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## A [illegible]

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.

## B [illegible] A

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.d(h)-shdJ1(sh)-2.d raccorded to national products. This requirement is tempered 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

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.[21] 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.

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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.[22] 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).[23] 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 examt Minthe1 (x)-2.9 (a)-6.81

Pursuant to the 1982 Ministerial Declaration, consultations with GATT contracting parties were held by the then Deputy Director-General, M.G. Mathur, and

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

> *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.

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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 availa.6 (e a)7b.a

# The TRIPS negotiations: An overview

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

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

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

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

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 nationaional and

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

One feature was that developed and developing Commonwealth countries, which s.6 v 1oah

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

of economic planning and import substitution policies followed by many developing

expectation of greater security of the benefits being negotiated, but it does the

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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; MTNitze, India, Ni2sNegotiatinsNegdlncluding Trade