

Revisiting the TRIPS negotiations: Genesis and structure of this book

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

The TRIPS Agreement was the product of an unusually successful and effective multilateral negotiation process. The Agreement, and the negotiations that led to it, have since spawned a voluminous scholarly and academic literature. That literature still lacks a full inside perspective of the negotiations and thus can overlook some of their most distinctive and instructive characteristics. Few of the original negotiators - who mostly worked in other professional or official roles in their subsequent careers - have set down their reflections on the process, and their potential contribution to a richer and more informed account of the negotiation

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

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

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

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

Part I: Introduction, context and overview

Part II: Anatomy of the negotiations

Part III: Perspectives from the developed world

Part IV: Perspectives from the developing world

Part V: Negotiating substantive areas of TRIPS

Part I contains this general introduction to the book followed by a thematic overview of the negotiations.

This part begins with a key contribution by Adrian Otten, a central figure in the GATT and WTO Secretariats who has 25 years of unequalled experience with the development and implementation of the TRIPS Agreement both before and after the establishment of the WTO. His chapter describes the formal and informal negotiating processes and sets the scene for the later contributions to this volume. It can be used as a compass to guide the reader through the rest of this book: other contributors add layers to his foundation. His contribution provides an authentic timeline and background of the negotiations starting from the Tokyo

context. He sets the negotiations within their full historical context, describing the pivotal period of the relaxation of East-West confrontation, the resultant political transformations, and a period of economic optimism as the chief factors behind the success of the Uruguay Round. He offers an insider's account of the distinctive manner in which the EC delegation prepared for and engaged in TRIPS negotiations, and its unique model of engagement with stakeholders and the member states of the European Communities (EC). Mr Carl maintains that the TRIPS negotiations cannot be reduced to classical trade "bartering" but were

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

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

A.V. Ganesan negotiated on TRIPS for India at several stages, from 1987 to 1989 and again from 1991 to mid-1993, and played a key role in negotiating what became known as the Dunkel Draft in December 1991. He traces the approach taken by developing countries in general and India in particular from the launch of the Uruguay Round onwards. Initially, India took the position that substantive norms of IPRs were not incl2.2 (r5l)1.4 2 (r6)-13.7 (R)-13.dncl2.2 (ra())TJ 0 T5TJ 0 T5

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

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

Part V looks closely at the negotiations in three substantive areas of TRIPS, which had contrasting negotiating dynamics: the texts on patents, on copyright, and on the settlement of disputes. TRIPS largely gives effect to existing international copyright law in the form o004 Tc -0. (h)0.5 (l)12.4actec83.6 (e s)8.9igh n.5 (e)6.8 (t)

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

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

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

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

