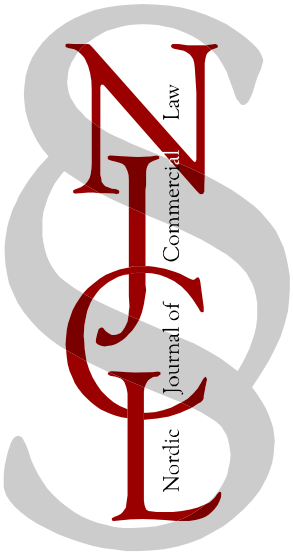

The 2004 United States-Australia Free Trade Agreement

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This note is primarily a short report from Australia on a new bilateral FTA between Australia and the United States (AUSFTA). While it conveys the experience of a very small country, at the other end of the earth, I want to use this example for what it says about the increasingly complex and fluid nature of law making in trans-national commercial law fields like foreign investment and intellectual property.

Australia has been a strong supporter of the multilateral trade agreements at the WTO.[1] AUSFTA is not Australia' first bilateral FTA, but it is significant because the partner this time is the strongest of the developed countries. In many ways, the constituents of Australia's commercial law already reflect the Washington policy consensus. Nonetheless, this agreement with the United States lays down detailed requirements for changes to Australian domestic law. The requirements are not simply a direct translation of United States law. They represent another building block in an edifice of global economic law.

1. Patterns of International Law Making

The paper begins with some remarks about nature of law making which this FTA may represent. In seeking an understanding of contemporary law making, the insights of socio-legal studies have much to offer. Socio-legal studies recommend that we do not start by looking for formal hierarchies of legal authority and settled rules for conduct. The boundaries between legal fields are blurring and there are many more encounters between differing legalities. Fuzzier concepts, such as global governance and legal pluralism, will assist most with understanding.

On this understanding, the nation-state is not to be regarded as the sole source of legal authority. Law across the world is not simply inter-national law.[2] Even where the law is made by nation-states, it comes in many different directions and styles. One characterisation that conveys this dynamism is regulatory competition and cooperation.[3] Not only should we expect to find multiple sources of law, we must try to map the interactions between them. A major theoretician, Bonaventura De Sousa Santos, has called this 'inter-legality'.[4]

The Regulatory Criss-Cross

The dimensions of law making are both horizontal and vertical. They form a regulatory criss-cross. The interest lies in legal principles and processes that mediate the interaction between them. Thus, horizontally, trans-national and inter-national laws do not simply compete for supremacy, they defer to each other within certain spaces and they draw on each other's resources. Concepts with currency in international law - such as multilateralisation, mutual recognition, incorporation, harmonisation and the community of courts - capture important aspects of these relationships.[5]

Likewise, vertically, global law does not only direct and constrain national law. We expect such law to limit the nation state's choices of regulation. Often, it leaves gaps for national legislation (and other sources of law) to operate or sets minimums on which countries may advance individually (or bilaterally).[6] It sometimes directs, while expressly allowing countries to make exceptions or attach qualifications.

Interaction does not only occur when new treaties are being aligned against existing treaties and domestic law. It is seen as an ongoing process. Interaction is built into the implementation of a treaty, when it provides for instance for standard setting systems, alternative paths to compliance, and the settlement of disputes.[7]

Compliance might be shown, for example, by adherence to the standards of another international convention or to customary international law. The standard of review for national law may allow a 'margin of appreciation' to the national legislators or even accept their assurance of compliance.[8] National governments may be asked to do no more than make all reasonable efforts to obtain conformity from other levels of government, such as regional authorities and domestic courts. Governments agree to working groups to develop common standards. The treaties leave room to make authoritative interpretations or to grant waivers of troublesome provisions.

This approach employs a relaxed sense of what law is, as well as where law is found. The styles of law making may be both hard and soft. While there is a natural interest in any move to legalisation, this looser fit finds a resonance in much contemporary international relations and international law scholarship too.[9]

Nonetheless, as lawyers, we remain interested in how clashes are resolved and rulings made in the individual situation.[10] Neither is this inquiry out of keeping with the inquiries of the other disciplines. They may still stress the part that power plays (persuasive, coercive, hegemonic etc) in determining relationships between sources of law. For instance, we would expect that some nation states will seek a way to have their models adopted as the international norms. Some models are exported directly, while others are insinuated into the bloodstreams of trans-national institutions.

In this vein, scholars are identifying a new jurisprudence, possibly a new constitutionalism, that would entrench trans-national rights of commerce and property over national public regulation. Some wish to see this come to fruition, others are more inclined to warn of the dangers.[11] This scholarship seems particularly relevant to understanding the bilateral FTA. It casts light on its substantive provisions, its aspiration for global traders and investors to enjoy commercial freedoms and property protections. It alerts us too to its careful specification of the relationships with other sources of law, even at the point when disputes will have to be determined.[12]

BITs, BIPs and FTAs

Australia's partner, the United States, is a major force in bilateral treaty formation. The European Union is active too, especially where it fails to see the new issues, like an investment agreement, added to negotiations at the WTO.[13] Consistent with our general approach, we can see that bilateral bargaining does not work alone. It may form part of a broader strategy.[14] So, for example, in order to maximise the gains, the United States is prepared to move between forums. Most recently, it has moved away from the multilateral organisations, such as the WTO, to the level of the regional compact and bilateral agreement. Behind this strategy lies the wealth of its own domestic economy and the threat of unilateral measures.

For investment, the bilateral approach is stepping up. The number of agreements is increasing rapidly. Ambitions have increased beyond the early trade and investment treaties, which provided for fair treatment and physical protection to those foreigners who had become involved in other countries. The newer BITs and the FTAs have become, for the time being at least, the major

vehicle for both investment liberalisation (national treatment, rights of establishment, and prohibitions on performance requirements) and investment protection (not just against nationalisation but 'indirect expropriation' too).

The newer BITs and now the FTAs are also an advance on the multilateral agreements. The WTO Uruguay Round could only achieve a narrow set of disciplines for trade-related investment measures. Apart from non-discrimination, the Agreement on Trade-Related Investment Measures (TRIMs) focuses on certain performance requirements for those manufacturing goods on-shore. Since 1995, the WTO membership has not been prepared to negotiate a full-scale investment code. The MAI, while inviting developing countries to become associates, proved too stringent a regime for even the industrialised countries inside the OECD to accept at the time. The agreement was shelved. Famously, the WTO's Director-General had to reassure members that he had not claimed they were writing 'a constitution for a world economy'.[15]

There is a link to intellectual property protection. For the developing countries, where intellectual property protection has been limited, the BIT is made conditional on agreement to a BIP.[16] In protracted negotiations, the partners are softened up with threats of unilateral action, the withdrawal of aid and preferences, and WTO complaints.

