

Thematic review: Negotiating “trade-related aspects” of intellectual property rights

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TRIPS: reframing international intellectual property law

The entry into force of the TRIPS Agreement, along with the inception of the WTO in 1995, was a turning point for multilateral governance and a catalyst for transformation of law, policy and international relations in IP and in a host of related policy fields. Through the linking concept of “trade-related aspects” of IP rights, the TRIPS negotiations reframed both the international governance of IP and the very conception of “trade” within multilateral trade law and policy. The period since the Agreement entered into force has undoubtedly been the most active, the most intensively debated and the most geographically and economically diverse phase of intellectual property law-making and policy-making processes ever experienced: national legislative texts on IP notified to the WTO TRIPS Council now amount to over 4,500 official document references.

Yet twenty years is a brief period in the history of international IP law. IP was the focus of some of the first multilateral conventions in any field, and of the first attempts at multilateral regulatory convergence: the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886 were negotiated during an earlier phase of economic integration, when it was recognised that the absence of an agreed framework for IP protection adversely affected commercial relations involving industrial products, branded goods and creative works. The initial negotiations in the 1880s were followed by a series of amendments over successive decades, and by further multilateral conventions; these agreements - especially the Paris and Berne Conventions - have proved to be remarkably resilient throughout all the change and upheaval of the 20th century and today still constitute much of the legal backbone of international relations in IP.

The TRIPS Agreement was consciously built upon this established framework, yet its very purpose was to be a dramatic departure from it: hence, it both reaffirmed the multilateral law of IP and fundamentally restructured its base. The conclusion and entry into force of the Agreement precipitated concern that it would not only subvert the existing multilateral IP system but would equally taint the multilateral trading system, particularly through its incorporation into the WTO dispute settlement mechanism; critics were concerned about its potential impact on sound domestic policy-making and upon the stability and legitimacy of the trade law system. And the period since the Agreement was concluded has unquestionably been the most dynamic and challenging time ever for the IP system in general.

Hence it is remarkable that, in the turbulent times of rapid social, technological and economic change that followed its conclusion, the TRIPS Agreement largely sustained its relevance and legitimacy. Its essential built-in balances have not been revisited by WTO members - apart from one specific case² - and the reported experience with its implementation across a wide spectrum of the WTO's membership has been a record of balanced, diverse and suitably tailored domestic policy-making,³ rather than bare legal compliance backed by the threat of trade disputes.⁴ While few may have predicted it, this more positive outcome is arguably of a piece with the logic and content of the Agreement as a legal text, and with the decisions taken about its place within the legal and institutional framework; hence, to understand the role and impact of the Agreement today, it is essential to understand its origins and above all how the text was crafted.

In 1986, when trade ministers from the bulk of the world's trading nations launched the Uruguay Round, the most complex and ambitious set of multilateral trade negotiations to be undertaken at the time, the IP negotiating mandate responded to the concerns of some that the existing legal and institutional multilateral framework for IP no longer represented "a functioning multilateral rule of law".⁵ The Punta del Este Declaration directed negotiators to address "trade-related aspects" of IP rights. The original mandate was somewhat indeterminate: indeed, as many contributors to this volume recall, the first phase of the TRIPS negotiations largely constituted a debate over what "trade-related aspects" should be included, and how that understanding should structure the negotiation outcome. The results of these negotiations - the TRIPS Agreement - far exceeded most expectations in its coverage and its reach behind the border into the domestic domain, and in how its implementation would be monitored and enforced.

The Agreement emerged as the most comprehensive and far reaching international treaty on IP to date, covering as it did a wide sweep of substantive subject matter,

as well as the administration and enforcement of IP, and the settlement of disputes between trading partners over IP. It also set out, for the first time in international IP law, the underlying public policy rationale for IP protection, and it provided policy space sufficient for countries at different levels of development to take measures to balance the interests of the right holders with the public interest in access to and use of protected content. Having been negotiated and then administered in a trade forum, it inevitably forged enduring legal, policy and institutional links between IP and the multilateral trading system. Its effects - and, more so, its perceived effects - have been profound, not only on the domestic IP laws and systems of the WTO's members, but on the international legal architecture and multilateral institutions concerned with both IP and trade.

Today, it is three decades since trade ministers at Punta del Este framed multilateral negotiations on IP in terms of their “trade-related aspects” - more as a diplomatic formula to facilitate production of a mandate than as a substantive concept to guide and inform negotiations. The Agreement itself entered into force over twenty years ago, and its main provisions were largely settled by negotiators four years prior to that, in 1991. We have since gained twenty years' practical experience with its effect on national law and policy in many legal systems across the globe, with its practical role in the management of trade relations and disputes and its influence on bilateral and regional trade agreements. This passage of time potentially offers a clearer perspective from which to assess the dynamics and importance of the negotiations and to distil their essential lessons for the future - both in administering the existing agreement and in developing new ones.

From this perspective, the TRIPS text, while a pragmatic negotiating outcome and an artefact of the inevitable give-and-take and ambiguities of trade negotiations, has come into clearer focus as a sound and legitimate framework not merely for resolving disputes between trading partners, but also for sound and balanced domestic policy-making responsive to national needs and circumstances. This creation of a new benchmark for legitimacy in IP policy-making is the most abiding and consequential outcome of the TRIPS negotiations, and it is only by closer attention to the distinctive qualities of the negotiating process that we can understand how this was achieved. Indeed, closer familiarity with the negotiations enables us to discern that the goal of creating a platform for sound, balanced and practically-informed policy may have been a shared, if mostly tacit, negotiating objective for many. The abiding effects of the final negotiated outcome can also be traced from a closer consideration of the structure and organization of the negotiations and their internal dynamics, the external driving factors and an exploration of how earlier, inconclusive work within the GATT purely on counterfeit

trade ultimately yielded a comprehensive behind the border treaty on domestic regulatory convergence and on standards for domestic law enforcement and legislation.

From “trade-related aspects” of IP ...

The catalytic, linking concept of “trade-related aspects” of IP can now be seen as an acceptance, in effect, by trade policymakers and by trade negotiators that IP was indeed trade-related - in the very practical sense that a comprehensive set of trade agreements could only be concluded if recognition of the value and significance of IP in the contemporary international economy was part of the deal. In turn, this realization stemmed from growing anxiety within industrialized economies about their longer-term competitiveness, and recognition that their capacity to create jobs depended in part on advances in innovation - gains that could be lost if innovation and creativity was not adequately protected. Already by the late 1970s these concerns had centred on counterfeit trade - at that time, the most immediate threat to the producers of intangible value embedded in international trade. Progress towards the 1986 Punta del Este mandate, and during subsequent phases of negotiations, can be mapped against an increasing realization and consequent political acceptance - in some cases, grudging - that positive IP standards had to be a part of multilateral trade law if the Uruguay Round was to conclude successfully. Less clear at that time, but increasingly apparent in the period since the TRIPS negotiations, has been the wider recognition of the objective economic and commercial significance of the knowledge component of trade in goods and services, and thus the trade policy significance of IP - for instance in contemporary analysis of global value chains.⁶

The structure and character of the international economy when ministers established the Punta del Este mandate had differed considerably even from the state of affairs apparent at the time the negotiations concluded in 1994: several contributors in this volume chart the effect of these broader economic and geopolitical shifts on even the internal dynamics of the TRIPS negotiations. Today, twenty years later, the transformations already evident at the time the TRIPS Agreement entered into force are even more profound and fundamental, and yet the Agreement - as a legal text and as a framework for economic relations - proved to be uncannily fit for purpose for the new economy. These developments include a vast increase of the geographical scope of the trading entities encompassed within the international trading system, and a progressive shift of the centre of gravity of economic activity (and, later, of innovative activity) away

from the traditional concentration in the industrialized world, but they also include a transformation of the very nature of the trade conducted within that system.

At the centre of this transformation of global trade was the progressive recognition of the value added by the intangible knowledge component of globally-traded goods and services, and its significance for trade policy and negotiations. But dealing more directly with the knowledge embedded in international trade in goods and services also meant crossing traditional disciplinary boundaries and policy domains, and engaging other areas of expertise and administrative competence. In turn, this meant that trade law and institutions engaged the interest of a much wider range of public policymakers, officials and analysts than those in the traditional trade policy community: TRIPS negotiators relate how their domestic consultations on the negotiations necessitated the construction of new consultative mechanisms so as to draw together all needed policy perspectives and expertise.⁷ This was a conceptual and bureaucratic challenge even for those developed economies that were already more conscious of the increasing critical importance of the knowledge component of trade in goods and services, and yet a far greater challenge for developing country negotiators. The accounts of two Swiss negotiators - Thomas Cottier and Thu-Lang Tran Wasescha (chapters 4 and 9, respectively) - combine to present an absorbing case study of a cross-sectoral and federal consultative process that produced a consolidated stance for a country with strong domestic IP interests. Equally, A.V. Ganesan, Piragibe dos Santos Tarragô and Antonio Gustavo Trombetta recount that a strong defensive interest of developing countries was to preserve policy space so as to ensure scope to consider and develop alternative approaches in sensitive areas, rather than being pressured to adopt through a trade negotiation the exact same approach on IP and regulatory issues that developed economies had established for themselves (chapters 11, 12 and 13, respectively). India’s approach in the area of patents exemplifies how these defensive interests were carried through to close textual negotiations (as described by Jayashree Watal, chapter 16).

