

# Negotiating for the European Communities and their member states

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## Introduction

### *The focus of this chapter*

This chapter will focus on the substance of the TRIPS negotiations. I will explain what was at stake, how the negotiations went and what the outcome was for the substance of IP – all from my own personal perspective and based on my own previous and subsequent experience in this field. It follows that this chapter is not designed to provide a comprehensive assessment of the TRIPS Agreement, nor will it embark on the political environment of the Uruguay Round of multilateral trade negotiations in general and of the TRIPS negotiating mandate in particular. But let me present the flavour of what we, the negotiators, were up against and what we eventually achieved in the area of IP.

My starting point will be an explanation of where I came from when I joined the TRIPS negotiating team and what my role was during the negotiations. As background information, I will also present the status quo of IP protection in the European Communities (EC) and its member states in the late 1980s and early 1990s and its interface with the treaty now known as the Treaty on the Functioning of the European Union (hereinafter the ECT) – that is, the substance of IP protection at the time from an EC perspective. Subsequently, I will cover the main challenges for the EC in the TRIPS negotiations, which will be followed by a presentation of some selected achievements of the TRIPS Agreement, which strike me as being particularly important. Finally, I cannot help looking beyond the TRIPS Agreement: I have personally witnessed its major impact on the further development of international law on IP.

### *My role in the TRIPS negotiations*

Shortly after I had taken up my position in the European Commission in summer 1988, I joined the EC team in the TRIPS negotiations of the Uruguay Round of the GATT. At that time, pure trade negotiations were new to me, but the substance of, and international negotiations on, IP were not. As a lawyer by training, I had previously served in the Ministry of Justice of the Federal Republic of Germany, dealing with IP issues and participating in international negotiations within the framework of WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO). In addition, immediately prior to coming to Brussels in 1988, I had served for two years as a Counsellor at the Permanent Representation of the Federal Republic of Germany to the UN in New York.

All this helped me to pursue my responsibilities in the EC TRIPS negotiating team, which was headed by Mogens Peter Carl from the European Commission Directorate General responsible for trade. My tasks in our team were mainly twofold: due to my IP expertise and as an official of the European Commission Internal Market Directorate General (which was responsible for the domestic EC aspects of IP), I had to coordinate the substance of IP within the Commission services and give input on such substance to the EC negotiating team; and, to fulfil this task, I had to cross-check our input on substance with IP experts in EC member states and assure their feedback. Needless to say, I shared these tasks with other members of our team, notably Tony Howard, whose expertise, particularly on industrial property issues, was crucial throughout the negotiations. Both Tony and I came from the substance of IP when we joined the EC TRIPS negotiating team. We were so fascinated by the negotiating targets, the process and the progress, that we could not resist, already in 1991, sharing our impressions on the state of play of the TRIPS negotiations with a wider audience.<sup>1</sup>

### **Intellectual property within the framework of the European Communities**

At the outset, let me shed some light on a rather particular, if not unique, challenge that we in the EC delegation had to face: the features and state of play of IP protection in the EC at the time of the TRIPS negotiations. Why would our internal situation in this respect be so special, and why would this be relevant for the negotiations? The main reason is that the EC then, as well as the European Union (EU) today, was not, and still is not, a state. Other delegations represented states and their national interests, with their own national legal order and economy in mind. As the EC delegation, we had to carry an even bigger backpack, or at least

one with more complex contents: there was hardly any genuine EC law in place on IP, but, at the same time, we had to keep in mind all the - at the time - 15 rather different legal systems and economic orientations of the EC member states.

Having a closer look at these differences makes sense. After all, with IP law at EC level in the making in parallel with the TRIPS negotiations, and with IP and intra-EC trade also being an issue within the EC, we could easily draw on our own domestic experiences when negotiating a TRIPS agreement. We were busy building bridges in both the TRIPS negotiations and the EC.

### ***The interface between intellectual property law and the European Communities treaty***

In fact, at the time of the TRIPS negotiations, EC law on IP was still pretty much in its infancy and presented a rather scattered picture: from the outset, the EC had left the protection of IP to its member states. While topics such as agriculture, competition or the EC internal market had always been core policies for the EC, IP protection was not an active EC policy. Rather, the ECT addressed IP only in a defensive manner: under Article 36, EC member states were allowed to maintain their IP protection to the extent such protection did not unduly interfere with the functioning of the EC internal market. In this respect, the concept of Article 36 of the ECT was very similar to that of Article XX(d) of the GATT.

