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Governing Global Services Trade

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Legal Regimes and Regimes of Knowledge: Governing Global Services Trade

Andrew T. F. Lang^{*}

Abstract: The starting point of this paper is that if we want to understand the way in which international law structures and mediates the deployment of power in international life, then we need to attend to the relationship between law and knowledge - the relationship between international legal processes and the processes by which we collectively come to know, describe, and imagine the world in which we live. My aim is to explore this relationship empirically by looking in detail at one case study, namely the international legal regime governing international trade in services, and specifically, the World Trade Organisation's General Agreement on Trade in Services. Over the last fifteen years, this new body of international law has developed and evolved alongside a corresponding body of social scientific expertise on the nature and dynamics of the global services economy. I tell a story of the co-evolution of these two systems - the legal regime on the one hand, and the body of knowledge on the other - and try to trace in detail the ways in which law and legal processes have been present in processes of knowledge production, shaping the way the global services economy is collectively imagined and its dynamics understood. I offer four axes along which to think about this relationship, corresponding to the concepts of constitution, transmission, objectification and empowerment.

INTRODUCTION

Legal regimes not only regulate behaviour within their domain of operation, but also help to constitute the social domains on which they act. International environmental law, for example, structures the way we know the 'global commons'

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even as it marshals normative technologies to address global environmental problems.¹ International economic law helps to construct and project shared ways of imagining the ‘global economy’ at the same time as it regulates the deployment of public power on global economic flows. And international human rights law constitutes a particular kind of rights-holding subject just as much as it puts in place rules about how that subject can and cannot be treated. The starting point of this paper, then, is that if we want to understand the way in which international law structures and mediates the deployment of power in international life, then we need to attend to the relationship between law and knowledge – the relationship, that is to say, between international legal processes and the processes by which we collectively come to know, describe, and imagine the world in which we live.

My aim is to explore this relationship empirically by looking in detail at one case study, namely the international legal regime governing international trade in services, and specifically, the World Trade Organisation’s General Agreement on Trade in Services. Over the last fifteen years, this new body of international law has evolved alongside a corresponding body of social scientific expertise on the nature and dynamics of the global services economy. I tell a story of the co-evolution² of these two systems – the legal regime on the one hand, and the body of knowledge on the other – and try to trace in detail the ways in which law and legal processes have been present in processes of knowledge production, shaping the way the global services economy is collectively imagined and its dynamics understood. I argue that we should see bodies of rules/norms and bodies of expertise as two connected parts of a larger system of governance: the knowledge which services experts produce help to make the global services economy amenable to regulation by law, while the forms of rationality which their expertise generates help to shape the behaviour of governmental actors even before those actors are confronted by international legal constraints. It follows that international legal processes themselves have (at least) a dual character: both producing the world and acting on it, working constitutively as well as normatively, structuring systems of knowledge at the same time as systems of rule.

In Part 1, I briefly survey some of the literature which has inspired this project, so as to help the reader identify the conversation of which it forms a part, as well as to indicate (if necessarily in a thin and partial way) the theoretical terrain on which it rests. Part 2 is the case study itself, and takes up the bulk of the paper. I look in detail at the gradual accumulation of two types of knowledge about the global services economy – data on the nature and extent of trade flows in services, and data on the level and nature of existing barriers to trade in services – and try to show how international legal processes have shaped efforts to generate that

¹ C. A. Miller, ‘Climate science and the making of global political order’ in S. Jasanoff (ed), *States of Knowledge: The co-production of science and social order* (London: Routledge, 2004) 46-66.

² There is a strong affinity between this notion of ‘co-evolution’ and that of ‘co-production’ used in Jasanoff 2004 (ibid). It may be that the story I tell in this paper can usefully be understood as a modest illustration of the broader proposition that the natural and social orders are ‘co-produced’ in the sense described by Jasanoff and others.

data. Because it is designed to address a very particular question, it is inevitably a partial story, and it should not be read as if it were an account of the activities of services experts since 1995 – it is not. The aim is merely to identify in as concrete a way as possible some of the influences which international law has had on knowledge production in this area. In Part 3, I take a step back from the detail of the case study and try to reflect more generally on what it might tell us about the relationship between law and knowledge production. I offer four axes along which to think about this relationship, corresponding to the concepts of constitution, transmission, objectification and empowerment.

GOVERNING AND KNOWING

This article proceeds from some basic claims about the nature of law and governance which, while second nature to some, will be unfamiliar to others, and so need a brief introduction. The starting point is that the ‘legibility’ of the social world is a precondition of the exercise of public power over it.³ One must ‘render visible the space over which government is exercised’, in order to make it amenable to specific, effective and directed interventions.⁴ Rose, for example, notes that

the government of ... a national economy ... becomes possible only through discursive mechanisms that represent the domain to be governed as an intelligible field with specifiable limits and particular characteristics, and whose component parts are linked together in some more or less systematic manner by forces, attractions and coexistences ...⁵

In this sense, regulating the world always also involves redescribing (interpreting⁶) it – generating knowledge and ‘authoritative representations’⁷ of the social phenomena we seek to govern, in order to guide our interventions on them. The consequence is that statecraft always also involves knowledge production, and that the activity of government is intimately connected to the processes which determine what counts for true, relevant and reliable knowledge of that which is governed.⁸

³ See, eg, J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998) especially 2, 83.

⁴ N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999) 36.

⁵ *ibid.*, 33. See also N. Rose and P. Miller, ‘Political Power Beyond the State: Problematics of Government’ (1992) 43(2) *British Journal of Sociology* 173, 182.

⁶ I use the term ‘redescription’ throughout this paper to connote an active process of constituting the world by imagining it, and producing knowledge about it. ‘Redescription’ in other words is not intended to be distinct from ‘interpretation’, but rather a species of it.

⁷ S. Jasanoff, ‘Ordering Knowledge, Ordering Society’ in Jasanoff (ed), n 1 above, 13, at 26.

⁸ Rose, n 4 above, 30.

The converse is also true: if re-description is a precondition of the exercise of public power, it is also the case that the way the social world is described shapes the way such power is exercised. The way we imagine reality profoundly structures the way we act on it, and our knowledge of the social world helps to establish the conditions of possibility for governance.⁹ In that sense, knowledge is itself (potentially) transformative of the social world, and processes of knowledge production are in themselves key mechanisms by which the world is shaped and remade.

Taking these propositions seriously leads one to enquire ‘how knowledge-making is incorporated into practices of state-making, or of governance more broadly’ and conversely ‘how practices of governance influence the making and use of knowledge’.¹⁰ In their broadest formulation, these are also the questions which fundamentally animate this paper. More specifically, my focus is on international governance rather than governance within the domain of the nation state. To paraphrase the formulation just given, then, I am interested in the ways in which knowledge-making is incorporated into the practices of international governance, and how the practices of international law and international institutions shape the making and use of (expert) knowledge.

The existing literature around these questions emanates from a variety of disciplinary homes, including anthropology, critical development studies, political science, as well as international law. A number of authors have focussed, for example, on the ways in which international organisations have a privileged position in the production and dissemination of authoritative ways of knowing or classifying the world.¹¹ Others have detailed ways in which international

⁹ A. Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, N.J.: Princeton University Press, 1995) 5; Rose, n 4 above, 197; Jasanoff, ‘The idiom of co-production’ in Jasanoff (ed), n 1 above, 2 (‘the ways in which we know and represent the world ... are inseparable from the ways in which we choose to live in it’).

¹⁰ Jasanoff, n 9 above, 3. Note also the converse question – how knowledge structures mediate and shape governance practices – is of course of equal interest, though that side of the relationship is not the focus of the present study.

¹¹ Bowker and Star, for example, have traced in detail the historical formation and evolution of the International Statistical Classification of Diseases, for which the World Health Organisation has had primary responsibility since World War 2. They describe also the ways in which this classification has come to be embedded in material conditions – medical practices, medical artefacts, and health regulation – which profoundly affect personal biographies: G. Bowker and S. Star, *Sorting Things Out: Classification and its Consequences* (Cambridge, Mass.: MIT Press, 1999). Barnett and Finnemore have argued similarly that the power of international organisations derives in part from their ability to ‘create knowledge’, to authoritatively ‘classify’ the world and ‘fix [the] meanings’ of social phenomena within their domain: M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004) 29, 32. In addition, an analysis of the UN Food and Agriculture Organisation by Ilcan and Phillips has shown that the influence of the FAO on the management of food and agriculture globally in the post-war period depended heavily on the ‘professional forms of expert knowledge’ that it deployed, which were ‘based on scientific classification and calculation’ and mobilised through extensive programs of technical assistance and training programs: S. Ilcan and L. Phillips, ‘Making Food Count: Expert Knowledge and Global Technologies of Government’ (2003) 40(4) *Canadian Review of Sociology and Anthropology* 441, 441. And in a fascinating account of the birth and development of the Intergovernmental Panel on Climate Change, Miller shows the myriad ways in which ‘knowledge and order became coupled in the emergence of a new phenomena like climate change’: n 1 above. See also generally W. Larner and W. Walters (eds), *Global Governmentality: Governing International Spaces* (London:

institutions subject states to surveillance and normalising discipline, mobilising expert knowledge to reshape governmental practices in countries subject to their supervision.¹² The present study is in part a response to the richness of this scholarship, and an attempt to bring its insights to bear on the governance of international trade at the WTO. It shares essentially all the analytical claims made by this literature, concerning the constitutive role of knowledge in social life, and the centrality of international institutions in the process by which such knowledge is mobilised and meanings are produced. At the same time, it is worth making clear at the outset that this paper does not adopt the normative presuppositions which are associated much of the existing literature. A good deal of this literature expresses a particular normative concern about a gradual encroachment of expert rule within international political life. Rosga and Satterthwaite, to take a representative example, express their concern that this movement towards governance by knowledge may ‘close off spaces for participation and democratic consultation’.¹³ While it is impossible to deny the seriousness of this concern, as well as the urgent need to address it, my perspective differs from these authors’ in two ways. First, and most simply, it is simply not my primary aim to make a normative critique of this kind – this paper is self-consciously a mapping exercise, purporting only to describe the relationships between international legal structures and regimes of expert knowledge. I do not offer my account as either a critique or a celebration of the role of knowledge and expertise plays within international governance. Second, and probably more importantly, I do not see processes of knowledge production within international governance as *necessarily* part of a turn

Routledge, 2004); P. Canan and N. Reichman, *Ozone Connections: Expert Networks in Global Environmental Governance* (Greenleaf, 2002).

¹² Anghie, for example, shows how the Mandate System of the League of Nations acted as a system for the disciplining populations and territories, using information derived from mandate territories to construct ‘a science by which all societies may be assessed and advised on how to achieve the goal of economic development’. He sees a parallel in the contemporary operation of the IMF and World Bank, which process information from developing countries into ‘knowledge, theories of development and best practices’ which he argues are then used to ‘discipline deviation by developing countries’: A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 264-265, 147-178. Escobar sees the World Bank in similar terms as a venue for the creation, elaboration and dissemination of a particular kind of expertise – developmentalism – which represents the Third World in ways which make it amenable to the deployment of technocratic power: Escobar, n 9 above. Outside the realm of economic governance, a recent paper by Rosga and Satterthwaite charts the development of ‘human rights indicators’ to measure the quality and extent of human rights enjoyment in different states, as well as those states’ compliance with their human rights obligations. They show how this movement towards quantification and statistical measurement tends to empower experts over other actors and transform questions of judgment into technical problems of measurement and data production: A. Rosga and M. Satterthwaite, ‘The Trust in Indicators: Measuring Human Rights’, *NYU School of Law Public Law and Legal Theory Research Paper Series*, Working Paper No. 08-59 (November 2008).

¹³ Rosga and Satterthwaite, id., 5. For some of the best and clearest expressions of this concern, see D. Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27 *Sydney Journal of International Law* 5; D. Kennedy, ‘The Politics of the Invisible College: International Governance and the Politics of Expertise’ (2001) 5 *European Human Rights Law Review* 463; M. Koskenniemi, ‘The Fate of Public International Law’ (2007) 70(1) *Modern Law Review* 1; M. Koskenniemi, ‘Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalisation’ (2007) 8(1) *Theoretical Inquiries in Law* 9; M. Koskenniemi, ‘Constitutionalism, Managerialism and the Ethos of Legal Education’ (2007) 4 *European Journal of Legal Studies* 1, at <http://www.ejls.eu/1/3UK.htm> (last visited 1 June 2009).

towards technocratic managerialism (though of course I leave that possibility well and truly open). Rather, I see them as an inevitable and everpresent part of international governance, and as more ambiguous and indeterminate in their political valence. I share with Jasanoff, then, the view that while knowledge practices may play a role in ‘shaping and sustaining’ existing configurations of power, they also hold out the promise ‘subverting or transforming relations of authority’¹⁴, not merely sustaining or entrenching them.¹⁵ As I intimate in the conclusion, it is that latter possibility which in some general sense animates and directs the present study.

