and service providers. Apple has reached agreement with the record companies to supply songs through iTunes to iPod users; it is now making videos such as episodes of television series available on later models. Next is the streaming of material to mobile handsets, such as the Apple iPhone.

The service providers seek a legal basis on which they too can charge for their service and limit access to those users who are prepared to pay. In appreciating the kind of copyright protection suitable to their needs, we should understand that the value of the service does not lie simply in its content. Instead, as we noted earlier in the chapter, its speedy, convenient, reliable means of access to information will be part of its attraction. The costs associated with accessing information efficiently are sometimes overlooked; an abundance of information means little without the capacity to use it well. Searchable indexes or abstracts, with follow-up delivery of full copy online, if the user so selects, are an example of this kind of value added service. ISPs such as Yahoo or

search engines like Google take centre stage. Instead of sales, the provider of an online information service may wish to obtain a fee for the information actually used. The use can be measured, for example, by applying a meter to the technology by which it is accessed. Again there may be alternative sources of revenue, particularly in selling advertising space to merchants, but users may try to bypass these messages.

For the providers, the real issue becomes the legal means to control access to a service which is available online. For some, it is indeed to prevent the theft of a service.[49] An approach that makes use of the most established copyright law looks for acts of reproduction within the online media. But there is legal controversy over whether the temporary storage of a work or other subject matter in an electronic medium, such as random access memory or a hard drive, its display ephemerally on the screen, or its relay to other computers in a network, can be regarded as reproduction. Pinpointing the acts of reproduction is crucial to identifying a viable defendant within the network of transmission. Still, reproduction rights remain significant because they attach to those who would download and fix in another medium such as a CD. Then they are also an issue for those who seek to time shift or place shift material to suit themselves.

Where reproduction is arguable, support may be sought instead in other rights. This strategy shifts the emphasis from protection of the content as such to control over its uses and in particular the ways in which it is distributed. However, so far, a fully-fledged distribution right has achieved little acceptance outside the US. Within existing regimes, those who wish to secure online transmission may look to rights over broadcasting or communication to the public. But these rights have often been tied to specific technologies from a previous era such as wire. Furthermore, selective subscriber services, or services which are triggered by users individually accessing them at their own convenience and in their own time, are seen to strain the concept of the 'public'. The use of online media also involves transmission one to one, closer in form perhaps to 'private' telephone calls or communication by mail than to broadcasting. An email is the obvious analogy, but what then of list-serves? So the existing rights were likely to prove inadequate. The situation demanded a new technology-neutral right, such as the right of making material available to the public in such a way that members of the public may access that material at a place and time individually chosen by them.[50]

If intellectual property protection often backs up these services, the providers are also exploring technology (code) combined with contract (the market) to determine the conditions of access. The law comes in most heavily here when governments criminalise the circumvention of the technological measures taken to control access. Circumvention devices break codes, intercept signals and open locks. With the US legislation again leading the way, this has extended from the manufacture and sale of the circumvention devices to the circumvention itself and here from the circumvention that results in infringement of copyright material to the circumvention that gains unauthorised access.[51] As we noted above, such circumvention might also involve infringement of software interfaces. Digital rights management systems also attract protection.

Licensing

If the authors of content and their publishers enjoy rights to control the use of their material in the online media, distributors would prefer these rights to be assignable in the market place so that they can be mobilised. When works, such as texts, music or images, are re-worked and re-contextualised in such media, moral rights become a notable point of friction between legalities. Moral rights are meant to retain for the author protection against dealings that undermine the integrity of the work, even though the author has assigned or licensed the work to another. We can also see the moral rights perspective represented in the concern expressed about the commercial use of artefacts and folklore that have sacred and cultural significances for indigenous peoples. But, interestingly, it is not only the commercial developers and distributors who are challenging moral rights. Artists with post-modern sensibilities are querying the notions of authorship and originality and welcoming the opportunity to borrow from a diversity of sources and cultures around the world.

If copyright protection finds its way into the online media, developers and distributors of multi-media products and information services will need to track down the various authors and make arrangements with them. The industry is working on technological means to obtain clearances. But in connection with more established media, governments have sometimes stepped in to provide statutory licensing, for example to permit sound recordings to be broadcast on payment of a fee. These schemes have had a troubled history and, in some instances, the content producers have continued to oppose the granting of such licences.

National copyright laws also make exceptions to infringement for certain limited kinds of use. In terms of reproducing content, the most common exception is to allow fair dealing or fair use. This exception permits copies to be made for such purposes as individual research and study, quotation, news reporting, review and criticism, or personal private use.[52] Such allowances start to cause conflict when, for instance, public libraries and educational institutions become involved in making copies for large numbers of researchers. The allowances may also be subject to legal challenge. In particular, it may be argued that they exceed the restricted allowances made to national legislation under the Berne or Rome Conventions.

A crucial issue for the on-line media is whether the new subject matter and the new rights should be qualified by the same kinds of licensing provisions and exceptions from infringement. The suppliers may resist the extension of non-voluntary licensing and fair dealing to the electronic media. Their aim may be to capture value from the provision of a service rather than the sales of hard copies. At the same time, they may feel confident they can extract payments from users of the service on a pay-per-view or use basis, say by browsing and sampling works online. But, critics are equally concerned that control of access online will present a threat to freedom of information. It will further undermine social goals like general education and social participation. These critics worry that material in the public domain such as the underlying ideas and information, will be just as inaccessible as the protectable online forms of expression to those who cannot pay the visitation or user charges. So too when technology and contract control access to the online forms of expression, backed by their own legal protection, the material will not be available for fair uses such as education and research. Public libraries and schools have a major stake in the outcome of this debate.[53]

Some think that contract is a sufficiently accommodating form to be left to determine the conditions of access. However, intellectual property has a public policy dimension; it is meant to strike a balance between the producers' rights to reward and the users' need for access. With little bargaining power or even legal knowledge, the users will submit to contracts with the major content owners and service providers that give away public access. For example the schools and libraries contracting for the new online information services will agree to limit access to on-site stations not off-campus locations or to enrolled students rather than the public at large.[54] Should such users be

able to contract away fair use rights, especially if the interests of third parties are affected? Much depends on how the producers and users are configured. Perhaps the users could pool their resources to match the concentration that has occurred in the publishing industry or choose to contract with the remaining independent publishers. But a legal safeguard might be necessary, whether it is to be found in intellectual property or competition policy law.

A related concern surrounds the anti-circumvention measures that have been added onto the end of intellectual property protection. If these laws make unauthorised access a crime, they may catch circumvention that does not involve an infringement of intellectual property rights. Again, those who control access can screen all uses of the material whether they amount to fair use or not. In some jurisdictions, the offences are carefully restricted to those involving infringement, while in others the approach is to settle exceptions similar to those which apply to the infringement of copyright itself. The more radical opposition would do away with such laws entirely. But the impact is in the practice, for who can resist law suits by the larger companies? The same chilling effect might be felt by website inventors, faced with a flurry of computer-generated take-down notices and the prospect of arduous litigation.

It may remain the case that the information will be made available elsewhere than online. Then, it will truly be the way it has been packaged and customised by the online service providers which provides its added value. Control of access to such services becomes most critical, then, if it were to come to pass that the online media replaced other sources of content completely. Yet, even if those other sources remain in existence, online service delivery may create the prospect of a new resource disparity. Select firms and individuals will obtain the advantage of access to information that is reliable, timely and purposeful. Or rather we might anticipate the prospect of a stratification of services distribution, the ordinary user only able to afford basic, undifferentiated services such as popular entertainment, home shopping and electronic gambling. However, it would not do to overstate the contribution which intellectual property might make to the cost of these information-rich services. It may not be content that is costly online, but rather the technological facilities which are needed to access and utilise it effectively. Intellectual property power is relevant here again but it is in combination with other assets, which is why we need a more flexible, comprehensive legality (perhaps competition law) to grapple with the abuses.

IMPACT OF TRIPs

The TRIPs agreement made a major contribution to the international standardisation of copyright law. The agreement did not attempt to specify choice of law criteria that would apply in the event of a conflict between national jurisdictions. It has proved difficult, in other forums, to achieve agreement on such criteria. The need for agreement was obviated somewhat by the success of TRIPs in promoting the standardisation of substantive protection across the many member countries. We should further note the trouble it took to ensure that members would make legal facilities available to foreigners to permit effective action against acts of infringement. It seemed determined to see that variations in procedures and sanctions did not defeat its substantive protections. We understand that rights holders still need to localise their protection; they are not provided with an international tribunal to obtain enforcement of the rights the agreement is promoting. But standardisation should make the particular location of less significance.

However, we should concede here once again that the standards remain general and partial. Thus, scope remains for the play of national differences, reined in to some extent by the decisions of the dispute settlement process on complaints of violation. In this chapter, we shall concentrate on the standards relevant to the online media. In furthering substantive copyright standards, the primary role of the agreement was to apply the provisions of the Berne Convention. We identified those provisions in Chapter 6. So TRIPs affirms copyright protection for the subject matter which falls within the Convention's concept of 'works'. It supports the rights which the Convention attaches to copyright such as the right to control reproduction of the work. This application was then a strong case of one international agreement cross-referencing another, drawing on the conceptual groundwork and legitimacy achieved by the older Convention and reinforcing the norms of that Convention with its own pulling power and capacity to follow through.

In so doing, TRIPs gives copyright recognition to certain of the materials which serve as the underlying content for online transmissions. The agreement also extends recognition to other subject matter that is proving valuable in the online environment. To overcome any doubts that surround the coverage of the Convention, TRIPs expressly requires that computer programs, whether in subject or object code,

should be protected as literary works under Berne (Article 10:1). Members of the WTO are also expressly required to afford protection to compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents, constitute intellectual creations (Article 10:2). This protection is not to extend to the data or material itself, though it is without prejudice to any copyright which otherwise subsists in the data and material. In other words, to attract protection, the underlying content must satisfy the usual requirements for recognition such as originality. In Chapter 6, we also noted how the agreement extends recognition, on the basis of neighbouring rights, to performances, sound recordings and broadcasts (Article 14).

In applying Berne, the agreement makes the right of reproduction central to its protection of copyright. The preceding discussion in this chapter suggests that the act of transmission online is problematic, especially if the content producer wishes to attach one of the parties involved in the transmission of the material rather than the user who prints out hard copies. TRIPs applies the other rights which Berne has itemised. But, thinking in terms of early technologies, these rights did not really anticipate the way material is often communicated online. TRIPs is innovative internationally for broaching the matter of distribution rights, nominating rights to control the commercial rental 'at least' of films and software. However, again, it would be stretching the concept to equate rental with online transmission. So we can say that TRIPs stopped short of extending copyright protection to rights of control over digital transmissions. The same can be said of the protection it gave to performances, sound recordings and broadcasts.

Where rights are applicable, TRIPs applied a range of specific Berne provisions relating to non-voluntary licensing. Furthermore, in its own express provision for limitations and exceptions, TRIPs Article 13 adopts the language of Article 9(2) of the Berne Convention. It requires members to confine their limitations or exceptions to exclusive rights, to 'certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder'. We saw that this language cannot be read too liberally. The allowances to users must respect the commercial interests of the copyright holder. Many online uses will undermine those interests. But there are difficult issues ahead in determining whether freedom to cache, display or browse, say for research purposes, cuts across these interests.

THE WIPO INTERNET TREATIES

Treaty proposals

The gaps apparent in the coverage of TRIPs revived a long-standing discussion about the need for additions or supplements to the Berne Convention. Early in 1996, WIPO agreed to convene a diplomatic conference in an effort to resolve the discussion. A major interest was the extension of the Convention's copyright protection to new categories of subject matter and rights. Production centres such as the EU and the US proposed that the conference return to the question of computer software and deal with the challenges of digital technology.[55] More specifically, the US proposed that digital transmissions be included within the scope of a distribution right, as it had proposed to do within its own new national model. But such a right would have to be related to the existing Berne rights such as reproduction, communication to the public and public performance. A proposal was also made for an international *sui generis* protection for non-original data bases, along the lines of the EU Directive, though it was to be additional to other existing protections such as the protection afforded by copyright.[56] But the agenda soon broadened out. Some countries from the South were interested in bringing protection for performers and producers of sound recordings within the embrace of the Convention.

In the previous attempts at scheduling a diplomatic conference, it had proved difficult to reach a consensus on the limitations and exceptions which might attach to such copyright protections. Now there were proposals from the EU, and, interestingly, from Argentina and Uruguay, to phase out provisions for non-voluntary licensing. The US Government also showed support for phasing out these provisions but it was mindful that its own recording, film and broadcasting industries have interests in the facilities of such licensing. Online services providers in Europe were reported to be sharing this outlook.[57] On the issue of non-voluntary licensing, Oman had earlier counselled the industry in the US to adopt a consistent line if it hoped to get other countries to agree to rights over electronic transmissions; also if it hoped to win a share of the revenue which is collected in such licensing schemes abroad and especially in the EU.[58] The lack of national treatment in the distribution of revenues from collective licensing and levy systems was another issue left unresolved by the TRIPs negotiations.

In August 1996, WIPO released a set of proposals for the diplomatic conference which had been drafted by the chairman of its committee of

experts.[59] If adopted, the proposals would make clear that the Berne right of reproduction takes in direct and indirect reproduction, whether permanent or temporary, and in any manner or form. This elaboration was intended to catch such acts as the temporary storage of works on a hard disc, together with uploading and downloading whether to or from memory. A right of distribution would be recognised. A sticking point was the reach of such a right, with the draft text providing a choice between national/regional exhaustion and international/global exhaustion of rights. International exhaustion would permit the copyright holder to control importation of copies legally purchased in another jurisdiction. The Peoples Republic of China is reported to have joined with Uruguay, Canada, the EU and the US, in supporting international exhaustion. The proposals also contained a right of rental of originals or copies of works.

The proposals made a major concession to the interests of the authors and publishers of works. Berne's right to control communication to the public would be strengthened to provide protection in the case of works that are made available by interactive, on-demand acts of communication. This approach seemed to be the preferred option for catching transmissions not covered by the right of reproduction, though some countries also had the distribution right in mind. Argentina, Australia, Canada, Japan and the US lined up in support of the communication right; Latin American and Caribbean countries favouring recognition of a general right too. At the same time, it was proposed that the allowances in Article 9(2) for non-voluntary licensing be explored. Consideration would be given to the status of transitory copies, which were created, for instance, when using public library networks or when downloading from subscriber services.

The proposals also included obligations to abolish certain established types of non-voluntary licensing, specifically the licensing of primary broadcasting for rebroadcasting and the licensing of works for use in sound recording and broadcasting. Here, some Latin American and Caribbean countries joined with Canada and the EU, but the Peoples Republic of China and a group of African countries took issue.

Treaty text

Accommodating representation from 130 countries, together with seven inter-governmental organisations and seventy-six NGOs, the Conference managed to conclude two major treaties, the Copyright Treaty and the Performances and Phonograms Treaty.[60] In terms of

copyright protection, both are significant advances on the Berne Convention and the TRIPS agreement.