Nevertheless, the interface between IP, on the one hand, and two other major EC policies (namely, competition and the internal market), on the other, had already been an issue for a long time before the TRIPS negotiations. Since the early 1960s, the European Court of Justice had marked the territory and the dividing lines in several decisions. And from the 1970s, the EC legislator began taking on an active role in the structuring of IP protection through the harmonization of EC member states' laws and, in some cases, the creation of EC-wide titles. The focus was, in particular, on industrial property, such as patents (biotechnology) and trademarks, whereas copyright harmonization was not initiated until the late 1980s.

### ***The EC law (acquis communautaire) on intellectual property during the TRIPS negotiations***

#### **EC member states and their different economic realities**

A closer look reveals that the state of play with respect to IP protection in the EC member states at the time of the TRIPS negotiations was not homogeneous, to

say the least. In most of the 15 member states of the EC, different cultures, different languages, different economic realities and, in some cases, different legal traditions prevailed.<sup>2</sup> Also, some EC member states were net exporters; others were net importers of IP-based products, such as pharmaceuticals, brand-named products, such as cars or consumer electronics, products with a link to a geographical indication (GI), music and films; and member states' views on the protection of IP were not always identical. However, they were all trading partners with respect to goods and services protected by IP and had to find common ground on the parameters of protection. Note the similarities with the TRIPS negotiations!

### The EC *acquis communautaire* on intellectual property in the early 1990s

At the time of the TRIPS negotiations, the EC had harmonized its member states' laws only to a certain extent: in the area of patents, the European Patent Organization was in place, though it was not an EC institution; one aspect of patent law, namely, the treatment of inventions in the field of biotechnology, was harmonized by Directive 98/44/EC only after the TRIPS Agreement, and there was no EC patent office; trademark law was harmonized through Directive 89/104/EEC in 1989, but Community Trademark Regulation 40/94 was only adopted in 1993, and the European Trademark Office had not yet taken up its work; the harmonization of design law was in the making; the harmonization of copyright had just taken off with the adoption of a first Directive on the protection of computer programs in 1991, followed by three other Directives in 1992 and 1993 (the Database Protection Directive was adopted in 1996 and the other EC/EU copyright Directives followed even later); the Directive on the protection of topographies of semiconductor layouts was adopted in 1986; and no comprehensive EC legislation yet existed on the protection of GIs.

All this demonstrates that, at the time of the TRIPS negotiations, there was no settled *acquis communautaire* on IP in place. As a result, in WIPO as well as within the TRIPS framework, the EC negotiating team always had to take into account the to some extent rather different approach of EC member states to IP. The progress that we were after on IP had to pass the acceptability and sustainability tests with respect to both EC member states and the international community.

During the TRIPS negotiations, we could also draw upon something else that was very familiar to legislation within the EC internal market framework: the principle of subsidiarity. We have always been bound to limit EC legislation to what was absolutely needed for the functioning of the EC internal market; the rest was to

be left to EC member states' own legislation. Indeed, this principle was (and still is) relevant in the TRIPS context, too: the TRIPS Agreement, like any other multilateral framework of IP rules, addresses (only) those issues that are relevant for the functioning of international trade on IP – not more, and certainly not less.

### **The challenges of the TRIPS negotiations regarding the substance of intellectual property**

In addition to the respect for these general principles of acceptability, sustainability and subsidiarity, which we were very familiar with against our EC experience, there were some truly IP-related principles, crucial for legislating on IP protection, at no matter which level, that we had to keep in mind – and, I believe, we respected – in the TRIPS negotiations.

#### ***General objectives***

##### **The balance of rights and interests**

In preparing and negotiating any legislation on IP, be it in national parliaments, within the EC framework, or with international partners, one has to face a fundamental challenge: how to balance the IP rights of right holders and give them a strong and meaningful protection of their property while protecting the interests of users, consumers and the society at large in the access to protected goods and services at low prices, and within competitive markets. It did not come as a surprise that the search for a fair balance of these rights and interests – something I had already experienced on so many occasions – was also an important issue in the TRIPS negotiations. But, also, the need for finding a balance between the often very different interests and traditions of states was all too familiar: the differences in the approach to IP protection of the GATT contracting parties were mirrored, albeit on a smaller scale, by the situation within the EC.

