

Chapter Six

Power, Discourse, and International Trade Governance

This final chapter explores the location and nature of power in the development and implementation of international trade rules, insofar as those rules may affect plant conservation, sustainable plant trade, and trade in biotechnology products. It maintains the constructivist argument that discourses, norms, and principles have significant influence in global governance processes.

The first section examines the growing influence of sustainable development discourse within the World Trade Organization (WTO), including NGO access to WTO deliberations.¹ It argues that the norm of states' sovereign equality, and the principle of non-discrimination in international trade have benefited various governments who have successfully defied attempts by the United States to regulate imports from developing countries on the basis of environmental and labour rights standards. This perceived weakness of the WTO on trade and environment issues has angered many environmental and labour rights organisations mainly in developed countries.

There is also a widespread concern amongst civil society organisations and developing country governments that the globalisation facilitated by world trade rules is not equitably benefiting all countries and regions. Between 29 November and 4 December 1999 about 50,000 demonstrators rallied at the Third Ministerial Conference of the World Trade Organization in Seattle. The protests, the largest in the United States since those against the Vietnam War in the early 1970s, challenged current international trade governance and globalisation trends. These protests were a contributing factor to the failure of the meeting which had been intended to launch the Millennium Round of trade negotiations.

Many governments also contributed directly to the failure of the November 1999 Seattle meeting. At an UNCTAD meeting of about 80 governments in Morocco, at the last Ministerial Meeting of the G77 before the Seattle meeting, the leaders of many developing countries expressed disillusionment with globalisation, and insisted that the developed countries had to do more to implement previous commitments before new issues were negotiated. The chairman of the G77, Mr Clement Rohee, Foreign Minister of Guyana, called on the Seattle conference to 'review, repair and reform' the WTO. Rohee also said that more had to be done to offer special and differential treatment to G77 members.²

States' groupings remained divided over many issues at the Seattle meeting, as

¹ The WTO had 137 members as at 14 June 2000: WTO homepage, accessed 12 June 2000: <<http://www.wto.org/>>.

² M. Khor, <twonet@po.jaring.my>, 'Developing world voices doubts on globalisation', Human Rights Information Network <hurinet-development@mail.comlink.apc.org>, 21 November, 1999.

they had been at preparatory meetings in 1999. The G77 was resistant to the raft of new proposals being promoted by developed countries. The G77 did not want to negotiate issues such as investment, transparency in government procurement, competition, tariff cuts, labour and environmental standards, or the creation of a WTO biotechnology working group. The G77 was also concerned that its requests for extensions of time to implement aspects of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) were refused by several developed states.

In this chapter, realist and neorealist arguments about the unipolar nature of the international order, or the multilateral order in which either the United States or a few great powers dominate, are shown to be unsustainable. The TRIPS agreement is potentially very beneficial to corporate actors in developed countries, but it also includes significant concessions for developing countries. Again the argument made in the thesis that power is diffuse and possessed by diverse actors is substantiated further in this chapter.

This first section also examines the debate about the consistency or otherwise between trade restrictions permitted under multilateral environmental agreements (MEAs) and the trade rules administered by the WTO. It provides the example of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to make the constructivist argument that principles of sustainability and free trade may be in conflict, and that this may have implications for the global governance of plants and plant genetic resources, depending on how the issues are resolved or if disputes arise. This discussion is necessarily speculative.

The second section is more directly focused on issues affecting plant genetic resources and plant biotechnology. It examines the significant coercive power that can be exercised pursuant to the TRIPS agreement, which WTO member states are required to comply with. This section argues that corporate actors were highly successful in having their aspirations met concerning stronger intellectual property rights (IPRs) enforceable using WTO dispute resolution processes.

The WTO was established on 1 January 1995 as a result of the Uruguay Round and it will administer various trade agreements, including those concerned with trade in goods,³ the General Agreement on Trade in Services, the TRIPS agreement, and the Understanding on Rules and Procedures Governing the Settlement of Disputes.⁴ The TRIPS agreement manifests a globalising governance of private property rights which is likely to effect significant change in the micro-level practices and subjectivities of researchers involved in gene technologies in many parts of the world. WTO remedies are more coercive and potentially more effective than those previously available

³ These 'Annex 1A Agreements' include the General Agreement on Tariffs and Trade 1994, Agreement on Agriculture, Agreement on Trade-Related Investment Measures, Agreement on Subsidies and Countervailing Measures, Agreement on Import Licensing Procedures and the Agreement on Implementation of Art.VII (Customs Valuation).

⁴ The WTO will also oversee the Plurilateral Trade Agreements which are binding only on the parties to them. These include the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Arrangement, and the Arrangement Regarding Bovine Meat.

through the World Intellectual Property Organization (WIPO). This section suggests that the G77 offered relatively weak resistance to developed states' aggressive IPR agenda during the Uruguay Round of trade negotiations but that their resistance to the introduction of domestic patent regimes for patents for plant and animal 'inventions' is strong and continuing. Some members of the G77 are also promoting reform proposals for the TRIPS agreement concerning *sui generis* legal regimes which recognise the value of informal innovation in product development.

The third section examines resistance to normative power and tensions amongst various norms and discourses. It argues that human rights discourse has had marginal influence in international trade fora, largely because G77 governments have refused to accept the inclusion of a 'social clause' in General Agreement in Tariffs and Trade (GATT) and WTO agreements. Human rights discourse has significant constitutive power, as discussed in Chapters Three and Five, but G77 governments have been able to resist its explicit inclusion in WTO agreements because in international negotiations the norm of sovereign equality gives them an international 'constitutional' right to do so. The norm of state sovereignty and equality, and the corollary principle of non-intervention in domestic affairs, is used with various degrees of success to resist the use of human rights discourse against governments in diverse circumstances. In WTO fora this resistance has been more successful than in others.

The fourth section examines other selected trade agreements briefly. These include the Agreement on Sanitary and Phytosanitary Measures (SPS) and the Agreement on Technical Barriers to Trade (TBT). It argues that the SPS agreement may require governments to undertake risk assessments before they can lawfully restrict imports of biotechnology products on phytosanitary grounds. This is beneficial to states that export GM-crops and other biotechnology products as they are seeking greater access to markets that have been restricted because of resistance from consumers, food producers and processors and farmers. Whether importing governments' domestic labelling requirements for GM foods can be maintained in the face of the Biosafety Protocol and the TBT agreement remains to be seen.

Sustainable development discourse

The GATT⁵ and WTO agreements are concerned primarily with promoting trade liberalisation. Sustainable development discourse only became a contentious issue for these agreements in the last stages of the Uruguay Round negotiations which began in 1986 and ended in 1993. The discourse which most influenced GATT negotiators in its early days was anti-mercantilist, consistent with works by Adam Smith on trade specialisation, David Ricardo on comparative advantage, and Eli Heckscher and Bertil Ohlin on relative factor endowments for comparative advantage. International trade

⁵ The original was agreed to on 30 October 1947, and came into effect in 1948. This first GATT 'round' in 1947 was followed by Annecy (1949), Torquay (1950-51), Geneva (1955-66), 'Dillon round' in Geneva (1961-62), the 'Kennedy Round' in Geneva (1964-67), the Tokyo Round in Geneva (1973-79) and the Uruguay Round (1986-94).

rules were intended to reduce barriers to trade and prevent the rise of the economic mercantilism which exacerbated international tensions between World War I and II.⁶ This intent continues. In 1993 WTO members reaffirmed their belief that market forces and free trade could do much to promote the efficiency and productivity of economies, and remove trade distortions. They also affirmed that an open, non-discriminatory trading system is best able to promote growth, and aid a transition to sustainable development for all economies.⁷ A commitment to economic and social-co-operation is also reflected in other international agreements and in the UN Charter.⁸

The GATT/WTO agreements require of their member states several basic commitments. These include a willingness to negotiate tariff reductions, the same treatment of own-country and overseas nationals under trade laws and procedures,⁹ equal treatment for imported and domestic goods,¹⁰ transparency and notification, and the elimination of quantitative restrictions on imports and exports.¹¹ Since the early 1970s the breadth of GATT governance has been extended from its primary focus on trade liberalisation and trade in goods, to include issues such as subsidies, customs, services, agriculture, intellectual property, and foreign investment. The Uruguay Round marked a high-point in the expansion of GATT/WTO jurisdiction. Intellectual property, trade-related investment measures and trade in services were brought within the established GATT agenda.¹² Many aspects of these trade agreements have implications for the global governance of plant genetic resources. Until recently GATT/WTO agreements have not been much concerned with sustainable development. The GATT 1971 Working Party on Trade and Environment had not met before 1991, for example.¹³ A GATT group on environmental measures in international trade and the preparatory committee on trade and the environment did meet more often in the closing year of the Uruguay Round negotiations, however.

The recognition of norms and principles of sustainable development during the Uruguay Round is likely to have been a result of NGO campaigning, and changes in the declaratory principles of global governance as a result of the 1992 United Nations Conference on Environment and Development (UNCED). In recent years NGOs and

⁶ Mercantilism is a form of economic nationalism which promotes exports and discourages imports, often through measures such as tariff barriers.

⁷ Art.36 GATT 1947. See also: 'Declaration on the contribution of the MTO [WTO] to achieving greater coherence in global economic policymaking', in 'General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (the Uruguay Round): Ministerial Decisions and Declarations, 15 December 1993', *International Legal Materials*, vol.33, 1994, pp.139-140.

⁸ Arts 55 and 56 of the UN Charter. See also Principle 12 of the Rio Declaration on Environment and Development and Chapter Two of Agenda 21, concerning improved access to export markets for developing countries.

⁹ Art.3: national treatment and non-discrimination.

¹⁰ Art.1: most-favoured-nation treatment.

¹¹ Art.11.

¹² A GATT ministerial meeting in Punta del Este in 1986 issued a declaration which set the agenda for the Uruguay Round negotiations.

¹³ S. Charnovitz, 'Improving environmental and trade governance', *International Environmental Affairs*, vol.7, 1995, pp.59-91 at p.66.

academics have become increasingly interested in issues such as the legality of trade-restrictions on environmental grounds, the possible consequences of trade dispute resolution and the GATT panel rulings, and the implications of further trade liberalisation for sustainable development generally. Establishing causative links requires further research, however. For example, a 1995 European survey found that 150 NGOs were active on GATT issues, but most respondents considered that their efforts had produced few tangible results.¹⁴

NGOs only began to campaign in earnest on trade, development and environmental issues well after the Uruguay Round was in train, from as late as December 1990. Environmental and fair trade NGOs lobbied the United States and the European Union seeking to ensure that the Uruguay Round responded to their concerns about sustainable development.¹⁵ NGO efforts were also focused on lobbying during the lead-up to the Rio Earth Summit in 1992 and this may have reduced their capacity in GATT/WTO fora. NGOs called for the revitalisation of the GATT Working Party on Trade and the Environment in 1992, and suggested that the GATT should develop criteria for assessing environmental trade restrictions.

It is worth noting again here that securing citizen participation in decision-making is a commonly cited principle of sustainable development, and this is now reflected in trade governance. The Constitution of the new WTO includes provision for establishing consultative relations with NGOs.¹⁶ The WTO General Council approved arrangements for WTO-NGO relations on 18 July 1996. NGOs 'concerned with matters of the WTO' will be able to observe plenary meetings of the Ministerial Conference, and to have facilities made available such as a conference room, fax, computers and a viewing screen for plenary sessions. The WTO has undertaken to offer regular briefings for NGO representatives in Geneva, to de-restrict documents more quickly than in the past, and to discuss the earlier publication of dispute settlement panel reports. It has also proposed the creation of an informal structure to establish regular dialogue with civil society.¹⁷ The WTO also holds *ad hoc* symposia to discuss WTO-related issues, to receive information from and consult with NGOs, and to respond to NGO requests for information and briefings about the WTO.

Another development foreshadowing increased WTO openness to NGO input occurred in 1998 when the WTO Appellate Body reversed a panel's finding that accepting non-requested *amicus briefs* submitted by NGOs was incompatible with the

¹⁴ M.D. Wilkinson, 'Lobbying for fair trade: northern NGOs, the European Community and the GATT Uruguay Round', *Third World Quarterly*, vol.17, no.2, 1996, pp.251-267 at pp.252, 256.

