POLICY BRIEF

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History of the Negotiations of the TRIPS Agreement

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ABSTRACT

When the currently developed countries started their industrialization process, the intellectual property system was very flexible and allowed them to industrialize based on imitation, as it was notably the case of the United States. The international intellectual property system evolved since the end of the XIX Century based on a number of conventions on which the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) was later built on. Developing countries resisted the incorporation into the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) of broad disciplines on intellectual property, as they were conscious that they were disadvantaged in terms of science and technology and that a new agreement, with a mechanism to enforce its rules, would freeze the comparative advantages that developed countries enjoyed. Faced with the threat of not getting concessions in agriculture and textiles -that were crucial for their economies- they were finally forced to enter into negotiations of an Agreement, the terms of which were essentially dictated by developed countries. Coercion rather than negotiations among equal partners seems to explain the final adoption of this Agreement.

KEYWORDS: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), International Intellectual Property System, Uruguay Round of the General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO)

Lorsque les pays développés actuels ont entamé leur processus d'industrialisation, le système de propriété intellectuelle était très flexible et leur a permis de s'industrialiser en s'appuyant sur l'imitation, comme ce fut notamment le cas aux États-Unis. Le système international de la propriété intellectuelle a évolué depuis la fin du XIXe siècle sur la base d'un certain nombre de conventions sur lesquelles s'est ensuite appuyé l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (Accord sur les ADPIC). Les pays en développement se sont opposés à l'intégration dans le Cycle d'Uruguay de l'Accord général sur les tarifs douaniers et le commerce (GATT) de disciplines générales en matière de propriété intellectuelle, car ils étaient conscients qu'ils étaient désavantagés sur le plan scientifique et technologique et qu'un nouvel accord, assorti d'un mécanisme visant à faire respecter ses règles, gèlerait les avantages comparatifs dont bénéficiaient les pays développés. Face à la menace de ne pas obtenir de concessions dans les domaines de l'agriculture et des textiles, qui étaient cruciaux pour leurs économies, ils ont finalement été contraints d'entamer des négociations en vue d'un accord dont les termes ont été essentiellement dictés par les pays développés. La contrainte plutôt que les négociations entre partenaires égaux semble expliquer l'adoption finale de cet accord.

MOTS-CLÉS: *Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (Accord sur les ADPIC), Système international de la propriété intellectuelle, Cycle d'Uruguay de l'Accord général sur les tarifs douaniers et le commerce (GATT), Organisation mondiale du commerce (OMC)*

KEY MESSAGES

- When the United States was still a relatively young and developing country, it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further social and economic development.
- Under the system of international conventions that were adopted since the end of the XIX Century, there was a significant room for maneuver. For instance, under the Paris Convention on the Protection of Industrial Property, it was completely legal not to grant patents on pharmaceuticals. And many countries did follow this approach.
- The lobbies of the industries, notably the pharmaceutical industry, were crucial for the adoption of the TRIPS agreement. Developing countries resisted it as they realized that it would freeze the competitive advantages of developed countries in science and technology. They finally accepted to negotiate the agreement when developed countries made it clear that there would be no concessions in agriculture and textiles -major areas of interest for developing countries- if there was no agreement on intellectual property. Some authors have asked whether the adoption of the TRIPS agreement was a matter of negotiation or coercion.

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Cuando los países actualmente desarrollados iniciaron su proceso de industrialización, el sistema de propiedad intelectual era muy flexible y les permitía industrializarse basándose en la imitación, como en particular el caso de los Estados Unidos. El sistema internacional de propiedad intelectual evolucionó desde finales del siglo XIX basándose en una serie de convenios sobre los que se construyó posteriormente el Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Acuerdo sobre los ADPIC). Los países en desarrollo se resistieron a la incorporación en la Ronda Uruguay del Acuerdo General sobre Aranceles Aduaneros y Comercio (GATT) de amplias disciplinas sobre propiedad intelectual, ya que eran conscientes de que se encontraban en desventaja en términos de ciencia y tecnología y que un nuevo acuerdo, con un mecanismo para hacer cumplir sus normas, congelaría las ventajas comparativas de las que disfrutaban los países desarrollados. Ante la amenaza de no obtener concesiones en materia de agricultura y textiles, que eran cruciales para sus economías, se vieron finalmente obligados a entablar negociaciones para un acuerdo, cuyos términos fueron dictados esencialmente por los países desarrollados. La coacción, más que las negociaciones entre socios en pie de igualdad, parece explicar la adopción final de este acuerdo.

