

## Working together towards TRIPS

Thomas Cottier<sup>1</sup>

### Introduction

The negotiations on IP during the Uruguay Round of multilateral trade negotiations of the GATT (1986–94) were able to build upon a large body of existing law, both international and domestic. The main disciplines and notions of IP protection were already well established at the inception of the negotiations in 1986, with the adoption of the Ministerial Declaration in Punta del Este and its compromise that meant that negotiations would be conducted only on so-called trade-related aspects of intellectual property rights. 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 – both amounting to the very first multilateral agreements in the field of international economic law, long before the advent of the GATT in 1947 – provided the underpinnings in international law. More recent conventions, in particular the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) of 1961 and the more recent Washington Treaty on Intellectual Property in Respect of Integrated Circuits, adopted in 1989 but which never entered into force, added to these foundations. In domestic law, IP protection amounts to a mature field of commercial law in industrialized countries. This body of law strongly informed the IPR negotiations in the Uruguay Round. In addition, those engaged in the effort were able to benefit from extensive experience in the field of competition policy in these countries, in particular the experience of the United States (US) and the European Communities (EC) – later the European Union (EU) – which was one of the tools to curb excessive recourse to exclusive rights enabling dominant market positions and risk of abuse of these rights.

To some extent, building the TRIPS Agreement was an effort to bring these prior agreements and disciplines into the realm of the GATT and trade law and to further refine and expand them to global law, yet without seeking full harmonization. It

was also an effort to extend the application of IP rules and safeguards to new and emerging economies and to extend established principles of domestic law to this group of countries. Patenting pharmaceuticals and chemicals is a case in point. It was one of the main objectives of industrialized countries. It was certainly the main goal for Switzerland, given its strong pharmaceutical and chemical industry, which is one of the pillars of its export industry. To a considerable extent, however, it was also a matter of introducing new disciplines and of seeking new ground. For example, relying upon protection against unfair competition, new disciplines on geographical indications (GIs) and the protection of undisclosed information emerged and were adopted. Foremost, negotiations developed novel disciplines on enforcing IPRs, which had previously been completely absent from international law. The provisions on fair and equitable procedures, addressing civil, administrative and penal provisions, amount to the first GATT and WTO agreement on regulatory convergence. Based upon the traditions of Anglo-American law and continental European law, a set of procedural requirements and obligations were negotiated that were entirely new to public international law.

The results achieved exceeded the much more modest expectations that were held at the outset of the process. The concept of minimal standards reminds us of these modest beginnings. It is somewhat at odds with the high level of standards achieved by the end of the negotiations and which today is increasingly being questioned from a trade and competition policy angle. The negotiations produced an impressive set of detailed rules and established the base code for international IP for decades to come.

In the 20 years since its adoption, the Agreement has faced much criticism for its uniform and detailed high standards of protection, which are largely applicable irrespective of the levels of social and economic development and the needs of developing countries. The debate on access to essential drugs, leading to waivers and modifications of the provisions on compulsory licensing, or the debate on appropriate levels of protection for goods in transit, show that the quest for a proper balance and calibration of IPRs has not ended, but was just opened up with the adoption of the TRIPS Agreement in 1995. The forum shift towards preferential agreements in recent years, adding additional standards of increased IPR protection (TRIPS plus) shows that the battle is far from won. It takes place today mainly in other fora on the basis of a very substantial TRIPS Agreement with largely universal and uniform standards different from the philosophy of progressive advancement (in this case, progressive liberalization) otherwise found in the GATT and the General Agreement on Trade in Services (GATS).

