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