Another source of inspiration for this article has come from a body of literature which approaches the same questions from a different angle, emphasising the central role of *law* in shaping the way individuals imagine or ‘know’ themselves and the social world in which they live. Ever since Geertz’s call many decades ago to examine law as ‘local knowledge’ – as ‘part of a distinctive manner of imagining the real’¹⁶ – a certain kind of legal anthropologist has been attentive to the way law and legal practices act as a species of social imagination. In a variety of contexts, there have been attempts to explore how law helps to ‘create[] worlds of meaning’¹⁷, ‘constructs many of the concepts and categories that we experience as making up social structure’¹⁸, or acts as a ‘cultural code for interpreting the world’.¹⁹ Some of the most significant of such explorations came out of the critical legal studies movement some decades ago, which took to itself the task of exposing and critiquing the worldviews embedded within, and expressed through, particular systems of law.²⁰

More recently, Kennedy has sought to expose the mental world in which international lawyers think and act – the ‘vernaculars’ of international law, each with their own ‘vocabularies, expertise and sensibility’²¹ – and to show how that mental world structures the decisions and commitments of legal professionals. Within this body of literature, then, the focus has been on exploring the relationship between law and social knowledge by analysing the vocabularies, concepts and discursive forms characteristic of a particular legal order, so as to

¹⁴ Jasanoff, n 9 above, 4.

¹⁵ See also generally Jasanoff, n 7 above, 33-36; Bowker and Star, n 11 above, 5-6, 49.

¹⁶ C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 184, 215 (‘Law ... is local knowledge – vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings ... that I have been calling a legal sensibility.’)

¹⁷ G. Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’ (1989) 23 *Law and Society* 727, 739.

¹⁸ M. Suchman and L.B. Edelman, ‘Legal Rational Myths: The New Institutionalism and the Law and Society Tradition’, (1996) 21(4) *Law and Social Inquiry* 903, 908, italics omitted.

¹⁹ S. Merry, ‘Legal Pluralism’ (1988) 22(5) *Law and Society Review* 869, 886.

²⁰ D. Trubek, ‘Where the Action Is: Critical Legal Studies and Empiricism’ (1984) 36 *Stanford Law Review* 575, an early but still seminal description of the CLS project.

²¹ Kennedy, ‘Challenging Expert Rule’, n 13 above, 7.

discover what is distinctive about that legal order's manner of representing social reality.²²

The great value of this work has been to draw attention to the imaginative power of law – its formative and crucial role in constituting the cognitive structures which shape our engagement with the world – as opposed to solely its regulative power over our behaviour. As Trubek noted some time ago, however, work in this mould can be incomplete to the extent that it contents itself with describing the worldview internal to a system of law, without then tracing the processes by which this worldview comes to be adopted by social actors and influences concrete social outcomes.²³ For that reason, my focus is somewhat different from that which characterises much work in this tradition. This article does not focus on the 'internal' structure or symbolic order of international law, nor does it seek to excavate the mental world in which international lawyers live and work. There is of course great value in scholarship of that kind, and as it happens some description of these 'internal' processes are part of the story I want to tell – but ultimately they are not the point of it. Instead, my focus is on the ways in which law and legal processes shape social scientific representations of the world – in other words, not just how legal systems structure the way lawyers imagine reality, but how the law's reality becomes embedded in social imagination more generally, through the disciplines and institutional mechanisms which produce authoritative, expert and widely shared 'knowledge' of the world. Although this does not trace the causal path all the way from law to knowledge production through to social outcome, it goes I hope a long way towards that goal. One aim is to provide a thick empirical account to provide support for the claim – often made, but less often concretely substantiated – that law 'constitutes' social relations.

This paper be understood, therefore, as an attempt to bring together some of the insights of the two different bodies of literature just described. My central concern is with the relationship between international law and systems for the production of expert knowledge. My aim is to explore the ways in which international legal regimes are involved in the processes by which such knowledge structures are 'formed, communicated, imposed, shared, altered [and] reproduced'.²⁴ My initial claim is that we need to pay closer attention to these processes if we are to understand more fully the way power is constituted, mediated and deployed in international life.

I have chosen to examine the relationship between law and knowledge in the specific context of the international legal regime governing trade in services, negotiated and administered by the World Trade Organization. In the story which follows, I try to track the co-evolution of this international legal infrastructure with a new domain of expert knowledge about the global services economy. I trace the

²² There is a useful survey of some such material in S. Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31(4) *Law and Social Inquiry* 975.

²³ Trubek, n 20 above, at 610ff.

²⁴ Geertz, n 16 above, 182.

ways in which the General Agreement on Trade in Services (GATS) has shaped and structured the work of experts interested in mapping global flows of international trade in services, creating statistics on existing barriers to such trade, and analysing and interpreting that raw data to produce policy-relevant knowledge to shape public decision-making. It turns out that law is everywhere in this story – providing a social and political context for the production of knowledge, privileging and objectifying certain forms of knowledge and not others, helping to disseminate authorised forms of knowledge, and mediating the relationship between experts and sites of political decision-making. What Geertz saw to be true at the level of adjudication turns out also to be true at the systemic level: the construction and application of a system of legal norms is always and necessarily at the same time a re-interpretation or redescription the reality on which those norms operate.²⁵

IMAGINING TRADE IN SERVICES

One of the major innovations in the domain of international economic governance over the last two decades has been the creation of an international legal regime governing international trade in services. The watershed moment came in 1995 with the coming into force of the General Agreement on Trade in Services (GATS) at the conclusion of the Uruguay Round of multilateral trade negotiations – almost a half century after its equivalent in the goods area, the General Agreement on Tariffs and Trade (GATT). Since then, over 50 bilateral and plurilateral agreements have been signed which contain rules on the liberalisation of ‘trade in services’.²⁶ It has been a remarkable, and remarkably rapid, addition to the international legal landscape, and one which has grown out of a quite unique confluence of social, economic and political conditions. Among the most important but least often recognised of those conditions was a conceptual revolution: the invention of the concept of ‘international trade in services’, and its broad acceptance as a useful and authoritative description of particular kinds of international economic activity.

Prior to the 1970s, transnational economic transactions which involved a services element had not been commonly described as ‘international trade’ in such services. The provision by one firm of financial services through an affiliate in a foreign country to foreign consumers, for example, or the teaching of foreign students in a private university, had not been conceptualised as ‘trade’ in financial services or education services. They were more likely to be framed as instances of foreign direct investment, foreign establishment, or (where such transactions were

²⁵ *ibid*, 175.

²⁶ See ‘Regional Trade Agreements Notified to the GATT/WTO and in Force by Type of Agreement’, at http://www.wto.org/english/tratop_e/region_e/type_e.xls (last visited 1 June 2009).

carried out by personnel sent abroad) as issues of immigration and border control. But beginning in the mid- to late-1970s, as Drake and Nicolaïdis have chronicled, all this began to change, as an increasingly influential group of experts, policy-makers, intellectuals and others began to redescribe transnational services transactions as ‘trade in services’, to marshal arguments about the significance of their contribution to global economic growth and prosperity, and to claim that the liberalisation of such trade was likely to bring precisely the same kinds of benefits as the liberalisation of goods trade had brought since the end of World War II. Over the course of the next decades, this ‘epistemic community’²⁷ began to elaborate the meaning and implications of these claims, and to create a new domain of knowledge about the global services economy.

We have seen, then, the simultaneous construction of a new international legal regime and a new regime of expert knowledge. In this section, my aim is to chronicle some aspects of the co-evolution of these two regimes, to show some of the ways they have influenced each other. Since the period prior to the creation of the WTO has been detailed elsewhere, I will cover that chapter briefly, and the primary focus of attention will be in the period subsequent to 1995.

ENCODING KNOWLEDGE IN LAW

At the beginning of the 1980s, the GATT was between negotiation rounds. The Tokyo Round had finished in 1979, and in the early 1980s attempts to begin a new round had not yet borne fruit. Within trade policy circles, there was widespread concern about the future of the liberal trading system, given (among other developments) the rise of so-called ‘new protectionism’ in the wake of the oil crises of the 1970s and the emergence of the new industrialising economies of East and South-East Asia. It was in the context of pessimism about the degree of political support which could be marshalled for a new trade round that the epistemic community of trade in services advocates began to call for the inclusion of services trade on the agenda of the next GATT round. Armed with impressive (if necessarily at that stage somewhat speculative) statistics on the significance of services as a proportion of world exports, and using their influence to gain traction in important venues such as the OECD, they argued that ‘transactions in services could be considered trade, that the principles and norms for trade in goods might apply, and that the challenge in the emerging transition was to avoid ‘protectionism.’²⁸ The United States was particularly responsive to these arguments. This was in part because the US appeared to have a significant comparative advantage in major service sectors such as financial services, banking, entertainment, and telecommunications, and thus the inclusion of services in the next round was in its interest. But it was also because it was thought that domestically powerful service industries may provide some much needed support

²⁷ W. Drake and K. Nicolaïdis, ‘Ideas, Interests and Institutionalization: ‘trade in services’ and the Uruguay Round’ (1992) 46(1) *International Organisation* 37, 38.

²⁸ *ibid.*, 45. This entire section draws heavily on Drake and Nicolaïdis’s work.

for the US administration's liberalising international trade agenda. From the early 1980s, then, the United States became the champion of the inclusion of services on the agenda of what became the Uruguay Round negotiations. Despite significant initial obstacles, it was ultimately successful in that effort.

As different countries began the process of working out whether and what type of services liberalisation was in their interest, a variety of studies were produced which attempted to discern, as best they could on the available information, which countries had comparative advantage in which sectors of service production. Some were produced by national bodies, others by international institutions such as UNCTAD, the body to which many developing countries turned for advice and assistance. As Drake and Nicolaidis tell the story, the first half of the 1980s was therefore a period of intense knowledge production. A 'flood of studies'²⁹ was produced analysing the nature and consequences of services liberalisation in different sectors. But in addition to this simple accumulation and interpretation of initial data, this period also more fundamentally involved the coalescing and dissemination of the basic conceptual framework for describing and analysing international trade in services which had so recently been developed. The early period of negotiations was a learning process for GATT negotiators, as they absorbed the ideas of trade in service experts, and came to a large extent to share the conceptual frameworks, assumptions and modes of analysis characteristic of that body of expertise. Background 'conceptual' discussions in negotiating groups, for example, drew quite explicitly on papers developed by trade in services experts. Dense networks of information exchange between government officials and members of the expert community were created, and over time the former came to accept the latter's claim that certain types of transborder services transactions could usefully be understood as international trade and subject to liberalisation commitments. As the process continued, however, the influence became mutual, as the negotiations themselves began to structure and focus the knowledge-generating activities of trade in services experts. As negotiators began to think concretely about what an agreement on trade in services might look like, they identified conceptual issues in need of clarification by expert groups. At the same time the political dynamics of the negotiations shaped the ways in which these processes of clarification proceeded.

Perhaps the best example of this process is the definition of trade in services itself. The importance of the definition is obvious. It was the single most important concept on which the application of the disciplines contained in the GATS depended: if the economic activity in question did not come within the definition of trade in services, measures taken to interfere with that activity were left unfettered by the GATS.³⁰ Although a number of different typologies of trade

²⁹ *ibid*, 55.

³⁰ Article I of the GATS provides simply that 'This Agreement applies to measures by Members affecting trade in services'.

in services had been developed over the prior decade or so within the epistemic community around services, one in particular came to be dominant in the context of trade negotiations.³¹ It classified transactions as international trade in services according to the location and/or nationality of supplier and consumer. A transaction was international trade, that is, either where the supplier and consumer were in different countries, or where one of the parties travelled (either through the movement of people or capital) to a foreign country to effect the transaction.

