

The Making of the TRIPS Agreement

Personal insights from the Uruguay Round negotiations

Edited by Jayashree Watal and Antony Taubman



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Cover photo “Peace” (1925), by Genevan artist Luc Jaggi (1887-1976), which adorns the left side of the main entrance of the Centre William Rappard, home of the WTO. (c) WTO/Pierre-Yves Dhinaut. This image recalls the reference in the Preamble of the WTO TRIPS Agreement to the shared emphasis among WTO members on “the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures”.

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Negotiating for Switzerland

Thu-Lang Tran Wasescha¹

Introduction

Learning is a continuing process in one's life. Some lessons are well archived on our "personal hard disk", with learning by doing being the most efficient method of saving those lessons. Negotiating the TRIPS Agreement was "unforgettable", to cite a famous American TV series. Indeed, it is one of the most well-archived and prominent learning experiences of my career. Having been born and grown up in a developing country, namely, Viet Nam (south), with its realities printed in my DNA, I came a long way, eventually working at representing a small developed country. Switzerland, which is characterized by an economy based on free enterprise, innovation and exports of manufactured goods and services, as well as by a compromise-oriented "culture" in terms of policy, law-making and negotiating, set the stage for this learning experience in the field of IP, prior, during and after the Uruguay Round of multilateral trade negotiations under the GATT.

As a law student, I worked part time in a small private trademark bureau, which specialized in trademarks and applications for drugs marketing authorization by the Interkantonale Kontrollstelle für Heilmittel (IKS, Intercantonal Office for the Control of Medicines), now called Swissmedic. It was bureaucratic and technical work but educative. I joined WIPO, first as a trainee, and finally moved up as Senior Legal Officer in the Industrial Property Division.² There, I learned the complex and subtle art of combining substance and diplomacy – at both internal and external levels. In 1987, I joined the Federal Office of Intellectual Property in Bern – now the Swiss Federal Institute of Intellectual Property – to deal with international affairs. This covers WIPO, the GATT, the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the International Labour Organization, the Organisation for Economic Co-operation and Development (OECD) and the Food and Agriculture Organization. I also dealt with environmental issues (notably, biodiversity), human rights, bilateral and regional affairs and

negotiations, for example EFTA,³ the EU and third countries. After 14 years, the most challenging period for me as a civil servant, I joined the WTO Secretariat (Intellectual Property Division). It was a great school of intellectual rigour for navigation in waters with cross currents. I served as Secretary to the Special Session of the TRIPS Council, the negotiating group on the establishment of a multilateral system of notification and registration of geographical indications (GIs) for wines and spirits. I would not have been able to live through all these interesting experiences without all those who gave me that opportunity. The Uruguay Round experience is, for me, “unforgettable”, not only for its various processes of high intellectual and negotiating complexity but also for this unique human touch, formed by colleagues, delegates, a very professional Secretariat led by Adrian Otten, and a brilliant Chair, Ambassador Lars Anell. That human touch greatly facilitated dialogue, set alight sparkles of ingenuity and led to success.

This chapter does not have the ambition of being a rigorous scientific work. It is a mere recollection of experiences and observations, a mix of anecdotes, remembrances and descriptions of the Swiss approaches. It cannot but be an individual and subjective perception of the landscape of that time.⁴ This, I hope, may help the reader understand the Swiss role, in addition to chapter 4, by Thomas Cottier.

This chapter first gives an overview of considerations that made Switzerland embark on a long journey of some eight years to the very end of the negotiating round. It gives a brief list of the areas of focus for Switzerland. It will then address some specific aspects of TRIPS Article 27 (patentability), and Articles 22–24 (GIs). Finally, this chapter offers some reflections on the future if lessons learned from the past could at all help avoid errors, and if future and creative thinking by the new generations of negotiators or Secretariat staff could ensure a coherent development of the TRIPS framework, and not disrupt a delicate balance.

Overview of considerations before the Uruguay Round negotiations

The pre-Uruguay Round phase

Globalization hit market economies, the “peak” being in the 1970s to 1980s. While it had not reached today’s dimensions, it was the first challenge for economic players and governments, particularly newly independent countries facing the challenges of political change, and for other governments needing to step outside the comfort zone of uninterrupted economic development and business models. It changed the market access conditions for entrepreneurs. New technology

acceleration implied adjustments, sometimes drastic, for many small and medium-sized entrepreneurial businesses, including the loss of markets, bankruptcy and job losses. As a civil servant – both international and national – I unfortunately witnessed a number of such casualties. But, as the old saying goes, there are two sides to every coin. Technology also facilitated easier counterfeiting and piracy. This phenomenon was not easy to combat due to mobility, that is, the capacity of counterfeiters – producers and distributors – to move from one place to another: closing down a counterfeit-producing premise, even if such enforcement action was taken in a country, rarely resolved the problem. Judicial or administrative costs discouraged actions abroad. In any event, they were beyond the reach of small and medium-sized enterprises. At the same time, technology made it easier to engage in useful activities, for example, reverse engineering, which also helped genuine invention.

In the GATT context, attempts to contain counterfeiting had already been made in the Tokyo Round (see Adrian Otten, chapter 3). This would rather contradict the belief that the TRIPS negotiations were malevolently introduced into the GATT by industrialized countries. It is well known that economic actors affected by counterfeiting tried to find a forum to resolve it; this was true as well for their opponents, who would use the channels they could find.

During the TRIPS negotiations, the GATT Secretariat issued a summary of “Activities in Other International Organizations of Possible Interest in Relation to Matters Raised in the Group”.⁵ This gave a comprehensive view of the landscape and the issues addressed or being debated elsewhere. It listed work undertaken in WIPO: Committee of Experts on Measures against Counterfeiting and Piracy, revision of the Paris Convention on the Protection of Industrial Property, Stockholm Act 1967 (“Paris Convention”), and patent law harmonization.

The revision of the Paris Convention addressed complex and controversial topics, such as compulsory licences and GIs, and faced many difficulties, not least due to the varying but rigid alliances among the contracting parties. Compulsory licences faced a North–South divide, with some developed countries, such as Australia, Canada, New Zealand, Portugal and Spain, occupying the “middle ground”. GIs was a New World–Old World battlefield, each group including developing and developed countries. The two issues, as well as the one relating to inventors’ certificates, opposing market and planned economies, did not offer enough diversity to create a real coalition-building potential. It was difficult to make trade-offs. While developed market economies formed a relatively united front against proposed rules on inventors’ certificates, the “non-voluntary” licences

pitted developed countries against developing ones, with some developed countries, such as Canada, which had a strong generic industry, taking positions closer to those of some developing countries. Government use, or “Crown use”, a common law “legacy” to former Commonwealth countries, was not clearly put on the table, as was done later in the TRIPS negotiations. The revision might, in my view, have been beset by birth defects. It was too difficult for negotiators to reconcile and agree.

In 1985, WIPO launched a process to address the issues of counterfeiting. Ideas such as some stronger implementation and monitoring systems, for example, a mention of the lack of protection or enforcement in the General Assemblies’ meetings, drew a blank with the strong opposition from developing countries, led by Brazil. The exercise eventually turned into a process for the adoption of model provisions for national laws.