¹⁵ N. Shaw and A. Cosbey, *GATT, the WTO and Sustainable Development: Positioning the Work Program on Trade and Environment*, International Institute for Sustainable Development, Winnipeg, 1995, p.17.

¹⁶ Art.V. of the WTO constitution on 'relations with other organizations' states under point V.2. that: 'The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organisations concerned with matters related to those of the WTO.' ANNEX III, WT/L/160/Rev.1, 26 July 1996, World Trade Organization.

¹⁷ World Trade Organization, 'WTO High-level Symposia on Trade and Environment and Trade and Development: Press Release', <<http://www.wto.org/wto/new/press/23.htm>>, 1 March 1999.

provisions of the GATT Dispute Settlement Understanding. The Appellate Body also ruled that panels may allow any party to a dispute to attach all or part of an NGO brief to its own submissions.¹⁸ U.S. President Clinton suggested in 1998 that increased opportunities should be available for the involvement of non-government actors in GATT/WTO dispute resolution, and for WTO meetings to be open to the public.¹⁹ The U.S. continued with this theme at the Seattle meeting. The European Commission has also said that it supports moves toward greater WTO transparency, including the circulation of documents and more general openness in WTO processes. The European Commission had organised a series of 'outreach' meetings with NGOs to discuss the proposed 'Millennium' trade negotiating round.²⁰

The WTO and trade and environment

The WTO is also responding to other principles of sustainable developing discourse, in addition to accommodating NGO participation. Again this was a late stage development during the Uruguay Round. After negotiations were concluded and before the Final Act had been signed by ministers, the Trade Negotiations Committee agreed to prepare a broad work program on trade, environment and sustainable development for signature with the Final Act in Marrakesh in April 1994. States agreed that at the first meeting of the WTO General Council, a Committee on Trade and Environment (CTE) would be established to begin a comprehensive work program on trade and environment, with a sub-committee undertaking the work meanwhile.

The WTO CTE, established in January 1995, provides analyses of the links between trade and environmental measures, and makes recommendations on trade liberalisation and sustainable development. It reports to the WTO Ministerial Conferences and to the WTO General Council.²¹ Some academics and NGOs have been critical of CTE discussions, however, suggesting that progress on its broad range of agenda items is disappointing.²² Cynics might suggest that the CTE was established as a foil for NGO concerns.

Steve Charnovitz attributes the failure of the CTE to lack of leadership, the dominance of trade officials, a paucity of commissioned research, lack of NGO input

¹⁸ *United States — Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body (AB-1998-4)*, UN Doc. WT/DS58/AB/R, accessed 13 April 1999 <<http://www.wto.org/dispute/58abr/htm>>; Report of the Panel on United States — Import Prohibition of Certain Shrimp and Shrimp Products, UN Doc. WT/DS58/R, excerpted in *International Legal Materials*, vol.37, 1998, pp.832-857.

¹⁹ E.J. Dionne Jr, 'Globalism with a Human Face', *Washington Post*, 29 May 1998.

²⁰ The Rt Hon Sir Leon Brittan QC, Vice-President of the European Commission, *Speech to the WTO's High-Level Symposium on Trade and Environment, 15-16 March 1999, SPEECH/99/4*, accessed 16 October, 1999 from <<http://www.wto.org/>>.

²¹ 'The Marrakesh Ministerial Decision on Trade and Environment' <<http://www.wto.org/wto/envir/marrakes.htm>>. The CTE's report (WT/CTE/1, 12 November 1996) is available from the WTO Secretariat <<http://www.wto.org/>>.

²² C. Carpenter, A. Cosby, P. Chasek and L.J. Goree, 'WTO Symposium on Trade, Environment and Sustainable Development, 20-21 May 1997', *Earth Negotiations Bulletin*, <<http://www.iisd.ca/linkages/>>, vol.5, no.1, 1997.

and weak or non-existent linkages with inter-governmental organisations for the environment.²³ Another explanation may be that the CTE is overly constrained by its trade focus, which is not an environmental-effects-of-trade focus. The WTO is limited to examining trade policies, and trade-related aspects of environmental policies which are of significance for members' trade, and cannot examine environmental issues generally.²⁴ The CTE's meeting in March 1998, for example, focused on market access and the implications of removing trade restrictions for identified industry sectors, suggesting that less restrictions would lead to economic and environmental benefits.²⁵ Governments in the CTE may also be resistant to new obligations concerning sustainability.

Trade dispute resolution and sovereign power

NGOs and academics argue that the WTO is weak on sustainable development in other respects, including in its dispute-resolution rulings. For example, the reluctance of the GATT/WTO to give priority to sustainable development concerns over free trade is evident in several panel determinations on trade disputes, where the United States attempted to rely on the environmental exemptions in article 20(b) and (g) of the GATT in defence of its trade-restrictive measures. In various trade and environmental disputes, both developed and developing country governments have successfully rebuffed the United States in GATT dispute-resolution fora, with a few exceptions. The norm of sovereign equality for states²⁶ was a significant factor in this regard, as unilateral actions to compel other governments to change domestic law is viewed with disfavour in international law. Multilateral negotiated outcomes consistent with internationally agreed standards are preferred. This is consistent with constructivist arguments as normative considerations are dominant. However, a ruling by the WTO Appellate Body indicates a significant change in approach which is likely to be welcomed by commentators critical of earlier panel reports, as some trade restrictions on environmental grounds will be permissible if genuine multilateral attempts to negotiate outcomes have failed.

The current exemption provisions in the GATT are narrow. For example, states' parties can restrict the import of products if they are produced by prison labour, contrary to public morality or health, or place animal, plant or human life or health at risk. Trade restrictions can also be imposed so as to conserve exhaustible natural resources, if such measures are made effective in conjunction with restrictions on

²³ S. Charnovitz, 'A critical guide to the WTO's report on trade and environment', *Arizona Journal of International and Comparative Law*, vol.14, no.2, 1997, pp.341-379 at pp.374-375.

²⁴ K.P. Ewing and R.G. Tarasofsky, *The 'Trade and Environment' Agenda: Survey of Major Issues and Proposals from Marrakesh to Singapore*, IUCN, Gland and Cambridge, 1997 at p.19.

²⁵ WTO 'Second Ministerial Conference of the World Trade Organization: Press Pack', <<http://www.wto.org/>>.

²⁶ The doctrine of sovereign equality is one of the basic principles of the UN Charter (art. 2.1) and it is also recognised in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

domestic production or consumption. None of these measures may be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, however. States' parties may also claim exemptions for technical measures taken for environmental protection,²⁷ or for emergency or national security measures.²⁸ These exemptions may be available to legitimate governments' import restrictions on plants and plant genetic resources, in the circumstances prescribed, and provided relevant international law (as interpreted) is complied with.

The chapeau (introductory clauses) and key paragraphs of art. 20 of the GATT provide:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ...
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- ...

These exceptions have been construed narrowly so as to preserve the objectives of the GATT and not to erode its promotion of the right of access to markets. This normative priority for free trade has caused environmentalists considerable concern for many years. For example, NGOs reacted with dismay to several panel reports interpreting art. 20, including the unadopted panel rulings on U.S. dolphin-protection measures.²⁹ In 1994 a GATT panel said that the GATT exceptions could not be used to justify states' unilateral trade measures which sought to compel other countries to change their resource management policies. The GATT multilateral trade liberalisation objectives had to be paramount.³⁰ The panel suggested that since trade embargoes could

²⁷ Agreement on Technical Barriers to Trade (TBT), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Annex 1A to the Agreement establishing the World Trade Organization, accessed May 1999 from <<http://www.wto.org>>.

²⁸ Art.19 (Emergency Action on Imports), art.21 (Security Exceptions). See generally: H.L. Schloemann and S. Ohlhoff, 'Constitutionalism and dispute settlement in the WTO: national security as an issue of competence', *The American Journal of International Law*, 1998, pp.414-457.

²⁹ GATT, 'General Agreement on Tariffs and Trade — Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna', *International Legal Materials*, vol.30, 1991, pp.1594-1623.

³⁰ The U.S. was required to bring its *Marine Mammal Protection Act 1972* into conformity with the GATT. The GATT has also been used to have environmental action dropped in other cases. In 1993 Canada repealed its law prohibiting the importation of U.S. puppy mill dogs, and the U.S. dropped its

not further environmental objectives by themselves, because they could only be effective if exporting states agreed to change their laws or policies, such embargoes could not be primarily aimed at conservation, or at rendering effective restrictions on domestic production or consumption, as required by article 20(g).³¹ Another panel had ruled that for measures to be considered 'related to the conservation of an exhaustible natural resource' such measures must be 'primarily aimed' at that conservation, even if they were not necessary or essential'.³² Other panels have said that measures inconsistent with the GATT would only be exempted if there were no alternative measures available which a party could reasonably be expected to employ. Article 20 had to be interpreted narrowly.³³

The GATT 'shrimp-turtle' case also caused environmentalists much concern but it also demonstrated the potential benefits of the norm of sovereign equality for developing country governments. India, Pakistan, Thailand and Malaysia successfully defended their laws and practices in this dispute. The U.S. had attempted to protect sea turtles from shrimp trawlers by prohibiting imports from countries whose commercial fishers did not use turtle excluder devices on their trawlers. The panel ruled that the basic objectives and principles of the GATT, including the right of access to markets had to be paramount, and that the exceptions in the GATT had to be construed narrowly. It ruled that GATT exceptions should not be interpreted so as to permit contracting parties to derogate from their GATT obligations even to implement conservation policies. Multilateral co-operation, rather than unilateral measures, was necessary to promote sustainable development. The panel found that the U.S. legislation had attempted to influence the operation of other governments' policies in a way which threatened the multilateral trading system and that this was not consistent with the GATT.³⁴

threat of sanctions against Norway because of commercial whaling due to threats of GATT action: R.D. Ryder, 'The new World Trade Organization — a major threat to social values', *Biodiversity and Conservation*, vol.4, 1995, pp.206-207. See also B.F. Chase, 'Tropical forests and trade policy: the legality of unilateral attempts to promote sustainable development under the GATT', *Hastings International and Comparative Law Review*, vol.17, 1994, pp.349-388. The U.S. Clean Air Act had to be amended to lower its standards so as to comply with the GATT ruling. A finding of GATT-consistency on 'petrol-guzzler' car taxes is one ruling viewed positively by environmentalists. See: GATT, 'General Agreement on Tariffs and Trade — Dispute Settlement Panel Report on United States Taxes on Automobiles', *International Legal Materials*, vol.33, 1994, pp.1397-1459. See also: E. Phillips, 'World trade and the environment: the CAFE case', *Michigan Journal of International Law*, vol.17, 1996, pp.827-863.

³¹ GATT, 'General Agreement on Tariffs and Trade — Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna', *International Legal Materials*, vol.33, 1994, pp.839-903 at pp.893-894.

³² General Agreement on Tariffs and Trade, 'Dispute Settlement Panel Report on United States Taxes on Automobiles', at pp.1441-1442 citing the GATT Panel report on Canada-Herring and Salmon, BISD 35S/98, para.4.6.

³³ GATT, *Report of the Panel on Section 337 of the United States Tariff Act*, BISD 36S/345; GATT, *Reports of the Panels in Canada — Administration of the Foreign Investment Review Act*, adopted 7 February 1984, 30S/140, at p.64 cited in GATT, 'General Agreement on Tariffs and Trade — Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna', *International Legal Materials*, vol.33, 1994, at pp.879, 881, 894, 896-897.

³⁴ World Trade Organization, *Report of the Panel on United States — Import Prohibition of Certain*

This very narrow approach was criticised by the WTO Appellate Body when the decision went on appeal in 1998, however. The Appellate Body said that while maintaining the multilateral trading system is necessarily a premise underlying the WTO agreement, it is not a right or an obligation, nor an interpretative rule for assessing measures under the chapeau of article 20. It said that the correct approach to interpreting article 20 involved two steps: first, a characterisation of the measure under the specific exceptions in the paragraphs of article 20, followed by a further appraisal of the same measure under the chapeau. The Appellate Body recognised that access to a market may be made dependent on whether exporting members comply with, or adopt, a policy or policies unilaterally prescribed by an importing member invoking one of the exceptions of article 20. It said that to disallow all unilateral measures would be inconsistent with the purpose of the article, and such measures might be lawful provided they did not constitute arbitrary or unjustifiable discrimination. The failure of the U.S. to pursue serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, was one of the relevant factors indicating arbitrary discrimination.