The reasons for this remarkable, albeit controversial, result are manifold. It has been argued that the outcome is mainly due to the effort of private lobbies, in particular in the United States.<sup>2</sup> While these efforts were critical, in particular at the outset, they alone do not explain the results achieved. In hindsight, the geopolitical changes of 1989, with the fall of the Berlin Wall and the collapse of the Soviet Union, changed the rules of the game and countries were obliged to turn to market economy precepts, including appropriate levels of IPRs, in order to attract foreign direct investment, which was much needed at the time. It was the time of “the end of history” (as stated by Francis Fukuyama). Progress made in laying new foundations for liberalizing textiles, services and agriculture offered internal, albeit eventually unsuccessful, balances within the GATT during the negotiations and greater willingness to engage in negotiations on the part of developing countries. But in addition to these endemic factors, and perhaps more importantly, there were a number of endogenous factors which allowed the negotiations to move forward. It is to these that I turn in this chapter commemorating the twentieth birthday of the TRIPS Agreement. They relate to the process of mutual learning, the building of mutual trust, and the negotiating techniques used to build a common and comprehensive treaty text. While the literature discussing the substance and the implications of the TRIPS Agreement is vast,<sup>3</sup> much less has been written about the process by which the Agreement actually came about.<sup>4</sup>

### The learning process

The work of the Negotiating Group 11 assigned to trade-related IPRs (TRIPS) on the basis of the Punta del Este Declaration, at its inception and during the first years, may be well-characterized as a *dialogue de sourds* (a dialogue of the deaf). Discussions were based on introducing basic interests. Developed countries, led by the United States, and eventually joined by the EC, Japan and Switzerland, focused on the need for enhanced protection and the implications of insufficient protection observed around the world. In an early submission, Switzerland, for example, argued in favour of a strong linkage between trade and IPRs. “Proper protection of property is an essential precondition for trade at both national and international levels. In other words, if property is not protected, trade cannot expand and thrive.”<sup>5</sup> Developing countries, on the other hand, stressed the risks of monopolization, the resulting South-to-North transfers and the detrimental effects on the building of their own technology base. Neither camp was able to provide solid evidence in support of its views. They were essentially dominated by doctrines adopted and developed in the Organisation for Economic Co-operation

and Development (OECD), and United Nations Conference on Trade and Development (UNCTAD), respectively. Early proposals made the case for establishing IPRs in the trading system, or argued on the other hand for the need to minimize the effect of such rules in defence of domestic policy space and the need for flexibility commensurate with levels of social and economic development.

Eventually, engagement and discussions began. Many of the trade officials and diplomats assigned to the topic were new to IPRs, as the field was new in the context of the GATT, beyond unsuccessful discussions on combating counterfeiting and piracy held towards the end of the Tokyo Round. It was only at a later stage, if at all, that these officials were accompanied by specialists from their capitals. The Negotiating Group 11 was required to engage in a mutual learning process. This was a matter of becoming fully acquainted with the intricacies of IP and the various forms of protection, and with their functions and implications for the economy and international trade. But, most of all, it was a matter of fully understanding the interests and needs of others with a view to creating a common foundation upon which negotiations could eventually take place. It was here that I learned about the particular preoccupations of contracting parties, for example those with a strong generics industry, or the fear of abuse of rights, or the need to combine enhanced protection with enhanced transfer of technology and job creation. It was here that I learned about the importance of bringing about a proper balance while defending Switzerland's core interests, which lay mainly in the pharmaceutical and chemical sectors, machinery industry and extensive watch industry, all depending on patents and trademarks. Others would understand why patenting of pharmaceuticals and chemicals was of the utmost importance to Switzerland, as well as the introduction of effective protection of undisclosed information not only among private operators but also in the context of submitting test data in the process of drug approval before government agencies. Also, they would understand why a country like Switzerland depends upon enhanced protection of its specialty foods. It was thus that the protection of GIs eventually emerged as an important prerequisite for liberalizing trade in agriculture, but also laid the foundation for a larger coalition on offering protection beyond agriculture, in particular handicrafts, textiles and watches (see Thu-Lang Tran Wasescha, chapter 9). Next to enhanced market access in services, and thus negotiations on the GATS, IP amounted to the most important negotiating subject for the country. Defensive interests focused on agriculture and absorbed most of the governments' political capital. Without substantial results in services and IPRs, the Uruguay Round package as a whole was difficult to defend, given its potential negative implications, in particular on agriculture.

