

The TRIPS negotiations: An overview

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As a former official within the Secretariat of the GATT/WTO with responsibility for TRIPS matters, my aim in this chapter is to set the scene for the contributions to this book of the negotiators themselves, by outlining the origins and various stages of the negotiations that led to the TRIPS Agreement. I will also make some general observations on the negotiations, in particular on how it proved possible to negotiate an agreement as substantial as the TRIPS Agreement and on why the WTO has been finding it difficult to achieve results comparable to those of the Uruguay Round of multilateral trade negotiations. I will, of course, do this from the perspective of a former Secretariat official; other chapters will add additional perspectives. I should add that I left the WTO Secretariat in 2008.

Background to the negotiations

Intellectual property in the GATT

Prior to the Uruguay Round, there was relatively little on IP in the GATT, at least explicitly. Despite this, there were two significant dispute settlement cases in the 1980s, reflecting no doubt the increasing importance of IP issues in international trade relations.

The primary thrust of GATT rules of relevance was (and remains) to ensure that IP laws and regulations do not discriminate against or between imported goods, while not preventing compliance with them. Given that IP laws and regulations have been held to be “internal” for GATT purposes, the most important provision is Article III:4; this requires that IP laws and regulations (like other internal laws and regulations) accord imported products no less favourable treatment than that accorded to national products. This requirement is tempered by the general exception provision of Article XX(d), which ensures that GATT trade rules do not stand in the way of measures necessary to ensure compliance with IP laws and

regulations, subject to a number of safeguards to ensure such measures are not used as a disguised restriction on trade. There are also some specific rules aimed at ensuring that balance-of-payments import restrictions do not prevent compliance with IP procedures (Articles XII:3(c)(iii) and XVIII:10).

The only GATT provision that specifically promotes the protection of IP is that in Article IX:6 on the protection of distinctive regional or geographical names – what we would now call geographical indications (GIs). This does not lay down specific standards of protection of GIs but calls on GATT contracting parties to cooperate with each other on their protection. It was included in the Havana Charter (on part of which the original GATT was based) at the instigation of the French and the Cubans.

Both the dispute settlement cases were complaints by the European Communities (EC) about aspects of United States (US) IP law claimed to be unjustifiably trade restrictive or discriminatory. As the desk officer for IP matters in the Secretariat, I was the secretary of each of these panels. One of these cases concerned the so-called Manufacturing Clause of the US Copyright Act, which prohibited the importation into the United States of certain copyright works and penalized them in other ways unless they had been manufactured (i.e. printed) in the United States. The issue was not the GATT inconsistency of the import restriction but whether such inconsistency remained grandfathered by the Protocol of Provisional Application, under which the GATT had been originally applied, even though the United States had prolonged it after fixing an expiry date. The Panel, which reported in May 1984, found that the Protocol of Provisional Application had to be understood as a “one-way street” towards GATT conformity and that the US action constituted an unjustifiable reversion away from GATT conformity.¹

The other dispute settlement case concerned Section 337 of the US Tariff Act, under which producers in the United States could obtain orders excluding the importation into the United States of goods found to be infringing US patent and other IP rights. This was an issue giving rise to considerable tensions at the time in US trade with not only the EC but also some other countries, including Japan, Canada and the Republic of Korea. The task of the Panel was to (i) interpret the national treatment standard of GATT Article III:4, (ii) examine whether the special remedies and procedures applicable under Section 337 when imported goods were challenged on grounds of IP infringement constituted less favourable treatment than that applicable under the US federal district court procedures when like products of US origin were similarly challenged, and (iii) consider whether any instances of less favourable treatment could be justified under the exceptions

provision of Article XX(d). In what I believe was a seminal set of findings, the Panel found that six features of Section 337 did constitute less favourable treatment of imported goods inconsistently with Article III:4 and that most, but not all, of these inconsistencies could not be justified under Article XX(d). The Panel reported in January 1989 shortly after the Montreal mid-term ministerial meeting of the Uruguay Round.² While the Panel went out of its way to avoid impacting on the negotiations, the case demonstrated the ability of the GATT dispute settlement system to handle complex IP issues and highlighted the role of the GATT as a forum for preventing the abuse of IP rules as trade restrictive measures.

Work in the GATT on trade in counterfeit goods, 1978–85

The first initiative in the GATT framework to go beyond what was in the General Agreement in addressing IP matters was a proposal put forward by the United States in 1978, towards the end of the Tokyo Round of multilateral trade negotiations, 1973–9.³ This was for a code, or a plurilateral agreement, on trade in counterfeit goods, roughly corresponding to what is now in Section 4 of Part III of the TRIPS Agreement on border measures (although limited at that stage to counterfeit trademark goods, not addressing pirated copyright goods). By the end of the Tokyo Round in 1979, only the United States and the EC supported the proposed code and it was not included in the results of the Round.

The matter was reverted to in 1982 when a ministerial meeting was held to agree on the post-Tokyo Round work programme. In the preparations for this, a revised proposed code was tabled, this time with support from the so-called “Quad” (Canada, the EC, Japan and the United States).⁴ No agreement was reached on either the draft or pursuing work on the basis of it. But the Ministerial Declaration did include an instruction to the GATT Council “to examine the question of counterfeit goods with a view to determining the appropriateness of joint action in the GATT framework on the trade aspects of commercial counterfeiting and, if such joint action is found to be appropriate, the modalities for such action, having full regard to the competence of other international organizations”.⁵

At the time, I was a relatively junior official in a division of the GATT Secretariat dealing with non-tariff measures. For no particular reason that I can recall, responsibility for servicing these consultations was given to me, as one of a number of files that I was tasked with. So began for me 25 years of work on IP issues in the GATT/WTO Secretariat on behalf of the GATT contracting parties and later the WTO members.

