Opening Doors to the World

A New Trade Agenda for the Middle East

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Edited by Raed Safadi

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The Evolving Agenda for Trade in a Globalizing World

Introduction

The increasing globalization of economic activity has intensified policy interaction in traditional areas of multilateral economic cooperation. The most obvious manifestations of this have involved governments in continuing efforts to remove tariff and non-tariff barriers to trade, to extend the coverage of liberalization efforts in such areas as government procurement and agriculture, and to sharpen trade rules, including those relating to matters like safeguards, subsidies and countervailing duties, and antidumping. In addition, closer economic integration among nation states has "internationalized" a range of policy domains that previously were either simply neglected, or considered an exclusively national preserve, or else were subject only to comity-like coordination and consultation arrangements. As a result, major multilateral initiatives have led to negotiations, and in some instances agreements, in new areas such as trade in services, the protection of intellectual property rights, and investment. Other issues, such as competition policy and labor rights, have been proposed by some governments as matters ripe for international negotiation. This chapter attempts to identify what pressures for increased policy commitments at the international level mean in practice in the area of trade.

The deepening and broadening of the international economic agenda has influenced governments' approaches and priorities with respect to policy in at least two significant ways. First, a number of new policy areas that have either found their way onto the international agenda, or are under discussion, are not necessarily about trade per se, but rather are treated as "trade-related" matters. This is most obvious in the case of intellectual property rights, labor standards and environmental issues. In these areas, an organic link may exist between the issues at hand and trade policy, but it may also be the case that the trade policy dimension is concerned primarily with the question of enforcement. In other words, the link between policies in such areas as those mentioned above and trade policy may reside fundamentally in the notion that the threat of denial of trade benefits offers an effective means of enforcing unrelated policy obligations. The practical implication of this tendency for bodies like the World Trade Organization is that subjects brought within the institution's purview will not necessarily relate to traditional areas of concern. This is but

one reflection of how closer economic integration among nations triggers broad-based policy responses from governments.

More generally, governments have demonstrated increasing concern with a broad range of policy-related determinants of competitiveness. The globalization of economic activity has nurtured a growing interest in the numerous ways in which the conditions of market access may be influenced. Perhaps the area where this concern is most noticeable is in standard-setting and domestic regulation more generally. Sensitivity to the reality that regulations can be manipulated to tilt the conditions of competition in favor of a subset of economic actors, together with the realization that sharply divergent preferences in such matters as environmental quality and social policy are increasingly crucial determinants of competitive advantage, have increased pressures for harmonization in many policy areas. Such harmonization may be negotiated, or may come about through de facto competition among regulatory systems. Whichever approach dominates, the imperative felt by governments to ensure that their economic constituencies are not placed at a disadvantage through sharply different approaches to policy intervention can be a source of significant friction at the international level. Managing this friction is one of today's most pressing challenges for policy-makers.

Second, globalization and a growing attachment to regionalism seem to have coexisted in a manner which might seem contradictory at first sight. At the same time as barriers to integrated economic activity on a global scale appear to be disintegrating, so does governments' fascination seem to grow with intensified cooperation bounded by a localized or regional focus. If the phenomenon of growing interdependence is apparent not only in respect of relations with near neighbors, why limit the policy response to this subset of players? The risk of too narrow a policy focus is that the economic benefits of globalization may be compromised through regional integration arrangements that discriminate against outsiders. On the other hand, it is probable that a regional approach has been preferred more because of the greater ease of managing a complex set of relations among a limited number of like-minded countries than because governments have wished to discriminate. To the extent that this is the case, the risk is not great that the prominence of geographically-bound policy responses to international economic integration will frustrate natural tendencies towards globalization. Nevertheless, the danger that regionalism could become a splintering and destructive force cannot be ignored, and should remain uppermost in the minds of policy-makers.

In the remainder of this chapter, attention will be focused on particular issues that appear to be among the most significant in defining the evolving agenda for trade, investment and finance. The next three sections deal with,

respectively, trade in services, intellectual property rights and technical standards and regulatory reform. Finally, the last section offers some concluding remarks.

Trade in Services

Background

It took more than four decades after the birth of GATT (the General Agreement on Tariffs and Trade) for the subject of trade in services to find its way onto the multilateral negotiating agenda. By about the latter half of the 1970s, the absence of rules and multilateral commitments on trade in services was beginning to be seen as a significant systemic gap. Awareness was growing of the importance of services-related activities in the world economy. The process of globalization probably accelerated the pace at which this perception became generalized, on account of the fundamental importance of a number of services sectors in international trade – most notably, transport, telecommunications and financial services.

The production of services was increasingly seen as an independent activity, worthy of explicit multilateral attention. Prior to this, international trade had been seen largely through the prism of trade in goods. Services were altogether subsidiary, either in the sense of being embodied in goods, or as secondary activities undertaken in the cause of facilitating the supply and commerce of goods. Also missing from this perception of what was important in the world economy was the role of investment. Investment was treated largely as a matter of domestic policy concern. The notion that investment and trade are merely different means of gaining access to markets, to be treated in a complementary fashion rather than as substitutes, is also a rather recent phenomenon.

Technological advances have also played a key role in bringing trade in services to the forefront of policy makers' concerns. Advances in transport and information technologies have contributed to a rapid expansion of services trade. Many international transactions, which previously would have been considered prohibitively expensive, have now become commonplace because of the ease with which people can move and communicate electronically across national boundaries. These trends are reflected in the fact that trade in services has grown faster than trade in goods for well over a decade. While services exports accounted for some 16 percent of world exports in 1980, the share had risen to over 20 percent in the early 1990s. Annual average growth in services exports was approximately 8 percent from 1980 to 1992, compared to some 5 percent for merchandise exports.

Salient Characteristics of Services

It is arguable that some of the features of services and the nature of services transactions have contributed to the relative neglect of services in policy discourse. It is useful to consider briefly a number of the differences between goods and services, as these are at least part of the explanation as to why the General Agreement on Trade in Services (GATS) is different in a number of important respects from the GATT.

Invisibility, Measurement and Data

The intangible or invisible nature of services has made the measurement of them difficult, and resulted in significant lacunae in the existing information base on services transactions at both the national and international levels. For the most part, production and investment data on services are scarce, and it is virtually impossible to make international comparisons, even on a cross-sectional basis. National input-output tables are the most detailed source of production data on services, since they help to isolate services transactions which otherwise stay hidden as goods production, but few countries maintain recent and significantly disaggregated input-output matrices. Data on investment are frequently not sufficiently disaggregated for it to be possible to derive reliable information on trends in investment, and this problem is even more acute at the international level. By contrast, data on international trade in services have been collected on a systematic basis for many years in balance-of-payments statistics. But the statistics are highly aggregated, concentrating primarily on transport and travel, and only providing a limited picture. The International Monetary Fund, however, has recently introduced more disaggregation in balance-of-payments data.

Another problem in the sphere of data is known as the "disembodiment" or "splintering" question. Increased specialization has resulted in services activities being broken off from goods production. A manufacturer, for example, may in the past have maintained all advertising activities in-house, with the consequence that the production of advertising services would simply be counted as an input into the production of manufactured goods. If this manufacturer subsequently purchases advertising services from an agency specialized in producing these services, then national statistics will record this same element of production as services production and not goods production.

Thus, disembodiment via specialization may create the impression that services production is increasing relative to goods production, when in effect some of this perceived shift is the result of structural change within the economy. Another factor which may give rise to an exaggerated picture of growth in

the relative importance of services is simply that measurement techniques have improved over time. Thus, what data are available measure a growing component of services activities in total production at least in part because the hardest part of measurement is being done better. Notwithstanding these sources of bias, however, it is clear that demand for services does rise relative to demand for goods as income grows, and that services-related activities are therefore bound to become a greater source of interest from a policy perspective.

Simultaneity in Production and Consumption, and Physical Proximity

A feature of most services is that they cannot be produced and then stored for later consumption. Production and consumption are simultaneous. This is clearly an additional source of measurement difficulty, and also gives rise to a greater tendency for "customization" or product differentiation, such that it can be misleading to assume that unit prices can be identified for homogenous output. Even the question of what represents a unit of production may be open to debate.

Simultaneity in production and consumption also carry the implication that producers and consumers often need to be in the same location in order for a transaction to take place. The classic example of haircutting services makes this point clear, given the obvious impossibility of supplying haircutting services at a distance. There are, however, some services transactions that may occur over distance, on account of the possibility that they can be transmitted electronically. Moreover, one class of services – transport services – is intrinsically about bridging distance, so the question of physical proximity does not arise. The immediate policy implication of the importance of physical proximity in services trade is that liberalization cannot be discussed solely in the traditional terms of cross-border trade. It is also necessary to consider commercial presence, or investment. A further point to note is that even if physical presence is not a technical prerequisite of consummating transactions in services, it is in the nature of many service products that suppliers will want to be in close proximity to their customers.

As discussed below, the significance of investment in trade in services is reflected in GATS, and is what makes GATS into an agreement about both cross-border trade and investment. It might also be argued that the prominence of investment issues in trade in services has contributed to a growing awareness of the need to deal with investment questions as an integral part of the international economic policy agenda.

A Detour: Investment in the GATT Context

If rules on investment had already existed in GATT, it is possible that investment

in both goods and services would have been treated together, and so would trade in goods and services. This was the pattern that emerged in NAFTA (North American Free Trade Agreement), for example, an agreement that was negotiated from a clean slate. The differential treatment of goods and services within the WTO (the World Trade Organization) framework raises questions of coherence that will have to be addressed in due time, not least because of the asymmetries between rules on goods and services that this model has produced.

The issue of investment was taken up in the GATT context in the Uruguay Round (UR), eventually leading to the Agreement on Trade-Related Investment Measures (TRIMS). But the TRIMS Agreement is very limited in scope. Some industrial countries, most notably the United States, had pressed for a far-reaching mandate to negotiate about investment in the broad sense. Many developing countries were unwilling to engage in such an exercise at that time. They believed that it would challenge a basic tenet of their development policy, which saw the careful management of investment flows as indispensable to appropriate, balanced growth.

Investment policy, involving a mix of controls and incentives, has traditionally been used by many countries as a tool for promoting specific objectives, such as technology transfer, industrialization, regional development and export expansion. Some of these objectives, like regional development, have also been pursued through investment incentives in industrial countries. The emphasis of the Uruguay Round TRIMS exercise, however, was mostly on trade-related investment conditionality. The subsidy aspect of investment policy was addressed in the Agreement on Subsidies and Countervailing Measures, where regional subsidies are defined as non-actionable, provided they are granted in the context of an overall regional development program, are non-specific to an enterprise or industry, and do not result in serious adverse effects to the industry of another party.

Moreover, the ability to condition and control investment flows has traditionally been considered necessary to avoid monopolistic abuses by transnational corporations. Seen from this perspective, multilateral efforts to liberalize investment threatened to weaken the ability of countries to pursue active development policies. Opposition to a broad-based negotiation on investment in the UR was strong enough, given the disposition of interests and priorities in other areas (especially intellectual property rights and trade in services), for agreement to be reached on a narrow negotiating mandate for TRIMS. The negotiating mandate simply called for an examination of the operation of GATT articles related to the trade restrictive and distorting effects of investment measures, following which "negotiations should elaborate, as appropriate, further

provisions that may be necessary to avoid such adverse effects on trade." The use of the phrase "as appropriate," along with the conditional tense, left open the possibility that governments might agree to nothing at all.