As useful and as neat as this definition was, it also presented difficulties to negotiators. A definition of trade in services which included all situations in which a services firm set up business in a foreign country could potentially subject *all* foreign investment, including even portfolio investment, as well as other kinds of transnational capital flows, to new international legal disciplines. For many developing countries – and in this they were supported by the institutional voice of UNCTAD – this was unacceptable, and discussions therefore began on how to clarify the nebulous line between trade in services and other kinds of transnational capital flows. Similarly, a definition of trade in services which included all instances in which services firms send personnel to another country to supply services could potentially subject broad swathes of immigration law to discipline under international trade law. Again, this was politically unpalatable, and required a refinement of the definition of trade in services. In the end, trade in services was defined in GATS Article I:2(a) as:

the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

This mirrored very closely the dominant understanding of the concept within the community of services experts. However, in order to deal with the political difficulties just mentioned, an Annex to the agreement clarified that it does not apply to ‘measures regarding citizenship, residence or employment on a permanent basis’³². Furthermore, the various definitions of key terms contained in Article XXVIII together excluded short-term portfolio investment (among other kinds of capital flows) from protection by GATS disciplines.

A separate question for negotiators concerned the extent of liberalisation which would be expected within this defined domain of trade in services, and the

³¹ For further details, see Drake and Nicolaidis, n 27 above.

³² GATS Annex on Movement of Natural Persons Supplying Services Under the Agreement, paragraph 2.

way in which it would be carried out. It was decided relatively early on that certain policy disciplines would only be applied on a service by service, sector by sector basis, and that each country could choose for itself which service sectors (and which modes of supply) it would undertake access commitments. As a result it was necessary to construct a comprehensive and (more or less) uniform classification of all traded services by reference to which these liberalisation commitments could be negotiated. To this end, negotiators turned to experts within the statistical community, who had already compiled a document called the (then provisional) Central Product Classification (CPC), which contained a comprehensive system for categorising all services produced at that time.³³ Negotiators, aided by the GATT Secretariat, compiled a simplified and slightly modified version of this classification system – the ‘W/120’ document – which could be used as a non-binding template to guide negotiators as they made their commitments. Most governments used this template, sometimes with minor modifications, and as a result the classification categories contained in the W/120 (and by extension the CPC, to which they were cross-referenced) were then ultimately inscribed in legal form in the services schedules of each WTO Member.

I offer these two simple examples as useful illustrations of the broader dynamics at work during this period. The creation of the GATS represented in many ways the encoding of expert knowledge into legal texts: the inscription of a new set of concepts and categories, developed by pre-existing communities of experts, into the text of the General Agreement on Trade in Services. This encoding was of course neither a simple nor automatic process: the social and political contexts of negotiations inevitably left their mark on the kinds of ideas, concepts, principles and categories which were written into legal texts. As a result, the experts often perceived the negotiated texts as in some important respects distortions of, or departures from, their own ideas. Nevertheless, if there is a theme to emerge from this first part of the story, it revolves around the impact of knowledge practices on legal processes, and the encoding of new forms of knowledge in legal texts. In the years since 1995, however, another side of the relationship between knowledge and law has emerged, which illuminates precisely the converse: the influence that legal processes have had on the processes by which knowledge of the global services economy has accumulated, and the role that the international legal regime governing services trade has played in re-constituting this new domain of services expertise.

MAPPING GLOBAL SERVICES TRADE

The creation of the GATS, and in particular the next round of services negotiations, led to greatly increased demand for statistical data on international

³³ The Provisional CPC can be found here: <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1> (last visited 1 June 2009). It has since been updated a number of times, and the current version is CPC Ver. 2, see <http://unstats.un.org/unsd/cr/registry/cpc-2.asp> (last visited 1 June 2009).

trade in services. Trade negotiations are, of course, data intensive. Successful negotiations depend on participants having access to a broad information base: information about the nature and extent of trade in services; the nature and extent of existing and potential barriers to trade; the relative size and importance of these barriers, as well as of their socioeconomic impacts; and the likely consequences of the removal or modification of these barriers.³⁴ This kind of information allows governments to determine their interests, to define clear strategies for negotiations, to help mobilise domestic constituencies, and to compare and commensurate their concessions with those of their negotiating partners. It is true that in principle it is perfectly possible to want to negotiate even without such data, particularly where a country is keen to make liberalisation commitments in order to attract FDI.³⁵ But negotiations within the WTO are often motivated by different concerns, and in a political context which keenly values reciprocity. Furthermore, in practice, availability of reliable data seems to have presented a problem for services negotiations from the very beginning. Negotiations in the Uruguay Round were made considerably more difficult by the scarcity and comparative unreliability of statistical measures, and negotiating positions in that round were at times based on little more than educated guesses about what the consequences of liberalisation were likely to be. Indeed, some observers close to the negotiations have suggested that the (low) level of liberalisation achieved in those negotiations reflect the fact that many ‘countries were unsure, for lack of information, of the real implications of making commitments’.³⁶

It was not long after the creation of the WTO, then, that new efforts to address this problem began.³⁷ As is well known, the GATS requires periodic trade negotiations, and the next round of such negotiations was to commence no later than 2000.³⁸ As early as 1996, therefore, the Council for Trade in Services began to develop an information exchange program to facilitate the generation and dissemination of statistical data on services trade.³⁹ As part of this program, a series of discussions were held from roughly 1997 to 1999 on specific service sectors, aimed at exposing Members to the universe of available statistics and

³⁴ The significance of statistical data in the context of services negotiations has been the subject of a good deal of comment. See, for example, A. Maurer et al, ‘Measuring Trade in Services’ in Mattoo et al. (eds.), *A Handbook of International Trade in Services* (Oxford: Oxford University Press, 2007) Chapter 4, 133, 136; Drake and Nicolaidis, n 27 above, 54; A. Jara and M. Dominguez, ‘Liberalization of Trade in Services and Trade Negotiations’ (2006) 40(1) *Journal of World Trade* 113, 121; M. Robert, ‘Negotiating Services Agreements: Challenges Ahead’ in S. Stephenson (ed), *Services Trade in the Western Hemisphere: Liberalization, Integration and Reform* (Washington: Brookings, 2000) 250; *Manual on Statistics of International Trade in Services* (Geneva: UN, 2002) paragraph 2.6.

³⁵ I am indebted to Rolf Adlung for this clarification.

³⁶ Robert, n 34 above, at 251, citing Geza Feketekey. See also Drake and Nicolaidis, n 27 above, at 41; and WTO document S/C/M/12, para 17, for similar views.

³⁷ See Maurer et al, n 34 above, for a recent survey of these efforts and existing data sources.

³⁸ See GATS Article XXI.

³⁹ See the recommendation of the Council for Trade in Services contained in para 47 of WTO Document S/C/3, subsequently endorsed by the Ministerial Council. The idea for this information exchange program in fact originated within the Secretariat itself.

thereby ‘enabling Members to identify negotiating issues and priorities’.⁴⁰ These discussions were supported by a series of papers prepared by the Secretariat. The first such paper reviewed and described the sources of data which were currently available at that time, and on the basis of that data provided a high-level overview of global trade in services.⁴¹ The following papers then focussed more specifically on individual service sectors, presenting available information on ‘the economic importance of the service, issues of definition, the main ways in which the service was traded and regulated’ among other things.⁴²

The main sources of data on trade flows at that time were – and still are – individual countries’ Balance of Payments (BOP) statistics and (to a lesser extent) Foreign Affiliates Trade in Services statistics (FATS) reported by central banks and national statistical offices.⁴³ These existing data sources posed difficulties, as they had been compiled in accordance with statistical standards and frameworks that do not correspond easily with the new set of categories and concepts entrenched in the GATS. Specifically, there were at least three serious problems from the perspective of GATS negotiators.⁴⁴ First was the problem of coverage. While most countries report BOP statistics, a relatively small proportion compile FATS. Even for those countries which do compile both, the definition of ‘trade in services’ under the GATS is so broad that certain activities which are defined as trade in services are simply not measured as foreign transactions in existing statistical measures. For example, because BOP statistics use the concept of residency to define trade, and because residency is by statistical convention treated as changing after a year’s presence in a foreign country, trade involving presence of natural persons for more than one year is not captured in BOP statistics.⁴⁵

⁴⁰ WTO Document S/C/6, at para 5.

⁴¹ WTO Document S/C/W/27, see also Add.1 and Add.2.

⁴² *ibid*, at para 6. See also R. Adlung and M. Roy, ‘Turning Hills into Mountains? Current Commitments Under the General Agreement on Trade in Services and Prospects for Change’ 2005 *Journal of World Trade* 39(6) 1161, 1191.

⁴³ BOP statistics record the value of transactions between residents of a country and non-residents, with services transactions disaggregated according to sector. In order to facilitate cross-country comparability and consistency, this data is collected in accordance with a uniform set of guidelines promulgated and periodically updated by the IMF, the most recent of which is BPM-6, released in prepublication form at the end of 2008. FATS data is information on the activities of locally-based foreign affiliates (inward) and of foreign-based affiliates of local businesses (outward). While the practices of statistical agencies differs significantly from country to country – and indeed only a handful of the advanced economies currently produce such statistics – this information can include data on sales, turnover, employment, exports, imports and value-added, among other things. The European Union has recently put in place a framework to encourage and ensure that FATS statistics are compiled for its member countries. It is worth pointing out that while many individual service sectors have additional sources of information, they are less useful than BOPS as they lack comparability, and have no easily identifiable common economic denominator. (I am grateful to Rolf Adlung for this point.) In addition, these datasets have sometimes been augmented by *ad hoc* surveys and other data collection activities in relation to specific service sectors in specific countries – see, for example, the sources referred to in J. Magdeleine and A. Maurer, ‘Measuring GATS Mode 4 Trade Flows’, WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2008-05, December 2008.

⁴⁴ See generally, WTO, ‘A Review of Statistics on Trade Flows in Services’, WTO Document S/C/W/27, including Add.1 and Add.2. Also P. Chang et al. ‘GATS, the Modes of Supply and Statistics on Trade in Services’ (1999) 33(3) *Journal of World Trade* 93.

⁴⁵ WTO, n 44 above.

Second, existing statistics do not disaggregate by ‘mode of supply’ – commercial presence, cross-border trade, movement of natural persons, and so on. This makes it tremendously difficult for negotiators wishing to distinguish between modes in their scheduled commitments in meaningful ways. Third, existing sources use different frameworks for classifying and categorising services from those found in GATS schedules, sometimes rendering statistical information virtually useless as a basis on which to predict the consequences of particular GATS commitments.⁴⁶

As a result, a series of projects were initiated to change the way data is collected by national statistical bodies, in order to make it more useful for GATS negotiators. A growing community of knowledge-producing actors and institutions began to be mobilised to expand and elaborate this relatively new domain of knowledge, and to give new impetus to the vast project of redescribing the world in the language of trade in services. The WTO has contributed to this project in a number of ways. One of the most significant has been through its participation in the Interagency Task Force on Statistics of International Trade in Services. The Interagency Task Force is convened by the OECD, and is a cooperative effort of six different international organisations: the IMF, UNCTAD, UN Statistic Division, Eurostat, the United Nations’ World Tourism Organisation and the WTO. It was initially established at the request of the GATT in 1994 to take a leadership role in the long-term effort to produce reliable and comprehensive statistics on international trade in services.⁴⁷ Its first and primary task was to draft the Manual on Statistics of International Trade in Services (MSITS), which sets out a statistical framework for the collection of statistics on services, designed to guide and inform the work of national statistical agencies as they begin to collect such data. The Manual was drafted over a number of years, based in part on ‘the advice of specialist consultants [and] a large number of member countries’ experts’.⁴⁸ It was approved for publication in 2002, and is currently being revised.

The MSITS was explicitly drafted with the needs of GATS negotiators in mind. It surveys existing statistical standards and data sources such as the BOPS and FATS frameworks, analyses their mutual consistency and adequacy from the perspective of GATS negotiations, and proposes progressive changes to and elaborations of these standards, so that over time the data produced in accordance with them comes gradually to conform more closely to the categories and concepts contained in the GATS. Thus, for example, as regards classification problems, the MSITS establishes a new and more detailed classification system for

⁴⁶ *ibid*, gives this example: ‘For example, in the IMF BOP classification, computer and information services include news agencies services which are part of recreational and cultural services in the GNS classification’.

⁴⁷ See for further information <http://unstats.un.org/unsd/tradeserv/TFSITS/default.htm> (last visited 1 June 2009). See Interagency Task Force, n 34 above, at 3: ‘a particular impetus for the preparation of a separate manual on statistics of international trade in services has arisen from the recent tendency for trade agreements to cover services as well as goods, and the need for statistics both to guide the negotiations and to support implementation of these agreements. The most well-known and wide-reaching agreement involving services is the *General Agreement on Trade in Services*.’