The Copyright Treaty adds significantly to the rights which may be exercised over copyright works. The Treaty adopts a right of distribution as the exclusive right of authorising the making available to the public of the original or copy of the work through sale or other transfer of ownership (Copyright Treaty, Article 6). However the Conference was not able to settle on an importation right and it leaves countries free to determine the conditions, if any, under which exhaustion of the right applies after the first sale. It institutes a rental right for authors of computer programs, cinematographic works and works embodied in phonograms (CT, Article 7). A set of agreed statements which accompany the Treaty make it clear that these rights of distribution and rental relate only to fixed copies that can be put into circulation as tangible objects.

The Conference decided ultimately not to extend the right of reproduction explicitly to electronic media. Instead, it leaves the issue to be resolved by reference to the existing international norms. However, the agreed statements did provide that the reproduction right does fully apply in the digital environment, in particular to the use of works in digital form (Agreed Statement Concerning Article 1(4)). They advise that it is to be understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention. But even this statement proved controversial – some countries were apprehensive that it would catch browsing, and it was only adopted on a majority vote.

Perhaps the major initiative of the Treaty is to extend the public communication right into the circumstances of the online media. Here, it becomes an exclusive right to authorise any communication to the public of the works by wire or wireless means, including making available to the public their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (CT, Article 8). The act of making available is wider than sending works and could cover, for instance the connection of a file server containing a work to a public network. It takes in those who put works up on the web rather than those who convey or call them up. So the right is a most expansive one, though it is to be noted that the Copyright Treaty applies it only to literary and artistic works. So the Conference did not confer protection on online transmission as such, rather the underlying content which it contains. Instead, the transmission will have to fit one of the recognised categories.

To add to the efficacy of protection, the Treaty also obliges countries to protect against the removal or alteration of rights management information (CT, Article 12). Furthermore, they must provide adequate legal protection and effective legal remedies against the circumvention of the technological measures which authors use in connection with their rights (CT, Article 11). Again, this requirement creates a substantial onus, though it was qualified to take account of concerns that technological protections can have the effect of locking up public domain material and obstructing fair dealing access.

At the same time, the Treaty allows countries to provide for limitations of – or exceptions to – the rights under the Treaty (Article 10). The agreed statements declare that the Treaty provisions permit the parties 'to carry forward and appropriately extend into the digital environment, limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention' (Agreed Statement Concerning Article 10). Similarly, these provisions should be understood to permit parties to devise new exceptions and limitations that are appropriate to the digital network environment. Yet it should be noted that Article 10 adopts the disciplines we found in Article 9(2) of Berne.

In the Performances and Phonograms Treaty, performers and producers of phonograms are given similar rights. As we have said, previously their rights internationally were limited to neighbouring rights and the rights of performers in particular were severely limited. So again this Treaty is a major advance in terms of protection. Performers are first afforded moral rights (PPT, Article 5). Then, they are to have the exclusive economic right to authorise the fixation of their unfixed performances, together with the broadcasting or communication to the public of their unfixed performances (PPT, Article 6). In respect of their fixed performances, they also attract rights regarding reproduction, distribution, rental and making available to the public (PPT, Articles 7–10). Phonogram producers are to enjoy the same rights (PPT, Articles 11–14).

It can be seen that the Treaty hesitated to afford performers rights to control the use of their fixed performances in audio-visual media such as films and videos. Cresswell suggests that, given its media interests, the US was a major opponent. Furthermore, where phonograms have been published for commercial purposes, the Treaty says that the right of broadcasting or communication to the public can be confined to schemes of equitable remuneration for non-voluntary use (PPT, Article 15).

This qualification took in the act of making the phonogram available to the public. Countries were allowed to enter reservations to the right to remuneration, including to national treatment. Some countries have chosen not to remunerate US nationals for the secondary uses of sound recordings because the US does not collect remuneration itself. Provision is also made generally for limitations and exceptions, but respecting the now common discipline of the three-step test (PPT, Article 16).

Consideration of the proposal for protection of non-original databases was postponed. The Conference did not have enough time to resolve the difficulties that many countries had with this proposal. The parties agreed to return to this matter at a later date.

Treaty mediation

Negotiations over the Treaty provide a good example of the way globalisation reveals a multi-dimensional pattern to inter-legality. The role of the Treaty is all the more striking then because it was intervening at a time when all countries were shaping their laws. It was able to apply a standard at the formative stage, not just when the 'backward' countries were to be brought into line. Yet to achieve anything at all, the Treaty had to leave some sensitive issues to the discretion of policy making and jurisprudence at the national level.

For example, it has been suggested the US Government saw the Conference as a way to overcome a clash of legalities within its own community. Internal differences had led to gridlock in Congress over the passage of the National Information Infrastructure Copyright Protection Act. Entertainment and publishing companies, the heavyweights of the content industries, were reported to be backing the Government move for the extension of copyright protection. On the other hand, telecommunications companies, together with online access and service providers, sought to inform WIPO representatives of their concerns about liability as distributors, while public access organisations such as the Association of Research Libraries and the Digital Future Coalition expressed fears for the freedom to cache, browse or transmit online. In addition, computer hardware manufacturers, from Japan and Europe as well, opposed the proposal to outlaw circumvention devices.

Some of these concerns were assuaged by the decision not to translate the reproduction right explicitly into the digital arena.[61] On the sore point of third-party liability, a note to the proposals had stressed

that they did not attempt to define the nature or extent of liability at the national level; instead, who was to be liable and the extent of liability were for national legislation and case law according to the legal traditions of the contracting party. The agreed statements accompanying the Copyright Treaty declared that: 'It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention' (Agreed Statement Concerning Article 8). We have noted also that the Treaty left the crucial aspect of exceptions unresolved with its reliance on such very general forms of words.

In addition, the Conference provoked variations on the accustomed north–south divide. In place of the Group of 77 and the old socialist bloc, more issue-based groupings were evident among the Latin American, Caribbean, African, Asian, Central and Eastern European, and CIS countries. The policies these countries were adopting had become less predictable. For instance, producer groups within certain of the African and South American countries pressed for stronger copyright protection to be given to artists, in particular to musicians and performers. They had in mind the use of their work in videos, films and broadcasts destined for affluent markets in the north. Opposition was also expressed to non-voluntary licensing for musical works. However, these groups encountered resistance, especially from the US, and they were only partially successful in their claims.

The Treaty expounds a vital relationship with the TRIPs agreement. WIPO could be said to have stolen a march on the WTO. It has retained its relevance by being able to extend copyright to online media. But in the process it has been able to retain its own style. Just as there were elements of Berne in TRIPs, there are elements of TRIPs in the Copyright Treaty (ie, the protection for computer software and the rental right). Yet, on the central issue, the online media, the Treaty focused on the authors of underlying works and plumped for its own public communication right over the distribution right. In requiring parties to the Treaty to comply with Berne itself, it has brought moral rights back into the international arena. So too, the companion Treaty extended the reach of copyright, not only to phonograms, but also to performances to a limited extent.

Nonetheless, the Conference was unable to resolve all matters and meanwhile the field continues to shift. Back at WIPO, the database proposal has moved very slowly.[62] It is reported that developing

countries want the WIPO model law on the protection of folklore enacted as a trade-off for the protection of databases. The issue of audio-visual performances has lingered too. A sticking point has been the US preference for the performers' rights to be subject to non-voluntary licensing and confined to equitable remuneration.[63] If the Rome Convention and the TRIPs agreement itself are reference points, the most categorical omission was the rights of broadcasters. Again, WIPO has been working hard on a Broadcasting, Webcasting and Podcasting Organizations Treaty. Each of these topics has become implicated in a split between developed and developing countries (see below).

As well, like Berne and Rome, the Treaties lack punch. A proposal was made to the Conference to include TRIPs-like obligations, making enforcement procedures available at the national level to copyright holders. But it was rebuffed.[64] WIPO has developed a voluntary mediation and conciliation service for contracting parties. If the provisions of the Treaties were incorporated within TRIPs, they would be given the firm support of the WTO inter-governmental dispute settlement system. However, along with the review of the TRIPs agreement in general, this proposal has gone nowhere since Seattle. The WTO's Work Programme on Electronic Commerce still required attention to intellectual property issues.[65] Furthermore, before we signal a sea change in the attitudes to copyright, we should note that it has taken some time for both Treaties to obtain enough signatures to come into force.[66]

COMPETITION REGULATION

In this section, our attention turns to the demands that globalised organisation and operation of the online media place on national competition policy legalities. It considers whether and with what effect the WTO might mediate these overlapping and conflicting legalities by addressing directly the issue of competition policy standards at the international level. For competition law to be effective in a global field, it must be able to mediate the considerable national differences. Global flows mean that it is unlikely that the effects of restrictive business practices will be confined to any one country. But competition policy coordination continues to face resistance because individual countries wish to retain the space to exercise discretion and maintain differences.

There are many reasons why countries wish to make unilateral decisions. We might suspect that some countries wish to protect their industries domestically from foreign competition and bolster their strength for participation in export markets. Certainly, we shall see that the authorities are receptive to claims from firms in this field that they would be disadvantaged by the imposition of more stringent competition requirements than their foreign counterparts. But resistance can be more fundamental. Competition law is of course a regulatory legality with its intellectual origins in the market economies of the west. While general economic reforms are making more countries politically susceptible to the adoption of competition law, it can still be considered a major step.[67] Fully fledged, it can have profoundly disturbing implications for existing industry structures and economic relationships across the society.[68] Consequently, some countries baulk at adopting competition policy regimes at all, certainly they are selective about their application. Sometimes, this hesitation reflects cronyism or a corporatist style of governance (ie, the reluctance to expose incumbent insiders to competition). But it can also be about broad social impacts (eg, the prospects for small local operators to survive).[69]

Furthermore, where competition laws have been introduced, the systems tend to display significant differences. Coordination would require those differences to be submerged to some extent. The differences involve their sector coverage, institutional structures, legislative prescriptions, allowances for exemptions, case jurisprudence and practices of enforcement. Some of these differences reflect historical conditions and the general regulatory cultures of each jurisdiction. But they also reflect the different ways in which national authorities have chosen to grapple with an increasingly complex and sophisticated regulatory task. For instance, the differences reflect attempts to be effective regulators. The drive to be effective has led the authorities to approaches that, as we shall see, are less readily amenable to standardisation.

One basic thrust of competition policy is structural: the privatisation of public providers, the removal of statutory privileges (such as those for the professions), and the liberalisation of restrictions on market entry. We can see that thrust represented above in the collapse of industry-specific regulation. Competition policy has some overlap then with trade policy. That thrust might be regarded as deregulatory, though it does require oversight by agencies to ensure that public providers in

particular are respecting the correct principles of engagement such as competitive neutrality. Economic thinking is dominant here or in Bronwen Morgan's interesting account of the Australian experience, 'non-judicial legalities'.[70]

What is the government's role, when it withdraws from public provision? In the public policy and public sector management lingo, government steers, not rows. Government will set and police the rules for competition in the private sector. This policy may start with some basic rules, concerning the clearly anti-competitive practices, which are outlawed per se. However, we can observe that competition law tends to move it on from an initial concern with directly and even blatantly anti-competitive practices like collusive price fixing. It begins to take an interest in market structures and the behaviour of firms that occupy dominant positions within the market or enjoy substantial market power. Instead of treating certain practices as illegal per se, the legalities require proof of their purposes and effects. The authorities are drawn into making judgements that turn very much on the characterisation of the conduct in question and an assessment of its impact in a particular situation.

In these more particularistic approaches, economic evaluation interacts with legal criteria in deciding first what is to be regarded as pro-competitive rather than anti-competitive. As we should see, a pertinent example of this issue is whether the aggressive behaviour of market leaders towards their potential rivals just reflects their superior drive and efficiency. Thus, it can be regarded as healthy for competition. The assertion of intellectual property rights presents this issue.

In many systems, a second stage of decision making is then introduced. Provision is made for exemptions and authorisations to be given to anti-competitive conduct. The authorities are entitled to reach the conclusion that the public benefits of the conduct outweigh its anti-competitive costs. A pertinent example is whether integration ought to be allowed because it is considered conducive to technological innovation, especially by a national champion. The policy might include block exemptions, or authorise alliances, consortia and mergers on a case-by-case basis. Yet, even these two approaches do not exhaust the regulatory strategies of the authorities. In this case study, we shall identify a trend towards mandating certain conduct on the part of the firms that are seen to control core facilities. For example, they may be required to afford their competitors access to the facilities on reasonable and non-discriminatory terms. Paradoxically, this approach can be

reminiscent of the style of the industry-specific regulation which competition law is replacing. It leads to the objection that certain players, often the privatised public instrumentalities, are being saddled with specific obligations that their competitors do not have to bear.

Market power and essential facilities

We use the question of market power and the denial of essential facilities to highlight these issues. Of course, this question is not the only way that competition law has for dealing with the kinds of private control points that may be constructed along the electronic highways. But it represents the trend.

If the question is whether the denial of access to facilities is anti-competitive, policy makers need to think in terms of whether control of the facilities affords a firm power in a market. The first step is the definition or delineation of the relevant market. We can see that the more broadly the market is defined, the less likely a firm is to be in a dominant position. The delineation may proceed both by territory and by product. If in terms of geography, the regulator concedes that the market is global, then one firm is less likely to dominate than it would in a self-contained national market. In terms of products, acceptance of innovation tends to favour a laissez-faire approach. It proves difficult to say that technologies are not substitutable. Today, should we regard cable television as constituting a separate market to free-to-air broadcasting? What if we add in satellite television from abroad and mobile telephony? Is operating systems software to be regarded as a market in its own right or can certain types of wired hardware, applications software or software on the network, provide alternatives to the customers? Yet a laissez-faire approach carries a significant risk. In a rapidly developing field, control of a facility in one market may be a springboard to power in a related market, such as a new innovation market. For example, control over the operating software for personal computers may be the way to promote sales in the emerging internet access and services markets.

A judgement also has to be made about the presence of market power. Broadly speaking, market power might be characterised as freedom to operate without concern for the competitive disciplines of the market, for instance when determining the firm's pricing or product strategies. An indicator of market power might be the market share that a firm enjoys or the number of other firms it faces. But 'Chicago School' theory has suggested that even a firm that is alone in a market can still

be sensitive to the prospects of competition: its market may be 'contestable'. We should appreciate that other policy analysts are not so sanguine about such prospects. Nevertheless, Chicago School thinking has been influential in recent years in a number of countries and, on this approach, the attention turns to the level of the barriers to entry into a market, that is, the costs which other firms would have to sink into establishment in order to compete. In this regard, a particular concern lies with the cost of acquiring 'essential facilities', those facilities that rivals need if they are to compete with the incumbent. It may not be practical or reasonable to expect competitors to duplicate those facilities. It is here that economies of scale and scope, together with the capacity to spend on research and development and deploy other assets, may place the incumbent at an advantage. Customer loyalty or inertia is another advantage. So, we should note that the rival might not want to compete with the controller of the facilities in its core market. Yet, denial of access to the facilities will still add to the cost of providing ancillary or related services separately, including new types of services.