##### **The interface between intellectual property protection and free trade**

Similarly, and again due to my previous experience with domestic and regional IP legislation, I was not surprised by the presence of another challenge, which is inherent in the very nature of IP protection: how to reconcile the monopoly protection that IP grants with open competition and free trade. When I joined the TRIPS negotiations, it was already clear to me that both competition and free trade, on the one hand, and IP protection, on the other, serve very similar, if not identical, objectives, namely, fostering high quality and stimulating inventions, creations and investments for the benefit of the society at large. So for me, these

are not contradictions in terms but, rather, very valuable policies and instruments that have to be seen together in perspective; this is also reflected in Article XX(d) in the GATT and Article 36 of the ECT mentioned above, which were designed to do justice to all these policies and strike an appropriate balance among them.

### **TRIPS negotiations and the existing international intellectual property framework**

For the Uruguay Round negotiations, IP might have been considered the new kid on the block – but was it really? While IP had already been an issue raised in the GATT (previously, mainly through Article XX(d) and the project of an Anti-Counterfeiting Code), it had been addressed in other international fora, such as the Organisation for Economic Co-operation and Development (OECD), UNESCO and the United Nations Conference on Trade and Development (UNCTAD), and, of course, in WIPO. It was, in particular, the comprehensive WIPO framework of international IP protection, with its more than 20 international treaties, that had to be taken into account. But we were determined to do more than that, to respect the treaties administered by WIPO, build upon them and prove that a meaningful and balanced IP protection is a legitimate part of international trade – beneficial for all countries and territories, irrespective of their state of development.

Also, those familiar with the existing international IP framework and coming from that side of the spectrum, like me, shared the strong feeling that the time was ripe to integrate IP into the framework of international trade. Commerce with IP had already become an indispensable part of world trade, so that IP experts, too, could no longer afford to turn a blind eye to the successful and operational set of GATT rules and mechanisms. So why not try to engage together, we felt, in a new endeavour – without abandoning the fundamental principles of IP protection? This truly created a common spirit between IP experts and trade negotiators.

### ***Overview of some selected issues at stake***

#### **Copyright**

Apart from these general or, as one may call them, horizontal, challenges described above, each area of IP presented its own challenges on substance. As far as copyright is concerned, the principal reference point was the Berne Convention for the Protection of Literary and Artistic Works, with its then over 80 contracting parties.<sup>3</sup> Here, the main focus was on issues on which the Berne Convention or other conventions could benefit from clarification or where gaps had to be filled with a view to providing for more legal certainty.

The Berne Convention had last been revised in 1971. Further revisions would have been called for in view of the rapid progress of technology, such as in computers, but revising the Berne Convention directly through a diplomatic conference at WIPO had apparently not been a realistic option. Such a revision would have required unanimity among all Berne Convention contracting parties. The GATT, with its more pragmatic decision-making mechanism, was therefore the obvious route to take. At the same time, we had to be aware of Article 20 of the Berne Convention. It provides that any other agreements by Berne Convention contracting parties outside the Berne Convention must not reduce the level of IP protection granted by the Berne Convention. So, agreeing on a lower level of protection than provided by the Berne Convention was not an option, supported also on legal grounds.

From an EC perspective, this translated into the following main objectives in the field of copyright: a clarification that computer programs (an issue on which the EC itself had only in 1991 adopted its very first Copyright Directive) and compilations of data (creative databases), both areas where new technology had become relevant for trade, are protected as literary works; granting explicit rental rights; providing certain neighbouring right holders with at least basic protection; clarifying the scope of the national treatment obligations; respecting in all of that Article 20 of the Berne Convention, the provision “safeguarding” the Berne level of protection, as explained above; and, finally, integrating the substantive provisions of the Berne Convention into the TRIPS Agreement. In the copyright area, it turned out to be particularly difficult to bridge the cultural differences and the different legal traditions inherent in most, if not all, of these issues (see Hannu Wager, chapter 17).