Learning on the job at this stage was one of the most rewarding experiences for me. The learning process took place in formal and informal meetings held throughout the negotiating process. Discussions increasingly resembled academic seminars, starting with a problem and the search for a common solution. I still recall, for example, the discussions on basic principles, the process of accommodating countries in the field of exceptions from patent rights, the development of disciplines on government use and compulsory licensing, and on developing transitional arrangements in patent law, combining special and differential treatment with the need for legal security and predictability. The same holds true, in particular, for negotiations on GIs or undisclosed information, and the new disciplines on enforcement of IPRs, combining common and civil law principles.

The input of the private sector was, as mentioned at the outset, of paramount importance. Interests and goals defined by contracting parties were largely influenced by domestic lobbies working with delegations. Direct influence was particularly strong in the US delegation. US interest groups also actively lobbied other delegations in Geneva in a concerted effort. Crucial in its importance and impact was the trilateral paper and draft proposal jointly submitted by the US, EC and Japanese industry associations in 1988.<sup>6</sup> Many of the formulations drafted therein influenced or even found their way into formal submissions of the respective contracting parties. They had a lasting influence, shaping the Agreement in its subsequent stages.

Internal preparations by the Swiss delegations were based upon regular internal meetings and briefings by the Swiss industry association (today *Economie Suisse*, represented by Thomas Pletscher and Otto Stamm) and interested circles, in particular relating to patents and trademarks (the chemical, machinery and watch industries) and copyright protection (collecting societies). Yet there was virtually no contact with individual companies, and finding out about the specific problems confronting them, beyond anecdotal evidence, was a particular difficulty the Swiss delegation faced. Companies were not willing to fully disclose the problems they faced abroad for fear that the information could be useful to competitors who were members of the same association. Non-governmental organizations (NGOs), other than those representing generic industries, defending developing country interests in the maintenance of low levels of IP protection, were not yet fully organized at the time and were not included in the process of defining negotiating interests and directions to be taken. The role of parliamentary committees was not yet developed in the field of international trade and the international dimension of IP. The Uruguay Round, however, created increasing awareness and the Swiss

Government and delegation was repeatedly called upon to address questions relating to the negotiations raised in parliament and by the public at large. The dialogue contributed to emphasizing and supporting reservations in the negotiations for the protection of environmental concerns and human dignity, and to the idea of a *sui generis* system of protecting plant varieties. In hindsight, a stronger influence of NGOs would have been beneficial in preparing an overall balanced result. I recall internal staff meetings held in May 1987 when arguments in favour of stronger disciplines on transfer of technology and on addressing restrictive business practices within the TRIPS negotiations were not taken up in further preparations for negotiations. Regular discussions were held among different governmental departments, in particular between the office responsible for external economic affairs at the Ministry of the Economy, responsible for overall GATT-related matters, and the Office for Intellectual Property at the Ministry of Justice and Police. Relating to enforcement and border measures, consultations were mainly held with the Customs authorities of the Ministry of Finance. Coordination among these different departments benefited from the fact that the people concerned within the Swiss Federal Administration and the GATT delegation were all well acquainted. Within the general and specific goals set, the negotiating team was given ample leeway. The business was conducted by setting objectives. No micro-management by the heads of the Swiss delegation, Secretary of State Franz Blankart or Ambassador David de Pury, took place.

### **Building mutual trust and inclusiveness**

Understanding problems, issues and interests and conceptual work towards commonly accepted solutions did not happen on its own. It was accompanied by a process of building mutual trust among delegations and the Secretariat. It was characterized by inclusiveness of all those who had a strong interest in the subject and were willing to engage and participate in the negotiations. Not all of those who were active participants in the Negotiating Group can be mentioned here, but a few stood out and essentially formed the inner circle of the operation. The Chair of the Negotiating Group, Ambassador Lars Anell of Sweden, enjoyed the trust of all. He was impartial and open to all concerns alike. He was supported by a very able and neutral Secretariat with David Hartridge, eventually led by Adrian Otten and his staff, including Daniel Gervais, Arvind Subramanian and Matthijs Geuze. The Chair and Secretariat in the TRIPS negotiations operated an open and inclusive process. All contracting parties who were interested were able to participate if they so wished. There were only a few instances when interested parties, even among the Friends of Intellectual Property group, were deliberately