Again, it may be extremely difficult in a rapidly developing field to judge whether facilities are essential. How ready should the authorities be to accept that alternatives are not feasible? On an optimistic view, innovation may lower entry costs and undermine incumbency advantages. Indeed, the creative destruction wrought by radical innovation may enable new rivals to bypass the facilities. For example satellite-based communications may provide a cost-effective bypass of the facilities controlled by television broadcasters and telecommunications carriers. In such an environment, incumbency can become a disadvantage. In the second phase of a new wave of innovation, when the technology starts to stabilise and standardise, it is these entrants which may consolidate their position and emerge as the new market power. The judgements are all the more difficult to make for new markets, which no one presently dominates.

For example, in the computing markets, while competition authorities concentrated on the mainframe giant, IBM, innovations were shifting the fulcrum of power to the personal computer and its operating software. With the limelight on Microsoft, will those firms pursuing the strategy that 'the network is the computer' take over the field, using the Java computer language in particular to overcome differences in operating software? Or, as News Limited was thinking for a time, will television set-top boxes prove more of a control point for the supply of future media services? Wireless streaming to personal computers or

portable hand-holds does not yet carry the same capacity for the 3 play, voice, data and video, as broadband cable. But broadband cable access is often limited to the metropolitan grids.

Such uncertainties suggest to the authorities that it would be unwise to concentrate their energies on a single firm. The demarcations between markets are breaking down, and not even the largest firms seem able to sustain a 'stand-alone' position. Still, we should remember that market power might be acquired by forming alliances with firms of a similar size and complementary assets, while at the same time buying into the smaller specialised firms. The independent and alternative producers, which remain unaffiliated, will be the ones to worry about access.

As we noted earlier in this chapter, the approach taken within industry-specific regulation was to make an *a priori* judgment about the value of vertical or horizontal integration. In return for this government protection from rivals, the incumbents had their spheres of operation limited and their access practices regulated directly. In dealing with powerful firms, competition authorities have shaped the structure of markets too. Blocking mergers and acquisitions is the most common precautionary device. The authorities have also drawn 'lines of business' restrictions around their activities. A prominent instance was the strictures the United States authorities placed upon AT&T once the regional operating companies were divested. It was bound not to engage in equipment manufacture or in carriage on the local loops. A milder version of this kind of discipline is the requirement for structural and accounting separation of the businesses which operate in related markets. Services are to be unbundled, so the core company deals with its affiliates at arm's length and does not get away with subsidising their competition with other firms.

It is clear though that industry is resisting directives to separate and, certainly, further restrictions on lines of business. Rather, integration should be allowed because it realises the possibilities offered by converging technologies. It achieves the economies necessary to match resources with other major participants in a global market. If, however, the core firms are to be allowed to integrate, the authorities must rely on another regulatory strategy. We may see convergence on 'access regimes'. The firms should be required to grant non-affiliates access to their facilities on reasonable and non-discriminatory terms. We look now at two applications of this regulatory approach: access to make computer platforms inter-operable and access to make

telecommunications networks inter-connectable. They are examples only; it might be that access to satellite space and wireless spectrum will become as crucial in the future.

Computer platforms

Computer hardware or software may become a core technology. Various strategies can be employed if the controller wants to deny access to those firms which compete with it in related markets, such as peripherals, applications and services markets. The most direct way is to assert the intellectual property rights in order to prevent the competitor's technology from interfacing. We saw that the competitor may have to reproduce the interface specifications to be inter-operable. A related strategy is to licence the core technology, but only on condition that the customer take the firm's own peripherals, applications or services or those of its affiliates, sometimes called tying.

However, the obstacles put in the way of non-affiliates can be more subtle. Now, firms say that they are not trying to build closed, proprietary systems. They are moving to open systems such as the Unix standard. There are varying degrees of openness, nonetheless, and they might be able to put their competitors at a disadvantage by concealing interface code specifications within their systems, changing specifications repeatedly to stay a step ahead or even setting traps for others, or foreshadowing changes to keep the industry uncertain and deter customers from purchasing alternatives for fear that they will turn out to be incompatible. Perhaps the biggest challenge to the independent producer is the functional integration of technology. The strategy is not to deny competitors access to the core facilities as such but to bundle them up with its own products and services. The facility, speed, reliability and price that go with the package make it less likely users will be prepared to mix and match and put together their own systems.[71]

Recently, Microsoft has been accused of pursuing such a strategy in relation to online media. It is reckoned that Microsoft Windows represents some eighty or more per cent of the operating systems software market for personal computers. Rivals argue that it is leveraging its control over operating software into the related internet software and services markets. Readers might already be aware that Microsoft is working on a number of fronts. It is building up its own inventory of internet software and services, partly by making exclusive arrangements with or buying into those other firms which have developed

these complementary assets. To make an attractive package, it offers its internet browser software free with its operating software or tied to the operating software. It engineers the specifications to integrate the browser with the operating software. It begins to do the same with internet applications software such as web page publishing, home banking software and media players. Windows was also being integrated with Microsoft's central server software and the server software made available free. Microsoft follows up by promoting its own content services like news and travel information on its browser default screen. It forms alliances with or buys up firms with catalogues and repertoires of content.[72] At the same time, it is forming alliances with internet traffic carriers such as cable and telecommunications companies.

As we noted at the outset, it is not clear whether the technology will permit such control strategies to work. However, a Microsoft strategy aims to meet the possibility that the network will be able to transcend the operating system of the personal computer. The Java computer language may mean that software can be downloaded from the network to any operating system. Microsoft is producing a version of Java which is Windows specific. More recently, it has started to join up with firms developing set-top box technology and mobile equipment.

Would the competition authorities treat Windows as an essential facility and insist that Microsoft grant access to rivals on reasonable and non-discriminatory terms? In competition law there are precedents for this approach. In a notable settlement with the European Commission, IBM agreed to release adequate information about its hardware – software interface specifications and its systems network architecture in a timely fashion. Under the Clinton Administration, the Department of Justice was to signal a more robust and questioning approach to the practices of the marketplace. Assistant Attorney-General Ann Bingham advised that it would have little sympathy with the view that near-monopolies must be tolerated for the sake of technical progress. Yet such commitment was missing from the settlement Microsoft reached with the Department (and the European Commission) in 1994.

When the settlement was presented to the US Federal Court, the presiding judge expressed concern that it did not go far enough.[73] When the settlement was eventually approved, the Department undertook to keep Microsoft's Internet access practices under scrutiny. In 1998, the Department took Microsoft to court again. Granting a preliminary injunction, the Federal Court agreed that Microsoft was in

breach of the settlement. It could not insist that personal computer manufacturers install its Internet Explorer software if they wanted to licence its Windows 95 operating system. But what of Microsoft's plans to integrate the browser with its Windows 98 release? The Department's case dragged on through 1998 and, as the presentations came to a halt, attention began to focus on the kind of remedies that should be sought. The Government was reported to be contemplating, for a time, some form of structural separation of Microsoft's various operations, particularly the separation of its operating software arm from its net software and services ventures. The request ultimately was for disclosure of the Windows source code.

All along, Microsoft has put up a vigorous opposition to the suit. It responded by arguing that functional integration is only what customers wanted. It could offer manufacturers an operating system with all the browser files removed but it warned that it would not be able to function as designed. Certainly, the authorities have been receptive to this kind of argument in the past. A private product standard can even be seen as the mark of a firm's efficiency. In contrast, firms will need a competition clearance to collaborate on an industry standard. The competition authorities have been even more reluctant to fix such standards themselves. Thus, while the European Commission sees the value in a single interface decoder system for digital pay-television services, it has not been prepared to decide what that system should be.[74]

Microsoft also warned that the restrictions placed on its market strategies would endanger the US economy. After all, Microsoft is a major source of export earnings. Similarly, the earlier settlement was met with the claim that it would handicap a national champion at a time when international competition was intense and unfair. The authorities face difficulties responding to such debateable claims. Not only has Microsoft mounted an argument on the merits, it seems it also threatened to move its headquarters up the road into Canada.[75]

The impact of Microsoft is already worldwide and many countries waited to see whether the US Government had the resolve to proceed with the case. Despite its awareness of the issues, we could not expect countries like Australia to make the running in such cases. We should recall that the anti-trust litigation against IBM ran for thirteen years, only finally to be relinquished by the Reagan administration. The Bush Administration has now called off the Department of Justice. By 2002, Tom Miller, Attorney General for the State of Iowa, was to say: 'the

browser war is over, Microsoft has won'.[76] Meanwhile, the European Commission tried to pursue Microsoft. In the European Court of First Instance, Microsoft was ordered to provide such adequate technical details of its operating system that would enable rival makers of server systems (such as Sun) to design programs that would work with Windows. However, two years later, Microsoft was still arguing the toss about compliance and it was the end of 2007 before the European Courts upheld the Commission's stance.

Now the spotlight shifted to MP3s. One case, this one about tying, involved Microsoft again. Microsoft was told it could not insist that purchasers of Windows buy its Media Player if they wished to play audio-visual content on their computer. This would entrench the Windows Media Player, encouraging content providers to put out their product in its format. Again, Microsoft argued that this ruling was not in the consumers' interests.[77]

Ironically, the next major defendant was to be Apple. In a short space of time, Apple iPod became the iconic MP3 player. Before the French courts, other music content providers complained that Apple's Fairplay format favoured iTunes. The court found that Apple iPod had captured a market share of round seventy per cent. However, it noted that alternative players were available. Besides, users could find ways to load music other than iTunes onto their iPods. The providers turned to the French Government, which was reported to be considering legislation to require Apple to make Fairplay more accessible.

Telecommunications networks

Much more so than the computer industries, telecommunications has been subject to industry-specific regulation. Telecommunications was often a monopoly and, in many countries, the monopoly was held in public ownership. Liberalisation of telecommunications markets began with peripherals equipment, intra-corporate and local area networks, and value-added services such as data transmission. Now it is spreading to basic transport networks and services, as competition is introduced into long-distance and international markets. We saw earlier how the GATS has added a multilateral overlay to the pressures being exerted on countries to liberalise. With liberalisation has come privatisation of the core carriers and the sale of shares to foreign investors, such as the telecommunications companies from Europe and the US.[78]

The openings made for competitors have brought the access issue alive. Various aspects of the transport networks could be regarded as

essential facilities, more so now that the uses made of telecommunications are expanding so rapidly beyond voice telephony. Presently, the existing telephone lines are the main carrier of communications across the Internet. As early as 1983, the anti-trust settlement required AT&T to allow competitors to connect to its local loop distribution facilities. Even in the US only the most built-up areas, with the most affluent customers, would provide any justification for duplication of the infrastructure. The last line to the home and the office, especially in outlying areas, together with inter-exchange line links, require daunting investments. It remains to be seen whether technologies such as cellular and satellite-based communications can make bypass effective.

The network carriers are concerned, not only to protect their monopolies over local voice telephony, but also to take advantage of their position to provide services in related markets. Again, specification of the technical standards for physical inter-connectivity could present an opportunity to practise discrimination. The tendency has been to take this kind of standard setting away from the transport operator. The pricing of access is an obvious issue. But discrimination against non-affiliates might be practised in more subtle ways. The practice of bundling limits the number of points at which connections can be made into the local loop. If the competitors are riding on the carrier's lines, and the traffic is heavy, the scheduling and queuing of transmissions can affect the speed and ease of the service the competitor is able to offer.

In certain countries, industry-specific regulatory authorities developed codes of conduct to try to ensure that competitors enjoyed access to those lines. Open network architecture was a goal.[79] But the protections built around the industry are being eroded. A generalist competition law approach is recommended to governments as a more flexible approach. This approach looks at the carrier's practices from the perspective, for instance, of the abuse of a dominant position or misuse of market power. However, similar to experience in the computer industries, it relies heavily on litigation. Yet we know such litigation to be painfully reactive, protracted and expensive. It has not proved possible to jettison the industry-specific regulatory approach; indeed, the competition authorities have themselves been drawn into the complexities of the industry. They have had to decide which services to declare as essential facilities. They have had to bring the industry participants together in order to produce undertakings on access and particularly to fashion inter-connection agreements.[80] They

have had to arbitrate differences between the carriers, the various entrants into the core and related markets, and the user groups. All of these regulatory tasks recreate a legality that is embedded within the jurisdiction and which is resistant to standardisation.

At the same time, this approach has required the authorities to attend to the reasons why the national carriers should be allowed to deny access. One reason given is the maintenance of the technical integrity and quality of the core network. But a much bigger concern underlies the access issue. Huge and often publicly funded investments have been sunk into the construction of the networks. The public carrier often bears responsibilities for research and development, maintenance, local employment, domestic equipment purchases, and cross-subsidisation of indigent users. Access might give an advantage to the private competitors who service only the most lucrative customers. So the access regime may be inclined to allow the carrier to exclude services from access if they would undermine the economies of its operation overall or obstruct the performance of its public responsibilities. Where access is allowed, the price should at least reflect something of the capital investment and public outlays of the network; otherwise the competitors will get a free ride.[81]

Yet this focus on the conduct of the incumbent national carrier is increasingly a myopic one. If access is to be truly open and the network to become, in the jargon, seamless from end to end, the authorities must consider placing the private competitors under obligations to carry content, services and traffic too. Regulation should be symmetrical.[82] At the very least, the concept of the common carrier must be expanded. Furthermore, because access involves users as well as rival suppliers, the carriers need to be placed under an obligation to contribute to universal service, say by way of payment of a levy into a common fund. Otherwise, the configuration will increasingly become one of privileged closed networks that operate on top of a more amorphous and less resourceful public grid. But this objective is not made any easier by the fact that universal service will need to extend beyond the standard telephone service. It will, as we have argued, have to take in enhanced services such as data transmission and perhaps internet access.

The fashioning of an effective response is more complicated now because the service providers are not contained within national borders. They operate increasingly within a global network, where communications are switched between lines and between technologies according to the logic of private, commercial considerations. A service

that has been rooted in national politics and cultures will be shaped by the economically resourceful around the world. A coordinated approach to regulation will be essential to ensure that commitments to open access and universal service are met on an inter-operator and inter-national basis.

Content resources

The identification of essential facilities involves content too. In some analyses, the expectation of the new media is that content will be limitless and free. Those optimistic about the media anticipate a proliferation of content on the online media. In others, with so many channels of communication available, the distributors will be competing for content. Content will be king. While we continue to share tastes, we shall see items of popular culture being acquired, and then limited to specific sites, so that they can act as hooks for customers. Presently, sport seems to act as bait, at least for male viewers. In another service sector, specialist streams of hard information such as financial data might also be made available on an exclusive basis.

Thus, content could be regarded as an essential facility for competition in media markets. Mindful of this, industry-specific communications legislation has been used to require incumbents to give new entrants into such sectors as cable television access to essential content. The reasoning is that consumers are reluctant to acquire new platforms, even slow to switch between those they have available, for the bits of content they desire. Premium content might include news reports and major events. In another version anti-siphoning rules keep essential content such as sports from going exclusively to conditional access channels. Likewise, to compete for certain demographics, service providers need access to catalogues of popular songs, films and pictures.