However, the UR TRIMS agreement only reaffirmed existing GATT rules on national treatment (Article III) and on the prohibition of quantitative restrictions (Article XI). An illustrative list of TRIMS identified two measures as being inconsistent with GATT's national treatment provisions and three as constituting illegal quantitative restrictions. The first category included local content requirements and trade balancing requirements. The TRIMS identified as quantitative restrictions included trade balancing requirements (also Article III-inconsistent), foreign exchange balancing requirements, and domestic sales requirements.[1] The agreement requires that WTO-inconsistent TRIMS must be phased out, and that no new WTO-inconsistent TRIMS are to be introduced during the phase-out period.[2] Industrial countries must complete the phase-out within two years, developing countries within five years, and least-developed countries within seven years. These transition periods may be extended for developing and least-developed countries under certain circumstances. All TRIMS subject to the phase-out requirement had to be notified to the WTO.

The Role of Regulation

Given the invisible character of services, the normal requirement for production and consumption to occur simultaneously, and the general lack of information about services transactions within the economy, it is unsurprising that regulation is a prominent feature of services activities. Governments are much more heavily involved in regulation in services sectors than they typically are in goods sectors. Two aspects of regulation in services may be usefully distinguished.

First, in contrast to goods sectors, interventions are more often of a quantitative nature rather than price-based. The preference for administrative interventions of a quantitative character may be understandable in view of the difficulties of identification and measurement that plague the services sector. But from an efficiency perspective, price-based interventions are likely to prove better in many cases. A policy challenge in the services field, therefore, is to find ways of improving the information base so that greater reliance can be placed upon fiscal policy in the future to achieve regulatory objectives. It is noteworthy in this context that the GATS has very little to say about price-related measures, basing almost all its rules dealing with access to markets upon quantity-based interventions.

Second, the impossibility of storing most services, or of distancing

production and consumption in a temporal sense, means that much regulation is of an ex ante variety. In other words, instead of focusing on output, regulatory interventions need to occur on the input side. This means regulating suppliers rather than products. Regulators can hardly be expected to wait upon the consequences of a surgical intervention, for example, before judging whether the person performing it is capable of doing so.

One implication of the regulatory focus on the supply side is that much regulation, at least in the first instance, is about authorization to enter the market, rather than performance in the market. This automatically translates into a greater preponderance of regulatory interventions, since product regulation does not necessarily involve conformity assessment with respect to every single unit of production, whereas if services need to be regulated, this cannot be achieved on the supply side via sampling. All service suppliers will have to submit to whatever procedures are required. From a policy perspective, this means that progress in liberalization of trade in services is highly dependent on progress in the field of regulatory reform.

The General Agreement on Trade in Services (GATS)

Scope and Structure

Governments exercised caution when they negotiated the GATS, providing themselves with ample scope to condition their multilateral commitments. Two aspects of the GATS that need to be distinguished are the part that establishes a framework of rules governing trade in services, and the part that sets out the specific sectoral commitments undertaken by Members. The latter are inscribed in schedules appended to the Agreement. Only some of the provisions of the GATS framework agreement relate to the universe of trade in services, as defined under the agreement, while others are restricted to those service activities subject to scheduled sectoral commitments.

Several provisions clearly reflect the pervasiveness of regulations in many service sectors, and the intent to prevent the protectionist abuse of such regulations. The specific schedules indicate which service sectors each signatory has been willing to subject to non-general obligations under GATS. The schedules also provide for qualifications to the national treatment and market access commitments that otherwise apply to sectoral commitments. Finally, a series of annexes and decisions elaborate on commitments and exceptions with respect to different rules and sectors, and also establish a work program, including further sectoral negotiations.

The obligations and disciplines set out in the GATS framework include rules on most-favored nations (MFNs) treatment, transparency, increasing

participation of developing countries, economic integration, domestic regulation, recognition, monopolies and exclusive service suppliers, business practices, emergency safeguards, payments and transfers, balance-of-payments restrictions, government procurement, general and security exceptions, and subsidies.

The scope of the agreement, the definition of trade in services, and sectoral coverage are laid out in Part I of GATS. The Agreement applies to all measures taken by Members that affect trade in services. Trade in services is defined in terms of four modes of supply. The first mode involves the cross-border (arms-length or long-distance) supply of a service from one jurisdiction to another. This mode of delivery is analogous to international trade in goods, in that a product crosses a frontier. Many different kinds of electronic information flow occur across national borders. The second mode of supply requires the movement of consumers to the jurisdiction of suppliers.[3] Tourism is a good example of this mode, involving the movement of (mobile) tourists to (immobile) tourist facilities in another country.

The third mode of supply is through the commercial presence of a supplier in the jurisdiction where the consumers are located (abstracting from export sales). This is the investment mode, referred to above. An important point to note about the investment mode is that it involves two distinct components. The first relates to the authorization to invest, or in other words to the setting up of business in another Member's territory. The second deals with post-establishment operations, or in other words with actually doing business. Both these aspects are covered by GATS. The idea of including commercial presence in GATS was initially opposed by many developing countries. They argued that commitments on service transactions under this mode of supply were tantamount to a surrogate obligation on foreign direct investment, and they expressed unwillingness to tie in their investment regimes in this manner.

Finally, the fourth mode entails the movement of natural persons from one jurisdiction to another. This is the mode under which the sensitive issue of the movement of labor is addressed. The Agreement makes it clear that provisions on movement of natural persons do not address issues relating to access to the employment market, nor measures regarding citizenship, residence or employment on a permanent basis. The fourth mode relates both to independent service suppliers and to employees of juridical persons supplying services. Just as with the commercial presence mode, the GATS covered both the right to establish a presence and the right to do business under the fourth mode.

The conceptual approach underlying these modes was first developed in the academic literature as a heuristic device to explain the nature of international

transactions in services. Differentiation by modes of supply later formed the basis on which governments defined market access commitments under GATS, permitting a choice to be made from among alternative modes. The use of modal distinctions is a reflection of the manner in which liberalization is defined under the Agreement, and the possibility of applying different policy regimes to different modes of supply is a potential source of economic distortion. It may also be argued that the absence of symmetry in the policy conditions affecting the different modes imposes limitations on the reach of liberalization. Despite early reservations about commercial presence, a tendency is discernible for scheduled commitments to be concentrated in the commercial presence mode. In some cases, this may be because countries have attempted to use the GATS as an instrument for encouraging foreign direct investment. In others, it reflects the desire to avoid "regulatory competition" between different jurisdictions. Furthermore, where regulatory control is considered important, as in prudential controls in banking, for example, governments find it easier to impose and enforce regulations in their own territories.

A second feature of the definition of services covered by GATS is the exclusion of services supplied in the exercise of governmental authority. The definition of a service supplied in the exercise of governmental authority is "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" (Article 1:3(c)). The intention of this provision is to permit governments to exclude basic infrastructural and social services which they supply their populations on an exclusive basis from the purview of the Agreement.

The most important general obligations in GATS are the MFN principle articulated in Article II and the publication and supply of information aspects of the transparency provisions in Article III. The MFN clause states that:

> 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 favorable than that it accords to like services and service suppliers of any other country.

Note that the MFN principle refers to both services and service suppliers, reflecting the fact that the GATS is both an investment and a trade agreement. Article II of GATS also provides the possibility that Members may maintain MFN-inconsistent measures as long as they are scheduled in the Annex on Article II Exemptions. Exemptions from MFN could only be registered prior to the entry into force of the Agreement, and cannot be supplemented. Moreover, they are subject to periodic review and are in principle meant to be maintained for no longer than ten years.

The MFN exemption provisions reflected the concern of some larger

countries that by granting MFN access to their markets, they would be losing the opportunity to exchange their relatively open access for further liberalization in other markets. In other words, these countries were arguing that "free riding" would occur in the absence of an effective instrument to ensure reciprocity. The issue was raised most explicitly in the telecommunications and financial service negotiations. Some 60 countries took MFN exemptions, affecting most significantly the audio-visual, financial, basic telecommunications, and transport services sectors. The MFN exemption in the financial services sector was suspended pending the outcome of post-UR negotiations. MFN provisions did not apply either to basic telecommunications and maritime services (except where specific scheduled commitments have been undertaken) pending completion of negotiations in these areas. Audio-visual MFN exemptions reflect European concerns about the cultural reach of US entertainment products, and are justified in terms of arguments about defending the national heritage. The European Union (EU) not only exercised its right to insist on an MFN exclusion, but also failed to make any specific commitments in this sector.

A fundamental feature of GATS is the principle of progressive liberalization (Part IV). It reflects the reality that governments were neither willing nor able simply to open up their services markets to international competition from one day to the next. Progressive liberalization implies a gradual approach, and the structure of the GATS accommodates such gradualism. Members have already committed themselves to enter into successive rounds of negotiations aimed at achieving higher levels of liberalization. The first such negotiation is to take place at the turn of the century. A question to consider, however, is whether the GATS does indeed offer a vehicle for achieving trade liberalization, or whether its structure is such as to allow governments to support a putatively market-opening instrument while in practice holding off liberalization into the indefinite future. In other words, has a proper balance been struck between gradualism and the gradual attainment of ever higher levels of liberalization?

In considering this question, it is useful to examine certain structural features of GATS which, it could be argued, are important in determining the pace of liberalization. Two of them relate to the discussion so far, and others are dealt with later in relation to scheduled commitments. First, there is the question of the scope of application of the provisions of GATS. Under the existing structure, few obligations in GATS apply unless a sector and the associated modes of delivery have been made subject to specific commitments in the schedule of a Member. As noted above, the MFN principle in Article II and the transparency commitments in Article III are the main general obligations

of the agreement. In addition, certain provisions dealing with recognition of qualifications (Article VII), monopolies and exclusive suppliers (Article VIII), and business practices (Article IX) are of general application. The most important gaps in general application, which have the effect of reducing the reach of GATS, are those relating to domestic regulation, market access and national treatment.

The intensity of regulation in services, as well as the fact that the GATS deals with both investment and trade, makes the GATS provisions on domestic regulation a crucial element of the Agreement. To the extent that the disciplines on regulations laid out in Article VI do not apply to unscheduled activities and sectors, the disciplinary impact of GATS is correspondingly limited. Moreover, only the bare bones of rules on regulations have so far been established. These are based primarily on the notion of necessity, such that any regulatory interventions relating to qualification requirements and procedures, technical standards and licensing requirements should not constitute unnecessary barriers to trade in services. Regulatory interventions must also be non-discriminatory and based on objective and transparent criteria. Licensing procedures must not in themselves create a restriction on the supply of a service.

In light of the acknowledged inadequacy of these provisions in terms of their generality, paragraph 4 of Article VI calls for a work program to develop further the GATS provisions on domestic regulation. In addition, the Decision on Professional Services calls for recommendations for the elaboration of multilateral disciplines in the accountancy sector. Governments might consider whether regulatory disciplines should cover all sectors, and the work program could provide an opportunity for extending regulatory disciplines beyond specific commitments in schedules, to all services covered by GATS.

A second structural issue relates to the difference between a "positive" and a "negative" list approach to scheduling specific commitments under GATS. A positive list approach to sectoral coverage requires that Members list the sectors in which they are willing to undertake commitments, and any sector or activity not so listed in a Member's schedule is not subject to specific commitments. The GATS has adopted a positive list approach to scheduling sectors. A negative list approach, by contrast, requires that Members list those sectors or activities in respect of which they are unwilling to assume commitments, leaving all other sectors covered by implication.

Three arguments are advanced as to why a negative list approach may foster greater liberalization than a positive list approach. First, it is argued that with a negative list greater transparency is assured, since the true coverage of the Agreement would be readily revealed. On the other hand, given that all governments know what services are included in the established sectoral

nomenclature under GATS, the validity of the transparency argument would seem to depend on whether adequate transparency provisions per se are in place, rather than upon the choice of means to indicate sectoral coverage.

The second argument is that by forcing governments to list sectors in which they are unwilling to accept commitments, a greater pro-liberalization dynamic will be created, as long lists might cause embarrassment. It is not altogether clear, however, why governments should be more embarrassed by long negative lists than by short positive ones. The third argument is probably the most powerful in favor of a negative list approach. It is that with a negative list, new sectors would automatically be covered by GATS disciplines, unless explicit action were taken to exclude them. As technology moves fast in many service sectors, this is a significant consideration, and may help explain the reluctance of governments to adopt a negative list approach.

