

THE NEW WORLD TRADE
ORGANIZATION AGREEMENTS
Globalizing Law Through
Services and Intellectual Property



Christopher Arup

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THE NEW WORLD TRADE ORGANIZATION AGREEMENTS

Globalizing Law Through Services and Intellectual Property

This detailed and insightful book assesses the impact of the WTO through the medium of two new multilateral agreements – the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). It explains how these agreements push trade policies 'behind the border', mediating conflicts between contrasting legalities and negotiating political and cultural, as well as economic, issues. Detailed case studies address topics of global significance: competition between different types of legal services, ownership claims to the genetic codes of plants and animals, and access to the content resources and technical facilities of the on-line media. With the Millennium Trade Round in the balance, the book assesses the WTO's potential to move beyond laissez-faire and provide support for independent and alternative producers, providers and users. It takes account of developments up to and including the Seattle ministerial meeting.

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ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation Organization
ASEAN	Association of South-East Asian Nations
CIS	Commonwealth of Independent States
DSB	Dispute Settlement Body
FAO	Food and Agricultural Organization
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ILO	International Labour Organization
IMF	International Monetary Fund
ISO	International Standards Organization
ITO	International Trade Organization
ITU	International Telecommunications Union
JFBA	Japanese Federation of Bar Associations
MAI	Multilateral Agreement on Investment
MFN	Most favoured nation treatment
NAFTA	North American Free Trade Association
NGOs	Non-governmental organizations
NICs	Newly industrialising countries
NIH	National Institutes for Health (USA)
NT	National treatment
OECD	Organization for Economic Cooperation and Development
PBR	Plant breeder's right
QUAD countries	United States, European Union, Japan and Canada
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
Triad countries	Japan, European Union and United States
TRIMs	Agreement on Trade-Related Investment Measures
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law

UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UPOV	International Convention for the Protection of New Varieties of Plants
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

PREFACE AND ACKNOWLEDGEMENTS

The completion of this book has provided me with a challenge in life. My earlier work in these fields made me realise that their international dimensions were becoming ever more important. Internationalisation grew into globalization, which is a general and grand phenomenon, yet one which we must try to represent in an open minded and nuanced way. This effect is even harder to achieve when the focus is on law for, traditionally, we are obliged to treat law with great precision. Consequently, the approach I have taken might seem cautious. But I should like to think that the book will grow on readers, revealing depths as well as breadth. My objective has been to analyse the agreements closely and study their impacts in selected fields. But it is not a blow by blow account of their origins or progress. It aims to be forward looking, conceptualising and evaluating their role in the globalization of law.

Some thanks are overdue. Even if my research has been a solitary pursuit, unwittingly others have provided inspiration. Probably, the greatest assistance came from the opportunity to take part in international gatherings of the law and society movement, particularly conferences in Amsterdam, Onati and Tokyo, and meetings of CONGLASS in Glasgow and New York. The work of Michael Blakeney, John Braithwaite, Peter Drahos, Walter Goode, Sol Picciotto and Sam Ricketson I have found especially helpful to my thinking. I should also thank the readers of the manuscript for having enough faith in me to be critical and demanding. My editors at Cambridge, Phillipa McGuinness, Sharon Mullins and Heather Jamieson, were the most positive influence of them all. I was grateful for an Australian Research Council grant at the start of the project. Peter Quinlivan and Ian Yorke were intelligent assistants at a time when it was just taking shape. I should acknowledge that an early version of chapter five appeared in the journal *World Competition*, of chapter six in the *Australian Intellectual Property Journal*, and chapter eight in a report published by the La Trobe Online Media Program. My thanks in each instance to the editors.

Closer to home, while I had teaching and administrative work to do during the time of the book's writing, my University was kind enough to allow me study leave in 1995. On a daily basis, my colleagues in the School and Faculty created a very cheerful and helpful environment. I

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PART I

**GLOBALIZATION, 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 which I wish to pursue and indicate the purposes which the book might serve.

My primary objective is to examine the texts and assess the impacts 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 organization, using these two most innovative agreements to illustrate how its reach has been extended significantly. It seemed clear from the outset that the agreements would be significant landmarks in the development of international trade law overall. They remain so today. The shambles which was the Third Ministerial Conference late 1999 in Seattle has highlighted the difficulties confronting those who wish to broaden the WTO's agenda. For the time being at least, work on the WTO will concentrate on a better understanding of the architecture which has so far been established, and a cautious development of agreements like the GATS and TRIPs which have an 'in-built' agenda. No new agenda can be expected before the next Ministerial Conference, which is not likely to be held until the year 2001. Yet this experience with the established agreements might point up ways in

which other topics, such as competition policy, can sensibly be pursued in the future.

The two agreements were struck when the Uruguay Round reached a conclusion late in 1993.² Naturally, they have already attracted their share of expert commentary. Much of this early analysis has been 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 is often one of neo-classical economics and consumer welfare.³ Another established approach, found for example in international relations, has begun 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 has begun to consider where the WTO fits into theories of regulation.⁵ Public choice and game theories have figured among the theories which have been 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 are drawing on the long-standing resources of political economy,⁶ while post-colonial studies has developed a concern about the impact of the agreements on cultural diversity.⁷

Globalization and law

In this book, I have 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 globalization 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. Thus the analysis is succeeded by case studies of the roles which the agreements play in the provision of legal services, the appropriation of genetic codes and the organization of the on-line media. These case studies have been chosen because their areas of interest also contribute greatly to the process of globalization. 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 globalization and law. 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.⁸ 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 use law themselves in interesting ways in order to achieve these ends. Consequently, we shall find that many more matters – at the core of economics, politics, cultures, and law – become 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 globalization. Yet, at the same time, it need not render us entirely dispassionate about the outcomes of this high-stake 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 the next chapter. 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 globalization, such legal diversity often comes to be regarded as difference. From the viewpoint of some traders, this difference gives rise to 'systems friction'. They would like to see such friction 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 Bonaventura da Sousa Santos derived from post-modernism's literary interests in inter-textuality.⁹ 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.

Globalization can be expected to widen and deepen the phenomenon of inter-legality. Such inter-legality is spreading wider across the world as many more countries open up to the global flows of goods, persons, money, information and services. Inter-legality is also extending deeper down into the layers of each locality as foreign suppliers seek not only to ship finished goods but also to provide services and make investments. In keeping, we shall see that the two WTO agreements are still concerned

with 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 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 engage in comparisons between legalities and possibly manipulate choice of laws so that they can connect with the most sympathetic 'home country' legality they can find. The suggestion is that globalization makes this strategy accessible to a wider range of persons. In the process, national jurisdictions cut across each other