The above-mentioned GATT Secretariat summary also mentioned the work of the United Nations Conference on Trade and Development (UNCTAD) on technology transfer. Patents for inventions were at the heart of the controversy: for some, patents benefit society at large and stimulate innovation; for others, they create monopolies, which could lead to monopolistic abuses to the detriment of competitors and consumers. Eventually, UNCTAD did not alleviate the tension surrounding the dichotomous perception of the role of patents. In hindsight, in my view, the burden of the debate on whether or not IPRs, in particular patents, were good or bad shifted to WIPO. Not surprisingly, it was a massive offensive. What struck me was the organization of discussions and negotiations on the basis of regional groups within the UN system: Group B (developed countries), Group D (socialist or planned-economy countries) and the Group of Developing Countries (G77 and other developing countries), with relatively rigid operating rules; while there had always been bilateral, regional or subregional alliances or “sympathies”, the position-taking was rather straight-jacketed. As is underlined elsewhere in this publication, the GATT operated differently. Delegations seemed to have more leeway to negotiate according to their best interests, which varied depending on the topic. And, more importantly, the GATT had a relatively prompt and efficient system for resolving disputes between parties.

As far as Switzerland was concerned, the pharmaceutical and chemical industries’ interest in protecting their innovations was at the forefront of TRIPS negotiations, but exporting companies also had strong interests in other IPRs: trademarks for products and services, in particular, the protection of well-known marks; industrial designs; know-how; GIs, notably “Swiss Made” for watches; and, of course,

enforcement. It was believed that, without actual enforcement, the best of substantive standards would remain a dead letter. Switzerland, although a small country – that is, not the size of the “Quad” countries (Canada, the European Communities (EC), Japan and the United States) and other developed ones – had adjusted its legislation to the latest international developments, notably in the area of patents for inventions. Switzerland had joined the European Patent Organisation in 1977. This relatively late adherence to the community of pro-product patent countries did arouse curiosity, which was not always friendly, I assume. How could Switzerland demand from developing countries higher levels of protection when it had itself introduced such protection only in 1977? On a similar note, why did Switzerland deny to developing countries the right to imitate and build up its industry as it had itself done at the beginning of the twentieth century? Similar observations were made regarding Japan during the Meiji era. The questions were not simple to respond to, in particular, if the interlocutor’s agenda were political, which was often the case. The suggestion I received from the then Director-General of the Swiss IP office was illuminating: transition periods could be envisaged for structural adjustments but they should be short, taking into account technological advances available worldwide and other considerations. The suggestion was clear and politically helpful for a “newcomer” in the negotiating team.

The “Swiss spirit”

In Switzerland, amendments to the Federal Constitution, acceptance of certain agreements or adherence to certain international organizations are subject to the so-called “mandatory referendum”, requiring a double majority of votes, that is, a majority of the total population vote as well as a majority of the 26 cantons of Switzerland. New or revised laws, certain federal ordinances and certain other international agreements are submitted to a nationwide referendum, if 50,000 electors or eight cantons so request. For this category of referendum, called “optional”, only a majority of the population’s votes is required. With the Damocles’ sword of referendum, even the single-majority one, hanging over TRIPS negotiators’ heads, embarking on negotiations with the aim of arriving at an international treaty was an exercise that required extreme prudence. This special feature of the Swiss system explains, in my view, the Swiss propensity to internal (administration) and domestic consultation, task forces, dialogues, step-by-step process and mid-way solutions. This takes time and efforts but proves eventually rewarding because it is transparent enough and is propitious to a wider acceptance of the result. This holds true for my “TRIPS journey” during the Uruguay Round.

As was pointed out by Thomas Cottier, negotiators were fortunate enough to have a certain leeway, working with objectives-setting and without micromanagement by the “big bosses” of the negotiating team. Implementing the Uruguay Round results in 1994 was limited to the minimum necessary for the purposes of submitting the whole package, which was subject to an optional referendum of the Swiss people. On the TRIPS front, the biotechnology-related provisions were the most critical ones for such a request for referendum, if added to the concerns of certain circles opposed to the liberalization of services and agriculture.

A task force gathering together federal administration “départements” (ministries, with several portfolios) was set up. Each department and its offices (agencies or even ministries in some other countries) have their own channels of information flows and consultation within the ambit of their activities, that is, among interested circles. For example, the Department of Economy covers, *inter alia*, the Federal Office for External Economic Relations (now the State Secretariat for Economic Affairs), dealing with the GATT, UNCTAD, EFTA and OECD on any trade agreements, and the Agriculture Office, which is responsible for agriculture matters and plant varieties protection. The Department of Interior has under its aegis the Office of Culture, the Office for Science (in charge of biotechnology) and the Health Office. Within the State Secretariat for Economic Affairs, the former Federal Department for Exports has a technical cooperation division and the Department of Foreign Affairs is responsible for, *inter alia*, international organizations, international law and the Swiss Agency for Development and Cooperation, which has its channels of information and consultation, for example, with Swiss non-governmental organizations (NGOs), such as La Déclaration de Berne, Swissaid and Pain pour le prochain. Customs matters are under the aegis of the Department of Finance. Finally, during the Uruguay Round, the Department of Environment, Transport, Energy and Communications was handling the work undertaken on environmental issues, including biodiversity in the context of the Rio Summit of 1992. The cantons were kept informed, notably on enforcement issues. The Swiss IP office was placed under the Department of Justice. Unlike many other countries’ IP offices, its tasks covered both copyright and industrial property. Coordination and information flows were therefore facilitated.

Of course, the Swiss delegation did not suffer from jetlag and capital-based experts were readily able to come to Geneva. This advantage of capital-based assistance was not available to all delegations and, for those who had it, it could not be available at each and every meeting, in particular, when the negotiations entered into the critical phase and decisions on the drafting of a provision, a sentence, a term, or the deletion of square brackets had to be agreed to. It was

of paramount importance to be part of the small, informal groups, but it was not a free lunch. Delegations that insisted on participating just for the sake of it and could not demonstrate the usefulness of their participation by contributing to the negotiations would endanger the process and, for example, incite the most interested ones to meet outside the group and strike a deal. The Chair's authority in arbitrating a carefully balanced and meaningful distribution of seats was of utmost importance. It was rarely challenged.

It was in certain moments of the Uruguay Round that I fully measured the meaning of the "solitude" of the negotiator in small delegations. It was more comfortable to be a team of two, to consult each other and take decisions quickly. Leaving the room to make a telephone call for instructions could be costly as that meant missing an opportunity to approve or oppose a proposal. "*Les absents ont toujours tort*" ("Those who are absent are always in the wrong"). If silence could mean acquiescence, repeating a position *ad nauseam* could irritate and, since it did not bring anything new or helpful, could mean eviction from the group at the next meeting. It was also there that I learned the GATT process and negotiating peculiarities, for example, what a "1+1" meeting was – a head of delegation plus an expert, if available, of course; and why minutes or hours seemed so long while one was waiting in the corridors next to rooms F, D and E when two, or a small group of, delegations met with the Chair and the Secretariat to remove the stumbling block from the path to consensus. The expert had therefore to brief his or her boss well, and bear the burden of ill or good advice. The head of delegation in turn did not have an easy task: he or she had better have taken the right approach and been able to justify the outcome *vis-à-vis* his or her superiors. You can be two and feel alone. As others have said in this volume, the process was masterfully and creatively handled by the Chair, and the Secretariat facilitated our work.