Schedules of Specific Commitments

Articles XVI, XVII and XVIII are the core of the Agreement as far as specific commitments are concerned. Article XVI deals with market access, which is defined in a very specific manner. Having established that signatories will accord services and service suppliers treatment at least as favorable as that provided for in the schedules, the Article goes on to define six types of market access restrictions that will not be adopted in respect of sectors where market access commitments are undertaken unless there is a specification to the contrary in the schedule of specific commitments. In other words, disciplines on market access impediments will apply to scheduled commitments unless a reservation is registered to the contrary. This is a negative list approach nested in the overall positive list approach of the GATS schedules. The six impediments or limitations on access are defined as: a) limitations on the number of suppliers; b) limitations on the total value of service transactions or assets; c) limitations on the total number of service operations or on the total quantity of service output; d) limitations on the total number of natural persons that may be employed; e) measures which restrict or require specific types of legal entity or joint venture; and f) limitations on the participation of foreign capital. Article XVI limitations are exhaustive, in the sense that these are the only limitations on market access that Members are permitted to inscribe in their schedules.

It should be noted that items (a) to (d) of Article XVI are expressed in terms of quantitative market access limitations – the number of suppliers, the value of transactions or assets, the number of operations or quantity of output, or the number of natural persons that may be employed. In considering the overall GATS objective of progressive liberalization, a question is whether it

would be more appropriate to express these limitations in terms of price measures rather than quantitative limitations. Access limitations could be imposed on foreign suppliers through fiscal measures, and perhaps even subjected to periodic negotiations aimed at reducing such limitations. If this approach were adopted, governments may then want to consider whether the framework agreement contained enough provisions for applying quantitative restraints on services trade under particular circumstances. A structural change of this nature would almost certainly imply a greater degree of liberalization than the existing arrangements. It is questionable, however, whether governments would be willing, in the foreseeable future, to move in this direction.

Article XVII contains the national treatment provision of the agreement. The approach here is very similar to that of market access, with national treatment applicable only to scheduled commitments, and only then if reservations are not made to the contrary. National treatment is defined in the traditional GATT manner, as treatment no less favorable than that accorded to domestic homologues, in this case services and service suppliers. Article XVII recognizes, however, that the attainment of national treatment may involve treatment that is not formally equivalent, and that formally equivalent treatment may not yield a non-discriminatory outcome either. A significant difference between national treatment in GATT and in GATS is that in the former case, national treatment is established as a principle to be applied across the board,[4] whereas in the latter case, national treatment has been given negotiating currency – it is something to be granted, denied or qualified, depending on the sector and signatory concerned.

One reason why governments may have been unwilling to see national treatment play the same role in GATS as in GATT, or the role that MFN plays in GATS as a general principle, is that under the commercial presence and movement of natural persons modes in GATS (Modes 3 and 4), full national treatment is equivalent to free trade – it would guarantee unlimited investment rights for foreign service suppliers. While governments were willing to guarantee this treatment in some sectors where they made scheduled commitments unencumbered by national treatment limitations, this was clearly not true across the board. In these circumstances, if national treatment had been an inviolate principle not subject to conditioning, it is probable that even less would have been incorporated in the schedules than what is there at present.

An intermediate approach to using the national treatment rule as a more effective instrument of liberalization would be to impose limitations on the nature of permissible departures from national treatment. At present, any kind of departure is permitted, provided the limitation is entered in the schedule

against the relevant sectoral commitment. The nature of departures from national treatment could be defined, with an emphasis on price-based measures, and these measures could also be subject to progressive reductions in the context of negotiations aimed at greater liberalization. Once again, it is an open question whether governments would be willing to embark on a structural change of this nature.

Article XVIII offers the possibility for signatories to negotiate additional commitments not dealt with under the market access and national treatment provisions of Article XVI and Article XVII. These commitments could apply to such matters as qualifications, standards and licensing, and would be inscribed in Members' schedules. Limited use was made of this option in the UR negotiations. The most important aspect of Article XVIII measures is that they must express commitments favoring more open access, and not additional market barriers.

As noted at the beginning of this chapter, any analysis of GATS or trade in services more generally suffers from an acute shortage of reliable data. In the case of specific commitments, no statistical base exists from which to estimate the value in trade or welfare terms of what countries have bound. The only alternative is to undertake a frequency count of commitments. Such a procedure ignores the relative importance of different service activities, and takes no account of the implications of market access and national treatment limitations inscribed in the schedules.

On the basis of a frequency count, industrial countries on average made commitments on 64 percent of all service activities, while the comparable figures for transition and developing economies were 52 percent and 16 percent respectively. It is important to note that these averages conceal significant variance among countries within the groupings. This is especially true of the developing countries, of whom a number made commitments more far-reaching than suggested by the average. For various reasons, commitments were more sparse in the audiovisual sector, basic telecommunications and transportation. When these are excluded from the reckoning, the shares increase to 82 percent (industrial countries), 66 percent (transition economy countries), and 19 percent (developing countries). Only five participants made more than 100 commitments out of the population of 149 possible sectoral commitments, based on the highly aggregated sectoral nomenclature developed for the negotiations (Austria, European Union, Japan, Switzerland, United States). At the other extreme, 28 countries made less than ten commitments.

Clearly, considerable scope exists for increasing the level of obligations accepted by governments without undertaking the kinds of adjustments to the structure of the Agreement discussed above. Action could be taken on

several fronts. First, governments could reduce and eventually eliminate all exemptions to the MFN principle. As already noted, a presumption exists in GATS that this ought to occur over time. Second, governments could include more sectors and activities in their schedules of specific commitments. Third, they could reduce and eliminate the market access and national treatment limitations that they have inscribed in their schedules. It has been suggested that the limitations which have been inscribed reflect the status quo in terms of policies applying at the time the commitments were made, and that in this sense, the GATS has yielded little so far by way of trade liberalization. Fourth, governments could eliminate the gap that is sometimes maintained between the actual policies they apply in practice and the level of commitments they undertake in GATS. By aligning GATS commitments with policies actually in place, governments would be providing greater market security and ultimately a more liberal trading environment, pending the attainment of additional trade liberalization which could be scheduled.

Future Work Program

A good place to start would be the post-UR work program, which took up several issues on which agreement proved impossible within the time frame of the negotiations. In some areas dealing with sectoral negotiations, the program was a "rescue" operation, designed to prevent the withdrawal of market access offers or the adoption of a discriminatory approach at the sectoral level. The work program also contains the mandate on domestic regulation referred to earlier, and negotiating mandates for emergency safeguards, government procurement and subsidies, which were all areas where it proved impossible to conclude within the time frame of the UR.

Sectoral negotiations that were left over from the UR involved financial services, movement of natural persons, basic telecommunications and maritime transport. An interim agreement on financial services, securing further market access and national treatment commitments in the areas of banking, securities trading and insurance, was accepted by some 30 countries in mid-1995, excluding the United States. The fact that the United States is not part of this agreement is the reason why the negotiations will be resumed at the end of 1997, in the hope of securing further liberalization, fuller geographical participation and a longer-lasting arrangement.

The negotiations on movement of natural persons were also completed in mid-1995. Most countries had made commitments on the movement of natural persons in the UR, but nearly all of them were narrow, limited to intra-corporate transferees, and then only to personnel at the managerial level. A few schedules, notably those of Canada and the United States, also contained

limited commitments in respect of independent professional service suppliers. Movement of labor is a sensitive issue for all governments, and it is noteworthy that even those countries pressing for better access for different categories of natural persons, such as India and the Philippines, were unwilling to offer much themselves. The post-UR negotiations on movement of natural persons brought very little by way of improvements in the schedules of offers, again reflecting the unwillingness of governments to forego control over what is universally seen as a sensitive policy area.

As with financial services, the negotiations in basic telecommunications were prolonged beyond the end of the UR against a background of the risk that major participants, on the basis of their dissatisfaction with the overall package on offer, would schedule limited commitments and seek reciprocity-based exchanges of market access on a discriminatory basis. It became clear before the end of the negotiations that significant liberalization was unattainable within the time frame of the Round. While a few countries (such as the United States, the United Kingdom, Australia, New Zealand, Sweden, Chile and Mexico) had already opened up their telecommunications sectors, or were in the process of doing so, others (most notably the EU) were still deciding what to do.

A worldwide trend toward liberalization in the telecommunications sector is clearly discernible. Globalization of economic activity has increased the importance of telecommunications as a production input, making firms much more sensitive to competitive disadvantages arising from poor or costly services. This has mobilized powerful private sector constituencies in many countries that are pushing governments to liberalize and to eliminate or dilute telecommunications monopolies. The extended negotiations in this sector were due to be completed on 30 April 1996, but it proved impossible to meet this deadline. Governments have agreed to freeze their best offers until a one-month period ending on 15 January 1997, at which time efforts will be made to consolidate high quality liberalization commitments from as many countries as possible. The results of these negotiations are scheduled to enter into force at the beginning of 1998.

Despite the efforts of negotiators on maritime transport services, it became obvious towards the end of 1993 that it would be impossible to reach a broad-based agreement on maritime services. A decision was therefore taken to prolong the negotiations. A number of countries have traditionally maintained restrictive shipping regimes. The United States, for example, prohibits foreign participation in cabotage.[5] Cabotage is widely restricted in other countries as well, and indeed, was excluded from the negotiations. Liner conferences have played a prominent role in EU shipping arrangements in various parts of the

world. By contrast, the Nordic countries, some EU nations, a number of Asian countries, and others maintain relatively open maritime regimes. When maritime services were initially placed on the negotiating table, the United States opposed the move, seeking the explicit exclusion of the sector from GATS coverage. With the decision taken by the United States not to participate in the maritime negotiations, an agreement was made to carry forward the exercise into the new round of negotiations already scheduled for the year 2000.

Turning to those aspects of the post-UR work program dealing with rules, Article X of GATS consists of a negotiating mandate on emergency safeguard measures. A safeguard provision would allow a signatory to withdraw benefits contingent upon some occurrence or development adversely affecting domestic production. The absence of safeguard measures at the outset would have presented governments with greater difficulty had they not been given scope through other means to avoid the application of GATS disciplines in sensitive areas.[6] On the other hand, some might argue that safeguard provisions are now needed in order to allow governments to extend their specific commitments into new areas. Article X provides three years in which to negotiate appropriate provisions. The mandate indicates that negotiations on emergency safeguard measures will be based on the principle of non-discrimination.

Article XIII deals with government procurement, which is defined as the purchase of services for governmental purposes and not with a view to commercial resale or use in the supply of services for commercial sale. Procurement is exempted from market access and national treatment provisions (Articles XVI and XVII), as well as from the MFN rule in Article II. This exemption in GATS is similar to what is found in GATT, although in the latter case the exemption applies to national treatment but not the MFN principle. Article XIII of GATS calls for negotiations on government procurement within two years. The existing government procurement agreement under the WTO, which was first negotiated in the Tokyo Round (1973-79), is one of the few agreements with membership restricted to less than the full complement of WTO signatories.[7] Indeed, only twenty-two countries have committed themselves to procurement disciplines, in part because of rigidities perceived by governments to exist in the present agreement, but also on account of a natural reluctance by governments to forego this particular source of patronage.[8] The existing agreement covers both goods and services, so the question arises as to how this agreement would relate to any provisions on procurement developed under the GATS. Among the factors being considered in the discussions currently taking place are the role of transparency and national treatment in procurement, and the nature of complaints and dispute settlement procedures that might be contemplated in any future agreement.