Pursuant to the 1982 Ministerial Declaration, consultations with GATT contracting parties were held by the then Deputy Director-General, M.G. Mathur, and background documentation prepared by the Secretariat.⁶ It was decided at the end of 1984 to set up an expert group, including the participation of an expert from WIPO, to help the Council take the decisions which the ministers had instructed it to take.⁷ In its report at the end of 1985, the expert group considered that there was a growing problem of trade in counterfeit goods and that there was a case for enhanced international action, but did not agree on whether the GATT was the appropriate framework for such action.⁸ The further consideration of this issue then became caught up in the preparations for what would become the Uruguay Round.

Evolution of the Uruguay Round TRIPS mandate

The driver behind the inclusion of IP in the Uruguay Round was the United States. The background was that, in the years following the end of the Tokyo Round, large parts of US industry as well as the US Government became increasingly of the view that what they saw as inadequate or ineffective protection of US IP abroad was unfairly undermining the competitiveness of US industry and damaging US trade interests. These concerns went beyond the issue of border controls to prevent the importation of counterfeit goods, to the substantive standards of IP protection in other countries and the effectiveness of means for their enforcement, internally as well as at the border. This, in turn, was part of a wider perception of many in the United States that the GATT system, while doing quite a good job in regard to standard technology manufactured goods where the United States was losing international competitiveness, was doing a bad job, or none at all, in the areas of agriculture, services and IP where US competitiveness increasingly lay. It should also be remembered that this was a period when the international value of the US dollar increased enormously, almost doubling between its low point in 1978 and high point in 1985 according to the DXY index (US dollar relative to a basket of foreign currencies); this greatly exacerbated concerns in the United States about the country's international competitiveness.

The US Trade and Tariff Act of 1984 made inadequate or ineffective protection of IP explicitly actionable under Section 301 as an unjustifiable or unreasonable trade practice that could lead to trade retaliation by the United States. It also explicitly made the pursuit of adequate foreign IP protection a major US objective in trade negotiations. Against the background of these and other trade provisions, the United States pursued its IP objectives through intensive bilateral consultations

and also in the preparations under way from late 1985 for a new GATT round of multilateral negotiations.

As regards future GATT negotiations, in April 1986 the US Administration made a major policy statement setting its goals, not only to complete an anti-counterfeiting code but also to conclude a more far-reaching IP agreement, building on pre-existing WIPO standards. Later that month, the United States got some measure of support from other Organisation for Economic Co-operation and Development (OECD) countries when their ministers agreed that the new round should address IP, provided it concerned the “trade-related aspects”.

In the Preparatory Committee for a new round meeting in Geneva, it was evident that, while the United States was fairly clear about what it wished to achieve, other developed countries were less so and many developing countries continued to oppose both a GATT anti-counterfeiting code and more ambitious ideas. The compromise text for the Uruguay Round TRIPS mandate that was eventually adopted at Punta del Este, Uruguay in September 1986 was a modified form of language developed in the parallel informal preparatory process of smaller developed countries and less hard-line developing countries under the auspices of Colombia and Switzerland.

TRIPS negotiations, 1986–April 1989

The Uruguay Round TRIPS negotiating mandate

The Uruguay Round was launched with agreement on a Ministerial Declaration in Punta del Este in September 1986. The TRIPS mandate appeared as one of 13 subjects for negotiation in Part I of the Declaration dealing with trade in goods (Part II dealt with trade in services). It read as follows (emphasis added):

Trade-related aspects of intellectual property rights, including trade in counterfeit goods

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, *the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.*

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the *World Intellectual Property Organization* and elsewhere to deal with these matters.⁹

The only reasonably clear part of the mandate was the second paragraph, which represented an agreement that some sort of code or agreement on trade in counterfeit goods would be negotiated along the lines that had been discussed in past GATT work on this matter. The first paragraph opened up the possibility of going further if this were found to be appropriate, but this appeared to remain anchored in the world of the GATT and of trade in goods. This sentence was quite similar to the mandate agreed for negotiations on trade-related investment measures (where the eventual results essentially took the form of a codification of pre-existing GATT jurisprudence). The third paragraph reflected concerns about the competences of other intergovernmental organizations, notably WIPO.

Work of TRIPS Negotiating Group, 1987–8

In its first two years, the TRIPS Negotiating Group organized its work under agenda items corresponding to the three paragraphs of the mandate. In almost any GATT/WTO negotiation, the first tasks are to assemble necessary factual information and to get to understand the concerns and objectives of the negotiators. Accordingly, the Group had the Secretariat prepare some factual background material and also received a major contribution from WIPO in the form of a paper on the existence, scope and form of generally internationally accepted and applied standards/norms for the protection of IP.¹⁰

As regards the concerns raised by delegations, these were summarized in a compilation paper prepared by the Secretariat under the following headings:

- I. Issues in Connection with the Enforcement of Intellectual Property Rights:
 - (a) Enforcement at the border:
 - (i) Discrimination against imported products
 - (ii) Inadequate procedures and remedies at the border
 - (b) Inadequate internal enforcement procedures and remedies

- II. Issues in Connection with the Availability and Scope of Intellectual Property Rights:
 - (a) Inadequacies in the availability and scope of intellectual property rights
 - (b) Excesses in the availability and scope of intellectual property rights
 - (c) Discrimination in the availability and scope of intellectual property rights

- III. Issues in Connection with the Use of Intellectual Property Rights:
 - (a) Governmental restrictions on the terms of licensing agreements
 - (b) Abusive use of intellectual property rights