Another lesson: a failure to explain a position and to convince others generally produces the effect of having the interlocutor digging in his or her heels. That said, Switzerland did not always have time to explain and convince. Maybe today's generation is living through the unfinished business of clarifications and convincing with regard to some parts of the TRIPS Agreement. We might have accepted "constructive ambiguity" for the sake of achieving a package of results, assessing the win-win elements in the whole Agreement. The balance in the TRIPS Agreement was delicately struck. Its core is like a house of cards. If a card is removed or added, the house risks falling apart; the core should remain untouched. In retrospect, I remember thinking that when no one was happy with the result it

must mean that the text is somewhere mid-way. The TRIPS Agreement was a text no one was entirely happy with – this, in itself, could be an achievement.

The TRIPS Agreement being such a comprehensive agreement on IPRs, delegations could find provisions they had defended to the maximum, depending upon their mandate. All were interested in patents and trademarks; some were more interested in copyright and related rights, industrial designs, undisclosed information or GIs. The alliances varied depending on the category of IPR. To cite a few examples, we shared the same concerns as did Japan with regard to the system of equitable remuneration of copyright and related rights vs rental rights, and we had a similar system of dependent inventions. In the area of patents, we were certainly closer to the United States, except for certain aspects of the patent system: the first-to-invent approach and government use. While Austria – not yet a member of the EC – and India did not object to Switzerland defending a wider scope of protection of GIs for products, the Swiss delegation had to repeat *ad nauseam* its negotiating mandate for the protection of GIs for all products, in particular industrial products. Moreover, defending GIs for services was, in retrospect, terrifying. There, I felt the loneliness of the unarmed soldier advancing on a battlefield. Maybe we were too “visionary”. Or, more humbly put, Switzerland, not blessed with natural resources, was already relying on tertiary sector activities, in addition to manufactured goods.

Bilateral IP arrangements were flourishing, even in the late 1970s and 1980s, presaging an invasive comeback of reciprocity endangering the national treatment principle in existing IP conventions. The straw that broke the camel's back was the retroactive “pipeline protection” accorded by the Republic of Korea to US pharmaceutical companies in 1985–6. Switzerland was not able to invoke the national treatment of the Paris Convention. The pipeline protection privilege was given to US – and later, to European – companies. I remember that we also envisaged exploring the most-favoured nation (MFN) clause in the Swiss–Korean bilateral investment agreement but did not pursue that path very far. In any event, the discrimination convinced Switzerland that the GATT MFN might be an avenue to explore further, in order to ensure better treatment of Swiss IP interests outside its frontiers, thus avoiding a repetition of discrimination. It was Switzerland's firm conviction that a multilateral framework was the best shield for a country of its size, however successful it was in economic and trade sectors. The Korean experience led to the Swiss proposal for inclusion of the MFN provision in the TRIPS Agreement.

In spite of its top innovation ranking at that time (and today), Switzerland was (and remains) a medium-sized economy relying on exports with its added value being in the form of IP. IP became an objective of world trade policy to correct several situations, namely: (1) the lack of adequate international legal instruments against counterfeiting and piracy, resulting in commercial losses for innovative and creative enterprises; (2) excessive or too complex a protection, which could be a disguised trade barrier to the extent it discouraged market access; and (3) the lack of effective non-discrimination obligations (national treatment and MFN). There was a need to recalibrate the multilateral framework.

Not only for IP-related matters but also for the wide gamut of disciplines, Switzerland was active on almost every front of the Uruguay Round package. Not surprisingly, IP was among the most important. The delegation covered all the discussions on a road that was initially foggy and muddy, with only the Punta Del Este Ministerial Declaration as a map and, later, with greater visibility shed by the results of the Montreal mid-term review in 1988. Nonetheless, the road remained winding and full of obstacles.

I remember that the first formal meetings were strongly divided between the pro-IP and anti-IP delegations in GATT, with some developing countries, in particular the Asian “dragons”, which had started modernizing their IP systems, in the pro-IP camp or in a neutral, observation mode. Most debates had an air of *déjà vu* and, to be frank, this pertained to both camps, including Switzerland. I remember, for example, how statistics published by the Swiss IP office were interpreted by the Colombian delegation to support the following point: since, at the peak of the curve, the duration of patent renewals was ten years, the duration of patents should therefore be limited to ten years, and not, as requested by industrialized countries, 20 years from the date of filing the patent application. My response was not the best one of my life: “There are three categories of lies: the big ones, the small ones and statistics”: *déjà vu*, as someone more famous than I had said that. Fortunately for me, I was supported by the fact that companies would not pay progressive annual fees if the patented invention proved not to be a successful one. Of course, there could be cases of abuses, that is, where a company might want to pay fees for the sake of preventing competitors from entering the market. Such cases could, under a rules-based system, be corrected and should not be used as an example to undermine the role of patents by throwing the baby out with the bath water. But that is another story.

After a heated internal discussion, the small team in Berne, based on comments made by some delegations and individuals, agreed to make a soft take-off by

proposing an approach more familiar to the GATT but alien to IP, that is, to “build TRIPS 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 ...”⁶ (see Thomas Cottier, chapter 4). The idea of an indicative list approach, alien to IP thinking, was not considered sufficient and was eventually replaced by proposals for minimum standards, in the second generation of submissions. The prize for that was a cartoon posted in an American paper, with a cat (WIPO) stuck in the branches of a tree and a firefighter (Switzerland) climbing to rescue the animal. Never mind, we had broad shoulders: the classic approach of standards as known in the IP world was, in any event, easier for drafters.

This was how we slowly came to the Communication from Switzerland of 14 May 1990, discussed by Adrian Otten, Thomas Cottier and Jayashree Watal in this volume.⁷ I shall limit myself to a few points on which the Swiss delegation was particularly active in dialoguing, or asking for or providing clarifications.

The journey down the long, winding road of TRIPS negotiations was slowed down not only for substantive reasons but also due to the pressure put on delegates by their own mandates, leading to misunderstandings, and sometimes to acrimonious mutual hints of bad faith. On the process itself, Switzerland (Luzius Wasescha) played the go-between the EC and the United States. I queried India (Jayashree Watal) about the real difficulties it had in accepting the incorporation of Paris Convention provisions when India and the EC were log-jammed on this issue. I also asked Thailand why it opposed the patenting of life forms, notably micro-organisms. Thomas Cottier patiently built up the dialogue with Hong Kong and Singapore on exhaustion, with Argentina on pharmaceuticals patents, and with many others, such as the EC, India and the United States. I also remember the bilateral discussions on price controls for pharmaceuticals, under the trees of the parking lot at 2 a.m.; that is a veteran’s memory.