Article XV deals with subsidies but has no substantive provisions. The Article contains general GATT-like language recognizing that subsidies may distort trade, but also that they may play an important role in development. Negotiations are called for with a view to establishing subsidy disciplines and examining the case for countervailing remedies. It is noteworthy that Members have already accepted subsidy disciplines to the extent that they have made national treatment commitments in their schedules of specific commitments. The undertaking in such a case is not to discriminate against foreign services or service suppliers in granting any subsidy. The inability to discriminate in this way is likely in itself to impose a significant subsidy discipline. Unlike the negotiations foreseen for safeguards and government procurement, no time frame is set for these negotiations. Pending their outcome, signatories are entitled to request consultations when they consider that adverse effects result from the subsidies of other parties, and such requests are to be accorded sympathetic consideration.

Intellectual Property Rights

Background

The Agreement on Trade-Related Intellectual Property Rights (TRIPS) was one of the most far-reaching results of the UR. The TRIPS Agreement is by no means the first international effort to establish rules for the protection of intellectual property rights – indeed, it rests heavily on previous agreements such as the Paris Convention, the Berne Convention, the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits. At the same time, however, the TRIPS Agreement goes much further than this earlier patchwork, creating a seamless network of minimum uniform standards of protection for a wide range of intellectual property on a near-universal basis.

The pressure for strengthened rules for protecting intellectual property (IP) rights that emerged from the late 1970s onwards was a natural outgrowth both of globalization and of the increasing role of knowledge and technology as determinants of international competitiveness. Firms seeking to produce research and technology-intensive goods and services in diverse locations around the world, as well as those wishing to serve diverse markets for such products through trade, clamored increasingly for higher levels of IP protection. Without this, the owners of intellectual property argued that they would be unable to recoup investments made in fostering creativity, accumulating knowledge and developing new technologies.

Four particular aspects of the TRIPS Agreement deserve emphasis in the context of intensified economic linkages among nations. First, the TRIPS

Agreement covers a broad range of intellectual property rights, including patents, trademarks and copyright. These are covered more comprehensively – that is, in greater depth and detail – than in any previous international agreements. Second, the TRIPS Agreement has been subscribed to by all WTO Members. This means that most countries, with the notable exceptions of China and Russia, are subject to the disciplines of the Agreement. When China and Russia become members of the WTO, as they are expected to do in due course, they will also be required to subscribe to the TRIPS Agreement. No scope exists for securing departures or exemptions from the rules in accession negotiations.

Third, the TRIPS Agreement is a prime example of how an area of law and policy has been designated "trade-related", when it might be argued that the protection of IP rights has little to do with trade per se. On the other hand, the protection of IP rights does have much to do with the conditions of competition in markets. Whatever view is taken of the degree to which IP rights are linked to trade, the fact of placing the TRIPS Agreement squarely within a multilateral trade agreement has significant implications for the manner in which IP rights are protected. In particular, the WTO's integrated dispute settlement system creates the conditions under which non-compliance with IP-related commitments may be addressed with reference to a broad range of trade policy commitments. What this means in practice is that significant leverage has been created well beyond the domain of intellectual property rights, such that refusal to abide by the TRIPS Agreement can trigger retaliatory action in any number of trade areas. This possibility undoubtedly expands the number of countries favorably disposed towards making serious efforts to implement the TRIPS Agreement in full measure.

Fourth, the TRIPS Agreement is a reflection of the recent trend in international rule-making towards a greater concern with the manner in which international obligations will be fulfilled. Thus, instead of considering it sufficient for governments to undertake certain specified commitments, with the understanding that the manner in which these commitments will be carried out is a matter for individual governments, pressure has grown for such commitments to be accompanied by supplementary undertakings as to the way in which they will be given force. In the TRIPS Agreement, governments have not only subscribed to a set of substantive IP protection standards, but have also signed on to a series of domestic enforcement commitments. This is a reflection both of heightened economic integration, giving rise to interest in a wider set of policy areas, and of the increased complexity of international rule-making that inevitably comes with an agenda that has expanded into many more detailed and varied areas of policy.

A vigorous debate occurred during the UR negotiations on IP rights, which at least in the early stages of the negotiations, tended to divide countries along North-South lines. It is only a mild simplification to distinguish the protagonists in this discussion into those that were significant generators and exporters of intellectual property (usually OECD countries) and those that were not (typically non-OECD countries). As expected, the first group was determined to ensure that foreign governments would provide high standards of IP protection regardless of the ownership of IP rights. Such rights, it was argued, were essential if the necessary investments were to be made so that creativity, inventions and technological innovations would be supplied in socially desirable quantities. The initial position of the second group was somewhat hostile to IP protection, seeing it either as a pretext for denying developing countries access to modern technology and know-how, or as a questionable means of increasing reverse resource transfers via the abuse of monopoly positions and payments for access to intellectual property.

As the UR progressed, however, developing country attitudes softened considerably. Several factors explain this change of heart, thus opening the way for the TRIPS Agreement, which is the most comprehensive and far-reaching IP agreement ever negotiated. Two of these factors are worthy of mention in the present context. First, a significant reason why net importers of IP became less negative to the idea of providing stronger guarantees of IP protection was the realization that the absence of adequate protection may well inhibit foreign investment in high technology sectors. The argument was that in choosing an investment location, a prospective foreign investor would be significantly influenced by differences in IP protection standards and in the perceived ability of the host government to enforce them. In other words, insisting on higher levels of IP protection could not simply be dismissed as a ruse to extract additional resources from poor countries.

A second reason for a more accommodating view towards a strong IP regime on the part of net importers of intellectual property, and in particular among the more advanced non-OECD countries, was that producers in their countries were increasingly developing creative and technological bases which relied for their prosperity on adequate IP protection. Inadequate IP protection in other countries would reduce the scope for competing successfully in foreign markets and diminish export opportunities. Such concerns are typified, for example, by the entertainment industry in India and the computer software industry in many of the more advanced non-OECD countries.

Principal Features of the TRIPS Agreement

The TRIPS Agreement is one of the three pillars of the WTO system. The

other two comprise trade in goods – the traditional area of GATT concern – and the General Agreement on Trade in Services, which was negotiated in the UR. All three pillars are unified as constituent parts of the Marrakech Agreement Establishing the World Trade Organization (the WTO Agreement). Apart from common provisions relating to such matters as joint decision-making, amendments, non-application of the Agreement between parties, and a range of institutional provisions, the most important unifying thread of the three pillars is the dispute settlement system. The system operates with respect to the entire Organization, both in terms of procedure, and in terms of remedies. What this means in practice is that compensatory adjustments may, under certain conditions, be made in any area of the WTO in the event that a Member is found in breach of a WTO obligation.

The TRIPS Agreement covers seven areas of intellectual property. These are copyright and related rights (rights of performers, producers of sound recordings and broadcasting organizations), trademarks, geographical indications including appellations of origin, industrial designs, patents including the protection of new varieties of plants, layout- designs of integrated circuits, and undisclosed information including trade secrets. In each of these areas, the Agreement establishes minimum standards of protection, provisions relating to the domestic enforcement of IP rights, and provisions concerning international dispute settlement.

A noteworthy feature of the TRIPS Agreement is that it only sets minimum standards. In other words, it does not prevent governments from establishing higher standards, provided that these do not infringe upon the Agreement, including with respect to its rules regarding non-discrimination. Thus, harmonization is not an objective of the Agreement, except in the narrow sense of establishing a benchmark below which commitments cannot fall. A general issue facing all international rule-making endeavors is whether harmonization is a desirable or attainable objective. In the field of IP, governments interested in establishing rules did not insist on harmonization, largely in recognition of the reality that harmonized provisions would be constrained to the level attained through the minimum standards, and that it would be neither realistic nor desirable to prevent governments from imposing more rigorous requirements to the extent that they did not undermine the TRIPS Agreement. It is worth noting, nevertheless, that the standards contained in the TRIPS Agreement are broadly similar to those in existence in many industrialized countries.

Like the rest of the WTO, the principles of most-favored nation (MFN) and national treatment form a vital part of the base upon which the Agreement is structured. These principles apply not only to the standards of protection

themselves, but also to the use of IP rights, their acquisition, scope, maintenance and enforcement. In other words, they apply to all obligations under the Agreement. Certain exceptions have been "grandfathered", however, in relation to national treatment and MFN, where such exceptions existed in earlier international agreements on intellectual property rights.

Article 8 of the TRIPS Agreement contains provisions on technology transfer to which a number of non-OECD Members attach importance. One of these provisions allows Members to adopt any necessary measures to promote technological development,[9] provided that such measures are consistent with the Agreement. Article 8 also acknowledges that measures 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, any such measures must be consistent with the Agreement.

The TRIPS Agreement is cognizant of a possible tension between the monopolistic effects of granting exclusive rights through law to a particular economic agent and the general objective of promoting competition. Thus, paragraph 1 of Article 40 of the agreement 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.

The Agreement also states that Members may adopt licensing practices or conditions that might in particular cases constitute an abuse of intellectual property rights. But the right is also recognized to take appropriate measures to prevent or control abuses of intellectual property rights that have an adverse effect on competition in the relevant market. The Agreement further provides that a Member seeking to take action against abusive practices involving the companies of another Member may enter into consultations with that other Member in order to seek cooperation through the supply of publicly available non-confidential information.

In recognition of the fact that many countries, especially developing countries, would have to make significant changes to existing laws, and in some cases introduce entirely new ones, it was agreed that certain transitional periods should be permitted before Members would be in full conformity with their obligations. Broadly, industrial countries were given one year to implement the Agreement, while developing countries were given five years, and the least-developed countries eleven years. However, all Members were required to apply the MFN and national treatment obligations of the

Agreement with effect from one year from the entry into force of the Agreement.

Prior to the UR, provisions relating to "special and differential treatment" for developing countries were often such as to provide substantively different obligations for developing countries. It is noteworthy that the tendency to vary the actual content of rules in the name of fostering development or avoiding the imposition of an undue burden on poor countries has diminished sharply in recent years. The bulk of special provisions for developing countries agreed to in the UR were of an exclusively temporal nature, simply allowing developing countries a longer time period to come into full conformity with their new obligations. The TRIPS Agreement is no exception in this regard.

Standards of Protection

With respect to each of the seven areas of intellectual property listed above, the Agreement defines the subject matter to be protected, the rights to be conferred and the duration of the protection. With the exception of moral rights under the Berne Convention, the substantive provisions of the Paris Convention and the Berne Convention are incorporated in the TRIPS Agreement by cross reference to the original instruments. This is the starting point upon which the TRIPS Agreement then builds.

Copyright and Related Rights

While considering the Berne Convention generally adequate, the Agreement does add a few provisions. One is to designate and protect computer programs as literary works. Another is to protect data bases, even if they contain information not protected by copyright, provided a data base can be considered an intellectual creation. The Agreement grants exclusive rental rights to authors of computer programs, and in certain circumstances does the same for the creators of cinemagraphic works.

Performers, producers of phonograms and broadcasting organizations are all granted specified protection. Performers can prevent recording of their performances on a phonogram and the reproduction of such recordings. Producers of phonograms are assured exclusive rights over the reproduction and rental of their phonograms. Broadcasting organizations have similar rights to prevent unauthorized recording, reproduction of recordings and dissemination with respect to broadcasts, although such rights may reside with the copyright owner rather than the broadcasting organization. As for the term of protection, if this is not calculated on the basis of the life of a natural person, then it must be at least fifty years.

Trademarks

Any sign or combination of signs that distinguishes a good or a service must be eligible for registration as a trademark, provided that it is visually perceptible. Where signs do not inherently distinguish the relevant good or service, the authorization to register a trademark may be attainable on the basis of distinctiveness through use. Owners of registered trademarks have the exclusive right to prevent third parties from using identical or similar signs for any goods or services which are identical or similar where such use may cause confusion. Trademarks must be registered for at least seven years, and registration is renewable indefinitely.