excluded, for example while discussing restrictive business practices (informal meeting, 10 and 11 September 1989). Trust in the work of the Chair and the Secretariat was crucial and essential in running a largely informal, inclusive negotiating process in which all those voicing an interest were able to participate. Importantly, the composition of key delegations was stable and did not substantially change over time. As Gervais later noted, "Participants were more or less the same people at all meetings and got to know one another quite well."<sup>7</sup>

Trust was essential in compiling the proposals and developing the textual negotiating documents and subsequent versions of the composite text discussed below. The process was ably steered by the Chair and supported by the Secretariat; this also facilitated the gradual building of trust among delegations. Negotiators worked in an environment which allowed them to put problems and issues on the table in a frank and open manner. Negotiations were actively followed by some 25 contracting parties, with Argentina, Australia, Brazil, Canada, Chile, the EC, Hong Kong, India, Japan, Malaysia, New Zealand, Switzerland and the United States playing the most active parts. Discussions among these contracting parties were largely held in an open and transparent manner. There were, at least until the very last moments of the negotiations, no behind-the-scenes deals. Rather, the body of the text, together with all the brackets, was drafted in a joint effort.

The US delegation, led by Bruce Wilson, Michael Kirk, Michael Hathaway and Catherine Field, played a crucial role in offering transparency. In a series of bilateral meetings, delegations were able to react to proposals made and accommodations were sought to the utmost extent possible, taking up concerns voiced. The EC delegation, led by Mogens Peter Carl, Christoph Bail, Jean-Christophe Paille, Jörg Reinbothe and Hansjörg Kretschmer, mainly focused on coordinating EC member states and consolidating their varied interests and goals. The fact that, at the time, IP was not an established field of legal harmonization in European internal market law (apart from the case law of the European Court of Justice) rendered it a matter of extensive internal consultations, which often led to other delegations being kept waiting until meetings could start with GATT delegations. The position of the Commission, owing to the constitutional set-up of the EC at the time, was a challenging one of having to navigate between external and internal negotiations, between Charybdis and Scylla. Contracting parties sometimes double-checked information with delegations of other GATT contracting parties in order to get the full picture, in particular European Free Trade Association (EFTA) countries. The setting of what eventually qualified the TRIPS Agreement as a mixed agreement under EU law in Opinion 1/94 of the European

Court of Justice rendered negotiations more demanding than under today's powers granted under Article 207 of the Treaty on the Functioning of the European Union, including IPRs in European trade policy powers. Clear internal allocations of powers facilitate transparent modes of negotiation.

Canada, another member of the "Quad" (Canada, the EC, Japan and the United States) and led by John Gero, assumed an important role in bridging interests between industrialized and developing countries, given its strong interest at the time in defending a generics-based pharmaceutical industry. Japan, the fourth member of Quad, with its large delegation led by Shozo Uemura and Kazuo Mizushima, actively intervened in formal meetings and played a discreet but important role in informal discussions, in particular among Quad members. India, the leading voice of the developing countries, led by A.V. Ganesan and Jayashree Watal, together with Argentina, led by Antonio Gustavo Trombetta, and Brazil, represented by Piragibe dos Santos Tarragô, were the main representatives of the developing countries present at the negotiating table. African countries, except Egypt, Nigeria and Zaire (in the early phases), were largely absent at the time, certainly from the inner circle of negotiations. This was particularly true of South Africa, which at the time was under a regime of anti-apartheid economic sanctions, and essentially silenced. Among the other Asian countries that participated actively, to the extent that they were already GATT contracting parties at the time, Korea, Thailand, Malaysia, Singapore, Indonesia, the Philippines and Hong Kong come to mind. Developing countries, except for the larger ones, faced the problem of understaffing and the challenge to cover all the subjects discussed in the Round, including IP. The voice of China, while a candidate for accession, was not heard during the talks. BRICS (the major emerging national economies of Brazil, the Russian Federation, India, China and South Africa) did not exist at the time.