Paris, Berne and Rome Conventions and the IPIC Treaty

The incorporation of the substantive provisions of the two fundamental IP Conventions, Paris and Berne, was – in terms of international law legal drafting – a bold new step. On the one hand, it faced objections from some developing countries and quarters because of the possibility of making applicable the GATT dispute settlement system, or simply because they were not yet party to those Conventions. On the other hand, it would be impossible to take up each and every provision of the Conventions again. The incorporation of the Paris Convention also

absorbed a great deal of time and energy to convince Brazil, which had not accepted the latest Acts of Lisbon and Stockholm. For copyright (or *droit d'auteur*), the incorporation of the Berne Convention was less controversial for one of the main developing countries, India. The Indian movie industry – the appellation “Bollywood” was not yet coined in the 1970s and early 1980s – was doing well in many parts of the world, including South-East Asia. On a personal note, in Viet Nam (south), after the diplomatic freeze with France, the entertainment treat in my youth was divided between (old) French and (newer) Indian movies.

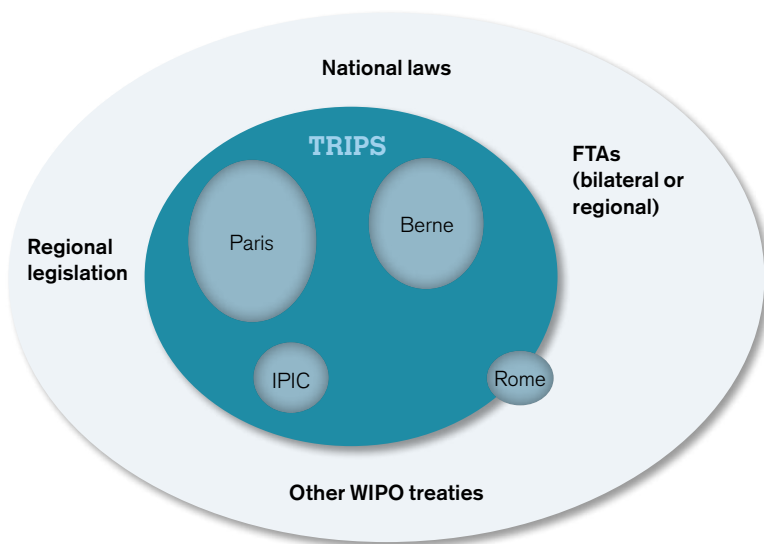
Another intriguing but fascinating consequence from a purely legal drafting point of view was the 1989 Treaty on Intellectual Property with Respect to Integrated Circuits (IPIC or Washington Treaty). Designed as a *sui generis* system, it has never reached the required number of ratifications to enter into force. Some of its substantive provisions are still “living” due to their incorporation into the TRIPS Agreement. This was a result of creativity under time pressure, necessity and using the systemic approach of the incorporation technique. The 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention – or “Super Rome”, as David Fitzpatrick from Hong Kong once called it) was a difficult piece of meat to chew on. Most Commonwealth countries and the United States accepted only some parts of the Rome Convention; rental rights for phonograms were introduced with a special grandfather clause on equitable remuneration for Japan and Switzerland. That said, the partly incorporated Rome Convention provisions later formed a useful basis for many countries (Switzerland) or groups of countries (EFTA) to ask for, in their bilateral agreements with third countries, a commitment to join the Rome Convention. It was still not an easy task, as some of our partners knew that the TRIPS Agreement did not require a full Rome Convention adherence. The world has evolved since then: there is better acceptance nowadays as countries are well aware of the importance of related rights, for example, performers' rights.

TRIPS Agreement

There is no hierarchy between the TRIPS Agreement and the aforementioned WIPO Conventions, corresponding to the classic rules of *lex posteriori* or *lex specialis*; they were all considered to be on an equal footing. This political and legal outcome is the best one that could be envisaged. That said, it is not an easy task for lawyers and panelists to analyse a measure. Maybe the following simplified illustration of the IP universe could help, to a limited extent, with understanding the relationship between the WIPO Conventions, the TRIPS Agreement and other

texts, bilateral, regional or multilateral (figure 1). The blue colour indicates what the provisions negotiated were meant to do: to fill the gaps, complement or clarify other treaties. That said, the degree of creativity in interpreting IP and the TRIPS Agreement in accordance with the Vienna Convention on the Law of Treaties is sometimes high. In principle, the equilibrium struck in the TRIPS Agreement should not be disrupted and the *acquis* should not be eroded.

Figure 1: The IP Universe



MFN was introduced in TRIPS Article 4, with very limited exemptions listed in 4(d), and in Article 5 with regard to registration treaties administered by WIPO. The TRIPS Agreement is different from the GATT and the General Agreement on Trade in Service (GATS), which provide for an *en bloc* (i.e. per category) exception to MFN with regard to free trade agreements (FTAs). A member granting higher protection “to the nationals of any other country” must grant MFN “immediately and unconditionally” to the nationals of other members, provided they do not fall into the above-mentioned exemptions. *De facto* and *de jure*, any IP privilege granted by a treaty is, in principle, transposed – unless directly applicable – into national legislation and applied to its nationals. Other WTO members could therefore get the same advantage by invoking national treatment. The additional requirement for MFN in the TRIPS Agreement – and other FTAs – should not, in practice, be a major obstacle or give rise to fears. MFN only adds to national

treatment in situations where a contracting party does not give the advantage to its own nationals. It is, however, a reality that the effects of MFN in those contracting parties that accept a higher level of IP protection would be greater than for their counterparts in the negotiations who are the strong IP *demandeurs*. Switzerland fought to the very end of the negotiations for an additional exemption under Article 4. Switzerland's proposal read as follows:

Any advantage, favour, privilege or immunity deriving from bilateral agreements related to the protection of geographical indications, including appellations or origin, provided that the PARTIES to that agreement are prepared to enter into negotiations in good faith with other interested PARTIES in order to expand such recognition of respective geographical indications and appellations of origin with a view to avoid arbitrary and unjustifiable discrimination of competing products or disguised restrictions on international trade (...)⁸

The ground for such rejection was that protection granted to GI is name by name, and by this very nature is on a reciprocal basis and not amenable to MFN. I am convinced that there could be cases where our concerns would materialize, or have already materialized. But this would be the topic of another article. "At ten minutes before midnight" – that is to say, at the last moment, just before the deal was closed – the Swiss felt the extreme loneliness of the isolated negotiator on this issue.

Industrial designs were one of our areas of focus after patents and trademarks. There was a long, difficult discussion on the criteria for protection, namely "new and/or original", and I learned there the role of the written slash, which, in my view, was not advisable in a legal text. It did, however, help move the discussions. The final text eventually resolved the problem, to a great extent. There was another issue: once the application for protection under the category of designs was published, the design was quickly copied and produced, well before the original was put on the market. Another obstacle for producers of original designs was a too-long period for examination under certain countries' systems, which Swiss producers considered as impairing the possibility of seeking and obtaining protection for products that have to respond swiftly to fashion or seasonal imperatives. Costs for protection could be very high, in particular in multiple applications (textiles and watches). Thomas Cottier and I spent some time explaining our proposals to some partners, including the EC. Most of Switzerland's objectives were attained, except for a point dear to our heart: Australia proposed

that copyright protection should be an alternative avenue, in particular for textiles and wall painting designs (if my recollection is correct). We were a bit disappointed by the final wording, as copyright protection would, at least in my view, not ensure the same degree of business security. To the best of my knowledge, most WTO members have modernized their legislation to comply with the TRIPS design section, in particular the industrial-type protection, thus showing the increasing economic importance of this sector.