⁴⁸ Interagency Task Force, n 34 above, iii.

different categories of services – the Extended Balance of Payments Classification System (EBOPS) – to address problems posed by inconsistencies between the existing BOPS classification and the more detailed classification system used by GATS negotiators (the ‘W/120’). It also publishes tables showing how the categories used in the W/120 correspond with those used in other classification systems, as a first step towards creating a harmonised framework, and to give clarity to the categories used in existing GATS schedules.⁴⁹ On the question of coverage, the MSITS also seeks to augment existing information sources by strongly encouraging national agencies to compile information on trade in services by trading partner, in order to ‘give a firm basis for multilateral and bilateral ... negotiations that are carried out under the GATS’.⁵⁰ Similarly, the MSITS proposes a number of changes to facilitate the allocation of services transactions to a particular mode of supply. These include, for example, separately identifying traveller’s expenditure on goods and services; collecting information on the location of the supplier at the time of the services transaction for a range of service sectors; and breaking down information on the compensation of non-residents by the industry of the employing establishment.⁵¹

At times, the MSITS seeks to respond more directly to the needs of GATS negotiators, by paying closer attention to specific sectors which are the subject of particular commercial interest. For example, in response to the stated need of GATS negotiators for information on a range of transactions related to audiovisual activities, the Manual sets out a ‘memorandum item’ with a suggested means of aggregating data on this category from existing and proposed data sources, which negotiators may use in their analyses.⁵² In addition, in the course of revising the MSITS, the Interagency Task Force has put together a Technical Subgroup on the Movement of Natural Persons, with the aim of establishing a conceptual framework and guidelines for the production of data on Mode 4 trade (that is, trade through the transboundary movement of natural persons).⁵³ Although the paucity of data in this area has been recognised for some time, it is clear that the focus of energies on this issue was in part a response to negotiating priorities in the Doha Round, where Mode 4 commitments have been of particular interest for a number of developing countries. It has corresponded with concerted efforts from other bodies over the last few years, including both national agencies and independent experts, to improve such data.⁵⁴ These examples are illustrative of a more general dynamic by which the activity of knowledge-producing experts

⁴⁹ *ibid.*, Annexes III and IV.

⁵⁰ *ibid.*, paragraphs 3.38ff.

⁵¹ *ibid.*, paragraphs 3.41-49.

⁵² *ibid.*, paragraphs 3.144ff. To take another example, the revised version of the MSITS will include a framework for the collection of data on ‘environmental services’. I am grateful to Andreas Maurer for this example.

⁵³ This group was, however, closed after carrying out only a small part of this work, and the Joint Task Force itself has taken on some tasks relating to Mode 4 trade. The new revised MSITS will apparently include further guidance on Mode 4 trade. My thanks to Andreas Maurer for this information.

⁵⁴ For a very useful review of this work, see Magdeleine and Maurer, n 43 above.

has in many ways been directly channelled and mobilised by treaty negotiations within the WTO.⁵⁵ The creation of the GATS and its associated institutional structures, it seems, have shaped the practices of experts and knowledge producers in important ways – providing an impetus for their activities, directing their energies towards particular questions, and shaping the concepts and categories they use to describe and map reality.

The WTO has also begun to involve itself in *disseminating* knowledge produced by services experts and statistical bodies. For example, the WTO Secretariat has produced a number of papers for the Council on Trade in Services, in which it has updated Members on the state of the art in the collection of services statistics, including keeping them informed of the activities of the Interagency Task Force.⁵⁶ These papers have been very well received by delegations, and have led to a number of requests for technical assistance from some developing country members. As a result, the WTO has conducted a number of in-country training seminars for individual countries, explaining the importance of the collection of statistics on services trade, outlining methods for doing so, introducing country experts to existing data sources, and promoting implementation of the latest recommendations from international bodies. Furthermore, in combination with a number of other international organisations,⁵⁷ the WTO has begun to collate statistical information from national agencies, and publish them annually in a form more accessible to the public.⁵⁸ Specifically in relation to the MSITS, the WTO has participated in a number of regional seminars coordinated by the Interagency Task Force promoting awareness of the Manual, including in Africa, Western Europe, Latin America and North America. The WTO's website also contains material related to the collection of statistics on international trade in services, including a training module for general use.⁵⁹ Through these activities, and a growing list of more like them, the trade regime seems therefore to be constituting itself as a node in existing networks for the dissemination and propagation of knowledge about global trade in services.

But generating statistical data is of course never simply a mechanical exercise in the collection and transmission of data. There are always hard choices involved in the application of statistical categories in particular cases, and this is as true in the context of trade in services as in any other. How, for example, is one to draw

⁵⁵ Another example might be the work of the OECD/Eurostat Informal Working Group on environmental services set up in 1995, whose work on classification of the environmental services sector has been driven in part by negotiations on that sector in the WTO. See OECD, *Future Liberalisation of Trade in Environmental Goods and Services: Ensuring Environmental Protection as well as Economic Benefits* COM/TD/ENV(98)37/FINAL, Paris, 1999.

⁵⁶ Eg, n 44 above.

⁵⁷ See for example, the IMF Balance of Payments Database (<http://www.imfstatistics.org/BOP/>), Eurostat New Cronos Database (http://www.esds.ac.uk/international/support/user_guides/eurostat/cronos.asp), OECD Statistics on International Trade in Services (http://lysander.sourceoecd.org/v1=3534529/cl=14/nw=1/rpsv/statistic/s21_about.htm?jnlissn=16081277); and UN Statistical Division's Service Trade Statistics Database (<http://unstats.un.org/unsd/servicetrade/default.aspx>), last visited 1 June 2009.

⁵⁸ See, for example, the annual publication of the WTO entitled *International Trade Statistics*.

⁵⁹ See generally http://www.wto.org/english/tratop_e/serv_e/serv_e.htm (last visited 1 June 2009).

the line between trade in goods and trade in services where goods are transported internationally for processing, or where a firm provides manufacturing or merchanting services in respect of imported goods? How should the payment of royalties and licensing fees be treated for statistical purposes? What mode of supply is most appropriate for services supplied by intra-corporate transferees working in an affiliated company? Such difficult questions are commonplace, and of course the statistical community has a variety of venues and procedures for discussing and developing collectively agreed standards to resolve hard cases. For present purposes, the important point is that such questions have a potential legal significance, in addition to their technical statistical significance.⁶⁰ Labelling a particular type of economic activity as trade in services – and classifying the kind of service in one way or another – is a key process by which government action in this area comes to be subject to the various techniques of surveillance and discipline which make up the international trade regime. Knowledge production and practices of classification shape governance, therefore, in the crucial sense that they provide the basis and rationale for the application of particular domains and regimes of governance to the social world.

The result is that classification questions are not solely the domain of statistical experts, but are also discussed, debated and adjudicated in the context of the interpretation and application of GATS disciplines. The most obvious example is the *US – Gambling* case, in which the WTO's Appellate Body was required to decide, as a legal matter, whether 'remote gambling services' fell within the category of 'other recreational services' contained in the W/120.⁶¹ (This decision, to be sure, concerned a relatively minor and technical point, but it is almost inevitable that the Appellate Body will be asked to make more consequential classificatory distinctions relating to the more fundamental issues set out in the previous paragraph.) But it does not occur only in formal judicial proceedings. For example, the WTO's Committee on Specific Commitments has been host to lengthy discussions about whether and in what circumstances the transnational provision of 'manufacturing services' ought to be characterised as 'trade in services' for the purpose of the GATS.⁶² Other committees have (inconclusively) discussed the best method of allocating a mode of supply to services supplied electronically.⁶³ More generally, the same kinds of discussions have begun to occur among professional international lawyers more generally, who typically address these questions in a somewhat unique way, using established professional

⁶⁰ This is hardly unique to the particular case study under examination here. No doubt there many contexts in which the choices made in the context of statistical projects have direct or indirect legal consequences – for example, the collection of census data can have significant effects on the distribution of public money and the number of elected representatives allocated to a particular area. The dynamic I am referring to here may therefore be a more general one. I owe this point to Don Regan.

⁶¹ See *United States – Measures affect the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, 51-73.

⁶² See WTO Document, S/CSC/M/16-17.

⁶³ For example, WTO Documents S/C/M/31-38, S/C/W/68, S/C/W/87, S/C/W/98, S/C/W/104, S/C/7-8, S/C/W/100, S/C/W/115.

techniques of treaty interpretation. All of this conversations – additional to those which are occurring with statistical communities – can be understood as venues for the production of shared understandings about the ways in which different economic activities should be interpreted, understood and classified in the new language of trade in services. One result of the GATS, then, has been to multiply the different communities and different venues which are involved in processes of collective meaning-making.

It is difficult to generalise about the degree to which meanings circulate between these different communities. The decision of the Appellate Body in *US – Gambling* has ensured that, in the context of formal dispute settlement, interpreters will (indirectly, but no less meaningfully) give weight to the opinions and classification practices embodied in global statistical standards such as the CPC.⁶⁴ Furthermore, as noted above, in the context of Committee discussions, the Secretariat has to the extent possible tried to ensure that WTO delegates are aware of recent developments in statistical venues, which inform their discussions to some degree. There are at least some mechanisms, therefore, by which formal and informal processes of legal interpretation are to some extent informed by statistical practices of meaning-making. So far, however, the converse seems to be less true. I have described above the ways in which the formal concepts and definitions encoded in trade law are beginning to reshape statistical practice, but it is another question whether these less formal, ongoing processes of meaning-making within the trade community have a similar effect.⁶⁵ There is, to be sure, a small body of services statisticians who try to facilitate communication between the trade regime and the national statistical communities who produce the raw data on which these statisticians rely. Anecdotally, however, establishing these lines of communication seems to have been difficult. As a result, there is little evidence that these tacit agreements within the trade community on how to apply services classifications to particular transactions for the purposes of trade law directly influence the decisions reached on similar issues among national statistical communities, or are directly embedded in formal practices of data collection. That said, it remains to be seen whether formal legal decisions by the Appellate Body regarding classification will guide statistical classification practice over the longer term. There are practical reasons to expect that they might.

⁶⁴ The Appellate Body in that case considered that an internal GATT document – namely, the W/120 document referred to earlier – was essentially decisive in the interpretation of the phrase ‘other recreational services (except sporting)’ the United States’ Schedule. But the W/120 document itself cross-referred to CPC category 964 to define this phrase, with the result that it was ultimately the CPC categories which (indirectly) determined the outcome of the case. See *US – Gambling*, n 61 above, paragraph 201.

⁶⁵ I use the term ‘trade community’ in a loose sense, to include not just negotiators and officials from government delegations within Geneva, but also country-based officials, Secretariat members, as well as NGOs, think tanks, academics and others closely connected with trade policy and the workings of the WTO.

BARRIERS TO TRADE IN SERVICES

One major project for knowledge producers since the creation of the GATS, then, has been to create the institutional and conceptual infrastructure for mapping global trade in flows in services. But another major project has been the complementary one of mapping *barriers* to trade in services. Which countries impose trade barriers on what kinds of services? What are the nature of these trade barriers? What are the most common types? What is their economic impact? Over the last 15 years an expanding array of expert communities have been mobilised, expanded and deployed to address precisely these kinds of questions. They have set about not only to do the mundane work of collecting this data, but also the foundational tasks of developing methodologies for measuring trade barriers, generating shared ideas of what does and does not count as a trade barrier in services, as well as building institutions and routine practices for the collation and publication of this information. Again, the GATS has shaped this work in interesting ways – not only providing an important motivation for it, but also structuring its content and the dynamics of evolution.⁶⁶

Some of the earliest work cataloguing and quantifying barriers to services trade was carried out within national trade bodies, or at least closely associated with them. For obvious reasons, a good number of trade ministries have developed practices of collecting information on the trade barriers imposed by other states, either on a routine and ongoing basis or in the lead-up to a new round of trade negotiations. The inclusion of services on the agenda of the GATT/WTO during the Uruguay Round meant that these national bodies began also to turn their attention to barriers to services trade in their reviews of other countries' trade policies. The office of the USTR, for example, was the first to include information on foreign countries' barriers to trade in services in its National Trade Estimates early in the Uruguay Round. Its European and Japanese counterparts followed suit soon after.⁶⁷ Of course these reports are not typically viewed as the most reliable of data sources – for obvious reasons, they reflect the interests of a single countries' exporters, and are often based on 'uncollaborated assertions from interested parties'⁶⁸ – but for some time at least they were the best that existed. Towards the end of the 1990s, however, as the new round of GATS negotiations approached, a major research project was begun in Australia, involving two major Australian universities in collaboration with the Australian

⁶⁶ For useful reviews of this work see Z. Chen and L. Schembri, 'Measuring the Barriers to Trade in Services: Literature and Methodologies' in J.M. Curtis and D. Ciuriac (eds), *Trade Policy Research 2002* (Ottawa: Department of Foreign Affairs and International Trade, 2002) at 219–285; and A. V. Deardorff and R. M. Stern, 'Empirical Analysis of Barriers to International Services Transactions and the Consequences of Liberalization' in Mattoo et al, n 34 above, Chapter 5.