PALABRAS CLAVES: *Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (Acuerdo sobre los ADPIC), Sistema internacional de propiedad intelectual, Ronda Uruguay del Acuerdo General sobre Aranceles Aduaneros y Comercio (GATT), Organización Mundial del Comercio (OMC)*

Thank you to the organizing missions for the invitation to talk about the history of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement). This is an important subject for me.

I actually participated in the process of making the TRIPS agreement, but please don't blame me for the outcomes of such a process... I was at that time with the government of Argentina and leading an inter-ministerial commission that was established to give instructions to the Mission here in Geneva.

Let me start by indicating how developed countries industrialized in the context of an intellectual property system that was very flexible. I will show, in particular, the case of the United States, just to mention one example. I will also make a reference to Switzerland later. Then I will make a very brief comment on the evolution of the international intellectual property system and the main conventions that were adopted. Next, I will come to the 1980s, where the cooking of the TRIPS agreement started. As you will see, developing countries at that time were looking for something very different. Finally, I will make some reference to the process of negotiation itself. I have inserted in my PowerPoint a couple of quotes from some academics from the United States, in particular about the TRIPS agreement.

When the currently developed countries started their industrialization process, the intellectual property system was very flexible. You can see here, a paragraph from a report produced by the Office of Technology Assessment that worked for the Congress of the United States to provide advice to the congressmen. This official report says:

"When the United States was still a relatively young and developing country, it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further social and economic development"[1].

In fact, if you visit the Smithsonian Museum of Industry and Arts in Washington, you will see in a room big like this, a very candid demonstration of how the United States actually copied technology coming, as you can imagine, from the United Kingdom, and how this technology was improved. There is another book which makes the point that getting these technologies on the basis of reverse engineering/ imitation was a state policy:

"After the revolution, the leaders of the republic supported the piracy of European technology in order to promote economic strength and political independence of the new nation"[2].

I know this may not sound very good for the U.S. representatives who may be here, but it is just a fact.

I'm not trying to be provocative, but just showing how the intellectual property system was at that time, which allowed, in particular, the industrialization process in the United States. Of course, this applies also for other countries. In relation to copyright, for instance, an issue that will be addressed later, as you may know, during most of the 19th century, the United States refused to grant copyright protection to foreign authors. This protection was only introduced, with some restrictions as well, in 1891. Then the arguments that were given, were that expanding literacy demanded cheap yet excellent books, there was no inherent property right in literature, granting copyright to foreigners would give them a monopoly at the expense of the United States reading public, and U.S. publishers and their employees needed the *de facto* advantage afforded by the absence of protection. There is a lot of literature about copyright during the 19th century, showing how English authors went to the United States to lobby the Congress and the administration to change the rule. It was not changed, however, until the end of the century. Of course, we know that today the United States champions the protection of intellectual property, but it is important to know that this was historically not always the case.

Now about the building up of the international intellectual property system.

As you can see, in the last part of the 19th century, two major conventions, still in force and important were adopted: the Paris Convention for the Protection of Industrial Property and the Berne Convention on Copyright, in 1883 and 1886 respectively. Also, the Madrid Agreement, which is different, for trademark registration. This Agreement has not gotten the importance of the other treaties. But it's interesting that at the time already some basic rules were established for the protection of industrial property, including patents, trademarks, etc. as well as for copyrights.