While the WTO produced a quite comprehensive multilateral TRIPs agreement, the bilateral demands are 'TRIPs-plus'. They seek further protections and they may ask the partners to forgo allowances given them under the consensus decision making of the multilateral agreement.[17] They urge parties to sign up to other international treaties that are strengthening intellectual property rights.

To these inducements, the new FTAs can add the attraction of improved market access for industrial goods and agricultural produce. They blend TRIPs-plus intellectual property rights, investment rights and the freer flow of capital-intensive high technology services into a package. After establishing basic protections, these agreements institute working groups, joint committees and dispute panels to continue the law making, at levels of specification normally the preserve of local legislative, administrative and judicial authorities.

The effect is cumulative. Each gain in intellectual property standards is expressed as a minimum and the parties are free to extend protection. Interacting with the TRIPs agreement, the minimums are adopted on an MFN basis, so they are spread to other countries as well.[18] Thus, one country partner serves, temporarily, as the pace setter for intellectual property overall. A 'script' is written for subsequent bilateral agreements and possible consolidation in a new round of multilateral treaty making. The script is revised in the light of the experience of the previous agreements. This pressure is felt back at the WTO too, though resistance here is a reason for the current forum shift.

If it were to gain purchase, the new constitutionalism would establish rights for investments and property across a range of societies. Constitutional rights should put protections beyond the reach of local re-regulation and popular revision.[19] The partners agree to modify their domestic constitutional and legislative arrangements and to concede that international law rules and tribunals will determine the scope of the rights - subject only to any reservations its negotiators may enter for non-conforming measures at the time the agreement is struck. This commitment

locks in future governments and the local electorate, limiting their scope to fashion regulation responsive to changing circumstances.

Yet, while this account has much to tell us, it is rather one-sided. The studies show that localities, each in their own way, resist, translate and coopt the demands being made from outside through globalisation.[20] At this stage, certainly, there is some doubt whether constitutionalism is a helpful way to characterise either the WTO agreements or the bilateral treaties.[21] A comparison could be made with developments within the European Union[22] or with what some countries are doing individually, such as South Africa,[23] or those countries in Eastern Europe. Even in these instances, the picture is far from clear.

AUSFTA

What does AUSFTA say about the accuracy of this portrayal? The paper now offers an account of the making of the agreement and an analysis of the particulars of two chapters.

The Origins of AUSFTA

The Australian Government initiated the discussions with the United States. Australia has a developed economy, but it is very small and incomplete on a world scale. Australia depends on trade. Traditionally, it has traded in agricultural and mineral commodities. It makes some headway now exporting expert services and cultural products. However, it remains a net importer of manufactured goods and intellectual property. It relies heavily on inward investment, though again, recently, Australian investors have been venturing abroad, for instance into the United States. Australia has floated its currency and abolished controls on movement of capital.

Announcing the negotiations, the Government said the FTA would give Australian producers preferential access to the wealthy United States markets. Yet it undertook negotiations with very little economic analysis of the costs and benefits. It soon received criticism from within its own circle of international trade specialists. They argued that the economic gains from an agreement with the United States would be slight. Indeed, the agreement ran the danger of diverting trade from markets more important to Australia such as those in East Asia.

Furthermore, the strategy would undermine Australia's stake in successful multilateral negotiations and rule based regulation at the WTO, where a small country can share in benefits it could not possibly extract on the basis of bilateral bargaining. In particular, concern was expressed that concessions to the US position on agricultural quotas and subsidies would compromise Australia's stand as a member of the Cairns Group.

The Australian Government conducted consultations with selected industry stake-holders and it received submissions from public interest groups. As well, news of some mooted provisions appeared in the press. This was not a popular debate, however. The best source of media information was a specialist business paper, the Australian Financial Review.

The Labor or social democrat opposition party, the Australian Labor Party, remained quiet during the negotiations. Quite possibly, it was fearful that the Government would play 'wedge politics'

and brand it as anti-American. Sceptics from within the Party relied heavily on public interest groups to research the costs and make a case for opposition to the FTA or for safeguards to be included. These groups included a civil liberties association and catholic justice commission, a social democrat think-tank, a coalition of pharmacology and legal academics, a philanthropic foundation, a public interest advocacy centre, and a fair trade and investment network.[24]

Commentators have suggested that the Government's initiative was as much about geo-politics as trade and investment. As a member of the 'coalition of the willing', the Australian Government wished to firm its national security alliance with the US and to keep the US engaged in Australia's region. At the signing of the agreement, the Minister for Trade declared: 'The blood of young Australians and Americans has been shed in most continents of the world in defence of our shared ideals of freedom and democracy'.[25]

It is fair to say that the two Governments are close temperamentally. The present Australian Government is right-wing, strong on security of borders, socially conservative and neo-liberal economically. It is notable that the Australian Prime Minister, John Howard, had earlier rebuffed an overture from the Clinton Administration to negotiate a free trade agreement.[26]

For the United States part, Australia must rate as a minor market. Elimination of the remaining vestiges of investment and trade controls, in sensitive sectors such as media, would see relatively small gains compared to other countries with which the United States trades. Consistent though with a broader strategy, the agreement may serve as a standard setter for agreements with other western countries, and most formidably with the European Union. So far the United States has concentrated on the developing countries.[27]

The AUSFTA Negotiations

The negotiations for the FTA were conducted in confidence. A team reporting to the Minister for Trade and the Department of Foreign Affairs and Trade represented Australia's interests. Over the course of a year, the team engaged in six rounds of negotiations with a team from the Office of the United States Trade Representative.

From reports, negotiations seemed always to be on a precipice. In truth, a few of the provisions may have been settled at the last moment. But many follow the script of earlier United States agreements, for example with Singapore and Chile.[28] Certainly, in fields like investment and intellectual property, the United States was clearly the *demandeur*.

Parliament and the Australian public had to wait until release of the draft text to see what had actually been undertaken. By way of contrast, we should recall that the OECD was moved to put drafts of the MAI on the worldwide web. So too, in the negotiations over the Free Trade Agreement of the Americas (FTAA), the drafts have been exposed.[29] Release of the AUSFTA text was delayed even after the agreement had been concluded. Its release was preceded by Australian Government publicity that greatly glossed the impact of the agreement; sceptics went to the USTR website for a point of comparison.

According to Australian law, treaties do not require ratification by the Parliament. Subject of course to their own requirements for coming into force, they create international obligations when

the executive government signs. But they are not 'self-executing', even if they come in the form of legal rules and they prescribe legal rights for private parties.[30]

Some provisions of AUSFTA were already reflected in local Australian law and some changes could be made by administrative fiat. But other changes required amendment to legislation in order to have local effect. Legislation meant the support of the major Opposition party, the Australian Labor Party, was needed in the upper house of the Parliament, the Senate. Here, the Government has not held the balance of power. The Senate also contains independents and minority parties, but too many of them had decided to vote against implementation of the FTA.