Patents

The negotiators' work was facilitated to some extent by the fact that the Swiss legislation already had higher levels of protection. With the objective of reaching out to a great number of countries, we could not but be realistic and expect a lower common denominator. Whether this latter is already too high or unrealistic for some quarters is another matter, addressed in other chapters. As has been indicated, Switzerland was party to the European Patent Convention (EPC) and to the WIPO registration agreements. But what is more relevant was the fact that Switzerland and other EFTA countries were negotiating the European Economic Area with the EC, and were, in principle, permanently negotiating the *acquis communautaire*. For example, the protection of test data in Switzerland was an issue between Switzerland and the EC for reasons to do with its compatibility with the legislative trend in the EC, and not a matter of TRIPS minimum-level protection. Some quarters, including industry and some federal colleagues in Switzerland, erred when they analysed the implementation of the Uruguay Round, which did not cover test data protection, and thought that the implementation package missed mentioning the duration of protection. It was time and energy consuming for the Swiss IP office and IKS/Swissmedic to explain that we already had provisions under revision to match the European standards.

The Swiss economic operators signalled several issues or problems that clearly showed that the patent area was not, as often alleged, limited to a South–South divide but included North–North divergences as well as those between continental law and common law. This is ably described by Jayashree Watal (chapter 16). I, rather, delve into the contributions of, or issues raised by, the Swiss negotiators on the basis of information, requests, clarifications or concerns by interested circles, in particular economic and industry sectors, and parliamentary interventions. It is worth mentioning that some TRIPS provisions have been developed *au fur et à mesure* (“progressively”) in the negotiations. The following list is not exhaustive.

- Exhaustion of rights: Pharmaceutical and chemical industries, in particular, had strong interests in the national exhaustion for patents.
- First-to-file (all countries except the United States) vs first-to-invent: We were fully aware it would be difficult to obtain reform of a well-anchored system, not only for legal and judicial reasons but also for domestic, political ones. For both Swiss and European industry, the complexity and costs of US judicial proceedings, including the discovery procedure and the ensuing legal and business insecurity, were too high.
- The issue of government use in general and in the United States in particular.
- The issue of compulsory licensing for local working and the realities of modern trade and GATT concepts (quantitative restrictions to imports and comparative advantages for countries): The local working requirement in the old approach would consist in requiring production of the products “*sur place*”, which would not make sense for small market countries such as Singapore, or even Switzerland, particularly in the case of products the demand for which would be too low. I learned a lot of these GATT aspects from Thomas Cottier, Luzius Wasescha and John Gero (on exports), even if, intuitively, I had the same thinking on the obligation of local working. Put in GATT terms and concepts, it was perhaps more palatable to others.
- There was the unexpected setback of an EPC provision, Article 53 (exceptions to patentability) (see below on TRIPS Article 27.2).
- Better protection of biotechnological inventions.
- Environmental issues.

On the prohibition of discrimination between imported and locally produced products, one of my recollections was that the old United Kingdom Patent Act, which was using working as a ground for compulsory licensing, was amended before the entry into force of the Marrakesh Agreement Establishing the WTO) to expressly provide that importation would equal working. This change, made by an important player in the IP world, may have inspired other, similar changes in the laws in former Commonwealth countries.

TRIPS Article 27.2 is one of the provisions on which the Swiss delegation had invested much of its energy and efforts. It reads:

Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

It is a combination of the EPC provisions, with additional wording regarding environmental concerns and the Paris Convention. To refresh our memory, here is the text of the Article 53(a) and (b) of the EPC (1973):

European patents shall not be granted in respect of:

- (a) inventions the publication or exploitation of which would be contrary to "ordre public" or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;
- (b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof;

The practical and legal problem encountered by the Swiss pharmaceutical industry was as follows: a patent application could be rejected because the publication thereof could be considered by a country's authorities as against *ordre public* or morality. Such exclusion from patentability had the unexpected outcome that the invention that was the subject matter of the rejected application could, nevertheless, be used by others, as it had no protection and was therefore in the "public domain". The example of the abortion pill in a European country was put forward. The EC member states were bound by the EPC, and the EC had some leeway to negotiate, but not to negotiate the kind of change the Swiss delegation was requesting and which would require an insurmountable round of negotiations among the EC member states. What we proposed was to go a step further, that is, to deal with the prevention of commercial exploitation only. Not only did we have to defend the Swiss ideas *vis-à-vis* those of developing countries, but also those of other developed countries. Here again, the message delivered by some quarters that the TRIPS Agreement was a conspiracy of the evil against developing countries is ill founded.

It took some time for the Swiss delegation to explain its position in various fora, for example, the Swiss Federal Parliament, and clarify its proposal to reflect the

practical concerns of industry and also the concerns expressed by some interested circles, notably the anti-biotechnology and pro-ethics circles. Thus, the concept of “human dignity”, which would discourage the creation of chimeras or human clones, might be encompassed in the concept of *ordre public* or morality. Animal dignity, a very hot issue in Switzerland, was discussed too. But like *ordre public*, morality is subject to the perception of the people living in a country or region. Protection of the environment was already a topical issue, and the delegation explained as much as it could the need to reflect on problems in a relatively uncharted area, but presaged by discussions in scientific circles and the UN in the context of the Rio Summit 1992 process. In hindsight, the wording negotiated in Article 27.2 is the best we could have. Albeit a bit convoluted, it has all the ingredients: the territoriality principle, the GATT necessity test and other GATT terms, and the reflection of the idea that the patent is neutral and should not be confused with other considerations in domestic law. It should be noted that the refusal of an application or the cancellation of a patent in this paragraph 2 must be made on a case-by-case basis. I believe, in the present circumstances, that this provision will remain untouched for some time, thanks to the flexibility it offers. That having been said, I confess that I am amazed that sensitive issues, which terrified me, have now been well accepted by a large section of the Swiss public.

Paragraph 3(a) of Article 27 relates to optional *en bloc* exclusions from patentability. As a minimum level of protection, the subparagraph did not present any major obstacle. Contracting parties may provide or not provide for the patentability of certain methods of treatment.

My recollection is that the Swiss delegation tried, in the drafting committee, to advance the wording it had initially proposed, that is, the words “human and animal body” instead of “humans and animals”. Like several attempts by other delegations to change the final text here and there (e.g. the EC regarding spirits in Article 23.4), this was flatly turned down – rightly so, in retrospect. If it had been accepted, others would also have demanded different changes. Good soldiers have to give it a try and know when to retreat.

