

## **Revisiting the TRIPS negotiations: Genesis and structure of this book**

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The 1986 Punta del Este Declaration inaugurated a set of negotiations on “trade-related aspects of intellectual property rights” as part of the Uruguay Round mandate for multilateral trade negotiations. These negotiations led, ultimately, to the conclusion of the TRIPS Agreement, an integral element of the single undertaking constituting the legal framework for the newly established WTO which came into existence in 1995.

The TRIPS Agreement was the product of an unusually successful and effective multilateral negotiation process. The Agreement, and the negotiations that led to it, have since spawned a voluminous scholarly and academic literature. That literature still lacks a full inside perspective of the negotiations and thus can overlook some of their most distinctive and instructive characteristics. Few of the original negotiators - who mostly worked in other professional or official roles in their subsequent careers - have set down their reflections on the process, and their potential contribution to a richer and more informed account of the negotiation process has been scarcely tapped. Equally, with multilateral norm-setting on IP mostly at a standstill, and regional and bilateral avenues proving to be more active in this field, collective sense of how to make multilateral negotiations “work” is potentially ebbing away.

The widely felt need to develop a more informed and objective understanding of the TRIPS negotiations was the genesis of a symposium convened in February 2015 which drew together many of those who participated in the making of the text of the TRIPS Agreement. Stimulated by and building upon the spirited and instructive discussions at the Symposium, this volume gathers together unique insights into the negotiating process, and seeks to illuminate the process that led from an ambiguous and somewhat uncertain negotiating mandate to what became

a transformative instrument in the field of trade, and the most wide-ranging and influential multilateral treaty to date in the field of IP.

This volume therefore aims to fill a gap in the literature on TRIPS by providing important insights into the TRIPS negotiations centred on the individual accounts of a wide spectrum of key participants in the negotiations, who were invited to look back on the experience from the vantage point of twenty years after the entry into force of the TRIPS Agreement. It is not an authoritative history of the negotiations that produced the Agreement, still less a guide to its legal interpretation. The authors were invited to provide their personal recollections of the process itself, and to reflect upon the actual practice of making of the TRIPS Agreement and the practical skills they applied in making negotiations work. The contributors therefore discuss what the negotiations achieved, how that outcome was achieved and what lessons this process and outcome could offer today's policymakers and negotiators. Additionally, as many of the negotiators remain active in policy spheres, they also reflect on the enduring relevance of the TRIPS Agreement and consider the possible avenues for multilateral work on IP issues today.

These individual accounts are expressly personal and informal in character, and are not presented as representing the past or current view of any participating government or of the GATT or WTO Secretariats. A conscious effort has been made to ensure a wide spectrum of views representative of the diverse array of active participants in the negotiations; but the views captured in this volume are not comprehensive: it proved practically impossible to capture insights from all those involved.

The aim of this project - this volume, and the Symposium that renewed dialogue between the original participants in the making of the TRIPS Agreement - is to provide today's negotiators, policymakers and analysts, whether in government service, in civil society, industry, or academia - with a fresh understanding of the TRIPS negotiating process. What interests drove negotiations forward? What can we understand about the practical management and conduct of negotiations in an area that is at once politically sensitive, technically demanding and multidisciplinary? How exactly were these negotiations structured and organized? How were understandings reached so as to produce a balanced and wide ranging final text?

Any such negotiation is a one-off, and perhaps the same convergence of institutional, commercial and wider geopolitical factors that produced the

TRIPS Agreement is unlikely to be closely replicated in the future. Nonetheless, there are valuable practical lessons to be learned from the negotiations, particularly key elements of negotiating know-how that may otherwise have been lost to view and would then have to be painstakingly relearned. These diverse individual accounts help us to understand the distinct roles of negotiators, Chair and Secretariat, as well as how negotiators sought to balance matters of principle and good policy against simple commercial or political trade-offs.

The TRIPS negotiations drew together countries at different levels of economic development and involved intensive engagement with a range of substantive fields of IP law and policy. The negotiations also followed a clear trajectory from discussion of the mandate and overall direction, to submission of concrete proposals, to the engagement with substantive issues, to close textual negotiations and final agreement on the text. While this volume is structured to cover this diverse set of perspectives in the following five parts, it is clear that many contributions span the subject of several parts, and allocating them to one or other part of the volume was inevitably somewhat arbitrary:

Part I: Introduction, context and overview

Part II: Anatomy of the negotiations

Part III: Perspectives from the developed world

Part IV: Perspectives from the developing world

Part V: Negotiating substantive areas of TRIPS

Part I contains this general introduction to the book followed by a thematic overview of the contributions that describes the context of the TRIPS negotiations and summarizes the views of the contributors on key themes recurring throughout the book. It also discusses substantive issues addressed in the negotiations and negotiators' observations relevant for the contemporary scene.

