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Negotiating for Brazil

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The beginning

In the 1980s, intellectual property rights (IPRs) reappeared as one of the top items in discussions on international trade. In my view, some factors would explain this:

- the emergence of new technologies, especially computer programs, integrated circuits, biotechnology and new pharmaceutical products
- the interest of producers of high-tech products in obtaining enhanced market access by means of IPR protection
- the competition from producers and exporters in third-country markets from countries where the protection of IPRs was considered insufficient or not available
- the absence of an effective multilateral dispute settlement mechanism to address complaints for violation of IPRs, and the lack of adequate remedies in the treaties administered by WIPO against violations of IPRs or inadequate protection of IPRs
- the perceived economic value of technology as a means to gain access to international markets and beat competitors
- the need to recoup the high research and development (R&D) costs involved in the launching of new products, especially high-tech products and pharmaceuticals
- the fact that technology in itself had become a valuable asset in international markets; enhanced protection of IPRs would further increase its market value

- the perception of the technology producers that higher standards and more effective protection of IPRs would strengthen their predominant position in international markets of high-tech goods

- the view of the technology producers that the looseness of the international agreements on IPRs administered by WIPO facilitated non-authorized copying and was at the origin of the growth in international trade of counterfeit goods manufactured by low-cost producers

- the commitment by the *demandeurs*[1] to a strengthened international system of protection of IPRs as a part of the multilateral trading system, via an expanded GATT.

By that time, in the GATT, preparations had begun to launch a new round of trade negotiations. After extensive discussions and bargaining, IP was eventually included among the subjects to be negotiated in the new round, together with two other so-called new themes – services and investments. This represented a major departure from the pattern of trade rounds thus far undertaken. By encompassing subjects outside the traditional mandate of the GATT, the Uruguay Round of multilateral trade negotiations opened the way for the creation of the WTO, including under its coverage not only trade in goods but also trade in services, trade-related aspects of IPRs and trade-related investment measures.

In general, developing countries, such as Brazil, had misgivings about the inclusion of new themes in the GATT, as these would hardly bring benefits to the developing contracting parties. But, eventually, they accepted the inclusion of the new themes in exchange for negotiations aiming at enhancing market access, mainly for agricultural, textile and tropical products, improving rules on safeguards and strengthening the dispute settlement system against the use of unilateral measures. In accepting the new themes, they were clear that they would have to negotiate potential gains in sectors of their export interest against, *inter alia*, required changes in domestic rules and policies concerning industrial and technological development, services and investment.

Therefore, in approaching the TRIPS negotiations, Brazil and many developing countries formulated their respective negotiating positions in defensive terms. Particularly in the case of Brazil, the national authorities were aware that the country was targeted by the *demandeurs* on the subject, as the latter regarded Brazil's IP laws as obstacles to the higher rents their corporations would like to obtain from higher standards of IP protection.

In the main, Brazil's stance on negotiating an agreement on TRIPS derived from the consideration that the protection of IPRs afforded by the existing Conventions administered by WIPO (Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works and International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)) was sufficient or adequate. If changes were to be introduced in those treaties, Brazil would have favoured, at the time, further flexibility in the application of rules regarding, for instance, compulsory licences and forfeiture for patents and the adoption of a *sui generis* protection for computer programs or, at best, including them in a category similar to that of applied art under the Berne Convention.

As the negotiations took a decisive turn after the mid-term review (1988–9), where it was agreed to include under the negotiating mandate higher standards of IP protection, as was the intention of the *demandeurs*, Brazil, as part of a group of developing countries, felt it necessary to submit the group's proposal in writing so as to demarcate its lines of defence in the negotiations on such a wide range of subjects.

In this personal account, I think a few selected topics are important in gaining an understanding of Brazil's concerns and approach to the negotiations.

The mid-term ministerial meeting, 1988–9

A mid-term review meeting at ministerial level took place in Montreal in December 1988, but it was concluded in Geneva in April 1989. It was a crucial moment in the negotiations, for it defined the terms under which we negotiators would work until the conclusion of the Uruguay Round (initially foreseen for December 1990).