... to trade in IP

Yet, paradoxically, from today’s perspective, the most remarkable and visible “trade-related aspect” of IP was not foreseen by the TRIPS negotiators, still less in the mandate for TRIPS: that is the very tradeability of IP in itself, the burgeoning of international transactions at the individual consumer level that are defined by purchasing access to content protected by IPRs. In 1986 the Internet was a limited tool for academics and researchers, unknown to most of humanity who were largely oblivious to its potential economic and social impact. And the very character

of trade was perceived essentially to concern transactions in physical objects that passed across borders and could be counted and measured as such - things you could drop on your foot, as the familiar parlance put it. Yet the impact of globalized communications networks and increasingly accessible information technologies was also beginning to be felt. In 1993, seemingly the earliest year for which such statistics were kept, only 0.3 per cent of the world's population had access to the Internet; today, this figure is close to 44 per cent. The Internet is a major conduit of global commerce, creating a seemingly borderless online global market, enabling vast markets in intangible products and trade in knowledge and creative content as such, shorn of the physical carrier media that had long served as a proxy for this form of valuable trade.

It is only since the conclusion of the TRIPS Agreement that we have seen the emergence - and in some industry sectors, the more recent predominance - of new consumer markets in digital products such as music, software, books, journals and audiovisual works, suggesting the development of a form of trade in IP as such, and the emergence of IP as a tradeable good in itself.⁸ The Agreement was not drafted expressly to promote or to enable trade in IP as such: nonetheless, this form of international trade has flourished within the convergent set of standards established by TRIPS. David Fitzpatrick recalls that, at the time of the TRIPS negotiations, the full impact had yet to be felt of the new technologies that are currently revolutionizing content distribution models in the copyright sector; the negotiators did not "indulge in futurology", and so did not address the thorny IP issues raised by the online environment (chapter 15). It was only in 1999 that Indonesia and Singapore, in a thoughtful contribution to the WTO's electronic commerce work program, observed that books, music and software had been traded as goods "because they had to be delivered in the form of a carrier [medium]", and that such products "without a carrier medium are intangible goods considered under the ambit of intellectual property rights" and thus speculated whether they could be "simply considered as trade in [IPRs]".⁹

TRIPS negotiations forged a transformation of international IP law ...

The significance of the transformation in international IP law wrought by the TRIPS Agreement is apparent in three fundamental ways. While these three features are now an accepted, integral part of international law and its administration, it is striking that none of them was preordained by the original negotiating mandate, nor could even be readily predicted from it. Accordingly, it is only through understanding the internal dynamics and external driving factors of the

negotiations that one can fully trace the character of these three interrelated transformations:

- *Substantively*, through the effective recognition that trading partners have a legitimate interest in how, and how well, their firms’ IP is protected in export markets, not merely as a political claim but as a matter of substantive trade law commitments. This is the essential legal logic of an agreement on standards of IP protection as an integral component of the Marrakech outcome and as an expression of the *demandeurs*’ claim that adequate and effective protection of IP should be recognized as a prerequisite for trade. This pivotal transformation of international trade law was the import of the critical choice made in the course of the TRIPS negotiations, extensively discussed in this volume, and confirmed in the decisive year of 1989, to work towards agreement on minimum standards for “adequate” IP protection and not only the articulation of general policy principles, nor exclusively to focus on trade in counterfeit goods.
- *Administratively and institutionally*, with the incorporation of trade-related aspects of IP as an integral responsibility of a newly created international organisation, the WTO, establishing it definitively as one of the institutions involved in the international governance of IP alongside WIPO, and adding IP as covered subject matter to the scope of the trade policy review process.
- *In the practical management of trade relations*, following the decision to incorporate IP commitments within a uniform dispute settlement mechanism administered by the WTO, integrating IP into the same system that is applied to more conventional trade disputes, with the unexpected – but entirely logical – consequence of giving WTO members the opportunity of using the threat of cross-retaliation by withdrawing IP benefits to enforce respect for rules in more conventional market access areas covered by the multilateral trading system.

In essence, the result of the negotiations was that international IP law would become a branch of international trade law, structurally and substantively, in the form of the TRIPS Agreement, even though the legal and policy rationale for this move was far from settled (and is still debated today), and even though it retained its own character and identity as a distinct branch of international law, administered mostly by WIPO. This reconceptualization of IP law and of trade interests meant a country’s interests in the IP system would be defined, asserted, defended and

litigated in the domain of trade law: not only for WTO members, but for all others that sought to be integrated into the global economy. The conclusion of the TRIPS Agreement was in effect a formal multilateral recognition of a broader paradigm shift, with significant consequences not only for IP law and policy across the globe, but also for mainstream trade law and for the institutions - multilateral, bilateral and regional - which manage trade relations between nations - a paradigm shift that can be traced to past GATT work on counterfeit trade and changes in US trade law in 1984. In this sense, the Agreement continues to find an imprint in the numerous bilateral and regional trade agreements that now incorporate IP as a trade issue. And this three-way convergence - minimum standards for protecting IP, a new international trade organisation overseeing those standards and a rigorous dispute settlement mechanism to deal in a balanced and fair way with frustrated expectations - is now firmly entrenched in today's international system.

... but to yield a zero-sum deal or a balanced framework for policy-making?

Despite its complex character, this convergence between streams of international law is typically characterised in zero-sum terms - for instance, as trade trumping policy, or economic law trumping human rights law. Indeed, much of the analysis of the Agreement pivots on assumptions and perceptions of the objectives and character of the negotiating process - largely characterising it as an all-or-nothing trade-off between the industry interests of the North and the public policy interests of the South. Yet this conventional model lacks nuance and depth, and above all offers little insight into the actual dynamics of the negotiations and the specific ways in which important and diverse policy interests were secured; it runs the risk of reifying inflexibilities that are not present in the treaty text, and foregoing opportunities for positive-sum gains that serve public policy interests. The derestricted formal documents from the negotiations are an inherently limited source of information, and do not enable a full understanding of the largely informal process and dynamics, nor of the considerations and assessment of interests that yielded the negotiating outcome. Still less do they enable lessons to be learned that may be of broader application as the international community continues to strive for consensus on how to adapt and apply the IP system, and other forms of domestic regulation, to advance common interests in promoting social and economic development in a coherent way that still accommodates necessary policy space for distinct national needs and interests.

Yet the narrative accounts gathered together in this volume - particularly when they reflect on the second stage of the negotiations, once the mandate question

had been largely resolved - give a general impression that the negotiators did not see their essential task in zero-sum terms, nor in terms of one set of interests trumping another. The picture that emerges is a kind of dialectic, supported by a willingness to engage with the issues and to negotiate the most acceptable course guided by domestic experiences and an openness to learn from respected experts. The balance and quality of the negotiated outcome help us to understand today why many of the more dire predictions about the impact of TRIPS have not come to fruition (see, for instance, Jayashree Watal, chapter 16, discussing post-TRIPS pharmaceutical prices in India). This helps explain why the Agreement has proven to be a more flexible document, more accommodating of diverse domestic policy needs and priorities, than both its critics and its proponents anticipated at the time. In turn, this explains why implementation of the Agreement has proven to be less contentious in character than was feared. The expected avalanche of dispute settlement claims aimed by developed against developing countries has not eventuated: indeed, the predominant pattern in TRIPS dispute settlement was one of contention between developed economies, partly reflecting the continuation of policy differences already apparent during the negotiations.

The outcome on dispute settlement meant that not only the provisions of TRIPS itself, but also the pre-existing Paris and Berne Conventions, would be interpreted and applied in a trade law context. Even so, despite some concerns, multilateral IP law did not fragment into a TRIPS version conflicting with a WIPO/UN version, due in part to pains taken to ensure coherence both during negotiation and in subsequent interpretation. And the concept of “trade-related aspects” of IP did not mean ignoring the wider public policy questions of social welfare and economic development. Rather, the Agreement has proven to be a nuanced and balanced instrument and an expression of sound policy thinking, and it can still today enable fair and balanced public policy and defend against the excessive influence of sectoral interests and specific actors in domestic policy-making. It is impossible, in reading this volume, not to conclude that this positive outcome can be attributed in large part to the skill, expertise and professional focus of the negotiators, and to their awareness of the need for coherence and sound public policy (see Mogens Peter Carl, chapter 6).

This policy awareness is indeed evident in the very logic and structure of the Agreement: one of the striking achievements of developing country negotiators, well documented in this volume, was to build public policy safeguards into the text. They also articulated, for the first time in a multilateral IP instrument, the policy rationale for the IP system. Article 7 of the Agreement stipulates that IP protection should “contribute to the promotion of technological innovation and to the transfer

and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.

This conscious embedding of public policy guidance and the construction of policy space within the Agreement were not a mere face-saving exercise in soft law, but rather - as several of the accounts directly attest - were a part of deliberate defensive negotiating strategies maintained and executed by developing country negotiators, with a view to the longer term, even though this was at the cost of substantive concessions elsewhere in the text (see Piragibe Tarragô, chapter 12). The subsequent experience of TRIPS implementation in the intervening period provides support to the understanding of the negotiators. By one reading, to secure a balance between protection of IP and public interest, all features incorporating a balance in the Agreement must be given full weight and meaning (see A.V. Ganesan, chapter 11). In effect, there is considerable opportunity for TRIPS implementation to include attaining public policy goals through sound policy-making, not simply passing legislation to achieve passive, formal compliance with the letter of the law of TRIPS.

This more nuanced picture both of the negotiations and of the treaty text they produced should not imply, however, that all negotiators' interests were secured and negotiating objectives attained, nor that the outcome did not entail serious concessions; still less, that the Agreement as concluded was an ideal outcome from any point of view, but especially from the perspective of the developing countries that had initially opposed substantive standard-setting. Indeed, the accounts that emerge from the negotiators bear witness to the difficulties in accepting certain concessions on significant provisions of the text, with serious policy implications - both from an offensive and a defensive point of view. Perhaps the least known aspect of these negotiations, however, is the extent to which developed countries (generally perceived as the winners of the TRIPS negotiations) individually gave ground on significant points of law and policy.

