

## Why we managed to succeed in TRIPS

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There have been many books and articles written about the TRIPS Agreement. Most go into great detail over the costs and benefits of the various provisions of the Agreement. As one of the negotiators of the Agreement, I will not attempt to debate such an analysis. Rather, this chapter will provide brief, personal reflections of my experiences during the negotiations, which have had a significant impact on the rest of my career as a Canadian diplomat focusing on trade issues.

The most important aspect of these negotiations for me was that people matter and, more particularly, one's interpersonal relationships with people matter a lot. These relationships played a significant role, not often truly recognized, in the successful conclusion of the TRIPS Agreement. The TRIPS Negotiating Group was blessed to have a superb group of negotiators, but so did many of the other negotiating groups. We were also blessed with two other aspects. We had a phenomenal Chair in Ambassador Lars Anell, who exhibited the finest traditions of Swedish diplomacy and knew how to push us, pull us back a little bit and get the best out of us. I am personally convinced that this Agreement would not have happened without his chairmanship. We also had a superb Secretariat team, led by David Hartridge and Adrian Otten. Importantly, we got to know them and trust them. We recognized that the Secretariat was not our enemy, although, at the beginning of the negotiations, we were all very hesitant about letting the Secretariat do anything. Ultimately, we learned that we had a Secretariat who knew how to listen, who knew how to think, who knew how to be fair in reflecting conflicting viewpoints and who knew how to write, and we used those skills to maximum advantage. Therefore, the first answer to the question of why the TRIPS Agreement happened is that it was the people who were involved and the relationships of trust that they established that made it happen.

At the time, all we knew was the GATT, and we had 40 years of experience of knowing how to put square pegs into square holes. However, the Uruguay Round

of multilateral trade negotiations was different. All of a sudden, we were required to deal with circles and octagons, in areas such as services and IP. When we tried using square pegs (i.e. the GATT concepts), they did not always fit. Therefore, the second aspect that led to a successful TRIPS Agreement was the ability of the negotiators to think on their feet, using new methodologies and new perspectives. Many of the concepts that we had learned over the past four decades as trade negotiators, concepts that were totally unfamiliar to our IP colleagues in our national capitals, had to be adapted or even discarded in the context of the TRIPS negotiations. The GATT had largely dealt with border measures. Services and TRIPS were creating a new kind of international regulatory agreement that was walking a very fine line between international obligations and the right of countries to regulate their national economies, as we were actually establishing new global societal norms. This led us towards negotiating not traditional trade policies but domestic economic policies that had an impact on trade. We had to look at this prism from a new angle.

For example, one of these concepts was the non-violation provisions of the GATT. They had worked well as part of the GATT, but here was an example of trying to make a square peg fit into a round hole and, for the longest time, we did not know what to do with it. Some felt that the concept should not be a concept in a TRIPS agreement, while others felt that it was absolutely necessary. We finally agreed on a compromise, which placed it in the text but also waived its application, leaving it to future generations to come to grips with its ultimate effect. Canada can be blamed or thanked, depending on your perspective, as being one of those that emphasized that this square peg would not fit into the round hole of the TRIPS Agreement. In the case of non-violation, there was the important issue of policies that governments could follow that did not violate the TRIPS Agreement but that could still be the subject of a non-violation case. At that point in time, Canada was specifically concerned about pharmaceutical price controls that would not be contrary to any provision of the TRIPS Agreement but could conceivably be subject to a nullification and impairment case under a non-violation clause. In today's context, it would be interesting to contemplate what the Australian tobacco case would have been if recourse to a non-violation, nullification and impairment clause had been available.