- IV. Issues in Connection with the Settlement of Disputes between Governments on Intellectual Property Rights:
 - (a) Inadequate multilateral dispute settlement mechanisms
 - (b) Excessive national mechanisms for dealing with disputes with other countries.¹¹

In the TRIPS Negotiating Group's first two years, much of the discussion revolved around disagreements about the scope of its negotiating mandate, in particular its second paragraph. Whereas the United States was clear from the outset that it wished to negotiate on substantive standards of protection of IP and internal enforcement as well as border enforcement, it took some time for other developed countries to join the United States in this. It was not until mid-1988 that the EC came to this position. For all negotiating parties to come to this position involved, in addition to consideration of economic interests, finding a sometimes difficult accommodation between governmental agencies, in particular the IP offices and the ministry responsible for foreign trade. In the EC, there was the added complication that negotiations on IP issues, previously an essentially EC member state responsibility, would have almost inevitable consequences for the distribution of competences between member states and EC institutions, given that the latter had exclusive competence for GATT matters. Many developing countries continued to oppose the negotiations getting into issues of internal enforcement and especially substantive standards: they considered them as matters where a balance between domestic interests had to be found and, as such, only marginally trade-related, and they could not see how the GATT could negotiate on them without prejudicing work in WIPO and elsewhere.

Montreal mid-term ministerial meeting, December 1988

The Uruguay Round was originally scheduled to last for four years. A so-called mid-term review meeting was held at ministerial level in December 1988 in Montreal. In reporting on the work so far, the Chair of the TRIPS Negotiating Group made it clear that there were still wide divergences in the Group and that guidance from ministers was needed.

The meeting in Montreal was a tense affair, not least in the TRIPS area. What was at stake in the negotiations was becoming increasingly evident to ministers, including those from developing countries hitherto opposed to a major TRIPS outcome. Without a successful result to the Uruguay Round, it was not clear that the multilateral trading system, and the market access it secured, could survive as a functioning system, and a major agreement on TRIPS was increasingly seen as a necessary part of a successful result to the Round. Refusing to negotiate on IP matters in the Round would not mean that the issues would disappear; rather, they would have to be dealt with in an essentially bilateral framework, against the background, in the case of the United States, of a newly introduced Special Section 301 on IP. At the same time, the scope of the potential benefits that could flow to developing countries from the Round in such areas as textiles, agriculture, tropical products and tariffs was becoming clearer. All this meant that some developing countries, especially those with more export-oriented and market-based economic development policies, began to move their positions in TRIPS matters.

This was reflected in the tabling of new ideas on TRIPS in Montreal and their embodiment in a text from the Friend of the Chair conducting the consultations on TRIPS matters, Minister Yusuf Ozal of Turkey. All this was moving too fast for some delegations and no agreement was reached in Montreal on TRIPS, and neither was it on three areas of great interest to many developing countries – agriculture, safeguards and textiles. The specific cause of the meeting breaking down was that the main Latin American agricultural exporters came to the view that not enough was going to be on the table on agriculture. The outcomes achieved in 12 other areas were put “on hold” and the GATT Director-General, Arthur Dunkel, was tasked with holding consultations to secure agreement on a complete package. Overall agreement was reached in April 1989, with the TRIPS decision based closely on the Montreal Ozal text.

The TRIPS mid-term review decision

The April 1989 decision on TRIPS was a critical step in the negotiations. If the original Punta del Este Ministerial Declaration was characterized by a lack of clarity, the mid-term review decision was noteworthy for the precision of the guidance it gave to the negotiators. The key parts were in paragraphs 3 to 6, which read as follows (emphasis added):

3. Ministers agree that the outcome of the negotiations is not prejudged and that these negotiations are *without prejudice to the views of participants concerning the institutional aspects of the international implementation of the results* of the negotiations in this area, which is to be decided pursuant to the final paragraph of the Punta del Este Declaration.
4. Ministers agree that negotiations on this subject shall continue in the Uruguay Round and shall encompass the following issues:
 - (a) the applicability of the *basic principles* of the GATT and of relevant international intellectual property agreements or conventions;
 - (b) the provision of *adequate standards* and principles concerning the availability, scope and use of trade-related intellectual property rights;
 - (c) the provision of *effective and appropriate means for the enforcement* of trade-related intellectual property rights, taking into account differences in national legal systems;
 - (d) the provision of effective and expeditious procedures for the *multilateral prevention and settlement of disputes* between governments, including the applicability of GATT procedures;
 - (e) *transitional arrangements* aiming at the fullest participation in the results of the negotiations.
5. Ministers agree that in the negotiations consideration will be given to concerns raised by participants related to the *underlying public policy objectives of their national systems* for the protection of intellectual property, including developmental and technological objectives.
6. In respect of 4(d) above, Ministers emphasise the importance of reducing tensions in this area by reaching *strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures*.¹²

The basic deal in the TRIPS decision, as part of the wider trade-offs in the mid-term package as a whole (including textiles and agriculture), was between paragraph 4, on the one hand, and paragraphs 3, 5 and 6, on the other. Paragraph 4 represented a readiness to negotiate on the full range of issues that developed countries wished to see addressed. Paragraphs 3, 5 and 6 contained some key provisos or safeguards that made it possible for developing countries to accept the agenda in paragraph 4. Paragraph 3 made it clear that what became referred to as the “GATTability” of the results would not be prejudged, that is whether the results would be implemented in the GATT or some other framework; in some respects this put the TRIPS negotiations on a similar footing to the negotiations on trade in services where there had been a similar consideration since the outset of the Round. Paragraph 4 represented an acceptance that developing country concerns about the underlying public policy objectives of their national IP systems would be taken into account. Paragraph 6 reflected concerns about the absence of a functioning multilateral rule of law in the IP area, in particular, tendencies in the United States towards unilateral approaches to the resolution of disputes, and was important not only to developing countries but also to most other developed countries, especially Japan.