A trademark can be canceled if it is not used for an uninterrupted period of three years, unless some valid reason exists for why it has not been used. Government-imposed measures, such as import restrictions, could be considered valid reasons for non-use. If another person uses a trademark with the approval of its owner, this shall be recognized as use. The use of a trademark should not be unjustifiably encumbered by any special requirements, such as use with another trademark or use in another form that inhibits the effectiveness of the trademark. The compulsory licensing of trademarks is not permitted, and the owner of a registered trademark has full rights to transfer the trademark in question, with or without the business with which it is associated.

Geographical Indications

Geographical indications are defined as indications identifying a good as originating in a particular locality where a given quality, reputation or other characteristic of the good in question is attributable to its geographical origin. Geographical indications are protected against any designation or presentation that misleads the public as to the true origin of a good, or which constitutes an unfair means of competition. Additional protection is provided, however, in the case of wines and spirits, where neither the effects of misleading the public nor of interfering with competition are applied as tests in determining whether a geographical indication is being misused. Certain exceptions to the above provisions are contemplated, the most significant of which is designed to accommodate a situation in which a geographical indication has already become a generic term. If a Member avails itself of these exceptions, it must at the same time show willingness to enter into negotiations aimed at increasing the protection of geographical indications.

Industrial Designs

Protection must be provided for industrial designs that are new or original. In

order to be new or original, they must differ significantly from known designs or combinations thereof, and the designs must not be dictated essentially by technical or functional considerations. In the case of textiles designs, which tend to be of commercial value for short periods of time, Members must ensure that requirements for securing protection are not overly burdensome or costly. The protection of designs prevents them from being made, sold or imported without the design owner's consent. Limited exceptions to these provisions may be granted, provided they do not conflict unreasonably with the legitimate interests of the owner of a protected design. Protection for industrial designs is granted for a minimum period of ten years.

Patents

Patent protection is to be available for any invention, whether a product or a process, in all new fields of technology involving an inventive step and capable of industrial application. Patents must be available without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. Exclusions from patentability are permitted if commercial exploitation of the patent may pose a threat to ordre public or morality, including to protect human, animal or plant life or health, or to avoid serious prejudice to the environment. Additional areas where exclusion may be permitted are in respect of diagnostic, therapeutic and surgical methods for the treatment of humans or animals, plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than micro-biological processes. If plant varieties are excluded from patentability, an effective sui generis system of protection must be employed.

Where the subject matter of a patent is a product, a patent owner has the right to prevent third parties from making, using, offering for sale, selling, or importing the product in question for such purposes. Similarly, patented processes may not be used, nor may products obtained directly from the process in question be used, offered for sale, sold or imported for such purpose. Thus, it may be noted that process protection extends to products obtained directly using the protected process. Patent owners have full rights to assign or transfer by succession a patent, as well as to license the use of a patent by a third party.

Compulsory licensing or government use are anticipated without the authorization of the patent holder. But the right to force the working of a patent in this manner is heavily conditioned in a number of different ways. A prospective user must have made previous unsuccessful attempts to obtain authorization from the patent holder on reasonable commercial terms,

although this requirement can be waived in a national emergency. The scope and duration of a compulsory license or use must be limited to the specific purpose for which authorization is granted, and the use must be non-exclusive, non-assignable, and authorized predominantly for supplying the domestic market. Right holders must be adequately compensated, and decisions relating to the compulsory allocation of patent rights must be subject to judicial or independent review by a higher body. The authorities may waive certain of the above requirements in order to remedy a practice found through a judicial process to be anti-competitive. The minimum term of patent protection under the TRIPS Agreement is 20 years from the date of filing.

Layout-Designs of Integrated Circuits

The provisions for protecting layout-designs (topographies) of integrated circuits are based on the 1989 Treaty on Intellectual Property in Respect of Integrated Circuits. In addition, the TRIPS Agreement provides that protected layout-designs and products incorporating protected layout-designs may not be imported, sold or otherwise distributed for commercial purposes without the authorization of the right holder. In order to address the concerns that made the above-mentioned Treaty unacceptable to many governments, the Agreement added a number of provisions. These included the understanding that persons unknowingly using or selling integrated circuits (which may or may not be incorporated in products) containing unlawfully reproduced layout-designs would not be liable for this action prior to their being informed of the situation. Also, most of the conditions dealing with compulsory licensing of patents apply in the event of non-voluntary licensing or government use of a layout-design. Layout-designs are protected for a minimum of ten years.

Undisclosed Information

Undisclosed information, relating to trade secrets or know-how had not been subject to protection under any international agreement prior to the TRIPS Agreement. The protection granted relates to secret information with a commercial value that derives from the fact that it is secret and has been maintained so. Persons in control of undisclosed information must have the right to prevent such information from being disclosed, acquired or used in a manner contrary to honest commercial practice. The Agreement also deals with undisclosed test data relating to governmental approval procedures for pharmaceuticals and agricultural chemicals.

Enforcement of Intellectual Property Rights

The introduction of explicit provisions on enforcement was a novel feature of

the TRIPS Agreement, in that such provisions had not been developed before in international agreements dealing with the protection of intellectual property rights. As noted earlier, this was also a more general innovation from the perspective of multilateral rule-making. The basic idea behind insistence upon international obligations relating to enforcement provisions is a simple one – substantive standards can be rendered meaningless if the necessary mechanisms for enforcement are not in place and if no way exists of ensuring that such mechanisms are used as required. The provisions in the TRIPS Agreement on enforcement attempt to address both of these concerns, that is, the existence of the necessary enforcement mechanisms and their use. Thus, the obligations that the Agreement establishes in relation to enforcement, address both the substance of procedures and remedies and the practical working of these procedures and remedies.

The enforcement provisions in the TRIPS Agreement seek to guarantee both that the owners of intellectual property rights can fully exercise those rights, and that procedures associated with the use of IP rights are not abused in a fashion that transforms them into barriers to legitimate trade. An important point to make about the first of these objectives is that what the rules actually do is to underwrite the right of action of private right holders. Governments have agreed to guarantee these rights as a matter of international commitment. The Agreement attempts to accommodate significant differences in national approaches to these matters, while at the same time embodying a sufficient degree of specificity to impose real disciplines. Enforcement provisions are targeted at infringing activity in general, for which civil judicial procedures and remedies are contemplated, as well as at counterfeiting and piracy (relating to serious trademark and copyright infringements respectively), in respect of which criminal procedures and border measures are foreseen.

General obligations in relation to enforcement stipulate that remedies must be available both to prevent infringements and to deter further infringements. Enforcement procedures must be fair and equitable, and must not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays. Parties to a proceeding are entitled to judicial review of legal aspects of final administrative decisions, and at least the legal aspects of initial judicial decisions on the merits of a case, but not to review of acquittals in criminal cases. The Agreement states that no obligation is created to put in place a judicial system for enforcement of IP rights distinct from that for the enforcement of law in general, nor is there any obligation created with respect to the distribution of resources for enforcement of the law in favor of IP law.

Civil judicial procedures must exist to enforce all rights in the TRIPS Agreement, and certain basic features of the procedures are stipulated. Available remedies linked to civil judicial procedures must include injunctions, damages and in some circumstances the forfeiture or disposal of infringing goods. Members must also provide for provisional measures that may be taken to prevent infringing activity from occurring and to preserve evidence. Provisional measures may be required in certain circumstances without the right of a prior hearing for the affected party. Measures are also established to safeguard against the abuse of provisional action.

While the preferred method of dealing with IP infringements is at the source of the problem, the TRIPS Agreement does provide for border measures. These are particularly relevant in the case of counterfeiting and piracy, but border measures may also be applied in appropriate circumstances in respect of infringements of other IP rights. Border measures basically entail a procedure by which a right holder can request the customs authorities, upon production of sufficient evidence, to prevent the goods in question from entering into circulation. The Agreement also spells out conditions for ensuring that border measures do not become a barrier to legitimate trade. These include the posting of a security by right owners seeking the detention of goods, and indemnification in the case of wrongful detention. Criminal procedures apply to willful counterfeiting and piracy on a commercial scale. Penalties must be sufficient to act as an effective deterrent.

Dispute Settlement

Previous international agreements on the protection of intellectual property rights did not provide any mechanism for governments to seek redress in the event of alleged non-compliance by another party. The WTO dispute settlement machinery provides such recourse both with respect to infringements of substantive standards of IP protection, and domestic enforcement commitments. The WTO dispute settlement procedures are significantly stronger than those that existed under the GATT. Most notably, procedural time limits have been established for every stage of the process, and losing parties to a dispute can no longer delay or block the adoption of dispute panel decisions. Given the more binding and automatic nature of the WTO juridical process, an Appellate Body has also been established, so that losing parties have the opportunity to appeal panel decisions. The decisions of the Appellate Body are final.

As noted earlier, an aggrieved Member may be authorized to withdraw commitments in respect to a Member that fails to comply with a dispute settlement panel finding and recommendation. Where such retaliation is not

deemed practical or effective in the same policy area as that in which a recommendation for remedial action has been made, the retaliation may be applied in any other area of policy covered by WTO disciplines. Both the increased automaticity of the system and the enhanced scope for retaliation are illustrative of how governments have tried to increase international accountability through legal due process in a world of intensified dependency. One of the effects of these changes in the dispute settlement system is to create a situation in which refusal by a government to comply with its international obligations would be much more visible than in the past. It is no longer so easy to obfuscate and procrastinate in ways which might be tantamount to non-compliance, but which were never openly identified as such. Under the new arrangements, the stakes are much higher, since unwillingness to abide by the rules is in open view, and is therefore more easily perceived as systemic failure.

Technical Standards and Regulatory Reform

Background

The rationale and appropriate role of regulatory intervention has become a central concern in international economic policy-making. Until comparatively recently, governments considered both the objectives of regulation and the nature of interventions deployed to meet regulatory objectives largely a matter of domestic policy, interference with which was a threat to national sovereignty. The idea that regulation can be treated as the exclusive prerogative of individual governments is no longer tenable, if it ever was, and there is growing pressure for governments to find ways of accommodating one another with respect to a wide range of domestic regulatory policies.

This is apparent at both the multilateral and regional levels, and it touches upon virtually all countries in some measure. In the GATT/WTO context, several agreements address regulatory issues in increasingly detailed, explicit and intrusive ways. This trend has become particularly marked following the UR. In the Round, the Agreement on Technical Barriers to Trade (TBT) was reformed, and entirely new agreements that were negotiated include the GATS, the TRIPS Agreement, and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). All these agreements deal in significant ways with domestic regulatory interventions. Moreover, the UR results, embodied in the Marrakech Agreement establishing the World Trade Organization and the Annexes to that Agreement and the associated ministerial decisions, declarations and understandings are a "single undertaking" to which all WTO Members subscribe.

This is in sharp contrast to the pre-UR situation, when governments could pick and choose in relation to a range of agreements and associated commitments. In the case of the TBT Agreement, for example, only 46 countries were signatories of the precursor to the present Agreement, the Tokyo Round TBT Code. Now some 120 countries subscribe to the strengthened UR TBT Agreement. According to one estimate, this expanded membership represents an increase of approximately US$ 182 billion in imports subject to new international discipline, representing an increase of 17.5 percent in coverage compared to the Tokyo Round Code.

The WTO Agreements embody the international commitments that are of most relevance to the great majority of countries, especially non-OECD countries. Although their contents are discussed below, it is perhaps worth noting how the one significant WTO Agreement dealing with regulation that was not introduced for the first time in the UR – the TBT Agreement – has changed as a result of the negotiations. The significant point about all these changes is that they strengthen the degree of international accountability to which governments have submitted their regulatory regimes. This is indicative of the direction that globalization and growing interdependence is inevitably taking nations.