Following the Uruguay Round, a Committee of both Houses of Parliament, the Joint Standing Committee on Treaties (JSCOT), was established to give some more popular examination to treaties negotiated by the executive. This Committee now commenced a review of the FTA. With the support of independents, the Labor Opposition established a second committee to review the FTA, a Senate Select Committee. Both committees took submissions and held hearings over several months following the conclusion of the agreement. In May, before they had reported, the Minister for Trade went to Washington to sign the FTA.

JCSOT reported favourably on the FTA in June.[31] Yet still the Labour Opposition had not declared its position. Despite pressure from the Government, Labor said it would reserve its judgement until it had the report of the Senate Committee. When the Committee reported on 2 August 2004,[32] the Opposition gave its endorsement to the FTA.

By this time, the Government had introduced its implementing legislation into the Parliament. The Implementation Bill seemed deliberately styled to minimise the legal changes necessary, raising queries, as we shall see, whether Australian law would be in compliance with the FTA.[33] Labor then moved two amendments. The first, which the Government accepted immediately, was to enshrine in legislation the local media content quotas that the Government had reserved as non-conforming measures under the FTA. The second was a provision designed to discourage patent holders bringing infringement proceedings to delay the release of generic drugs (see below). The Government resisted this amendment, finally conceding in order to ensure the Bill was passed.

Soon after, the date for a national election was set. In the election campaign, little was heard of the FTA. On October 9, the Government was returned to office with an increased majority, including the numbers it needed to overcome obstructions in the Senate to its legislative wishes. Given concerns about the patents legislation (see below), the United States Ambassador reiterated the Administration's reservations about certifying the conformity of Australia's legislation with the provisions of the FTA. Certification is due in November this year, if the FTA is to come into force on 1 January 2005.

2. Investment

Australia has a liberal policy of accepting foreign investment. Nonetheless, it chooses to screen proposals for acquisition or establishment, both in sensitive sectors (such as the media) and across the board if they are of sufficient economic proportions. The Australian Government also retains

the discretion to attach conditions to approvals on the recommendation of an advisory board.[34] In exceptional circumstances, when it is not confident that such conditions will safeguard the national interest, it will block a proposal.

Australia is a member of the WTO and therefore bound by TRIMs. However, TRIMs addresses measures relating to trade in goods only; other major sectors are not included. The GATS comprehends investment measures, so long as they relate to commercial presence in another territory as a mode for the supply of a service. But GATS only applies to the extent that a member chooses to make a commitment to national treatment or market access, either across all sectors or in a specific services sector. The GATS employs a negative listing approach.

The investment chapter of AUSFTA is then a major change to the complexion of investment regulation for Australia. It contains a full set of contemporary investment freedoms, rights and protections. They include rights to non-discrimination both at the pre and post establishment stages, minimum standards of treatment including fair and equitable treatment and full protection and security, the limitation of performance requirements, and protection against expropriation direct and indirect.

The AUSFTA provisions are built on a body of investment repertoires in NAFTA and other FTAs, the growing number of BITs, and the United States own model for BITs. Rulings by inter-government panels and arbitrations by investor-state tribunals have produced interpretations of the early provisions. In subsequent deliberations and negotiations, the parties have reformulated basic provisions, issued notes of interpretation and annexed statements for 'greater certainty'. These clarifications and revisions have addressed some of the substantive requirements directly. They have also specified more selectively the law which is to govern, should a dispute need to be determined. Kantor observes: 'Where the original 1994 U.S Model BIT covered investor-state arbitration in forty-three lines, the new Draft Model U.S BIT now devotes more than thirteen pages to the topic.'[35]

Investment Rights and Protections

The AUSFTA investment chapter applies to measures adopted or maintained by a Party relating to investors of the other Party and to covered investments.

The definition of investment is broad. It is to mean every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. The forms that an investment may take include enterprises, shares, futures, certain types of contracts, intellectual property rights, licences, authorisations, permits and similar rights conferred pursuant to the applicable domestic law, and other tangible or intangible, movable or immovable property, and related property rights. This elaboration aims to settle doubts that were raised in certain of the investor arbitrations regarding expropriation of investments.[36]

AUSFTA requires national treatment and most-favoured nation treatment both for investors of the other party and for covered investments.[37]

For covered investments, AUSFTA requires treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment

and full protection and security. Article 11.5 cautions that these two concepts do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. It specifies that the obligation to provide fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principles of due process embodied in the principal legal systems of the world. Full protection and security requires each party to provide the level of police protection required under customary international law.

This statement is an embellishment on a note of interpretation issued by the NAFTA Free Trade Commission.[38] Some commentators regard the note as a clarification; others have argued that, by inserting the word 'customary' before the concept 'international law', it cuts back on investment protection.[39] Article 1105 of NAFTA says each party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The AUSFTA investment chapter is not confined to such general standards. It addresses the particular of domestic regulation. It prevents the parties from imposing or enforcing certain performance requirements, or enforcing certain commitments or undertakings. The main targets are requirements that foreign establishments source content locally or export product from the host country. AUSFTA also proscribes technology transfer requirements.

Such performance requirements may not be applied as a condition of the investor obtaining an advantage from the host government. The offer of advantages may be linked with certain other requirements. Here, AUSFTA allows requirements that the investor establish a presence in the host country, train or employ workers locally, or carry on research and development.

These provisions restrict the host government's options to ensure that benefits flow back to the locality from foreign investment. The particulars hark back to the GATT and to the indicative list in the WTO TRIMs agreement. But they are much more prescriptive. The model is NAFTA and the recent US bilateral agreements; a similar approach was attempted in the draft MAI.

Protection Against Expropriation

The current generation of FTAs contains a broader challenge to domestic regulation. They place a ban on the expropriation of investments. Such protection begins conventionally with a ban on direct expropriation or nationalisation. However, in keeping with NAFTA and other more recent BITs and FTAs, AUSFTA goes on to say that neither party may expropriate a covered investment indirectly through measures equivalent to expropriation.

In a standard clause, AUSFTA allows the parties only the one limited exception to this ban on expropriation. The expropriation, whether direct or indirect, must be: (a) for a public purpose (b) in a non-discriminatory manner (c) on payment of prompt, adequate and effective compensation, and (d) in accordance with due process of law.