TRIPS negotiations, April 1989–90

Proposals and synoptic tables

The task facing the Negotiating Group, now that broad agreement had been reached on what should be addressed in the negotiations, was how to get all participants up to speed on what was at stake before the real negotiating phase was entered into. The main vehicle for this were proposals from delegations and Secretariat “synoptic tables” on standards and enforcement setting out side-by-side these proposals and relevant provisions of existing international conventions on each topic.¹³ Specific proposals (not yet in legal form) were received for this exercise from nine developed, or groups of developed, countries (Australia, Austria, Canada, the EC, Japan, New Zealand, the Nordic countries, Switzerland and the United States) and seven developing countries (Brazil, Chile, Hong Kong, India, Korea, Mexico and Peru) as well as more general contributions from Thailand, Hungary, Chile and Bangladesh on behalf of the least-developed countries.

The detailed discussion of the proposals and the synoptic tables during the second half of 1989 and early 1990 was, I believe, essential for laying a basis of knowledge of the issues and understanding of each other’s positions and

concerns, which made possible the subsequent negotiating phase. This was particularly important for trade negotiators, who were generally not experts in IP, and for developing country participants who did not have the same depth of national expertise to draw upon as most developed countries had. It was also useful for virtually all active participants in getting national agencies to work together on a range of issues where this had not necessarily been required in the past. This was not just the trade and IP (patent, trademark, copyright, etc.) people, but also other affected ministries/agencies in areas such as agriculture (GIs, plant variety protection), justice (enforcement), finance and customs (border enforcement), culture/education/information/broadcasting (copyright and related rights), development, technology and competition/anti-trust.

Draft legal texts and Chair's texts, June–December 1990

Perhaps the most difficult transition in any international negotiation on rules of general application is that between exploratory work of the sort I have just described and actual negotiations on the basis of a common text. One way that this is sometimes done is for a group of delegations representing a critical mass in the negotiations to work out among themselves and put forward a common draft legal text that becomes *de facto* the basis. Such an approach can be effective but risks further polarizing the negotiations if the text comes from essentially one side. There was some effort made in this direction among the major *demandeurs*, in particular the Quad countries, but they found that, although sharing a broadly common objective in the negotiations, their positions on many specific issues were too far apart to make feasible a common draft. In the end, five comprehensive draft legal texts were tabled in the spring of 1990, by the EC, United States, 14 developing countries jointly (Argentina, Brazil, China, Chile, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Peru, Tanzania, Uruguay and Zimbabwe), Switzerland and Japan, followed by a draft from Australia on GIs.¹⁴

The Negotiating Group was under some pressure to find a negotiating basis, because the overall timeframe agreed at Punta del Este for completing the negotiations by the end of 1990 was still being adhered to and, given this, the superior negotiating body, the Group of Negotiations on Goods, had instructed all negotiating groups to have such a basis by July 1990. In the end, the Chair informed the TRIPS Negotiating Group of his intention to prepare, with the assistance of the Secretariat, a composite draft text, based on the draft legal texts submitted by delegations and without attempting to put forward compromise formulations where there were differences of substance between positions.

This composite draft text was circulated as an informal document in mid-June 1990.¹⁵ With some minor modifications of a non-substantive nature, it proved possible to produce a usable document that incorporated all the different proposed formulations, using square brackets and alternatives to set out all the differences. The continuing disagreements on structure, reflecting different positions on the GATTability question, were described in the introduction.

Starting in June 1990 on the basis of the composite draft text, the Chair held a series of intensive informal consultations with delegations. After each of these rounds of consultations he circulated a revised draft, six in total in the latter part of 1990.¹⁶ While the texts highlighted points of difference with square brackets and alternatives, they were circulated on the Chair's responsibility and on the basis that they did not commit any participant; indeed, it was the general understanding in the Round as a whole that nothing would be agreed until everything was agreed. Initially the consultations focused on getting rid of non-substantive differences and thus simplifying the text. They then sought to find compromise language on more substantive points. Sometimes the compromise would be worked out in the consultations themselves. Sometimes the Chair would make a suggestion in the next draft to see if it would fly. The first two of the drafts were characterized as compilations of options for legal provisions rather than draft agreements. The following four looked increasingly like draft agreements.

Brussels ministerial meeting, December 1990

The draft TRIPS text of 23 November was forwarded to the ministerial meeting held in Brussels in December 1990,¹⁷ avowedly to complete the Round in accordance with the timetable agreed at Punta del Este. This text, which was forwarded on the Chair's own responsibility and did not commit any delegation, contained what could nevertheless be described as common language for large parts of the text, for example most, but not all, of the sections on general provisions and basic principles, trademarks, industrial design, enforcement and IP procedures (Part IV); but the text, and its covering letter, also highlighted continuing differences on the GATTability question and about 25 key issues of substance.

On the GATTability question, there were some delegations that advocated a single comprehensive agreement implemented as an integral part of the GATT, while some other (developing country) delegations wanted only the part on border enforcement against trade in counterfeit and pirated goods implemented in the GATT, with the remainder implemented in the "relevant international organization".