It would, however, be wrong to assume that the TRIPS negotiations were essentially limited to the Quad and the leading developing nations, in particular Argentina, Brazil and India. Smaller countries made important contributions to the debate. In addition, Australia, represented by Patrick Smith, played an active part in the negotiations, in particular in relation to industrial property, in particular patents, and design protection for textiles. Together with Chile, Australia was most active and persistent in the field of GIs, wishing to ensure protection of its growing wine industry using traditional European names. New Zealand was represented by Adrian Macey, a thoughtful and active diplomat, Hong Kong by Peter Cheung, John Clarke and David Fitzpatrick, with his unique Welsh sense of humour, and Malaysia by the articulate Umi Kalthum Binti Abdul Majid. Switzerland was represented by Thu-Lang Tran Wasescha, Luzius Wasescha, William Frei and

myself, and enjoyed the privilege of having its additional Bern-based staff members Pietro Messerli, Carlo Govoni, Philippe Baechtold, all of the Federal Office of Intellectual Property (today the Swiss Institute of Intellectual Property), and Hermann Kästli of Customs Administration close by. The combination of generalists and specialists worked out very well and formed a strong team. The Nordic countries had a strong voice in the field of copyright with Jukka Liedes and Hannu Wager from Finland, but otherwise there was little coordination among EFTA countries due to a divergence of interests.

Indeed, the diverse interests and varied goals opened the door for flexible coalitions which varied among different subjects and even forms of IP protection. Such variable geometry and flexibility allowed progress to be made and avoided stalemate. Beyond the early stages, the alignments among the Group of 77 (for developing countries) and the B group (for developed countries), paramount in WIPO and other UN agencies, did not materialize in GATT talks. Each of the contracting parties would, at some point, find itself in agreement with another contracting party despite having divergent views on other subjects. This largely contributed to the building of mutual trust on the one hand and a rational distinction of diverging interests, goals and mutual confidence on the other hand. For these reasons, the TRIPS negotiations, contrary to the usual public perception, were much less a North–South negotiation than a negotiation among a divergent group, often with major difficulties to be solved, among industrialized countries. (The subsequent record in TRIPS-related dispute settlement confirms this point. Most of these cases have been filed by industrialized countries against other industrialized countries; only a few have been filed against or between developing countries).<sup>8</sup>

Of particular importance in building trust were informal meetings held outside the premises of the GATT over the weekends. The Swiss delegation and its Geneva-based mission under the auspices of Luzius Wasescha and William Frei, organized and chaired a series of meetings of the Friends of IP,<sup>9</sup> with gradually increasing participation. Meetings were held in Coppet (7 February 1990, organized by the Japanese mission) and during two weekends in Gruyères (14 and 15 September 1989) and in Zug (28 and 29 October 1989); the latter one also included the delegations from interested developing countries, in particular Brazil, India and Thailand. These informal meetings organized by the Swiss were crucial, not only to advance common thinking towards solutions, but also to deepen acquaintances with colleagues and to learn more about the needs of contracting parties and delegations in a relaxed atmosphere and in circumstances of mutual respect. These were good moments, often with a helpful sense of humour. Understanding

and mutual respect, sometimes even friendship, did not run counter to defending interests in an open and transparent manner; quite the contrary. These encounters greatly facilitated work back in Geneva and paved the way for making progress on the texts.

A further meeting was organized by the EC, and the French delegation in particular, in Talloires (12 December 1989), and later on meetings were held among extended Quad members, including Switzerland, in Chouilly (17 May 1990) and in Geneva (21, 22 and 26 June 1990). Delegations met in different discussion groups throughout the heyday of the negotiations in 1989 and 1990: the Boeuf Rouge Process,<sup>10</sup> and the Anell Group, which consisted of the “most interested participants”, known as 10+10,<sup>11</sup> included, in particular, Brazil and India.<sup>12</sup> The Association of Southeast Asian Nations (ASEAN) Group on Enforcement, the Andean Group, and bilateral talks between different parties, in particular the EC and the United States, further characterized the architecture of the process.