1 U.S. Congress, Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information, OTA-CIT-302, (Washington, DC, U.S. Government Printing Office, April 1986).
2 Doron S. Ben-Atar, *Trade Secrets. Intellectual Piracy and the Origins of American Industrial Power* (Yale University Press, 2004).

But then, if you look at the following 60, 70 years, there was little advance in terms of developing new rules. In fact, during this period, there were revisions of the Paris Agreement and the Berne Convention. The Paris Convention was revised in the Hague in 1925, in Lisbon in 1958 and so on. Hence, the building up of the international system was focused on the revision of these important international conventions.

In addition, in 1952, another convention was adopted: the Universal Copyright Convention, promoted by the United States. It was not administered by the World Intellectual Property Organization (WIPO), but by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The reason for this was that the United States did not join the Berne Convention, but much later in 1989, because of differences *inter alia* with the national treatment principle.

In the 1960s, as you can see there was like a boom of new initiatives on intellectual property. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations was approved in 1961. This was an European initiative, not coming from the United States, which did not join this convention. The International Convention for the Protection of New Varieties of Plants (UPOV Convention), again, a purely European initiative, was initiated by France, and a few European countries joined the initiative. The Lisbon Agreement on Geographic Indications; again, an European initiative, not very popular among other countries, was also adopted. And perhaps the most important treaty in the period in terms of patent protection is the Patent Cooperation Treaty, adopted in 1970.

And there were other treaties as well, of minor importance - the Geneva 1971 Treaty on Phonograms, the Brussels treaty on Satellite Signals, and the Budapest Treaty for the Deposit of Microorganisms. As you can see, this decade was very active in building up the international intellectual property system.

Under this system, there was quite a significant room for manoeuvre. Because the Paris Convention, unlike the TRIPS Agreement, provides very general obligations. For instance, it does not oblige all parties to the Paris Union to grant patents in all fields of technology. Under this Convention, it was completely legal not to grant patents on pharmaceuticals. And many countries did follow this approach, which started by France with its law in 1844 excluding pharmaceuticals.

At the time when the negotiations for the TRIPS Agreement started, more than 50 countries in the world did not grant patents for pharmaceuticals. And for sure, this is one of the main reasons why the TRIPS Agreement was negotiated and adopted. Those countries did not include only developing countries. Many developed countries also excluded patents for pharmaceuticals for a long time, including Japan and France, which only introduced such patents in the 1960s, Germany, Italy (in 1978), and Spain and Portugal, who adopted patents for pharmaceuticals in 1995. Hence, it was not just a matter of developing countries denying protection for pharmaceuticals. It was a practice that was also applied in many European countries. There was also no term regarding the patent duration. It could last 7 years, for instance, in India, 10 years in Andean Community countries. In my own country, it could last for 5, 10 or 15 years. There was no fixed term, as it is now in the TRIPS Agreement, with a minimum of 20 years from the date of the application. Therefore, there was a lot of flexibilityin this regard. There was even one country that had patent protection for one year.

And also it was possible to revoke a patent in case of non-working. This practice also came from the French law of 1844. Many countries followed this approach. The idea was that a patent was granted in order to be worked, to develop an industry, and to bring technology into the territory where the grant has been given, not just to grant a monopoly for importation. Therefore, there was significant scope for different modalities for patent protection.

Below is one example also coming from Switzerland.

Swiss Federal Councillor Brennan, during the Parliament's debates about patent law: "In our deliberations on this law, we would do well to bear in mind that it should be framed in such a way that it is adapted to the needs of our own industry and conditions in our own country. These considerations, rather than the demands and claims of foreign industries, must be our primary concern in shaping the law"[3].

The fact is that Switzerland was not as advanced as Germany in the area of chemical production. It was under constant pressure by Germany to adopt patent protection, although Germany adopted patent protection for pharmaceuticals also quite late in the 70s. They wanted to have patents for the chemical industry. But Switzerland said, "well it is our decision. We should not just accept this". And, in fact, Switzerland only introduced patents for pharmaceuticals in 1970.