If the resource is content, quite often the incumbent has exclusive intellectual property rights. We have seen that, while intellectual property is primarily concerned with conferring rights of control, it makes certain limited concessions to competitors. However, the fair use exceptions are more concerned with access for public-spirited than for commercial purposes. Non-voluntary licensing schemes, for example giving radio stations access to musical works and sound recordings, on payment of a fee, are closer to commercial concerns. However, we noted in Chapter 6 that rights holders are not always comfortable with these schemes.

In turn, within national competition policy, intellectual property has often enjoyed a categorical exception. Under such a rule-based approach, the question became whether the use made of the rights was within the scope of the protection which the grant of property was intended to confer. This approach provided a basis for a line to be drawn. Latterly, the tendency has been for competition authorities to look at the intellectual property licensing practices much more on the merits of the particular case. This approach has not produced a stricter attitude to intellectual property.[83]

For example, while refusals to license are anti-competitive in an immediate sense, the authorities have been receptive to the argument that they contribute in the longer term to investment in innovation. Consideration of such merits requires the authorities to make judgements in specific situations, considering for example, the kind of moveable factors we noted above, such as the degree of market power the property holder enjoys and the actual impact of the practice on competition.[84] Nonetheless, we note that several European Commission cases have resulted in orders that copyright intellectual property be made available to competitors.[85] The *Magill* case involved television programming information a rival magazine wished to include in its publication. Recently, too, in France, Apple has been challenged for not permitting iTunes to be played on rival media players.

Media alliances

Before we turn to the role the WTO will play, we should note that competition policy cannot be confined neatly to rules about access to specific facilities. Indeed, the challenge to regulatory competence lies as much in the complexity and fluidity of the alliances being fashioned across sectors and across borders. Such alliances combine programming and other content resources with command over the different kinds of service and technology platforms. Because the media keep mutating, it is hard to fix in a categorical way the points at which access obligations should be imposed. Rather the regulators need a way to keep track of the rapid movements, possibly to prevent the constellations of power from forming, at least to attach conditions responsively for the protection of competitors. However the alliances are more subtle combinations than the straight-out mergers and acquisitions that the competition authorities are accustomed to authorising.

To take an early example from the television sector, we should note that the European Commission ruled in late 1994 against a joint

venture to provide technical and administrative services for pay-TV and other television communications services. The venture involved German telecom, the publishing group Bertelsmann, and a film and television company Taurus. Rather than persist with a proprietary encryption system, the venturers had indicated their preparedness to provide a common interface for the decoder base which was to be installed in customers' homes. A common interface would allow competitors to plug in their different access control systems. But the Commission felt that the venture would exploit other advantages such as a large subscriber base and knowledge of customer preferences, a catalogue of attractive programs, and the ability to offer a comprehensive service. Even if a common interface was provided, overcoming one of the bottlenecks we identified above, the venture could manipulate access, to delay or bury competitors' programs, citing technical problems or piracy concerns.[86]

The Commission was soon faced with a number of similar 'hard cases'. For instance, it was investigating a joint venture between German telecom, the same publishing group Bertelsmann, and the internet service provider, America Online. One concern about this venture was the access of competing online service providers to vital network, services and content. Yet, it is readily appreciated that such alliances offer benefits too. For example, alliances between telecoms might lead to an 'end to end seamless network', which would overcome national incompatibilities. More pragmatically, an alliance among 'European' companies could strengthen their ability to compete in international markets with the giants of Northern America and Japan. Within the ranks of the European Commission, the critical approach of the Competition Directorate was countered with support for the promotion of such European joint ventures.[87]

The line of cases has continued. Many decisions scrutinise alliances between content providers and pay-TV platforms. However, reflecting movements in the media, they have extended more recently to alliances between content providers and broadband internet access and service platforms and now onto mobile communications too. On the whole, the regulatory response has been to approve the alliances subject to the firms accepting undertakings. Natali Helberger rightly identifies this approach as a kind of case-by-case negotiated regulation.[88] To be effective, the regulatory agencies must operate in a timely, sophisticated and knowledgeable way. The approach does not produce standards to go by. Rather than developing a new categorical, rule-based

system, it emerges as a contemporary variation on industry-specific regulation. It incorporates features of the new regulation, such as the mix of legal and other instruments of regulation, public and private regulators, and judicial and other means of accountability.

The initiation of the AOL/Warner discussions is an example of the concern raised by a combination of content rights (especially over music) and broadband delivery including proprietary formatting (digital rights management). Among others, the case concerning the Vodaphone/Vivendi/Canal alliance best illustrates the patchwork of connections within an alliance between content providers (including film, television and program libraries), pay-TV and mobile phones. The concern here was use of the power to bundle offerings, so that customers would be encouraged to migrate from pay-TV to the alliance's new web-based services. In such cases, the undertakings include giving access to content and to digital control technology, even to receivers such as mobile phones and media players. A more specific condition is a requirement of inter-operability. But the safeguards might reach further back into the alliance's configuration; the regulator might for instance insist on unbundling. We have seen that access is not always a sufficient safeguard.

Indeed, as Helberger points out, an approach based on access concedes a dominant, standard setting position to the alliance. Sometimes, the approach is characterised as a choice between network or facilities based competition and services based competition. Facilities based competition requires unbundling. But the cases indicate that even this requirement may prove insufficient. In certain cases, the effective approach would be to prohibit the alliance or merger from taking place because they lead to a dangerous concentration of power; the complementary remedy for incumbents is that of structural separation.

Yet, it is clear that authorities are very wary of making judgements like this in what they see as a 'technologically dynamic market'. For Kathy Bowrey, this deference represents the language of globalisation. Might it lead to a new media oligarchy? The danger is the media moguls capture the kind of position they enjoyed in newspaper publishing and television broadcasting. The interesting alternative outlets stay strictly on the margins. Despite the rhetoric of liberalisation, this position may still build on support from government. In return for its undertakings, the consortium is given protection by the state. That protection might include the authorisation of the merger or consortium, together with stronger intellectual property protection, and

direct legal protection for conditional access technology, even, in some sectors of the media, the grant of one of the few licences to operate a channel.

WTO COMPETITION RE-REGULATION

TRIPs and access regimes

How then does the nation state gain not just the freedom but also the courage to limit this support and to temper protection with access for others? If national competition policy is to insist that intellectual property content be licensed to competitors, it must respect the provisions of the international copyright acts, the Berne Convention, TRIPs itself, and the new WIPO Treaties. For copyright material, the analysis of all three sources suggests that the main reference point will be the allowance for exceptions that originates with Article 9(2) of the Berne Convention. Akin to the fair use exceptions, this allowance had other objectives in mind than ensuring commercial competitors access to essential facilities.[89] The same holds true for its counterpart in Article 13 of TRIPs.[90] The US homestyle exemption was not for competitors but for users; its aim was to relieve small diners and shops of the burden of paying for the music they played.

This orientation does not mean however that the wording of the three-step test could not accommodate competition provisions. We should note that the European Commission took the view in *Magill* that the order to licence the television program information to a competitor would not run aground on Article 9(2).[91] Nonetheless, if member countries are to find the nerve to take on corporations with the economic and political power of Microsoft or News International Ltd, these allowances might not be enough.[92] As we have said, while Article 40 is recognition of the members' need to control some anti-competitive practices, it is suggestive and permissive, rather than directive.[93] It nominates perhaps one practice that affects access indirectly, coercive package licensing. While it speaks of licensing practices as well as conditions, it does not mention refusals to licence outright. In any case, if it is true that intellectual property rarely confers market power on its own, its combination with other assets should come under scrutiny. The European cases indicate the relevance of this scrutiny. But, for this kind of inter-legality, we shall have to wait to see whether the WTO's general interest in competition policy will provide greater comprehension.

GATS and access regimes

In contrast, the GATS reveals one aspect that has already been given attention by the WTO. The Annex on Telecommunications to the GATS agreement takes on some of the issues of access we have discussed in this chapter. The Annex applies to all measures of a member that affect access to and use of public telecommunications transport networks and services. Once again, the subject of the (GATS) regulation is the member government's measures. Those measures should ensure that service suppliers are accorded access to and use of telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for the supply of a service included in the member's schedule.

To gauge the scope of this obligation, we can first identify the intended beneficiaries. It is for the benefit of any service supplier of any other WTO member, when it is supplying a service that is included in the member's schedule – that is, a class of service that has by inscription in column A been exposed to the requirements of the GATS. So members avoid the obligation to the extent they withhold telecommunications from their schedule. On the other side of the coin, the obligation applies for the benefit of service suppliers generally, not just telecommunications suppliers. Often those suppliers will be suppliers of telecommunications such as those who want to get their traffic onto the national grid and local loop. The beneficiaries may also be for example suppliers of financial services, audio-visual services or retailing services, so far as these services have themselves been entered in the member's schedule; the entry for these services might impose some limitations on cross-border supply. This means, however, for services that are entered in a schedule, those limitations cannot be applied to access or use, except as authorised by the Annex itself, or by way of limitations on national treatment or by way of the measures which Article XVI of the GATS, the general Article on market access, requires to be listed.[94]

To which telecommunications transport networks and services does the obligation apply? Telecommunications are defined broadly to mean the transmission and reception of signals by any electro-magnetic means. Transport networks mean the infrastructure that permits telecommunications between and among defined network termination points. This definition does not include terminal equipment.[95] The definition of transport services states that these services may include telegram, telephone, telex and data transmission, typically involving

the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information. These services are carrier rather than transformation services. Thus the Annex develops a distinction between these transport networks and services on the one hand, and the services that supply through them on the other.

All this is subject to the qualification that the obligation does not apply to 'measures affecting the cable or broadcast distribution of radio or television programming'. These are left to the negotiations over audio-visual services. With media converging, especially through the facilities of digitalisation, each of these demarcations will be increasingly arbitrary and may prove difficult to work. Depending on the content given to them, they may restrict unduly the scope of the obligation. The boundaries remain uncertain. Of course, much of the access regime can be explained by the GATS fix on those national government measures that limit the opportunities for global suppliers to compete in local markets. So the target of the access obligation was really the national grids. With the US a notable exception, they have been in state hands, often as sole operators. Now the districtions are becoming harder to make, because in many countries these public telecoms are being privatised, and some shareholdings are allowed to concentrate in the hands of local oligarchs or foreign countries.

Yet privatisation and liberalisation do not necessarily lead to a multiplicity of carriers. The cost of duplication can be prohibitive. Here, it is important to note that the obligation does not settle only on public carriers in the sense of state-owned monopolies. The background note on the WTO negotiations begins to develop this point: 'The specification of terms and conditions of interconnection is just as relevant in respect of dominant private suppliers as it is in the case of state-owned carriers'.[96] Indeed, the definitions do not insist that the supplier be dominant. Nor does the obligation attach only to the old established communications, which were more likely to be state supplied. The concept of transport networks encompasses the expanding media of optic fibre cable, ADSL, microwave and satellite. Perhaps cable networks are subsumed, though not for the distribution of radio or television programming.[97] Services are included too, as we have noted, as long as they are carrier services. They could run for example to internet service provision. But does this include the streaming of television programs?

In determining the sweep of the obligation, the key concept is that they are public. The Annex defines public services to be any transport service required, explicitly or in effect, by a member to be offered to the public generally. A contrast might be made with intra-corporate or closed-circuit networks. Again, the concept is of uncertain scope. With privatisation, it recalls the general notion of the common carrier, but its reach will depend ultimately on a member's particular requirements.

What facility does the access obligation afford service suppliers? We have seen that the general obligation is for access to and use of networks and services on reasonable and non-discriminatory terms and conditions. A footnote says that non-discriminatory is taken to mean not only the general trade regulation requirements of MFN and national treatment but also the sector-specific usage of the term to mean terms and conditions no less favourable than those accorded to any other users of like public telecommunications transport networks or services under like circumstances. The Annex is specific about physical interconnection. For access to be enabled, service suppliers are to be permitted to purchase or lease and attach terminal and other equipment which interfaces with the network, interconnect private leased or owned circuits, and use operating protocols of the supplier's choice. While these entitlements are important, they again show their limits. They say nothing explicitly about the subtle devices incumbents use to disadvantage competitors, such as slowing the speed they are transported. So too, to be effective, access might need to extend for instance to number portability, customer information and subscriber management systems.

The obligation is not specific either about pricing criteria. The troublesome issue is whether the interconnection rate must be struck at marginal cost or whether it can reflect the network's need to invest in improving the infrastructure or supporting community service obligations. We shall note below the Panel's ruling on this issue in the case the US brought against Mexico on behalf of international call operators.

On the other hand, we have noted that these types of access obligations can be one-sided. They are targeted at the public carrier operating the national grid and the local loop landlines. As networks proliferate, the sensible response is to extend them to other providers. Luff notes that increasingly the traffic is two-way; access should be symmetrical. The capacity of the current obligation to do so depends on the scope that may be given to the definitions above.

The more conservative response is to allow the public carrier some reservations. The Annex says that no conditions are to be imposed on the access and use which is embraced, other than is necessary to safeguard public service responsibilities and to protect technical integrity, as well as to limit users to the supply of services that are permitted by the commitments made in the member's schedule. This last reservation has more to do with the balance of trade concessions than with telecommunications technology or economics. Conditions may be imposed to ensure that suppliers do not take advantage of the obligation so as to provide services that go beyond the member's commitments to national treatment and market access. But equally it follows that the conditions of access cannot cut across the commitments the member has made.

In regard to public service responsibilities and technical integrity, the Annex itemises a set of conditions that may be imposed. They include restrictions on resale, requirements for inter-operability, technical requirements relating to attachment of equipment, restrictions on inter-connection of private leased or owned circuits, and notification, registration and licensing.

For developing countries, there is also a concession to industry development. The Annex allows them, consistent with their level of development, to place reasonable conditions on access and use necessary to strengthen their domestic telecommunications infrastructure and service capacity and to increase participation in international trade in telecommunications services. Such conditions have to be specified in their GATS schedules. The Annex also encourages technical cooperation.

The negotiating group on basic telecommunications pursued the access obligation further. It considered whether to promote access by way of a draft model national schedule or a body of general rules and understandings. The group also had to decide whether it would be preferable to do so by means of international rules and regulatory requirements specific to the telecommunications sector or through the applicability of more general competition law principles relating to positions of market dominance. To give this re-regulation substance, the WTO secretariat was now instrumental in drafting a Reference Paper (RF).[98]

The paper is significant. Fifty-five countries went on to incorporate it in their schedule of commitments. The paper provides definitions and principles regarding the regulatory framework for basic

telecommunications services. The issue of interconnection is also addressed. Suppliers of public networks or services are to ensure interconnection at any technically feasible point, and the interconnection would need to be on non-discriminatory terms and terms that are transparent, reasonable and sufficiently unbundled.

The paper goes beyond the specific issue of interconnection. The definitions adopt the concept of essential services and identify major suppliers to be those who can materially affect the terms of participation as a result of control over essential facilities or use of a position in the market. Members are to take appropriate measures to prevent major suppliers from engaging in anti-competitive practices, in particular from engaging in anti-competitive cross-subsidisation, or not making available on a timely basis technical information about essential facilities and commercially relevant information which are necessary for other services suppliers to provide services. At the same time, the paper recognises the right of any member to define the universal service obligations it wishes to maintain.