## Patents

In the field of patents, clarifications were sought regarding the term of protection (duration), the required minimum level of protection and the conditions for protection. One of the major challenges here was to agree on exclusions from patentability.

## Trademarks, models and designs

On trademark protection, the desired clarifications included the conditions for protection, the rights conferred, permitted use requirements and the term of protection of trademarks. Regarding design protection, the issues were rather similar to those in the field of trademarks. However, a particular challenge here was to determine the borderline between protectable designs and designs

following technical requirements or functions. In fact, this was an almost classic dispute about the scope of IP protection: should the monopoly held by car manufacturers, which is based on their IP protection, extend to spare parts, if the shape and design of the latter is merely dictated by their function?

### Semiconductor layouts

Agreeing on the protection of topographies of semiconductor layouts presented specific problems, because attempts to define such protection at international level had so far been unsuccessful; the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC or Washington Treaty) of 1989 had never come into force, so that, actually, no specific international treaty covered this type of subject matter. The objective was, therefore, to arrive – for the first time internationally - at common ground on the protection of semiconductor layouts by way of drawing upon the IPIC Treaty, but redefining a self-standing, appropriate balance of all rights and interests.

### Geographical indications

The existing international treaty on the protection of GIs (the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration) had a rather limited membership. And yet, trade in goods with a reputation based on their geographical origin, such as wines, spirits, other foodstuffs or industrial products, had gained a worldwide dimension. Protecting the producers as well as consumers against unfair trade in such products was, therefore, an important negotiating objective of the EC. However, several challenges surrounded this issue throughout the negotiations, and they all had a lot to do with different cultures, outlooks and traditions. Still, we felt that a line had to be drawn between indications that have a link to a certain region and its reputation for quality (and that are purposefully (ab)used on non-original products with a view to benefiting from the reputation of the original product), on the one hand, and generic names that no one would confuse as referring to a region in the first place, on the other hand. We would believe that the latter category was fairly small, as are the sometimes claimed differences in the perception of consumers worldwide.

### Unfair competition and trade secrets

Originally, the objective behind this issue was to arrive at a clarification of the protection against unfair competition, dishonest practices, misconception and passing-off as it is contained in Articles 10*bis* and 10*ter* of the Paris Convention for the Protection of Industrial Property. But even with these Articles of the Paris

Convention as a basis, the challenges attached to this issue were the rather different concepts of protection against unfair competition – again, even within the EC.

## Enforcement

One may say that, in general, legislating on the substance of IP protection is of little use without meaningful provisions on its domestic enforcement – and the same holds true for reaching a level playing field at international level. In fact, the quality and scope of IP protection depends on its enforcement. The problem we had to face here was that, apart from the rather general provisions in the Berne Convention or the Paris Convention, with their adjudication left to the International Court of Justice, which had never been applied, no multilateral discipline or agreement existed with rules on the domestic enforcement of IP. Putting together an operational and, at the same time, balanced text on enforcement in the TRIPS Agreement was thus a major challenge – and an uphill battle: while we all agreed that such rules would be needed, many negotiators had different views on what they should look like; and even within the EC, finding a valid common denominator of all the civil procedure concepts with their many different features was not an easy call.

This survey could only present a selection of the different challenges. Yet it only goes to show that, on each of these issues, the cards on the TRIPS negotiating table were shuffled anew. The views differed, even controversies occurred, according to the varying features of IP topics, cutting across geographical and political boundaries, be they North–South, North–North, between different regions or even within the same region. Nevertheless, we were all dedicated to arriving at good and sustainable results. And I have only the best memories of the constructive and always fact-oriented spirit of these, at times, rather tough discussions.

## Some selected achievements and value additions

Despite all these difficulties, differing conceptual views and the implied challenges, we succeeded. Yes, personally, I believe that the TRIPS Agreement does represent a success for all states, rights and interests involved. All negotiators were winners in the sense that all elements of added value contained in the TRIPS Agreement – and there are quite a few – remain faithful to the general objectives of international IP protection that any national, regional or international legislator has to keep in mind: providing for an appropriate balance of rights and interests;

doing justice to the interface between IP protection and free trade; and respecting, and building upon, the existing international IP obligations. Let me highlight in the following some of the features of added value that we accomplished.