The making of the TRIPS Agreement was imbued with a strong sense of the policy issues at stake. But it was a tough set of trade negotiations conducted under significant external pressures, and entailing necessary compromise and suboptimal deal-making. Antonio Trombetta's clear-sighted analysis of the negotiations makes it clear that the Agreement was not the ideal outcome for the set of interests he was defending (chapter 13); likewise Catherine Field records some areas where the Agreement falls short of the interests the US delegation was working to secure, and where the Agreement forced change in US domestic law (chapter 8). The hesitation

to reopening the text at a late stage (see Adrian Otten, chapter 3) and the ultimate agreement to accommodate specific demands on two substantively unrelated issues - compulsory licensing of semiconductor patents and the grounds for taking a complaint on TRIPS under the WTO dispute settlement system (discussed in Catherine Field, chapter 8) - illustrates the pragmatic character of the negotiations, driven as they were by a complex of sectoral interests and the overarching goal of a credible and coherent agreement. Nonetheless, many of the negotiators developed, and showed at the February 2015 Symposium and in this volume, an informed, judicious, practitioner’s grasp of the complex public policy dimensions of IP, an awareness that helped shape the treaty text in key parts.

Insights into negotiations for today’s TRIPS debates

The keynote address at the February 2015 Symposium by the widely respected Negotiating Group Chair Ambassador Lars Anell gave a sweeping review of contemporary IP policy challenges, and reminded us that the TRIPS negotiators did not settle many of the policy issues they grappled with, as these issues remain current and contested today, in some cases still more than ever, with some policy differences evident in the negotiations finding expression in the resort to the WTO dispute settlement mechanism (appendix 1). Within the broader multilateral context, the Agreement has helped provoke and frame debate on a host of public policy questions, ranging from public health to climate change, and debate about the linkage of TRIPS with human rights and other spheres of public international law. Debate and analysis continue about its very character and legal effect as an international legal instrument - at a time when the IP component of trade and the public policy role of IP systems are both more important than ever - and its legal and policy implications are still uncertain. Active and important debate and analysis centred on the Agreement continues at several levels concerning:

- The place and legitimacy of an agreement on substantive IP standards within the framework of trade law, and in particular the negotiating dynamics that brought the Agreement to fruition, given the perception that it was only the consequence of a wider negotiating deal forming part of a set of trade-offs with other sectors. A related, continuing question concerns whether the outcome would work to the overall benefit of developing countries, which had initially resisted the expansive interpretation of the TRIPS mandate.
- Specific legal questions, many relating to the exact scope and character of the commitments entered into under the Agreement and the legitimate scope for domestic discretion and flexibility within TRIPS standards.

- Fundamental systemic questions within the realm of trade law, such as the legal basis of a dispute under TRIPS: whether complaints can only cover non-compliance with treaty obligations, or could extend to frustration of treaty objectives and the nullification and impairment of expected benefits. This was a matter that negotiators could not resolve at a late stage, and passed to the TRIPS Council for resolution.
- The consequences for international governance, not merely in substantive international IP law, but also concerning its interplay with law and policy in several other areas such as health, the environment, food security, climate change and several strands of human rights law.

The present volume is not intended to, and will not in practice, settle any of these four lines of important debate about TRIPS, which continue to this day. However, the insights from the making of TRIPS that this unique set of authors provide will certainly inform and illuminate these essential debates, and may help future negotiator and policymakers chart their way through this perennially difficult terrain. The following chapters by individual negotiators discuss the negotiating dynamics of the Agreement and probe the assumptions and sets of interests driving the negotiations, the nature of the negotiating process, specific choices made during the negotiations and the reasons behind them, the considerations that led to concessions in the area of TRIPS as against expected benefits in other sectors, and the political economy background in which newly recalibrated economic interests in international IP made their presence felt through a range of trade and political channels.

Analysing the TRIPS negotiations

The negotiating dynamics are anatomized most effectively by the key Secretariat figure in the negotiations and in the subsequent administration of the TRIPS Agreement: Adrian Otten, whose account serves as the keystone of this volume. He contrasts the peripheral reference to IP in pre-existing GATT law with the growing perception that the future of the multilateral trading system depended on some recognition of the importance of IP protection and accommodation of IP interests within the trade policy mix. He tells us in unambiguous terms that the driver behind the inclusion of TRIPS in the mandate for the Uruguay Round was the United States, following the Trade and Tariff Act of 1984. His narrative traces how the negotiations moved from the initial standoff over the mandate, through a process of initial understanding the factual background and diverse negotiating objectives, and were transformed by the pivotal, mid-term decision that enabled

negotiation on substantive standards, finally leading to a close and intensive textual negotiation that involved diverse alliances and a resolution of significant North-North differences along with institutional and dispute settlement questions. His account therefore serves as the core of this book, with the other individual perspectives by negotiators and Secretariat staff illuminating and expanding upon his thematic framework (chapter 3).

Distilling these diverse narratives, this chapter draws out the main themes identified by the contributors, who have analysed the negotiations at several levels:

- The place of the negotiations within the Uruguay Round, including the trade-offs and linkages with other areas of negotiation
- The external political and other factors that drove the negotiations, and that influenced evolving negotiating positions
- The role of non-state actors
- Sources of legal standards and the multilateral institutional linkages – within the GATT and elsewhere, notably in WIPO
- The influence of the outcome on regulatory convergence
- The anatomy and dynamics of the negotiations, including the origins and the evolution of the negotiating mandate.

TRIPS negotiations within the Uruguay Round

The genesis and negotiation of TRIPS was a pragmatic initiative, resolved by creative negotiators in the overall context of the Uruguay Round, a negotiating platform that offered unprecedented opportunities for market access in areas of interest to developing countries. The major economies had reassessed their economic and trade interests, saw IP protection in foreign markets as critical to those interests and therefore insisted that their need for more effective IP protection be integral to any multilateral trade deal. Developing countries were not won over at the level of principle: many accepted the deal only as a trade-off for gains elsewhere, cautioning against legal harassment upon the conclusion of the treaty, but – as this book records – they had negotiated hard for the text to include provisions to preserve their policy interests in ways that have been since demonstrated as providing effective safeguards. The accounts of Piragibe Tarragô and Antonio Trombetta in particular bring out the importance of the trade-offs with market access for agricultural products and the key role that these played at

various stages of the negotiations, but most crucially in April 1989 and December 1991 (chapters 12 and 13, respectively). The TRIPS negotiations were a realist diplomatic process: in essence, each party asserted and defended their interests, and sought to accommodate those of others, in the hope of achieving a balanced outcome that could be acceptable in a domestic context.

While the comprehensive nature of the Uruguay Round gave opportunities for trade-offs between sectors of negotiations, and this was a major impetus to the negotiations and conclusion of the TRIPS Agreement, TRIPS were not a monolithic set of interests that remained essentially the province of developed countries, to be traded off against market access elsewhere. This finished character of TRIPS - a seasoned and carefully curated articulation of a balanced framework for domestic IP policy-making, rather than a checklist reciting a set of unilateral demands - is surely what has enabled its consolidation as a widely-accepted basis today for legitimate balance in the protection, administration and enforcement of IP.

When discussing the dynamics of the negotiations, Mogens Peter Carl comments on the general assumption that the TRIPS Agreement is a consequence of a mercantilist trade-off between different trade sectors, suggesting that this analysis can be overstated. He observes that negotiators may make concessions while persuading themselves they are acting in their own interests. In his view the TRIPS negotiations did not have the character of a traditional bartering, but enabled consideration of what amounted to good policy (chapter 6).

This analysis provides support for the growing understanding today that the policy framework and principles articulated by TRIPS are not, for the most part, a bare set of diplomatic formulae, but rather represent something of a compromise agreed upon to codify a kind of best practice in policy terms. This applies not merely to the substantive standards, but still more so to the enforcement provisions, the negotiation of which is revealed as a process of articulating due process and appropriate balance. The exceptions that prove this general rule - those areas of text that bear the hallmarks of what authors describe in diplomatic parlance as “constructive ambiguity” (as Matthijs Geuze and Thu-Lang Tran Wasescha recall in chapters 7 and 9, respectively) - lie principally in areas where disagreement over policy is most pronounced and lingers today. In this vein, several authors discuss geographical indications, which remain a divisive issue today. Even the careful crafting of provisions relevant to local working requirements has not, apparently, put a decisive end to a legal and policy debate that continues today.

External political and economic drivers

All accounts point to 1989 as the pivotal year, internally and externally, for the negotiation of TRIPS. It was a critical and decisive time for the negotiation process, the point of inflexion when the focus turned to the concrete elaboration of substantive standards. It was also a remarkable year in global politics that led a recalibration of negotiating stances that put a substantive outcome within closer reach of the negotiators.

No negotiator operates in a vacuum, and several contributors to this volume emphasize the influence of dramatic changes in the international realm, particularly the fundamental political and economic realignments culminating in the fall of the Berlin Wall in November 1989. In 1986, when the Uruguay Round mandate was framed, many countries maintained centrally-planned economies and import substitution policies. While economic liberalisation was continuing apace, particularly in East Asia, there was arguably no fully international or global trading system. Several negotiators reflect on the impact of this transformation.

For Peter Carl, the relaxation of East-West confrontation and the resultant political transformations, producing a period of economic optimism and a unique “political and psychological context”, was the chief factor behind the success of the Uruguay Round in general (chapter 6). Thomas Cottier also stresses the significance of the geopolitical changes of 1989, which for him had the effect of changing “the rules of the game” as countries turned to market economy precepts, noting the significance of appropriate levels of IPRs to attract much-needed foreign direct investment (chapter 4). From a developing country perspective, Antonio Trombetta also centres his account on the global political and economic shifts of 1989 - “of magnitudes unknown up until then” - and their implications for an economy such as Argentina, when it became clear that its positive economic interests lay in ensuring greater market access for agricultural products through trade negotiations in that area (chapter 13).