Part II gives a series of accounts of and reflections on the overall negotiating process from GATT Secretariat staff and TRIPS negotiators. Several contributions in this part are written from the particular perspectives of the delegation on which that author served, but also draw broader lessons from the negotiating process.

This part begins with a key contribution by Adrian Otten, a central figure in the GATT and WTO Secretariats who has 25 years of unequalled experience with the development and implementation of the TRIPS Agreement both before and after the establishment of the WTO. His chapter describes the formal and informal negotiating processes and sets the scene for the later contributions to this volume. It can be used as a compass to guide the reader through the rest of this book: other contributors add layers to his foundation. His contribution provides an authentic timeline and background of the negotiations starting from the Tokyo Round, and systematically runs through the seven years it took to complete the Uruguay Round. He describes the growing perception at the time that the future of the multilateral trading system depended on some recognition of the importance of intellectual property protection. Mr Otten makes the vital observation - which is developed further in other chapters - that the conventional narrative of the TRIPS negotiations as being defined by North vs South negotiating camps overlooks the more complex and diverse structure of negotiations, with North-North differences at times proving to be more intractable.

Thomas Cottier, the lead Swiss negotiator and one of the most thoughtful trade law scholars on TRIPS, reflects on the nature of the Agreement that emerged from the negotiations, laying emphasis on its ground-breaking character as a trade agreement setting standards for domestic regulation, with deep roots in existing domestic law (especially in developed countries). He analyses the role of informal plurilateral processes and the active lobbying role of the private sector. His pen-sketches of the main actors involved in the process, both in the GATT Secretariat and in the delegations, further leaven this personal account. He also reflects on the practical modes of working that made the negotiations a success.

John Gero negotiated on TRIPS for Canada and has elsewhere been described as a bridge between negotiators from the developed and developing worlds. He analyses the human and institutional factors that contributed to the success of the negotiations, singling out, as many others do, the competence of, and the trust placed in, the Chair and the Secretariat. He attributes the outcome to the ability of hard-working negotiators to bring creativity to the negotiating method, but also to their willingness to engage with each other on the substance of the issues at stake, guided by domestic practices, and to the dynamics of shifting alliances that cut across the full economic and political spectrum of negotiators, beyond conventional North-South boundaries.

Mogens Peter Carl, the lead negotiator for the European Commission, assesses the reasons for the success of the negotiations and evaluates the results in today's

context. He sets the negotiations within their full historical context, describing the pivotal period of the relaxation of East-West confrontation, the resultant political transformations, and a period of economic optimism as the chief factors behind the success of the Uruguay Round. He offers an insider's account of the distinctive manner in which the EC delegation prepared for and engaged in TRIPS negotiations, and its unique model of engagement with stakeholders and the member states of the European Communities (EC). Mr Carl maintains that the TRIPS negotiations cannot be reduced to classical trade "bartering" but were founded on a more reasoned public policy basis for moving forward, spearheaded particularly by the EC. More recent work on access to medicines illustrates for him how balance was already built into the text, particularly on compulsory licences and parallel imports. While TRIPS rules remain generally legitimate today, he makes a strong plea for a major review in the light of "signs of age" and emerging gaps, for instance, on copyright protection for software, patent trolls and the un-stemmed tide of trade in counterfeit goods.

Matthijs Geuze, a GATT Secretariat official during the negotiations, describes how certain elements of the TRIPS text came together, and gives insights into the personal dynamics that made the negotiations function effectively. He points to the care taken by the Secretariat in compiling the Composite Draft Text of June 1990 that formed the foundation of the textual negotiations on the Agreement, the "constructive ambiguity" that produced outcomes in some areas that remain sensitive today. On the relationship of the TRIPS Agreement with WIPO treaties, he notes the impulse that TRIPS gave to participation in other non-WTO IP treaties, as well as the complex question of the relationship between TRIPS obligations and those under the WIPO conventions it incorporates by reference. He shares his memories on the informal and collegial approach taken at times to work on matters that squarely divided delegations.