As regards Article 27.3(b), I simply refer to the contributions of other authors (see Jayashree Watal, chapter 16, and Matthijs Geuze, chapter 7) and to the Secretariat's paper on the matter.⁹

I would like to simply add some comments. In the course of negotiations leading to the Brussels ministerial meeting in December 1990, the Swiss team had to face questions from the Swiss Federal Parliament, Swiss NGOs and

internationalized NGOs such as Greenpeace. The latter, in a spectacular action, sent climbers to the top of the GATT building in Geneva to hang a banner protesting against the “patenting of life”. The deal struck on Article 27.3(b) in particular within a small group of delegations left the Swiss delegation with some frustration at that time. The long-term impact is difficult to measure. In any event, those quarters that feared the TRIPS Agreement could be reassured. The TRIPS Agreement is about minimum levels of protection.

Article 27.3(b) is flexible enough. Eventually, it is a policy matter left to the contracting parties. As a delegate, I had to endure for quite some time the difficulties of the constructive ambiguity of a provision as part of an “agreed” TRIPS package, almost fully fleshed out but not yet agreed in the overall package. The negotiation of the future Convention on Biological Diversity (CBD) before the Rio Summit was one of most difficult experiences. The process was different from the one in the GATT, at least from my point of view: there was a lack of real dialogue, lack of transparency and defensive positions taken by all sides (plant variety circles, patent circles, biodiversity experts, NGOs, industries, etc.). Evidently, the lack of time did not permit a clarification process to alleviate concerns about the role of patents. At the end of the conference – actually midnight – it was in the area of technology transfer that we felt we should and could intervene as it was too late to negotiate or correct anything else. This was why the adoption of the CBD by Switzerland was accompanied by an interpretative declaration on technology transfer. I felt lonely, but Thomas Cottier helped me from Bern, over the phone and by fax. It reads:

Declaration:

Switzerland wishes to reaffirm the importance it attaches to transfers of technology and to biotechnology in order to ensure the conservation and sustainable use of biological diversity. The compliance with intellectual property rights constitutes an essential element for the implementation of policies for technology transfer and co-investment.

For Switzerland, transfers of technology and access to biotechnology, as defined in the text of the Convention on Biological Diversity, will be carried out in accordance with article 16 of the said Convention and in compliance with the principles and rules of protection of intellectual property, in particular multilateral and

bilateral agreements signed or negotiated by the Contracting Parties to this Convention.

Switzerland will encourage the use of the financial mechanism established by the Convention to promote the voluntary transfer of intellectual property rights held by Swiss operators, in particular as regards the granting of licences, through normal commercial mechanisms and decisions, while ensuring adequate and effective protection of property rights.¹⁰

The overall question I keep asking – and Thomas Cottier has posed it in different terms in another context – is: if we had had more time, or the process had been different, would we have a different text, and could biodiversity conservation – a visionary issue – have been more promptly operationalized?

On both paragraphs 2 and 3 of Article 27, the jurisprudence developed by the European Patent Office is of great importance. That said, I would like to pay tribute to our successors in the Swiss IP office for having revised the patent law, in full consideration of a fundamental requisite, that is, the balancing of rights and obligations, of interests and of all parameters – legal, sociopolitical and Swiss entrepreneurs' competitiveness – not only on the domestic front but, as importantly, on the international plane. What will remain a great challenge is to arrive at an interpretation of what is a “plant” or an “animal”, parts thereof and so on, matching the developments of science and the legal framework (laws, regulations, practices and jurisprudence). The legislator went through a long and purposeful exercise of adjusting the Swiss legislation, ensuring some legal and business security, preserving innovative initiatives and, at the same time, appeasing the concerns about trespassing a certain ethical line.¹¹ In any event, this area will keep the next generation of lawyers busy.

Geographical indications

Every part of the TRIPS Agreement had provoked heated debates during negotiations. All other categories of IP follow, with slight differences, the following pattern: definition, if possible; protection requisites; rights granted; exceptions to rights; duration of protection; and other issues. The structure of the text for GIs slightly differs. The TRIPS Agreement contains a definition of GIs, provides for a first, general level of protection for all products, and provides for a higher level of protection for wines and spirits, with a series of exceptions authorizing members

to continue certain uses of the geographical name on their territory and, *de facto*, to export into third country markets.¹²

It was not a North–South confrontation, or a North–North one. It was a New World–Old World divide, with, on one side, the Old World – mostly European countries at the time of the negotiations – and, on the other side, the New World – that is, those countries with population composed of migrants from Europe who used names they knew for the same products in their country of origin. There are, of course, other reasons, notably, the branding business model consisting in using certain signs and/or names evoking a geographical place. There was the feeling and posture among some Old World countries that these signs or names were used in an unfair manner, either by misleading consumers as to the true origin of the product or for “free-riding” purposes, that is, taking advantage of the existence or reputation of a geographical name or sign.¹³

For one side, countries of the Old World, the export of products to some New World countries faced market access barriers with regard to the product itself and to objections posed by the New World producers – for example, that there was a prior trademark containing the geographical name or that the name had become generic. For the other side, market access to some Old World countries was more difficult, not only on the grounds of production rules but also because there was a GI protected by a *sui generis* system. The wave of bilateral agreements on GIs concluded by certain European countries with neighbouring countries had occurred in the twentieth century. Switzerland concluded agreements with (in chronological order): Germany, Czechoslovakia (now the Czech Republic and the Slovak Republic), France, Spain, Portugal, Hungary and, in the post-Uruguay Round period, the EC (later validated for the EU), the Russian Federation and Jamaica.¹⁴ I also remember a delegate attempting to find in Geneva a certain branded beer from his country. In conformity with a bilateral agreement with a third country, Switzerland could not let in any product bearing a name that was protected under the bilateral agreement and not coming from that third country. I would like to make a general comment here: this is an area where business circles concerned sometimes strike deals between themselves that governments would not be able to do, sometimes, genuinely, because they may be obliged to stick to a wider picture of cross trade-offs.

The Swiss system

Why was Switzerland so active in this field of the TRIPS negotiations? To be able to be so, there must be legal background. The Swiss trademark law then in force

provided for the protection of *indications de provenance* or *Herkunftsangaben* (GIs). As has already been mentioned, Switzerland is attached to free enterprise. This means that, in sectors where there is a need for production rules, producers would favour self-regulating and to agreeing on the rules. The *indications de provenance* system works relatively well within the general federal framework of the trademark law. The only sector in which there were specific provisions concerned “Swiss Made” for watches, showing – if need be – the importance of the sector for the Swiss economy. Names of a locality or a region were, in principle, entitled to protection. There was no special registry under the trademark law.

In addition to the legal framework of the trademark law and of cantons, the pre-Uruguay Round bilateral agreements provided for extremely detailed protection with geographical names negotiated and listed in annexes. The main body of the bilateral agreements contained, in general, provisions on the following points (this is a non-exhaustive list; there are variations of the list depending on the partner):

- Protection of “Confédération suisse”, “Suisse” and its variations in adjectival form, as well as its emblems (e.g. the cross)
- Protection of the canton’s names and emblems
- Protection of names listed in annexes
- Provisions on free-riding or unfair competition and on dilution of the GI name
- Protection against use of terms such as “type” or “imitation”, translations or the mention of the true place of production
- Rules on homonymous GIs for wines, spirits and other products
- Enforcement provisions.