Well before the Uruguay Round came to an end in 1994, many countries had embarked on a fundamental structural transition to a market-based economy, leading over time to near universal engagement with a globalized marketplace. Adrian Otten therefore sees these changes as “a reflection of the *Zeitgeist* and a great stimulus to it”, as TRIPS was going with the grain of economic policy thinking and reform underway at the time (chapter 3). It must be noted that the paradigm shifting 1989 mandate came in April, a good seven months before the fall of the Berlin Wall. A.V. Ganesan and Piragibe Tarragô also highlight the wider political

context: the importance of new governments more disposed to market-friendly policies and to the economic role of the private sector and foreign investments (chapters 11 and 12, respectively).

Another important factor for many negotiators, particularly but not only from the developing world, was the compelling defensive interest in dealing with the consequences of the growing leverage of IP interests in domestic trade policy processes of developed economies, notably in the US. Indeed, these accounts taken together directly illuminate the existing understanding of how the multilateral turn represented by TRIPS was impelled in part by the actual and feared impact of unilateral action - essentially, pressure from the US Special 301 process, which expressly envisaged trade sanctions against countries that did not provide adequate and effective standards of IP protection and enforcement to US entities. For some negotiators, this was a spur to advancing negotiations to ensure that IP trade matters would fall within the multilateral trade dispute settlement system.

This unilateral trade policy process, which began effectively to be enforced in 1989, was also influential in shaping the character of TRIPS as a set of agreed multilateral standards that would define, in effect, what was adequate and effective for the purposes of reconciling mutual expectations of IP protection in the context of trade relations. Several authors, including A.V. Ganesan, Piragibe Tarragô, Antonio Trombetta and Umi K.B.A. Majid, dwell on the significance of this unilateral pressure and the resultant common desire to deal with trade tensions over the protection of IP through a multilateral dispute settlement system. This objective was by no means limited to developing countries and was also pursued by developed countries such as Australia, Canada and Japan (see chapters 11, 12, 13 and 14, respectively). As Catherine Field recalls, the US "was sending a strong message that maintaining access to its market was linked to having adequate IP protection". She highlights *inter alia* the determination of the US government to take trade action to address IP concerns as one reason for the acceptance of the more specific April 1989 mandate, and recalls that the United States successfully engaged with its trading partners as part of the Generalized System of Preferences process and under Special 301 to obtain IP improvements (chapter 8).

The role of non-state actors

Contributors to this volume recognize the impact of domestic players, including industry and other nongovernmental interests, in shaping their negotiating positions, but also in catalysing the TRIPS negotiating mandate in the first place. Thomas Cottier recognizes the influence of private lobbies at the outset of the negotiations,

whose direct influence was particularly strong in the US delegation, but argues that these efforts do not alone explain the results achieved (chapter 4).

Industry interests especially were instrumental in getting IP - and the more concrete demand for substantive minimum standards - on the negotiating agenda, but did not determine the character of the outcome, which differed significantly from what key industry players had sought. Nevertheless, inputs from the private sector, in particular the common statement of views put forward in 1988 by the US Intellectual Property Committee, the Japanese Keidanren, and the Union of Industrial and Employers' Confederations of Europe, guided the *demandeurs* in formulating their own negotiating positions.¹⁰

Peter Carl notes that the European Commission, on the other hand, was much less exposed to external pressures from private parties, industry or non-governmental organizations (NGOs) (chapter 6). The contrast with the current multilateral environment on IP - which sees much more active and direct engagement with civil society and other policy voices - is remarked by several, including Thomas Cottier who in hindsight believes their involvement may have been beneficial in preparing an overall balanced result (chapter 4).

Industry interests from developing countries were also closely associated with the negotiations. Antonio Trombetta and Jayashree Watal both highlight how the Argentine and Indian generic drug industry groups and experts were closely following the negotiations and even liaising with their counterparts in other countries to safeguard their interests (chapters 13 and 16, respectively).

The focus on the role of non-state actors has limited explanatory value, however, and the essential analytical point that this volume bears out is that the negotiated outcome cannot be attributed simply to the private sector demands of TRIPS proponents or opponents. In particular the final text was very far from a passive imprint of the expectations of those interests that put “trade-related aspects” of IP on the multilateral trade agenda. Indeed, all negotiators describe a process of mutual learning, debate and negotiating give-and-take that yielded a balanced and nuanced document that articulated a number of concrete policy principles and recognized potential risks to legitimate trade from excessive IP enforcement and abusive licensing practices.

The sources of legal standards and links with multilateral institutions

The TRIPS Agreement was all the more momentous as a paradigm shift given that - of all the areas of law, policy and regulation that the newly formed WTO

would cover - it was IP law that was the longest established and deepest rooted internationally. The TRIPS negotiators therefore made a critical decision not to address the drafting of standards *ab initio*. Negotiators elected to save time and enhance coherence by incorporating the substantive standards of the latest texts of the Paris Convention and the Berne Convention - the key WIPO conventions - directly into text, but also to draw on past WIPO work in some substantive areas still, at that time, unsettled in international law.

Several authors describe the complex implications for the TRIPS mandate and subsequent negotiations of faltering negotiations in WIPO - which had been seen as failing to respond effectively to the IP related interests of developed countries, and yet provided source material for the TRIPS text. The Treaty on Intellectual Property in Respect of Integrated Circuits - concluded at the mid-point of the TRIPS negotiations in 1989 and discussed by Hannu Wager (chapter 17) - provides a good illustration: this diplomatic outcome was perceived as weighted too heavily towards developing country interests and thus attracted virtually no ratifications (to date, only three parties have accepted or ratified the treaty), but the bulk of its substantive text was incorporated within the TRIPS text and thus it was given legal effect by an indirect route.

This incorporation of the WIPO treaties raised several technical legal questions, particularly of treaty interpretation (would provisions of Paris or Berne within the TRIPS Agreement differ from those same provisions in their original legal setting, and was there an hierarchy of provisions between the TRIPS Agreement and these earlier conventions?) which would only be resolved in subsequent dispute settlement. Further, while the existing WIPO instruments provided a surer foundation, they did not preclude differences in approach. As Adrian Otten and Hannu Wager note, even after the US had acceded to the Berne Convention, North-North differences continued to dominate the copyright negotiations with respect to moral rights and contractual arrangements (chapters 3 and 17, respectively).

Yet this critical decision by TRIPS negotiators ensured that trade-related standards on IP would be anchored within the existing corpus of multilateral IP law, and that in turn TRIPS would influence the WIPO legal system, for example on the so-called WIPO Internet Treaties in the area of copyright concluded in 1996. And the paradigm shift in international governance that the Agreement represented was immediately apparent in the form of concerns about its impact on WIPO as an institution, and in terms of the threat posed to the future coherence of international IP law.

The dynamics of WIPO work on IP standard-setting both before and during the TRIPS negotiations are well documented by contributors as a significant influence on the pace, content and outcome of the negotiations. Thu-Lang Tran Wasescha recalls that the TRIPS negotiations emerged from a period of failed attempts since the 1970s to update and reform the international IP framework in WIPO (chapter 9). Jayashree Watal tells us that during the Uruguay Round, WIPO undertook negotiations on patent law harmonization, a process that continued in parallel with the TRIPS negotiations. Indeed, despite the fact that this process did not succeed, TRIPS negotiators drew upon these materials as a substantive resource (chapter 16). The negotiators also drew extensively upon trade law principles and developments in the GATT. GATT work on a code on the suppression of counterfeit trade began in the 1970s, and GATT dispute settlement over the trade impact of discriminatory IP enforcement long preceded the finalization of the TRIPS text.

Catherine Field's contribution contains the most exhaustive analysis of the relationship between TRIPS and trade law. She stresses the significance of past GATT work on counterfeit trade and its link with domestic concerns about such trade in the US and other industrialised economies. She also explains how the TRIPS text on national and most-favoured nation (MFN) treatment is “an amalgam of both IP and trade principles, with the IP community unwilling to give up existing exceptions to national treatment and the trade community seeking to avoid ‘free-riders’”. She recalls that the MFN provision, which is drawn from trade law and does not exist in the WIPO conventions, was mainly proposed by the European Communities (EC), which had not benefited from the pipeline protection for pharmaceutical patents that had been provided for in the bilateral US-Korea agreement. She points out that the TRIPS MFN provisions are not subject to an exception such as Article XXIV of GATT that provides for regional or bilateral trade agreements or customs unions. The more “limited” and “specific” scope for MFN exceptions under TRIPS means that the benefits of so-called TRIPS-plus provisions in bilateral or plurilateral trade agreements should be automatically extended to all WTO members without discrimination. She analyses the role of MFN in the area of geographical indications (GIs), where the European Union (EU) and European Free Trade Association have agreed to protect particular GIs listed in bilateral trade agreements, while noting that to date members have chosen not to challenge such agreements in relation to the MFN principle. In considering exceptions more broadly, she contrasts the approach taken with that of the GATT: negotiators considered, but rejected, a general exception clause such as GATT Article XX. Instead, they settled on tailored exceptions specified for each IP right. She draws a link, however, with the IP enforcement exception under GATT XX(d), viewing the TRIPS enforcement provisions as an elaboration of the positive disciplines in this area.¹¹

The one area that is treated identically in both the TRIPS Agreement and other areas of trade law is dispute settlement, since TRIPS largely adheres to the same system. The TRIPS Agreement differs in the formal terms applying to dispute settlement only in that non-violation and situation complaints do not currently apply to it. This exception is a subject of on-going negotiation in the TRIPS Council.