These groupings (and perhaps additional ones not on my record) were crucial not only for mutual understanding and resolving outstanding issues, but also in forming flexible coalitions and advancing negotiations. It is impossible to recall and list all the informal activities that were going on at the time. Many will remain unrecorded in the history of the TRIPS negotiations. But overall, relations among negotiators were conducted in a spirit of transparency and openness, creating mutual trust. They were more important than the formal meetings that were regularly held in Geneva for the record.

The fact that many of the TRIPS negotiators met at the WTO 20 years after the entry into force of the TRIPS Agreement<sup>13</sup> reflects the level of understanding and trust which the core group was able to create. In hindsight, it amounts to the most valuable asset and explains much of the success to the extent that it was in the hands of negotiators and delegations.

### **Building the TRIPS Agreement**

The TRIPS Agreement amounts to the most comprehensive international treaty in the field of IPRs. Incorporating the Paris and Berne Conventions, it provides the basis for the additional commitments eventually made in preferential trade arrangements (PTAs), subject to the national treatment and most-favoured nation (MFN) obligations of the TRIPS Agreement. In addition to the factors mentioned above, the methodology for building the Agreement through the process of consultations and negotiations deserves highlighting.

The different stages of the process are aptly described in the paper by Adrian Otten in this volume (see Adrian Otten, chapter 3). Reviewing different generations of submissions, the process started with conceptual papers, emphasizing the interaction between trade and IP and establishing the latter as a proper subject for GATT talks. The Swiss delegation initially proposed to build a TRIPS agreement on the basis of GATT disciplines of nullification and impairment, developing normative principles and an indicative list of types of conduct considered detrimental to international trade.<sup>14</sup> The idea of an indicative list was not considered sufficient and was eventually replaced by proposals for minimal standards, in the second generation of submissions. The submissions at the time were all strongly influenced by the trilateral paper jointly prepared by the industry associations of the EU, Japan and the United States, as well as other inputs.<sup>15</sup> Further efforts resulted in the submission of a complete draft agreement in May 1990.<sup>16</sup>

The Chair and the Secretariat compiled these proposals in a systematic manner, first indicating the source of the proposal in a composite draft text,<sup>17</sup> and later deleting its authorship and provenance.<sup>18</sup> Negotiators started a process of condensing and refining by means of eliminating and combining different proposals of which the origin was no longer transparent. A checklist of issues and open questions, prepared by the Secretariat, was a most helpful aid to this process.<sup>19</sup> The negotiations led to a sequence of draft texts still containing a considerable amount of brackets, which were mainly addressed in informal sessions. The technique of using compilations and draft texts compiled, but also structured, by the Chair and the Secretariat amounts to one of the most remarkable features of the process of building up a complex agreement. The work resulted in a second and almost complete draft by the December 1990 ministerial meeting in Brussels.<sup>20</sup> The draft was further negotiated in 1991 and the so-called Dunkel Draft of December 1991 found its way, with minor amendments and upon legal checking and integrating a separate draft agreement on counterfeiting, into a single TRIPS instrument, inserting it into the dispute settlement system and into the overall package deal completed in 1993.<sup>21</sup> The TRIPS Agreement was completely negotiated within the Negotiating Group and no arbitration was required in the so-called Green Room, i.e. horizontal talks among Geneva-based ambassadors chaired by the Director-General of GATT.

It is fair to say that, without these complex and gradual steps, the TRIPS Agreement could not have been achieved, with its comprehensiveness and overall structure, nor organized into general provisions, standards relating to the different forms of IP, enforcement and due process, and transitional arrangements. The result was due to a well-structured negotiating process, clearly dedicated to

different issues, which also allowed experts to be flown in from the capitals to deal with specific issues.