The Mexico telecommunications ruling

In this dispute, the United States brought a complaint against Mexico challenging the basis on which its long distance call operators had to deal with the Mexico public telecom in order to route calls in and out of Mexico. The main focus became the rates the telecom was charging. The US notified this complaint in 1999 but then refrained from requesting a panel ruling when Mexico agreed to take steps to remedy the situation. In 2003 it proceeded, dissatisfied with the voluntary action.

As we know by now, the Panel's report is one of the few on the GATS.[99] It is of added interest because the Annex on Telecommunications and the Reference Paper address the content of domestic regulation in this sector directly. The decision itself is not so remarkable. A comparison of rates seemed fairly to reveal that the Mexico telecom was milking the US operators. So the Panel did not really have to decide what rates were chargeable or which conditions were 'necessary', so that a member country could further the objective of supporting a public telecommunications service.

The Panel was asked to rule whether Mexico had met both its interconnection obligation under the RF and its access obligation under the Annex. Initially, it had to determine to what the obligations attached. This was a matter of the terms of the obligations – the services on which

they could be fixed – but only within the commitments the member had undertaken in its GATS schedule. So first the Panel had to identify the foreign services which Mexico had given the benefit of national treatment and market access. Mexico had made commitments regarding telecommunications services, if they were supplied by way of a facilities-based public telecommunications network (wire-based and radio-electric) and if they came through nominated technological media. Those media included voice telephony, data transmission services, cellular telephone services and private leased circuit services. But facilities-based supply did not include by way of resale or leased capacity, that is, by commercial agencies, which were the subject of a separate and more limited listing.

Regarding these facilities-based services, Mexico entered a limitation specifying that international traffic must be routed through the facilities of an enterprise that had been granted a concession by the Mexico Ministry of Communications and Transport. Such enterprises needed to have majority Mexican ownership and Mexican juridical personality. Thus, US long distance providers had to supply their services through the services of the Mexican telecom; they could not provide an end to end international service by themselves.

Did such services involve an inter-connection point to which the Reference Paper obligation applied? The obligation applied to interconnections linking the suppliers granted access with suppliers providing public telecommunications transport networks or services, that is, the Mexican telecom. For services provided cross-border, the interconnection point was the call termination, when the international call links with the domestic public network or service. The Panel held that the obligation did apply to this foreign–domestic link, even if traditionally international accounting rates were applied here. To reach this view, the Understanding in the Report by the Negotiating Group on Basic Telecommunications could be taken into account as a supplementary means of interpretation, together with the drafting history of the RF itself.

The RF is based on competition policy principles. So the Panel needed to determine whether the domestic supplier was a major supplier of the network or service to which the foreign supplier wanted to connect. The Panel asked whether Telmex had the ability to affect materially the terms of participation in the market as a result of control of essential facilities or use of its position in the market. With a market share of 74 per cent and the right to negotiate settlement rates, Telmex enjoyed such ability.

So the question became whether, under paragraph 2.2 of the RF, Telemex's inter-connection rates were cost-orientated. The Panel took the view that, according to this RF standard, the supplier may strike a rate to recoup the costs incurred in providing inter-connection, and to obtain a reasonable rate of return on investment, but not to generate revenue for expanding its telecom infrastructure, for example to roll-out cable. A supplier should not have to pay for facilities it does not need for the inter-connection service to be provided. It was clear that the rate was much higher than the charges to domestic users or other international suppliers, so the ruling put a brake on Mexico, which had depended on accounting rate revenues to fund infrastructure including the provision of universal service in a poor country.

Under the RF, the Panel also asked whether the Mexican government had failed to maintain appropriate measures to prevent Telmex from engaging in anti-competitive practices. The RF listed examples of anti-competitive practices and they included anti-competitive cross-subsidisation. In passing, the Panel said the list was not exhaustive and suggested in a fertile fashion that assistance could be gained as far abroad as the members' own competition laws, the Havana Charter, UN Principles and OECD Recommendations.

Mexico was one of the fifty-five members that had incorporated the RF within its schedule of commitments. On the other hand, the Annex is binding on all members, though, again, its access obligation is only triggered to the extent that the member undertakes commitments. As we have seen, for the services that have been committed, the member must provide access to its public transport networks and services; again this was the Mexican telecom, Telmex. Where the Annex applies, section 5 says that the member country must ensure that access is provided on reasonable and non-discriminatory terms. No condition may be imposed on access other than is necessary for the achievement of three nominated objectives. Section 5(f) of the Annex then identifies some such likely conditions.

Taking all this into account, the Panel scrutinised the settlement rates once again. While saying that the rates could be set higher under the Annex than the RF, it concluded that Telmex's rates were still not reasonable. One of the reasons in section 5 why the member could impose conditions on access was to safeguard the public service responsibilities of its network or service and in particular its ability to make its network or service available to the public generally. But the condition had to be 'necessary'. The Panel referred to the *Korea–Beef* test (see

Chapter 3), saying that the condition need only be reasonable. But tantalisingly it declined to rule on this issue, invoking the principle of judicial economy.

It did however examine Mexico's ban on non-facilities based commercial supply. Annex section 5(b) insists that, subject to the conditions members may impose (see above), suppliers must be permitted to attach terminal and other equipment and to interconnect private leased or owned circuits. But again the application of the Annex is limited to the commitments the member has made in its schedule. For non-facilities based supply, Mexico had volunteered no limitation on national treatment. But it had specified in the market access column that a permit was needed from the Mexican Ministry. No permits would be granted until regulations were issued. The Panel characterised this as a temporal limitation rather than a proper limitation on market access. As no time frame had been set, Mexico was not in fact complying with its market access commitments.

Finally, Mexico had argued that developing countries had a special allowance under Annex section 5(g) to take measures to strengthen their domestic infrastructures and services. The Panel conceded this allowance but pointed out that such measures had to be specified in the member's schedule. This final ruling closed the book on any real jurisprudence regarding the set-off between liberalisation and public service regulation.

Before closing this section, we should note here the trend for members sometimes on request to give assurances about their domestic regulation by specifying the standards they will observe by way of additional commitments in column 4 of their schedules. The telecommunications reference paper is in fact a plurilateral version of this approach. While the GATS does not require this of them, if the regulation is outside the scope of Articles XVI and XVII, Article XVIII enables them to do so, and the members representing the international suppliers have been seeking these commitments within the current round of negotiations. Of course the round has not been brought to fruition.

Overall, this experience indicates how prepared the WTO is to elaborate re-regulatory requirements, when it thinks the cause is justified. This preparedness seemed highly significant at a time when the WTO was considering taking on competition policy generally. However, as we shall see now, the WTO has struggled to find an appropriate policy, despite the need to temper the excesses of free trade, intellectual property rights and investment liberalisation.

WTO COMPETITION AND INVESTMENT AGENDA

Framing WTO competition policy

In the post-Uruguay Round world of the WTO, much of the intellectual impetus for competition regulation has come from experts in the West, some of whom are officials or consultants to the international organisations such as the European Commission, the OECD, the World Bank and the WTO itself; others who are more academically detached.[100] Thus, versions of the proposals have appeared in the documents of the organisations as well as in academic journals, though none can be said to have received an official imprimateur at this stage.

The proposals concern primarily the type of practices that should be targeted or prioritised by any international policy. So, even within these like-minded policy circles, the proposals afford variety. The emphasis in each case might represent a judgement about which approaches would 'work' at this level. These judgements are said to be technically minded. Thus, the experts may wish to emphasise those practices most amenable to clear, common rules. National systems do proscribe certain practices outright, for instance by deeming them anti-competitive per se, without giving the administrative or judicial authorities the opportunity to make their own characterisation or indeed to apply a rule of reason. In theory, a rule could be devised for any practice; only in some situations is it the case that a blanket proscription does not seem appropriate. To take a case relevant to our discussion, intellectual property practices rarely, if ever, are the subject of blanket proscriptions, either within the legislative framework or in the guidelines issued by the authorities, such as their various white, grey and black lists. The experts are really making a judgement here about which practices attract the most censure. A worldly version of this approach to international policy making is to say that any international code is going to require the expenditure of political as well as cognitive resources. Therefore, it is advisable for the international forum to confine its efforts to a generally accepted core of practices.

This advice begins to recognise that nominating the contents of the code cannot avoid value preferences. If there are tendencies for competition policies to converge, significant differences remain. The priorities suggest which practices are considered the most deleterious, here where they are employed in an international context. Such preferences show through in the examples given by the Director-General of the

WTO when he particularised his support for competition regulation. He nominated export cartels, merger controls and cooperative research and development ventures.[101] Then it must be conceded that other perspectives will perceive a different set of practices to be of concern, if they do embrace a competition policy perspective on restrictive trade practices at all. Thus, to cite a few examples, one OECD wish list identified horizontal and vertical agreements, abuse of a dominant position and mergers and acquisitions, but left out intellectual property licensing and consumer protection,[102] while a significant scholar of the subject, Scherer, joined such licensing with export and import cartels and international mergers.[103]

If intelligent competition policy requires much of its regulation to be tailored to the individual situation, then the design of a framework must provide ways to leave as much space as possible to national authorities. Arguably, if the framework is sound enough to attract strong support, then fellow member countries will be prepared to accept and back the judgement of another country's authority, even though the practices have spill-over effects to their territories. The framework can involve procedures to be followed in order to ensure that the perspectives of these members are taken into account. Through its Committee on Competition Policy and Law, the OECD has already worked with such procedures in cases of international mergers.

Yet, these efforts to allow individualisation might activate the very same differences that generated the call for international harmonisation and standardisation in the first place. If individualisation claims a necessary part of a competition policy, an international authority might be a better place in which to invest this discretionary space. However, debate over the constitution of such an authority is not any easier than the construction of the legislative framework. A key consultant, Peter Nicolaides, envisaged a body more official and binding than the networks of functional national regulators that have formed in this field as they have in other fields of international business regulation such as banking regulation.[104] But he wanted to see the authority avoid politicisation; he felt a constitution of neutral experts and government delegates would seem the best way to keep the function technocratic. Others do not think such an epistemic community or regulatory conversation is possible.

As we foreshadowed in Chapter 3, the proper constitution of such international regulatory authorities is part of a general contest over the form which global governance is to take. If such authorities are to make

sophisticated judgements about the effects on competition of various practices, better then that they are not dominated by any particular theoretical perspective. More so, if they are to weigh the benefits of the practices against their effects on competition, sometimes to the point of allowing the practices to continue, then they will need input from other perspectives, such as producer, employee, consumer and regional interests. They will have to confront a problem that many international organisations are encountering when they make decisions at a remove from local communities, the problem characterised earlier as 'democratic deficit'.

As the power of the WTO is recognised, its decision making is coming under scrutiny. One issue is the opportunity for the smaller member countries to exert a genuine influence over the provisions of its agreements; another issue is the nature of the involvement of NGOs. We shall see that the developing countries have generally been suspicious of the plans for a WTO competition policy. Yet, any such democratisation should not really allow the nations with the greatest power to discipline the transnationals to pull back from a responsible role. Arguably, the United Nations codes of conduct remained soft law because the major western powers were not prepared to give them full support.[105] So too, if NGOs are to be involved, then it must be appreciated that they will include the representatives of the corporations which are the subjects of the regulation. Already, they have been incorporated in the delegations of some members to the WTO. Yet again, the efficacy of such regulation may depend on their willingness to comply.

Rather, the democratisation issue concerns the scope for alternative perspectives to be included. It remains to be seen whether, as Reichman speculated when writing for UNCTAD, international competition policy provides an opportunity for small and medium-sized enterprises to form coalitions of interest over national lines.[106] One practical consideration is whether they would be able to marshal the resources to participate effectively in what are likely to be very complex and often protracted issues. Yet, even where competition policy is working effectively, it tends to make tremendous allowances for imbalances of power and concentrations of interest in the marketplace. It focuses on the corporation that dominates a market. It does not easily comprehend the phenomenon of the shared monopoly. Suthersanen cites the case of the five major record companies, which, without colluding, all adopted the same negative approach to single track digital format downloads.[107]

So too, Preston suspected that the kind of competition policy, which treated the world as one market, would show little concern for small and localised firms.[108] Larger markets will indeed provide the justification for rationalisations to be accepted.

Specific practices will have to be targeted, if the openings for competition in these localities are to be safeguarded, especially for independent start-up and small-scale producers. But it is questionable whether competition policy can be sufficiently fine-tuned to deal with such practices. Paradoxically, competition policy begins to take on some of the sector-specific characteristics of industry regulation when it attempts to deal with these practices. The access codes in the telecommunications sector provide a good illustration. So, ultimately, are we talking about much more in the way of regulation than general competition policy?

At the international level, the United Nations codes of conduct for multinational enterprises were tailored to the practices of particular concern to importing countries. One of the reasons why these codes might still seem more apt is because they explicitly represent a number of economic, cultural and political concerns that go beyond competition policy's focus on allocative efficiency, consumer choice and faith in the market generally. Moreover, rather than creating a set of offences to be avoided, they translate the concerns into positive obligations of fair trading and international corporate citizenship. Industry, labour and tax concerns were among those expressed in the early codes; the question is whether they could now be updated to take account of the growing concerns about violation of human rights, loss of local and indigenous cultures and damage to the natural environment.[109]

Linkage to investment liberalisation

As trade liberalisation eats into the scope for national measures, the linkage with international regulation becomes important. Investment liberalisation makes it more essential again. Investment liberalisation allows global business greater freedom to establish and acquire local firms. This adds to its strategies for organising production and distribution. The moves to draft an investment code, so soon after the Uruguay Round was completed, brought the prospect of this global power into sharp relief. It strengthened arguments for an international competition policy and other international regulation. The manner of that linkage will be the focus in this final section.

By the first Ministerial meeting, in Singapore in 1996, the European Communities were ready to place several new items on the WTO agenda. They were investment policy, competition policy and trade measures. These proposed items were to become known as the Singapore issues. Regarding competition policy, the Union sought to initiate work on four tracks: commitment by all members to effective domestic competition laws, identification of core competition principles and procedures, establishment of instruments of cooperation, and submission of the procedural and material elements of competition law to the WTO dispute settlement process.

We should recall from Chapter 3 the different strands to competition policy. One strand stresses reform of the domestic economy to create more openings for foreign businesses to operate. The second concerns domestic reform again but to eliminate practices with anti-competitive off-shore effects. The third however looks to the global economy and the impact of restrictive business practices of the transnational corporations. The European Communities programme seemed very much occupied with the first strand. Other developed countries such as Japan were agreeable to this work commencing, on condition that the use of import relief measures, such as anti-dumping procedures and safeguards, was examined as well.

Among the ASEAN countries there was apprehension that the agenda would be designed to break down local monopolies and target practices that help domestic companies maintain market share.[110] All the same, some developing countries were prepared to support WTO work on anti-competitive practices, because they thought that the liberalisation of investment controls would intensify the need for regulation of the restrictive business practices of the transnational corporations. Demonstrating how broadly the field of regulation might be cast, they were reported to be thinking of transfer pricing and other intra-firm practices.

