

**THE MAKING OF
THE TRIPS AGREEMENT**

**PERSONAL INSIGHTS
FROM THE
URUGUAY ROUND NEGOTIATIONS**

Edited by Jayashree Watal and Antony Taubman



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<http://onlinebookshop.wto.org>

ISBN 978-92-870-4025-1
French version 978-92-870-4026-8
Spanish version 978-92-870-4027-5

Designed by Messaggio
Printed by WTO Secretariat

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Cover photo “Peace” (1925), by Genevan artist Luc Jaggi (1887-1976), which adorns the left side of the main entrance of the Centre William Rappard, home of the WTO. (c) WTO/Pierre-Yves Dhinaut. This image recalls the reference in the Preamble of the WTO TRIPS Agreement to the shared emphasis among WTO members on “the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures”.

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FOREWORD

As we mark the 20th anniversary of the WTO, it seems appropriate that we should put a spotlight on the TRIPS Agreement which also turns 20 this year. When the TRIPS Agreement came into being in 1995, it introduced substantive and comprehensive disciplines on intellectual property rights (IPRs) into the multilateral trading system. It had a significant impact on national intellectual property (IP) regimes the world over, with the most significant changes experienced in the developing world. Indeed, in 1995, and earlier in the negotiations leading to the conclusion of TRIPS, the international IP system was largely seen as a trade interest of the developed economies. Today, the picture differs dramatically. Some middle-income countries are among the major users of the global IP system, and many other developing countries are increasingly engaged with it.

The adoption of the Doha Declaration on the TRIPS Agreement and Public Health in 2001, and its subsequent amendment, encouraged this shift in perceptions. Today the Agreement is no longer seen as a one-sided imposition of the strong IP laws of developed countries on the developing world. Rather, experience has shown how it serves as a benchmark for legitimate policy-making, balancing protection of IPRs with the interests of users and the general public.

This volume tells the story of how that balance was achieved. It helps us to understand how the text of the Agreement was constructed – from a brief negotiating mandate to a sophisticated and balanced agreement that has stood the test of time. Moreover, it illustrates that, contrary to the general belief that the negotiations were dominated by a stark North-South division, large parts of the TRIPS text were developed through the resolution of intra-North differences or through alliances that cut across North-South boundaries, including on copyright, patents, trade secrets, test data protection and geographical indications. The general need to reconcile different legal systems was also an intra-North challenge. The provisions on enforcement saw many compromises made by developed countries to ensure an overall goal of ensuring balance and fairness, as well as with a view to limiting impediments to legitimate trade.

The accounts in this volume from negotiators from Argentina, Brazil, Hong Kong, India and Malaysia show how developing countries made crucial contributions to the Agreement that today give testament to their substantive and farsighted engagement in the negotiations.

I recommend this book not just to TRIPS specialists but also to all those who are interested in learning about how a complex and sensitive subject came to be successfully negotiated in the Uruguay Round.

I would like to congratulate Jayashree Watal, Antony Taubman and their colleagues in the IP Division for their dedicated efforts in collecting these important accounts, first in the organization of a Symposium which sparked discussion of the TRIPS negotiations, and later in their hard work in bringing this present volume to fruition. I also want to thank the negotiators and former Secretariat staff for taking the time to engage in dialogue at the Symposium and then preparing this unique and irreplaceable set of perspectives on the negotiations.