Linked with this were three different approaches to dispute settlement: one was the application of GATT rules and procedures *tel quel* (as it is), favoured by the major *demandeurs*; a second was a free-standing mechanism, with more emphasis on conciliation and no provision for retaliation, favoured by those with concerns about GATTability; and a third was a modified GATT system with special provisions to take account of IP, which was a compromise approach developed by New Zealand, Colombia and Uruguay.

As regards matters of substance, outstanding points on copyright included moral rights, computer programs, rental rights and exceptions, and there was also a range of differences on related rights. Most issues on GIs remained to be decided. While on patents a framework of language had been developed, most of the key questions still had to be resolved. The principle of the inclusion of provisions on the protection of undisclosed information remained to be settled as well as the content of possible rules in this area and in regard to anti-competitive practices. Further work was required on transitional periods and the question of the extent to which the new rules would apply to pre-existing IP (now Article 70).

Hopes to conclude the Round in Brussels proved wildly premature and the meeting broke up with, once again, the Latin American agricultural exporters believing that not enough was being achieved on agriculture. The first thing that the Argentinian minister did after the collapse of the agriculture negotiations was to burst into the room where the TRIPS negotiators were meeting to prevent further work in that area. Before this, some useful work had been done on TRIPS, for example on GIs, which was not lost when the work resumed in the second half of 1991, but no major breakthroughs had been made.

The final phases, 1991–4

Autumn 1991

Intensive work in the Round resumed in the autumn of 1991. This work was aimed at the Chair of the Trade Negotiations Committee (TNC), Arthur Dunkel, in conjunction with the chairs of the individual negotiating groups, tabling by the end of the year a revision of the texts that had been sent to Brussels. In the TRIPS area, this meant, especially in the later phases, more or less continuous negotiations, both in direct contacts between participants and under the auspices of the Chair. For these consultations, the Chair used, in addition to a so-called “10+10” group (i.e. 10 developed and 10 developing countries, but in practice open to any interested delegation), “5+5” groups with variable membership,

especially on the most difficult issues. After these smaller group meetings, the Chair made detailed reports to meetings of all participants, which were also made available in writing, to ensure transparency and give all participants an opportunity to react.

The result of this work was a text forwarded by the Chair for inclusion in the Draft Final Act – sometimes referred to as the Dunkel Draft – that was circulated by Arthur Dunkel, in his capacity as Chair of the TNC, on 20 December 1991.¹⁸ It aimed to offer a concrete and comprehensive representation of the results of the Round. Negotiations had continued on the TRIPS text until the small hours of the morning of 19 December, with exhaustion (Article 6) the last issue to be resolved, perhaps aptly. Agreement could not be reached on all issues, but participants had seen and discussed all the texts that the Chair planned to put forward, with only three outstanding points on which he had to arbitrate afterwards: the inclusion of spirits in additional protection for GIs, the duration of the transitional arrangements, and some details of the special transitional arrangements for pharmaceutical and agricultural chemical product patents.

In the autumn 1991 consultations, copyright and related rights, which for some participants had become linked with concurrent negotiations on market access for audiovisual services, continued to be difficult. Differences persisted on various matters: moral rights; the need to specify special exceptions on computer programs; the definition of “public” for the purposes of public performance and communication to the public rights under the Berne Convention for the Protection of Literary and Artistic Works; the scope of national treatment in respect of related rights; and a possible provision calling for respect of contractual arrangements on the allocation of rights. The approach adopted by the Chair to most of these difficulties was to exclude them from the text.

On GIs, the most difficult questions were providing additional protection for products other than wines – in particular spirits, as mentioned above – and how to find a proper balance between providing legal security for those who had been using foreign GIs in good faith and not legitimizing forever their loss (Article 24).

However, the key set of issues facing participants was the so-called patent complex, in particular the situation of countries that did not provide patent protection for inventions of pharmaceutical products and were relying on the production, or importation, of generics. The basic question facing delegations was: if the TRIPS agreement were to include an obligation to provide patent protection in virtually all areas of technology, including pharmaceuticals, how would

a number of related provisions concerning the scope of patent rights, the ability of countries to take into account underlying public policy objectives and the timing of the economic impact of the new obligations need to be treated? In other words, what would be the TRIPS rules on such matters as exhaustion, compulsory licensing, test data protection, anti-competitive practices, the protecting of existing subject matter (Article 70) and transitional arrangements? It was not possible for participants to reach explicit agreement on all these matters – which for many would depend in any case on progress in other areas of the Round of vital interest to them – but the text sent forward by the Chair on these matters was that which had been developed in the negotiations, with only certain aspects of transition arrangements having to be filled in.

The TRIPS GATTability issue and the related dispute settlement issues were resolved through parallel negotiations on institutional questions that led to a text providing for the creation of a new organization, then proposed to be called the Multilateral Trade Organization (MTO), with an integrated dispute settlement system. Under the MTO, the TRIPS Agreement would sit alongside the GATT and a new agreement on trade in services (the GATS). The integrated dispute settlement system would include special provisions to regulate such matters as cross-retaliation and appropriate expertise on panels that had previously preoccupied TRIPS negotiators.

Autumn 1993

The tabling of the Draft Final Act was a major step forward, but it was done on the responsibility of the Chair of the TNC and it remained to be seen how acceptable it would be to participants. Moreover, the arduous process of negotiating specific schedules of tariff, agriculture and services commitments still had to be completed, as did the legal drafting clean-up of the texts. On matters of substance, the most controversial parts were agriculture, anti-dumping and the concept and details of the proposed MTO, which had been drawn up rather rapidly in the last days before the circulation of the Draft Final Act. It was not until the autumn of 1993 that the time was ripe to attempt to resolve outstanding difficulties in the draft texts and complete the Round.