⁶⁷ See, eg, USTR, various years, 'National Trade Estimate Report on Foreign Trade Barriers', US Government Printing Office; EC, 1995, *1995 Report on US Barriers to Trade and Investment*, Brussels: European Commission; Japanese Ministry of Economy, Trade and Industry, *Report on the WTO Consistency of Trade Policies by Major Trading Partners* (2003).

⁶⁸ See, eg, C. C. Findlay and T. Warren, 'Measuring Impediments to Trade in Services', Centre for International Economic Studies, University of Adelaide, CIES Discussion Paper No. 99/19, n 9.

Productivity Commission. This project has produced a good number of studies of barriers to services trade across a variety of different sectors, the bulk of these studies were published in a 2001 collection, which became available, not coincidentally, in time for the early stages of the GATS negotiations.⁶⁹ While the body of papers produced in this context focussed primarily on sectors of particular interest to Australian service suppliers, it remains tremendously influential – not only as a source of some of the best available information on the sectors addressed, but also as a guide to the different methodologies available to measure and model trade barriers in the services context. Studies since then have virtually uniformly used this Australian body of work as a guide and reference point for their own efforts, and a number of other national trade bodies have also begun to turn their attention to this work since that time.⁷⁰

In addition to these national bodies, a number of international organisations have also provided important spaces for this kind of work. One of the most influential has been the work of the Trade Committee of the OECD, which has had an active and continuing role in the area since 1996, and constitutes a crucial node in the network of knowledge producers working in and around the effort to map barriers to trade in services.⁷¹ One of its most important functions has been its role in creating a network of services experts: since 1999, it has held (almost) annual meetings of services experts – on occasion bringing together trade negotiators with industry experts and economic modellers – to discuss and define core negotiating issues in GATS negotiations, to share information on recent work mapping services barriers and their effects, to discuss difficult conceptual issues standing in the way of this mapping work, and so on.⁷² The OECD itself has not been prominently involved in the actual collection of new data on barriers in its member countries, but it has certainly contributed to the effort by compiling lists of indicative trade barriers on both a universal and sector specific basis,⁷³ by evaluating different methodologies for measuring services barriers,⁷⁴ by helping to develop a ‘trade restrictiveness index’ for all countries and all sectors,⁷⁵ as well as

⁶⁹ C. Findlay and T. Warren (eds), *Impediments to Trade in Services: Measurement and policy implications* (London: Routledge, 2000).

⁷⁰ For a review of these efforts, in the context of Canadian governmental research in the areas, see Chen and Schembri, n 66 above.

⁷¹ For a useful overview of OECD activities in this area, see OECD Trade and Agriculture Directorate, Trade Committee, ‘Towards a Services Trade Restrictiveness Index (STRI): A Proposal for a Road Map for future Trade Committee Work on Services’, 27 June 2007, TAD/TC(2007)4, 11-18.

⁷² OECD Services Experts Meetings have occurred in June 1999, May 2000, March 2002, November 2003, February 2005, and February 2007, and – in addition to the reports of the meetings themselves, have led to three publications: *Quantifying the Benefits of Liberalising Trade in Services* (Paris: OECD, 2003), Mattoo and Sauvé, *Domestic Regulation and Services Trade Liberalisation* (Oxford: World Bank and Oxford University Press, 2003), and *Trade and Migration: Building Bridges for Global Labour Mobility* (Paris: OECD, 2004). There was also a joint OECD-UNCTAD Workshop on Trade in Services in June 2006 which helped to bring some of this work to WTO Members, particularly developing countries.

⁷³ Eg, OECD Trade Directorate, Trade Committee, ‘Assessing Barriers to Trade in Services: Revised Consolidated List of Cross-Sectoral Barriers’, 28 February 2001, TD/TC/WP(99)/FINAL.

⁷⁴ Eg, OECD, ‘Measuring Barriers to Trade in Services’, TD/TC/WP(96)38.

⁷⁵ OECD, n 71 above.

by modelling the benefits of services liberalisation using the data on existing barriers produced by others.⁷⁶

UNCTAD has also constituted itself as a central venue for the production of services expertise, particularly as it relates to development and developing countries. Even before the end of the Uruguay Round, UNCTAD had begun to investigate the possibility of compiling a global searchable database of non-tariff barriers (NTBs) in services, to complement its existing and highly authoritative database on similar measures in the goods context ('TRAINS'). It has since done exactly that, creating its Measures Affecting Trade in Services (MAST) database, which – as sources of data become more sophisticated and comprehensive – is intended to act as a primary statistical and policy tool in the area. In addition, UNCTAD has been working more generally to 'develop methodologies to identify, classify and quantify NTBs', to 'analyse the impact of NTBs on international trade' and to 'build analytical and statistical capacities to assess how NTBs affect developing country exports'.⁷⁷ In collaboration with developing country governments, it has conducted over 30 assessments of trade in services in particular countries, seeking to identify both the benefits and risks of liberalisation in various service sectors, and to guide the decisions of policy-makers and development experts in this area. It has also produced and commissioned a wide variety of analyses of the development implications of global services liberalisation and barriers to developing country services exports.⁷⁸ This work has been complemented by similar research carried out by key World Bank personnel on the implications for developing countries of services trade, which has been tremendously influential.⁷⁹ Indeed, the first attempt at a more rigorous and comprehensive mapping of global trade barriers in services was conducted by Bernard Hoekman, a senior economist working at the World Bank, in 1995.⁸⁰ In addition, figures on services barriers have been incorporated into the organisation's annual World Trade Indicators publication.⁸¹

Of course, the WTO itself has played an important role in this project. There are a number of activities which the WTO performs which have the effect of

⁷⁶ Eg, OECD, 'Services Trade Liberalisation: Identifying opportunities and gains', TD/TC/WP(2003)23/FINAL and TD/TC/WP(2003)25/FINAL. The OECD Trade Policy Working Paper Series has also since 2004 produced a number of papers directly relevant to services negotiations.

⁷⁷ See <http://www.unctad.org/Templates/Page.asp?intItemID=3848&clang=1> (last visited 1 June 2009).

⁷⁸ See, for example, UNCTAD, *Trade in Services and Development Implications*, 16 Jan 06, TD/B/COM.1/77 and February 2007, TD/B/COM.1/85. For a useful review of the literature on services liberalisation and developing countries see Whalley, 'Assessing the Benefits to Developing Countries of Liberalisation in Services Trade' (2004) 27(8) *The World Economy* 1223.

⁷⁹ Both Bernard Hoekman and Aaditya Mattoo, for example, have been central figures in the development of this literature, from within their positions at the World Bank.

⁸⁰ B. Hoekman, 'Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services', World Bank Policy Research Working Paper No. 1455, May 1995; see also B. Hoekman, 'Assessing the General Agreement on Trade in Services' in W. Martin and L. A. Winters (eds), *The Uruguay Round and Developing Countries* (Cambridge: Cambridge University Press, 1996) 88.

⁸¹ See, eg, World Trade Indicators 2008, pp20ff: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:21393040~pagePK:210058~piPK:210062~theSitePK:239071,00.html> (last visited 1 June 2009).

producing catalogues of trade barriers – whether deliberately or as a by-product of other activities. The WTO exercises, for example, a rudimentary (but rapidly evolving) surveillance function, through which it seeks to monitor the trade policies of its Members, in part to aid compliance with its agreements. This occurs in part through the Trade Policy Review Mechanism – through which each WTO Member has its trade and economic policies periodically subject to review and criticism by its peers⁸² – which provide a valuable, if less than fully reliable, source of data on the trade policies of Members and how they have changed over time. In addition, the Council for Trade in Services itself receives and compiles information on certain trade barriers imposed by WTO Members pursuant to a number of transparency disciplines contained in the GATS. For example, Article III:3 requires Members promptly to inform the Council of any new measures they establish which significantly trade in services covered by its liberalisation commitments. Even the schedules of commitments entered into by each participant in the Uruguay Round negotiations produced a database – albeit an imperfect one – of information about existing barriers to trade in services. Furthermore, the Secretariat reports produced in the context of the information exchange program (discussed earlier⁸³) were early attempts to identify the nature of existing barriers to trade in specific service sectors, and to estimate their incidence and impact worldwide.⁸⁴ More specifically, answers to a questionnaire sent out by the Working Party on Professional Services, in respect of domestic regulations in the accountancy sector, produced a rough list of trade restrictions in that sector.⁸⁵ Earlier, during the Uruguay Round, the Negotiating Group on Maritime Transport Services distributed a questionnaire requesting information from Members on the different kinds of trade restrictive measures they had in place.⁸⁶ While the information produced by the WTO regime through these processes is flawed in many ways,⁸⁷ a lot of the scholarly literature and policy analyses on services liberalisation in fact draw heavily on it as one important source of data on existing trade barriers.⁸⁸

These institutions are not, of course, working in isolation, nor are they by any means the only ones. Naturally, there are a number of experts within the services community who are well-connected with all of these organisations, and information flow and interpersonal contacts between them are common. Sometimes this cooperation takes on a somewhat more formal shape: an OECD

⁸² See generally the reports contained on the WTO website: http://www.wto.org/english/tratop_e/tp_r_e/tp_rep_e.htm#chronologically (last visited 1 June 2009).

⁸³ See n 39 above and accompanying text.

⁸⁴ See WTO Documents S/C/M/28-35.

⁸⁵ See D. Nguyen-Hong, *Restrictions on Trade in Professional Services*, Productivity Commission Staff Research Paper, AusInfo, Canberra, Australia, August 2000.

⁸⁶ See G. McGuire, M. Schuele and T. Smith, 'Restrictiveness of international trade in maritime services' in Findlay and Warren (eds), n 69 above, 201.

⁸⁷ See, for example, the views expressed in A. Hardin and L. Holmes, 'Services Trade and Foreign Direct Investment', Staff Research Paper, Industry Commission, Australian Government Printing Service, 1997, eg, 37.

⁸⁸ See further below, nn96-102 and accompanying text.

report on the benefits of liberalisation, for example, was presented to the Council on Trade in Services in 2003, where it received considerable attention and interest.⁸⁹ UNCTAD reports have also been formally circulated to trade delegates in the context of WTO meetings, where their influence on the negotiating priorities of developing countries is clear. On a more informal level, the WTO Secretariat can, with the appropriate authorisation from the WTO membership, also distribute papers among its members submitted to it by bodies such as the OECD and others.

It is clear, then, that the legal regime governing trade in services – along with its associated institutional infrastructure – has been involved in the processes of knowledge production in important ways: helping to mobilise and knit together expert communities, aiding in the task of collecting data; disseminating knowledge to key decision-makers, and so on. But there is another important function it has performed, which is less readily apparent. One of the biggest conceptual difficulties facing this network of experts, as they attempt to map barriers to services trade, has been how to define a ‘barrier’ or ‘impediment’ to trade in services. In precisely the same way that labelling certain kinds of economic activity (and not others) as ‘trade in services’ involves a degree of judgment and choice, so too does the characterisation of a particular form of governmental measure as an ‘impediment’ to services. This difficulty is at times acknowledged in the literature. Kimura, for example, observes that the notion of a barrier to trade is indeterminate in important ways.⁹⁰ McGuire notes that the standard definition of a barrier – that is, ‘any measure that distorts the efficient allocation of resources in the services sector’⁹¹ – implies the need to distinguish legitimate regulation from ‘distorting regulation’, which in turn involves a degree of normative judgement, both about the existence of a market failure, as well as about the nature of optimal regulation.⁹²

On occasion, there have been attempts to resolve this problem by explicit reference to specific expert norms, such as codifications of what is considered to be optimal regulation in a particular industry. On this approach, a regulatory trade barrier is a regulation which has an appreciable effect on trade and which varies significantly from optimal regulatory regimes, as codified by expert norms, whether formal or informal. A recent paper published by the OECD for example highlights the difficult issue of distinguishing trade barriers from ‘regulations that address market imperfections ... [or] public policy including distributional

⁸⁹ See n 76 above.

⁹⁰ See, eg, Hardin and Holmes, n 87 above, 30; F. Kimura et al, ‘Estimating the Ad Valorem Equivalents of Barriers to Foreign Direct Investment in Financial Service Sectors in Russia’, World Bank Policy Paper, 2004, 7 available at <http://siteresources.worldbank.org/INTRANET/TRADE/Resources/Topics/Kimura-Ando-Fujii-RussiaTelecom.pdf> (last visited 1 June 2009).