Here, AUSFTA is clearly ahead of the multilateral agreements and, for Australia, it extends protection beyond the national constitutional guarantees regarding compulsory acquisition of property. Such special protection may make the host country's general regulatory policy an issue of expropriation, triable at the investor's initiative by international commercial arbitration.

When such protection was mooted, local opposition pointed to the investor suits challenging health and environmental policies under chapter 11 of the NAFTA. The record suggests that many of the NAFTA claims are about other protections of the investment chapter. Nevertheless, investors have won rulings against indirect expropriation. With such an encouragement, investors may be tempted to run cases speculatively, placing respondent governments under pressure to settle claims rather than contest their legalities.[40] A more subtle effect is the 'chill factor' – the prospect of suit may make governments reluctant to introduce new regulations.[41]

AUSFTA includes an annex, Annex 11-B: Expropriation, which carries a set of clarifying statements. These statements are a mixture of consolidations for investors and reassurances to governments. The AUSFTA Annex has been transplanted from earlier United States FTAs, such as the agreement with Chile; this AUSFTA version can now be found in the recently concluded FTAA.[42]

Annex 11-B begins by saying the parties conform their shared understanding that expropriation article is intended to reflect customary international law concerning the obligation of States with respect to expropriation.[43]

It then declares that an action by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. It identifies indirect expropriation to be where an action by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

Annex 11-B then provides that whether actions of a government constitute an indirect expropriation requires a case-by-case, fact-based inquiry. The inquiry will consider three factors, among others. The first factor is the economic impact of the government action, although the fact that an action has an adverse effect on the economic value of an investment, standing alone, does not alone establish that an indirect expropriation has occurred. The two other factors are the extent of interference with distinct, reasonable investment-backed expectations and the character of the government action. These factors are reminiscent of the distinctively United States constitutional doctrine of 'regulatory takings', a doctrine which is quite foreign to Australian law.[44]

The Annex finishes with a statement that 'except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives such as public health and safety and the environment do not constitute indirect expropriation'.

Dispute Settlement

NAFTA gave investors the right to bring suit directly against a host government. They did not have to seek the sponsorship of their home government or another government party.[45] They can take those disputes to ad hoc appointed supra-national tribunals. Those tribunals may be appointed under the aegis of the International Centre for the Settlement of Investment Disputes (ICSID), the ICSID Additional Facility or the United Nations Commission on International Trade Law (UNCITRAL).

In a notable departure, AUSFTA did not give private investors access to supra-national tribunals. The Australian Government Guide to the FTA advises that this omission: 'reflects the fact both countries have robust, developed legal systems for resolving disputes between foreign investors and

government'.[46] The omission means that, instead, the investors will need to bring actions in the domestic Australian courts, casting the onus on Australian judges. Or they will rely on the US government to represent their case in the government to government dispute settlement proceedings under chapter 21 of AUSFTA.

Here, consistent with other FTAs, AUSFTA provides a panel procedure for the settlement of disputes between the parties. Where the standards of protection require interpretation, the constitution of these panels (especially the chair), and the jurisprudence they develop, could be influential in determining the impact of the FTA. Under NAFTA, this government to government dispute settlement has been used sparingly.[47] When investors may not bring suit directly, the practice may be different.

AUSFTA also keeps a small opening for director investor-state arbitration. Article 11.16(1) requires consultations, if there is a change in circumstances affecting the settlement of investment disputes, and, in the light of these changes, the government parties should consider allowing an investor to submit to arbitration with the other party.

What will be the reference point for interpretation? NAFTA article 102 indicates that the parties shall interpret and apply the provisions of the Agreement in the light of its objectives and in accordance with applicable rules of international law. For investor-state arbitrations, article 1131 says a Tribunal shall decide the issues in dispute in accordance with the Agreement and applicable rules of international law. While it is clear that the primary focus is to be on the words of the Agreement itself, this formulation appears to range wider, allowing consideration of other treaties that are in force, customary international law and the general principles of international law.[48]

In contrast, the dispute settlement chapter of AUSFTA states that the panels shall consider the provisions of the Agreement in accordance with applicable rules of interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the law of Treaties. This statement appears to narrow the frame of reference for the interpretation of AUSFTA and for the determination of the parties' compliance. Some say the operation of article 31(3)(c) of the Vienna Convention lets in consideration of other treaties. Also relevant is whether it will allow consideration of the jurisprudence surrounding those treaties, including the case law of the investor-state tribunals under NAFTA.[49]

3. Intellectual Property

Protection for intellectual property is now one of the strongest sub-sets of public international law. The multilateral WTO agreement, TRIPs, did more than insist on non-discrimination when a country sets its own levels of protection for intellectual property. It required all members to observe substantive levels of protection across key categories of intellectual property. The TRIPs agreement was also notable for its prescription of the procedures and remedies that each member was to make available (administratively and judicially) for the effective enforcement of rights.

While TRIPs was a major convergence in protection across the world, it held back from legislating in some areas, such as the on-line media and traditional knowledge and folklore. It allowed countries discretion to pick their own level of protection in others. So did the 1996 World

Intellectual Property Organisation (WIPO) Copyright and Performances and Phonograms Treaties, WCT and WPPT, while they extended copyright and related rights for the authors of works, the producers of phonograms and performers, into the digital environment.

In its bilateral initiatives, the US has been pressing the developing countries, particularly those in Latin America, to forego their allowances under TRIPs. These forbearances include the phase-in periods for implementation, the right to except plants and animals from patentability, the right to adopt a *sui generis* system of protection for plant varieties other than the 1991 version of the International Convention for the Protection of Plant Varieties (UPOV), and a full set of grounds for compulsory licensing. The strategy has been backed by complaints to the WTO.[50] The US is, nonetheless, being selective, for it opposes certain extensions of rights itself at home and in the international forums.[51]

With historically high levels of protection, Australia is much closer to the US position. Nevertheless, the USTR wanted Australia to tighten protection for US products such as patented pharmaceuticals, entertainment with copyright content, and brand names that are well-known marks. The USTR wrote of establishing standards that build on the foundations established in TRIPs and other agreements such as the WIPO Treaties; seeking to enhance the level of protection beyond TRIPs in new areas of technology, such as internet service provider liability; in other areas, such as patent protection and protection of undisclosed test data; seeking to have Australia apply levels of protection and practices more in line with US law and practices; and seeking to strengthen domestic enforcement procedures, including criminal penalties, to deal with piracy and counterfeiting.[52]

Relationship to the Multilateral Agreements

The IP chapter begins by making reference to the major IP multilateral agreements. In article 17, each party affirms that it has ratified or acceded to an itemised list of such agreements. The list starts with recent versions of Paris (1967) and Berne (1971), also mentioning the Patent Cooperation Treaty (1970), Budapest (1980), the Madrid Protocol (1989), the Satellite Convention, UPOV (1991), TRIPs (1994) and the Trademark Treaty (1994). Australia is directed to ratify the WCT and WPPT.[53] Both parties undertake to make their best efforts to comply with the provisions of two other treaties, the Hague Designs Agreement (1999) and the Patent Law Treaty (2000).