This is just one example of the scope that countries, including developed countries, had to frame their own policies, in particular in the area of pharmaceuticals, which, as you know, has been very much affected by the adoption of the TRIPS agreement. Notwithstanding this flexibility in the patent system, in the 50s and in the 60s, criticism emerged about the impact of the patent system.

I will just quote two major economists, both from the United States. One of them is Edith Penrose, who lately worked in the United Kingdom. Because of McCarthy she had to go to exile. Penrose wrote a very important book *The Economics of the International Patent System*, that was very influential. One of the texts in this book says:

"Up to the present, the regime for the international protection of patent rights has been developed primarily in the interest of patentees. The gains to be derived from an extension of the patent system have been stressed, but the concomitant increase in social costs has been seriously neglected"[4].

3 Richard Gerster, "Patents and Development: Lessons learnt from the economic history of Switzerland", Intellectual Property Rights Series #4 (Penang, Third World Network, 2001), p. 10.
4 E. T. Penrose, *The Economics of the International Patent System* (The

Penrose elaborates then on why the Paris Convention, even if flexible, was not to the advantage of developing countries. Interestingly, the Senate of the United States requested a study also to one of the great economists of the time, Fritz Machlup, about the impact of the patent system in the United States. One of the most famous conclusions of this report is that

"If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one"[5].

This was quite strong. Machlup added that this was also true for developing countries. You may say, well, this is very old opinion, because it was given in 1958. But if you read recent economic literature by United States academics, you may be shocked because many of the mainstream economists in the United States would share the view of Machlup. Some of them, for instance, a couple of academics from Princeton University who studied the evolution of the patent system in the United States, have suggested to just abolish the patent system, because there will be more innovation based on diffusion, rather than of the monopolies that the patents create. But this is another debate.

My intention has been to mention that during the 50s and the 60s, there were some important critical views about whether the patent system was right, was appropriate, was fuelling development, economic growth, and in particular, transfer of technology. And this thinking was influential. Developing countries were concerned at that time, in particular, about the role of patents in the transfer of technology. The argument by developing countries was that most of the patents which were granted in those countries were for foreign applicants but they were not transferring technology.

In this regard, a request was done by Brazil to the United Nations, to prepare a report on patents and transfer of technology, which was published in 1975. It's still available on the website: "The role of the patent system in the transfer of technology to developing countries" by the United Nations Trade and Development (UNCTAD), United Nations Department of Economic and Social Affairs (DESA), and WIPO. It recommended the revision of the patent system at that time.

Developing countries embarked in a process of revision of the Paris Convention. A diplomatic conference was convened to revise it but not to increase the standards of protection, to make, for instance, compulsory licenses more flexible and allow them to be exclusive. Also have a more flexible national treatment to allow for some differentiation for developing countries and introduce changes to priority rights. They wanted also to introduce inventor certificates that were used at that time in the socialist countries. The idea was to make the Paris Convention even more flexible and to expand the potential use of compulsory licenses as a means for transfer of technology, including, of course, the working obligation, which was very important in that context. The conference held several meetings. And as you may know, in the end, there was no revision. Because developed countries blocked any progress in this direction.

At the same time -this is also important as part of the context- developing countries requested the adoption of an "International code on transfer of technology". Interestingly, this was one of the items in the work program attached to the declaration on the New International Economic Order. Negotiations took place also in a diplomatic conference for many years for adoption of this code on transfer of technology, which was never adopted. There were some differences regarding particularly on the definition of restrictive business practices. Hence, both the revision of the Paris Convention and the code of transfer of technology were initiatives by developing countries that ultimately failed.

During the 80s, something very different was being cooked in the United States, going in the other direction. Perhaps this was a reaction to the offensive by developing countries. And this was the starting point of the TRIPS agreement.