### **Copyright**

There are plenty of such added-value elements already in the area of copyright. We settled the dispute about the “work” character of computer programs and creative databases by (i) clarifying that computer programs, by definition, and databases, on condition that they are “intellectual creations”, are protected as literary works within the meaning of the Berne Convention’s terminology, and (ii) drawing explicitly the borderline with the public domain in Article 9(2). For the first time in an international IP agreement, rental rights were explicitly granted for certain works and under certain conditions, the term of protection for legal persons’ rights was clarified, and some basic protection was provided for performers, producers of phonograms and broadcasting organizations. In addition, and again for the first time, the copyright section contains several general principles of copyright protection: it states explicitly the general principle that copyright protection extends to “expressions and not to ideas, methods of operation or mathematical concepts as such” – an important clarification on the limits of protection; it clarifies that the protection of databases (“compilations”) does “not extend to the data or material itself”; and it establishes the “three-step test” (drawn from the Berne Convention where it applies only to exceptions from the reproduction right) as a general, generic test for the application of any exception to copyright.

Moreover, it should not be forgotten that this TRIPS section on copyright and related rights very elegantly confirms the substantive provisions of the Berne Convention and includes them into the TRIPS Agreement through the “compliance clause” in Article 9(1) – a new method and a breakthrough in international law-making: it *de facto* overcame the requirement of unanimity for the revision of the Berne Convention.

### **Semiconductor layout-designs**

The “compliance clause” that was already applied for copyright protection in Article 9(1) was used again for the protection of semiconductor layouts. But, as neither the IPIC Treaty nor any other international treaty had come into force in this field of IP, the “compliance clause” was simply, and in a very pragmatic manner, applied as a reference to those provisions of the IPIC Treaty that all negotiators were in a

position to agree on. In addition, several other provisions were adopted to fill gaps or overcome controversies that were left by the IPIC Treaty. For my taste, the added value of this section stems from both its contents on substance and the chosen method of international law-making, namely, the particularly interesting use of the “compliance clause” – referring to a treaty that never came into force.

### *Trade secrets*

The common ground on the understanding of the notion of unfair competition within the meaning of Article 10*bis* of the Paris Convention turned out to be limited. Part II Section 7 is called “Protection of Undisclosed Information” and provides, basically, for the protection of trade secrets and certain test data. Still, the reference to the Paris Convention was maintained, so that this Section does serve as a clarification of a very important aspect of unfair competition.

### *Geographical indications*

Admittedly, Part II Section 3 on GIs does not go as far as the EC would have wanted (or as would have been appropriate, in my view). However, with its structure of a general protection of all GIs, a more explicit protection of indications used for wines and spirits, and the explicit promise to enter into negotiations on a reinforced protection, this Section was at least a good start. It was certainly a valid and constructive way out of the international deadlock on this topic that we could witness in the late 1980s.

### *Enforcement*

Last, but not least, a word on Part III of the TRIPS Agreement on the Enforcement of Intellectual Property Rights. When we worked on our first draft proposal of this Section, but also throughout all the negotiations that followed, we were painfully aware that we entered new territory. Internationally, we were in “no man’s land”; we could not draw upon any existing multilateral international agreement in this respect. But, on the other hand, this area was densely populated by national laws and, being a lawyer myself, I know that lawyers tend to be convinced that their own country’s system is the best. It was a bit like exploring new uninhabited territory with an overly heavy backpack filled with preconceptions.

This is how we went about this task that appeared to be an attempt to square the circle: we closely cooperated with other delegations; we discussed with the EC member states (which have plenty of differences among themselves in their legal

enforcement systems, including civil law and common law concepts); we consulted experts, judges and customs officials; we cross-checked our ideas with the interested circles concerned; and we relied on advice from WIPO.

I think Part III is a particularly successful result of our negotiations. Even if it may appear to be too detailed for some and too general for others, it does reflect the common ground among all negotiators – and, as I am convinced, it was a balanced breakthrough based on common sense.