Despite this general affirmation, we shall see that, in certain categories of protection, AUSFTA restates key provisions of these treaties. We might suppose their direct expression in the text creates a base on which to build the additional protections that the FTA requires. Curiously, though, these statements tend to reword the multilateral provisions.

Even the most emphatic multilateral agreement is likely to contain its share of generalities and vacuities. Such agreements leave gaps, indeed make allowances for departures at the national level from the protections they advance. It is apparent the United States Government has wanted to give specification and provide elaboration to crucial intellectual property protections. United States dissatisfaction with the direction of decision making within the multilateral forums, including the dispute settlement rulings, may help explain these restatements.

From a legal perspective, the question remains whether the FTA provisions conform to the existing agreements which bind the US and Australia, or whether they cut across their provisions. Generally we should expect them to conform, but we cannot assume for instance that something styled as an elaboration is necessarily consistent.

The possibility of a legal clash is eased somewhat by the allowance that the multilateral agreement makes for more extensive protection on a unilateral or bilateral basis. Notably, article 1.1 of TRIPs provides that members are legally free, on an individual basis, to institute more extensive protection than is required by the Agreement, provided such protection does not contravene the provisions of the agreement. This allowance says the agreement is not a code; mostly it does not set maximum levels of protection.[54]

Then, in a further interaction, the TRIPs MFN obligation insists that the nationals of all WTO members have the benefit of these extensions.[55] So the extra protections given the nationals of the bilateral partner, the United States, must be extended to the nationals of other members too, but without the assurance of reciprocal protection. For Australia, this means significant exporters from such countries as the members of the European Union.

A related reason for restating certain of the multilateral IP provisions is to give the parties access to the inter-governmental dispute settlement proceedings under the FTA. AUSFTA overlaps considerably with TRIPs.

While the TRIPs agreement has a compelling procedure for non-compliance, a complaint attracts attention from the diverse WTO membership. The FTA procedures may be more inviting.[56] The WTO Dispute Settlement Understanding presses members to use the WTO itself for redress.[57] However, in article 21.4, AUSFTA purports to give the complaining party a choice between its own dispute settlement processes and the WTO. If the complainant chooses the FTA process, will the application of Vienna Convention articles 31 and 32 let in consideration of the WTO TRIPs jurisprudence or that of the other multilateral conventions?

AUSFTA is also an advance on TRIPs. We should note in particular that, in the case of intellectual property rights, the AUSFTA dispute settlement chapter allows for 'non-violation complaints'. AUSFTA Article 21.2 says the proceedings apply where a benefit a party could reasonably have expected to accrue is being nullified or impaired as a result of a measure that is *not inconsistent* with the Agreement. While non-violation complaints are a recognised part of GATT and WTO dispute settlement, these complaints cannot currently be brought under the TRIPs agreement.

Moreover, AUSFTA takes up provisions from the treaties that are administered by WIPO. WIPO does not have a compelling dispute settlement system.

Patent Rights and Limitations

While AUSFTA builds on the multilateral agreements, it contains notable extensions in several categories of intellectual property. For example, the term of protection for copyright in Australia is brought into line with the European Union and United States extension of the term to seventy

years. AUSFTA greatly elaborates the responsibilities of internet service providers for preventing infringements and it attacks further the circumvention of technological protection measures.

The paper's example is the AUSFTA's calculated specifications for patents. AUSFTA begins by presenting a version of the lead TRIPs article, article 27.1. Under AUSFTA article 17.9, each party is to make patents available for any invention, whether a product or process, in all fields of technology. Thus, AUSFTA retains the concept of invention, but without defining it. The liberality of patent grants will remain essentially a matter for national law and practice.[58] At the same time, Article 17.9 carries a statement that the parties confirm that patents shall be available for any new uses or methods of using a known product.

Like TRIPs, the grant of patents is subject to the demands of the common technical criteria: that the invention is new, involves an inventive step and is capable of industrial application. Regarding the third of these technical criteria, article 17.9.13 says each party shall provide that a claimed invention is useful if it has a specific, substantial, and credible utility. This requirement links Australian practice into the US PTO policy and the Trilateral Commission. This interaction also shows how patenting practices can also be internationalised through memoranda of understanding and coordination at the level of the national intellectual property offices.[59]

AUSFTA seeks to confine the parties' exclusions from patentability to two categories. The first in familiar terms is a TRIPs allowance. Parties may exclude from patentability inventions 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. The FTA's other allowable exception is made for diagnostic, therapeutic and surgical methods for the treatment of humans and animals. Such an exception seems unimportant to Australian law, since the recent interpretations the local courts have placed on the 1990 Act.[60] Again it remains faithful to TRIPs.

Yet the TRIPs exception for plants and animals is not here. Neither party applies this exception anyway, but the US has been consistent in seeking to eliminate it from national law. It persuades its partners to agree not to make use of the TRIPs allowance. Its position at the WTO is for removal of the allowance.[61]

Those interpreting TRIPs have faced some difficulty reconciling the articles laying out the patent holder's rights with those making allowances for exceptions to infringement.[62] AUSFTA does not repeat the TRIPs article 27 requirement that the parties make patents available and patent rights enjoyable without discrimination as to place of invention, the field of technology, or whether products are imported or locally produced. Neither does AUSFTA enumerate the patent holder's rights. TRIPs article 28 says a patent shall confer the exclusive rights to prevent third parties from making, using, offering for sale, selling, or importing for these purposes.

Regarding parallel importation, the United States has argued that TRIPs article 6 is subject to articles 27 and 28.[63] Article 6 says for the purpose of dispute settlement, subject to articles 3 and 4, nothing in the agreement shall be used to address the issue of exhaustion of intellectual property rights. TRIPs article 6 appears to leave the level at which rights are exhausted to national policy.

For patents, AUSFTA seeks to cut through this argument. Article 17.9.4 states that each party shall provide that the exclusive right of the patent holder to prevent importation of a patented product, or a product that results from a patented process, without the consent of the patent owner, shall not be limited by the sale or distribution of that product outside its territory, at least where the patentee has placed restrictions on import *by contract or other means*.