This change in approach demonstrates the growing significance of sustainable development discourse for decision-makers involved in global governance. This ruling modified an earlier panel ruling that the U.S.'s prohibitions on the importation of certain shrimp and shrimp products from particular countries violated the GATT's prohibition of quantitative restrictions on imports and exports. It opens the way for unilateral trade restrictions in the event that multilateral attempts to negotiate sustainable trade cannot be agreed to. This may have implications for future trade in plants and plant products, if importing governments consider that exporting states are not trading in a sustainable way. Trade restrictions on environmental grounds also arise under multilateral environment agreements (MEAs).

MEAs and GATT/WTO Agreements: principled conflict?

A contentious issue in the trade and environment debate is the relationship between trade provisions in post-1947 MEAs and the GATT/WTO agreements.³⁵

Shrimp and Shrimp Products

³⁵ D. Brack, 'Reconciling the GATT and multilateral environmental agreements with trade provisions: the latest debate', *RECIEL*, vol.6, no.2, 1997, pp.112-120; Australia, Department of Foreign Affairs and Trade, GATT Projects Section, *The Relationship Between the Provisions of the Multilateral Trading System and Trade Measures Pursuant to Multilateral Environment Agreements: A Discussion Paper*, Department of Foreign Affairs and Trade, Canberra, 1995; Charnovitz, 'A critical guide to the WTO's report on trade and environment', at pp.350-357; T.J. Schoenbaum, 'Free international trade and protection of the environment: irreconcilable conflict?', *American Journal of International Law*, vol.86, 1992, pp.700-727; J. Cameron and J. Robinson, 'The use of trade provisions in international environmental agreements and their compatibility with the GATT', *Yearbook of International Environmental Law*, vol.2, 1991, pp.3-30; B.F. Chase, 'Tropical forests and trade policy: the legality of unilateral attempts to promote sustainable development under the GATT', *Hastings International and Comparative Law Review*, vol.17, 1994, pp.349-388; E. Phillips, 'World trade and the environment: the CAFE case', *Michigan Journal of International Law*, vol.17, 1996, pp.827-863; J. McDonald, 'The World Trade Organization: Law and Policy' in B. Boer, R.J. Fowler and N. Gunningham, eds, *Environmental Outlook No.2: Policy and Law*, The Federation Press, Sydney, 1996, pp.158-172.

Environmentalists promoting sustainable development norms and principles argue that MEAs should be paramount, while proponents of less-constrained free trade argue that the GATT/WTO agreements should have priority, especially where the MEAs permit unilateral trade restrictions. Some commentators suggest that MEAs would usually take precedence over the GATT (where parties are members to both) as later-in-time treaties relating to the same subject-matter,³⁶ or as a specific treaty prevailing over a more general one (*lex specialis* under customary international law). Or the treaties may be considered to deal with different subject matters and therefore no inconsistency would arise. But where an MEA precedes the 1994 GATT/WTO agreements, under general rules of treaty interpretation, as between parties to both treaties, the earlier treaty may only continue to bind the parties to the extent that it is consistent with the later treaty. Commentators disagree about whether the re-publication of the 1947 GATT as an annex to the legally distinct 1994 GATT means that the former has been effectively 'readopted' as a 1994 treaty, and therefore should take precedence over most MEAs, or whether it remains a 1947 treaty and precedes most MEAs.³⁷

Governments are also divided on this issue. The WTO CTE has suggested that WTO members who are also parties to a MEA should first resolve their difficulties via the MEA procedures, and only then consider WTO action.³⁸ But where later MEAs are weak or cannot be negotiated because of state opposition, this response does not allay environmentalists' concerns because the WTO is then the appropriate dispute resolution forum. Several governments and WTO officials have acknowledged that some trade actions taken pursuant to or consistent with MEAs are vulnerable to challenge under the GATT/WTO agreements.

The CITES³⁹ is a pertinent example of an MEA which aims to ensure that wild-harvested and captive bred animals, and wild and artificially propagated plants, are protected from over-exploitation in international trade.⁴⁰ CITES is relevant to plant

³⁶ Vienna Convention on the Law of Treaties, art.30.

³⁷ J. Thomson, 'The impact of GATT and the proposed MAI on multilateral environmental agreements', *Environmental and Planning Law Journal*, vol.15, no.5, 1998, pp.307-320 at p.309; Charnovitz, 'A critical guide to the WTO's Report on Trade and Environment', at pp.349-350.

³⁸ WTO 'Second Ministerial Conference of the World Trade Organization: Press Pack' <<http://www.wto.org/>. Richard Tarasofsky argues similarly that trade and environment disputes should be referred to an MEA mechanism, the International Court of Justice or a new independent mechanism with sufficient legal authority and legitimacy: R.G. Tarasofsky, 'Ensuring compatibility between multilateral environmental agreements and GATT/WTO' in G. Handl, ed., *1996 Yearbook of International Environmental Law*, vol.7, Clarendon Press, Oxford, 1998, pp.52-74 at pp.73-74.

³⁹ CITES was adopted in 1973 and entered into force on 1 July 1975. As at June 1999 the treaty had 145 parties from six regions. The largest group of non-parties include small island developing states in Oceania, republics in the former Soviet Union, and the Lao Peoples' Democratic Republic: 'Communication from the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Communication from the CITES Secretariat, UN Doc. WT/CTE/W/119, para.7.

⁴⁰ CITES parties have defined 'artificially propagated' as including live plants grown from seeds, cuttings, divisions, callus tissues or other plant tissues, spores or other propagules under controlled conditions, and intensively manipulated by human intervention for the purpose of producing selected species or hybrids. It does not include flaked orchid seedlings: CITES, 'Resolution of the Conference of the Parties Conf. 9.18 (rev.): Regulation of Trade in Plants', *Ninth Meeting of the Conference of the Parties, Fort Lauderdale (United States of America)*, 7-18 November 1994.

genetic resources because CITES aims to ensure that species' populations are maintained throughout their range at a level consistent with their role in the ecosystem. CITES-listed plants include artificially cultivated plants and wild plants including cacti, orchids, ferns, medicinal plants, and timber species. The legality of unilateral action under CITES is questionable, however, because even though CITES permits stricter domestic measures than CITES specifies, the GATT/WTO agreements could be considered later in time.

CITES establishes an international co-operative framework for international trade regulation. Species that are listed on its three appendices can only be legally traded if relevant government import, export or re-export permits and certificates have been issued consistent with treaty requirements. The possession of relevant permits is usually monitored by customs, police or wildlife protection officers and sanctions apply for non-compliance. Regulated species are listed in the three CITES appendices. The most endangered species are listed in Appendix 1, and this includes all species threatened with extinction which are or may be affected by trade. In 1999, CITES had 310 species of plants, three sub-species and one plant population listed on Appendix I. CITES Appendix II lists species that may become threatened with extinction unless trade in them is subject to strict regulation. Appendix II also lists species which are so similar in appearance to Appendix I species that they should be subject to trade regulation in order that trade in Appendix I species can be brought under effective control. In 1999 there were 24,881 plant species, three sub-species and one population listed on Appendix II. Appendix III lists plant species which any party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation. Compliance with Appendix III is not required by CITES expressly although most states' national trade control authorities do comply as a matter of domestic practice. In 1999 five sub-species and one plant population was listed on Appendix III.⁴¹ The total number of species listed on the three CITES appendices in 1999 was about 4,000 animals and 30,000 plant species.⁴² In 1997 the CITES Plants Committee,⁴³ one of the CITES various subsidiary bodies,⁴⁴ agreed to review the plants listed on the CITES appendices. This process is continuing.⁴⁵

In addition to the required exchange of trade permits, CITES regulates trade by way of economic instruments. Positive trade measures, known as CITES 'Trade

⁴¹ 'Communication from the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Communication from the CITES Secretariat, UN Doc. WT/CTE/W/119.

⁴² World Trade Organization Committee on Trade and Environment, 'Communication from the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Communication from the CITES Secretariat, UN Doc. WT/CTE/W/119, 25 June 1999, para.3.

⁴³ UN Doc. WT/CTE/W/119, p.4, para.11.

⁴⁴ The CITES has four committees: a permanent Standing Committee of the Conference of the Parties, which is senior committee that reports to the Conference of the Parties. Other committees include an Animals Committee, a Plants Committee, an Identification Manual Committee and a Nomenclature Committee. The COP may also appoint additional committees as needed. The Convention is funded with obligatory and voluntary contributions, and non-state actors are closely involved in its work and provides significant funding: UN Doc. WT/CTE/W/119.

Facilitating Measures', provide economic incentives to parties to support the sustainable use of their wildlife resources. These include:

- permissible trade in Appendix II species provided it is not detrimental in the long term
- financial assistance from the CITES Secretariat for capacity building;
- legislative implementation and special studies;
- *ad hoc* trade approvals for trade in species so as to provide funding for conservation, capacity building and community-based programs;
- approval for special ranching or captive breeding projects, and the
- transfer of listed species from Appendix I to Appendix II to allow trade to within agreed quota levels.

In addition, specific trade measures can be adopted pursuant to CITES so as to discourage unsustainable trade. These measures are agreed to at the biennial COPs or by the CITES Standing Committee. These measures restrict trade in identified species to and from states that have not been complying with CITES requirements. The CITES Standing Committee can ask parties to refuse the import of any or all CITES specimens from, and the export and re-export of all or any CITES specimens, to identified parties. Parties including Bolivia, Thailand, Italy, Greece and Indonesia have been the subject of such Standing Committee recommendations. In 1999 CITES recommendations were in place concerning the suspension of trade concerning 68 species from thirteen countries. Whether measures instituted in compliance with non-binding recommendations of a CITES committee, or where CITES parties impose quantitative restrictions from exporters permitting unsustainable harvesting practices, are consistent with the GATT/WTO agreements is a hotly-debated issue.⁴⁶

The issue of trade-related environmental measures remained topical in the lead up to the November 1999 trade meetings in Seattle. Canada took the lead in international discussions on this issue, supported by the U.S. and Finland. Canada argued that environmental issues need to be included in the next trade round, and circulated a proposal that the relationship between MEAs and WTO rules should be clarified through an interpretative statement that addresses principles and criteria.⁴⁷ Japan also called for a review of some of the GATT exceptions (Article XX) with a view to introducing a link between MEAs and trade.⁴⁸ The UK said that governments must avoid forging new protectionist tools. Wherever possible, environmental regulation

⁴⁵ CITES Resolution Conf. 9.1.

⁴⁶ C. Wold, 'The relationship of CITES to the ITTA and ICCAT', *Paper presented as a submission attachment by the Human Society International — Australia to the Senate Rural and Regional Affairs Transport References Committee Inquiry into the Commercial Utilisation of Australian Native Wildlife*, March 1997.

⁴⁷ International Institute for Sustainable Development Report on the WTO's High-Level Symposium on Trade and Environment, 15-16 March 1999, accessed 16 October 1999 from <<http://sww.wto.org/>>. *Canadian Discussion Paper on Key Questions related to Trade and Environment* March 1999, <<http://www.wto.org/>>, 16 October 1999.

⁴⁸ International Institute for Sustainable Development Report on the WTO's High-Level Symposium on Trade and Environment, 15-16 March 1999, accessed 16 October 1999 from <<http://www.wto.org/>>.

must be multilaterally based and command the widest support. However, trade rules must not be used to frustrate legitimate environmental protection.⁴⁹ New Zealand said there was a need for clarification regarding non-parties to MEAs. The U.S. said it reserves its right to ensure that imports to the U.S. conform to the U.S. standards and to take measures even where there is lack of full scientific certainty.