At the Montreal meeting, Brazil and a number of developing countries still insisted on the inadequacy of the GATT to host negotiations on IPRs. They maintained that the treaties on IP were fundamentally about the protection of rights, whereas the GATT essentially concerned trade in goods. Delegations of some developed countries replied, in no ambiguous terms, that they considered a TRIPS agreement as part of the package on market access for goods. As many of us in the delegations of the developing countries thought that IPRs were, first and foremost, designed to reward inventors and creators and protect their works against undue copying, to us, WIPO was the most appropriate body to hold discussions on the matter. But for the developed countries, now acting almost in unison, since the European Communities (EC) had accepted to engage in full-fledged negotiations about TRIPS in the GATT, it became more and more difficult to block the holding of the TRIPS negotiations in the GATT.

In order to avoid the failure of the Uruguay Round and be subject to the unilateral application of trade sanctions against their exports, Brazil and other developing countries eventually did not block the rewriting of the mandate as the outcome of the mid-term review. Therefore, the *demandeurs* succeeded in having their approach to the negotiations prevail in the terms of the new mandate. It was then clear that it would cover new or higher standards of IPRs, including measures of enforcement. But definition on the lodgement of the eventual TRIPS Agreement was left open, to be decided at the end of the negotiations. It was, possibly, a concession to the developing countries' position (and perhaps to some European countries that still upheld WIPO against the GATT).

The agreement at the mid-term review was also possible because many developing countries softened their stance in view of the trade-offs in other areas. They entertained the expectation of receiving important concessions in other negotiating areas, such as agriculture and textiles, in exchange for agreeing to negotiate new standards in the TRIPS Agreement. In addition, and of no less importance, many were compelled to take a "more constructive attitude" in the negotiations in order to avoid being subject to trade sanctions by the United States, under its national legislation (in particular, Section 301 of the Trade Act 1974 and Special 301 of the Omnibus Trade and Competitiveness Act 1988).

The negotiations

The *demandeurs* soon made known their proposals, which were characterized by a high degree of ambition. They had particularly in mind the strengthening of IP holders' rights and further restrictions on the ability of governments to set conditions to grant those rights. If they could have their way entirely, it was possible that: the duration of patent protection would be uniformly applied and valid for a longer period (certainly more than the 20 years finally agreed, along with "pipeline protection"); the use without authorization of the right holder would be limited to a minimum (possibly only to national emergencies and to avoid anti-competitive practices); the enforcement measures would probably be stiffer and more intrusive than those that found their way into the agreed text; and the transition period for the actual application of the new standards, including for the existing IPRs unprotected prior to the TRIPS Agreement, would also be much shorter than that finally adopted.

The negotiations showed two quite distinct approaches. Whereas the developed countries aimed to raise, considerably, the international standards of protection of IPRs, including by submitting it to the GATT dispute settlement mechanisms, a group of developing countries (which were the equivalent of today's so-called emerging countries, including Argentina, Brazil, China and India – although China was still in the process of accession to the GATT), set for themselves the goal of preserving the current standards as much as possible. That group of countries could agree to insert into the TRIPS Agreement clauses that, for example, would allow them to continue to establish limitations to the protection of IPRs for public policies in general.

To my mind, the gap between the negotiating positions of these two groups was quite considerable, rendering almost impossible the attainment of a common ground. But through a process of "composite texts", first craftily elaborated in June 1990, taking into account the texts of the *demandeurs* as well as that of 14 developing countries,[2] the draft of the Agreement was being gradually built, first, around the common perceptions existing among the *demandeurs* and, later, around language that could count on the widest possible acceptance by the latter. The objections raised in the negotiations by the group of 14 developing countries to the draft proposals of the *demandeurs*, incorporated under the Chair's guidance in the "composite text", were, as the Chair used to state, "duly noted and to be addressed at a later stage". Actually, they were to be taken up only after the *demandeurs* had settled their differences and reached agreement. It was usually commented within the group of 14 developing countries that the Chair of the Negotiating Group was clearly bent on giving primacy to the big players' positions, for they represented the only possibility of giving substance to the mandate agreed in the mid-term review ("availability, scope and use"[3]), as the group of 14's positions were considered too limited or did not cover all the issues.