Roberto Azevêdo
WTO Director-General

PREFACE

Jayashree Watal

This book was conceived in mid-2014 when members of the Intellectual Property Division (IPD) of the WTO began to reflect on what facets of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) could be highlighted for WTO members and the public at large in 2015, a year marking the 20th anniversary both of the WTO and of the entry into force of the TRIPS Agreement. The IPD, under the leadership of its Director, Antony Taubman, planned a capacity-building Symposium on the TRIPS Agreement and a book on TRIPS negotiations, informally dubbed the “TRIPS@20” project. This project was in large part delegated to me, which I carried out with the able assistance of Karyn Russell and my other colleagues in the IPD. The Symposium was financed by WTO’s Institute for Training and Technical Cooperation (ITTC) as part of the Secretariat’s programme of technical assistance and capacity building for WTO members in the TRIPS area. It was held back-to-back with the TRIPS Council in February 2015 in order to facilitate the wider participation by both Geneva and capital-based TRIPS Council and other WTO delegates. A central objective of the Symposium was to bring together key TRIPS negotiators and GATT Secretariat staff who crafted the original text. The broader purpose for us in the IPD was to “bring TRIPS home”, namely to take ownership of the Agreement and try to shape a fact-based discussion on it in 2015. We organized two other sessions to evaluate the legal and economic aspects of TRIPS and to look at emerging issues in the TRIPS area and possible responses to them.

It took many months of hard-core detective and diplomatic work on my part to track down the whereabouts of key TRIPS negotiators, whom I had known during the negotiations in the Uruguay Round but with whom I had lost touch over the years. I was delighted to have a good reason to seek them out again in order to get them to commit to participating in the capacity-building Symposium and the book project. One of the first persons I contacted was Ambassador Lars Anell, who was Chair of the TRIPS Negotiating Group in the Uruguay Round, and who is currently Chair of the Swedish Research Council. He delivered a thought-provoking and substantive keynote address drawing from his vast experience in

the Swedish Government, private sector and research organizations and sprinkled it liberally with his unique sense of humour. We thought it best to reproduce his speech verbatim and this is appended to the book.

The other indispensable figure from whom we wanted a firm commitment was the true guiding spirit behind the TRIPS negotiations, Adrian Otten, who worked in the GATT Secretariat, was Secretary of the TRIPS Negotiating Group and continued working on the subject as the Director of the IPD until 2008. Fortunately for us, Adrian lent his enthusiastic support to the project and devoted an inordinate amount of his time to guiding me closely in planning and executing both the Symposium and the book, right up to the final stages.

Thanks to the Internet, help from Geneva-based delegates and a lot of luck, I was able to track down most of the key TRIPS negotiators from both developed and developing country members of the WTO. We could not have held the Symposium or written this book without a voice from the United States, which was the major driver behind the inclusion of intellectual property in the Uruguay Round. I was lucky to have caught Catherine Field between jobs in the United States Trade Representative. Despite being one among many members of the US negotiating team, she worked hard to make this project a success. The European Communities (EC) played a crucial role in bringing about a balanced TRIPS Agreement, and so I was particularly happy when Mogens Peter Carl, leader of the European TRIPS negotiating team throughout the Uruguay Round, supported us enthusiastically. Fortunately, I was already in touch with A.V. Ganesan from India and we were indeed privileged that he undertook the travel necessary to participate in the Symposium and contributed to the book with his characteristic sincerity of purpose. John Gero, who played an important bridging role in the TRIPS negotiations, recently retired from his post as Permanent Representative of Canada to the WTO in Geneva and readily accepted to return for the Symposium and to reproduce his insightful contributions for this book.

I was happy to learn that two key negotiators from Latin America, Antonio Gustavo Trombetta from Argentina and Piragibe dos Santos Tarragô from Brazil, are Ambassadors of their countries in Europe. They were gracious enough to take time away from their duties to participate in the Symposium and contribute substantive chapters to the book, despite having moved on to many other subjects in the course of their diplomatic careers. Both freely shared their views in a frank, disarming manner and we learned about many new facets of the issues they faced during the TRIPS negotiations. I am particularly proud to have managed to track down the intrepid TRIPS negotiator from Malaysia, Umi K.B.A. Majid, whom I

persuaded to temporarily leave her important position as a judge in the Court of Appeal of her country to join us on our trip down memory lane. Peter Cheung and David Fitzpatrick were both available and ably represented the Hong Kong perspective at the Symposium, and David Fitzpatrick contributed an important chapter to the book. A chance meeting with Adrian Macey in December 2014 at a climate change conference in Lima, Peru, brought him on-board to discuss the original dispute settlement proposal he initiated during the TRIPS negotiations, which he explains in his contribution.