The Canadian government argued that principles and criteria could guide WTO panels in resolving the legal uncertainties about which treaty should prevail. Relevant principles include whether the MEA was open to all countries and had broad-based international support, how precise the provisions are authorising trade measures, whether trade with non-parties to the MEA was permitted on the same basis as parties when non-parties provide environmental protection equivalent to that required by the MEA, and whether negotiators have explicitly considered the criteria for the use of trade measures in MEAs. The Canadian government also argued that MEA negotiators should follow specified criteria when determining the need for trade provisions. Trade measures should be the least preferred option, should be no more trade-restrictive than necessary to achieve the environmental objective concerned, and they should not constitute arbitrary or unjustifiable discrimination.⁵⁰ Less developed countries including India, Brazil, the Philippines and Thailand have opposed approaches to the GATT/WTO agreements which would give MEAs paramount status.⁵¹

Thus the relationship between environmental norms and trade rules are unclear and contested, with various states and stakeholders taking different positions. Generally, however, G77 states are prioritising access to trade over unilateral environmental pressures, and successfully so in accord with trade rules. The current Appellate Body's approach may encourage developed states to better pursue negotiated solutions to improve environmental governance. Agreements are more likely to be reached if the necessary finance and technology transfer is available to developing states to enable their transition to more sustainable development, as is recognised often in MEAs.

Corporate power, economic security discourse and the TRIPS

Having reviewed the growing influence of sustainable development discourse within GATT/WTO agreements, the chapter will now explore the influence of security discourse in WTO agreements, and particularly economic security discourse. This section explores the power that multinational business associations exercised successfully, to ensure that intellectual property rights issues were included in the Uruguay Round agreements. Although protecting the biotechnology companies' IPRs

⁴⁹ International Institute for Sustainable Development Report on the WTO's High-Level Symposium on Trade and Environment, 15-16 March 1999, accessed 16 October 1999 from <<http://www.wto.org>>.

⁵⁰ 'Canadian Position on the Use of Trade Measures in Multilateral Environmental Agreements (MEAs)', March 1999.

⁵¹ International Institute for Sustainable Development Report on the WTO's High-Level Symposium on Trade and Environment, 15-16 March 1999, accessed 16 October 1999 from <<http://www.wto.org>>.

was not the only concern motivating the corporate coalition promoting stronger IPRs, these were a relevant issue. As was explained in Chapter Two, IPRs for high-technology products are of increasing value in the global political economy and they can confer significant benefits on IPR holders if they are rigorously enforced. The U.S. government has been taking a particularly strong stand on IPR enforcement both bilaterally and multilaterally.

The TRIPS agreement is one of the most significant Uruguay Round agreements. It resulted largely from the mobilisation of corporate power and the influence of discourses of economic security for OECD governments particularly. The TRIPS agreement manifests a firm globalising governance which enables governments to invoke the dispute resolution procedures of the GATT/WTO to protect IPRs. It requires all WTO members to establish and effectively enforce minimum standards of protection for patents, copyrights, trademarks, trade secrets, and other forms of intellectual property. This is relevant to the concerns of the thesis, because IPRs over biotechnology 'products' including animals and plants are highly politicised internationally.

This inclusion of IPR issues on the Uruguay Round agenda was largely attributable to lobbying by various coalitions of corporations involved in knowledge-based industries (including chemical, pharmaceutical, information technology, luxury goods and entertainment),⁵² and the U.S. Chamber of Commerce. Several of these had senior representation on the U.S. Presidential Advisory Committee for Trade Negotiations (ACTN), whose Task Force on Intellectual Property recommended a broad-ranging IPR strategy to bring intellectual property protections within the GATT.⁵³ The two key transnational coalitions of trade associations included the International Intellectual Property Alliance which focused mainly on copyright,⁵⁴ and the Intellectual Property Committee (IPC) which sought stronger international and domestic patent law. The U.S.-based IPC worked with the Japanese Federation of Economic Organizations (Keidanren) and the European Union of Industrial and Employers' Confederations (UNICE) to develop a consensus position on the reforms sought. The IPC included representatives of more than ten leading multi-national corporations. Keidanren was a private, non-profit organisation representing many Japanese corporations, while UNICE represented 33 industrial and employer

⁵² See D. Purdue, 'Hegemonic TRIPS: world trade, intellectual property and biodiversity', *Environmental Politics*, vol.4, no.1, 1995, pp.88-107 at pp.96-97. One hundred and sixty-four companies in the U.S. responded to a Conference Board survey in the late 1980s that IPR reform was high on their lobbying agenda: Fowler, *Unnatural Selection: Technology, Politics, and Plant Evolution*, pp.176, 213, fn.19.

⁵³ Unpublished paper, Recommendations of the Task Force on Intellectual Property to the Advisory Committee for Trade Negotiations, March 1986, p.1, cited in P. Drahos, 'Global property rights in information: the story of TRIPS at the GATT', *Prometheus*, vol.13, no.1, pp.6-19 at p.18.

⁵⁴ Members included publishing, film, office, computer, music, chemical, automobile and other industry associations: S. Sell, 'The origins of a trade-based approach to intellectual property protection', *Science Communication*, vol.17, no.2, 1995, pp.163-185 at p.165.

federations from 22 countries.⁵⁵ Peter Drahos has described this process as ‘a consensus-building exercise of Herculean proportions’, which was achieved within six months in 1986.⁵⁶ These stakeholders sought a multilateral trade agreement with effective deterrents to international trade in goods which violated IPRs, and the adoption and implementation of adequate and effective IPR rules.⁵⁷ The Punta del Este Declaration which set the parameters for the Uruguay Round, as agreed in 1986, included trade-related aspects of IPRs generally, as one of the 15 areas to be negotiated within the Round.

Other characteristics of the discursive formation which facilitated the move to include IPRs in the Uruguay Round included a growing intensity of knowledge-based production, with science, and tertiary-trained employees playing an increasingly important role in agricultural and manufacturing production and provision of services, and with intellectual property (in the form of foreign patent applications, and the transfer of technology and the licensing of information) becoming a larger component of international trade. Acharya suggests further that biotechnology was included in the TRIPS agreement because the main biotechnology firms which often included agrochemical and pharmaceutical linked companies, were experiencing slumps in chemical innovation and saw biotechnology as a technology of increasing importance.⁵⁸ IPR violations were represented during the negotiations as ‘trade distortions’ since producers are unable to recover research, development and production costs when IPRs are violated, leading to lower output, less trade and higher prices for consumers.⁵⁹ It is also suggested that fair trade is distorted when consumers are deceived with products near-identical to ‘authentic’ products.⁶⁰ Oddi, on the other hand, argues that patents are ‘technological protectionism’ when reciprocal patents are obtained in countries other than the country of manufacture.⁶¹

The U.S. government may have been particularly receptive to complaints of IPR violations because of academic and industry concerns in the 1980s that the U.S. was a hegemonic economy in decline. Since the 1970s the U.S. has been strengthening trade

⁵⁵ Intellectual Property Committee (U.S.A.) Keidanren (Japan), UNICE (Europe), *Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities*, Trilateral Secretariat, 1988, p.4.

⁵⁶ P. Drahos, ‘Global property rights in information: the story of TRIPS at the GATT’, at pp.12-13.

⁵⁷ The IPRs sought included patents, trademarks, designs, copyright, semiconductor chip layout and proprietary information: Intellectual Property Committee (U.S.A.), Keidanren (Japan), UNICE (Europe), *Basic framework of GATT provisions on intellectual property: statement of views of the European, Japanese and United States Business Communities*, Unpub. report, 1988, p.17.

⁵⁸ R. Acharya, ‘Patenting of biotechnology: GATT and the erosion of the world’s biodiversity’, *Journal of World Trade*, vol.25, no.6, 1991, pp.71-87.

⁵⁹ M.A. Leffer, ‘Protecting United States intellectual property abroad: toward a new multilateralism’, *Iowa Law Review*, no.76, 1991, pp.273-308 at pp.275-276, 277.

⁶⁰ Intellectual Property Committee (U.S.A.), Keidanren (Japan), UNICE (Europe), *Basic framework of GATT provisions on intellectual property: statement of views of the European, Japanese and United States Business Communities*, Unpub. report, 1988, p.12.

⁶¹ A.S. Oddi, ‘The international patent system and Third World development: reality or myth?’, *Duke Law Journal*, 1987, pp.831-878 at p.834.

legislation to ensure better compliance with IPRs⁶² and has negotiated new bilateral and regional agreements on IPRs.⁶³ This move to strengthen IPRs followed the increasing prevalence of arguments in the international relations and international political economy literature about U.S. decline.⁶⁴ The explanations for this alleged decline were variable, but included trade barriers to U.S. exports, technological diffusion, and the violation of U.S. IPRs particularly within South-east and East Asian economies.⁶⁵ IPR violations were estimated by the U.S. International Trade Commission to be costing industry US\$61 billion in 1986.⁶⁶ Irrespective of the strength of the empirical evidence on the indicators, these concerns are likely to have been a contributing factor for securing further GATT reforms to include intellectual property rights.⁶⁷ The U.S. chose the GATT fora to supplement its bilateral PR reform agenda, because the enforcement mechanisms under TRIPS are potentially more effective than those available under instruments administered by other multilateral institutions such as the WIPO.⁶⁸

A group of developing countries, led by India and Brazil, opposed having IPR issues brought within the GATT, preferring the jurisdiction of WIPO and UNESCO under existing instruments. But the G77 did not mount sufficiently strong opposition to prevent its inclusion, perhaps because of the spectre of bilateral U.S. retaliatory action

⁶² The U.S. used trade policy and legislation to promote compliance with its IPR standards both by other states and domestic traders. See for example the *Tariff Act 1930* (19 USCS @ 1337, 1997), *Trade Act 1974* (19 USCS @ 2114a, 1997), and the *Omnibus Trade and Competitiveness Act of 1988* Pub L No 100-418 s1101, 102 Stat. 1107 (1988). See generally: R. Marlin-Bennett, 'International intellectual property rights in a web of social relations', *Science Communication*, vol.17, no.2, 1995, pp.119-136 at p.125.

⁶³ Such as the North American Free Trade Agreement between the U.S., Canada and Mexico and the proposed bilateral agreement between Ecuador and the U.S. on the protection of IPRs: S. van de Wateringen, 'U.S.A. pushes Ecuador to sign IPR agreement', *Biotechnology and Development Monitor*, no.33, December 1997, pp.20-22.

⁶⁴ R. Gilpin, *U.S. Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment*, Basic Books, New York, 1975; R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton University Press, Princeton, 1984; R. Gilpin, *The Political Economy of International Relations*, Princeton University Press, Princeton, 1987; P. Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000*, Random House, New York, 1980.

⁶⁵ R. Acharya, 'Patenting of biotechnology: GATT and the erosion of the world's biodiversity', *Journal of World Trade*, vol.25, no.6, 1991, pp.71-87 at p.72. Gilpin, *The Political Economy of International Relations*, pp.201-202; E.F. Vogel, 'Pax Nipponica?', *Foreign Affairs*, vol.64, no.4, 1986, pp.752-767.

⁶⁶ Fowler, *Unnatural Selection: Technology, Politics, and Plant Evolution*, p.177.

⁶⁷ P. Drahos, 'Global property rights in information: the story of TRIPS at the GATT', at pp.7-8.