In describing more fully the status of IP in the pre-WTO GATT, Adrian Otten recalls the significance of dispute settlement on IP under the GATT, notably the seminal and timely ruling in Section 337 of the US Tariff Act in early 1989. This case demonstrated how the GATT dispute settlement system could handle complex IP issues and could prevent the abuse of IP rules as trade restrictive measures. He suggests that this experience helped boost confidence that “trade-related” IP disputes did have an appropriate place in the GATT/WTO dispute settlement system (chapter 3). On the politically sensitive negotiations on GATTability, Catherine Field notes that inclusion of TRIPS within the dispute settlement system was a top-level objective for the United States, in particular the aspect of trade retaliation (chapter 8).

Adrian Macey recounts how an exemplary middle player grouping of New Zealand, Colombia and Uruguay worked on a proposal on dispute settlement with the goal of enabling conceptual discussion and alleviating the divisiveness of this issue, highlighting the benefit of creative approaches to negotiations in sensitive or otherwise difficult areas. In analysing the debate over cross-retaliation (the possibility of withdrawal of concessions under another agreement in the event of non-compliance with TRIPS), he concludes that the symmetrical and balanced application of cross-retaliation has enabled developing countries to exercise leverage in disputes over more conventional market access obligations frustrated by developed country WTO members. He therefore describes the resultant dispute settlement system as a “two-edged sword”, an unexpected development in that the principal exponents of cross-retaliation have in fact been developing countries, despite their opposition in the negotiations to this linkage, whereas the developed countries that advocated the prospect of cross-retaliation during the negotiations have seen it used to encourage their own compliance with dispute settlement rulings under other agreements (chapter 19).

In addition to pre-existing international IP and trade law, the TRIPS Agreement drew most of all from long-established domestic IP law - the practical desire being to limit changes to established domestic balances - but also to provide a positive source of concepts, principles and standards. Catherine Field relates that the US submissions laid down what it considered to be adequate and effective protection

standards of IP, standards that were largely satisfied by US law and supported by business communities from the industrialized countries. The US negotiating team accepted proposals on what are now known as “flexibilities” that were in line with its own domestic laws, including use of patents by or on behalf of government upon payment of full compensation or compulsory licences to address anti-competitive behaviour. She perceptively notes that with regard to “must achieve” objectives of negotiators, a change to a country’s domestic law or practice may be possible but a change to the core principle underlying the IP or other regime of the country may not be possible if the agreement has to be implemented as envisioned (chapter 8).

In this context it is worth noting that Jagdish Sagar, who negotiated on copyright for India, observes that the emerging standards from the TRIPS negotiations largely mirrored domestic processes and the strong national interest identified in software and the film industry; the approach on performers’ rights more accurately reflected the cultural context of musicians in India, and overall in this area in view of specific domestic interests legislators elected to set standards beyond those of TRIPS in certain respects (chapter 18).

The EC negotiators recall that the process of formulating an EC-wide position on substantive issues, informed by the various domestic practices of its members, served as a precursor for the distillation of common standards for TRIPS. For the EC, it was a natural objective to seek to imprint its emerging common standards as multilateral standards in the TRIPS Agreement. Yet there was a two-way flow: Jörg Reinbothe describes how TRIPS provisions influenced the formulation of EU law itself, particularly in the field of enforcement. This experience in regional regulatory convergence also underscored specific IP-related principles of balance, reconciling IP with free trade and integrating with the existing multilateral IP system (chapter 10).

Developing country negotiators recall how, in some instances, their domestic enforcement standards already largely anticipated TRIPS provisions. David Fitzpatrick’s description of the elaboration of the enforcement part of the Agreement, and Umi Majid’s account of how she sought to preserve balance in the allocation of enforcement resources, both exemplify the benefit of experienced practitioners in crafting an informed, fair and effective set of provisions defining domestic enforcement of substantive standards. These two accounts help explain how these rules were shaped with a view to balance and procedural fairness, also taking account of actual enforcement experiences and their effects on trade. Notably, the TRIPS Agreement remained balanced between the two main legal

systems, civil law and common law, particularly within its provisions on domestic enforcement (chapters 15 and 14, respectively).

Nevertheless, as Catherine Field's chapter records, sometimes even the TRIPS *demandeurs* found that they were negotiating altogether new or significantly revised standards in a range of areas covering both substantive law and its administration and enforcement, and in the case of industrialized countries, with only a brief period of 12 months for implementation (chapter 8). Hence, the norm-setting process takes on the character of a regulatory feedback loop rather than the imposition of a single regulatory template. This loop draws on and informs domestic standards for the IP system within a broad policy framework – a characteristic since borne out in the subsequent experience with TRIPS implementation among WTO members.

Other institutional linkages within the multilateral system are discussed as well. Adrian Otten recalls the role of the Organisation for Economic Co-operation and Development (OECD) in first placing IP on the multilateral trade agenda in the 1980s (chapter 3). Thomas Cottier characterizes the initial phase of negotiations as a North-South *dialogue de sourds* (dialogue of the deaf) defined by two opposing positions lacking in solid evidence and dominated respectively by doctrines developed in the OECD and the United Nations Conference on Trade and Development (UNCTAD). Developing country negotiators describe the role of UNCTAD in helping draft the initial submission of 14 developing countries in Spring 1990 that provided a solid basis for their substantial negotiating positions (chapter 4 and part IV, respectively).

A potential model for regulatory convergence

From the perspective of the quarter century that separates us from the conclusion of the bulk of its text, the TRIPS Agreement comes into focus as a model for a regulatory convergence treaty, expressing a balanced conception of good governance, specifying how its provisions are to be given effect and providing for sound public policy safeguards. Before the Uruguay Round, the essential functions and objectives of trade agreements were seen as to reduce obstacles to trade in goods and to limit discriminatory treatment: the basic purpose of trade law did not extend to setting mandatory positive standards for domestic regulation. The Uruguay Round came at a singular point of economic, political and technological change: the attendant recalibration of trade and policy interests precipitated a major transformation of trade law. Central to this paradigm shift was the

acceptance that trade law commitments could legitimately reach behind the border and address areas of domestic regulation that had impact on trade.

Within this legal framework and trade policy context, the TRIPS Agreement comes into focus in retrospect as a precursor of a new kind of trade-related agreement – providing for convergence of standards by establishing broad policy principles and defining how they can be carried out domestically, while leaving latitude – policy space – for distinct needs and circumstances to be accommodated. Jörg Reinbothe recalls that the experience of standard-setting within the EC had enabled practical familiarity with the principle of subsidiarity, which in turn was highly pertinent for multilateral norm setting that left appropriate leeway for domestic systems (chapter 10).

Thomas Cottier emphasizes the groundbreaking character of the Agreement as a “regulatory convergence” multilateral trade Agreement setting positive standards for domestic regulation: it exceeded initial expectations to become a kind of base code for decades to come. Its standards had deep roots in existing domestic laws, particularly those of developed countries, and had the effect of extending some principles established at the domestic level to a wider range of economies. He singles out the provisions on fair and equitable procedures – based on established domestic traditions – as the first multilateral trade agreement on regulatory convergence, codifying principles that were entirely new to public international law, even if well-established in many national jurisdictions. The challenges to regulatory convergence are not necessarily North-South in character: he points out that difference on regulatory issues divided developed countries at the time of the negotiations and those differences were mirrored in the subsequent pattern of dispute settlement that took place principally between developed members. In any event, the outcome redefined and restructured international IP law. Furthermore, it altered the very character of international trade law by establishing harmonized positive standards with which domestic regulatory systems would have to comply, within a trade agreement that would reach well behind the border and stipulate how IP should be protected, going so far as to set forth the procedural principles for domestic courts and other authorities to follow (chapter 4).

The anatomy and dynamics of the negotiating process

It is critical to understand the full anatomy of the negotiating process – in terms of its chronology and distinct phases, the way in which interests were raised and accommodated, how and why compromises were reached and negotiating

objectives were not fully achieved, and the practical tools employed to achieve the outcome. Diverse factors - positive interests defined by the shifting external trade, economic and industry environment; the defensive quest for a multilateral shield from unilateralism; and the failure to progress past work in GATT and in WIPO - all fed into the Punta del Este mandate for TRIPS negotiations. The conception of “trade-related aspects” in this mandate was shorthand for the IP dimension that multilateral trade negotiators would need to address. Yet it was an ambiguous formulation that hovered uncertainly across a range of divergent expectations.

From an ambiguous mandate...

Adrian Otten explains how the wording of the Punta del Este mandate on TRIPS necessitated an initial focus on clarifying and giving substance to that somewhat uncertain reference to “trade-related aspects”. He notes that its only clear element was the reference to a code or agreement on trade in counterfeit goods along the lines of past GATT work. The mandate did open up further possibilities, although it seemed to “remain anchored in the world of the GATT and of trade in goods”, and recognized concerns about the competences of other IGOs, especially WIPO (chapter 3).

Recalling that this mandate was open-ended, Peter Carl singles out the question of dispute settlement on TRIPS matters - a key outcome, now a major component of the multilateral trading system - that was not expressly covered in the initial mandate (chapter 6). Catherine Field locates the origins of the mandate’s reference to “adequate and effective protection” of IPRs within the US Trade and Tariff Act of 1984, and its provision that denial of adequate and effective IP protection and enforcement amounted to an “unreasonable act, policy or practice” providing a basis for retaliatory action by the United States Trade Representative (chapter 8).