Such countries were watching the negotiations which the OECD had commenced over a multilateral agreement on investment (MAI) as well as the moves within the WTO. We shall say a little about the MAI now before returning to the WTO agenda.[111] Within the OECD, the ambitions were pitched very high. It was true that bilateral investment treaties had been around for a long time. But they had not been concerned as much with liberalisation as with securing fair treatment and protection for investments once they were made. The OECD itself had moved the agenda along, developing its codes of liberalisation of

capital movements and liberalisation of invisible transactions. The MAI, however, would be a true liberalisation code.[112]

Its definition of investment was wide. We should note it took in speculative portfolio investment as well as direct foreign investment, intangible as well as tangible property interests, and, so it appeared, contractual as well as proprietary rights. It required non-discrimination against investors and covered investments, both in the national treatment and MFN senses. This injunction was to apply to controls on foreign investment at the pre-establishment as well as the post-establishment stages, so that, in pursuing entry rights, the MAI was truly to be an investment liberalisation treaty. At the same time, it would not challenge controls on investment generally, if they did not discriminate against foreigners, for example in the sense of cross-media controls on ownership controls that apply to all.

The MAI did, however, proscribe a whole range of performance requirements. They included export, domestic content, domestic purchase, trade-balancing and foreign exchange-balancing requirements. They also included requirements of technology transfer, location of headquarters, research and development facilities, and hiring of nationals; the very activities that help build local capacity. These latter requirements would be permissible if they were applied as a condition of the investor obtaining an advantage from the host government. This seems positive because it accommodates the public–private partnerships the critics of privatisation are saying are needed. We might cite the Chapter 7 agreements for development of genetic resources, such as the agreement between the Merck pharmaceutical company and the Costa Rican Government.

For the protection of those foreigners who have made investments, the MAI picks up minimum standards of treatment of aliens (fair and equitable treatment and full protection and security) that have been part of the bilateral investment treaties. Another prohibition contained a broader challenge to domestic regulation. The investors' rights would extend to protection from expropriation. This protection began conventionally with a ban on direct expropriation or nationalisation of covered investments. However, in keeping with NAFTA, it also insisted that governments not expropriate investments indirectly, that is, through measures equivalent to expropriation. These measures need not be discriminatory. Such protection makes a country's general regulatory measures, such as health and environmental regulation, an issue of expropriation.[113] This protection has been the basis of suits

brought directly by foreign investors against host states under international arbitration.[114] Versions of such provisions are also contained in the recent United States FTAs.

We know that the OECD MAI negotiations ran aground. They were suspended on several occasions. In October 1999, the talks reached a stalemate and they have not been revived since. OECD members were unable to agree on key terms. Moreover, they sought to enter numerous reservations to the requirements for MFN and national treatment. Reservations were to be the main means to retain regulatory options. In this respect, the MAI adopted a negative listings approach. That meant the requirements applied unless reservations were scheduled; contrast this with the GATS positive listings approach. The MAI approach remained a work in progress, but it seemed that the contracting parties would be able to enter reservations in two ways. They could retain existing measures, the 'stand-still' option; furthermore, they could retain the scope to strengthen existing measures or introduce new measures, say in sectors that were still evolving such as new media sectors and the cultural industries. This approach placed the onus on each party to itemise their current measures accurately and to describe adequately the areas in which they wished to preserve their future options. The parties drafted many reservations. Likened to a Swiss cheese, the MAI now had 'more holes than cheese'.[115]

The MAI clearly prioritised liberalisation, putting great pressure on state measures of regulation. It would be a downward pressure. The concern was that it would undermine the ability of governments to regulate in the public interest. To some extent, the attack was direct. It positively afforded private companies freedoms to invest, while actively proscribing government regulatory measures. So it is worth noting that recent US FTAs contain an annex on expropriation seeking to reassure partners about the sweep of the prohibition. The FTA with Australia states that, except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives such as public health and safety and the environment do not constitute indirect expropriation;[116] it also chooses not to make available direct investor–state arbitration but to leave such protection to diplomatic means or the remedies of the domestic courts.[117]

The more diffuse concern is the effects of regulatory competition. Here, the concern was the MAI would do nothing to control the tendency for individual governments to give away regulatory measures, placing pressure on competing jurisdictions to outbid them. While such

investment 'codes' strictly limit the governments' choice of performance requirements, they are reluctant to place any control on the advantages the investors might obtain. For instance, the measure of national treatment is cast as 'no less favourable treatment'. There is nothing here to stop governments offering foreign investors better treatment than locals. Governments competing for investment engage in bidding wars. Governments do special deals to attract corporate investment and influence location decisions. Some create special economic zones and export processing zones, where local taxes are waived and labour standards relaxed. They favour foreign investors with financial grants and purchasing contracts.

In this regard, some versions of the MAI included the injunction that host governments should not, in their enthusiasm to attract investment, derogate from the standards embodied in their own labour laws. This stricture harks back to the NAFTA side agreement and it appears again in the labour chapters of the US FTAs. However, as Sol Picciotto has argued, as we did in relation to the GATS in Chapter 4, such global agreements could be doing much more to establish positive linkages with international regulation.[118] He argues that the privileges of liberalisation should come with responsibilities. Focusing on the investors' right to make financial transfers freely, Picciotto points out several ways the MAI could constructively have supported international finance and tax regulation. Instead of simply exempting some prudential requirements and temporary monetary controls of government from the demands of the right, the MAI could have limited the right of free movement for financial transfers to payments to those jurisdictions having financial supervision systems that had been approved as complying with the Basel Committee principles. Likewise it might have made the right to make financial transfers for tax minimisation purposes conditional on the existence of a bilateral tax treaty between the source and destination countries of such a transfer. However imperfectly, this web of treaties addresses the tax evasion strategies of transfer pricing that do such harm to public revenue bases.

These examples have the great virtue of specificity. International regulation is a broad church and the aim here is not to investigate it comprehensively, rather to draw attention to the missing dimension of trade and investment liberalisation agreements. Returning to labour issues, for example, we recall the idea of the social clause. The social clause is designed to link the benefits of these trade agreements

with support for the core standards of the International Labour Organisation. More to the point, it is to be appreciated that, in the course of its own liberalisation project, the OECD had taken the trouble to develop Guidelines on Multinational Enterprises. It was recommended those Guidelines be attached to the MAI.[119] Rather than working in favour of the MAI, this linkage became another ground for opposition to the agreement. The Guidelines were voluntary. MAI critics demanded reciprocity. Otherwise, investors would enjoy legally binding, hard law, freedoms and protections, while their responsibilities would only amount to soft law options. In a similar vein, recent US FTAs identify the ILO core labour standards as aspirations, rather than a mutual obligation.[120]

With the collapse of the MAI negotiations, it was possible the focus would shift back to the WTO. After all, the WTO had broader membership and indeed the argument was made that an OECD agreement would be inconsistent with the MFN obligations of the WTO agreements.[121] But of course the same breadth made consensus even harder to obtain. While QUAD countries were in favour, the response of most developing countries was to oppose the addition of this agenda item. In a response reminiscent of the early debate over TRIPs, a United Nations body, UNCTAD, was seen as the more appropriate international forum. A fundamental query was whether investment qualified as a trade-related issue.

Nonetheless, several of the developing countries, after their inclusion in the informal negotiating groups, decided to support a study of the interface between trade and investment. It was to be clear however that a study programme should not prejudge whether negotiations should be undertaken at a later date. The Singapore declaration carried a rider that further negotiations (regarding multilateral disciplines on investment) were to take place only after an explicit consensus decision among WTO members.

It was also the understanding of these countries that the study would stay within the bounds of the existing WTO provisions and in particular the limits of the TRIMs agreement. In this respect, we already know that the GATS agreement does comprehend investments. But it confines its interest to their role in establishing a commercial presence for the purpose of supplying a service. It is far from comprehensive. Furthermore, while the GATS coverage can lead to liberalisation of the regime for these investments, it is only to the extent the positive listings approach produces. Member countries may choose to withhold

whole sectors from the GATS requirements for national treatment and market access. For those sectors they have exposed, investment controls may show up in their schedules as either horizontal, across the board limitations or as sector-specific limitations.

The TRIMS agreement also produced a narrow focus.[122] Its reference point is trade in goods. Members are obliged not to apply any trade-related investment measures that are inconsistent with the GATT 1994 obligations of national treatment and the general elimination of quantitative restrictions. Performance requirements are in mind here, but the negotiations could only settle on expressing an illustrative list of such measures; they include local product purchasing and export/import balancing requirements.

In subsequent meetings, the European Communities continued enthusiastically to promote the investment agenda.[123] That promotion was a factor in the demise of the Seattle Meeting. The Singapore issues threatened to overload the WTO at a time when many members were still having difficulty implementing the requirements of the Uruguay Round agreements. Investment returned to the table at the Doha Meeting. The Doha Declaration included an uncertain commitment to go forward.[124] Proponents have read that reference as calling for the launch of negotiations, even if they accept that an explicit consensus would still have to be reached at a later meeting about the modalities for negotiations. However, other members are adamant there has been no agreement to pursue negotiations at all. Cancun dissolved partly because these kinds of issues continue to aggravate relations.

Meanwhile, Doha gave the Working Group a detailed programme. It began with scoping and definitions. Not surprisingly non-discrimination was to be explored. The program would consider modalities for pre-establishment commitments based on a GATS-style positive listing approach; this is an interesting choice over the MAI negative listing approach. Reassuringly, the Group would address general exceptions and balance-of-payment safeguards. Dispute settlement between the members was also on the list and by implication investor–state suits, a feature of NAFTA, many BITs and some FTAs, would not be in contemplation. Neither does the program make mention of protection against expropriation, though the EC has flagged it will raise the issue. But equally it does not broach the question of investor responsibilities. More recently, the EC has taken investment off the table in order to assist negotiations on the big outstanding item of agriculture.

The First Working Group Report

How has the WTO international competition policy agenda progressed while the members contemplated further liberalisation of the global economy? The WTO Working Group issued its first report on competition policy late in 1998.[125] The general observation to make about the report is how tentative it was, reflecting the lack of consensus within the WTO membership. Its recommendations were confined to educative work and further discussion throughout 1999. The report began by noting three general views. The first wished to give priority to governmental restraints and distortions, considering that competition 'would be more enhanced by trade liberalization and by competition-oriented reforms of WTO rules rather than by introduction of new WTO rules and standards relating to national competition laws and international cooperation'. The contrasting view preferred a focus on the anti-competitive practices of enterprises that affected international trade, though here the emphasis seemed to remain with the restrictive practices of domestic enterprises and their impact on the market access enjoyed by foreign firms. The third view recommended a balanced approach.

Nevertheless, the Group's survey work remains informative and in particular the section of the report considering the impact of private anti-competitive practices on international trade. The report recognised three categories of practice. The first was practices that affected market access for imports. In this category the report placed such practices as import cartels, vertical restraints, private standard setting activities, and denial of access to essential facilities. The second was practices affecting different countries in largely the same way. Here the report mentioned international cartels, some mergers and acquisitions, and abuse of a dominant position by firms operating in international markets. The report's final category comprised practices that have a differential impact on affected countries, such as export cartels and some mergers. In a special section, the Group noted that exclusive intellectual property rights were not seen as inimical to competition but that competition law was to be applied to the exercise of such rights.

In thinking about possible responses to these problematic practices, the report thought first in terms of government policies and measures that could facilitate harmful anti-competitive practices by enterprises or associations. At the national level, these government policies and measures could include a lack of a well-constituted competition law or

a failure to enforce existing laws. A specific mention was given to the lack of effective rules governing access to essential facilities, especially in the context of deregulation and privatisation. But we can see the lens opening wider with the report's acknowledgement of lack of jurisdiction to deter anti-competitive conduct originating abroad, lack of rules in the international trading system to deal with the practices, and lack of cooperation between countries to provide appropriate remedies. In particular, it was noted that existing WTO rules do not deal directly with anti-competitive practices by private firms such as international cartels. Presently, there was no alternative but to rely on non-violation complaints.

The Working Group seemed overwhelmed by diversity and the situation-specific or perspective-driven nature of national judgements about such practices. Weakly, it concluded by saying that we cannot expect any more than consultation between countries. 'For a variety of reasons, including different effects in different national markets as well as differing legal standards, it was inevitable that, from time to time, different jurisdictions would reach different conclusions regarding the acceptability of particular arrangements and transactions'.[126] At best, the Group might offer an illustrative list of factors, to be considered in the balancing act which occurs at the national level on a case-by-case basis. The Group might also assist with convergence in procedural requirements.

Competition policy follow-up

Throughout the subsequent meetings, competition policy has remained a sensitive topic. The EC has pushed on, meeting resistance from a range of members. Like investment, the topic rated an uncertain mention in the Declaration of the Doha Meeting. Constructively, the Working Group has continued to meet and to produce reports. With encouragement from the WTO's epistemic community, it has worked patiently to fashion a subtle and acceptable way forward.[127] The focus has been core principles. These principles are primarily orientated to process. They stress non-discrimination, transparency and procedural fairness in the application of national competition law. International efforts should concentrate on cooperation and capacity building. The substance of competition policy should be elaborated progressively and flexibly. Here, the language of the Working Group is reassuring.

The introduction of WTO competition policy would not mean members had to give more market access than they had been willing

generally to commit, for example within their GATS schedules. With the developing counties in mind, the Group signals that WTO policy would respect the exercise of discretion at the level of national government, including the preservation of space to express industry and other non-competition public policies and to further development objectives; it would respect the differences in the economic circumstances and legal cultures of the members.

The recommended approach shows consideration for the established regimes of the developed countries too. Any policy should avoid an overly prescriptive approach, in particular it should admit to the exemptions and exceptions that are to be found even within a pro-competition framework. Special care should be taken to limit the role of the DSU so that it does not review the individual decisions the national authorities are taking, save where they involve *de jure* violation of national treatment obligations. Instead, the WTO should find a softer means to monitor adherence to the policy such as use of a panel of experts or the Trade Policy Review Mechanism. The approach should stress positive comity. The obligation of a national government to enforce competition policy would be activated after they received a complaint from another member. This onus would be somewhat stiffer than the encouragement the TRIPs and GATS agreements apply to members to give sympathetic consideration to requests from other members.