### **TRIPS and beyond: The impact of the TRIPS Agreement on international intellectual property law and EU law**

I just described Part III of the TRIPS Agreement, on enforcement, as a breakthrough, and, indeed, it had a significant impact on international IP protection and its future. In fact, not only did this Part of the TRIPS Agreement open doors and lead to further international progress in this field, many other features of the TRIPS Agreement were subsequently adopted by international law-makers and included in other IP treaties. Indeed, other elements of the TRIPS Agreement were further elaborated on in international, national and EU law: had we called some of the TRIPS provisions on copyright “Berne plus”, we can now find TRIPS provisions and “TRIPS-plus” elements elsewhere.

Let us take the copyright provisions in Part II Section 1 and Part III on enforcement as examples. The provisions on the protection of computer programs and on the non-protectability of ideas found their way almost verbatim into the WIPO “Internet Treaties” (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT)) of 1996. These Treaties also provide for rental rights, albeit more explicitly than TRIPS and, therefore, constitute an example of TRIPS plus. The “three-step test”, for the first time introduced as a general test for all copyright exceptions by the TRIPS Agreement, has now become the international standard: it is not only reiterated in the WCT and the WPPT, as well as in the more recent WIPO treaties (Beijing Treaty on Audiovisual Performances, 2012 (BTAP) and Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013), but also included in Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. The legal technique of the “compliance clause”, introduced by the TRIPS Agreement in the field of copyright, has become established international practice when classic conventions that can only be formally revised unanimously are to be amended. It has already been used in several IP treaties, notably in the WCT and the BTAP.<sup>4</sup>

Finally, Part III of the TRIPS Agreement, on enforcement, has been the pacesetter for, and/or is referred to, in several more recent IP treaties, including the WCT and the WPPT. The fact that, to date, the TRIPS provisions on enforcement have remained unrivalled, and no other more detailed international rules have been put in place, amply proves their quality. In the EU, the very first Directive on the enforcement of intellectual property rights (Directive 2004/48/EC) clearly draws on, and was inspired by, the TRIPS provisions.

## Conclusion

Accomplishing the TRIPS Agreement was proof of the possibility of reaching, and the will to reach, common ground, despite all the initially rather strong North–South, North–North or other divergences in the field of IP. On substance, the TRIPS Agreement has managed to accommodate the needs and interests of countries with different backgrounds and different economic realities. This was even the case within the EC and, subsequently, the EU; and I believe it is fair to say that this aspect has added to our negotiating team’s credibility. Moreover, the TRIPS Agreement has also given an incentive and a push, in a balanced way, to the economies of such countries as Bulgaria, Hungary, Poland and Sweden, which were not yet members of the EC at the time of the TRIPS negotiations.

The protection of IP has always been an evolving scenario. And the positive impact of the TRIPS Agreement on a balanced IP protection regime and on trade with IP-based goods and services has also been taken further into the future. Not only has the TRIPS Agreement been the solid basis for many other international agreements in this field, it is itself “alive and kicking” and nowadays an indispensable part of the international IP environment.

No, negotiating the TRIPS Agreement was not easy. But I am proud to have been part of it. After all, EC officials are used to bridging gaps. We are used to squaring circles, to persuading experts not to focus exclusively on their own national systems. But once a Directive is in place, once we have overcome the hurdles and been successful in arriving at a balanced outcome, once there is satisfaction with and co-ownership of the result, we know that it was worth all the effort. All this greatly resembles the TRIPS negotiations.

What was very rewarding for me was the constructive climate of the TRIPS negotiations, which I remember well – the common spirit among so many different nations and those with different outlooks, from around the world. The TRIPS negotiations and their result have shown how much we have in common. It is our responsibility not to put these achievements at risk.

## Endnotes

- 1 See Jörg Reinbothe and Anthony Howard, "The state of play in the negotiations on TRIPs (GATT/Uruguay Round)", *European Intellectual Property Review*, 13(5) (1991), 157-64.
- 2 This was the number of EC member states between 1986 and 1995.
- 3 In 1990, the Berne Convention had 83 contracting parties.
- 4 More details on the extent to which these new WIPO treaties have drawn upon the TRIPS Agreement are provided in Jörg Reinbothe and Silke von Lewinski, *The WIPO treaties on copyright: A commentary on the WCT, the WPPT and the BTAP*, 2nd edition (Oxford: Oxford University Press, 2015).