How did the idea came about? There was a narrative developed by some industries. Without the lobbies of the industries, we would never understand why the TRIPS agreement was adopted. In particular, without the lobby of the pharmaceutical industry, in my opinion, there would be no TRIPS agreement. The narrative was that the United States trade deficit -as you know, the trade deficit in goods continues today, not in services- existed because in other countries the innovations made in the United States were copied, that the innovation system was very open and, therefore, there was a need of an international regime that will prevent copying of U.S. innovations abroad. This was one of the main arguments.

In fact, the electronics technology was born in the United States. The semiconductor technology was born in the United States as well. But during the 80s the U.S. semiconductor companies lost a very large portion of the market in the hands of Japanese companies, which became excellent in producing, in particular, memory chips. Then the argument was that this was happening because the Japanese were copying. And it was not true. The reality was the Japanese have improved a lot the equipment for manufacturing of semiconductors.

There were other reasons as well. At that time, the computer software had emerged as an independent market differentiated from hardware, and it was not clear what kind of protection could be given to software. Was it patents? Was it copyright? Was it a sui generis regime? Therefore, there was no uniformity regarding the protection of computer programs. Which was the country with the major global share participation in computer programs? Again, the United States, in particular, one company that I will not mention. But they actually dominated largely the market of computer software. The problem was that it was not very clear how to protect it. Some countries, for instance, France, adopted one solution, South Korea, another one. And for the United States, the option was copyright because copyright provides a long-term protection and there is no need for registration.

Johns Hopkins Press, 1951).

5 Fritz Machlup, An Economic Review of the Patent System (Washington, D.C., Subcommittee on Patents, Trademarks, and Copyrights, Senate Committee on the Judiciary, 1958), p. 80.

The same happened with biotechnology. The modern commercial biotechnology, to a large extent, was also born in the United States. And it was not clear whether you could get patents on a living material. This was decided in the Chakrabarty case by the United States Supreme Court by affirming that even a living material can be patented. But this was not accepted in other countries. The US biotechnology industry wanted, again, to have more uniform rules at the international level to protect biotechnological inventions. There was nothing like that at that time.

The same applied to semiconductors. There was a treaty -in whose negotiation I actually participated-, the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, that never entered into force. There was disagreement by the United States and Japan with some of the clauses. And, therefore, the semiconductors industry had no international standards relating to the protection of the designs for the semiconductors.

All this led the industry lobbies, in particular the pharmaceuticals and semiconductors industry, and also the entertainment industry, the software industry, to work to convince the U.S. government that there was a need to have international rules to solve these problems and prevent other countries from benefiting from innovations done in the United States. And these industries were very effective. They convinced the U.S. government that this was necessary. They made the argument that if in a particular country there is no protection for patents, copyright, etc. this will mean that when the right owner in the United States wanted to export to that country, that market will be already saturated by low-cost copies. And therefore, they said, this would amount to a barrier to trade because it will not be possible for, e.g. a patent owner to enter in an already saturated market.

As a result, the United States government decided to appoint one person in the United States Trade Representative (USTR) Office, Mr. Harvey Bale, who later became the Director General of the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) in Geneva and was also Vice Director of the Pharmaceutical Research and Manufacturers of America (PhRMA). He was tasked with convincing the European Communities and Japan to join the efforts for getting international rules in relation to intellectual property. He did a very effective work, and in fact, the European Communities and Japan were convinced. Hence, in 1982, while developing countries were trying to increase the flexibilities for the patent system, the United States was making a submission to the General Agreement on Tariffs and Trade (GATT) to develop new rules on intellectual property. Completely different directions, as you can see, and we know who prevailed in the end.

The first submission was done in 1992, to the surprise of many parties to GATT who asked: why GATT should be discussing intellectual property? For this matter, there was WIPO, the forum in which intellectual property should be discussed. But the United States' strategy was to bring this matter into GATT, which had very little to show on intellectual property. What was the main argument? As American lawyers would say, the international agreements managed by WIPO 'lacked teeth' to address non-compliance; there was no way to ensure compliance with the Paris Convention or the Berne Convention, unlike in the system of GATT, under which if there is non-compliance, you could retaliate, as it is now under the World Trade Organization (WTO). This is the strategic reason why the GATT was selected.