Part III sets out the perspectives of several developed country negotiators. While the negotiating dynamics cannot be accurately portrayed as a simple North vs South trade-off between two monolithic sets of interests, it is clear from the accounts in this part that developed country economies were the *demandeurs* who, on the whole, actively sought an agreement on trade-related aspects of IP rights as central to their goals for the Uruguay Round, even while they differed greatly on what this should mean in practice, and indeed failed to bridge some significant policy divides. Some of the contributions to this part could well have been placed in Part II, as they give valuable additional perspectives on the genesis and political context of the TRIPS negotiations, analyse the full negotiating process and draw useful lessons for future negotiations.

The United States was the principal *demandeur* in the area of TRIPS and was represented by a large and specialized negotiating team. Catherine Field, a key member of that team, gives a systematic account of the successive phases of the negotiations, highlighting the importance of IP as a major offensive objective for her delegation. The formulation of the mandate and progress in the negotiations was rooted in domestic trade policy considerations in the US and the use of the Generalized System of Preferences and Special 301 mechanisms to bring about improvement in IPR protection in foreign markets. She stresses that the US and others had sought to address IP enforcement standards in the GATT framework for over ten years before the pivotal mid-term decision on TRIPS in 1989 that set the foundation for substantive negotiations. Ms Field attributes the outcome to certain negotiating axioms and illustrates how they produced outcomes on patents (a “mixed bag” which only partly achieved US goals), trademarks, geographical indications, and general principles and exceptions, including the import of introducing a strong most-favoured nation principle to IP. Current issues such as patents and standards, patent trolls and IP and competition policy require careful solutions, but these can be achieved within the existing TRIPS framework.

From the viewpoint of a Swiss negotiator, Thu-Lang Tran Wasescha recreates the atmosphere of the negotiations and their multilateral context, starting with the failed revision of the Paris Convention on the Protection of Industrial Property, and goes on to describe the role of the Swiss negotiating team as well as the Swiss Government approval processes. She provides a unique account of how the Swiss negotiating position was developed in a complex and actively democratic federal system, and how her delegation sought to substantiate negotiating positions through careful explanation. Equally, “constructive ambiguity” was needed to forge a delicate and finely balanced agreement. She offers a detailed analysis on the dynamics and interests driving the negotiations on patents and GIs, explaining why Switzerland was particularly active in these areas.

Jörg Reinbothe reviews the challenges that confronted the European Commission in representing a diverse group of distinct member states at a time of evolution in EC IP law. Many contentious issues had to be resolved between EC member states, thus repeating the discussion that invariably took place in the context of TRIPS negotiations between developed and developing countries. The EC experience illustrated how a principle of subsidiarity could apply also in multilateral norm setting. He assesses the EC’s achievements against its negotiating objectives and the effect of TRIPS in the making of IP law elsewhere. While the EC secured notable gains especially on copyright and on enforcement, Mr Reinbothe maintains that the TRIPS Agreement was a success for all negotiators

in that it was true to widely-shared principles while adding value in several domains, and also formed the basis for norm-setting in other fora.

Part IV offers a range of perspectives from developing country negotiators, including accounts of those who, being less ambitious for an outcome on TRIPS, sought to safeguard domestic policy interests within the negotiated outcome, while obtaining other benefits from the multilateral trading system and blunting the impact of unilateral trade measures. Nonetheless, despite the common themes, developing country negotiators actively pursued several diverse trade interests, as is evident from their accounts. In this part, too, there are contributions that could have been placed in Part II or in Part V, as they review the overall process as well dealing with specific sections of the TRIPS text. They are nevertheless placed in this part as they predominantly describe the negotiating process and results from the perspective of a developing country delegation or of the developing world more generally.

A.V. Ganesan negotiated on TRIPS for India at several stages, from 1987 to 1989 and again from 1991 to mid-1993, and played a key role in negotiating what became known as the Dunkel Draft in December 1991. He traces the approach taken by developing countries in general and India in particular from the launch of the Uruguay Round onwards. Initially, India took the position that substantive norms of IPRs were not included in the mandate for negotiations. After agreeing to discuss these in April 1989, India then went on to defend its laws which notably excluded product patents for chemicals and pharmaceuticals. Mr Ganesan describes the reasons for India's positions with respect to product patents on pharmaceuticals and other sensitive issues through the various phases of negotiations. He acknowledges that India failed to get its demands met in the final stages before the Dunkel Draft and subsequently, yet reflects that TRIPS may be "a blessing in disguise for India" because India can assure foreign investors of its compliance with standard international IPR norms and thus better manage trade frictions.