The first major point to note about the new TBT Agreement is that it was extended to product-related production and process methods (PPMs) for the first time. This means that the disciplines of the Agreement relate not only to products per se, but also to those aspects of product characteristics that may be attributable to the way in which a product is produced or processed. Second, under the pre-UR Agreement national treatment applied only to product testing and certification programs in the field of conformity assessment. The new Agreement extends the non-discrimination principle to all aspects of conformity assessment, including registration, inspection, laboratory accreditation, and quality system registration programs. Third, governments were previously only required to take such "reasonable measures" as may be available to them in order to ensure compliance with the rules of the TBT Agreement by local government bodies and non-governmental bodies. Under the new Agreement, they are required to accept full responsibility for the observation of all relevant provisions by such bodies, and also to formulate and implement measures and mechanisms in support of observance of relevant provisions by subsidiary bodies. Similar provisions are written into the SPS Agreement (Article 13).

Regulation has also been the subject of attention in regional arrangements such as NAFTA, ANZCERTA, ASEAN, APEC and MERCOSUR.[10] Bilateral cooperation has led to the negotiation or establishment of various

understandings and arrangements relating to regulatory policy, for example, between the EU and the United States, the EU and Australia, the EU and Canada, the United States and Australia, the United States and New Zealand, and the United States and Japan. The integration process of the European Communities is the most far-reaching of all experiences with international cooperation in the domain of domestic regulation.

The pressure for international cooperation in matters of regulation is a natural outgrowth of globalization, and of the deeper level of economic integration inevitably implied by increased international economic interdependency. Moreover, the removal of traditional barriers to trade and investment in many countries has made regulatory interventions a far more crucial determinant of the conditions of competition in markets and of the ability of foreign suppliers of goods and services to secure effective market access outside the confines of national boundaries. Traditional trade and investment barriers can often be understood in relatively straightforward terms as interventions by governments to accord advantages to domestic suppliers over foreign ones – in other words to provide economic protection. Any international agenda designed to address protection is also uncomplicated, since it essentially entails the single objective of approximating, if not attaining, unimpeded market access.

But the objectives of domestic regulation are altogether more diverse and often more complex. Regulatory interventions may be designed to deal with poorly functioning markets or they may pursue non-market objectives. Because regulatory reform cannot simply be equated with liberalization, the possibility of conflicting policy objectives is ever present. Thus, for example, the attainment of a given social objective may not be compatible with unrestrained market access. But at the same time, it is very well known that the putative pursuit of legitimate regulatory objectives can easily cloak a protectionist intent. Regulations can be used to undo or neutralize market access commitments undertaken in other policy domains, such as tariff reductions, the removal of quantitative import restrictions, or the opening up of the investment regime. The policy challenge, therefore, is to safeguard the right of governments to pursue legitimate public policy objectives without using the regulatory interventions involved as an illegitimate means of frustrating economic liberalization or undermining pre-existing market access commitments.

Policy discussions about regulation and regulatory reform rest on a broad and generally vague notion of the nature and circumstance of regulatory interventions. In these general terms, however, it may be said that regulation seeks to intervene in decisions and circumstances surrounding market entry, product

attributes, production methods, and market transactions. The central objective of regulatory reform is to attain efficiency in the nature and form of regulatory intervention, both in the sense of attaining the "least-cost" or "least-disruptive" method of intervention, as well as minimizing undesirable side-effects from such interventions. Regulatory reform, therefore, may cover a wide variety of policies. These can range from structural approaches such as privatization to positive rules about deregulation per se or about standard-setting and standards-related procedures.

In broad terms, there are two distinct elements in the rationale for regulatory intervention. One is to do with the failure of markets to function properly on account of structural impediments of one kind or another, usually attributable to the behavior of economic agents in the market concerned, or on account of market failure in the sense of externalities. The second rationale concerns the pursuit by governments of social goals that markets simply cannot address. Those shortcomings of the market mechanism that reside in structural impediments to competition are the subject matter of competition or antitrust policy. They result from the ability of actors in the market to use a dominant position to override market forces and determine outcomes in a manner advantageous to their own narrow interests.

The appropriate policy response to anti-competitive behavior depends to a degree upon the source of the market distortion. Sometimes it may be other policies of governments that give rise to the problem, in which case the solution may well be to change those policies rather than to introduce an additional layer of regulation. In other circumstances, the need may well be present for a regulatory intervention to eliminate the source of market power. Some regulatory interventions of this nature may be ex post in the sense of correcting observed anti-competitive behavior, while others may already be written into laws proscribing certain kinds of behavior.

The other kind of market failure alluded to above arises when the calculus of private costs and benefits diverges from the calculus of social costs and benefits, giving rise to externalities, or to a situation in which private economic agents in the market behave in ways that are optimal from their perspective, but suboptimal in a social sense. This could arise, for example, when resource inputs are not priced to reflect their true scarcity value because of a lack of well-defined property rights over the resources. In this case, scarce resources will be priced too low, so that producers use them in a manner and at a rate that does not reflect their true value to society. In many instances like the example just cited, a price-based intervention, such as a tax, would be the most appropriate means of bringing private and social returns into alignment. In other cases, such as the production of a toxic emission considered to pose

an unacceptable risk at any level above zero, a regulatory intervention prohibiting the offending production process would be called for.

The distinction between price and non-price interventions is important to make in the present context, not so much because of the efficiency consideration underlying the choice of instrument (in the first example above, a government might have chosen the less efficient policy of restricting access to the scarce resource quantitatively instead of through influencing the price), but rather because the policy debate seems to have separated tax and subsidy policy from administrative or other kinds of regulatory intervention. While this may be useful in clarifying the issues at hand, it should be borne in mind that analytically, all these different interventions are part of the same continuum of government actions that affect access to markets and the conditions of competition in those markets.

The second rationale for regulation mentioned above, that of the pursuit by governments of social goals not attended to by markets, is closely linked to the idea of market failures that generate externalities. But in this case, a market-related remedy may not be an option because the public policy objective which needs to be addressed is simply too far removed from the array of market signals to which producers and consumers respond. Regulatory interventions to protect moral values, for example, could only be achieved by a specific intervention targeted to that objective. A similar argument might apply in relation to an income distribution objective.

Before considering the various ways in which international cooperation might be secured in matters of domestic regulation, it is perhaps worth highlighting one fundamental distinction that underlies the entire debate. This is the distinction between seeking to influence the objectives of public policy, and setting the rules about how to achieve those public policy objectives. The "models" of international cooperation relating to domestic regulatory regimes discussed below contain elements of these two aspects of regulation in sharply differing degrees. At one extreme, the objectives of public policy are considered sacrosanct, and the entire focus of rule-making efforts is on the manner in which these objectives are to be met. At the other extreme, countries might be so similar that they are willing to agree jointly upon the objectives of any intervention.

Similar contrasts, although not necessarily at the outer limits of the spectrum, are to be found in international agreements. The GATT/ WTO, for example, has generally been fastidious in avoiding rules that impinge upon the objectives of public policy – governments for the most part, but not in all circumstances, retain full sovereignty with respect to what they claim to be the social or public policy objectives of their regulatory interventions. Other

agreements, on the other hand, more readily give rise to accountability in terms of regulatory objectives. This can happen partly through commitments to regulatory harmonization, and partly through "regulatory competition" induced by mutual recognition arrangements.

Alternative Approaches to International Cooperation in the Field of Domestic Regulation

Four different approaches to regulatory cooperation at the international level are discussed below. They are not mutually exclusive in terms of the regulatory mix that might be chosen by governments. The principle distinguishing feature between these different approaches is the extent to which they impose international regulatory commitments on governments, or lead to convergence. The four approaches are, first, what has been described as "policed decentralization,"[11] which amounts to a set of international rules about the conduct of regulatory policies. Second, there is harmonization, where governments agree to harmonize defined aspects of their regulatory regimes, most notably the substantive content of regulations. Third, international enforcement commitments do not involve efforts to harmonize anything, but do entail the establishment of an internationally justifiable obligation to enforce national regulations. Finally, mutual recognition agreements do not seek to harmonize regulations either, but they may well lead in that direction over time.

Policed Decentralization

Policed decentralization describes an arrangement whereby governments operate their regulatory regimes independently, including in respect of the possibility of divergent regulatory objectives and substantive regulations, but subject to certain commitments relating to the operation of the regulatory regime. Such commitments might include non-discrimination, the obligation to give reasons for regulating and the means of doing so, transparency, and the use of the least-trade restrictive interventions. Non-discrimination refers to national treatment and by extension, the MFN principle. The commitment not to discriminate is a powerful discipline, especially in the national treatment sense, since it precludes the possibility of setting regulations in a fashion designed to disadvantage foreign suppliers or foreign products. Matters do not always turn out to be simple, however, because formally non-discriminatory interventions may still have discriminatory effects in practice, depending on the design of the substantive obligation, or the design of the procedures associated with its implementation.

The idea behind making governments accountable in the sense of explaining the objectives of a regulatory intervention is that if the authorities know

they will be obliged to explain why they are intervening, they will be less likely to deploy regulatory interventions for protectionist purposes. The reasons for embracing the principle of transparency are self-evident. A question, however, is precisely what aspects of regulation-setting or implementation should be subject to transparency requirements. Clearly, publication of rules and regulations is a basic requirement. In addition, governments may have the obligation to consult, both on the substantive content of regulations prior to their implementation and on all matters of implementation. The commitment to use the least-trade restrictive intervention to achieve a public policy objective is also a powerful discipline. It means that regulations must not inflict any unnecessary barriers to trade, although the consequence of a regulation complying with this requirement could, depending on the regulatory objective, still have the practical effect of limiting trade.

The approach of policed decentralization bears a close resemblance to many international rules dealing with regulation. The primary hallmark of this model of international cooperation is that it maximizes the flexibility of governments, particularly with respect to the objectives of regulatory interventions, although less so with respect to the manner of achieving them. Moreover, even where international commitments go further than this, these principles frequently form the basis upon which more far-reaching commitments are built. The WTO rules constitute the most significant set of international commitments in the field of regulation for most countries, especially non-OECD countries. They are based largely, but not exclusively on the policed decentralization approach.

Thus, the TBT Agreement does not define regulatory objectives. It refers in its Article 2 to "legitimate" objectives, but only provides an illustrative list of what objectives might be legitimate. Included in this list are national security requirements, the prevention of deceptive practices, and protection of human health or safety, animal or plant life or health, or the environment. These are all unexceptionable public policy goals, but reliance on a non-exhaustive illustrative list in the Agreement means that governments remain free to use regulations to pursue other objectives, provided they are prepared to defend them as legitimate. The approach in GATS is very similar, where in Article VI it only refers to a single objective, that of ensuring the quality of a service. The SPS Agreement, on the other hand, because it is more narrowly focused, is able to specify the single and exclusive objective of protecting human, animal or plant life or health (Article 2:1).

Turning to the question of non-discrimination, the TBT Agreement, which applies to all industrial and agricultural products, is firmly rooted in the principle of non-discrimination, via the national treatment commitment in Article

III:4 of the GATT. The latter provision 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.

Article 2:1 of the TBT Agreement itself states that products imported from the territory of any Member "shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country." This phraseology captures both the national treatment and the MFN principles. The SPS Agreement requires that sanitary and phytosanitary measures do not "unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members." (Article 2:3). Again, the wording addresses both MFN and national treatment.

The GATS national treatment provision is more elaborate than those mentioned above. It reads:

> 1. 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 favorable than that it accords to its own like services and service suppliers.
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services or service suppliers.
> 3. Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

The wording of the first paragraph covers MFN as well as national treatment. The GATS provisions address two situations in which a problem may arise: i) identical treatment may be discriminatory, thus calling for formally different treatment; ii) different treatment may be discriminatory, thus calling for formally identical treatment or for modified different treatment. This elaboration, which requires that whatever the treatment accorded is, it must not modify the conditions of competition in a manner less favorable to services or service suppliers of foreign origin, reflects earlier GATT case law.[12]

In sum, the national treatment requirement is a minimum standard. This means that countries are not obliged to apply to imports of goods or services, or to service suppliers, the regulations they apply to their domestic analogues. In other words, nothing in the WTO prevents governments from discriminating

against domestic goods, services or service suppliers. In addition, the national treatment provision is not outcome-oriented, but rather opportunity-oriented. For a regulation to be non-discriminatory, it must not change competitive opportunities in a market.