The scope of products is very wide in several agreements, that is, from names of countries to GIs for agricultural products and foodstuffs to handicrafts and industrial products. The more recent agreement, with Jamaica, includes GIs for services. As regards the relationship between the Swiss–EC agreement and EC members’ agreements concluded, the first replaces the latter, except for any aspect not covered by the Swiss–EC text; the individual bilateral agreement will remain within the purview of the EC member. In the EC agreement, there is no annex for industrial products, as there is not yet any EC regulation thereon. In that

regard, one may conclude that Swiss handicrafts and industrial products remain protected in those EC members concerned. Implementation and enforcement seemed to work well. Under the bilateral agreement with France, the Swiss producer of a sparkling wine changed the labels, abandoning the use of "champagne" as a common term. For the sake of transparency, I should mention the case of the Swiss village of Champagne (Canton de Vaud) which, under the Swiss-EC treaty, had to renounce the use of its own name on still wine. This shows that bilateral agreements may entail some risks if GIs are subject to trade-offs regarding market access in other areas.

It is worth mentioning that, apart from these agreements specifically devoted to GIs as a category of IP, there are a number of bilateral arrangements on market access – preferential tariffs – for a product bearing a GI. The most advanced agreement with market access features for products bearing GIs is the Swiss-Japan FTA, by which Switzerland obtained market access for a number of cheese products.

It is against this background of a mix of the trademark law, cantonal rules and the pre-Uruguay Round bilateral agreements that we embarked on an adventure, sometimes in an agitated state. One of Switzerland's main objectives was to ensure market access, in particular for small and medium-sized enterprises. It is worth mentioning that, for quite a long period, Switzerland had no specific protection at the federal level for the category of "appellations of origin". Foreign appellations of origin were mainly covered in bilateral agreements with those EC members that had such systems.

One of the main instructions for the Swiss negotiators was to cover industrial products in GI-related provisions of the TRIPS Agreement. Not covering them would entail the risk that Switzerland could be attacked under, for example, technical barriers to trade. The watch industry was facing great structural and economic difficulties and it was of utmost importance to avoid job losses, in particular in the Jura region, where a myriad of small and medium-sized enterprises were facing difficulties. The fact that other GATT contracting parties were using Swiss watch movements and called the final products "Swiss Made" was a hurdle to surmount. The brave soldiers that we were spent much energy and time to explain and convince. The result, the definition in Article 22.1, was a good one, covering all products. We are grateful to those who understood our position and accepted to reflect parts of our expectations. We failed on one point of principle, GIs for services.

Initially, the EC made an ambitious proposal for the protection of GIs. At a certain point in time, Switzerland was the main advocate for GIs. To be frank, I did not pay much attention to GIs for foodstuffs, being preoccupied by the scope of definition. The link was made later, I believe, at a higher level and also when the higher level for wines and spirits was accepted. The Swiss delegation had to convince countries outside the group meetings. Should there have been the possibility to spend more time, we might have rallied some supporters, or calmed down some vocal opponents. I do remember a question posed bilaterally in coffee breaks on whether or not “Gruyère” could be used as a trademark for bicycles. I shall never know whether or not my explanation on the specialty principle in trademark law and other points had actually convinced my interlocutor. Another concern was whether restaurants specialized in Chinese cuisine could continue to use names such as Hong Kong, Shanghai and so on. The problems dividing the EC member states – the feta/Feta case and the Torres case – did not help facilitate the negotiations. I also remember an anecdote from some years later: the delegation of a developing country interested in the production of ewe’s or cow’s milk cheese in brine informally asked me whether producers could call the cheese “feta”. I reminded the delegate of the TRIPS section on GIs and the ongoing discussions. It was not a difficult task; the points made by the two camps were reflected in the minutes and reports and so on for example, bilateral agreements with third countries and costs of re-renaming. In the mid- or long term, it would be better, right from the beginning, to use a new name or one’s own geographical name.

Another point, which was later developed by opponents to the *sui generis* system, was the claw-back of generic names, in particular by the EC. Australia and South Africa reported that negotiations on wine GIs undergone with the EC were traumatizing. Some countries of the New World felt they had sufficiently paid the price for accepting the inclusion of GIs in the TRIPS Agreement, but would not agree to go beyond that line, should other members ask for extension. In that regard, I would like to recall a post-Uruguay Round statement made by a developing country interested in agriculture, at an open-ended informal TRIPS consultation meeting: “Tell me what you are ready to give my country in agriculture and I will discuss extension.” The call was addressed to the EC, Switzerland and other delegations. It gives a good picture of the emotional pressure on all delegations.

The acceptance by the US of a higher level of protection for wines and spirits was, to a great extent, due to the fact that the US Bureau of Alcohol, Tobacco and Firearms had a list of names. To my great surprise, the names of many Swiss

wines were on the list. Thus, it was on the basis of a text outside the purview of IPRs that the deal on Article 23 was struck.

GIs was perhaps the most emotional topic of the negotiations, not only for its economic and trade impact but also for the sociocultural and historical aspects involved. While it is feasible to deal with one's own market, the fear relates to the possibility of losing third markets. Imagine one million Asians importing and consuming only Swiss Gruyère – a dream for the Swiss Gruyère producers. It is also the TRIPS GIs section which contains the highest incidence of constructive ambiguity, at least from my point of view. The built-in agenda of Article 23.4, complemented in Singapore to cover spirits, can be endlessly interpreted in different ways. While parties to the Agreement are lost in rhetorical debates, business circles may have found their own solutions. And more FTAs with a GI component have been concluded.

One important point recurrently raised is the freedom of countries to determine the appropriate method of implementing the TRIPS provisions within their own legal system and practice. Certification and collective marks are one possible way and a *sui generis* system another avenue. There are some differences between the two, explained by both camps.¹⁵ To date, no camp has convinced the other of its choice. Both continue to pursue the path of FTAs. We get either a spaghetti bowl or, more optimistically, a lasagne plate.

Back to the future

There are many challenges and open issues. One is what would have been the current landscape if negotiators had agreed on certain issues in the Uruguay Round. Thomas Cottier has suggested that establishing a five-year period in Article 39.3 might have better protected countries from being pressured to adopt an even longer term of protection. As regards this specific issue, developing countries may continue availing themselves of the point that the TRIPS Agreement is about minimum levels of protection and they could protect themselves behind this shield to alleviate the pressure. But would this retracting posture be a long-term viable choice? Would Switzerland be the first-ranking country it is in terms of innovation if it had not voluntarily opted for an outward-oriented policy of investment? Would Singapore have been chosen by a Swiss multinational as a biotech hub in South-East Asia if it had not voluntarily opted for an outward-oriented policy and created an environment propitious for foreign direct investment? Would the CBD be more promptly operational if patents were not considered as the target to shoot at, as having the main responsibility for biodiversity reduction or loss?