⁶⁸ The GATT-TRIPS agreement (Part III) strengthens significantly the obligations on states to protect IPRs within domestic laws and Arts.XXII and XXIII of the GATT-TRIPS agreement, as applied by the Dispute Settlement Understanding, apply to consultations and the settlement of disputes under the GATT-TRIPS agreement. Art.XXIII 1(b) and 1(c) do not apply for five years from the date of entry into force of the WTO Agreement however: art.64 GATT-TRIPS. Annex 2 to the WTO Agreement: the Understanding on Rules and Procedures Governing the Settlement of Disputes provides dispute settlement procedures for disputes under several GATT/WTO agreements, including those arising under the GATT-TRIPS agreement. The Understanding on ... the Settlement of Disputes includes processes such as good offices, mediation, conciliation and arbitration, independent government and non-government panels, appellate review, compensation, and the suspension of concessions: Understanding on Rules and Procedures Governing the Settlement of Disputes. See also: R. Kaplinsky, 'Industrial and intellectual property rights in the Uruguay Round and beyond', *The Journal of Development Studies*, vol.25, no.3, 1989, pp.373-400 at pp.373-374, 391.

under domestic trade law, and because of negotiating linkages made in other GATT/WTO agreement negotiations.⁶⁹ It has also been suggested that delegations from G77 countries were relatively under-resourced compared with those from economies with established biotechnology sectors and may have been unaware of the implications of the expansion of that biotechnology sector and of enhancing the intellectual property protections available to it under the TRIPS agreement. Delegations in the 15 negotiating groups were stretched across many issue areas and negotiating fora, and many had economics rather than legal expertise in intellectual property issues.⁷⁰

Negotiations on draft texts for the TRIPS agreement began seriously in the second quarter of 1990 with five drafts being circulated by the EC, the United States, 12 developing countries, Switzerland and Japan.⁷¹ These drafts were combined into a composite draft and subsequent negotiations enabled a chairman's text to be tabled in July 1990. Most disagreement over these drafts concerned patent issues, but negotiations produced sufficient consensus to enable a draft agreement to be included with the December 1991 Draft Final Act. Only two minor changes concerning semiconductor technology and dispute settlement were made before the text was adopted at Marrakesh.⁷²

Governments from the G77 did secure some concessions within the TRIPS agreement. One of its objectives, for example, is that IPRs should contribute to the promotion of technological innovation, and technology transfer and dissemination, so that both producers and users of technological knowledge benefit in a way which is conducive to social and economic welfare, and rights and obligations are balanced.⁷³ By far the largest majority of patent applications lodged in other countries are lodged by residents of G7 countries: the United States, Germany, the United Kingdom, and Japan in that order.⁷⁴

The WTO Committee on Trade and Environment (CTE) has taken the view that the TRIPS agreement will facilitate access to and transfer of environmentally-sound technology and products because the availability of protections such as patents, trade secrets and protection for layout-designs will provide an incentive for investment in the

⁶⁹ B. Dhar and C.N. Rao, 'Dunkel draft on TRIPS: complete denial of developing countries' interests', *Economic and Political Weekly*, vol.XXVII, no.6, 1992, pp.275-278 at p.275; P. Drahos and R.A. Joseph, 'Telecommunications and investment in the great supranational regulatory game', *Telecommunications Policy*, vol.19, no.8, 1995, pp.619-635 at p.626.

⁷⁰ Interviews with delegations from India, Indonesia, Malaysia, Mexico, the Netherlands, the Philippines, the USA and Zimbabwe suggested that negotiating delegations lacked both expertise and time to conduct negotiations from a strong position J. van Wijk, 'Intellectual property protection for plants: possible impact on developing countries', *Biotechnology and Development Monitor*, no.4, September 1990, pp.3-7 at pp.5-6.

⁷¹ Documents MTN.GNG/NG11/W/68, 70, 71, 73, and 74: World Trade Organization Committee on Trade and Environment, *Environment and TRIPS*, 8 June 1995, WT/CTE/W/8, p.24.

⁷² UN Doc. WT/CTE/W/8, p.24.

⁷³ Art.7.

⁷⁴ IP Australia, *Industrial Property: IP Activity in Australia and the Asia-Pacific Region*, IP Australia, Canberra, 1998, p.18, table 2; C. Juma, *Intellectual Property Rights and Globalization: Implications for Developing Countries*, Science, Technology and Innovation Discussion Paper No.4, Center for International Development, Harvard University, Cambridge, 1999, p.3.

development of new environmentally friendly technology. Other factors are likely to be influential, include the economic and political stability of the host country, its technological and infrastructure facilities, access to finance, and labour skills.⁷⁵ The agreement also includes provisions for compulsory licensing of technology for use without the patent-holder's consent if the rights holder is not prepared to grant a voluntary licence on reasonable commercial terms and conditions within a reasonable length of time.⁷⁶ These provisions are likely to be used rarely, however.⁷⁷ The agreement also includes provisions enabling states to respond to anti-competitive practices in commercial licenses.⁷⁸

These provisions, while potentially beneficial to G77 governments, are not entirely consistent with the CBD's articles that promote benefit-sharing and recognition of the value of traditional knowledge, innovations and practices, or its provisions concerning technology transfer.⁷⁹ Under the CBD, the transfer of technologies subject to IPRs should recognise and be consistent with the adequate and effective protection of IPRs. Contracting parties are also to apply appropriate legislative, administrative or policy measures so that the private sector can facilitate access to, jointly develop and transfer technology, and make use of the genetic resources provided by another party.⁸⁰ Developed country members under the CBD are obliged to transfer or facilitate the transfer of technology to developing countries 'under fair and most favourable terms where mutually agreed, and, where necessary, in accordance with the financial mechanism established by articles 20 and 21'.⁸¹

The issue of the relationship between the TRIPS agreement and the CBD remains vexed for some political actors. Some NGOs argue that because the TRIPS does not specifically recognise the value of traditional knowledge, innovations and practices, it is narrower than the CBD and informal innovation may not be rewarded or protected under TRIPS unless its patent provisions are amended. This may be particularly important in the context of pharmaceutical patents or plant patents, where plant material that has been developed for millennia in communities can be included in 'inventions' currently without acknowledgment under the TRIPS patent provisions. The alleged inequity of this was discussed in Chapters Two, Three and Four. On the other hand, the United States Assistant Trade Representative for Services, Investment and Intellectual Property, Joseph Papovich, takes the view that the WTO-TRIPS agreement and the CBD are not in conflict and that both can be implemented in a mutually supportive

⁷⁵ UN Doc. WT/CTE/W/8; *Factors Affecting Transfer of Environmentally-sound Technology (Note by the Secretariat of the WTO)*, UN Doc. UNEP/CBD/COP/3/Inf.10.

⁷⁶ Art.31, 27(1) art.5A of the Paris Convention (incorporated by virtue of art.2(1) of the TRIPS agreement: UN Doc. WT/CTE/W/8, pp.19-20.

⁷⁷ Juma, *Intellectual Property Rights and Globalization: Implications for Developing Countries*, p.14.

⁷⁸ Art.8(2), 30, 31, 40 of the TRIPS agreement.

⁷⁹ Arts.15, 16, 19, 20 and 21 of the CBD.

⁸⁰ Art.16.

⁸¹ Art.16(2).

manner.⁸² Others also acknowledge that many of the TRIPS provisions, including those concerned with copyright, trademarks, geographical indications, appellations of origin, industrial designs, patents and the protection of undisclosed information can be used to protect traditional knowledge, informal innovation and cultural property as forms of IPRs. This is discussed further below when human rights discourse and article 27.3 of the TRIPS agreement is examined.

The power of intellectual property rights

The powers that are available to contracting parties to the GATT/WTO agreements to ensure that the provisions of those agreements are complied with were significantly enhanced by the Uruguay Round agreements. Under the former GATT, a right of consultation between parties existed, and a dispute settlement procedure could be invoked if a GATT-related benefit was impaired or nullified by another GATT member.⁸³ Parties could make written representations about the concern and had to be provided with 'sympathetic consideration' in return. Continuing disputes could be adjudicated by the contracting parties. Following various consultations, and if the dispute was serious, concessions or obligations under the GATT could be suspended between identified parties. A subsequent right of withdrawal from the GATT was also available to the party which had been suspended from the concession or obligation.

The Uruguay Round resulted in a significant strengthening of these GATT/WTO dispute settlement procedures, except in relation to alleged breaches by least-developed country members.⁸⁴ A new Dispute Settlement Understanding (DSU) governs the settlement of disputes arising under most of the Uruguay Round agreements.⁸⁵ This Understanding is administered by the WTO's Dispute Settlement Body (DSB). The WTO dispute resolution processes now include preliminary consultations, investigations of allegations of non-compliance, good offices conciliation and mediation, the suspension of trade concessions or other obligations in serious situations, panel determinations, and rights of appeal to a standing Appellate Body (sometimes dubbed the 'trade supercourt').⁸⁶ The DSB establishes independent panels to make reports on disputes which cannot be resolved more informally, and the DSB can approve panel and Appellate Body reports by consensus.⁸⁷ The Appellate Body can

⁸² Email communication from Stas Burgiel — BIONET Information Services <bionet2@igc.org> to: 'List-Server, BIODIV-CONV' <biodiv-conv@igc.apc.org>, 'TRIPS and living organisms — letter from J. Papovich, USTR', 24 February 2000.

⁸³ Arts.22 and 23.

⁸⁴ Art.24. See generally: G.E. Evans, 'Intellectual property disputes and the supercourt of the World Trade Organization: the case for a new model of dispute resolution', *Prometheus*, vol.16, 1998, pp.395-410.

⁸⁵ Including the Agreement Establishing the World Trade Organization, Agreements on Trade in Goods, General Agreement on Trade in Services, and the TRIPS agreement (Appendix 1) and including Appendix 4 agreements as agreed by the parties to them: Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 December 1993, reproduced in *International Legal Materials*, vol.33, 1994, pp.112-135.

⁸⁶ Arts.2-5: Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁸⁷ Consensus decision-making occurs if no member present when a decision is taken, formally objects

hear appeals on matters of law from panel cases, and issue determinations and make recommendations which will usually become binding on the parties,⁸⁸ and which can be enforced with trade sanctions.⁸⁹

Thus the TRIPS agreement embodies a globalising political and juridical discourse of liberal governance and private property rights. It requires that states' parties create domestic intellectual property laws which are very similar to those which are in place in the most industrialised economies. Minimum national standards are prescribed so as to promote harmonisation. Economies in transition have up to five years to implement the TRIPS agreement, developing countries have between five and ten, and the least developed countries have up to ten.⁹⁰ Developing countries' requests for more time to bring their laws into compliance have been declined by governments such as the United States, which has already invoked WTO dispute resolution consultations with Argentina and Brazil to encourage compliance with the TRIPS agreement's patent requirements.⁹¹ This compliance requirement creates significant burdens for G77 governments who have rarely had strong domestic legislation concerned with IPRs, including over plant materials. In 1995 only about 27 mainly developed countries had plant breeders rights legislation and were members of UPOV,⁹² and in 1988 more than 44 countries expressly excluded plant varieties from patent legislation.⁹³

These more formal dispute resolution procedures may have implications for plant-related IPRs although such a dispute has not arisen yet. But the significant power that inheres in this punitive approach was demonstrated in a Canadian-Australian trade dispute. In February 2000 a WTO panel found that Australia's quarantine regulations on salmon imports were too restrictive.⁹⁴ In response Canada threatened to impose tariffs on a range of Australian exports including oranges, lemons, ginger, shoes and cotton. The federal government has 60 days from the date of the panel decision to negotiate a resolution of the dispute.⁹⁵ Although the imposition of sanctions was

to the proposed decision: Understanding on Rules and Procedures Governing the Settlement of Disputes, p.114, fn.1.

⁸⁸ Members of the Appellate Body must be 'persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally': art.17(3). The DSB must adopt the appellate body report unless within 30 days it decides by consensus not to adopt it: art.17(4).

⁸⁹ See generally the 'Understanding on Rules and Procedures Governing the Settlement of Disputes', *International Legal Materials*, vol.33, 1994, p.114.

⁹⁰ Art.65.

⁹¹ Juma, *Intellectual Property Rights and Globalization: Implications for Developing Countries*, p.6.

⁹² J. van Wijk, 'The impact of plant breeders' rights in developing countries: results of a study in five Latin American countries', in J. van Wijk and W. Jaffé, eds, *Intellectual Property Rights and Agriculture in Developing Countries* University of Amsterdam, Amsterdam, 1996, pp.8-16 at p.8.

⁹³ S.K. Verma, 'TRIPs and plant variety protection in developing countries', *European Intellectual Property Review*, vol.6, 1995, pp.281-289 at p.281.

⁹⁴ *Australia — Measures Affecting Importation of Salmon—Recourse to article 21.5 by Canada — Report of the Panel*, UN Doc. WT/DS18/RW.

⁹⁵ A. Clennell and J. Israel, 'Lamb exporters face sanctions from Canada', *The Sydney Morning Herald*, 21 February 2000, p.4.

averted following further negotiations, the dispute nevertheless demonstrated the coercive capacity of the new dispute resolution process.

It is this powerful enforcement capacity which is a relatively new development in international law and which has generated concern for some lawyers because of the absence of access and due process guarantees, particularly for G77 parties.⁹⁶ On the other hand, as noted above, several GATT and WTO dispute-resolution decisions have successfully constrained the power of the United States' government to restrict imports from developing states, indicating that developing country governments were not unduly disadvantaged during the former and current processes.