⁹¹ This orthodox definition is taken from M. Bosworth et al, ‘Price-impact measures of impediments to services trade’ in Findlay and Warren, n 69 above, 42. See also Hardin and Holmes, n 87 above, 31-32.

⁹² See G. McGuire, ‘Methodologies for Measuring Restrictions on Trade in Services’ in OECD 2003, n 72 above, 36-7; G. McGuire, ‘Australia’s Restrictions on Trade in Financial Services’, Staff Research Paper, Australian Productivity Commission, November, 1998.

objectives',⁹³ and recommends addressing it in part through a series of 'expert workshops'.⁹⁴ More commonly, however, this definitional problem is dealt with implicitly: that is to say, the author of a study draws on his or her perceptions of common, background understandings of what does or does not count as a market failure, what kinds of regulatory purposes are legitimate, and what kinds of regulatory interventions constitute 'optimal' ways of addressing that failure. Studies of barriers to trade in services, in other words, rest on a largely hidden foundation of tacit, collectively understood ways of categorising different forms of governmental action, broadly shared among a particular community of experts.

The point I wish to make here is that the international legal regime seems to contribute to shaping the content of these implicitly shared ideas. As it happens, the concept of a 'trade barrier' is not defined *per se* in the GATS, so it is not simply that experts look for guidance to legal definitions to determine distorting regulation.⁹⁵ Nevertheless, the trade regime does guide researchers in a different way by directing their attention to particular kinds of measures, and deflecting attention from others. I noted above that a variety of texts produced in and around the trade regime often 'provide[s] the starting point for defining ... what are impediments to trade in services', in that it provides a 'starting inventory' of measures which negotiators consider to be barriers to trade.⁹⁶ The very first attempt to comprehensively map global barriers to trade in services, for example, used GATS schedules as its data source.⁹⁷ A number of studies since then have reproduced precisely this methodology, sometimes updated to reflect changes in the content of schedules since then.⁹⁸ In addition, UNCTAD's MAST database and the World Bank's World Trade Indicators are heavily based on information derived from GATS schedules. Other WTO sources have also been used: McGuire and his co-authors, in their review of barriers to trade in maritime transport services, draw on information derived from responses to the questionnaire distributed by the WTO's Negotiating Group on Maritime Transport Services, as well as from Trade Policy Reviews conducted by the WTO.⁹⁹ Kalirajan and Nguyen-Hong also draw on Trade Policy Reviews, WTO-

⁹³ OECD, n 71 above, paragraph 17.

⁹⁴ *ibid*, paragraph 16. For a similar approach, see A. Colecchia, 'Measuring barriers to market access for services: a Pilot study on accountancy services' in Findlay and Warren, n 69 above, 259.

⁹⁵ I should note that this does happen to some extent. Indeed, according to one observer, the shorthand understanding of what constitutes a 'trade barrier' among many in the trade community is simply 'that which is prohibited by Articles XVI and XVII of the GATS'. But while it is clear that these provisions do guide services experts in important ways, the ambiguity and open-ended nature of those provisions means that that is not and cannot be the end of the story.

⁹⁶ Bosworth et al, n 91 above, 44.

⁹⁷ Hoekman 1995, n 80 above.

⁹⁸ See for example, A. Mattoo, 'Financial Services and the WTO: Liberalization in Developing and Transition Economies', (Geneva: WTO, 1998); M. Marko, 'An Evaluation of the Basic Telecommunications Service Agreement', Centre for International Economic Studies, University of Adelaide, CIES Discussion Paper No. 98/09; Pacific Economic and Cooperation Council, *Survey of Impediments to Trade and Investment in the APEC Region* (Singapore: PECC, 1995); S. Kemp, 'Trade in education services and impacts of barriers to trade' in Findlay and Warren n 69 above, 231-244.

⁹⁹ McGuire, Schuele and Smith, 'Restrictiveness of international trade in maritime services' in Findlay and Warren, n 69 above, 172-188.

compiled lists of MFN exemptions, as well as the WTO questionnaire on the accountancy sector.¹⁰⁰ It is true, of course, that as these mapping efforts have progressed, these rudimentary data sources are gradually being superseded or supplemented by a wide variety of other sources.¹⁰¹ Nevertheless, it is still true that GATS schedules, trade policy reviews, and other WTO-derived sources remain the starting point for most work in this area, and are likely to remain significant for some time.¹⁰²

The point is that these WTO-derived sources in some sense reflect shared ideas among trade negotiators and trade officials about what ought to be understood as a trade barrier. Of course, I am not suggesting that a clear, codified and uncontested body of such shared ideas exist. But it is true that the trade regime provides a number of venues in which precisely those ideas come to be formed. One example might be the discussion in the Council for Trade in Services, which dealt with the question whether spectrum management measures might potentially be regarded as a market access limitation covered by Article XVI of the GATS.¹⁰³ (A decision was made that they should not be so regarded.) Another example might be the subsidies negotiations in the Working Party on GATS Rules, which began with an attempt to agree a common conceptual framework for what constitutes a subsidy. In fact, no such agreement was reached, and delegates have been extremely reluctant to engage productively on the issue.¹⁰⁴ Nevertheless, the Secretariat has compiled information on existing subsidies from other sources, including a document surveying subsidies exposed through the Trade Policy Review Mechanism¹⁰⁵, subsidies specifically referred to in Members' Schedules,¹⁰⁶ as well as a document surveying work on this issue carried out by other international organisations such as UNCTAD.¹⁰⁷ The resulting body of documentation may represent at least the starting point for the generation of collective views on what ought and ought not to be treated as a trade-distorting subsidy. More generally – and whatever the status of these particular negotiations

¹⁰⁰ Nguyen-Hong, n 85 above; K. Kalirajan, 'Restrictions on Trade in Distribution Services', Staff Research Paper, Australian Productivity Commission, August 2000.

¹⁰¹ For example, there has increasingly been a turn to important sources of information collected outside the remit of the WTO itself: the TradePort database; information collected by specialised agencies such as the ITU; direct review of national legislation; among many others. In addition, work in this vein which measures trade barriers by essentially cataloguing and counting them, has gradually been supplemented by growing amount of work which measures them in other ways – such as by measuring the price or quantities consumed of particular services in a country, and comparing them against an international benchmark to give a rough quantitative measure of existing barriers.

¹⁰² Interestingly, despite their relative lack of sophistication as compared to price- and quantity-impact studies, Chen and Schembri conclude that frequency-type studies still provide the most reliable data in many ways: n 66 above, 250. R. M. Stern, 'Quantifying Barriers to Trade in Services' in Hoekman et al, *Development, Trade and the WTO: A Handbook* (Washington: World Bank, 2002) 247-258.

¹⁰³ See WTO Document S/C/M/18.

¹⁰⁴ For a synthesis of some of the views expressed see WTO Document, JOB(05)/04 (and Add.1). Discussions on a provisional definition of trade-distortive subsidies have been ongoing since 2005.

¹⁰⁵ WTO Document S/WPGR/W/25 (including regular Addenda).

¹⁰⁶ WTO Document S/WGR/W/13 (and Add.1, Add.2).

¹⁰⁷ WTO Document S/WPGR/W/47.

– the point remains that discussions within the WTO can in principle be important venues for collective and informal meaning-making.

The argument, in short, is this: that trade negotiators are beginning in some cases to develop informal shared ideas of what counts as a trade barrier, and that these shared ideas are (partially, imperfectly) transmitted to services experts, so that they form part of the background context in which knowledge production takes place. This is different from the context of statistics on trade flows themselves, where I noted the relative absence of such transmission.¹⁰⁸ One difference is that those involved in the collection of data on trade barriers have by and large begun their work after the creation of the GATS and are self-consciously working to support GATS negotiations – unlike those statistical communities compiling BOPS data and national accounts, who pre-existed the GATS, and have their own settled practices and formal institutions which are somewhat resistant to change. Indeed, those collecting data on barriers to trade in services are, on one view, not really a separate ‘statistical community’ at all, but are rather part of the broader trade community, and as such are more closely connected to and influenced by ideas and norms in circulation within the trade regime. This is not to say that these experts treat the catalogue of measures identified by trade negotiators as an exhaustive or conclusive list of barriers – indeed, it is not unknown for researchers to view the range of barriers identified by negotiators as incomplete, and as only a subset of the true range of potential ‘impediments’ to trade.¹⁰⁹ This is especially the case where the views of trade negotiators are understood to be lacking in economic logic, or unduly ‘distorted’ by the political context in which they are formed. Nevertheless, it is fair to say that the needs and views of trade negotiators exert some imaginative pull on knowledge producers, and influence the choices they make in important ways.

Probably the most striking illustration of this has to do with private, or non-regulatory, impediments to services trade. For obvious reasons, negotiators in WTO services negotiations are primarily interested in barriers to services trade which are public in nature – that is, governmental not private acts. (The GATS applies only to governmental measures,¹¹⁰ and to the extent that it is concerned with the activities of private bodies which impede or distort services trade, it is only in respect of government-mandated monopolies, and even then only so far as to ensure that government action is taken to ensure their activities do not undermine GATS policy disciplines.¹¹¹) Interestingly, this is reflected in the research literature on barriers to trade. While it is relatively common in this literature to refer to the existence and potential importance of private barriers to services trade,¹¹² there is barely any attempt to measure or quantify these barriers,

¹⁰⁸ See paragraph accompanying n 64.

¹⁰⁹ For example, McGuire 1998, n 92 above, 3 and 6ff; Bosworth et al, n 91 above, 2; Hoekman, n 80 above, 16.

¹¹⁰ See GATS Article 1.

¹¹¹ See, eg, GATS Articles VIII and IX.

¹¹² For example, McGuire 1998, n 92 above, 4; Hardin and Holmes, n 87 above, 32; Nguyen-Hong, n 85 above, 67; Kalirajan, n 100 above, 1, 6.

despite their acknowledged potential significance. Of course, there may be many reasons for this: there are many practical difficulties associated with identifying and measuring private activity of this kind. But it is hard not to conclude that one significant reason for the relative invisibility of private barriers in the literature on impediments to trade in services has to do with the irrelevance of these barriers within the trade regime, and the perceived need for this literature to be as relevant and pertinent as possible for trade negotiators. The legal invisibility of private barriers in the domain of the international trade regime, in other words, translates to the relative invisibility of such barriers in our data on extant impediments to trade flows in services.

KNOWLEDGE AND POLITICAL CHANGE

Together, these two projects – mapping trade flows and mapping barriers to trade – have helped to provide the foundation for more strategic and obviously policy-oriented analysis. Armed with this data, services experts have also begun to publish studies which perform at least three further functions: first, predicting the economic consequences of services liberalisation, both generally and in relation to particular sectors in particular countries; second, identifying the most significant export opportunities for service suppliers in specific countries and groups of countries; and third, providing advice on how best to carry out a program of liberalisation to ensure that its potential benefits are captured most fully. Studies of this kind have begun to proliferate, and are developing over time into an increasingly sophisticated and detailed body of highly policy-oriented knowledge – and entire edifice of ‘services expertise’. A fuller story of the development of this body of expertise would need to go far beyond the two elements set out here. It would, for example, trace the origin and nature of the causal models which have been deployed by these experts to generate predictions from raw data. It would identify the assumptions which experts have come to employ in their analysis, and highlight the ways these experts have framed problems and defined certain questions as relevant or irrelevant. It would seek to specify the habits of interpretation that these experts deploy when seeking to generate meaningful policy guidance.

For the purposes of this paper, however, it is enough simply to leave the story there. I will go on to offer some reflections in the next section about what it tells us about the relationship between law and knowledge, but there is another question which must be briefly addressed before I do. It is this: what difference does the activity of these experts make? Why, in other words, does it matter how we classify, categorise and map different services and different trade barriers? What is the connection between these choices and particular social and political outcomes? It is one thing to describe in detail the way knowledge and knowledge communities are produced and sustained, it is quite another to trace through the ways that – once created – such knowledge affects real world outcomes. In fact, the primary burden of this article is the former, and it does not purport to address

the latter question in any rigorous or empirical way. Nevertheless, the story would not be complete without at least a general indication of why these processes of knowledge production are significant, how they make their influence felt, and how that influence relates to the traditional regulatory function we normally associate with international legal regimes.