As regards patents, I still believe that this IPR, compared with others, is the most precise and effective protection system for the right holder as well as for competitors. I still do not believe in the straight-jacket perception of patents as being fully monopolistic. During the 20 years of protection, there are many safeguards for competitors; abuses, if any, can be corrected. Moreover, the WTO case law as well as the Doha Declaration on the TRIPS Agreement and Public Health have demonstrated or confirmed the TRIPS Agreement's flexibilities. To some extent, the TRIPS Agreement is the best we could arrive at. In a similar vein to Thomas Cottier's remarks at the TRIPS Symposium (February 2015), I do not believe that compulsory licences are the best way to obtain actual technology transfer. That said, one consequence of TRIPS Article 31 is that the mere threat thereof had produced some effects, for example, lowering of prices and more cooperation. This in itself is an achievement. Curiously enough, there does not seem any modern, comprehensive paper analysing the current situation, at least to the best of my knowledge.

I have – maybe a bit presumptuously – suggested food for thought from the lessons learned. I strongly believe that the issues of IP remain basically the same; it is only the clothes which have changed and need more efforts and creative thinking. I have cited the achievements made by the Swiss IP office regarding biotechnology. At the risk of repetition, I am perplexed that, currently, biotechnology is not raising the same emotional concerns as it did at the time of the Uruguay Round. Are there other fronts on which civil society is focusing, or are biotechnological advances better accepted? Should this be the case, there would be a need to reflect on a possible revisiting of our current thinking and postures. Should the TRIPS Agreement not be flexible enough to cover future technological developments? In any event, biotechnology will keep the next generation of lawyers and policy makers busy, if not at the WTO or WIPO, then at least at the national level. Should the TRIPS Agreement be flexible enough to cover future developments, we could then be content.

Reflecting on this chapter, I believe the younger generation has talent. Should they follow what we experienced in the Uruguay Round? The Uruguay Round process and ingredients have been efficiently used in the course of the negotiations of the Doha Declaration on the TRIPS Agreement and Public Health. Attempts to use the same way of proceeding were made for the register of GIs for wines and spirits. The Doha Declaration on the TRIPS Agreement and Public Health was an exceptional case due to the unchallenged urgency aspect of a humanitarian problem. Otherwise – and this is my personal opinion – we need to create the same conditions for a wider landscape, propitious for negotiations, namely, with

possible trade-offs across the board. Maybe a repetition of the Uruguay Round would not be possible, but some results are likely to be achieved by gathering persons with goodwill in a similar magic constellation.

I would add, on a personal note, that we negotiators often met during rest days, between two meetings or in the evenings, to get the pressure off our chests. I have fond memories of many – Lou Flaks, Sivakant Tiwari, Emery Simon, Larry Nelsen and David Hartridge, to name a few. Even the sandwiches and the one litre bottles of red wine offered by the GATT Secretariat were, in retrospect, not too bad. I have fond memories of a group of women (Alice Zalik, the Nordic delegates, Umi K.B.A. Majid from Malaysia and Jayashree Watal from India, among others). We did not talk about TRIPS negotiations but about families and frivolous things. Friendship is fully compatible with the defence of national interests and, in some cases, “shouting” at each other – as delegates – when we disagreed. I also have fond memories of a dedicated and skillful Secretariat and a very wise Chair.

Finally, I would like to paraphrase the vibrant call of a respected emeritus professor of sciences to new graduates and doctorates in Berne some time ago, and say: “Have a good state of mind, be patient and be cheerful” (*Haben Sie Mut, Geduld und Fröhlichkeit*, in German).

Endnotes

- 1 My thanks go to Felix Addor (Swiss Federal Institute of Intellectual Property), who helped me write and defend the TRIPS part in the implementation message relating to the results of the Uruguay Round. But, foremost, I am indebted to Thomas Cottier, my former superior, who made me discover the arcane GATT. I value his deep knowledge of constitutional and international law, his humanist mind and his genuine and respectful attitude *vis-à-vis* all delegations while tenaciously defending the Swiss positions, unless they were proven ill founded by the opponents. I am deeply indebted to him as well as to Adrian Otten and Jayashree Watal for their comments and corrections – enlightening as usual – and for sharing their memories. Anything the reader considers as historically erroneous inaccurate, substantively wrong or incomplete should be attributed to a fading memory.
- 2 I worked there under the able guidance of Ludwig Baeumer and François Curchod.
- 3 EFTA stands for the European Free Trade Association.
- 4 Certain parts or sentences on the Swiss system and legislation have been extracted or translated from the following sources: www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10107965&action=open (Message relatif aux modifications à apporter au droit fédéral dans la perspective de la ratification des accords du GATT/OMC (Cycle d'Uruguay) (Message 2 GATT), du 19 septembre 1994, FF 1994 IV 995; www.ipi.ch; www.parlement.ch (all sites last accessed 8 July 2015).
- 5 GATT document MTN.GNG/NG11/W/20, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods – Activities in other International Organizations of Possible Interest in Relation to Matters raised in the Group – Note by the Secretariat, 8 February 1988.
- 6 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.
- 7 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.
- 8 GATT document MTN.GNG/NG11/W/73, Article 102 (2).
- 9 WTO documents IP/C/W/273/Rev.1, Council for Trade-Related Aspects of Intellectual Property Rights – Review of the Provisions of Article 27.3(b) – Illustrative List of Questions – Prepared by the Secretariat – Revision, 18 February 2003, and IP/C/W/369/Rev.1, Council for Trade-Related Aspects of Intellectual Property Rights - Review of the Provisions of Article 27.3(b) - Summary of Issues Raised and Points made - Note by the Secretariat - Revision, 9 March 2006.
- 10 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27&lang=en#EndDec (last accessed 7 June 2015).
- 11 See www.ipi.ch; www.ige.ch/fileadmin/user_upload/Juristische_Infos/f/j10010f.pdf (last accessed 7 June 2015).

- 12 For a more detailed description of the GI section of the Agreement, I refer to *A handbook on the WTO TRIPS Agreement* (Cambridge, UK; Geneva: Cambridge University Press; WTO, 2012).
- 13 In this respect, I would like to refer to: the minutes of the TRIPS Council meetings up until the end of 2002 (the date by which the Council should make a report on the discussions on implementation issues, as instructed by ministers) (WTO document series IP/C/M); the minutes of the Doha ad hoc negotiating body entrusted with the negotiations on a register of GIs for wines and spirits (WTO document series TN/IP/M); WTO document WT/GC/W/546 – TN/C/W/25, *Compilation of Issues Raised and Views Expressed – Note by the Secretariat*, 18 May 2005; and the reports by former Director-General Pascal Lamy on implementation issues (WTO document WT/GC/W/591 – TN/C/W/50, 9 June 2008), (WTO document WT/GC/W/633 – TN/C/W/61, 21 April 2011).
- 14 See www.ige.ch/fr/indications-de-provenance/indications-de-provenance-et-indications-geographiques/traites-bilateraux.html (last accessed 7 June 2015).
- 15 For the most recent discussion, see former WTO Director-General Pascal Lamy's reports at www.wto.org/english/tratop_e/trips_e/ta_docs_e/5_2_wtgcw546_e.pdf (last accessed 7 June 2015).