TRIPS and research subjectivities

The enhancement of IPRs under the TRIPS agreement is likely to have a constitutive and pervasive effect on the governance of research and production globally, and on the subjectivity of researchers involved in activities to which IPRs will attach. This exemplifies Foucault's argument that power has macro- and micro-level implications, and that normative power can engender change in individuals' practises and beliefs.⁹⁷ The TRIPS agreement and its implementing legislation will in effect 'constitute' subjects, as domestic intellectual property laws in much of the world adopt the TRIPS' minimum requirements, and as those working in the biotechnology sector interact with those laws. The TRIPS agreement is indicative of a governance trend which is drawing subjects closer within a globalising liberal juridical order rather than encouraging a continuation of legal pluralism with respect to IPRs. IPRs over biological material in some form will increasingly become the norm, with limited protections available to protect the interests of other stakeholders in natural or cultural biological resources. 'Northern' IPR regimes are the model being propagated,⁹⁸ with some of the most significant differences between IPR laws in the European Union and the U.S. being resolved in favour of greater harmonisation.⁹⁹

Researchers in the public and private sector are likely to be affected by the spread of IPRs as science will fall subject to increasing IPR disciplining. Research with any potential commercial applications will increasingly be managed so that IPRs are not placed at risk, and this will involve an increasingly juridical or legalistic approach to science and research. The way that researchers interact may increasingly reflect IPR considerations. New documentation procedures may be introduced, as the commercial interests of research donors will need to be safeguarded. The utility of biological research may increasingly be assessed in commercial terms, with the boundaries

⁹⁶ G.E. Evans, 'Intellectual property disputes and the supercourt of the World Trade Organization: the case for a new model of dispute resolution' *Prometheus*, vol.16, 1998, p.395.

⁹⁷ As explained in Chapter One, Foucault focused on norms 'regulating' individuals attitudes to issues such as mental illness and sexuality.

⁹⁸ D. Purdue, 'Hegemonic TRIPS: world trade, intellectual property and biodiversity', *Environmental Politics*, vol.4, no.1, 1995, pp.88-107.

⁹⁹ For example, in 1998 the EU adopted the 'life patents' directive (98/44/EEC) which brought the EU law closer into line with U.S. law.

between pure and applied research becoming increasingly blurred. Property disputes over IPRs may escalate with trade secrets or patents increasingly becoming the preferred safeguards. Prospective patents may also be seen as a necessary lure for industry funding.¹⁰⁰ Butler, for example, suggests that the effect of IPRs on public plant breeding institutions in the United States has been to inhibit germplasm exchange and the flow of new knowledge, and to erode the distinction between pure and applied research and concepts of 'scientific integrity'.¹⁰¹

This trend towards an increasing regulation and disciplining of researching subjects concerning IPRs is already apparent. The government of India, for example, has issued guidelines to tertiary sector researchers working with biological resources, advising that until access and benefit-sharing legislation is in place special measures shall be taken to protect potential IPRs. The guidelines involve the securing of technology transfer, no foreign IPR applications over the biological material, no commercialisation of biological research without a fresh agreement, no transfer of genetic material to other parties, and guarantees that Indian scientists be involved in the projects involving Indian genetic materials.¹⁰² IPRs have also had a constitutive effect on private sector seed distributors and IPR owners in Argentina. Plant breeders in Argentina organised collectively to better enforce their IPRs and to reduce black market seed distribution after plant breeders' rights were introduced in that jurisdiction.¹⁰³

Human Rights Discourse

This section examines the weak constitutive influence of human rights discourse within GATT/WTO fora. It argues that Farmers' Rights, the rights of indigenous peoples and rights based on gender have had little influence in GATT/WTO deliberations, except in discussions of the implications and implementation of article 27.3 of the TRIPS agreement. The G77 have successfully resisted the inclusion of a 'social clause' within GATT/WTO agreements. Such a clause could permit an examination of the social impacts of trade liberalisation, including for the maintenance of cultural diversity, promoting social equity, and non-discrimination, depending on its terms.

Proposals for a social clause have been asserted by many developed country governments, and resisted by the G77, in GATT and WTO deliberations since the mid-1990s. The social clause proposal aims to link the human rights standards of some of the most highly ratified International Labour Organization (ILO) Conventions with the

¹⁰⁰ B. Sherman, 'Governing science: patents and public sector research', *Science in Context*, vol.7, no.3, 1994, pp.515-537.

¹⁰¹ L.J.B. Butler, 'Plant breeders' rights in the U.S.: update of a 1983 study' in van Wijk and Jaffé, eds, *Intellectual Property Rights and Agriculture in Developing Countries*, pp.17-33 at p.30.

¹⁰² S.P. Sagar, 'India: Govt fences research pacts to shield bio resources', *Reuters* GNR00008.htm, 1998.

¹⁰³ J. van Wijk, 'The impact of plant breeders' rights in developing countries: results of a study in five Latin American countries' in J. van Wijk and W. Jaffé, eds, *Intellectual Property Rights and Agriculture in Developing Countries: Proceedings of a seminar on the impact of plant breeders' rights in developing countries, March 7-8, 1995, SantaFe de Bogota, Colombia*, University of Amsterdam, Amsterdam, 1996, pp.8-16 at p.10.

GATT and WTO agreements. But it continues to falter. Many governments say they prefer to strengthen the existing UN human rights machinery and to improve inter-agency co-operation and co-ordination, rather than to amend the GATT/WTO agreements to include human rights exceptions to free trade. This is despite a flurry of activity to mainstream human rights throughout the United Nations (UN) following the 1993 Vienna World Conference on Human Rights and the 1995 Fourth World Conference on Women.¹⁰⁴

Proposals for a GATT/WTO social clause have been supported by the governments of the United States (U.S.), France, Belgium, Mexico, the Netherlands, the European Parliament,¹⁰⁵ Scandinavian governments,¹⁰⁶ and peak international trade unions organisations.¹⁰⁷ Various academics also support the idea.¹⁰⁸ The U.S. and the European Union (EU) particularly, wish to expand the GATT/WTO agenda to include labour standards, and competition policy and corruption, but G77 countries are resisting this on the grounds that increasingly globalised standards erode national sovereignty and comparative advantage in selected areas. The U.S. supported by the EU, had tried unsuccessfully to include the issue in the Uruguay Round negotiations in 1986, and on the GATT Council agenda in 1990. In April 1994 at the GATT Ministerial Meeting in Marrakesh, the U.S. and France failed in their bid to have a social clause included in the WTO agreement.¹⁰⁹ Labour standards were not mentioned in the Marrakesh Ministerial Declaration, but were referred to in the chairman's list of possible future items for the WTO program.

In December 1996 debate about the social clause was effectively stymied by

¹⁰⁴ *Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System Related to the Coordinated Follow-up to and Implementation of the Vienna Declaration and Programme of Action: Report of the Secretary-General*, UN Doc. E/1998/60; *Follow-up to and Implementation of the Beijing Declaration and Platform for Action: Report of the Secretary-General*, UN Doc. E/CN.6/1998/2.

¹⁰⁵ The incorporation of human rights standards within international trade law has been discussed in the European Parliament periodically since the early 1980s. See for example: Committee on Foreign Affairs, Security and Defence Policy, Sub-committee on human rights, 'Public Hearing on the Social Clause: Human Rights Promotion or Protectionism? Brussels 17 and 18 June 1997: Summary Record of Presentations', <<http://www.europarl.eu.int/dg7/hearings/sc1b/soclause/en/doc4.htm>>. In 1994 the Committee on External Economic Relations endorsed a resolution which *inter alia*, called for a ban on imports of goods produced with child labour, and for an amendment to art. 20(e) of the GATT: European Parliament, *Report of the Committee on External Economic Relations on the Introduction of a Social Clause in the Unilateral and Multilateral Trading System (André Sainjon, Rapporteur)*, Bruxelles, 6 January 1994, DOC_EN\RR\243\243101, PE 205.101/fin.fr.-OR.fr. at pp.3, 4-6.

¹⁰⁶ V.A. Leary, 'The WTO and the social clause: post-Singapore', *European Journal of International Law*, vol.1, 1997, pp.118-122 at p.120.

¹⁰⁷ Including the International Confederation of Free Trade Unions (ICFTU), and the European Trade Union Confederation (ETUC). But some members of these umbrella organisations oppose the social clause, such as the Indian National Trade Union Congress: N. Haworth and S. Hughes, 'Trade and international labour standards: issues and debates over a social clause', *The Journal of Industrial Relations*, vol.39, no.2, 1997, pp.179-195 at p.190.

¹⁰⁸ S. Charnovitz, 'The World Trade Organization and social issues', *Journal of World Trade*, vol.28, no.5, 1994, pp.17-33; E. de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization', *Human Rights Quarterly*, vol.17, 1995, pp.443-462.

¹⁰⁹ Tripartite Working Party on Labour Standards, *Report on Labour Standards in the Asia-Pacific*

opposition from various G77 states and the United Kingdom at the first WTO Ministerial Conference in Singapore. The governments of Indonesia, Malaysia, Brazil, Egypt, India and Pakistan were amongst those which successfully opposed the social clause idea. Instead, governments renewed their commitment to compliance with the international labour standards promoted by the ILO. They agreed that the WTO and ILO Secretariats should continue to collaborate on those standards. They also agreed that labour standards should not be used for protectionist purposes, and that countries with a comparative advantage, such as low-wage developing countries, should not lose that advantage.¹¹⁰ Although some developing countries opposed the inclusion of human rights matters in the declaration at all, the view that the issue should be raised, but left to the ILO, prevailed.

The U.S. has not abandoned the issue, however. U.S. President Clinton at the second WTO Ministerial Meeting in May 1998 called on the WTO to better integrate labour and environmental standards. In October 1999 the U.S. tabled a proposal with the WTO that at the Seattle meeting, WTO Ministers should agree to establish a WTO Working Group on Trade and Labour to discuss a wide range of trade-related labour standards and other social issues. This reflects a principal trade negotiating objective of the U.S. government, which is to promote respect for workers' rights and to secure a review of the relationship between workers' rights and the GATT and related instruments.¹¹¹ Developing countries rejected the proposal in its entirety, arguing that it had been agreed in 1996 that the ILO was the appropriate forum to discuss these issues.¹¹²

But this U.S. commitment to workers' rights is a very partial one. The U.S. has not been strongly committed to the recognition and implementation of Farmers' Rights in the FAO's CGRFA, for example. As discussed in Chapters Two and Four, Farmers' Rights can be seen as a human rights' issue involving compensation and incentives for traditional farmers' skill and labour contribution to the conservation and development of plant genetic resources for food and agriculture. Farmers' Rights, and the recognition of the value of the roles played by generations of men and women farmers and plant breeders, and by indigenous and local communities, in conserving and improving plant genetic resources are pressing examples of the central linkages between human rights and sustainable development. But to date these have not been brought squarely within the social clause debate.¹¹³

Farmers' Rights had not been raised at all during the TRIPS negotiations, which began in 1986. Farmers' Rights were raised in the FAO in 1985 and resolutions on

Region, AGPS, Canberra, 1996 at p.9.

¹¹⁰ World Trade Organization Ministerial Conference *Singapore Ministerial Declaration* adopted 13 December 1996, UN Doc. WT/MIN(96)/DEC, para.4.

¹¹¹ *Omnibus Trade and Competitiveness Act of 1988*.

¹¹² Khor, M., 'Third World Network Feature: U.S. proposal on labour splits WTO', <hurinet-development@mail.comlink.apc.org>, 24 November 1999.

¹¹³ See generally, J. Sutherland 'TRIPS, cultural politics and law reform', *Prometheus*, vol.16, 1998, p.291.

