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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,

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.[2] 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,[3] much less has been written about the process by which the Agreement actually came about.[4]

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."[5]

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

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

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."[7]

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 Mizushuma, 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 fielemi[N)-7.2 (o.5 3.1 (l)1.6(i)-3.1 (e)5.3 (t v)7.2 (e)2

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 Choully (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,[10] and the Anell Group, which consisted of the "most interested participants", known as 10+10,[11] included, in particular, Brazil and India.[12] T nt6 (a)--2.1n di

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

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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 fora 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.[22] 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

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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.

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