However, the reference to adequate and effective protection left open the question for many negotiators as to whether it required substantive standards to define such a level of protection. Thomas Cottier tells us of the 1987 Swiss proposal to build a TRIPS Agreement on the basis of existing GATT disciplines of nullification and impairment, developing normative principles and an indicative list of types of conduct considered detrimental to international trade.¹² This was rejected in favour of an approach covering minimum standards for IPRs (chapter 4).

... to negotiations on substantive standards...

Adrian Otten's account, reinforced by others, describes an initial wrangling over the import of this mandate, with even the EC taking until mid-1988 to accept that negotiations should cover substantive standards and internal enforcement of IPRs alongside the border measures contemplated in the counterfeit trade code, and many others only conceding that point as part of the April 1989 mid-term deal. He points to the practical impact this shift in focus had for many delegations who were faced with more complex domestic consultations, a challenge accentuated for the EC as it triggered a recasting of EC competences *vis-à-vis* its member states (chapter 3). Piragibe Tarragô suggests that this shift on the part of the EC was decisive in creating a sense that a treaty of substantive IP standards had become inevitable (chapter 12). In effect, it was the April 1989 decision that determined the full operational mandate of the negotiations. Indeed, a comparison of the separate elements of this decision with the table of contents of the TRIPS Agreement shows how closely the negotiators followed this structure, only leaving open the questions of GATTability and the institutional setting of the agreement once concluded.

The general view of the substantive TRIPS negotiations that emerges from this volume is of a more multipolar, balanced and nuanced negotiation process than is often depicted. However, the processes of information gathering and mutual learning - though valuable and well attested in many accounts - were not sufficient to carry forward negotiations, and without an external impulse the negotiations could have remained in the deadlock familiar from more recent attempts at multilateral norm-setting in IP. As Adrian Otten recounts, it was the sense of potential failure of the multilateral trading system apparent at the 1988 mid-term review, and awareness that refusal to negotiate on IP would not make those issues disappear, that ultimately led to political acceptance of the substantive approach. His analysis of the April 1989 decision on TRIPS stresses the value of clarity and precision in guidance given to negotiators. This reframing of the negotiation process explains the fundamental, even structural, trade-offs established at that time between the establishment of substantive standards on both availability and enforcement of IPRs on the one hand, and the reference to public policy goals and application of multilateral rule of law to IP disputes on the other. This enabled institutional questions – the so called GATTability of TRIPS and dispute settlement in particular – to be set aside for the final stages of the negotiations. Thus negotiations could proceed on text before it was even decided to establish a new multilateral organization, let alone the situation of TRIPS dispute settlement within it (chapter 3).

... to negotiations on text, informed by policy understanding

With a clearer mandate, greater understanding of negotiating positions and objectives, and a process of mutual learning underway, the path was clear for textual negotiations on content. The negotiators describe a progression from a procedural stand-off, wrangling over the negotiating mandate, towards an informed and thoughtful review of the principles of the IP system and a reasoned effort to capture the essence of good policy-making in different fields, while preserving significant latitude for domestic policy differences. What is presented is, without doubt, a pragmatic trade negotiation, but one that was increasingly informed by learning and debate about balanced policy settings, particularly in the view of the EC negotiators (see Peter Carl, chapter 6, and Jörg Reinbothe, chapter 10).

Factors enabling a successful outcome

The negotiators acknowledge the unique external factors - even the unprecedented, and likely unrepeatable, *Zeitgeist* - that not only put TRIPS on the negotiating table, but also drove forward the negotiations to an unexpectedly comprehensive and far-reaching conclusions. Yet the insiders' narratives about the very practice of negotiations - the internal dynamics, the practical negotiating know-how, the individual skills, expertise and personal qualities that were brought to bear - create a strong and convincing impression of a remarkable, memorable and instructive case study in effective multilateral process. Thomas Cottier identifies the processes of mutual learning, building of mutual trust, continuity of representation and the negotiating techniques used to build a common and comprehensive treaty text as "endogenous factors" for success. He recalls how trust and continuity engendered an environment in which problems could be discussed in a frank and open manner, enabling variant and conflicting interests to be aired while maintaining trust and mutual respect (chapter 4), a view echoed by others including John Gero and Jörg Reinbothe (chapters 5 and 10, respectively).

John Gero singles out the distinctive skills of the Chair and the importance of trust ultimately invested in the expertise and neutrality of the Secretariat. He observes that the challenges of framing IP standards within a trade law context inevitably lead to the formulation of new concepts and methodologies which recognised that trade negotiations now reached into areas traditionally reserved for domestic regulation. The question of non-violation disputes exemplified this challenge, as it was an established concept in traditional trade law, but uncharted territory when

it came to IP. He also underscores the importance of engagement with the substance of the issues, maintaining that negotiators were closely and professionally engaged with the substance, and did not avoid tough issues. For him, a key factor in the result was the salutary effect of turning from more abstract, “theological” debates to an approach rooted in the actual practices of the negotiating countries, illustrating how this led to solutions in one of the most sensitive issues addressed: that of patenting life forms. This account reinforces the overall conclusion that a number of key TRIPS provisions have roots in the domestic practice of national jurisdictions, and thus were more grounded than a more abstract level of negotiation may have delivered (chapter 5).

David Fitzpatrick’s account of the negotiations on enforcement measures exemplifies how seasoned practical understanding of domestic regulatory systems - in this case, IP enforcement - is vital for the creation of realistic and balanced international standards. Equally, understanding of the clear distinction between international-level standards and the choices taken to implement them domestically enabled negotiators to bridge between major legal traditions, particularly civil law and common law countries, and distinct legal conceptions of copyright (chapter 15).

Adrian Otten highlights the distinct and significant roles of each player in the negotiation process, particularly that of IP experts. The technical expertise and negotiating know-how of the central actors from both developed and developing countries “who were able to be constructive as well as hard headed in the pursuit of their national interests” are highlighted as key factors in the outcome (chapter 3).

Catherine Field recalls the need for trade negotiators and IP experts to learn from one another and respect distinct areas of expertise, and the acceptance of pragmatic compromises to yield a balanced outcome which nonetheless left some key issues unresolved. She attributes the outcome to four negotiating axioms: all participants should benefit; all should prioritize objectives and even accept difficult changes to their own regime (which applied to the US); there had to be a realistic assessment of what is achievable in the light of overall goals; and flexibility on the different ways progress can be achieved (chapter 8).

Thu-Lang Tran Wasescha stresses the value of substantiating negotiating positions through careful explanation, while recognizing that “constructive ambiguity” also remained necessary to forge a delicate and finely balanced agreement (chapter 9).

Several contributors tell us that the role of the Secretariat was essential: key factors that emerge from the narratives include its recognized technical expertise and neutrality, and its careful preparation of high quality supporting documents that were noted for being inclusive and accurate. Matthijs Geuze and Adrian Otten both attest to the scrupulous efforts taken by the Secretariat to ensure neutrality and quality in the supporting documentation (chapters 7 and 3, respectively).

Evolution from procedural deadlock to negotiations on substance

Several authors in this volume, beginning with Adrian Otten, tell us that the conventional narrative of the TRIPS negotiations being defined by North vs South negotiating camps overlooks the more complex and diverse structure of negotiations. North-North differences proved at times to be more intractable, and such divisions have persisted in dispute settlement and in other negotiations, such as contemporary bilateral and multilateral processes on GIs (chapter 3). In taking issue with “mythologies” of the negotiations, John Gero agrees that it is misleading to assume that the negotiations were essentially between North and South by illustrating the diversity of interests and shifting alliances that cut across the full economic and political spectrum of negotiators (chapter 5). Thu-Lang Tran Wasescha also charts the shifting alliances and diverse interests among developed economies, reinforcing the general impression that the negotiations evolved into a more nuanced and diverse set of interests, from an initial, already somewhat dated stand-off between “pro-IP” and “anti-IP” delegations (chapter 9).

This more nuanced, multipolar view of the negotiations is evidenced by several of the alliances recounted by the negotiators. They describe, for instance, how India, with a strong positive interest in the creative industries, was in some respects closer to the United States on copyright matters. A.V. Ganesan recalls that “the Indian film industry was as vociferous as Hollywood on the prevention of piracy of cinematographic works”. However, in pointing to a number of intra-North differences in the areas of copyright, related rights, GIs and patents on life forms, he notes that these differences were of a different class and character than the North-South differences. Developing countries saw themselves as “hapless defenders” in these new areas, with no *quid pro quo* to gain from the Agreement, and indeed much to lose (chapter 11). Piragibe Tarragô and Antonio Trombetta echo these views and note the unity of the North on core demands as against the disunity of the South, and the latter lists the disadvantages suffered by developing country delegations, including the lack of technical expertise (chapters 12 and 13, respectively).

The negotiations on the patent complex within the TRIPS Agreement provide an instructive case study about the practice of multilateral norm setting in a regulatory field of major trade significance that has bearing on other crucial areas of public policy. Patents were a key area of ambition for some developed countries; others, such as Canada, played more of a mediating and bridging role on such issues, aligning more with developing countries on some questions rather than seeing their interests purely in terms of stronger standards (chapter 5). For Piragibe Tarragô and Antonio Trombetta, the conscious concessions made by developing countries in this area were offset by the maintenance of flexibilities, particularly compulsory licensing (chapters 12 and 13, respectively). Catherine Field acknowledges that the outcome on patents was a “mixed bag” which only partly achieved US goals, left some matters uncertain, and yet overall created a clear framework (chapter 8).

Umi Majid describes how she was able to defend Malaysia’s interests in maintaining regulatory diversity and a balanced distribution of enforcement resources (chapter 14). Piragibe Tarragô observes that the enforcement standards set out in TRIPS were already largely effected in Brazil’s law, and that Brazil sought to fend off expectations that IP enforcement should have preference over other fields of law. He was satisfied that this was achieved through the inclusion of a tailored caveat in Article 41.5.