At the same time, and apparently under instructions by the Chair of the Trade Negotiations Committee (TNC), the then GATT Director-General, Arthur Dunkel, the Chairs of the various negotiating groups were to advance as much as possible in the drafting of the agreements, with a view to leaving to the political masters at the ministerial meeting in December 1990 only the most sensitive issues for possible cross-sector deals. That is why the Chair of the TRIPS Negotiating Group, with the help of the Secretariat, drafted (in practice, "arbitrated") certain portions according to what, in his view, could represent the closest to a balanced agreement.

The developing countries' proposal

By and large, the developing countries regarded themselves as the main targets of the major producers of goods subject to IP protection that alleged that the developing countries' national legislations did not provide for protection of IPRs for certain sectors, or did so in insufficient or inadequate manner. During the Round, some of those countries, such as Brazil, for example, were under unilateral trade sanctions by the United States for lack of patent protection for pharmaceutical and agrochemical products and for not applying "adequate" IP protection to software. In order to better express how they envisaged a possible final TRIPS agreement, and to have a voice in the negotiations, a group of 14 developing countries decided to draft a proposal.[4] It was elaborated in defensive terms, basically reflecting their national standards. But it meant to underline the relationship between the protection of IPRs and the socioeconomic, technological, development and public interest concerns prevailing in those countries.

The level of IP protection, as practised by those countries, reflected their low stage of development. They had not yet gone through the learning curve, unlike many developed countries that, just a few decades before, had benefited from "lower" standards of protection of IP that they now sought to raise. Underlying the position of many developing countries, in the TRIPS negotiations, one could distinguish considerations of public policies, such as the preservation of social benefits and the creation of conditions to set up a strong industrial and technological base, as opposed to purely commercial aspects or the need to recoup R&D expenditures, as transpired in the proposals of the developed countries. Distinct from the latter's proposals, the submission of the 14 developing countries envisaged a double-track approach – it consigned to GATT the negotiations of what the group deemed to be trade-related aspects of IPRs proper (basically, trade in counterfeit goods) and to "the relevant international organization" (i.e. WIPO) the negotiations of standards of IP protection.

Even in standards, the level of ambition of that group of countries was abysmally low as compared with that of the *demandeurs*. Nonetheless, the proposal provided the 14 developing countries with an opening to participate meaningfully in the negotiations and a chance to have some influence in the final outcome. It has to be noted that, in GATT/WTO negotiations, it is relatively common for a group of "like-minded" countries to jointly draft proposals, though the degree of substantial commitment to the proposals could vary according to the importance each country attaches to the subject matter. In the TRIPS negotiations, some developing countries added their support to a common proposal for tactical reasons, that is, in order to improve their chances of bargaining better deals in other sectors being negotiated in the Round. Among the group of 14 countries, that was evident in relation to certain delegations, which had their priorities set in areas such as agriculture or textiles, for example.

Patents

The TRIPS Agreement amplified considerably the scope of sectors subject to patentability. It rendered it mandatory to grant patents in all fields of technology. But it allowed national laws to exclude from patentability (which also means permission to "include", if desired) plants, animals other than microorganisms, and essentially biological processes.

The developing countries were unable to retain the possibility of invoking reasons of public health to exclude inventions from patentability. If that carried, they would have been able to continue not to grant patents to pharmaceutical products and processes, which, for many *demandeurs*, was their critical objective in the TRIPS negotiations. The 14 developing countries, with the possible exception of India, agreed not to insist on the issue as they were already in the process of changing their national laws to grant patent protection to pharmaceutical products.