There can be a tendency among negotiators to pass the buck, by either pushing it upwards to politicians or entrusting it to some third-party arbitrator. This way, it is easier to stick to firm negotiating positions and blame someone else if a compromise to a national position is made. There has been a mythology created, in the context of the Uruguay Round, that this methodology was followed by the

negotiators. The so-called Dunkel Draft is being perceived as a message from God that descended upon the office of Arthur Dunkel, Director-General of the GATT, late in December 1991, which Arthur Dunkel then delivered to the multitudes, as a third-party arbitrator. The third reason that the TRIPS Agreement happened is that this is a false perception. In the case of the TRIPS negotiations, the Dunkel Draft, in essence, had been 95 per cent thoroughly and utterly negotiated and vetted by the contracting parties. Under Ambassador Lars Anell, the Negotiating Group was a very hard-working group. The negotiators were meeting in all sorts of dingy corners of Geneva, poring over the nuts and bolts of the agreement. Furthermore, the term “negotiated by the members”, meant that all negotiators were under very close political guidance from their capitals, given the political sensitivity of many of the issues involved. This close link between the negotiators and their ministers was vital to the ultimate success of the negotiations. In the Canadian context, agreeing to the TRIPS Agreement involved a number of significant policy and legislative changes to the Canadian patent system. As negotiations were going on in December 1991, the Canadian delegation sat in sessions as late as 1 a.m., waiting for instructions from our capital, because the Canadian Cabinet was meeting in Ottawa where it was only around 7 p.m. The Canadian delegation had to keep open a constant line of communication between Geneva and Ottawa to determine whether it could agree to the Chair’s latest text, which used certain language more acceptable to Ottawa but which still implied significant changes for the Canadian patent system. This was an important dimension of the TRIPS negotiations at a crucial stage. While, in the end, there was a certain amount of give and take, to a large extent, it was the blood, sweat and tears of the negotiators talking, working things through, negotiating and coming to solutions based on compromises that led to an agreement. There was no shortcut to sitting down with one’s colleagues and negotiating, spending the time and effort to understand each other’s problems and trying to figure out solutions by trusting each other.

There seems also to be a mythology that the TRIPS negotiations were a North–South negotiation. It was not. In fact, most of the negotiations were North–North in nature. The developed countries were split as badly as were the developing countries. All countries’ IP laws attempt to find a societal balance between inventors or creators and users. Each party to the negotiation had been trying to find such a balance in a national context for the past 100 years. Interestingly, these balances are constantly shifting according to developments within a society. Not surprisingly, therefore, in attempting to find global balances, each country attempted to enshrine its own laws, balances and interests. Where we got lucky in the TRIPS Agreement,

is that we were having approximately a dozen negotiations in parallel. We all had offensive and defensive interests. Since countries negotiate in their national interests, alliances were formed, but, given the multifaceted nature of the TRIPS negotiations, there were always shifting alliances. India and Canada may have had differences with the United States and the European Communities (EC) on patents, but India and the United States shared similar interests on copyrights. On the subject of geographical indications, India and the EC had differences with Canada and the United States. These shifting alliances forced the development of trust and cooperation among the negotiators, since they changed from being allies to adversaries, and vice versa, as they moved through the various parts of the text. As a result, TRIPS negotiations were not a simple “theological” negotiation or rift between developed and developing countries.

Finally, negotiators of the TRIPS Agreement had to learn not to underestimate the value of finding simple solutions. Given the complexity of the subject matter, it was not unusual to have lengthy “theological” discussions based on one’s own policies and laws, but such discussions could not yield negotiated solutions. The negotiations on the enforcement section of the Agreement featured lengthy treatises on the benefits of civil law versus common law, and vice versa. Ultimately, the simple solutions that were found were based on the common principles underlying both types of law. Another example was the discussions on the patentability of life forms. The Harvard mouse, that famous little mouse, had been patented in the United States and there were substantial “theological” arguments about whether one should or should not be able to patent life forms. Countries took widely varying positions in that regard. All negotiators were bombarded by various interest groups that were either scared of, or in favour of, such patents. There were heated discussions about how such a practice would lead to the patenting of cows, and how that would enhance or destroy the whole agricultural sector. Ultimately, negotiators began to examine what countries actually did. When we looked at our own national practices, we found that they all used very similar language. In essence, differences arose because courts had interpreted these provisions differently in different jurisdictions. Ultimately, we found that, if we went back to the language that existed in some of our practices, a solution could be found. That is why the section on the patentability of life forms is a very close parallel to the actual Canadian practice at that time.

What this brief chapter demonstrates is that there was no magic or divine guidance in reaching an agreement on TRIPS. All that it took was a number of skilled and dedicated people working together in trust in the right global political environment. Fortunately for me, I was present when it happened.