The new GATT Director-General and Chair of the TNC, Peter Sutherland, asked Michael Cartland of Hong Kong, acting as a friend of the Chair, to take on the task of resolving any outstanding TRIPS issues. One feature of these consultations was five proposals from the United States, on rental rights and respect for contractual arrangements in the area of copyright and related rights, pipeline and

test data protection in regard to pharmaceuticals, and shorter transition periods in regard to enforcement obligations. While many other delegations, developed and developing, would also have preferred some changes to the TRIPS text in the Draft Final Act, they took the view that they could live with it as part of a balanced outcome to the Round and that any reopening would be dangerous. Some developing countries (Egypt, India and Indonesia) indicated what sorts of changes they would like to see if the draft were to be reopened. In the final days of the negotiations, the United States' priorities switched to limiting the scope for compulsory licensing in the area of semiconductor technology.

The other major issue was a concern raised, notably by Canada and many developing countries, about the applicability of so-called non-violation dispute settlement cases in the TRIPS area. These delegations argued that they were not reopening the TRIPS text, but were putting forward their proposals pursuant to a footnote to the TRIPS dispute settlement provision in that text that said that it might need to be revised in the light of the outcome of the work on the integrated dispute settlement system; this had been included because work had been still under way on the proposed integrated dispute settlement system up until the tabling of the Draft Final Act.

In the end, two changes were agreed: the addition to Article 64 of paragraphs 2 and 3 on non-violation disputes and the addition of the language in Article 31(c) in regard to semiconductor technology. Otherwise, the final TRIPS Agreement text was in substance that tabled in the Draft Final Act of December 1991.

Some observations on the negotiations

The actors

Let me start with the least important of the actors, the Secretariat, only because that was my role. In the Uruguay Round, I was the senior Secretariat official working full time on TRIPS. Above me was the Director of the Secretariat division responsible, David Hartridge, who played a major role, including in chairing consultations on behalf of the Chair. My TRIPS team included a number of talented officers, notably Matthijs Geuze (now with WIPO), Arvind Subramanian (now Chief Economic Advisor to the Indian Government) and Daniel Gervais (now in academia).

The Secretariat's role obviously included typical secretariat functions such as the recording of the results of meetings and the preparation of background studies.

It also entailed advising the Chair on ways of making progress and equipping him with speaking notes and other material to help him do this. While the successive drafts of the Agreement were circulated on the Chair's responsibility, they were inevitably prepared initially by the Secretariat. Carrying out these roles required an understanding of the legal systems being dealt with, in both international and national law, and of national negotiating positions, including the factors affecting those positions. The GATT Secretariat did not have a stake in the specifics of the outcome of negotiations, but it did have a stake in doing what it could to facilitate an outcome and, in that outcome, whatever it might be, being as legally and systemically coherent as possible.

Let me now turn to the Chair. We (by which I mean delegations as well as the Secretariat) were very fortunate to have had Ambassador Lars Anell of Sweden in this capacity. Among the qualities which Lars brought were an intellectual capacity and energy that enabled him to master complex matter and to handle it with confidence, a Nordic concern for fairness and transparency that inspired confidence, a great sense of humour and a readiness to take decisions and initiatives when necessary.

But of course, what the Secretariat and even the Chair saw was only the tip of the iceberg of the work of the delegations and, more generally, of the governments participating in the negotiations. Much of this work was carried out in capitals. Whereas, in traditional GATT negotiations, national objectives had been often fairly easily defined (in mercantilist terms) and needed to involve only a limited number of people, the TRIPS negotiations differed in both respects. Apart from the number of ministries, agencies and interests involved, to which I have already alluded, the TRIPS negotiations entailed each participant government reassessing the myriad of balances in its IP system and judging to what extent they could be modified to take account of the interests of its trading partners.

Even in Geneva, the formal and informal meetings of the Negotiating Group were only a small part of the activity of delegations. Much of this was in groupings where delegations would seek to agree or coordinate positions in advance, ranging from the fairly permanent and well-structured groups such as the Quad, the Nordic countries, the Association of Southeast Asian Nations (ASEAN) group, the Andean group, the African group, the developing countries and the least-developed countries (not to mention the EC internal meetings), to subject-specific groups such as the Friends of Intellectual Property and the group of 14 developing countries, and ad hoc groups reflecting coalitions of interest on specific points,

sometimes only for a limited time. In those less puritanical times, much of this provided good business for the restaurants of Geneva.

Unlike today when bilateral and regional work is favoured, multilateral trade negotiations during the Uruguay Round attracted the best and the brightest, and the TRIPS negotiations were no exception. They were blessed with a great many gifted delegates, from both developed and developing countries, who were able to be constructive as well as hard headed in the pursuit of their national interests. The negotiating teams typically included both trade and IP people and I would like, in particular, to pay tribute to the IP experts who contributed so much with their expertise and were able to win the confidence of others by their professionalism, including often delegates who did not share their negotiating objectives.

Some negotiating dynamics

Because so much of the post-Uruguay Round TRIPS literature has focused on the North–South aspects of the negotiations, there has been a tendency to underestimate the North–North components. It is important to remember this not only for its own sake but also because, once the negotiations got to specifics, developing countries quickly appreciated the room for manoeuvre this gave them, in particular the scope for North–South alliances. This was evident from the time the work on standards began in 1989 after the mid-term review decision; this started with copyright, an area where North–North issues were particularly acute (especially as, at that stage, the United States was not basing its proposals on the Berne Convention, which it had yet to sign).