I believe Brazil became more amenable to accepting patents for pharmaceutical and agrochemical products after a new government took office in early 1990, which coincided with the beginning of the crucial period in the TRIPS negotiations. Having embraced more market-friendly and privatization policies, and assuming the "inevitability" of changing the national law to grant patents to products hitherto not protected, the new Brazilian Government revised its TRIPS negotiating position. From then on, it took a more tactical approach to the TRIPS negotiations with a view to accumulating bargaining chips to strike more favourable deals in the negotiations on agriculture, then identified as the main sector of Brazil's interest in the Round. The Brazilian delegates were aware of the value of the concession Brazil was offering in accepting patents for pharmaceutical products. Estimates made by a Brazilian association of manufacturers of chemicals and pharmaceuticals indicated that, as an immediate consequence of the adoption of a new patent law, the country's import bill would increase by more than US$ 500 million. Though it is hard to attribute such an increase only to the changes in its patent law that Brazil had to enact as a result of the Uruguay Round accords, the fact is that, today, imports of pharmaceutical and agrochemical products in Brazil reach dozens of billions of US dollars annually.

Biotechnology

The question concerned the appropriation by patents of inventions involving living materials. In this case, even the developed countries could not agree on the extent to which that could be done. It was a difficult proposition, for many scientific and technical studies could not confirm the compatibility of inventions in this field with the criteria of patentability. It was especially hard to prove how the living materials in question could meet, for instance, the criterion of novelty. It was rather problematic to ascertain that a given microorganism was "created" in a laboratory and not "found" in nature. And even if it were "invented", how could the process of invention be described so that the microorganism could be reproduced by means of technical application? This, actually, was one of the strongest arguments, espoused by Brazil and others, to exclude from patents plant and animal varieties, as these can be reproduced by natural means. If a plant could be patented, how could it be possible to control its propagation and determine whether it has been reproduced by employing technical means or has been the result of simple natural reproduction?

The matter had clear and deep-seated economic implications, in particular for medicines, food and agriculture. Brazil is one of the world's largest agricultural producers, and its local communities have been using the fruits of the country's immense biodiversity for medicinal and farming purposes, through traditional knowledge. So it was quite natural that Brazil kept the matter under close scrutiny and that it saw it as in its interests that no new standard should be created in haste. In the end, despite extending considerably the frontiers of patentability, the TRIPS negotiators were not able to find appropriate answers to resolve the quandary of the compatibility with the criteria for patent protection and their application to living materials in a manner that could also take into account the genuine concerns of farmers and holders of traditional knowledge. Though deciding for the availability of protection, the Agreement left it to national legislations to establish the system of protection, whether by patents or by a UPOV-type[5] regime for plant varieties, or by a combination of both. It also determined to review the matter four years after the entry into force of the TRIPS Agreement.

Compulsory licensing

For Brazil, this was a key clause in the negotiations. The ability to apply compulsory licensing had long been a feature of Brazil's policies regarding the use of industrial property rules to induce industrial development. Since the early 1970s, Brazil had taken the leadership, alongside other developing countries, in the negotiations in

WIPO on the revision of the Paris Convention for the Protection of Industrial Property Rights, in particular, to secure further flexibilities in its Article 5A and 5*quater* that set the parameters within which governments can grant compulsory licences. In TRIPS negotiations, the developed countries were actually demanding the opposite, that is, less flexibility for governments on the matter. Granted, some developed countries also had reservations on proposals that could result in limiting their authorities' capacity to extract concessions from companies, by threatening to have recourse to compulsory licensing clauses.

The long exchanges on the matter in the Negotiating Group led to the conclusion that it would be practically impossible to negotiate on compulsory licences from the angle of reasons or grounds, as originally advocated by the US delegation, in that no one was ready to forsake the liberty to determine the circumstances to avail of such a tool. It was then convenient to opt for an approach based on conditions.

By setting clearer and firmer conditions, the *demandeurs* believed it was also possible to reduce the ability of governments to use compulsory licences for purposes of furthering industrial policies, their main concern *vis-à-vis* the developing countries. Actually, the arguments used to uphold national positions on the matter reflected, by and large, a North–South divide on the extent of governments' interference with the private sector's decisions in promoting development. On the one hand, most of the developed countries, but especially the United States, favoured a limited role for governments and laid a greater emphasis on the private sector and market forces; on the other, a great number of developing countries, such as Brazil, advocated a primary role for governments in generating, by means of rules and market intervention, better conditions for economic development. Admittedly, the matter was not so clear cut. Even some developed countries appreciated a role for governments in allowing use of a patent without the consent of its owner in projects in their national interest. They strongly opposed, though, the imposition of compulsory licences for purposes of import substitution, which had, in the past, been one of the main objectives of developing countries.