In GATT, there is a reference to intellectual property in Article 20 on exceptions. An exception may be invoked if "necessary to secure compliance with laws and regulations…" including those relating to the "protection of patents, trademarks, and copyrights". But this is all in GATT about intellectual property.

In fact, there were four cases under the GATT that related to intellectual property. One of them, very interesting, was on Section 337 of the U.S. Trade Law, but there is no time to refer here to it. The GATT was not really the forum to address intellectual property issues. The forum would have been WIPO, while the problem was that WIPO could not provide mechanisms for the implementation of these agreements.

In GATT there have been some discussions on intellectual property, which are important to consider here. At the end of the Tokyo Round, there was a submission by the United States, supported by the European Communities, to develop a new agreement on counterfeiting in trade. But this proposal failed because it was rejected by developing countries as they didn't want to develop such rules in the context of GATT.

When the declaration of Punta del Este that launched the Uruguay Round was adopted, after a lot of negotiations intellectual property was one of the so-called 'new issues' in the Round, with services and investment. There was a lot of opposition by developing countries, and finally, a compromise was reached, apparently between the Colombian and the European communities delegates, which is reflected in the Declaration. It is very important to read it because it tells us a lot about how the story goes on afterwards:

"*Trade-related aspects of intellectual property rights, including trade in counterfeit goods*. In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure the measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

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 under-

taken in the GATT."

This is an excellent example of a diplomatic compromise. After the text was approved, the interpretation by developed countries was "we have a mandate to develop a full-fledged agreement on intellectual property, including patents, trademarks, designs, etc".

The interpretation by developing countries was based on the second paragraph, which says that negotiations shall aim at developing something on counterfeiting. The developing countries -and this is very interesting because the developing countries acted as a group- argued that "they had not given a mandate to negotiate a full-fledged agreement on intellectual property, only on counterfeiting". And this position was held by developing countries for more than two years. During this period, developing countries said "no, we have never agreed to develop a full-fledged agreement on intellectual property. This is not the right interpretation of the mandate".

In the meantime, during this period, the European Communities, Switzerland, Japan, United States, started to exchange texts and to provide some basis for the future agreement with many of the elements that you know now.

But the developing countries continued to hold the position that only negotiations to address counterfeiting had been agreed upon. They also argued that there was such a deep asymmetry in science and technology that it was not in their interest to develop rules, in particular on patents. The then ambassador from Brazil, Rubens Ricupero, very wisely stated that the objective of the proponents of the TRIPS agreement was actually to freeze the competitive advantages of developed countries. At that time, developing countries only accounted for 6% of global research and development. It was very, very clear for developing countries that an agreement on intellectual property was not to their advantage. But you may ask then, why do we had a TRIPS agreement in the end? The reason is twofold:

The first one is that the developed countries, in particular, the United States, made it clear that there will be no concessions in the area of agriculture and textiles if there was no agreement on intellectual property. Some authors call this 'the Grand Deal' of the Uruguay Round. I was present in Montreal at the mid-term review of the Uruguay Round when the message was given to developing countries: "if you want any concession on agriculture and textiles, -of course there was a lot of interest for our countries to have concessions in those fields-, we need intellectual property".

Secondly, at the time this negotiation was going on, the United States was using Section 301 to threaten or sanction some developing countries, including Brazil for instance, that were not recognizing intellectual property at the level the United States wanted to. For instance, in Brazil, patents were not granted for pharmaceuticals, not even process patents, and Brazil was subject to trade retaliation because of this.

Developing countries were convinced that by establishing this agreement as part of a multilateral system, the unilateral sanctions would be disactivated, as there will be a system of disputes of a multilateral nature. As we know, however, the Special Section 301 is still there. That was one of the reasons why some developing countries actually agreed to enter into negotiations on TRIPS. Only in May 1990 -and the Uruguay Round started in 1986-, for the first time, developing countries presented their own text on the TRIPS agreement, with the help of UNCTAD and its legal advisor at the time, who became later on a member of the International Court of Justice. Thus, the text by developing countries proposed Articles 7 and 8, which are partially reflected in the current agreement.