Piragibe dos Santos Tarragô, who represented Brazil in the TRIPS negotiations from 1990 to 1993, reviews the major events in chronological order. He traces the evolving positions of Brazil in such sensitive areas as pharmaceutical and chemical patents and copyright protection of software as it took a tactical approach with an eye to gains in other areas of the Uruguay Round. He characterises this evolution as a move from "staunch opposition" to "somewhat hesitant acceptance" of the text. Developing countries were faced with relative unity among the *demandeurs*, saw the need to strengthen the multilateral system

in the face of unilateral action and sought to secure export interests in other sectors. Mr Tarragô underscores the compelling need for the effective preservation of policy space for developing countries to promote development and the public interest. He reviews the significance of negotiations on patents - the conscious concessions made were offset by the maintenance of flexibilities and a role for compulsory licensing as a policy tool.

Antonio Gustavo Trombetta negotiated for Argentina, and sets his account of the negotiations within the global and national political and economic shifts centred on 1989, a critical and decisive year in the TRIPS negotiations. He contrasts his country's offensive interest in ensuring greater market access for its products in the agriculture negotiations with a set of defensive interests pivoting on a range of public policy concerns, particularly the impact of pharmaceutical patents on the cost of medicines. Mr Trombetta acknowledges the impact of unilateral action on IP protection as a spur to cover IP disputes within the multilateral dispute settlement system. He concludes on a realist note: the TRIPS Agreement was not a perfect agreement, and only part of a broader framework, but constituted unprecedented regulation in the area of IP.

Umi K.B.A. Majid, Malaysia's negotiator, offers a perspective of a "small, developing, Muslim majority country that is very reliant on foreign investment" and a net importer of IP. She describes how she engaged with the negotiating process to deal with issues that had sensitive implications in a domestic context and argues that smaller delegations had to rise to a particular challenge to ensure their presence was felt. She underscores the significance of bilateral factors in encouraging developing countries to engage with multilateral standards. Ms Majid illustrates how the sensitive issue of GI protection, particularly for products of the vine, was dealt with to take account of regulatory diversity. The distinct situation of Malaysia could be accommodated, including through a footnote allowing for administrative enforcement action. She gives compelling examples of the need for all participants in negotiations to voice their concerns and positions clearly and firmly.

David Fitzpatrick's particular expertise in negotiating for Hong Kong was a deep knowledge of due legal process in enforcement as a former prosecutor and litigator. His account focuses on two issues of concern to Hong Kong as an important trading economy with an established IP system: parallel importation and enforcement. He identifies some of the features that enabled Hong Kong to make a distinctive contribution to the substance of the negotiations, given its significance as a trading economy and its extensive experience with the suppression of

counterfeit trade within an established legal system. Mr Fitzpatrick highlights the importance of the issue of parallel importation in a negotiation concerning “trade-related” aspects of IP. Recalling the controversial character of this question, which could not be resolved in the negotiations, he characterises the outcome as an “honourable draw”. Looking to the implementation of the enforcement part of TRIPS, he cautions against bias towards domestic firms in the enforcement of IP.

Part V looks closely at the negotiations in three substantive areas of TRIPS, which had contrasting negotiating dynamics: the texts on patents, on copyright, and on the settlement of disputes. TRIPS largely gives effect to existing international copyright law in the form of the Berne Convention for the Protection of Literary and Artistic Works, but added several key updates in economically significant sectors. The TRIPS Agreement broke new multilateral ground on patents against a backdrop of long-standing North-South dissent. Dispute settlement was contentious and uncertain until late in the negotiations, as it proved difficult to establish the proper place of IP disputes within the overall dispute settlement mechanism.

Jayashree Watal negotiated on all aspects of TRIPS (save copyright) for India in 1990, when much of the TRIPS text was developed. She provides a comprehensive account of the key developments in the critical area of patents within the TRIPS Agreement. Her contribution complements the overview of India’s negotiating positions provided by A.V. Ganesan. A key part of her account, crucial for understanding the structure and content of the TRIPS text, concerns the negotiation of the text on compulsory licensing, which drew together the notion of government use and compulsory licensing under the broader heading of “use without authorization of the right holder”, and the resultant absence of restrictions on the available grounds for such authorization. She attributes the balanced outcome to support from key developed country negotiators on aspects of public policy, as well as an overall negotiating environment characterized by cooperation, coalition-building and compromise.