As they were based in Switzerland, it was relatively easy, although no less important, to co-opt Swiss TRIPS negotiators Professor Thomas Cottier and Thu-Lang Tran Wasescha and my colleague and the Nordic countries' copyright negotiator Hannu Wager, as well as ex-GATT staffer Matthijs Geuze. Well after the project began, I managed to persuade two other negotiators who were unfortunately not at the Symposium, Jörg Reinbothe and Jagdish Sagar, respectively members of the EC and India TRIPS negotiating teams, to contribute chapters to this book. All the contributions have enriched the book and we are truly grateful for the authors' time and efforts.

I was truly saddened that one of the central figures in the negotiations, Sivakant Tiwari from Singapore, could not be with us to share his memories as he passed away in 2010. Also, while I was able to contact some other key TRIPS negotiators such as Michael Kirk and Bruce Wilson of the United States, Patrick Smith of Australia, Shozo Uemura of Japan, and Thosapone Dansuputra of Thailand, who all contributed immensely to the making of the TRIPS Agreement, they were unable to join us for the Symposium or in the book project.

The programme of the Symposium and some of the presentations made there are available at www.wto.org/tripsat20. Adrian Otten's presentation at the Symposium is a curtain raiser to his chapter in this book and has already been used by many who wanted to learn of the timeline and main issues in the TRIPS negotiations. Other panellists were Mogens Peter Carl, A.V. Ganesan, Catherine Field, John Gero, Antonio Gustavo Trombetta, Piragibe dos Santos Tarragô, Thomas Cottier, Thu-Lang Tran Wasescha, Umi K.B.A. Majid, Peter Cheung, David Fitzpatrick, Adrian Macey, Hannu Wager and me. We all spoke extemporaneously to describe various aspects of the TRIPS negotiations in response to questions asked by our able moderator, Adrian Otten, and we reacted spontaneously to what others said, creating a fascinating account of personal recollections and lessons learned from the historic TRIPS negotiations.

A clear message that came out of this session of the Symposium, albeit surprising for some, was that the making of the TRIPS Agreement, even on controversial issues such as patents or test data protection, was also characterised by an informal intra-North dynamic rather than only a North-South dynamic as is usually presumed. Another key factor for the success of TRIPS was the constructive environment engendered by mutual respect among negotiators and the trust inspired by the competence and skill of the Secretariat team and the Chair of the Negotiating Group. Several chapters in this book reiterate these messages, including those of Adrian Otten, John Gero and Thomas Cottier.

The feedback from those who participated in the Symposium was positive and we were encouraged to pursue the book project, seeking written contributions from those who were closely involved with the making of the TRIPS Agreement. Contributors to this volume who participated in the Symposium met the day after and discussed ideas about the structure and nature of the book, as well as the concrete outlines and chapters that had already been submitted. It was clear from the outset that most authors had long left the subject of TRIPS behind and preferred personal accounts of various aspects of the negotiations, with adequate freedom to pursue their own style and substance. The book does not claim to be an authoritative or complete history of the TRIPS negotiations but it is certainly the first time that the key negotiators have been able to corroborate each other's first-hand accounts of the negotiations written from different perspectives. This volume is undoubtedly a valuable contribution to our understanding of the TRIPS negotiations.