From a regulatory perspective, then, the substantive details or procedures associated with a regulation do not have to be identical, as long as any differences do not modify the conditions of competition in the relevant market. At the same time, regulations cannot be designed so that although they impose identical requirements upon domestic and foreign suppliers, they do not afford the same competitive opportunities to foreigners. An example of a regulation according identical treatment to foreign and domestic suppliers that would most likely be considered discriminatory would be a requirement that all lawyers wishing to practice in a particular country would have had to have received their formal legal training in that country.

An obligation to give reasons for a regulatory intervention is somewhat related to transparency requirements. The basic idea is that if the regulatory authorities are obliged to explain their regulatory policies, this would have the effect of deterring protectionist subterfuge. The strength and effectiveness of such a requirement would depend upon what it aimed at. Such accountability could relate to regulatory objectives, to the substantive design of a regulation, or to a procedure associated with the enforcement of a regulatory requirement, including conformity assessment.

The WTO agreements dealing with regulation do not contain explicit requirements of this nature. However, both the TBT Agreement (Article 2) and the SPS Agreement (Annex B) require that Members should be given adequate time to comment in writing about any intended new or modified regulatory intervention, where such an intervention is not substantially based upon international norms or practice. Moreover, there is an obligation to consult upon request in relation to the written comments, and to take the comments and the results of any discussion into account when formulating the final content of the regulation. The GATS does not contain comparable provisions, but Members have committed themselves to develop any necessary disciplines in the regulatory field to replace the very general provisions that currently exist in Article VI:4.

As for transparency requirements more generally, WTO Members are required to publish all laws, regulations, judicial decisions, and administrative rulings of general application insofar as these pertain to the subject matter of the relevant agreements. Publication should occur before implementation, except in particular circumstances of urgency. In addition, the TBT and SPS Agreements and the GATS require the establishment of inquiry points to which

any requests for information by other Members may be addressed. Wide-ranging notification requirements are also written into all the relevant WTO agreements that touch upon regulatory matters. In general, it may be said that transparency requirements, designed to raise the degree of accountability of national governments at the international level, offer a valuable means of influencing national policy while at the same time avoiding the more intrusive nature of approaches involving harmonization and mutual recognition.

As noted earlier, the requirement that regulatory interventions must not constitute unnecessary barriers to trade is another effective means of controlling the misuse of regulations to provide protection to domestic interests in a relatively non-intrusive manner. The necessity test may not always be straightforward to interpret in specific cases where disputes arise, but it nevertheless creates a strong presumption that adverse trade effects will be minimized. The necessity test is explicit in the TBT Agreement (Article 2.2), the SPS Agreement (Article 5), and in GATS (Article VI:4). In line with the generally conservative approach of these agreements towards judgment about the objectives of regulatory interventions, the necessity test applies only to the design and procedural features of regulations.

Harmonization

Even the most casual empirical observation reveals that approaches to regulatory policy and the content of regulations differ significantly from country to country. In considering the case for harmonization as a mode of international cooperation in the area of regulatory policy, it may be useful in the first instance to consider why regulatory objectives may differ among countries. Firstly, income levels are a key determinant of the content of standards because of the effect of income on preferences, as well as differences in the ability to afford the "quality of life" goals underlying many regulatory interventions. Moreover, even if standards are formally quite similar regardless of significant differences in income, there are often important differences in the degree to which standards are enforced in practice. This should be borne in mind by those interests seeking to impose standards on governments for whom the implementation of such standards is of no interest, or at least not a matter of priority. In addition, there are likely to be differences in tastes among different societies, independently of income differentials, which may also militate against harmonization.

Second, standards may differ because of different geographical conditions. In some cases, these translate into local differences which do not present any significant difficulty in terms of relations among countries, nor any interest in harmonization. It is hard to imagine, for example, that a building

code in a tropical country that does not set insulation standards for houses would be a source of contention, despite the fact that insulation is a significant element of building costs in temperate climates.

As soon as trade enters the picture, however, differences in production or process standards may generate friction, even if a solid rationale exists for differing standards. In the field of environmental policy, for example, emission standards may well be set in line with a judgment regarding the absorptive capacity of the surrounding environment. For example, authorities responsible for geographical areas with low population density and little polluting activity are likely to see less need to attain high emission control standards than the authorities responsible for an already highly industrialized and polluted center of production. Such differences in standards will bear on relative costs faced by producers in the two locations competing for the same market, and they can be a source of pressure for harmonization. While the case for harmonization would be hard to sustain on environmental grounds, there may nevertheless be grounds for legitimate concern about the abuse of this diversity to gain an illegitimate trade advantage. This kind of concern is analogous, but diametrically opposite, to that underlying the necessity test. The point is that regulations concealing an illegitimate trade objective could be either too weak or too strong.

In practice, it is no easy matter to set differentials in standards precisely to reflect the objective conditions that warrant such differences. An alternative to harmonization that avoids this problem is the establishment of minimum standards. A minimum standards approach may help to bridge wide gaps in national preferences while at the same time eliminating the risk of egregious standard-setting practices aimed at securing an illegitimate advantage. As noted earlier, the WTO has tended to shy away from establishing the substantive content of standards, even of the minimum variety. But in the TRIPS Agreement, minimum standards are established in relation to the substantive content of intellectual property rights. The TRIPS Agreement also contains an element of harmonization in the domestic enforcement procedures that are established to ensure that private right holders can exercise their rights through domestic judicial procedures. But the harmonization element of these obligations is relatively light, since it focuses primarily on the existence of an appropriate institutional setting and on a number of procedural obligations.

While arguments based on the desirability of diversity and the inappropriateness of imposing a straightjacket of uniformity in dissimilar conditions may be persuasive in some circumstances, there are also important reasons why a harmonized approach may be attractive. First, a corollary of the consensus implicit in the establishment of an international standard is the

existence of less scope for the protectionist capture of regulatory interventions. In other words, harmonization automatically reduces the scope for abuse and a potential source of contention in international economic relations. Second, regulatory heterogeneity can carry real economic costs for foreign products and producers. These costs may include the requirement to submit to more than one conformity assessment procedure,[13] additional uncertainty as to the stability of regulatory regimes, higher information costs for producers, and the loss of scale economies in production if differences in standards are sufficiently far-reaching to lead to significant differentiation of products or production processes.

The WTO Agreements dealing with regulatory matters are generally cautious when it comes to harmonization, seeking to tread an intermediate path and avoiding any direct involvement in standard-setting activities. Article 2:4 of the TBT Agreement states that:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

The Agreement establishes a rebuttable presumption that whenever a standard is adopted or applied in accordance with relevant international standards, it does not constitute an unnecessary barrier to trade. The Agreement also calls upon Members to play as full a part as possible in the preparation of standards in appropriate international standardizing bodies.

The SPS Agreement adopts a similar approach, requiring Members to base their SPS measures on international standards, guidelines and recommendations when these exist (Article 3), and establishing that such standards conform to the Agreement in the sense of meeting the necessity criterion. The Agreement allows Members to establish standards that are higher than those existing internationally, provided they can be justified scientifically and respond to an appropriate assessment of risk. Members are also required to participate in the work of relevant international standardization bodies, including the Codex Alimentarius Commission, the International Office of Epizootics, and organizations operating within the framework of the International Plant Protection Convention.

Thus, both of the main WTO agreements dealing specifically with standards encourage harmonization while at the same time avoiding involvement

in standard-setting. Clearly, this is only possible by cross-reference to bodies that do set standards, and implicit in the work of such bodies is consideration of the trade-off between the lower transactions costs associated with uniformity and the weight to be attached to objectively different conditions obtaining in different countries. The TBT Agreement in particular does, however, provide a basis to challenge the trade-off implicitly settled upon in the formulation of an international standard by recognizing that governments may have valid reasons for departing from international standards.

The GATS approach to the harmonization objective is conservative, consisting in the relatively weak requirement of taking account of international standards of relevant international organizations in ensuring that licensing and qualification requirements and technical standards do not constitute unnecessary barriers to trade in services. However, a recent noteworthy development in the direction of regulatory harmonization is the establishment of a common set of regulatory principles in the basic telecommunications sector. In the context of negotiations on liberalization of trade in basic telecommunications services carried over from the UR, some 30 governments have provisionally agreed[14] to incorporate a common set of regulatory principles in their schedules of specific commitments.

The reason for doing this is that despite the widespread trend towards the removal of monopoly privileges in the sector, strong elements of natural monopoly are likely to persist, through ownership and control of telecommunications networks by dominant suppliers in the market. This market dominance potentially renders the liberalization commitments of governments meaningless in terms of real access to markets. The common regulatory principles establish WTO-enforceable commitments by governments to impose interconnection obligations upon major suppliers and they also embody a number of competitive safeguards against abuse of market dominance. These provisions are remarkable for how far they go, considering the traditional reluctance of governments to harmonize the substantive content of regulations in a WTO context. Although only 30 countries or so are likely to assume these commitments, they are MFN-based, which means that any WTO Member can raise a non-compliance challenge. One explanation for why it was possible to move so far in this direction in a GATS negotiation is perhaps that the subject matter was sufficiently specific for governments to be assured of a requisite degree of reciprocity and for there to be little uncertainty as to any future implications of the commitments. Moreover, in some respects the common regulatory principles are stated at a sufficient level of generality to permit flexibility on detail at the national level.

International Enforcement

Another approach to cooperation in regulatory matters entails the acceptance of an international commitment to enforce domestic regulations. In other words, governments promise one another to enforce their respective regulatory regimes and submit to the possibility of an international challenge through dispute settlement in the event of lax enforcement. This approach does not involve harmonization, and is perhaps best suited to situations where governments are comfortable with the content of diverse regulatory regimes because the diversity is not considered excessive, but less comfortable with the degree of assiduity applied to the enforcement of such regimes.

Examples of international agreements based on this approach are not numerous, but elements of it may be found, for example, in the TRIPS Agreement. Here, governments have made explicit enforcement commitments, but they have been supplemented by certain provisions relating to the underlying enforcement regimes and procedures, as well as by the fact that they apply to internationally agreed minimum substantive standards. Nevertheless, a right of international action has been created on grounds of a failure to respect domestic enforcement procedures, and these procedures have not been fully harmonized.

A purer example of the international enforcement model is the 1994 North American Agreement on Labor Cooperation (NAALC). This is a supplementary agreement negotiated in the context of the North American Free Trade Agreement. In essence, the NAALC sets up cooperative machinery in matters of labor policy, the centerpiece of which is the right of a NAFTA Member to challenge another Member through NAFTA-based dispute settlement machinery in the event that the latter party is considered to be failing to enforce its own labor laws. Remedies in the face of non-compliance with a dispute finding include monetary penalties, and ultimately, retaliation through trade restrictions.

Mutual Recognition

Mutual recognition could be characterized as a market-based approach to harmonization, insofar as the regulatory competition implicit in mutual recognition may be expected to lead over time to a narrowing of differences among national regulatory regimes. This convergence process, if permitted to occur, is likely to be most pronounced and rapid in circumstances where regulations are a significant determinant of competitiveness. It is precisely this implication of regulatory competition that provokes governments to worry about mutual recognition as an assault on sovereignty, as well as about such consequences as the much vaunted "race to the bottom" in standard-setting.