AUSFTA article 17.9.3 is a take from TRIPs article 30. The parties may provide limited exceptions to infringement, provided the exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties.[64]

While its statement of these powers is narrower than the Paris Convention a century before, TRIPs does provide for member governments to license compulsorily. In its bilateral agreements, the US has been seeking to cut away at the grounds conceded in TRIPs article 31. AUSFTA article 17.9.7 now allows the two grounds.[65]

The first ground is to remedy a practice deemed, after judicial or administrative process, to be anti-competitive under the competition policy of the party.[66] The other is the case of public non-commercial use or of national emergency or other circumstances of extreme urgency. This ground has become vital to the debate over pharmaceuticals, a topic of particular interest to the bilateral parties also.

Patents and Pharmaceuticals

The WTO members have experienced difficulties reconciling patent protection with access to essential medicines. In contention has been the freedom with which a developing country may licence the production of cheaper generic versions during the life of the patent. Invoking art IX.2 of the WTO Agreement, the members have adopted a liberal interpretation of TRIPs.

The Doha Declaration on the TRIPs agreement and public health seeks to shield free use of key TRIPs allowances from challenge.[67] Among its provisions, it states that each member has the right to grant compulsory licences and the freedom to determine the grounds on which such licences are granted; each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDs, tuberculosis, malaria and other epidemics, can be so; and each member is free to establish without challenge its own regime for the exhaustion of rights.

After the Declaration, issues remained to be resolved within the TRIPs Council. Recently, the WTO settled on a system to permit production from another country, when the country in need of the drugs does not have local manufacturing capacity.[68] TRIPs article 31(f) says that compulsory licensing should be predominantly for the supply of the domestic market of the Member authorizing such use.

No part of the Declaration or its follow-up is incorporated in AUSFTA. In fact, AUSFTA contains limitations that appear designed to ensure that, as a developed country, Australia does not participate in this trade.

Yet the Australian Government runs a public program, the Pharmaceutical Benefits Scheme (PBS), where drugs are listed and their cost to the consumer are subsidised by the taxpayer according to a reference price. The PBS is evidence that some Australians can also find the market price of patented drugs difficult. There has been some disquiet about the FTA's provisions for review of PBS listing and pricing decisions.[69] Here the focus is on the intellectual property implications.

One United States objective is for partners to offer extensions to the patent term for pharmaceuticals. AUSFTA article 17.9 says that extensions should be made available, if the applicant has encountered unreasonable delays in the issuance of the patent, or if there was an unreasonable curtailment of the normal term due to the time it took to obtain marketing approval for the patented version. As a result of pressure that the United States has applied in the past, the Australian Government has already amended the local Patents Act to enable extensions to be granted.

At the same time, the United States wants partners to cut back on their allowances for the secondary generic producers to 'springboard' off the intellectual property of the original brand name producer. The background to this request is a WTO dispute settlement decision.[70] The EC challenged two Canadian provisions assisting generics to get onto the market quickly. The WTO panel considered one exception to patent infringement to be inconsistent with TRIPs, one that permitted generics to be manufactured and stockpiled ready for release as soon as the term expired. But the other exception was upheld, which was to test and trial the drugs for the purpose of obtaining regulatory approval.

AUSFTA makes it clear that Australia must control the use made of the subject matter of a subsisting patent. If, under the limited exceptions allowed to exclusive rights, a party permits the use of the subject matter to support an application for marketing approval for the generic version, then it must insist that the version is not be made, used, sold or exported for any other purpose.

This provision limits Australia's freedom, not only to produce generics under compulsory licence for the domestic market, but also to export to other countries under the TRIPs allowances. This year, the Canadian Parliament amended its patents legislation to enable this to be done.[71] It seems the United States is also fighting a rear guard action against the cost of drugs in its home market. Reportedly, United States 'seniors' cross the border into Canada to buy drugs cheaper under Canada's own public pharmaceutical benefits scheme.[72] Article 17.9.4, the general right to control imports, has application here too. It will for instance enable a patentee to prevent a pharmaceutical product, which is released into another market at a discounted price, from being re-routed into Australia.

AUSFTA contains provisions to preserve the exclusivity of chemical, safety or efficacy data, which is submitted as a condition of obtaining marketing approval for a new pharmaceutical product.

In addition, the FTA contains a US paragraph 4 style requirement. According to article 17.10.5, if a party permits competitors to rely on such safety or efficacy information for marketing approval, the party shall provide measures in its marketing approval process to prevent such persons from marketing a product or a product for an approved use – where that product or use is claimed in a patent. If the party permits a secondary producer to request approval during the term of such a patent, it shall provide that the patent owner be notified.

For pharmaceutical patents and data, the Government's implementing legislation has been minimal. The major change has been the response to article 17.10.5. Amendments to the local Therapeutic Goods Administration Act introduce a certification procedure. The applicant must certify either: (1) that the applicant, acting in good faith, believes on reasonable grounds that it is not marketing the therapeutic goods in a manner or in circumstances that would infringe a valid claim of a patent that has been granted in relation to the therapeutic goods, or (2) that a patent has been granted and the applicant proposes to market the therapeutic goods before the end of the term of the patent, and they have given the patentee notice of the application.

Following the Senate Select Committee Report, the ALP countered with an amendment to this legislation, arguing the need to discourage the pursuit of 'dodgy' patent claims. In its submission to the Committee, the Australian Generic Medicines Industry Association had expressed concern at the breadth of the FTA provision. Citing the Canadian experience of 'evergreening', it suggested that article 17.10.5 would assist the pharmaceutical companies to make patent claims for the purpose of delaying the marketing of generics. The practice of evergreening involves claiming new uses, reformulations or methods of administration for drugs reaching the end of their patent term.[73]

The ALP amendment has sought to intervene in this process by challenging the bona fides of infringement proceedings against the generic producers. Under the amendment, the plaintiff must certify that the proceedings are to be commenced in good faith, have reasonable prospects of success and will be conducted without reasonable delay. The plaintiff must have reasonable grounds (in addition to the 'fact of the grant of the patent') for believing that final relief will be granted and that each of the claims in respect of which infringement is alleged is valid. A court may apply a penalty if the certificate is false. A further provision provides for orders if the plaintiff obtains an interlocutory injunction in such circumstances.

There has been some question here whether the Government's certification procedure goes far enough in providing a measure for 'preventing' the marketing of products 'claimed' in a patent. On the other hand, the United States Administration has flagged its concern that the Labor amendment undermines the FTA protection for patents.[74] A further suggestion is that the amendment runs contrary to the TRIPs requirement that patents be granted without discrimination. It remains to be seen whether the United States will insist that the Australian Government use its new majority in the Senate (from next July, 2005) to repeal the amendment.