Copyright and related rights continued to be an area dominated by North–North differences even after the United States had joined the other main proponents in advocating a Berne-plus approach. Moreover, even on computer programs and the protection of audiovisual works, where North–South differences predominated, there were some developing countries, notably India, that had interests and positions closer to those of the main *demandeurs*. GIs were not a North–South negotiation but essentially one between the “old world” and the “new world”, with developed and developing countries on each side. In regard to the protection of technology, there were also major North–North differences. On pharmaceuticals, Canada and, to a lesser extent, some of the Nordic countries, Australia and New Zealand were generally on the defensive. Even among the major *demandeurs*, there were important differences on such matters as the patentability of plant and animal inventions, the limitation of the grounds for the grant of compulsory

licences, government use, first-to-file, discrimination against foreign inventions and pipeline protection.

One feature was that developed and developing Commonwealth countries, which shared the common law legal tradition and in many cases much substantive law, would often have similar concerns. This was evident in particular in the areas of enforcement and copyright, but also in regard to some aspects of trademarks, GIs, patents and undisclosed information. On some issues, the United States (also a common law country) would be an ally. Sometimes these countries would find themselves opposed to the United Kingdom, where law was evolving by virtue of its membership of the EC.

How was TRIPS possible?

With the passage of time and in the light of the difficulties that the WTO has since had in making headway in its negotiating agenda, the scale of the TRIPS Agreement seems the more remarkable. The pre-existing public international law no longer provided the basis for a functioning multilateral rule of law in the IP area, especially in the field of industrial property where it was silent on most of the key parameters of a minimum standard of protection (protectable subject matter, rights, exceptions and term), not to mention enforcement. Building on and incorporating the key WIPO conventions, the TRIPS Agreement provided for minimum standards in these areas and made the whole Agreement subject to a functioning system for the resolution of disputes between governments, for the first time in the IP area.

The Agreement has continued to form the centrepiece of the multilateral rule of law in an area where there had been marked signs of this breaking down with resort to unilateral withdrawals of trade commitments. It is precisely because there were strong perceptions of divergences of interest that it was essential to achieve a multilateral consensus on how far governments could be expected to go, when setting their domestic IP regimes, in taking account of the interests of their trading partners. The TRIPS Agreement, including the WTO dispute settlement system as applied to it, has stood the test of the last 20 years relatively well. While worked on from both sides (to interpret the flexibilities as broadly as possible and to seek TRIPS-plus commitments through international negotiations in other contexts), no effort has been made to reopen the basic balances found in the Agreement, except on one relatively small but important point in regard to the compulsory licensing of pharmaceutical products – where a solution was agreed.

So how was all this possible?

As indicated earlier, it was generally recognized that at stake in the Uruguay Round was the very existence of a multilateral system of international trade relations. Indeed, the reality of this was recognized in the fact that the WTO Agreement provided for a new GATT, not the incorporation of the pre-existing GATT, and that any government that decided not to join it would lose its pre-existing trade rights. As also indicated earlier, developed countries became increasingly convinced, as the negotiations progressed, of the central importance to their future international competitiveness of the technology, creativity and reputation incorporated in the goods and services they produced and thus of the TRIPS negotiations, and developing countries came to accept that a successful outcome to the Uruguay Round would require a major result on the TRIPS negotiations.

But it was not just in the area of TRIPS that the results of the Uruguay Round exceeded what could have been reasonably envisaged at the outset. This was also the case in some areas to which developing countries attached importance, including as trade-offs for TRIPS: agriculture, which went from being largely excluded from trade commitments to being arguably more comprehensively covered than other areas (although often at higher levels of protection); textiles and clothing, where the previous system of trade restrictions was phased out by 2005 (not by chance the same timeframe as for key developing country obligations under the TRIPS Agreement); and the bringing of emergency safeguard measures under effective multilateral rules, including the end of so-called grey-area measures (such as voluntary export restraints). In other areas, the results also exceeded Punta del Este expectations: the very concept and structure of the WTO, including the multilateral application of virtually all agreements; the greatly strengthened and more juridical dispute settlement system; the establishment of a comprehensive framework for the liberalization of trade in services; and the preference for price-based balance-of-payments restrictions, to name only some. In broader terms, the Uruguay Round represented a major evolution in the basic character of the multilateral trading system, from one focused on border measures applied to goods to one dealing with a spectrum of laws and regulations governing the conditions of competition between the goods, services and persons of contracting parties.

Underlying the dissatisfaction with the pre-existing trading system and creating the conditions for these Uruguay Round achievements was a changing view of the role of trade and international markets in economic and social development, especially in developing countries and the countries of the eastern bloc. The failure

of economic planning and import substitution policies followed by many developing countries and the success of the east Asian “tiger” economies and some ASEAN countries and Chile, which were following more export- and market-oriented policies, was not only influential in other developing countries but also meant that there was a growing kernel of developing countries committed to a major strengthening of the multilateral trading system from the outset. The dramatic collapse of the communist systems in Eastern Europe after the fall of the Berlin Wall in 1989 was both a reflection of the *Zeitgeist* and a great stimulus to it. Although the TRIPS Agreement went further and faster than some would have decided by themselves, much that was in it was going with the grain of economic policy thinking and reform under way at the time in many developing and Eastern European countries, where there was growing interest in the role of IP systems in promoting domestic innovation and creativity and facilitating the transfer of technology and foreign direct investment.

Another major consideration for developing countries in accepting the TRIPS Agreement was the international recognition they secured in it of important elements of balance and flexibility in IP systems, to safeguard their right to modulate their IP regimes to meet their national developmental, technological and public health objectives. The alternative of negotiating bilaterally with major trading partners, where developing countries would find it more difficult to use their collective weight and to exploit the differences between the major *demandeurs*, could not be expected to yield as much flexibility or give it the same degree of legitimacy.