The broad architecture of the Agreement itself manifests the idea of balance. Piragibe Tarragô recalls the determination of developing countries to incorporate references to the social, economic and technological rationale of the IP system in view of their concerns about the public policy consequences of stronger IP protection. These provisions were designed to ensure flexibilities as a safeguard against the impact of higher IP standards once it became clear that the “minimalist” preferences of developing countries could be sustained (chapter 12). This balance is also evident in the detailed text in more technical provisions which bear the hallmarks of effective negotiations by developing country delegations - a telling example being Jayashree Watal’s account of India’s role in the crafting of a provision on the sensitive question of compulsory licensing that left open the entitlement to specify grounds for the grant of such licences (chapter 16). While compulsory licensing is one of the most conspicuous and closely observed instances - in view of its pivotal policy significance - overall, the negotiators’ accounts identify a number of key areas where the outcome reached contrasts very significantly with the initial objectives of *demandeurs*, and the expectations of the industries that helped put IP on the multilateral trade agenda.

Peter Carl argues that the goal of a comprehensive and balanced agreement is measured more in political and psychological terms than in concrete terms. The accounts in this volume arguably show that the idea of balance in the negotiations has progressively shifted from a political and psychological perception that a TRIPS Agreement was needed to balance market access elsewhere (very strong at the time of the 1989 mid-term deal) – an Agreement perceived essentially as negotiating coinage to buy a Uruguay Round deal – to today’s widespread perception of the Agreement as embodying a legitimate conception of balanced policy in itself. Accordingly, the negotiators help us understand how the Agreement’s text gives expression to an enduring conception of what amounts to “adequate” and “effective” protection of IP that is a reasonable precondition for trading relations. He also makes the perceptive point that what are construed as “concessions” in trade negotiations may actually be accepted, if tacitly, as representing worthwhile policy outcomes in any case (chapter 6). A.V. Ganesan, in the light of subsequent experience with its implementation, goes so far as to describe the Agreement today as almost “a blessing in disguise” for India, given that it provides assurance to foreign investors and technology suppliers, and enables India to avoid unnecessary trade frictions by referring any grievance over IP protection to the WTO dispute settlement mechanism (chapter 11). It is noteworthy, in this context, that India has brought a complaint against the EU, in part under the TRIPS Agreement, in order to defend its interests in the export of generic medicines.¹³ In assessing the outcomes against the principal EC objectives, Jörg Reinbothe views the text as a success for all negotiators in that it remained true to broad principles that were widely shared (chapter 10).

Unquestionably, if TRIPS does have legitimacy and balance as a legal and policy instrument today, this is a consequence of the give-and-take of the negotiations and the efforts, well documented in this volume, of developing country negotiators to include effective policy safeguards which have since been shown to be effective in practice, for instance in the sensitive policy area of public health. Peter Carl maintains that the quality of the resultant TRIPS text is demonstrated by the fact that subsequent controversy over access to medicines could be largely resolved within the framework of the existing text, a view echoed by Catherine Field (chapters 6 and 8, respectively).

This understanding of the final agreement entails distinguishing the early diplomacy and divergence of interests that gave initial impetus to the negotiation mandate from the subsequent close textual negotiations. Jayashree Watal observes that the final package was much more balanced than some commentators assumed, drawing a clear distinction between the initial goals of

demandeurs, and the actual outcome of a genuine multilateral negotiation, with concomitant checks and balances. She attributes this 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 (chapter 16). Similarly, Thu-Lang Tran Wasescha maintains that the TRIPS text was not the so-called monopolistic straight-jacket that some had feared, but has allowed for effective safeguards and flexibilities. She attributes this outcome to the spirit of collegiality and mutual respect in which even sharp differences could be aired without derailing the negotiations (chapter 9). Piragibe Tarragô and Antonio Trombetta acknowledge that the outcome entailed a fundamental shift in the stance of key developing countries. This was hesitantly accepted as it enabled a stronger multilateral trading system and opportunities for their major export sectors, yet they could defend their core IP interests through the preservation of policy space and flexibilities to promote development and public interest (chapters 12 and 13, respectively).

The importance of the multilateral approach is borne out in this context: Adrian Otten observes that the counterfactual to multilateralism in IP is bilateral negotiations, where the lack of collective weight of developing countries and the opportunity to exploit differences between major *demandeurs*, “could not be expected to yield as much flexibility or give it the same degree of legitimacy” (chapter 3). Indeed, while TRIPS has been used as a basis for further bilateral and plurilateral negotiations on IP, these have resulted in what some would see as TRIPS-plus provisions without the same balance that TRIPS contained.

Nonetheless, developed country negotiators – despite dramatic policy differences in some areas – showed greater coherence and resolve overall in pushing forward the TRIPS project, and several contributors comment on the considerable constraints faced by developing country negotiators, and the limited participation from the developing world, notably the African continent.

Negotiation as a practical craft

Substantively, the TRIPS Agreement is unique – both in defining core standards across the spectrum of IP, and in engineering a fundamental shift in multilateral governance by integrating those standards within the trade law system. Given the changed external circumstances, it is also a moot point whether it would be possible to negotiate, multilaterally, a similar treaty on TRIPS today. Yet the TRIPS negotiators’ narratives of the making of the Agreement hold considerable practical interest for today’s negotiators not least because of what might be termed the

tracraft of negotiations - the skill set and the practical tools that were developed and applied so as to make this a successful process, indeed one that outpaced negotiations in other sectors in the Uruguay Round.

Several negotiators underscore the logical progression of the negotiations. Thomas Cottier maintains that the organized and structured approach to the negotiations, proceeding from principles, general proposals, to a draft composite text and checklists of issues, was central to its success (chapter 4). Adrian Otten's account highlights the importance of the opening phase of negotiations which enabled both the collection of factual information and the opportunity to come to understand the different negotiators' concerns and objectives. This laid a surer foundation for subsequent substantive work. He views the ensuing detailed discussion of proposals and synoptic tables as an essential basis for subsequent negotiations: not least because trade negotiators, including those from developing countries, generally lacked IP expertise, but because discussions precipitated consultative networks in domestic capitals that could deal with the full range of issues under discussion (chapter 3). Clarity in the negotiating mandate, and the consequent shared understanding of the outline of the common objective, are described by many negotiators as catalysts for progress on substance, the 1989 decision clearly being pivotal, just as the imprecision in the initial mandate had earlier led to unresolved procedural debate. Yet even that initial period was productive, as it enabled the commencement of the information gathering and mutual understanding that Adrian Otten describes in particular. The Chair, Lars Anell, remarks that "[i]t had to be a slow start and a steep learning curve" (appendix 1).

The quality and inclusiveness of the supporting documentation is widely cited as a vital ingredient. Catherine Field confirms the practical value of a single, synoptic table that reflected all views as a practical foundation for substantive negotiations (chapter 8). Piragibe Tarragô acknowledges that the practical diplomatic tool of a composite negotiating text enabled negotiations to proceed despite greatly divergent levels of ambition in IP protection standard-setting (chapter 12). Thomas Cottier recounts how the Chair and the Secretariat compiled the delegation submissions carefully, initially indicating the source of each proposal and later deleting such authorship and provenance, thus enabling more rapid progress to be made, presumably because no one would be attached to their original text. Indeed such rapid progress was made using these tools that in the space of less than six months an almost complete draft of the Agreement was in place by December 1990 (chapter 4). Lars Anell recalls that, when "real negotiations were all but impossible", the "obvious solution" was for

the Secretariat to prepare a composite text of different proposals as a basis for negotiations. Agreement could only be reached on the basis of a promise that “[l]iterally everything” that had been tabled was included, yielding the Chair’s Draft of June 1990 that put the negotiations on a solid track. This process disclosed significant convergence already in some areas – “an abundant crop of low-hanging fruits” (appendix 1). This enabled negotiators to make progress despite continuing disagreements on structure and the GATTability question.

Adrian Otten narrates how work then ensued on this basis: the Chair held intensive informal consultations with delegations to produce a series of revised drafts, on his responsibility rather than as expressing a commitment from any delegation, and highlighting points of difference. This enabled work on non-substantive differences and on compromise language in more substantive areas. These texts gradually took on the look of draft agreements. The final stage, he recalls, entailed virtually continuous negotiations, directly between participants and under the auspices of the Chair, the latter through a so-called “10+10” group (10 developed and 10 developing countries, in practice open to any interested delegation), and “5+5” groups with variable membership, especially on the most difficult issues. Such smaller group meetings were followed by detailed reports by the Chair to meetings of all participants, provided also in writing, “to ensure transparency and give all participants an opportunity to react” (chapter 3).

All accounts attest to the individual qualities of the Chair, the Secretariat, and the negotiators, who were united by a common professional objective to produce a creditable outcome in the face of considerable pressure from the dynamics of the Uruguay Round. Continuity of representation and well-established domestic consultative networks helped ensure that the negotiators were able to engage fully and effectively. Many negotiators estimated that this particular kind of negotiation required the integration of knowledge from many different sources, and required learning from recognized experts. The negotiations were extremely complex as they were situated within a multilateral trade law framework, but also covered the then-distinct field of international IP, with its own established rules: an existing treaty structure and specific practices drawn from the development, administration and enforcement of domestic standards in multiple areas of IP. Respect for professional expertise and the willingness to learn from it extended beyond formal negotiating differences, and did not in themselves compromise competing negotiating positions – but it did mean that negotiating compromises, when they came, were more likely to be consonant with established ideas of good policy.