Farmers' Rights had been agreed to in 1989 and 1991 in FAO conferences, but this G77 position was not carried across into other UN fora. A WTO officer suggests that the TRIPS agenda had been established by 1988 and effectively concluded in 1991, and that Farmers' Rights were never raised.¹¹⁴

The core standards which most supporters of the social clause agree should be linked with GATT and WTO processes and remedies, are found in various ILO Conventions that have a high ratification rate. These Conventions promote: freedom of association, collective organisation and bargaining;¹¹⁵ freedom from forced and compulsory labour;¹¹⁶ non-discrimination in employment;¹¹⁷ and the abolition of exploitative forms of child labour.¹¹⁸ Many of the obligations in ILO instruments are also found in the six better-known UN human rights' treaties although the linking of the social clause with these standards is less often advocated.¹¹⁹ Proponents of a social clause also sometimes include ILO occupational health and safety, and minimum wage fixing conventions.¹²⁰ But customary international norms,¹²¹ the ILO Convention concerning the rights of tribal and indigenous peoples,¹²² the 20 or so international environmental agreements with trade provisions, and the International Undertaking on Plant Genetic Resources tend not to be brought within the social clause debate.

Human rights discourse and the TRIPS agreement

Many of the Articles in the TRIPS agreement may be relevant authority for the introduction of mechanisms in domestic law that aim to protect and promote the

¹¹⁴ A. Otten, 'Viewpoint from the WTO' in M.S. Swaminathan, S. Padamsee and M. Harley, eds, *Agrobiodiversity and Farmers' Rights: Technical Consultation on an Implementation Framework for Farmers' Rights*, M.S. Swaminathan Research Foundation, Madras, 1996, pp.44-50 at p.49.

¹¹⁵ ILO Convention 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, 122 ratifications at November 1998; ILO Convention 98, Right to Organise and Collective Bargaining Convention, 1949, 139 ratifications: <<http://www.ilo.org>>.

¹¹⁶ ILO Convention 29, Forced Labour Convention, 1930, 147 ratifications; ILO Convention 105, Abolition of Forced Labour Convention 1957, 133 ratifications.

¹¹⁷ ILO Convention 111, Discrimination (Employment and Occupation Convention), 1958, 130 ratifications.

¹¹⁸ ILO Convention 138, Minimum Age Convention 1973, 66 ratifications.

¹¹⁹ The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CROC); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The number of states' parties to these instruments in 1996 were: ICCPR 134, ICESCR 134, CERD 147, CEDAW 153, CAT 98, CRC 187: *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System: Note by the Secretary-General*, UN Doc. E/CN.4/1997/74, para.37, Table 1.

¹²⁰ de Wet, 'Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization', at p.453.

¹²¹ Relevant customary human rights norms for the governance of plant genetic resources include prohibitions against genocide, slavery, and systematic racial discrimination. James Anaya argues that the rights of indigenous peoples are also protected by customary international law: S.J. Anaya, *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996 at pp.51-58, 73-112.

¹²² International Labour Organization, *ILO Convention 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, ratified by 13 countries as at 25 May 1998.

knowledge, innovations and practices of indigenous men, women and peoples, farmers, and local communities, although the practical ability of such beneficiaries to effectively exercise such rights is highly doubtful. Relevant articles are concerned with copyright, trademarks, geographical indications, appellations of origin, industrial designs, patents and the protection of undisclosed information. Member states may also legislate to offer stronger domestic protections for intellectual property rights provided they are consistent with the minimum standards in TRIPS agreement.¹²³ The TRIPS patent provisions have become a focus for many IPOs and NGOs' human rights lobbying in GATT/WTO fora.

Article 27(1) of the TRIPS agreement requires that patents be available in domestic law for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application. But article 27 also provides that plants, animals and 'essentially biological' processes for the production of plants or animals can be excluded from patent legislation provided an 'effective' *sui generis* system of IPR protection or a mixed *sui generis* patent system is introduced.

Article 27 says:

1. ... [... subject to various Articles] patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.
2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.
3. Members may also exclude from patentability: ...
 - (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

While the limited, publicly available records of the negotiations on Article 27 are not of much assistance in the interpretation of its terms, Leskien and Flitner suggest that Article 27 has several minimum requirements.¹²⁴ These include the general obligations

¹²³ Art.1(1) recognises that members may implement more effective protection of IPRs in their domestic law provided the articles of TRIPS are not contravened. Members may also choose the most appropriate method of implementing the agreement within their own legal system and practice.

¹²⁴ There is a brief discussion of the negotiating positions on patents and art.27 in a WTO paper on trade and the environment but it casts no light on what was understood by the term *sui generis*. UN Doc. WT/CTE/W/8, pp.24-26.

of national treatment and most-favoured-nation treatment. It also requires that an effective remedy must also be available in the event of a breach of any *sui generis* right which is created consistent with TRIPS.¹²⁵ For example, a WTO officer has suggested that if states' parties were to legislate in conformity with the 1978 UPOV Convention, a legal challenge determined by a GATT dispute settlement panel would not be likely to succeed.¹²⁶ Others suggest that the *sui generis* system must include an IPR component, so that it enables the rights-holder to exclude others from specified uses of the protected material, or requires that payment be made in respect of such uses.¹²⁷ This latter minimum requirement is likely to generate continuing opposition from NGOs and IPOs and others who are critical of IPR regimes over living material.

In December 1998 the Council for TRIPS asked those states that were already obliged to implement article 27.3 of the TRIPS agreement to provide information on that article was treated in their national law. A questionnaire was circulated to that effect.¹²⁸ The Council discussed article 27.3(b) of the TRIPS agreement at a meeting held from 20-22 October 1999. At the meeting, the U.S. argued that their patent-based approach was effective and could be adopted by other states. It also warned that any *sui generis* model for plant variety protection not modelled on UPOV 1991 would need to be looked at on a case-by-case basis. The U.S. also said that the TRIPS and the CBD were consistent with each other. The U.S. position was largely supported by Switzerland, Canada, Japan, Australia, and Korea. As noted in Chapter Two, one of the most important international industry organisations of plant breeders, ASSINSEL, also takes this position. ASSINSEL argues that its members 'unanimously' favour strong intellectual property protection 'to ensure an acceptable return on research investment and to encourage further research efforts'. UPOV 1991 is ASSINSEL's preferred regime for plant varieties, and patents for biotechnological inventions.¹²⁹

India also tabled a paper at the 1999 meeting, but focused on aspects of traditional knowledge and particularly the difficulty in protecting informal and oral tradition-based knowledge. India's views were for the most part supported by other papers by developing countries that included Kenya, and another by Pakistan, Egypt, Brazil, Ecuador, Peru, and Paraguay. The Kenyan paper, submitted on behalf of various African Group members, suggested that in future negotiations, to be agreed at Seattle, article 27.3 should be interpreted so that plants, animals and micro-organisms should not be patentable, and that a '*sui generis*' system of plant varieties protection could

¹²⁵ D. Leskien and M. Flitner, *Intellectual Property Rights and Plant Genetic Resources: Options for a Sui generis System*, International Plant Genetic Resources Institute, Rome, 1997, p.29.

¹²⁶ Otten, 'Viewpoint from the WTO' in Swaminathan, Padamsee and Harley, eds, *Agrobiodiversity and Farmers' Rights...*, p.48.

¹²⁷ UPOV 1991 requires that right-holders approve production or reproduction, conditioning for propagation, offering for sale or selling, or stocking, importing or exporting, but experimental or private, non-commercial acts are permissible: Leskien and Flitner, *Intellectual Property Rights and Plant Genetic Resources: Options for a Sui generis System*, p.61.

¹²⁸ Review of the Provisions of art.27.3(b): Communication from Canada, the European Communities, Japan and the United States, UN Doc. IP/C/W/126.

¹²⁹ ASSINSEL, 'Fostering plant innovation: ASSINSEL brief on review of TRIPS 27.3b'.

include systems that protect the intellectual rights of indigenous and farming communities. The African Group also asked that TRIPs be made to harmonise with the CBD and the FAO's International Undertaking on Plant Genetic Resources. The Third World Network and Tebtebba Foundation agreed at an NGO meeting in Manila on 9-11 August, that NGOs would draw up and disseminate a joint statement in support of the African Group position.¹³⁰ The Council agreed to continue the article 27.3(b) review process in 2000, with the TRIPs Council Chair to hold periodic informal meetings with delegates in an attempt to reach broad-based agreement.¹³¹

In 1999 nearly 70 IPOs and nearly 20 support organisations protested to the WTO that article 27 of the TRIPS agreement was contrary to their values and cosmologies, and that they were opposed to the creation of IPRs over life forms. They said that the patenting of life-creating processes was discriminatory because it did not account for IPOs' values, nor recognised that IPOs' knowledge evolved accretionally and across generations. IPOs' knowledge was different from that protected by IPR regimes. IPOs made many recommendations about how article 27 could be amended and implemented to better accommodate IPOs beliefs and practices. Many IPOs asked for article 27 to be amended to disallow patenting of life forms and processes involved in producing variations of plants, animals, and micro-organisms. They called for the disallowance of patents for plant varieties, and the introduction of a *sui generis* regime to protect various manifestations of traditional knowledge, consistent with the CBD and the International Undertaking on Plant Genetic Resources. They asked that such *sui generis* regimes be based on customary laws. They asked that prior informed consent be required before any research or collection activities were undertaken involving indigenous peoples. They also asked that indigenous peoples' rights to their territories be respected and that their biodiversity be protected from threatening activities such as mines, monocrop commercial plantations, and dams. IPOs also called on WTO members to extend the deadline of the implementation of Article 27.3b of TRIPS to the year 2006.

The TRIPS agreement was discussed again at the Seattle meeting in November 1999. Several developing countries tried to persuade the WTO to extend the deadline for the implementation of the TRIPS agreement by several years. India asked the TRIPS Council to re-examine the ethical and social implications of the availability of patents for life forms, arguing that they did not sufficiently recognise informal innovation. India and the African Group also argued that the CBD should have priority over the TRIPS agreement. India asked for either patents on life-forms to be excluded generally or for patents based on traditional/indigenous knowledge to be excluded from

¹³⁰ The Kenyan paper WT/GC/W/302, dated 6 August 1999, was tabled as part of the preparations for the WTO Seattle Ministerial Conference: Third World Network, 'Call for Support for African Group Proposal on TRIPS art. 27.3b on Patenting of Life', accessed from <<http://www.twn.org/>> 19 December 1999.

¹³¹ International Centre for Trade and Sustainable Development (ICTSD), 'North-South Divide Splits TRIPS Council', *BRIDGES Weekly Trade News Digest*, vol.3, no.42, 25 October 1999.

TRIPS or at least, that TRIPS include a requirement that the country of origin of the biological source and associated knowledge be disclosed on patent applications, and that the consent of the country providing the resource and knowledge be required, so as to ensure the equitable sharing of benefits. Bolivia, Colombia, Ecuador, Nicaragua and Peru similarly made a proposal concerning the protection of traditional knowledge. The group proposed that the Ministerial Conference in Seattle initiate discussions on a proposed multilateral legal framework for the protection of the expressions and manifestations of traditional knowledge. The African Group also called for systems to protect traditional knowledge. The African Group proposed that a footnote be inserted to article 27.3(b) stating that any *sui generis* law for plant variety protection could provide for the protection of the innovations of indigenous and local farming communities in developing countries, consistent with the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources.

The G77 does not seem to have a consensus position on plant patents and Article 27, however. As noted in Chapter Two, in 1999 16 French-speaking African countries agreed to ratify and implement the 1991 UPOV. Zimbabwe and Kenya, which have a large community of plant breeders, encouraged states to take this view. This agreement contrasted with another reached in January by the heads of government of the 62-member Organization of African Unity (OAU) in Lusaka, Zambia, to restrict patents on plant varieties until an Africa-wide alternative system to patents has been developed. The secretary-general of the Scientific, Technical and Research Commission of the OAU, Johnson Ekpere, has said that the decision by OAU would stand despite the later agreement by member countries of the African Intellectual Property Organization (OAPI).

The U.S. and the European Commission rejected proposals put by G77 members in a WTO 'Green room' consultation. The U.S. and Europe argued that WTO agreements should not be subordinated to any other agreement. The U.S. had said in its submission related to the TRIPs review, that the exception to patentability authorised by article 27.3(b) was unnecessary. Its view is also that states would best protect indigenous and local communities from biopiracy by requiring parties seeking access to genetic resources or traditional knowledge to enter into a contract with a national organisation that grants access.¹³² The U.S. also rejects NGOs' ethical arguments and says that the TRIPS agreement allows states to exclude from patentability plants and animals and essentially biological processes for the production of plants or animals.¹³³

Clearly these issues are unresolved. Although it is not possible to predict the outcome of future negotiations, the most likely outcome would be the maintenance of

¹³² V. Shiva, Biopiracy blocking TRIPS reform: Seattle and the politics of the W.T.O. TRIPs Review, 16 November 1999, reproduced in email communication from: Stas Burgiel — BIONET Information Services <bionet2@igc.org> to 'List-Server, BIODIV-CONV' <biodiv-conv@igc.apc.org>, 'Launch of Global Campaign on Biopiracy'.