Indeed, a particular concern for Brazil was how to continue to have the ability to grant compulsory licences to acquire manufacturing capacity whenever the patent owner made use of its monopolistic rights to serve the market only by importation. In its view, this would be tantamount to depriving the market of competition and offering consumers goods at more reasonable prices. For Brazil, the possibility of using compulsory licences to allow for local manufacturing was equivalent to the meaning of "working the patent", as provided for in the relevant articles of the Paris Convention, the validity of which was reconfirmed in Article 2 of the TRIPS Agreement. As the TRIPS Agreement expressly does not contradict those articles (for it has not set out the reasons for compulsory licences), but makes them subject to a non-discrimination clause, I think it can be assumed that countries are able to apply compulsory licences to obtain the working of the patent in those terms. Furthermore, in the negotiations of conditions, the Brazilian delegation endeavoured to keep for the government the maximum flexibility to apply compulsory licences, should it be needed, to meet its requirements of public health, combat abusive practices and encourage local manufacturing. Such a position could be sustained by the fact that a compulsory licence is granted on non-exclusive terms, that is, even if the local manufacturer is given the licence to produce the goods that are the object of a compulsory licence, the patent's owner is not barred from continuing to offer those goods by means of importation. I believe that that assumption was key in order for Brazil to eventually accept the clauses on compulsory licences in the TRIPS Agreement.

Computer programs (software)

In the light of the imprecise definition of software – whether a creation similar to a work of art or to a technology (expressive vs utilitarian) – Brazil and the group of 14 developing countries indicated their preference to leave to national laws how to protect software. A great number of developed countries held that computer programs should be protected as a literary work, as provided for in the Berne Convention, with some adjustments as to the term of protection and the exclusion of moral rights.

Most of the negotiations occurred among the developed countries, for there existed important gaps between the positions of the United States and the EC. Whereas the former supported a protection by copyright with the exclusion of moral rights (for it considered such programs the result of a business endeavour with many collaborators, whose rights are determined by contracts; the United States also considered as equals natural and legal persons for the enjoyment of copyrights), the latter maintained that computer programs should enjoy full status as literary works under the purview of the Berne Convention, including moral rights. Actually, the United States only became a signatory of that Convention in 1989, well after the start of the Uruguay Round. This must certainly have helped pave the way to the final agreement on this issue, which was also facilitated because the developing countries had already adjusted their national laws to acknowledge protection of software by copyright.

But in the TRIPS negotiations, the US position came out as the winner. The duration of the protection – at least 50 years for computer programs – was not exactly as that for a literary work. It would count as of the date of its publication or of its making. In addition, signatories were not obliged to recognize the author's moral rights. For many developing countries, such as Brazil, which, at the inception of the negotiations, questioned the assimilation of computer programs as literary works under the Berne Convention as they considered that such programs had a strong technological content, the fact that the TRIPS Agreement recognized the specificity of software – as expressed in the term of protection and the exclusion of moral rights – represented a somewhat late vindication of their stance.

Related rights

Brazil wanted to preserve the regime of the Rome Convention, to which it is a signatory. It had some misgivings as to the intention, in particular of the United States, which was not bound by that treaty, to introduce into any TRIPS agreement changes to the effect of extending the rights of producers of phonograms and of broadcasting organizations. In this respect, it could follow broadly the position of the EC, which also defended the regime of the Rome Convention. The United States, by the TRIPS Agreement, became indirectly bound by that regime, but was able to expand the scope of the rights set forth therein, or preserve the restrictions provided in its national legislation, in order to enhance the protection afforded to producers of phonograms and to broadcasting organizations.

Apart from the ability to submit possible violations of related rights to the WTO dispute settlement mechanisms, the main novelties introduced by the TRIPS negotiations concerned the inclusion of rental rights, that is, the possibility of producers of phonograms or right holders in them (viz. performers) to prohibit rentals; and the extension of the duration of the protection to 50 years for producers of phonograms and performances. In the end, the outcome was considered satisfactory for Brazil as the new provisions were acceptable. It also pointed to the new developments in the market with the increasing use of rentals of computer programs, phonograms, films, electronic games and so on. In addition, it clearly strengthened the position of right holders against piracy, to which Brazil could subscribe without hesitation.