In Chapter 3 we suggested that many countries are lacking the technical expertise and the political power realistically to assert standards of competition against transnational corporations. For a WTO policy to be effective, the home jurisdictions, that is, the larger developed countries, would have to be willing to act; presently, they tend to ignore or excuse the effects of corporate conduct on competition abroad.[128] In this regard, the Working Group nominates action on hardcore cartels, specifically export cartels that have the effect of raising prices in developing countries. Of course we remember that the US has attracted opprobrium for the extra-territorial reach of its competition laws, so the assistance would need to be welcome. It could indeed be regarded as a gesture of goodwill, perhaps a welcome first step, because approaches to hardcore cartels still vary and the dependent countries need help with more than hardcore cartels.[129]

For various reasons, most developing countries retain their opposition to the WTO becoming involved in competition law generally. The number of countries adopting some sort of competition policy is definitely rising and developing countries are among the new recruits. Yet

they are not prepared to invite WTO oversight. Sometimes, it must be said, this opposition stems for a desire to protect the systems of patronage and corruption that benefit members of the government and their families.[130] However, the wariness can be well placed. Sensibly implemented, competition policy provides a stimulus to most domestic economies, including those of the smaller developed and the bigger developing nations. However, for the fragile economies of the least-developed countries, it can be extremely radical and destabilising. In these economies, small-scale producers can only survive if they band together. Public instrumentalities play a vital role in ensuring that services reach the poor and privatisation surrenders government control over essential services to the market. The struggles over access to water have underscored the need to temper neo-liberal approaches.[131] In Chapter 4 we saw how such sensitivity had fuelled opposition to the GATS. It might be the case here that a sign of good faith (on hardcore cartels) 'will not calm their apprehension that a competition agreement just privileges foreign companies at the expense of locals'.

Access to knowledge

In any case, the project is not simply to check abuse of the freedoms of liberalisation. Much of the world still needs education and technology-driven development to build capacity and reduce dependence. Without such infrastructure, it will not be able to take advantage of liberalisation. Sustainable development will be based on the opportunities for small and medium-sized enterprises and skilled hard working people to flourish locally. The success with the system of microcredit is an example.

While it seems that intellectual property protections, investment incentives and privatisation programs will play a role, the expert literature is becoming more discerning about which particular enterprises and indeed which economies can benefit from these policies. Some space must be allowed within these regimes, so those without the capital to dominate can also prosper. This is not merely the case for new media enterprises in developing countries. In developed economies, the way must be kept open for creative workers, start-up companies and collaborative networks. Suthersanen argues that the insistence on incumbent legal rights stands in the way of new technologies and business models that are transforming the commerce of media and communications.[132] According to Peter Drahos, it seems strange to be extending exclusive control rights, just when the technology is providing the opportunity for distribution networks to bloom.[133]

Pursuing limited exceptions or uncertain flexibilities will not unleash this potential. The start-up enterprise and the organic network should be the centrepiece of such development. There remains too a positive public role for the state in coordinating social relations and providing infrastructure support. All countries do this, though the 'varieties of capitalism' literature shows they do so in different ways and indeed under different guises.[134] So for example the US Government provides extensive support to local research under cover of national security and its military budget. Now the public–private partnerships will need to be forged over national boundaries.[135]

With markets going global, the legal frameworks are not likely to work without a global dimension too. Over-arching principles such as access to knowledge and respect for cultural diversity need to be established in treaty form, so that the policy options of intellectual property, investment protections and competition policy play positive roles. In Chapter 7, we noted the initiatives within the FAO and CBD regarding the preservation of biodiversity. Before closing, mention is made of two other initiatives of relevance.

In 2005, UNESCO approved a new global convention recognising the sovereignty of each country to protect and promote diversity of cultural expressions.[136] The Cultural Diversity Treaty was hard won and critics continue to show concern about its impact on free trade. Its impact as a set of rules remains to be seen. The Convention contains clauses addressing its relationship with the existing trade agreements.[137] These 'cohabitation' clauses say that nothing in the Convention is to be interpreted as modifying rights and obligations under any other treaties, yet countries are to take into account the Treaty when interpreting and applying the other treaties or when entering into other international obligations. Telling here is the fact that the Treaty does not provide a means of adjudication and enforcement; rather it offers mediation and conciliation with UNESCO. This approach is in contrast to WTO dispute settlement and it raises the question again whether the panels and Appellate Body will place weight on the Treaty when interpreting and applying WTO agreements such as TRIPs and GATS (see further Chapter 3).[138]

Even if the hierarchies between treaties is uncertain, the UNESCO Treaty can still act as a symbolic resource, one that countries enlist when arguments are made for further liberalisation, for example of trade in services. A firm critic of the Treaty, the US, is reported to be taking it seriously, recommending that countries do not ratify the

Treaty, nor seek to invoke it in negotiations at the WTO. However, Brazil has invoked the Treaty in the debate at WIPO over the shape of the Broadcasting, Webcasting and Podcasting Organisations Treaty. With other countries, Brazil is seeking to limit the scope of this Treaty's new intellectual property rights (control of internet webcasts being a flashpoint) and to maximise the fair use type exceptions to the protection of broadcast signals that would be available to national legislators. To these ends, Brazil has also cited the Declaration of Principles and Plan of Action that was adopted at the December 2003 World Summit on the Information Society, promoting access to knowledge and information to bridge the digital divide.

The second is the Development Agenda initiative. A fourteen-strong Friends of Development coalition (FOD) has been trying to tie consideration of the intellectual property treaties before WIPO with a development agenda. The main target is the Substantive Patent Law Treaty; the Broadcasting Treaty was also linked. According to FOD, WIPO should consider the impact of extending intellectual property rights on the developing economies, giving attention to the protection of the public domain and access to knowledge, open standards and collaborative models, genetic resources and traditional knowledge, and the incorporation of competition rules.[139] An access to knowledge and technology treaty forms part of this Agenda.

WIPO established a Committee to explore the Agenda. The FOD initiative attracted support from the African and Asian groups. It was, however, opposed by the Group B developed countries and some developing countries. To achieve a resolution, the Chair devised a draft text. It attracted criticism from FOD for filtering out key issues and the discussions broke down. It looked then like the Agenda would essentially be a spoiling action, to counter moves for more high technology intellectual property protection. Nonetheless, efforts continued and in September 2007 the WIPO General Assembly adopted an Agenda and established a Committee on Development and Intellectual Property to flesh out a work programme for implementation.[140] The Broadcasting Organizations Treaty has been scheduled provisionally for a Diplomatic Conference.

CONCLUSIONS

This study has been the last and longest of the chapters because it best combines the themes we have developed in this book. The particular case highlights the importance of the digital online media to the nature

of global networks and their potential to enhance access. Recent developments indicate that the technology is undermining the nation state's ability to apply industry-specific regulation in the audio-visual and telecommunications sectors. The GATS has added to the pressure on those national measures that are designed to ensure that less powerful and mainstream voices, particularly local ones, enjoyed access to distribution channels. Nevertheless, for the time being, many countries have availed themselves of the opportunities inherent in the GATS itself to maintain limitations on their exposure to the open trade and free market norms of the WTO.

If industry-specific regulation is undermined, it is possible that the way will be open for distributors to exploit convergence and assume dominance in a global marketplace. But the technology itself may provide the means to circumvent the bottlenecks on which control has been built in the past. There is doubt whether intellectual property can expect to have much purchase in this environment. Certainly, the emphasis shifts from control over content to a strategic position in the provision of facilities and services. The TRIPs agreement strengthened intellectual property protection globally. But TRIPs fell short of conferring rights squarely over communications online. It left a space for another international organisation, WIPO, to fill.

The 1996 WIPO Treaties have placed intellectual property rights into the online environment. But a placatory approach has left room for other concerns to be mediated. The primary beneficiaries of the rights are the authors of works which may be transmitted online. Performers and producers of sound recordings have also received support. But the concerns of the online intermediaries have been assuaged somewhat by leaving important issues like third-party liability to be resolved at each national level. The Treaties also carried over into the digital environment the established concessions to the interests which end users and public organisations have in maintaining access to informational and educational resources.

Yet the power of intellectual property, which is limited in its own right, is giving way to command over other assets such as computer platforms and telecommunications networks. As much as qualifications on intellectual property itself, genuine access depends on the coordinated regulation of the acquisition and abuse of market power. This chapter has used the example of the many subtle ways access is denied to essential facilities. At present, we must rely on the variable policy of national competition regulation to deal with this problem.

Such potentially global power invites consideration of the institution of competition law standards at the international level. Tentatively, the GATS has acknowledged the issue by developing telecommunications access obligations. These obligations apply in respect of common carriers which are in private hands as well as public sector instrumentalities. But the focus is on domestic carriers. As we have observed at several points, many countries lack the legal jurisdiction or the political power needed to discipline the restrictive business practices of the TNCs. They need help from an international authority.

We saw first in Chapter 3 that competition law continues to hold quite different meanings. A WTO competition policy agenda is just as likely to challenge the industry-specific regulation which survives at the national level as it is to govern the practices of transnational operators. If a narrow view of competition law and a broad view of investment liberalisation are to be pursued, it suggests that other more positive, social obligations will be needed at this level. This is surely the case, if producer access and universal service are to have substance when the online media are privately owned and operated on a truly global scale. Again, we have seen in the last few years among the epistemic community some really sustained and imaginative efforts to devise workable policies for a contribution to international regulatory coordination. However, it remains to be seen whether these initiatives can be reconciled with the requirements of the WTO agreements and the conservatism of the institution. Could it be pushed in that direction by the requirements of its existing agreements and the preference some members are showing to exchange market access for regulatory agreements?[141]

NOTES

1. For background, see T. Flew, *New Media: An Introduction* (Oxford: Oxford University Press, 2002).
2. See *The Age*, 5 September 1996.
3. There are variations between countries as well as within countries. For figures relating to the relatively affluent OECD countries, see eg, OECD, *Information Technology Outlook 1977* (Paris: OECD, 1997); more widely, World Bank, *World Development Report 1998–99* (New York: World Bank, 1999); World Bank, *2006 Information and Communications for Development: Global Trends and Policies* (Washington: World Bank, 2006).
4. A particular enthusiast is G. Gilder, *Life After Television: The Coming Transformation of Media and American Life* (New York: Norton, 1994).

Also see F. Cairncross, *The Death of Distance* (London: Orion Business Books, 1998).

5. R. Caves, *Creative Industries: Contracts between Art and Commerce* (Cambridge MA: Harvard University Press, 2000).
6. J. Howkins, *The Creative Economy* (London: Penguin Books, 2001).
7. J. Van Dijk, *The Network Society: Social Aspects of New Media* (London: Sage Publications, 2nd edn, 2006).
8. Quoted in *The Guardian Weekly*, 17 April 1996.
9. K. Bowrey, *Law and Internet Cultures* (Melbourne: Cambridge University Press, 2005).
10. OECD, Directorate for Science, Technology and Industry, Working Party on the Information Economy, Participative Web: User-Created Content, DSTI/ICCP/IE(2006)7/Final (Paris: OECD, 2007).
11. U. Suthersanen, Technology, Time and Market Forces: The Stakeholders in the Kazaa Era. In M. Pugatch (ed.), *The Intellectual Property Debate: Perspectives from Law, Economics and Political Economy* (Cheltenham: Edward Elgar, 2006).
12. For a sympathetic critique, see H. Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (New York: Addison-Wesley, 1993).
13. *The Guardian Weekly*, 22 May 1994.
14. A concept borrowed from a colleague of mine, Peter White, On-Line Services: The Emerging Battle for Transactional Space, *Media Information Australia* 79 (1996), 3. An earlier work I found particularly helpful was N. Garnham, *Capitalism and Communication: Global Culture and the Economics of Information* (London: Sage, 1990).
15. E. Dyson, Intellectual value and the Net, *Wired* 3.07 (1995), 136.
16. For a useful analysis, see the report by the OECD, *Telecommunications and Broadcasting: Convergence or Collision?* (Paris: OECD, 1992).
17. F. Macmillan, Public Interest and Public Dominance in an Era of Corporate Dominance. In B. Andersen (ed.), *Intellectual Property Rights: Innovation, Governance and Institutional Environment* (Cheltenham: Edward Elgar, 2006).
18. For a survey and analysis of the field, see R. Mansell, Strategic Issues in Telecommunications: Unbundling the Information Infrastructure, *Telecommunications Policy* 18 (1994), 588.
19. *The Economist*, 21 January 2006.
20. See eg, L. Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004).
21. For an account of these negotiations, see I. Shefrin, The North American Free Trade Agreement: Telecommunications in Perspective, *Telecommunications Policy* 17 (1993), 14.
22. See the report by H. Ungerer, EC Competition Law in the Telecommunications, Media, and Information Technology Sectors, *Fordham International Law Journal* 19 (1996), 1111. Ungerer was with the European Commission Competition Directorate.

23. According to a report by P. Drahos and R. Joseph, Telecommunications and Investment in the Great Supranational Regulatory Game, *Telecommunications Policy* 19 (1995), 619.
24. J. Given, *America's Pie: Trade and Culture After 9/11* (Sydney: University of New South Wales Press, 2003).
25. See *WTO Focus*, No 6, October–November 1995.
26. R. Ruggiero, WTO Director-General Address to the Business Council, Williamsburg, WTO Press Release RELEASE/24, 13 October 1995.
27. See WTO Press Release PRESS/48, 1 May 1996.
28. See *WTO Focus*, No 16, February 1997.
29. Fourth GATS Protocol: Schedules of Specific Commitments concerning Basic Telecommunications. Available from the WTO as a separate publication. The Protocol, together with the Decision on Commitments in Basic Telecommunications is reproduced in *International Legal Materials* 36 (1997), from p 354.
30. R. Adlung and M. Roy, Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change, *Journal of World Trade* 39 (2005), 1161.
31. C. Graber, Audiovisual Policy: The Stumbling Block of Trade Liberalisation. In D. Geradin and D. Luff (eds.), *The WTO and Global Convergence in Telecommunications and Audio-Visual Services* (Cambridge: Cambridge University Press, 2004).
32. See OECD, Directorate for Science, Technology and Industry, Working Party on Telecommunications and Information Services Policies, Multiple Play: Pricing and Policy Trends, DSTI/ICCP/TISP(2005)12/FINAL (Paris: OECD, 2006).
33. An observation made by E. Noam, Beyond Liberalization: From the Network of Networks to the System of Systems, *Telecommunications Policy* 18 (1994), 286.
34. OECD, *Convergence or Collision*, p 101.
35. E. Plowman and L. Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge and Kegan Paul, 1991), p 149.
36. W. Alford, *To Steal a Book is an Elegant Offence: Intellectual Property in Chinese Civilization* (Stanford: Stanford University Press, 1995).
37. See P. Drahos, *A Philosophy of Intellectual Property* (Sydney: Dartmouth, 1996).
38. J. Sterling, *World Copyright Law* (London: Sweet and Maxwell, 2nd edn, 2003).
39. J. Rifkin, *The Age of Access: How the Shift from Ownership to Access is Transforming Capitalism* (London: Penguin Books, 2000).
40. For some discussion, see Note, (Student author) Global Limits on 'Look and Feel': Defining the Scope of Software Copyright Protection by International Agreements, *Columbia Journal of Transnational Law* 34 (1996), 503.
41. For a lively account of the industry disputes, see J. Band and M. Katoh, *Interfaces on Trial: Intellectual Property and Interoperability in the Global Software Industry* (Boulder: Westview Press, 1995). Now see Federal Trade Commission, *Competition and Intellectual Property Law and Policy in the*

Knowledge-Based Economy (Washington: Federal Trade Commission, 2002), ch 3.