Summing up

The accounts of the negotiations show remarkable diversity in the interests pursued and in the negotiating objectives and priorities identified by each negotiator: a broad spectrum of interests had to be accommodated in the final text. Nonetheless, it is possible to discern several common themes that help to explain the abiding success of the negotiated outcome, and potentially provide guidance for future negotiators and policymakers. These elements of success, also widely discussed at the February 2015 Symposium, include the following:

- The progressive development of trust and mutual respect between negotiators. They took time to understand the interests and concerns behind negotiating positions. Additionally, continuity of representation fostered common understandings and a collective sense of purpose.
- The scrupulously distinct but equally important roles of the Chair, the Secretariat and the negotiators. The Chair led and guided the negotiations, while the Secretariat provided neutral, discreet and substantive support. The negotiators acknowledged their gaps in technical expertise and addressed their tasks with intellectual integrity, consulting judiciously with acknowledged experts so as to ensure the quality of the negotiated text.
- The clear, logical sequencing of the work. The factual background, broad principles and the overall direction of the negotiations were established before moving to an inclusive and intensive text-based process led to an outcome that has served effectively as a stable multilateral framework.
- The progressive shifts from procedural wrangling to an informed debate. Preliminary negotiations over mandate and diplomatic formulae moved towards a thoughtful and constructive deliberation on points of principle and policy. Elements of best policy practice were increasingly informed by a wide range of practical experience and lessons from domestic regulation in a cross-section of jurisdictions. This provided the negotiations with a stronger empirical base and a practical focus.

Overall, the external factors driving the negotiations emerge as nuanced, diverse and multifaceted. They are not accurately captured by a monochrome picture defined by developed country industry interests set squarely against developing country policy concerns. To be sure, this subtler and more polychromatic picture does not conflict absolutely with conventional characterisations of the negotiations as a trade-off between IP demands from the North and the quest for policy

safeguards from the South. The accounts in this volume convincingly show how negotiators moved from diverse interests and disparate negotiating objectives towards the common goal of establishing a platform of adequate standards to serve as a foundation for a more stable and transparent multilateral order. In so doing, they sought a shared institutional and legal base, so as to ensure that the IP system and related areas of regulation would deliver on the economic and social policy objectives expected from IP law and policy.

TRIPS today and in the future

The TRIPS Agreement is a treaty of surprising resilience and adaptability that has been used as a basis for further multilateral and bilateral negotiations on IP in other spheres. The relative completeness of the text compared to other WTO agreements - in that its rules cover almost all areas of IP and provide for limited specific exceptions under the MFN principle - may be one factor behind its continuing relevance. Indeed, considering the text in today’s trade policy environment, the original negotiators do not, in general, see any need for a major renegotiation or extension. Catherine Field points to the major changes technology has wrought in IP and the transformation of information itself into a tradable good, but she does not estimate that this warrants a rewriting of the rules (chapter 8). Even the need she acknowledges for a more coherent international approach to the application of IP competition and antitrust measures may not necessarily require a renegotiation, but rather solutions within the established framework. Nevertheless, Thomas Cottier sees a role for greater development of competition standards to set a regulatory ceiling complementing the minimum standards for IP protection (chapter 4).

In any event, in IP and other areas of regulatory convergence, treaty standards are largely not self-actuating; they require significant domestic capacity to be implemented both effectively and in a balanced way. Peter Carl points to the gulf between TRIPS provisions and their effective implementation: most WTO members have implemented the provisions in their national law, but problems remain with effective administration and enforcement, some abusive litigation practices and the erosion of consensus around the basic principle of IP protection (chapter 6). Even the issue that first led the GATT to work on IP matters, counterfeit trade, remains a major scourge today due in part to technological developments unforeseen in the TRIPS provisions on enforcement.

For some of the contributors, including Peter Carl, Catherine Field and Thomas Cottier, TRIPS rules remain legitimate today, but are showing some signs of age

and emerging gaps, leading to different suggestions for reviews or further work within the TRIPS framework (chapters 6, 8 and 3, respectively). Peter Carl takes issue with the conventional view that multilateral negotiations are stalled due to unwillingness to accept the necessary compromises and concessions for classical economic reasons. Instead, he points to a less favourable external environment for negotiations, the political and psychological impact of globalisation, reactions to the ambitious outcome already achieved and the lobby against IP enforcement of both copyright and trademarks (chapter 6).

Can the TRIPS negotiations shed light on current difficulties in reaching multilateral agreement on IP standards? Adrian Otten concludes that the unique historical circumstances of the making of the TRIPS Agreement illustrate why it is now more difficult for the WTO to make headway. The very scale of the results on TRIPS, combined with the effectiveness of the WTO dispute settlement mechanism, has led to some governments being cautious about taking on any new obligations. The growing usage of the dispute settlement mechanism may “lead to a greater role for lawyers at the expense of deal-makers”. The increasing political importance of NGOs has led to a wider range of actors and interests, but also raises “the political cost of making the compromises necessary in any international negotiation”. Equally, global governance is at a time of renewed transition, with the effect that “a wider spectrum of countries must take the initiative if progress is to be made”. The formal structures do provide for this work to be done, but it is ultimately a matter for attitudes to change “in both countries that formerly assumed leadership and those that now need to” (chapter 3).

The lessons for future IP negotiators and policymakers that can be drawn from these reflections are manifold, but the following broad themes emerge:

- Considerable work needs to be done to establish a clear and workable mandate. While the Punta del Este mandate put “trade-related aspects” of IP on the agenda, it was only with the creation of the clearer and more precise 1989 mid-term agreement that constructive work could begin in earnest, aided by detailed textual submissions from delegations.
- Negotiations are greatly assisted by understanding drawn from past domestic and multilateral experience, and the infusion of actual expertise, provided that there is an environment of intellectual curiosity, mutual learning and respect for divergent positions among the key negotiators.

- Negotiators benefit from a clear, comprehensive and neutral set of preparatory documents, and a trusted and expert Secretariat can contribute through the preparation of such materials. Creative solutions and bridging proposals from negotiators and the Chair of the process can help.
- Leadership is vital. Political leadership, understandings at the political level that give impetus to the negotiations and the leadership role of the negotiating Chair are key elements. Additionally, these leaders must be supported by active delegations who accept the need for compromise and, equally, the need for all negotiators to come away with a sense that they have achieved material gains.
- Negotiations on regulatory matters can be informed and actively assisted by considerations of good public policy and experience of good regulatory practice. Such considerations underpin the legitimacy of the concluded text and set the text in its intended operational context.
- Periods of hiatus in formal negotiations or of political uncertainty can be used to work on consolidation of the background understanding, the resolution of technical issues and bridging gaps.

The practical lessons of the TRIPS negotiations, and the insights the negotiators offer in this volume, should be of significant service to future generations of negotiators, and warrant the close attention of analysts, even if the exact circumstances that led to the TRIPS Agreement are unlikely to be repeated.

Looking back over the past two decades, it is clear that the fundamental notion of what constitutes “trade-related aspects” of IPRs has undergone a thorough transformation: something that was once the province of negotiators has now become a daily consumer experience for billions. Throughout this period of fundamental change, the TRIPS Agreement has proven to be flexible, managing sensitive policy issues such as public health. The comprehensive, relatively finished and flexible character of the Agreement suggests to some of its negotiators that it can retain its central role in international IP law and dispute settlement, and as a touchstone for legitimacy and balance in policy-making for years to come.

Endnotes

- 1 This chapter benefits from extensive conceptual and textual input from, and a close critical review by, Jayashree Watal; any errors or inaccuracies remain, however, the responsibility of the author.
- 2 A system of special compulsory licences expressly for the export of pharmaceuticals was introduced in order to provide an additional legal pathway for access to medicines, first through a waiver of TRIPS rules and later through a proposal to amend the Agreement. See https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm#importing (last accessed 6 August 2015).
- 3 A record documented in the IP/Q/* series of documents prepared for the WTO TRIPS Council capturing its discussion on the distinct policy and legislative choices in the TRIPS area made by over 130 members. These documents can be consulted at <http://docs.wto.org>.
- 4 See Adrian Otten's and Adrian Macey's discussions of the pattern of dispute settlement (chapters 3 and 19, respectively).
- 5 See Adrian Otten, chapter 3.
- 6 See, for instance, Richard Baldwin, "Global supply chains: why they emerged, why they matter, and where they are going" in Deborah K. Elms and Patrick Low, eds., "Global value chains in a changing world" (WTO, 2013) (available at https://www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_e.pdf).
- 7 See, for example, Thomas Cottier, chapter 4.
- 8 See Catherine Field, chapter 8.
- 9 WTO document WT/GC/W/247, Preparations for the 1999 Ministerial Conference - Work Programme on Electronic Commerce - Communication from Indonesia and Singapore, 9 July 1999.
- 10 See in particular Catherine Field, chapter 8, and Thomas Cottier, chapter 4.
- 11 The concepts of national treatment and MFN as they apply in the GATT, the General Agreement on Trade in Services and TRIPS are outlined in a WTO Secretariat document prepared for the Working Group on Trade and Competition Policy, WT/WGTCP/W/114, Working Group on the Interaction between Trade and Competition Policy – The Fundamental WTO Principles of National Treatment, Most-Favoured-Nations Treatment and Transparency – Background Note by the Secretariat, 14 April 1999.
- 12 GATT document MTN.GNG/NG11/W/7/Add.2, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods - Submissions from participants on trade problems encountered in connection with Intellectual Property Rights – Switzerland, 5 August 1987.
- 13 WTO document WT/DS408/1, European Union and a Member State — Seizure of Generic Drugs in Transit – Request for Consultations by India, 19 May 2010. See one-page summary at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds408_e.htm (last accessed 13 August 2015).