## Conclusions

Perhaps once in a lifetime a negotiator meets a window of opportunity comparable to that afforded by the TRIPS negotiations. Endemic and endogenic factors were matching at the time, allowing for results which today are unlikely to be achievable. Lessons to be learned need to take into account the geopolitical changes that have come about in the meantime: they only allow for very limited conclusions. Yet lessons relating to the learning process – the need to primarily understand the needs of partners and what they are compelled to bring to the table and to bring home – remain valid today. A deliberate process to build mutual trust and run an open, transparent and inclusive process in close cooperation with the Secretariat of the WTO remains an important prerequisite to success in regulatory matters. Transparency and building trust does not exclude informal meetings. To the contrary, they are essential to making progress. Of course, there were also confidential meetings among different partners in the flexible and changing coalitions. Yet, to the extent that they existed, they were not able to destroy mutual trust. Never was there a climate of profound distrust, despite all the different interests and goals at stake. The techniques employed, with conceptual papers, comprehensive and selected proposals, compilations and composite texts, and regularly updated negotiating texts that no longer indicate the source, are most suitable for addressing complex regulatory issues of the kind the WTO will face in its future work. These lessons from the TRIPS negotiations deserve to be learned and remembered.

A look back at the process of the TRIPS negotiations cannot be concluded without a critical note. In hindsight, the process failed to address the problem of maximal standards and to properly balance exclusive rights beyond fair use and compulsory licensing. When the levels of protection unexpectedly increased and were refined, ceilings and a closer link with competition policy safeguards would have been warranted. In fact, negotiations should have extended into disciplines of competition policy relevant to IPRs, much as they could be partially observed in the reference paper on telecommunications in the GATS. Instead, the TRIPS Agreement left its parties with policy space to address competition policy in domestic law, ignoring the fact that most countries at the time would have had competition law and policies in place. Perhaps the subsequent debate on access to essential drugs and the changes to the law of compulsory licensing could have been prevented if a broader approach had been adopted. The concept of minimal

standards opened the door for ever-increasing levels of protection when for a eventually shifted to PTAs. No ceilings were built into the Agreement. The implications of national treatment and MFN, lifting global standards by means of these agreements, were not sufficiently anticipated at the time. Except for least-developed countries, most of the rules applied across the board, irrespective of levels of social and economic development. Special and differential treatment was not properly settled and subsequently led to proposals on graduation and a return to more flexibility based upon economic indicators built into a future revised TRIPS Agreement.<sup>22</sup> These deficiencies of the TRIPS Agreement are perhaps also due to the fact that, at the time of the Uruguay Round, there was insufficient debate with NGOs. Except for Greenpeace, globally active organizations such as Oxfam or Médecins Sans Frontières were not yet active in the field as they are today, and protests were anecdotal. Also, the linkages to WIPO and the World Health Organization (WHO), or the human rights bodies of the UN were not sufficiently developed, and the TRIPS negotiations were largely perceived at the time as a matter of unfriendly takeover of, instead of cooperation and joining forces with, other international organizations and bodies. The input to the negotiations largely came from industries and professional organizations interested in enhanced protection of IPRs. Governments and negotiators were not always able to arbitrate and establish a proper balance between right owners and users in the respective fields. These are also lessons which can be learned from the experience of negotiating the TRIPS Agreement in the Uruguay Round.