When one considers how unusual were the circumstances that made the TRIPS Agreement – and, more generally, the results of the Uruguay Round – possible, one can also understand more readily the difficulties that the WTO has since had in making headway. Paradoxically perhaps, it may be that the comparative success of the WTO in “holding the ring”, even at a time of severe international economic difficulties, has made making progress more difficult: on the whole, the prospect of new benefits is a weak incentive compared with the prospect of the loss of existing ones when it comes to the willingness of governments to expend the political capital necessary for change. Moreover, it may be that the very size of the Uruguay Round results, especially in the TRIPS area, and the lack of appreciation of the special nature of the circumstances that made them possible, has made some governments unduly cautious.

There are also other factors complicating progress. One may be the rigour of the WTO dispute settlement system. This has obvious advantages in providing an

expectation of greater security of the benefits being negotiated, but it does the same also for the obligations being entered into. This can make negotiators more cautious and perhaps lead to a greater role for lawyers at the expense of deal-makers. A further factor has been the increasing political importance of non-governmental organizations, especially those that claim to represent the public interest and that have a synergetic relationship with the media. While they are a positive force in ensuring that some aspects are fully taken into account, they also increase the political cost of making the compromises necessary in any international negotiation. But perhaps most fundamentally, the WTO and its members are faced with making a transition to a world where a wider spectrum of countries must take the initiative if progress is to be made. Fortunately, its structures do not need modifying to take account of the changing importance of countries in the international trading system (unlike in the cases of the International Monetary Fund and the World Bank, or even the UN), but attitudes do, in both countries that formerly assumed leadership and those that now need to. These changes began in the Uruguay Round, but have still some way to go before the multilateral system can once more play its proper role.

Endnotes

- 1 GATT document L/5609, United States Manufacturing Clause – Report of the Panel, 1 March 1984.
- 2 GATT document L/6439, United States – Section 337 of the Tariff Act of 1930 – Report by the Panel, 16 January 1989.
- 3 GATT document MTN/NTM/W/204, Multilateral Trade Negotiations – Group “Non-Tariff Measures” – Sub-Group “Customs Matters” – Commercial Counterfeiting – 11 December 1978.
- 4 GATT document L/5382, Agreement on Measures to Discourage the Importation of Counterfeit Goods, 18 October 1982.
- 5 GATT document L/5424, CONTRACTING PARTIES – Thirty-Eighth Session – Ministerial Declaration adopted on 29 November 1982, 29 November 1982.
- 6 GATT document C/M/183, Council – Minutes of Meeting – Held in the Centre William Rappard on 6–8 and 20 November 1984, 10 December 1984.
- 7 GATT document L/5758, CONTRACTING PARTIES – Fortieth Session – Trade in Counterfeit Goods – Action Taken on 30 November 1984, 20 December 1984.
- 8 GATT document L/5878, Report of the Group of Experts on Trade in Counterfeit Goods, 9 October 1985.
- 9 GATT document MIN.DEC, Multilateral Trade Negotiations – The Uruguay Round – Ministerial Declaration on the Uruguay Round, 20 September 1986.
- 10 GATT document MTN.GNG/NG11/W/24, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property – Note Prepared by the International Bureau of WIPO, 5 May 1988.
- 11 GATT document MTN.GNG/NG11/W/12, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods – Compilation of Written Submissions and Oral Statements – Prepared by the Secretariat, 11 August 1987.
- 12 GATT document MTN/TNC/11, Uruguay Round – Trade Negotiations Committee – Mid-Term Meeting, 21 April 1989.
- 13 GATT documents MTN.GNG/NG11/W/32, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods – Synoptic Tables Setting Out Existing International Standards and Proposed Standards and Principles – Prepared by the Secretariat, 2 June 1989; MTN.GNG/NG11/W/33, Negotiating Group on Trade-related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods – Synoptic Table Setting out Proposals on Enforcement and Corresponding Provisions of Existing International Treaties – Prepared by the Secretariat, 7 June 1989; and their revisions. These documents contain references to the national submissions.

- 14 GATT documents MTN.GNG/NG11/W/68, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods – Draft Agreement on Trade-Related Aspects of Intellectual Property Rights, 29 March 1990; MTN.GNG/NG11/W/70, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights – Communication from the United States, 11 May 1990; MTN.GNG/NG11/W/71, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, 14 May 1990; MTN.GNG/NG11/W/73, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Draft Amendment to the General Agreement on Tariffs and Trade on the Protection of Trade-Related Intellectual Property Rights – Communication from Switzerland, 14 May 1990; MTN.GNG/NG11/W/74, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Main Elements of a Legal Text for Trips – Communication from Japan, 15 May 1990; and MTN.GNG/NG11/W/75, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Draft Text on Geographical Indications – Communication from Australia, 13 June 1990, respectively.
- 15 Restricted GATT document, 12 June 1990.
- 16 GATT document MTN.GNG/NG11/W/76, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods – Status of Work in the Negotiating Group – Chairman’s Report to the GNG, 23 July 1990; restricted GATT document, 1 October 1990; restricted GATT document, 25 October 1990; restricted GATT document, 13 November 1990; restricted GATT document, 20 November 1990; restricted GATT document, 23 November 1990.
- 17 GATT document MTN.TNC/W/35/Rev.1, Uruguay Round – Trade Negotiations Committee – Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations – Revision, 3 December 1990.
- 18 GATT document MTN.TNC/W/FA, Uruguay Round – Trade Negotiations Committee – Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 20 December 1991.