4. Conclusion

What is the general significance of the making of such a FTA? It would be easy to say that AUSFTA is just another element in the fluid contemporary mix of trade regulation, global governance and legal pluralism. But such FTAs are making a distinctive contribution to investment and intellectual property law. Australia is already very much a dutiful member of the multilateral agreements that operate in these fields. By comparison, the FTA is a more strategic engagement. Immediately, it conveys detailed additional prescriptions for Australian domestic law. It carries careful specifications regarding the extent to which other international law will affect its requirements. Planning ahead, it is a key step in the construction of a global model. Directly, and indirectly, the legal rights of private investors and producers receive another boost.

(Endnotes)

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[1] For background on Australian trade policy, see A. Capling, Australia and the World Trading Systems; From Havana to Seattle (Cambridge University Press, Melbourne, 2001).

[2] Eg. G. Teubner, Global Law Without a State (Dartmouth, Aldershot, 1997).

[3] D. Esty and D. Geradin (eds), Regulatory Competition and Economic Integration: Comparative Perspectives (Oxford University Press, Oxford, 2001); Y. Dezalay and B. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Order (University of Chicago Press, 1996).

[4] B. de Sousa Santos, Towards a New Legal Common Sense: Law, Globalization and Emancipation (Butterworths, London, 2002).

[5] Eg. J. Braithwaite and P. Drahos, Global Business Regulation (Cambridge University Press, 2000); A. Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191.

[6] J. Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harvard International Law Journal 40.

[7] Eg. C. Arup, 'TRIPs: Across the Global Field of Intellectual Property' (2004) 26 European Intellectual Property Review 7.

[8] Eg. R. Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law' in J. Weiler (ed), The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade? (Oxford University Press, New York, 2001).

[9] See M. Finnemore and S. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 International Organization 743, criticising, for a preoccupation with formal liberal law, the editors of the special issue of International Organization on legalisation. The critique appears to have provoked the bridging piece, A. Slaughter, A. Tulmello and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 American Journal of International Law 367, where the authors recommend several law and society perspectives.

[10] Giving rise to the exacting scholarship in journals such as this, see for example M. Pere, 'Non-Implementation of WTO Dispute Settlement Decisions and Liability Actions' (2004)#1 Nordic Journal of Commercial Law. Generally, see J. Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (Cambridge University Press, 2003).

[11] See for example the exchanges between Petersmann and Howse and Alston in volume 13 of the European Journal of International Law.

[12] C. Brouwer, C. Brouwer, II and J. Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arbitration Journal 415.

[13] S. Choo, 'A Bridge Too Far: the Fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution' (2004) 7 Journal of International Economic Law 219.

[14] This account draws on the analysis of P. Drahos, see 'BITs and BIPs: Bilateralism in Intellectual Property' (2001) 6 World Intellectual Property Journal 791.

[15] 'WTO Denies Claim by Special Interests Linking Ruggiero to MAI', WTO Press Release PRESS/91, 17 February 1998.

[16] S. Picciotto, 'Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment' (1998) 19 University Pennsylvania Journal of International Economic Law 731.

[17] S. Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights (Cambridge University Press, New York, 2003).

[18] Subject to correction, possibly for BITs too, see discussion of the Maffezini case in R. Singh, 'The Impact of the Central American Free Trade Agreement on Investment Treaty Arbitrations; A Mouse that Roars?' (2004) 21 Journal of International Arbitration 329.

[19] D. Schneiderman, 'Investment Rules and the New Constitutionalism' (2000) 25 Law and Social Inquiry 757; J. Kelsey, 'Global Economic Policy Making: A New Constitutionalism?' (1999) 9 Otago Law Review 535.

[20] Eg. J. Jenson and B. de Sousa Santos (eds), Globalizing Institutions: Case Studies in Regulation and Innovation (Ashgate, Aldershot, 2000).

[21] For a recent consideration, see C. Joerges, IJ. Sand and G. Teubner (eds), Transnational Governance and Constitutionalism (Hart Publishing, Oxford, 2004).

[22] G. de Burca and J. Scott (eds), The EU and the WTO: Legal and Constitutional Issues (Hart Publishing, Oxford, 2001).

[23] H. Klug, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction (Cambridge University Press, 2001).
[24] Submissions were also put to a Parliamentary Committee during the negotiations, see Parliament of Australia, Senate Foreign Affairs, Defence and Trade Committee, Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement, 26 November 2003, at www.aph.gov.au/Senate/FADT_CTTE/gats/report.
[25] The Age Newspaper, Melbourne, 20 May 2004.
[26] In 1997, a framework agreement with the European Union failed at the last hurdle, when the Australian Government refused to agree to the European Union's human rights clause.
[27] The most recent being the FTA with five Central American countries.
[28] Text of the agreements are available at the USTR website, www.ustr.gov/new/fta.
[29] Jose Antonio Rivas-Campo and Rafel Tiago Juk Benke, 'FTAA Negotiations: A Short Overview' (2003) 6 Journal of International Economic Law 661.
[30] P. Alston and M. Chiam (eds), Treaty Making and Australia: Globalisation versus Sovereignty? (Federation Press, Sydney, 1995). Specifically, M. Chiam, Now That's Freedom: Australia and Free Trade Agreements, Law and Policy Paper 25 (Federation Press, Sydney, with Centre for International and Public Law, Australian National University, 2004).
[31] Report, Australia-United States Free Trade Agreement, tabled 23 June 2004, at www.aph.gov.au/house/committee/jcsot/usafta/report.
[32] Summary of Inquiry, at www.aph.gov.au/senate/committtee/freetrade_ctte/report/summary/index.
[33] US Free Trade Agreement Implementation Act 2004, available at Department of Foreign Affairs and Trade website, www.dfat.gov.au/trade/negotiations/us.
[34] Commonwealth of Australia. Department of Treasury, Foreign Investment Review Board, A Guide to Australian Investment (Australian Government Publishing Service, Canberra).
[35] See M. Kantor, 'The New Draft Model U.S. BIT: Noteworthy Developments' (2004) 21 Journal of International Arbitration 383, at 385.
[36] For useful analysis of these cases, see R. Bishop and W. Russell, 'Survey of Arbitration Awards Under Chapter 11 of the North American Free Trade Agreement' (2002) 19 Journal of International Arbitration 505.
[37] In its schedules to the Agreement, Australia reserves some non-conforming measures.
[38] For the note, see R. Bishop and W. Russell, 'Survey of Arbitration Awards Under Chapter 11 of the North American Free Trade Agreement' (2002) 19 Journal of International Arbitration 505, at 552.
[39] See C. Brouwer, C. Brouwer, II and J. Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arbitration Journal 415, at 432.
[40] For a comprehensive list of suits, see M. Staff and C. Lewis, 'Arbitration Under NAFTA Chapter 11: Past, Present, and Future' (2003) 25 Houston Journal of International Law 301.
[41] Liberty Victoria and the Catholic Commission for Justice, The Big Chill? Concerns About the Investor/State Provisions in the Proposed Australia-US Free Trade Agreement, Briefing Paper, 1 November 2003, at www.melbourne.catholic.org.au.ccjdp, citing a Canadian study.
[42] R. Singh, 'The Impact of the Central American Free Trade Agreement on Investment Treaty Arbitrations: The Mouse That Roars?' (2004) 21 Journal of International Arbitration 331.
[43] There is even a statement of what customary international law is. Annex 11A declares that the parties confirm their shared understanding that customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation.
[44] J. Starner, 'Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property' (2002) 33 Law and Policy in International Business 405. These factors were taken up in the investor-state arbitration, Metalclad Corp v United Mexican States, ICSID Case no ARB(AF)97/1, 30 August 2000, 5 ICSID Reports 209.
[45] Compare the experience under the WTO agreements, see G. Shaffer, Defending Interests: Public-Private Partnerships in WTO Litigation (Brookings Institution Press, Washington, 2003).
[46] The Guide is at www.dfat.gov.au/trade/negotiations/us_fta/guide/17/html.
[47] See, for instance the saga of one dispute: C. Arnett, 'Comment: The Mexican Trucking Dispute' (2003) 25 Houston Journal of International Law 561.
[48] T. Weiler, 'NAFTA Article 1105 and the Principles of International Economic Law' (2003) 42 Columbia Journal of Transnational Law 35.
[49] Compare also the WTO experience: see C. Arup, 'The State of Play of Dispute Settlement "Law" at the World Trade Organization" (2003) 37 Journal of World Trade 897. The DSU says the provisions of the WTO agreements may be clarified in accordance with the customary rules of interpretation of public international law (article 3:2).
[50] S. Sell, Private Power, Public Law: The Globalization of Intellectual Property Rights (Cambridge University Press, New York, 2003).
[51] At the WTO, the outstanding issues include the availability of non-violation complaints, stronger protection for geographical indications, patents and sui generis protection for plants and animals, and technology transfer; at WIPO, remuneration for the use of performances in audio-visual media, a broadcaster's right, sui generis protection for data bases, and appropriate recognition for folklore.
[52] Robert Zoellick's Letter to Congress, at www.ustr.gov/releases/2002/11/2002-11-3-australia-byrd.
[53] In 2000, the Government implemented many parts of the WCT and WPPT. But some parts, notably stronger protection for performers, were delayed. The US FTA Implementation Act now completes them.