## Endnotes

- 1 I am deeply indebted to Thu-Lang Tran Wasescha for sharing her memory, and to her and Jayashree Watal for valuable comments on the chapter. I am grateful to Erich Gehri, Swiss Intellectual Property Institute, for checking a number of dates in the official Swiss negotiating record.
- 2 Susan K. Sell, *Private power, public law: The globalization of intellectual property rights* (Cambridge: Cambridge University Press, 2003), 2, 164, 171 and passim.
- 3 The author's contributions to the topic include: "The Agreement on Trade-Related Aspects of Intellectual Property Rights", in Patrick F.J. Macrory, Arthur E. Appelson, and Michael G. Plummer, eds., *The World Trade Organization: Legal, economic and political analysis*, volume I (New York: Springer, 2005): 1041-1120; *Trade and intellectual property protection in WTO law: Collected essays* (London: Cameron, 2005); *International intellectual property in an integrated world economy*, with Frederick M. Abbott and Francis Gurry, 3rd revised edition (The Netherlands: Wolters Kluwer, 2014); *Concise international and European IP law: TRIPS, Paris Convention, European enforcement and transfer of technology*, editor with Pierre Véron, 3rd edition (The Netherlands: Kluwer, 2014).
- 4 For an analysis of the TRIPS negotiating history, see Daniel J. Gervais, *The TRIPS Agreement: Drafting history and analysis*, 3rd edition (London: Street and Maxwell, 2008), 10-26. For a paper contemporary to the negotiations, see Thomas Cottier, "The prospects for intellectual property protection in GATT", *Common Market Law Review* 28 (1991): 383-414.
- 5 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.
- 6 Intellectual Property Committee (US), Keidanren (Japan), Union of Industrial and Employers' Confederations of Europe (UNICE), (June 1988), *Basic Framework of GATT Provisions on Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities*.
- 7 Supra note 3 at 21 footnote 74.
- 8 Matthew Kennedy, *Dispute settlement and the WTO TRIPS Agreement: Applying intellectual property standards in a trade law framework* (Cambridge: Cambridge University Press, 2015).
- 9 The Friends of Intellectual Property group included Australia, Austria, Canada, the EC, Finland, Hong Kong, Japan, New Zealand, Norway, Sweden, Switzerland and the United States.
- 10 The Boeuf Rouge group of medium-sized countries included Argentina, Australia, Austria, Canada, Colombia, Finland, Hong Kong, Hungary, Israel, Malaysia, Mexico, New Zealand, Nigeria, Norway, Singapore, Sweden, Switzerland, Thailand and Uruguay. Boeuf Rouge refers to a restaurant, the Bistrot du Boeuf Rouge, located in the Paquis district in Geneva, where these negotiators met.
- 11 Gervais note 3 at 23.

- 12 The Anell Group (named for the Ambassador and Chair of the TRIPS Negotiating Group) included, with varying composition depending on the subject matter, Argentina, Australia, Austria, Brazil, Canada, Chile, the EC, Hungary, Hong Kong, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, Norway, Peru, the Philippines, Sweden, Switzerland, Thailand, Turkey and the United States.
- 13 The TRIPS Symposium organized by the WTO Secretariat on 26 February 2015 brought together many contributors to this volume.
- 14 GATT document MTN.GNG/NG11/W/15, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Suggestion by Switzerland for Achieving the Negotiating Objective, 26 October 1987; GATT document MTN.GNG/NG11/W/23, 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, 26 April 1988.
- 15 GATT document MTN.GNG/NG11/W/38, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Standards and Principles concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights – Communication from Switzerland, 11 July 1989; GATT document MTN.GNG/NG11/W/38/Add.1, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Standards and Principles concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights – Communication from Switzerland – Addendum on Proprietary Information, 11 December 1989.
- 16 GATT document 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.
- 17 GATT document MTN.GNG/NG11/W/12/Rev.1, 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 – Revision, 5 February 1988; restricted GATT document no. 1404, Composite Draft Text, 12 June 1990; GATT document MTN.GNG/NG11/W/33/Rev.2, 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 – Revision, 1 February 1990.
- 18 GATT document MTN.GNG/NG11/W/12/Rev.1, 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 – Revision, 5 February 1988; restricted GATT document, 12 June 1990; GATT document MTN.GNG/NG11/W/33/Rev.2, 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 - Revision, 1 February 1990.

- 19 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, 23 November 1990.
- 20 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.
- 21 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, Annex III; restricted GATT document, 21 June 1992; restricted GATT document, 27 June 1992.
- 22 See Thomas Cottier, “From progressive liberalization to progressive regulation in WTO law,” *Journal of International Economic Law* 9 (2006): 779-821.