This represented a major paradigm change because, as you know, the TRIPS agreement imposes minimal standards, and is not as flexible as the Paris Convention, although this Convention is incorporated into the agreement.

What influence developing countries actually had in the negotiation of the final text? As I mentioned, I did participate from the capital with my colleagues here in Geneva, and I could tell you, paragraph by paragraph, article by article, where developing countries were able to introduce some positive changes in line with their interests. One of them is probably Article 39.3, related to the protection of test data, in which developing countries, in association with some developed countries, such as New Zealand, were able to prevent the establishment of the so-called 'exclusivity of test data'. But in many other respects, developing countries had no actual power to influence the text.

For instance, consider Part III of the TRIPS agreement on enforcement. There is only one clause in which developing countries were able to introduce a significant amendment, regarding whether there is or not an obligation to establish special courts for intellectual property. But all the rest just went through, without any changes. Some literature has asked the question whether the TRIPS agreement was a matter of negotiation or coercion.

What is very clear, is that the negotiation was extremely unbalanced, both in terms of political and economic power, as well as in terms of technical capacities. For instance, in some cases, it was the first secretary of the mission here in Geneva who was negotiating with the director of the U.S. Copyright Office, or the director of the patent office in Japan; and they had to negotiate issues he or she was not really aware of. The technical asymmetry was also enormous.

But in any case, what prevailed was the political and economic power. Just to give an example, you may recall Article 8 about principles. This was suggested by developing countries. We start reading it and you say "well, this is very much in line with the interest of developing countries":

"Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic technological development".

So far it looks very good. But developed countries introduced

a last sentence, which says, "provided that such measures are consistent with the provisions of this Agreement". What does this mean? How can we interpret this provision? Can you actually take measures to promote the public interest in sectors of vital importance? What does it mean "to the extent that it is consistent"? This is a kind of 'repair' that was done by developed countries to fix provisions originally submitted by developing countries.

Finally, this is a statement made by the Chief Executive Officer (CEO) of Pfizer. Pfizer and IBM in particular were the leading firms that forged alliances in the United States in order to promote and support the TRIPS negotiations. This is reflected very well in the literature. Different alliances were established by corporations in the United States, and Pfizer and IBM led at least one of these coalitions. And then if you read the CEO of Pfizer, I think it's like a confession. He said,

"The current GATT victory, which established provisions for intellectual property, resulted in part from the hard-fought efforts of the U.S. government and U.S. businesses, including Pfizer over the past three decades. We've been in it from the beginning, taking a leadership role"[6].

And I would say, this is true. Without the Pfizer involvement, without the pharmaceutical industry lobby, perhaps we would not have the TRIPS agreement.

There is a lot of literature on the TRIPS agreement and the process that led to its adoption; Susan Sell is just one of very respected scholars from the United States, who said:

"Overall, TRIPS reflects and promotes the interests of global corporations that seek to extend their control over their intellectual property. These firms, acting through the United States government, and with the support of Europe and Japan, largely captured the WTO process, -so say, GATT process-, and succeeded in making public international law to suit their particular needs"[7].

And this is a statement, not by scholars from the South, but from a very, very distinguished scholar from the North.

Well, thank you very much. I'm sorry if I took longer, but I hope these elements put the TRIPS agreement in context and help to understand what implications it may have for developing countries. Thank you again for the invitation.

6 Edmund T. Pratt, Jr., Pfizer CEO (1972-91).
7 Susan K. Sell, "TRIPS-Plus Free Trade Agreements and Access to Medicines", *Liverpool Law Review*, Vol. 28 (2007), pp. 41–75.

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No. 126, 23 February 2024
Leveraging ESG for promoting Responsible Investment and Human Rights by Danish and Daniel Uribe
No. 127, 17 April 2024
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