Mutual recognition, or for that matter unilateral recognition, is most likely to be promoted where national regulatory regimes are already similar – a situation most prevalent among countries at comparable income and development levels. This is why mutual recognition has not occurred on an across-the-board basis, and is not likely to in any foreseeable future. Yet many international agreements, including under WTO auspices, actively promote mutual recognition because of its attractiveness as a mechanism for facilitating trade and eliminating any possibility of regulatory manipulation for protectionist purposes. But permitting the establishment of mutual recognition agreements (MRAs) with restricted membership raises a serious prospect of MFN-inconsistency. Some would even argue that MRAs amount simply to conditional MFN, with all the actual and potential discriminatory implications of such an outcome. On the other hand, it may also be argued that open-ended MRAs based on objective, pre-announced conditions of participation are MFN-consistent, insofar as they do not set out to discriminate against any party, nor prescribe the ab initio exclusion of any particular countries.

The most extensive experience with mutual recognition is that of the EU, which is built on a far-reaching process of constructing a single market. It has taken many years for the EU to reach its present stage of integration in the regulatory field. Apart from certain standards-related regulation defined at the Community level, the EU's regulatory policies are a combination of judicial mutual recognition,[15] and regulatory mutual recognition. These approaches are supported by a commitment to the principle of free movement of goods, services and factors of production within the EU and by the principles of subsidiarity and proportionality. At the political level, reliance on qualified majority voting (subject to exceptions) reinforces the integrating effects of a regulatory regime relying on mutual recognition. One lesson from the EU experience is that mutual recognition arrangements are not simple to attain, and may often require complicated negotiations. The recent experience of the United States and the EU in attempting to craft a mutual recognition agreement has confirmed how complicated such negotiations can be, even when restricted to conformity assessment procedures in relation to a selected group of agreed products.

The relevant WTO agreements in this area are supportive of recognition, whether unilateral or mutual, but they do not create strong obligations in this respect. The TBT Agreement encourages recognition both in relation to the substantive content of regulations and conformity assessment procedures. In relation to standards, Article 2.7 states that:

> Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations.

In a sense, this requirement does not entail "mutual" recognition, since Members are enjoined to make their own independent judgments as to whether they can accept the standards of others as equivalent to their own. In practice, however, pressures for reciprocity reduce the likelihood that governments would make favorable equivalence judgments in the absence of reciprocal treatment. The approach with respect to mutual recognition of conformity assessment procedures is very similar. Article 6:1 requires that Members shall "ensure, whenever possible, that results of conformity assessment procedures of other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures." The TBT Agreement also explicitly enjoins Members to show willingness to enter into negotiations for the conclusion of mutual recognition agreements with respect to conformity assessment procedures (Article 6:3).

The GATS provisions on recognition are more elaborate. Article VII:1 of GATS states that for the purpose of meeting standards or criteria in relation to the authorization, licensing or certification of services suppliers, Members "may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country." The paragraph goes on to say that "[S]uch recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously." The text of Article VII then states that:

> 2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in the other Member's territory should be recognized.
> 3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

Paragraph 5 of Article VII requires that wherever appropriate, multilaterally agreed criteria should be used in the area of recognition. Members are further directed to work in cooperation with "relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions." In addition, paragraph 4 of Article VII requires that all existing recognition measures be notified to GATS, and that any new negotiations concerning recognition and any new or modified arrangements relating to recognition must also be notified.

Like the TBT Agreement, the GATS does not seek to dictate the pace in relation to recognition, but seems at the same time to espouse recognition as a valid instrument of trade facilitation. One reason for the more elaborate GATS provisions is that they pay particular attention to the risks of unwarranted discrimination inherent in recognition arrangements that are less than universal. This tension between the attractiveness of recognition agreements and the specter of unjustified discrimination is a theme that will likely become more prominent in years to come.

Concluding Remarks

The past quarter-century has seen much progress in strengthening the processes of international consultation and negotiation about global issues. Completion of the Tokyo and URs of trade negotiation led to broad-based tariff reductions and the easing of some of the important non-tariff barriers. The establishment of the WTO in 1995 has greatly strengthened the permanent institutional mechanisms for the discussion of trade issues and the resolution of disputes. A larger number of countries, including the majority of ERF countries (the Arab countries, Iran and Turkey) increasingly accept the importance of trade as a engine of development. During the seven years following the launch of the UR in 1986, over 60 developing countries unilaterally lowered their barriers to imports and 26 have since joined GATT/WTO. Thus, membership has grown from 88 in 1985 to 130 today.[16] Moreover, both China and Russia as major players outside the WTO have defined their policies and programs to gain acceptance into the WTO.

With the progressive reduction in external trade barriers, further promotion of competition depends critically on the reform of "behind-the-border" barriers–notably, domestic regulation, restrictions on service sector activities, government procurement and subsidies. The further integration of economies facilitated by the removal of these barriers is sometimes referred to as "deep integration" in contrast to the "shallow integration" permitted by removal of

border trade barriers. Along with progress on the traditional agenda of tariff cuts, the UR built up momentum to tackle these issues – witness the reform of the Agreement on Technical Barriers to Trade (TBT), plus three new agreements: the General Agreement on Trade in Services (GATS), the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Some of the unresolved sectoral issues left over from the UR are now being tackled or are scheduled for negotiation in the next few years.

Regional groupings, notably the EU, have worked to harmonize national regulatory frameworks in the interests of improved efficiency and closer integration of partner economies. Convergence of domestic laws and regulations can come about through either negotiation or de facto competition among regulatory systems. Either way, however, governments still face pressures to preserve if not enhance the competitive positions of their business and labor interests. Their efforts to fulfill these expectations will continue as a significant cause of friction at the international level and managing it will remain a pressing challenge for international trade-related policy.

Although the starting point for advancing the global agenda of trade liberalization may look auspicious, the problems are getting much tougher and more complex. The remaining barriers comprise a mix of hard core protection of vital national interests such as farming, and other measures supported by powerful lobbies or local monopolies such as anti-dumping measures. Protection from competition through anti-dumping measures or other means usually proves very expensive and is often ineffective in preserving jobs and companies. Repeal of anti-dumping legislation is unlikely, however, even in a long term horizon as it enjoys widespread political support. The most practical approach towards lessening its threat (or making it less prone to capture by special interests) may be to introduce a stronger voice for the national interest via a greater involvement of competition policy agencies in decisions made in this area.

Although contingency protection (such as anti-dumping measures) and hard-core trade restrictions remain important, the "along-the-border" impediments to trade generally are diminishing. Of greater concern are so-called "behind the frontier" regulations and administrative practices that powerfully impede certain types of trade. Many regulations reduce or eliminate domestic competition and some aim directly at foreign competition. Well-known examples include "buy local" public procurement, monopoly concessions granted to local companies (often public companies) through bans on the entry of other potential players (power, postal services, telecommunications, tobacco and alcoholic beverage sales are examples commonly found in the OECD

countries), and the regulation of professional services that mandate local presence, require local professional qualifications, restrict the establishment of foreign firms, or require payment of services according to standardized fees.

Large benefits can be achieved by stimulating more competition in domestic markets through regulatory reform, including deregulation. Changing the rules to facilitate new local entrants is a part of the process, but in markets dominated by large players international competition plays a vital role. Indeed, a strong complementarity between competition policy and trade and investment policy has become increasingly recognized as a key element in the new trade agenda. The growing interest in competition law and practice at the international level in part reflects these concerns: thus chapter 15 of the North American Free Trade Agreement (NAFTA) explicitly recognized the importance of competition policy, and Mexico took steps prior to implementation of the Agreement to create a competition law. Competition policies however, tend to have a rather limited scope and many competition-inhibiting policies (for instance public procurement rules) tend to fall outside the jurisdiction of the competition authority. The strengthening of competition policy and international agreements or understandings relating to it likely will remain high on the policy agenda.

Other interactions occur between trade policy and the regulatory environment. Domestic regulations can, intentionally or not, undo or neutralize commitments undertaken in other policy domains, including trade liberalization. Divergent preferences in domestic policy areas such as environmental quality and social policy lead to different regulations and financial charges which have an impact on competitive advantage. Sometimes, as in the discussion of intellectual property rights and environmental issues, the trade policy dimension is associated primarily with the enforcement of agreements, as the threat of denial of trade benefits may appear to offer an effective means of securing other policy objectives. Thus, at a time when many of the traditional arguments for protection have been largely discounted (on practical grounds, if not in theory), other kinds of justification are replacing them. In these cases, however, the traditional argument is stood on its head: the threat of trade sanctions is a powerful weapon precisely because the benefits of trade are so valuable. The fear is that tougher trade restraints could emerge as a by-product of new domestic policy objectives.

Notes

1 Other TRIMS identified in the Uruguay Round discussions, but not mentioned in the illustrative list annexed to the TRIMS agreement, include manufacturing requirements, export performance requirements, product mandating requirements,

manufacturing limitations, technology transfer requirements, licensing requirements, remittance restrictions, and local equity requirements. The TRIMS agreement would have needed to go further than reiterating the established interpretations of GATT Article III and Article XI in order to cover most of these measures. A notable omission of the TRIMS agreement, however, was its silence on export performance requirements (EPRs). EPRs are analogous to local requirements on the import side, and strongly resemble export subsidies, which are prohibited on manufactured goods under the WTO.

2 It is provided, however, that existing TRIMS may be imposed on new enterprises during the phase-out period if this is considered necessary in order not to place existing enterprises subject to the same measures at a disadvantage.

3 Both a service supplier and a service consumer could, of course, move to a third jurisdiction. Under GATS, this would be treated as two separate transactions from the point of view of the host country.

4 Exceptions to national treatment under GATT exist in respect of subsidies and government procurement.

5 The Jones Act requires that US coastal trade should be conducted by US-owned, US-built and US-manned vessels.

6 Scope for restricting the application of GATS to particular activities or disciplines resides in the choice of whether to accept market access commitments with respect to particular sectors and sub-sectors, or particular modes of supply, and whether to impose limitations on market access or national treatment in respect of scheduled commitments.

7 This is one of the so-called plurilateral agreements, for which membership is optional and must be separately negotiated. The other plurilateral agreements are the Agreement on Trade in Civil Aircraft, the International Dairy Agreement and the International Bovine Meat Agreement.

8 The signatories of the Government Procurement Agreement are: Canada, the 15 Member States of the EU, Israel, Japan, Korea, Norway, Korea, Switzerland, and the United States.

9 Reference is made in the same context to the protection of public health and nutrition, and to the public interest in sectors of vital importance to socio-economic and technological development.

10 North American Free Trade Agreement (NAFTA), Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), Association of South East Asian Nations (ASEAN), Asia-Pacific Economic Cooperation Forum (APEC), Common Market formed by Argentina, Brazil, Paraguay, Uruguay (MERCOSUR).

11 This expression is attributable to Sykes. See Alan O. Sykes, (1996), "Strategies for Increasing Market Access Under Regulatory Heterogeneity," Unpublished paper prepared as a contribution to the OECD Trade Committee brainstorming on "International Contestability of Markets: Economic Perspectives," (Paris, February 1996).

12 The report of the GATT panel on "United States - Section 337 of the Tariff Act of 1933."

13 There could be duplication in conformity assessment procedures with harmonized standards as well, but a double compliance requirement would seem less likely in a situation where the degree of international cooperation was already sufficient to permit harmonization of standards.

14 The basic telecommunications negotiations under GATS were finalized in February 1997.

15 Judicial mutual recognition is an integrating force that took hold in the EU with

respect to non-SHEC products (products not regulated on grounds of safety, health, environment or consumer protection objectives) following the 1979 Cassis de Dijon Decision of the European Court of Justice, which in essence required that if free circulation of a product was permitted in one Member State, then the same should be permitted in others.

16 Since the launching of the Uruguay Round in 1986, Egypt, Morocco, Tunisia and Turkey have unilaterally lowered their barriers to imports, mainly in conjunction with a reorientation of domestic policies. Morocco, Tunisia, Bahrain, the UAE and Qatar have since joined the GATT; Algeria, Jordan and Saudi Arabia are now in the process of acceding, while other countries in the region have expressed interest in GATT membership and have so far held observer status inthe GATT (Iran).