Before this book, the closest we could come to piecing together a near-complete story of TRIPS negotiations was from the informal records kept by the GATT Secretariat. The GATT documents speak for themselves in revealing the major changes that took place in developing the TRIPS text, showing that most of the text was negotiated by 1990, beginning in right earnest with the June 1990 composite text, moving to a very detailed November 1990 text that was sent to the Brussels ministerial meeting in just six months, and then to the almost final ironing out of compromises, mainly on the patent complex, reflected in the December 1991 Dunkel Draft. The final TRIPS negotiated text in December 1993 made only two changes to the 1991 text. While only two derestricted texts, namely those of July 1990 and December 1991, are appended to this book, all other texts are readily available for consultation on the WTO website (a link is given at www.wto.org/tripsat20).

This book is the result of the collective effort of many months of preparation, writing, editing and re-structuring, and I am very grateful to all the contributors for the time and effort each devoted to the Symposium and the book. Without the financial and logistical support provided by the ITTC, we would not have been able to hold the Symposium or the subsequent meeting to discuss the book project – for this we owe a debt of gratitude to Bridget Chilala and her able team. I am deeply obliged to Antony Taubman for his wisdom, guidance and enthusiastic support for the project and, most of all, for his thoughtful contributions to the two introductory chapters of this book. I would also like to thank Adrian Otten who unstintingly gave his time to guide us through the planning of the session in the Symposium and the book project. I gratefully acknowledge the help and support received from Karyn Russell of the IPD at all stages of the project and, last but not least, I am truly grateful to Anthony Martin and Jaci Eisenberg of our publications unit for their superhuman efforts to produce the book on a tight schedule.

LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
ASEAN	Association of Southeast Asian Nations
CBD	Convention on Biological Diversity
EC	European Communities or European Commission (context-dependent)
EU	European Union
EFTA	European Free Trade Association
EPC	European Patent Convention
FRAND	Fair, reasonable and non-discriminatory
FTAs	Free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GSP	Generalized System of Preferences
GIs	Geographical indications
HIV/AIDS	Human immunodeficiency virus/acquired immune deficiency syndrome
IP	Intellectual property
IPIC Treaty	Treaty on Intellectual Property with Respect to Integrated Circuits (Washington Treaty)
IPRs	Intellectual property rights
MFN	Most-favoured nation
NGOs	Non-governmental organizations
OECD	Organisation for Economic Co-operation and Development
R&D	Research and development
TNC	Trade Negotiations Committee
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICE	Union of Industrial and Employers' Confederations of Europe
UPOV	International Union for the Protection of New Varieties of Plants
US	United States
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonogram Treaty

DISCLAIMER AND EDITORIAL NOTE

Disclaimer

The opinions and conclusions contained in this book are the sole responsibility of the individual authors and do not reflect the views of any institutions to which the authors are or were affiliated. This includes contributions prepared by staff of the World Trade Organization (WTO) Secretariat. None of the chapters purports to reflect the opinions or views of WTO members or the Secretariat. Any citation of the chapters should ascribe authorship to the individuals who have written the chapters. This book should not be viewed as advancing any form of legal interpretation or any policy position, and no views or analysis in this publication should be attributed to the WTO, its Secretariat or its members.

Editorial note

Please note several editorial points followed by the editors of this book.

Every time the word “country” appears in relation to GATT or WTO membership, it must be read as including customs territories. Any state or customs territory having full autonomy in the conduct of its trade policies may join (“accede to”) the WTO pending approval by WTO members.

GATT document MTN.GNG/NG11/W/71, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, 14 May 1990, lists 12 parties to the document; this is evident in its title. However, Pakistan and Zimbabwe later associated themselves with this group, bringing the total to 14 parties.

In the case of the European Union, the term “European Communities” (EC) is used for references prior to when the European Union gained legal personality on 1 December 2009. The authors of this book use the terms relevant to the period covered by their contribution.

The French term “*demandeurs*” used in the text may be understood to mean the WTO member or GATT contracting party requesting a particular outcome, according to the context.

Finally, the seasonal references in the contributions – autumn, winter, spring, summer – all refer to the Northern Hemisphere, since the TRIPS negotiations took place in Geneva, Switzerland.