42. See eg, the Australian experience, C. Arup, The United States–Australia Free Trade Agreement – the Intellectual Property Chapter, *Australian Intellectual Property Journal* 15 (2004), 205; Parliament of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, Review of Technological Protection Measures (Canberra, 2006).
43. The events are set out in P. Waters and P. Leonard, The Lessons of Recent EC and US Developments for the Protection of Computer Software under Australian Law, *European Intellectual Property Review* 13 (1991), 124. See Legal Protection of Computer Programs – Directive 91/250 [1991] OJL122/42 for the outcome.
44. See the report in *The Age*, 16 April 1996. The recommendation came from the Australian Attorney-General's Department, Copyright Law Review Committee, *Computer Software Protection* (Canberra, 1995).
45. See the item in the *World Intellectual Property Report* 1996 (10), 259.
46. S. John, What Rights Do Record Companies Have on the Information Superhighway?, *European Intellectual Property Review* 18 (1996), 74.
47. C. Arup, United States–Australia Free Trade Agreement.
48. See Suthersanen, Stakeholders in the Kazaa Era.
49. A characterisation ventured by Oman (1993), who had been Register of Copyright in the United States, see R. Oman, Berne Revision: The Continuing Drama, *World Intellectual Property Report* 1993 (7), 160.
50. A number of jurisdictions had been discussing and developing an approach at the time. See in particular the European Union: Copyright and Related Rights in the Information Society – Proposal for Directive [1998] OJC108/6; and the United States: Digital Millennium Copyright Act 17 USC#1201 (1998).
51. M. Geist, Anti-Circumvention Legislation and Competition Policy: Defining a Canadian Way? In M. Geist (ed.), *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005).
52. A comparative survey of such provisions can be found in Australian Copyright Council, *Fair Dealing in the Digital Age*, Bulletin No 92 (Sydney: ACC, 1996).
53. From Australia, see for instance A. Mason, Developments in the Law of Copyright and Public Access to Information, *European Intellectual Property Review* 19 (1997), 636.
54. M. Wilkinson, Filtering the Flow from the Fountains of Knowledge: Access and Copyright in Education and Libraries. In Geist, *In the Public Interest*.
55. See *World Intellectual Property Report*, 1996 (10), 82.
56. Legal Protection of Databases – Directive 96/9 [1996] O.J. L77/20; further, see M. Davison, *The Legal Protection of Data Bases* (Cambridge: Cambridge University Press, 2003).
57. See Ungerer, EC Competition Law.
58. See Oman, Berne Revision.

59. WIPO, Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference, WIPO, Geneva, CRNR/DC/4, 30 August 1996, at the WIPO website www.wipo.int.
60. The texts of the Treaties can be consulted at the WIPO website: www.wipo.int. WIPO Copyright Treaty, Geneva, 20 December 1996, 36 ILM 65 (1997) (entered into force 6 March 2002); WIPO Performances and Phonograms Treaty, Geneva, 20 December 1996, 36 ILM 76 (1997) (entered into force 26 July 2007). For expert commentary on the Treaties, see M. Ficsor, *The Law of Copyright and the Internet: The 1996 Treaties, their Interpretation and Implementation* (Oxford: Oxford University Press, 2002).
61. The insider's account comes from Cresswell (1997) who was head of the Australian Government delegation to the Conference; see C. Cresswell, Copyright Protection Enters the Digital Age: The New WIPO Treaties on Copyright and on Performances and Sound Recordings, *Copyright Reporter* 15(1) (1997), 4.
62. See Davison, *Data Bases*.
63. O. Morgan, *International Protection of Performers' Rights* (Oxford: Hart Publishing, 2002).
64. For this report, I rely on A. Dixon and M. Hansen, The Berne Convention Enters the Digital Age, *European Intellectual Property Review* 18 (1996), 604.
65. See WTO Focus, No 33, August–September 1998. Further, WTO Secretariat, *Electronic Commerce and the Role of the WTO* (Geneva, 1998) and the ongoing WTO electronic commerce work programme.
66. For updates on signatories, see WIPO, *Intellectual Property Laws and Treaties*.
67. See the country survey by B. Hoekman, Competition Policy and the Global Trading System, *The World Economy* 20 (1997), 383.
68. T. Stewart, Is Flexibility Needed When Designing Competition Law for Small Open Economies?: A View from the Caribbean, *Journal of World Trade* 38 (2004), 725.
69. S. Sell, *Power and Ideas: North–South Politics of Intellectual Property and Antitrust* (Albany: State University of New Press, 1998).
70. B. Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Aldershot: Ashgate, 2003).
71. These possibilities were well recognised by the United States Federal Trade Commission, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace: A Report by FTC Staff* (Washington, 1996).
72. One acquisition was the catalogue of Ansel Adams photographs.
73. For reports of this case, see the articles by A. Page, Microsoft: A Case Study in International Competitiveness, High Technology and the Future of Antitrust Law, *Federal Communications Journal* 47 (1995), 99

and L. Anderson, US v Microsoft, Antitrust, Consent Decrees, and the Need for a Proper Scope of Judicial Review, *Antitrust Law Journal* 65 (1996), 1.

74. A good account of this vacillation is provided in D. Levy, The Regulation of Digital Conditional Access Systems, *Telecommunications Policy* 21 (1997), 661.
75. *The Age*, 23 February 1999.
76. N. Helberger, *Controlling Access to Content – Regulating Conditional Access in Digital Broadcasting* (The Hague: Kluwer Law International, 2005).
77. R. Hart, Interoperability Information and the Microsoft Decision, *European Intellectual Property Review* 29 (2006), 361; J. Art and G. McCurdy, The European Commission's Media Player Remedy in the Microsoft Decision: Compulsory Code Removal despite the Absence of Tying or Foreclosure, *European Competition Law Review* 27(2) (2006).
78. These investments assume interesting patterns, Spanish telecom being active for example in Latin America.
79. For a resume of these codes, see OECD, *Convergence or Collision*.
80. Some examples came from the European Commission, *Competition Aspects of Interconnection Agreements in the Telecommunications Sector*, Final Report to the European Commission (DG IV) (Brussels: 1995); now see Helberger, *Controlling Access*.
81. OECD, Committee for Information, Computer and Communications Policy, *Information Infrastructure Convergence and Pricing* (Paris: OECD, 1996).
82. D. Luff, Telecommunications and Audio-visual Services: Considerations for a Convergence Policy at the World Trade Organization Level, *Journal of World Trade* 36 (2004), 1059.
83. K. Maskus and J. Reichman, The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods. In K. Maskus and J. Reichman (eds.), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005).
84. Consequently, the policies are both particular and tentative; see for example US Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property reproduced in *European Intellectual Property Review* 17(7) (1995), supplement 3; Federal Trade Commission and Department of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Washington: FTC, 2007).
85. B. Ong, Building Brick Barricades and Other Barriers to Entry: Abusing a Dominant Position by Refusing to License IPRs, *European Competition Law Review* 2005 (4), 215.
86. See the European Commission Decision, MSG Media Service [1994] OJL364/1.
87. See Ungerer, EC Competition Law.
88. See Helberger, *Controlling Access*.

89. For expert commentary, see S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2nd edn 2006).
90. D. Gervais, *The TRIPs Agreement: Drafting History and Analysis* (London: Sweet and Maxwell, 2nd edn 2003).
91. I have relied on Vinje (1995) for a report of the outcome of this case, the *Magill* case. In this case, television stations were using copyright to deny access to the programme information needed to make a rival magazine competitive. See T. Vinje, The Final Word on *Magill*, *European Intellectual Property Review* 17 (1995), 297.
92. C. Correa, Can the TRIPs Agreement Foster Technology Transfer to Developing Countries? In Maskus and Reichman, *International Public Goods*.
93. F. Abbott, Are the Competition Rules in the WTO TRIPs Agreement Adequate?, *Journal of International Economic Law* 7 (2004), 687.
94. This latter proviso is not self-evident but is one of several elucidations offered in a paper by Tuthill from the WTO secretariat; see L. Tuthill, Users' Rights: The Multilateral Rules on Access to Telecommunications, *Telecommunications Policy* 20 (1996), 89.
95. For analysis, see D. Luff, International Regulation of Audio-Visual Services: Networks, Allocation of Scarce Resources and Terminal Equipment. In Geradin and Luff, *The WTO and Global Convergence*.
96. WTO, Council on Trade in Services, Telecommunications Services, Background Note by the Secretariat, S/C/W/74, 8 December 1998.
97. See D. Luff, International Regulation.
98. The paper is reproduced in *International Legal Materials* 36 (1997), 367.
99. Report of the Panel, Mexico–Measures Affecting Telecommunications Services, WT/DS204/R, 2 April 2004.
100. See now for example, A. Davidow and M. Shapiro, The Feasibility and Worth of a WTO Competition Agreement, *Journal of World Trade* 37(1) (2003), 49; B. Hoekman and P. Mavroidis, Economic Development, Competition Policy and the WTO, *Journal of World Trade* 37(1) (2003), 1.
101. R. Ruggiero, Economic Globalization Increases Impact of National Competition Policies on International Trade, WTO Press Release PRESS/30, 30 November 1995.
102. See P. Lloyd and G. Sampson, Competition and Trade Policy: Identifying the Issues after the Uruguay Round, *The World Economy* 18 (1995), 681.
103. See F. Scherer, *Competition Policies for an Integrated World Economy* (Washington DC: The Brookings Institute).
104. See P. Nicolaides, For a World Competition Authority *Journal of World Trade* 30 (1996), 131.
105. For this interpretation, see F. Nixson, Controlling the Multinationals?: Political Economy and the United Nations Code of Conduct, *International Journal of the Sociology of Law* 11 (1983), 83.
106. J. Reichman, The 'TRIPs' Agreement and the Developing Countries, *UNCTAD Bulletin* 23 (1993), 8.

107. Suthersanen, The Stakeholders in the Kazaa Era.
108. P. Preston, Competition in the Telecommunications Infrastructure: Implications for the Peripheral Regions and Small Countries of Europe, *Telecommunications Policy* 19 (1995), 253.
109. J. Murray, *Transnational Labour Regulation: The ILO and EC Compared* (The Hague: Kluwer Law International, 2001); B. Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005). Now see the environment sustainability principles in the UN Global Compact, the UN Principles for Responsible Investment or the Equator Principles.
110. See the report by Martin Khor, Competing Views on 'Competition Policy', at the Third World Network website www.twnside.org.
111. R. Dattu, A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment, *Fordham International Law Journal* 24 (2000–2001), 275.
112. S. Picciotto, Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment, *University of Pennsylvania Journal of International Economic Law* 19 (1998), 731.
113. For the implications, see A. Newcombe, The Boundaries of Regulatory Expropriation in International Law, *ICSID Review: Foreign Investment Law Journal* 20 (2005), 1.
114. See R. Bishop and W. Russell, Survey of Arbitration Awards under Chapter 11 of the North American Free Trade Agreement, *Journal of International Arbitration* 19 (2003), 505.
115. See Picciotto, Antinomies.
116. C. Arup, The 2004 United States–Australia Free Trade Agreement, *Nordic Journal of Commercial Law* 2004 No 2, at www.njcl.fi.
117. W. Dodge, Investor-State Dispute Settlement between Developed Countries, *Vanderbilt Journal of Transnational Law* 39 (2006), 1.
118. See Picciotto, Antinomies.
119. For the experience with the Guidelines, see R. Blainpain, Guidelines for Multinational Enterprises. In R. Blainpain (ed.), *Comparative Labour Law: Law and Industrial Relations in Industrialized Market Economies*, 5th and rvsd edn (Deventer: Kluwer, 1993). Now see R. Blainpain and M. Colucci, *The Globalisation of Labour Standards: The Soft Law Track: Global Compact, ILO principles, NAFTA Agreement, OECD Guidelines* (The Hague: Kluwer Law International, 2004).
120. G. Griffin, C. Nyland, and A. O'Rourke, Trade Promotions Authority and Core Labour Standards: Implications for Australia, *Australian Journal of Labour Law* 17 (2004), 64.
121. See A. Wimmer, The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment, *World Competition* 19(4) (1996), 109.
122. For analysis, see J. Johnson, The WTO Decision – MFN, National Treatment, TRIMs and Export Subsidies. In M. Irish (ed.), *The Auto Pact: Investment, Labour and the WTO* (The Hague: Kluwer Law International, 2004).

123. M. Khor, Trade and Investment: Fighting over Investors' Rights at the WTO, published at www.twnside.org.
124. See C. McCrudden, Property Rights and Labour Rights Revisited: International Investment Agreements and the 'Social Clause' Debate, in Irish, *Auto Pact*.
125. WTO, Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/2, 8 December 1998 (available at www.wto.org).
126. Ibid., 39.
127. See more recently, WTO, Report of the Working Group on the Interaction of Trade and Competition Policy to the General Council, WT/WGTCP/7, 17 July 2003.
128. See Abbott, Competition Rules.
129. B. Sweeney, Export Cartels: Is There a Need for Global Rules?, *Journal of International Economic Law* 10 (2007), 87.
130. See Sell, *Power and Ideas*.
131. A. Lange, The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry, *Journal of International Economic Law* 7 (2004), 801.
132. See Suthersanen, Stakeholders in the Age of Kazaa.
133. P. Drahos The Regulation of Public Goods. In Maskus and Reichman, *International Public Goods*; further see P. Drahos, Access to Knowledge: Time for a Treaty?, *Bridges Monthly Review* 9(4) (2005), 15, at www.ictsd.org.; C. Arup, Services and Investment in the Free Trade Agreements: Liberalization, Regulation and Law. In R. Buckley, V. Lo and L. Boulle (eds.), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (The Hague: Kluwer Law International, 2008).
134. P. Hall and D. Soskice, An Introduction to Varieties of Capitalism. In P. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).
135. J. Barton, Integrating IPRs into Development Strategies. In C. Bellmann, G. Dutfield and R. Melendez-Ortiz, *Trading in Knowledge: Development Perspectives on TRIPs, Trade and Sustainabiity* (London: Earthscan, 2004).
136. See eg, A. Kachaturian, The New Cultural Diversity Convention and its Implications for the WTO International Trade Regime: A Critical Comparative Analysis, *Texas International Law Journal* 42 (2006), 191.
137. United Nations Educational, Scientific and Cultural Organization, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, (Cultural Diversity Treaty) Paris, 20 October 2005, (not yet in force).
138. M. Hahn, A Clash of Cultures? The UNESCO *Diversity Convention* and International Trade Law, *Journal of International Economic Review* 9 (2006), 515.
139. WIPO, Proposal by Argentina and Brazil, WO/GA/31/11, 27 August 2004.

140. WIPO Adopts Development Agenda but Faces Budget Row, *Bridges Weekly Trade News Digest* 11(33) (2007), 1 at www.ictsd.org.
141. See, eg, *WTO News*, 'Untransparent' Private Standards Criticized in a Week of More Transparency, 24 October 2007 and *WTO News*, Food Chemicals Regulation Stay in Focus in Technical Barriers Committee, 13 November 2007. Generally, D. De Bievre, The EU Trade Agenda and the Quest for WTO Enforcement, *Journal of European Policy* 13 (2006), 851.

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