[54] D. Gervais, The TRIPs Agreement: Drafting History and Analysis (second edition, 2003), p. 86.
[55] TRIPs Article 3. So long as they come with the designation of the protection of intellectual property. In the Cuban rum dispute, the WTO Appellate Body interpreted art 1.2 to mean all categories traversed by Pt II, not just those the subject of express protection there, see United States-s.211 of the Omnibus Appropriations Act, WT/DS176/AB/R, January 2, 2002. For instance, TRIPs incorporates many provisions of the Paris Convention.
[56] Note G. Marceau, 'The Dispute Settlement Rules of the North American Free Trade Agreement: A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization', in E. Petersmann, International Trade Law and the GATT/WTO Dispute Settlement System (Kluwer Law International, The Hague, 1997).
[57] Article 23, Understanding on Rules and Procedures Governing the Settlement of Disputes. In the dispute, United States- ss.301-310 of the Trade Act of 1974, WS/DT152/R, December 22, 1999, the US undertook to exhaust its WTO remedies before resorting to *unilateral* action.
[58] Picciotto observes: there is 'no basis for complaints about over-broad protection that is due to lax interpretation of patentability requirements', see 'Defending the Public Interest in TRIPs and WTO', in P. Drahos and R. Mayne (eds), Global Intellectual Property Rights: Knowledge, Access and Development (Sweet and Maxwell, London, 2002) p 235. Concern is expressed Australia will follow the US practice of granting software patents liberally, see Australian Financial Review, 16 July 2004.
[59] See L. Davies, 'Technical Cooperation and the International Coordination of Patentability of Biotechnological Inventions' (2002) 29 Journal of Law and Society 137.
[60] Bristol-Myers Squibb v FH Faulding (2000) 97 FCR 524; Rescare Ltd v Anaesthetic Supplies Pty Ltd (1992) 25 IPR 119. Though it does mean that Australia retains an important policy discretion.
[61] The allowance came under review in 2000. Other members have linked change to recognition and reward for traditional knowledges; see B. Sherman, 'Regulating Access and Use of Genetic Resources: Intellectual Property and Biodiscovery' (2003) 25 European Intellectual Property Review 301.
[62] Generally, see Nuno Pires de Carvalho, The TRIPS Regime of Patent Rights (Kluwer Law International, The Hague, 2002).
[63] See F. Abbott, 'The TRIPs-legality of measures taken to address public health crises: responding to USTR state-industry positions that undermine the WTO', in D. Kennedy and J. Southwick (eds), The Political Economy of International Trade Law (Cambridge University Press, 2002), p. 320.
[64] See Panel Report, Canada-Patent Protection for Pharmaceutical Products, WT/DS/114/R, March 17, 2000.
[65] It may also cut back on Australia's own provisions for compulsory licensing. See Patents Act 1968, section 135, the 'reasonable requirements of the public'.
[66] See also the Exchange of Letters on aspects of Intellectual Property applied to Australia.
[67] WT/MIN(01)/DEC/2, 20 November 2001.
[68] Document IP/C/W/405; see WTO Press Release/350, August 20, 2003. Further D. Matthews, 'WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?' (2004) 7 Journal of International Economic Law 73.
[69] See P. Drahos, B. Lokuge, T. Faunce. M. Goddard and D. Henry, 'Pharmaceuticals, Intellectual Property and Free Trade: The Case of the US-Australia Free Trade Agreement' (2004) 22 Prometheus 243.
[70] Panel Report, Canada-Patent Protection for Pharmaceutical Products, WT/DS/114/R, March 17, 2000.
[71] 'Fight Against Aids', The Guardian Weekly, 9-15 July 2004.
[72] B. Kuhlik, 'The Assault on Pharmaceutical Intellectual Property' (2004) 71 University of Chicago Law Review 93.
[73] Canadian Generic Pharmaceutical Association, The Patented Medicines (Notice of Compliance) Regulations, a Submission to the House of Commons Standing Committee on Industry, Science and Technology, go to Senate Select Committee website (submission number 77) at www.aph.gov.au/senate/committee/freetrade_ctte; see also United States Federal Trade Commission, Generic Drug Entry Prior to Patent Expiration, A FTC Study, July 2002, at www.ftc.gov/reports.
[74] The Age Newspaper, 14-15 August and 21-22 August 2004.