Hannu Wager, who represented the Nordic countries focusing on copyright issues, sets the TRIPS negotiations in the broader context of the development of international copyright law, in particular the differences between the civil law tradition of authors’ rights and the more utilitarian Anglo-Saxon tradition followed by the US, the UK and Commonwealth countries in general. They included the treatment of moral rights and a set of issues concerning the initial ownership of copyright and transfer of rights. Mr Wager also discusses the different approaches to the protection of performers, phonogram producers and broadcasting

organizations within these traditions, and how these differences were bridged in the negotiations. Finally, he describes how international IP law evolved since the 1970s with respect to two new areas of information technology, namely computer software and layout-designs of integrated circuits, and how this evolution influenced the way these issues were addressed during the TRIPS negotiations.

Jagdish Sagar was India's copyright negotiator and also oversaw the initial implementation of the TRIPS copyright provisions into Indian law. His contribution therefore describes the history of the already high level of copyright protection in India in the light of its economic interests in films, music and software, and gives an update on India's position on the WIPO Internet Treaties that followed TRIPS. His contribution is important in understanding why the US and India were largely on the same side when it came to copyright protection. Yet there were differences between these two delegations on copyright issues, for example on the "impairment test" in the TRIPS rental rights provisions for films.

Adrian Macey negotiated both on TRIPS and on dispute settlement for New Zealand, giving him a unique vantage point. His chapter describes the debate over whether or not there should be a stand-alone dispute settlement mechanism for TRIPS. Citing the Uruguay Round documents, he outlines the distinct concerns that were raised by the *demandeurs* and the developing countries on dispute settlement and potential trade sanctions in other sectors for violation of IPR standards, or "cross-retaliation". Mr Macey outlines the role of a New Zealand proposal drawn up with the support of Colombia and Uruguay to bridge across these concerns, noting that many of the ideas in this proposal found a place in the Dispute Settlement Understanding (DSU). He points to the irony that cross-retaliation has been authorized by the WTO several times for use by developing countries against their developed country trading partners, revealing the resultant dispute settlement system to be a "two-edged sword".

The central figure in the negotiations, Ambassador Lars Anell, who chaired the TRIPS negotiating group and whose indispensable role as a thoughtful, fair and effective leader is acknowledged with much respect throughout this volume, gave a keynote address at the February 2015 Symposium reviewing the negotiating experience but also looking forward to today's public policy challenges for the IP system (see appendix 1). Indeed Ambassador Anell's reflections serve as a powerful link between the remarkable, productive and enduring work of the TRIPS negotiators almost a generation ago, and today's complex policy environment within and beyond the field of IP.

It was striking, when the TRIPS negotiators came together many years later for the Symposium, to hear of their continued engagement with the policy domain: apart from reflections on the TRIPS negotiations, the conversation was imbued with knowledgeable concern about contemporary public policy issues and the need for the multilateral system to continue to play its proper, balanced role. For this is the essential message that we can glean from the narratives drawn together in this volume: the TRIPS negotiators ultimately transcended the bare logic of trade negotiations, the simple zero-sum exchange of concessions. The accounts here show that the work of the negotiators evolved into a true - if contested and pressured - dialogue about what constitutes a proper policy balance in the field of IP, and how to define an adequate level of regulatory convergence internationally while leaving essential policy space.

For many, such a negotiation could not be successful without mutual respect, intellectual curiosity and creativity, and a willingness to listen to one another and to learn from those who offer practical expertise. The TRIPS negotiations become a case study in how to address a very practical challenge today: how to conduct a set of multilateral negotiations in a politically sensitive and technically challenging area where trade interests and regulatory imperatives overlap and intersect.

As the negotiators themselves point out in this volume, today's world differs considerably from that in which the TRIPS Agreement was negotiated and concluded, and the multilateral system confronts new and ever more complex challenges. Therefore, the TRIPS negotiations are unlikely to provide a simple template to be applied to contemporary issues in the same manner. Yet the goodwill, intellectual curiosity, mutual respect and skill of the negotiators, the leadership and drive of a respected Chair, and the trust invested in a professional and neutral Secretariat are all ingredients that would surely support and facilitate future negotiations.

The growing recognition of the TRIPS Agreement as a touchstone of policy legitimacy and balance, and as a framework for appropriate levels of regulatory convergence and preservation of domestic policy space is, however, the essential legacy of the negotiators. The following chapter seeks to distil the core lessons for today's policymakers and negotiators from the diverse accounts provided by the negotiators as a further guide to the indispensable individual chapters that follow, giving unique and irreplaceable insights into the making of the TRIPS Agreement.