The first point to make is also the most obvious. I have been describing a process by which the creation of an international legal regime has given rise to a set of projects for redescribing the world in the terms of that legal regime. Those projects of redescription create raw data, which is then interpreted and deployed to generate policy-relevant analyses. Studies are produced which measure the benefits and risks of particular policy choices, and which evaluate who is likely to gain and lose from them. These studies in turn are brought to the attention of policy- and decision-makers – in part, as we have seen, within the WTO itself, but also more generally through the efforts of advocacy groups, think tanks, experts with special access to site of political authority, other international organisations, technical assistance activities, and so on. As a result, they inform political choices. Negotiators, for example, rely on expert analytical work to define priorities and strategies in negotiation. They use it to assess the cost of existing barriers to trade in services, and to estimate the likely consequences of their removal. Governmental officials might rely on this information to form a view of what kinds of policy are in their (or their country's) interests, and formulate strategies for the promotion of those interests. Policy-makers can use it to assess the contribution that services liberalisation can make to strategies for economic growth and development.

The point is that the international trade regime is not just in the business of regulating the conduct of its members through legal rules, it is also helping to develop a new body of knowledge which guides their behaviour in other ways. This body of knowledge provides a common framework of analysis through which states define their preferences and make choices based on them. It makes calculation and deliberation possible and defines the domain in which such processes occur. It provides a repertoire of models of how states may profitably engage with the global services economy, to guide the thinking of government officials. It produces collective understandings of what 'liberalisation' means in respect of particular service sectors, as well as shared views of both the risks and benefits that it may bring. Furthermore, the community built up around this body of knowledge helps, through mechanisms of persuasion and advocacy, to mobilise governments to act in accordance with the conclusions that they draw from it. To use Rose and Miller's evocative phrase, the international trade regime is working here by 'installing a calculative technology'¹¹³ in the domain of trade politics. International trade law, in other words, does not just constrain the freedom of governments, it helps to *produce* particular kinds of governments – by

¹¹³ N. Rose and P. Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43(2) *British Journal of Sociology* 173, 187.

manufacturing and deploying a particular kind of political rationality, with new models of behaviour to guide and structure the preferences of state actors. And the construction of this rationality is made possible by a prior juridico-statistical construction of the ‘global services economy’, which constitutes that domain as a ‘knowable, calculable and administrable object’.¹¹⁴ We should think of this ‘calculative technology’ as working in tandem with the more visible legal technologies of norm application and enforcement which we typically associate with international trade law. In many ways, this body of services expertise is helping to produce the kind of states which act in accordance with legal disciplines – which define their individual and collective interest in such a way as to make compliance with their legal obligations appear rational and normal.

But there is a second fundamental way in which this knowledge makes a difference. I noted above that in order to govern the social world one must first describe it – make it ‘legible’ to power. I also noted that the way in which the social world is described *shapes the way it is governed*. My second claim, then, is that the activity of services experts provides a lens through which we see the world, and therefore profoundly affect the way we choose to govern it. More specifically, the activities of services experts constitute the means by which certain kinds of economic transaction come to be made visible as international trade (while others are not), and certain kinds of governmental activity come to be made visible as barriers to trade in services (while others are not). This kind of visibility in turn shapes the mechanisms and technologies of government which are brought to bear on it. For example, making a measure visible as a barrier to trade in services subjects that barrier to surveillance by the international trade regime. When foreign participation in a country’s telecommunication sector came to be understood as ‘international trade in telecommunications services’, the WTO joined organisations such as the International Telecommunications Union and the World Bank as an important new node in networks of international governance of the telecommunications sector, and a new site for decision-making about it. The same act of redescription altered the dynamics of national policy-making in that sector, as trade ministries joined telecommunications regulators and other domestic agencies tasked with the supervision of foreign participation in the sector. Processes of knowledge production and data collection are significant, in other words, because they constitute the ‘object domains upon which [legal institutions] are required to operate’.¹¹⁵ More generally, classifying a governmental measure as a ‘barrier to trade’ can also significantly alter perceptions of the desirability of that measure, and the nature of debates which accompany it. Those who count themselves as economic liberals may find themselves instinctively against such a measure, and to err on the side of restricting its use. Debates about the desirability of the measure may shift to the ground of liberal trade theory, with

¹¹⁴ P. Miller and N. Rose, *Governing the Present: Administering Economic, Social and Personal Life* (Cambridge: Polity, 2008) 30 and generally.

¹¹⁵ Rose, n 4 above, 197.

its presuppositions (in practice at least) about the desirability of liberalisation. More generally, debates about the measure become subject to the dynamics of broader debates around economic liberalisation generally – whether for or against – which exist within the political culture in question.

REFLECTIONS ON LAW AND KNOWLEDGE

In Part 1 of this article, I raised the question of how international legal processes are related to processes for the production of knowledge in and through expert communities – and more generally how law is connected to the creation of public ways of imagining the world. In the course of the case study, I hoped to both test and illustrate the claim made elsewhere that law helps to constitute the social reality upon which it acts, and to generate the ‘webs of signification’¹¹⁶ which make the social world meaningful and governable. In this Part, then, I want simply to set out some tentative conclusions from the case study above about the relationship between law and knowledge in the context of the global services economy. Specifically, I offer four different (if overlapping) ways of thinking about the roles that law can play in processes of knowledge production and meaning-making, organised around the concepts of constitution, objectification, transmission and empowerment.

CONSTITUTION

The case study above demonstrates the way in which the establishment of a new international legal regime can help to constitute a new domain of expertise, in the sense of defining a social, political and cultural context in which knowledge production takes place. In the case study above, this occurred in a number of specific ways. First, the existence and operation of the GATS has provided an *impetus* for the generation of knowledge about the global services economy. This is in part the result of the ongoing demand of trade negotiators for information and analysis on which to formulate their negotiating interests and priorities. It is also in part the result of processes of legal interpretation (whether in judicial proceedings or non-judicial venues). We saw that discussions about the appropriate interpretation of ambiguous norms in the GATS necessarily rest on – and help to produce – a hidden foundation of collectively agreed conventions on what ought and ought not be described as a barrier to trade, on the kinds of economic activities which can properly be described as trade in services, and on shared ways of classifying different kinds of services. In a meaningful sense, then, the interpretation and application of legal norms has provided an important occasion and impetus for ‘collective sense-making’ of this kind, and has defined the key

¹¹⁶ Geertz, n 16 above, 182.

terms and concepts around which this sense-making takes place. Of course it is true that a body of expertise on trade in services existed before the GATS, and indeed contributed to its creation. But it is also true that the creation of the international legal agreement and its related institutional infrastructure has given new vitality and relevance to this body of knowledge, and provided substantial increased momentum for its development.

Second, the GATS has helped to shape the *purposes* of knowledge production. This is true in the specific sense that knowledge producers have tended to concentrate their efforts on the production of data in forms which are most relevant to trade negotiators, and on issues which are of particular relevance in trade negotiations. In this way, the international legal architecture can, over time, shape the directions in which our knowledge of the services economy evolves – the questions it most urgently seeks to address, the domains of activity which are most closely mapped, and the outcomes to which it pays most careful attention. Precisely because of the desire to be relevant to trade negotiators and trade policy-makers, the evolution of services expertise may track the trade regime’s shifting attention, priorities and domain of operation. In addition, the GATS shapes the purposes of knowledge production in the more general sense that most of the knowledge about trade in services has so far been produced in support of the broader project of liberalising of the global services economy – the project which lies, of course, at the heart of the GATS. I am not suggesting that services experts produce studies which universally support and extol the virtues of liberalisation – that is not my claim at all, nor would the case study support it. Rather, my point is the more general one that the liberal trade project in some way dominates the imaginative horizon of knowledge production in this area, so that data collection and analysis tends to be focussed on the risks and benefits of liberalisation, on obstacles to and facilitators of liberalisation, and on the most appropriate means of achieving and regulating liberalised services trade.

Third, the international legal regime governing trade in services has helped to reconstitute the *range of actors and institutions* involved in the production of knowledge about the global services economy. The creation of the GATS constituted the trade regime as a new node¹¹⁷ with existing networks of knowledge production, and began to mobilise constituencies connected to it. As a result, existing networks of services experts have been supplemented by new actors with an interest in the outcomes of trade negotiations. For example, we saw that national trade ministries have begun to commission studies mapping their trade partner’s barriers to services trade. Lobby groups connected to trade delegations have begun to produce studies on the potential consequences of services liberalisation. The WTO itself has helped to train and energise national statistical agencies to produce further data on services trade. Furthermore, this seems to have been accompanied by a fragmentation of the network into different sub-

¹¹⁷ My use of the term node here echoes the concept of ‘centre’ used by Rose and Miller, n 113 above, eg 185 (following Latour). The two terms are closely related.

communities with their own venues and techniques of collective sense-making. International legal communities, for example, have started their own conversations about how best to apply trade concepts to the messy realities of transnational services transactions. As noted above, governmental delegates within the trade regime themselves have at times initiated their own collective processes of meaning-making as they discuss interpretive questions related to GATS rules. Of course the ‘meanings’ or knowledge created within these different sub-communities will not necessarily (and may in only rare circumstances) have an impact more broadly. The point is simply that the creation of the GATS has contributed to an expansion and reconfiguration of the range of actors involved in knowledge production, multiplying different communities of meaning-making, which then interact, borrow from (or ignore) each other, and compete for authority, in a variety of ways and locations.

Finally, the creation of the GATS can change the *dynamics* of knowledge production about the global services economy. This is closely related to the previous point. With the creation of the GATS, the collective classification of governmental measure as a ‘trade barrier’ (for example) can have significant material consequences, by laying the groundwork for the actual or potential application of particular legal norms. As a result, definitional questions become highly sensitive and often contested. Instead of leaving them exclusively to technical experts, traditional political actors begin to take a closer interest in these definitional questions, interfering with the deliberations of experts, asserting a degree of control over their activities, and beginning their own conversations. These new conversations, of course, tend to bear the imprint of the political context in which these negotiations take place. In turn, the political controversies over such questions within the WTO can make more difficult the normal processes of technical meaning-making within expert networks.¹¹⁸ It becomes more difficult for experts to produce consensus answers to such questions in a technical environment, in part because it becomes more difficult to plausibly treat such questions as purely technical. Furthermore, expert communities may over time and in some ways come to be influenced by any resolution of such definitional controversies within the trade regime – particularly where they are subject to resolution through formal judicial interpretation by the WTO’s dispute settlement machinery or encoded in new treaty language. There is of course nothing sinister about this – I am not making a claim about political bias on the part of experts – it is merely the natural outcome of the legal context in which knowledge production now takes place.

¹¹⁸ An example of the same process at work in a different context is described in M. A. Livermore, ‘Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius’ (2006) 81 *New York University Law Review* 766. I am indebted to Nicolas Lamp for drawing this to my attention.

OBJECTIFICATION

International legal processes can also help to objectify particular forms of knowledge, and particular ways of classifying reality. By being encoded in law, certain contestable ways of describing reality can come to be experienced as objective or external, in part by becoming a common basis for collective endeavour. The best example is the definition of ‘trade in services’ written into Article I of the GATS. As described above, the concept of ‘trade in services’ was the invention of a relatively small group of experts and officials interested in transnational services transactions, and initially the precise scope and meaning of the term was contested even within this small group. Since 1995, however, such contestation has ceased. The particular definition of trade in services contained in Article I of the GATS has come to be canonical in all literature on trade in services, and has very clearly become the common starting point for all intellectual endeavour in the field. The four ‘modes of supply’ contained in that definition – though in so many respects the contingent product of contested international negotiations – are now commonly and unproblematically understood to objectively determine the domain of services trade by all actors working in the area.

Another example may be the classification of services. I noted above how, during the Uruguay Round, negotiators agreed to use (for guidance) a common framework for classifying services which drew on a UN-developed system for classifying services, in a modified and simplified form.¹¹⁹ This framework was then encoded into the GATS itself, by being written (sometimes in modified form) into each country’s Schedule of Commitments. Now, unlike the definition of trade in services, this system for classifying services has *not* become the unique authoritative starting point for those interested in mapping and cataloguing the global services economy. The statistical community has continued to develop its own independent classification systems, for example through iteratively updating the UN Central Product Classification, and these classification systems remain authoritative. Nevertheless, I would argue that we are already beginning to see a process whereby the various existing classification systems of services are gradually becoming unified and encoded into law. The MSITS, for example, represents a first important step towards mutual translatability of the GATS’ legal classification system and other classification schemes such as the EBOPS and CPC. Furthermore, as described above, the Appellate Body’s decision in *US – Gambling* has gone some way to ensuring that similar terms in Members’ schedules and statistical classification schemes will be similarly interpreted.¹²⁰ Although these processes are at an early stage and their outcome is uncertain, my argument is that over time international legal texts will come to reflect and embody shared ways of classifying services – and by making real-world legal outcomes dependent on those

¹¹⁹ See n 33 above, and accompanying text.