¹³³ Email communication from Stas Burgiel — BIONET Information Services <bionet2@igc.org> to: 'List-Server, BIODIV-CONV' <biodiv-conv@igc.apc.org>, 'TRIPS and living organisms — letter from J. Papovich, USTR', 24 February 2000.

the *status quo*. There is no imperative for amendments to be made to the TRIPS agreement, and states have considerable latitude already as to how the provisions are to be implemented. Given the relative advantages available to patent holders over other forms of IPR, it is likely that corporations based in the U.S., the EU and Japan will continue to lobby for no exceptions from patentability. The position of the EU is likely to be to seek conformity with the Biotechnology Directive which was adopted by the EU Council of Ministers in June 1998 and which must be implemented in domestic law by member states by 30 July 2000. The Directive clarified that patents can be claimed for transgenic animals and plants and isolated genes provided relevant patents criteria are met. Patents cannot be claimed for single plant and animal varieties. The Directive also includes 'Farmers' Privilege' provisions, enabling farmers to re-plant harvested products from bought plant-propagating material on their own farm.¹³⁴ The G77 is likely to seek to retain the option of an effective *sui generis* regime for plant varieties since they are unlikely to be able to substantially increase their market share of patents in the biotechnology sector, and would prefer cheaper and simpler mechanisms for protecting IPRs and encouraging innovation. They will continue to emphasise the value of traditional knowledge, innovations and practices. But whether this issue is as important as the high level of political activity it has generated also remains to be seen. Even if domestic laws are in place they may not be effectively enforced concerning plants and plant biotechnology. Pharmaceutical patents are the most valuable and although these may concern plant-derived medicines, if traditional knowledge is used in such medicines a counter-claim of 'prior art' may defeat the patent claim. These uncertainties suggest that IPRs will remain contested for some time to come.

The Seattle setback for 'the North'

For the developed country governments that had put forward various proposals concerned with biotechnology issues, the November 1999 meeting in Seattle was a significant setback. The meeting had been intended to launch a new trade negotiating round. During the lead-up to the Seattle meeting the governments of Canada, Japan and the United States made separate proposals for the creation of a working party on gene technology and LMOs. Canada tried to obtain agreement to set up a working party in the WTO with a fact-finding mandate to consider the adequacy and effectiveness of existing rules as well as the capacity of WTO members to implement these rules. Japan proposed that the WTO establish an 'examination group for new issues including GMOs'. The United States proposed that work be done to ensure that trade in products of agricultural biotechnology is based on transparent, predictable and timely processes.¹³⁵ Members of the G77, Norway and Switzerland had rejected proposals for

¹³⁴ 'UK: Focus — intellectual property — unravelling code of genetic patents (The Law)', *The Lawyer*, 29 September 1998, reproduced in *Reuters News* INUH0022.htm, 29 September 1998.

¹³⁵ Canada: WT/GC/W/359 dated 12 October 1999, Japan: WT/GC/W/365 dated 12 October 1999; United States: WT/GC/W/288 dated 4 August 1999: discussed in V. Shiva, 'GE-Biosafety, biodiversity, Seattle', GEN lists<genetics@gn.apc.org>, 11 November 1999.

a biotechnology working group at a 6 November meeting of WTO heads of delegations. The U.S. supported the proposals at the meeting. Draft text covering these proposals was included in the draft ministerial text but that was eventually abandoned in Seattle.

Environmental and consumer organisations called instead for a working group to be established on ecolabelling, and expressed concern that a WTO biotechnology working group may impose new restrictive trade disciplines on the Biosafety Protocol and prevent foods containing LMOs from being labelled. NGOs were concerned that countries may be prevented from regulating LMO products, and their import and export. As noted in the previous chapter, the Biosafety Protocol is intended to permit governments to regulate the import and domestic trade in living genetically modified organisms (LMOs — hereafter GMOs) so that potential risks such as contamination of local plants and crops, might be controlled. The biotechnology working group proposal was seen as a potential mechanism to undermine negotiations to establish a Biosafety Protocol.¹³⁶

The failure of the biotechnology working group proposal does not mean that the issue is resolved however, even though the Biosafety Protocol has been finalised and opened for signature. Other WTO agreements are also relevant to trade in GMOs and labelling, including under the Agreement on Technical Barriers to Trade and the Agreement on Agriculture.

The Agreement on the Application of Sanitary and Phytosanitary Measures

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)¹³⁷ aims to promote freer trade by encouraging members to use International Standards for Phytosanitary Measures (ISPMs) if trade restrictions are necessary to reduce risk. There must be a 'rational relationship' between the risk-assessment process and the trade-restricting measure. The results of the risk assessment must reasonably support the SPS measure taken.¹³⁸ Under the SPS Agreement, members are required to take into account the risk assessment techniques¹³⁹ developed by the relevant international organisations, such as the International Standards Organization, the FAO/WHO Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention.¹⁴⁰ The risk assessment must meet SPS requirements and the sanitary

¹³⁶ M. Khor, 'Implications of recent proposals on WTO and Biotechnology', <biotech_activists@iatp.org>, 29 October 1999.

¹³⁷ Annex 1A to the Agreement establishing the World Trade Organization, *International Legal Materials*, vol.33, 1994, p.1128.

¹³⁸ *EC-Measures Affecting Meat and Meat Products (Hormones) adopted 13 February 1998*, UN Doc. WT/DS26/AB/R, para.193; UN Doc. WT/DS18/RW para.7.73.

¹³⁹ A risk assessment is defined as an 'evaluation of the likelihood of entry, establishment or spread of a ... disease within the territory of an importing member according to the sanitary ... measures which might be applied, and of the associated potential biological and economic consequences': Annex A, SPS Agreement.

¹⁴⁰ Revised text of the International Plant Protection Convention of 6 December 1951, done at Rome on 17 November 1997.

measure must be based on the risk assessment. Member states can retain domestic standards if they are necessary for the protection of human, animal or plant life, or health, or the environment, including procedures to test, diagnose, isolate, control or eradicate diseases and pests. A science-based justification for the non-use of extant international standards must be available. The Codex Commission is likely to be a forum for continuing contentious debates concerning the standards it promulgates concerning the safety of foodstuffs produced using new biotechnology applications and plant genetic resources.¹⁴¹

Article 5.7 of the SPS Agreement allows countries to invoke the precautionary principle and take provisional measures to stop imports where there is scientific uncertainty about the risks faced, and pending a search for the additional information necessary for a more 'objective' assessment of risk. The measure must be based on available pertinent information and must be reviewed within a reasonable period. It is then incumbent on states to substantiate their action with the necessary risk assessment.

This creates an onerous obligation for G77 states who must provide such risk assessments before they can lawfully restrict imports. Since many of the risk of GMO products are unknown at this stage, and may require extensive and long-term research to be identified, G77 governments are likely to be at a significant disadvantage and vulnerable to a GATT/WTO challenge, if they attempt to restrict GMO imports.

Agreement on Technical Barriers to Trade

The Agreement on Technical Barriers to Trade (TBT Agreement) permits measures that are the 'least restrictive necessary' to fulfil policy objectives with respect to the management of the risks that would be created if the measures were not taken. The agreement does not permit discrimination based on the way in which products are made.¹⁴²

Labelling requirements for products containing GMOs has been a contentious issue under this agreement. The United States has submitted a paper to the TBT Committee challenging the European Union's compulsory labelling scheme for GMO products containing more than one per cent of GM material. The paper argues that GMO products do not differ as a class from non-GMO products, that the EU's measures are more trade restrictive than necessary to provide consumers with information, and that it discriminates between products. Canada also takes this view. NGOs view this more as a matter of consumers' 'right to know'. The European Union (EU), Norway and Canada unsuccessfully sought to include ecolabelling in the 'Millennium' trade round declaration that was to emerge at Seattle.

As noted in the previous chapter Miami Group states succeeded in the Biosafety

¹⁴¹ K. Dawkins and S. Suppan, *Sterile Fields: The Impacts of Intellectual Property Rights and Trade on Biodiversity and Food Security*, Institute for Agriculture and Trade Policy, with support from the Gaia Foundation, Minnesota, 1996, p.33.

¹⁴² Australian Conservation Foundation, *Briefing Paper: Eco-labeling & Trade — World Trade Organization Millennium Round Meeting, Seattle USA, November 30 to December 3 1999*, typescript, 26

Protocol negotiations in securing only a minimal labelling requirement for food, feed, and for products destined for processing. These need only be labelled as 'may contain' LMOs and as not intended for direct release into the environment, plus a contact point for further details. Details are to be concluded within two years. More onerous labelling requirements apply to LMOs that are intended for contained use and for intentional introduction into an importing state's environment. These need to be clearly identified as containing LMOs.

Since the Biosafety Protocol and the WTO agreements are to read as mutually supportive, it is more likely now that the U.S. will be successful in its claim that the EU's labelling requirements amount to a technical barrier to trade, although this may depend upon a determination by a dispute panel or other dispute resolution process. This potential dispute demonstrates that the trade rules are sites of contestation for powerful and less powerful states, and that governments pursue claims under various agreements to progress the interests of domestic and transnational stakeholders. Outcomes are not certain, however, and this issue may require resolution through formal dispute resolution processes.

Conclusions

This chapter has selectively reviewed the governance promoted by selected GATT and WTO agreements. It has explored the potentially coercive mechanisms that are available to states under the current international trade regime and various instances where compliance has been enforced pursuant to dispute resolution processes. It examined the content of several relevant agreements which may impact on the governance of plant genetic resources. It suggested that NGOs may yet come to have more influence on the direction of WTO governance since the WTO is having to respond to sustainable development discourse and the new environmental economics, and because the WTO is slowly becoming more open to NGO involvement.

This chapter suggested that the TRIPS negotiations that were conducted during the Uruguay Round were less transparent and less accommodating for G77 negotiators than fora which have been discussed in other chapters. Power/knowledge conflicts continue in relation to IPRs. A more important factor in the evolution of the TRIPS agreement than was apparent in relation to the negotiation of other instruments examined in other chapters, was the strength of economic security discourse and the availability of coercive powers to enforce compliance. But the U.S. did not succeed in its IPR agenda completely however, with the EU compromise position on 'life patenting' being adopted in the TRIPS agreement. Members of the G77 also have various beneficial provisions available to them in the TRIPS agreement.

This chapter suggested that the norms inherent in the TRIPS agreement are likely to effect substantial micro-level changes in subjectivities and power-relations, particularly for those involved in gene technology research and development. Other

chapters have examined more macro-level impacts.

Human rights discourses have been less dominant in this site than in others. Although there may yet be more common ground on the issue of Farmers' Rights in the FAO and labour standards, this is not being actively debated. This may be analysed as a 'knowledge-boundary' issue or as a more strategic non-linkage of issues by governments who may be potentially adversely affected by the linkage. Current provisions of the TRIPS agreement may be used by member states to justify measures to protect traditional knowledge and the heritage of indigenous peoples, traditional farmers and local communities, but the social clause debate is rather focused on longer-established and broader human rights norms. It is primarily the G77 countries who are seeking recognition of Farmers' Rights and it would be in G77 countries' interests to link the recognition of Farmers' Rights to trade in genetic resources. Such a linkage would potentially disadvantage states with more highly developed agro-biotechnology sectors, although there is also a high degree of interdependence in plant genetic resources. And some G77 governments could also be disadvantaged.

This chapter has also shown that the social clause proposal has met a determined opposition, but debate about its merits is likely to continue. As Leary has noted, the issue will not go away because civil society continues to lobby governments to better consider the social aspects of trade liberalisation.¹⁴³ The spectacular failure of the Seattle meeting is also likely to encourage states to better address the G77's concerns when discussing future trade governance proposals.

¹⁴³ Leary, 'The WTO and the social clause: post-Singapore', at p.120.

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