¹²⁰ See n 64 above.

classifications, help to ensure that they are treated as objective and determinative. This is of course precisely what has happened in the goods context – with the gradual acceptance of the Harmonised Commodity Description and Coding System by all WTO Members over the past few decades, and alignment of WTO goods schedules with it – and there is reason to expect to occur over time in the services context as well.¹²¹

To be clear, the process of objectification of knowledge through law does not – or at least does not necessarily – involve actors coming to think of this knowledge as *true*, or as the only and best way of describing the world. There will still be few lawyers operating in foreign countries, for example, who think of themselves as engaging in ‘international trade in legal services’.¹²² Nevertheless, all actors naturally accept this description of their activity for the purposes of international trade negotiations, and operate as if it were true. The reason for this is obvious: the definition of trade in services in the GATS is simply what must be accepted as a precondition for meaningful engagement in international negotiations, and for any attempt to gain advantage from them. The inscription of particular concepts in international legal texts, in other words, constitutes them as the collectively agreed reference point for political interaction and for the deployment of public power at the international level. Law objectifies knowledge, then, in the sense that it makes the contestability of that knowledge beside the point: certain concepts encoded in law become for that reason a shared basis for discussion and calculation, and are thus deeply inscribed in our habits of thought. Merry uses the helpful metaphor of ‘sedimentation’ to describe these process: her invocation of ‘legal technologies’ which ‘construct and sediment forms of knowledge’ seems an apt description of international trade law in this regard.¹²³ It may also be useful to think in terms of ‘institutionalisation’ – of law acting as the mechanism by which subjective ideas come to be encoded into the institutions which govern our social lives, and by which they thereby take on material force, and confront us as brute facts of objective reality.

It will be noted that there is something of a tension between the two roles for law that I have described. On the one hand, I have described international legal processes as creating spaces for the production of knowledge, and giving rise to a set of relatively open-ended processes for the generation of meaning. On the other hand, I have described the ways in which the law closes off processes of meaning-making, and enshrines certain ways of knowing the world as beyond effective

¹²¹ Not all will agree with this assessment. It is certainly true that this project faces particular difficulties, such as the political difficulty of updating the W/120 document, problems with transposing existing commitments to any new classification system, as well as the problems of new services which arise and are not adequately classified. Nevertheless, all of these problems also exist in some form in the goods context and have not proved to be insurmountable. I am indebted to Andreas Maurer for his insights on this point.

¹²² See, eg, S. Cone, ‘Legal Services in the Doha Round’ (2003) 37(1) *Journal of World Trade* 29.

¹²³ Merry, above n 22, 976. Bowker and Star also talk of the way in which the standards and categories we use to describe reality are given material force – for example, by being built into our physical environment. Our understanding of the nature and origins of disease, for example, is encoded into the way we build hospitals: n 11 above, 3, 17, and generally.

contestation. This tension is a deliberate one, and reflects the contradictory and multivalent quality of the relationship between legal processes and knowledge production. Law can both enable and constrain the production and contestation of knowledge, it can encourage both cognitive openness and cognitive closure. I will return to this observation below.

TRANSMISSION

Closely related to the process of objectification is that of transmission. International legal regimes such as that governing trade in services can serve an educational function, helping to disseminate expert knowledge across a broader and more diverse set of actors. Most obviously, knowledge about the nature and dynamics of the services economy is distributed among the community of government officials and others directly involved in trade negotiations. The original GATS negotiations during the Uruguay Round, for example, has often been described a learning process for those involved.¹²⁴ As set out above, Drake and Nicolaïdis have described the way that, during the early years of those negotiations, trade delegates were taught, and came to accept and adopt, the conceptual framework of ‘trade in services’ which had been developed by a small epistemic community over the preceding decade.¹²⁵ In addition, I noted above the concrete ways in which in the years since then the WTO has helped to act as a transmission belt for the growing body of analysis and knowledge of the global services economy: for example, through the information exchange program conducted in the Council for Trade in Services, through the publication and distribution of Secretariat papers, or even through informal seminars organised for delegates under the auspices of the WTO. Beyond the relatively small community of trade negotiators, the trade regime can also help to distribute the knowledge produced by services experts to broader constituencies. Although only lightly touched on in the case study, international technical assistance and capacity-building activities in relation to services can act as a conduit for the flow of expert information to broad networks of country-based governmental officials. The WTO’s growing role in the collation and publication of data about trade in services and barriers to such trade – whether it be through its World Trade Report, reports generated by the Trade Policy Review mechanism or other institutional transparency mechanisms – can also help to bring knowledge about the services economy to a broad array of audiences.

These mechanisms are mundane, and on some occasions may have only minor immediate significance. But they are interesting because they point to a

¹²⁴ See, eg, J. P. Singh, ‘The evolution of national interests: new issues and North-South negotiations during the Uruguay Round’ in J. Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge: Cambridge University Press, 2006) 41 and K. Nicolaïdis, ‘Learning While Negotiating: How Services Got on the Uruguay Round Agenda’ in A. Bressand and K. Nicolaïdis, *Strategic Trends in Services – An Inquiry into the Global Services Economy* (New York: Harper and Row, 1989) 161.

¹²⁵ Drake and Nicolaïdis, n 27 above.

somewhat deeper connection between legal systems and regimes of knowledge. It seems that international legal regimes in some sense carry with them a way of knowing the world in which their legal norms make sense. The idea here is that legal processes are not just about the identification and application of norms, but also the construction and communication of a way of viewing the world in which these legal rules pronouncements appear rational and right. In the present case, for example, the GATS not only lays down rules for WTO Members to follow but also helps to transmit a way of understanding the nature and dynamics of the global services economy which helps us to see the GATS as a rational and reasonable way for governments to pursue their objectives and address their common problems. It seems to be the case that engagement with a legal regime such as the GATS can involve a process of inhabiting the regime of knowledge on which the legal system is built – coming to accept (in the pragmatic sense described above) its description of reality. It is not merely accidental, in other words, that the WTO has come to take on some role in the transmission of services expertise. Rather, it may be an indispensable correlative of its role as a venue for the creation and enforcement of norms.

EMPOWERMENT

Finally, international law and legal processes can also function to empower experts, enhancing the role of certain expert communities in decision-making processes (while marginalising others), as well as providing new mechanisms and venues for the deployment of the knowledge they produce. In part this is a direct effect of the process of ‘constitution’ just described. I said above that the GATS has helped to provide the impetus for the generation of knowledge about the global services economy. In doing so, it has also helped to reconstitute and sustain a community of services experts who are by definition ‘*in the know*’ about that which they seek to govern¹²⁶, and who therefore occupy a powerful position from which to influence the governance of the global economy. The GATS creates constituencies among the trade community who depend on the knowledge that these experts produce, and who represent guaranteed audiences for their analyses. More than that, periodic rounds of trade negotiations – to the extent that they remain a central part of the trade policy landscape – help to maintain the relevance of services experts over time. They also help to generate and sustain interpersonal networks between policy-makers or trade negotiators on the one hand and services experts on the other. In that sense, the international legal regime governing trade in services can not only shape the kind of knowledge which is produced, but also help to keep those who produce that kind of knowledge in proximity to power. This effect is only enhanced, of course, to the extent that the legal regime helps to provide mechanisms for the transmission of knowledge to

¹²⁶ Rose and Miller, n 113 above, 186.

governmental officials and others involved in decisions about the governance of global services trade.

The GATS can enhance the authority of experts in more subtle ways. I have argued that the establishment of the GATS has inspired a monumental and ongoing labour of rendering the services economy knowable through the collection and interpretation of statistical data. This project itself encourages us to imagine the global services economy as something ‘out there’ to be discovered, with its own inherent dynamics, rules, laws, and so on. As a result, it makes the services economy appear amenable to intervention and manipulation through expert techniques of evaluation and calculation. In this way, controversial questions around complex socio-economic transformations come in part to appear amenable to resolution by technical means. We come to look more and more to experts for information about the nature and dynamics of the global services economy, and for guidance about how we ought to ‘intervene’ in it. More specifically, those communities of experts whose ways of knowing of social phenomena are encoded in law tend to be treated as if they were in a privileged position to guide us in governing it.

The creation of an international legal regime governing trade in services has also opened new spaces for the deployment of expertise in decision-making processes. For example, experts of a variety of stripes can often play a very significant role in the interpretation of international legal norms – whether in formal judicial proceedings or in less formal, non-judicial settings. Legal experts, of course, are empowered in such contexts: it has often been observed how judicialisation within international institutions can transform many issues into legal question to be resolved through the formal techniques of legal interpretation, requiring training within the legal profession. But it is not only that international legal regimes enhance the role of legal experts and expertise. What is very clear from the GATS context is that interpreters of legal norms will often look to other communities of expertise for guidance on how best to interpret open-ended legal norms. More generally, there is a very strong tendency among many legal experts within international trade law look to economic experts for guidance on what ambiguous legal norms can and ought to mean, and for an expression of the underlying object and purpose of the liberal trade regime. It is true, of course, that the question of the appropriate place of economic expertise in the application and operation of WTO law is a fraught and changing one, and the characteristic attitude of international economic lawyers to economic expertise is not one of total deference. Nevertheless, it is also true that economic expertise has a central place in international economic law. My point, then, is simply that the creation and operation of the GATS has mobilised a variety of communities of expertise, and helps to mediate the access that those communities have to sites and processes of decision-making.

CONCLUSION

I have argued in this paper that contemporary regimes of international governance mobilise both normative technologies and cognitive technologies – that in fact the two ought not to be understood as separate. While we are accustomed to associating international law and legal processes solely with the normative aspect of international governance structures I have claimed that international law also structures, shapes and mediates the cognitive aspect of international governance in ways we can sometimes neglect. Law is not only a tool for the projection and deployment of power in the world, it is also an important mechanism for making the world legible to power, helping to shape the way reality is made visible to those who govern it.

I have tried to ground these claims in a detailed case study of the General Agreement on Trade in Services and its associated institutional infrastructure. The establishment of a new system of international rules governing public intervention in the global services economy, I have shown, has been accompanied by a simultaneous and connected project of redescription – that is to say, the re-naming of a particular domain of economic activity as ‘global services trade’, and the subsequent generation of knowledge on the nature, dynamics and evolution of such trade and barriers to it. On the basis of this study, I offered four ways of thinking about the influence of law on knowledge production: international legal processes help to constitute the social space in which knowledge is produced; they can act as vectors for the transmission of knowledge among new networks and communities; legal frameworks can encode and objectify particular forms of knowledge and constitute them as the shared cognitive basis for collective projects of international governance; and international legal regimes work to enhance the role that different kinds of experts and expertise play in the international exercise of public power.

Where does one take this kind of study, and what kind of work does it prefigure? In one direction, this case study and the conclusions I draw from it could lead us towards a critical evaluation of the role of experts and expertise in contemporary international governance. It is possible to read the story I tell as another illustration of the contemporary consolidation of technocratic forms of international governance, and to use it as a launching point for a critique of the legitimacy, accountability and desirability of expertise-based governance regimes of this kind. Although I believe such work to be necessary, from my own point of view I see this paper as a prelude to a somewhat different line of enquiry. One of the lessons I draw from this case study is that the relationship between legal processes and the social production of knowledge is an ambiguous and multivalent one. Where some forms of legal practice may entrench and empower a particular community of experts, others may open up processes of meaning-making to multiple communities. While international legal regimes may work to objectify knowledge and produce cognitive closure, we have seen that there are also aspects of their operation which can open up existing knowledge to contestation and

redefinition, and lead to cognitive openness. And while some forms of international legal practice may lead to an increasing technicalisation of international governance, others may point in precisely the opposite direction, and produce a different relationship between expert knowledge and public power.

The choice available to us is not (or not just) between those forms of international governance which privilege and empower experts, and those which generate space for 'politics'. Rather, it is also the choice between different ways of 'doing international law' which produce different modes of knowledge production, and mediate differently the relationship between decision-makers and the knowledge structures which guide them. And that is the other direction in which this paper leads: it opens up space, I hope, for an examination of the different possibilities of international legal practice as it relates to knowledge production; it provides a detailed map of existing practices from which inspiration can be drawn or contrasts made; and it provides, in that way, the foundation for further thinking about how existing juridico-cognitive structures of governance can productively be modified or re-thought.