Objectives and principles

The insertion of Articles 7 and 8 in the agreed text originated from deep concerns hinted at in the proposal submitted by the group of 14 developing countries, which included Brazil.

The proposal was of a pre-emptive nature. Since, after the mid-term review, it was decided that negotiations should aim at raising the standards of IP protection, in the view of that group of countries, objectives and principles should be observed in the implementation of the new standards. As such, they should reflect the recognition in the TRIPS Agreement of the need for the social, economic and technological development of all countries; of proper balance between the rights of IPR holders and those needs; of the inter-relationships between rights and obligations; of ensuring diffusion of technological knowledge and stimulus to innovation in all countries; and of preventing abuses derived from the exercise of IPRs. The new standards should also result in social and economic welfare, as well as recognize the right of countries to take measures to protect public morality, national security, public health and nutrition, and promote the public interest in sectors of vital importance to their socioeconomic and technological development.

It was evident that these proposals, which eventually found their way in a more succinct form into the Agreement, were intended to allow for some flexibility in national laws, which was of particular interest to developing countries. The proposals came about in a stage of the negotiations where it had become clear that it would be impossible for developing countries to succeed with their "minimalist" approach for standards. At that point, basically, all developed countries (but especially the major trading partners, which carried a considerable weight in the GATT) had formed a front to fight for the adoption of ambitious standards of IPR protection, which ran in opposition to the stance taken by that small group of developing countries.

It should be noted as well that, in the GATT (and for that matter in the WTO today) there is no negotiating bloc, like the Group of 77, thus rendering quite difficult the process of bringing together all the developing countries to field common negotiating positions. But I believe that the texts on principles and objectives could count on unanimous support among the developing countries. In the end, the adoption of Articles 7 and 8 could be seen as a concession by the *demandeurs*, though the latter made sure that the eventual measures taken under national legislations, in the light of those objectives and principles, should be consistent with the provisions of the TRIPS Agreement.

The matter was of great interest for Brazil, as it eventually permitted national authorities to obtain an agreement from manufacturers and their countries of origin that they would not contest, by resorting to the WTO's dispute settlement mechanism, decisions to make available to the public at affordable prices, through the compulsory licensing of patents, medicines used, for example, in treatments for HIV/AIDS.

Enforcement

The issue was of high priority for the *demandeurs*. They aimed to have national judicial systems following high standards in combating counterfeit goods both in domestic markets and at the borders, and in ensuring the availability of legal procedures for IPR holders to defend their rights in member countries' national courts.

Brazil's main concerns with the topic lay in the possibility of imposition by the TRIPS Agreement of excessive obligations on its national jurisdiction for the purpose of enforcing the protection of IPRs *vis-à-vis* its judicial system of enforcement of laws in general. In addition, it was mindful that the enforcement provisions could give rise to possible conflicts in the application of judicial procedures between national systems based on civil law – followed by Brazil – or on customary law adopted by countries that followed the British system of common law.

As to the gist of the proposals, with one or two exceptions, Brazil did not have major problems with the disciplines proposed by the main negotiating parties, as they were already integrated into its judicial system. But it had a conceptual problem. If the TRIPS Agreement was to be part of the dispute settlement mechanism of the GATT/WTO, Brazil would be admitting that its national legal procedures, which are the same used in the enforcement of laws in general, could be questioned by another member in a case regarding IPRs. One particular concern was that some delegations of developed countries seemed to propose that the enforcement of IP laws could take precedence over other laws. The matter was more or less solved with the inclusion of a caveat in Article 41.5 in the subsection on General Obligations, by which no member is affected in its capacity to enforce its laws in general, nor has an obligation to distribute resources as between enforcement of IPR and of laws in general.

Dispute settlement

Initially, Brazil and many other developing countries took the stance that the question of dispute settlement should be dealt with separately in keeping with the double-track approach of their original proposals. Thus, the relevant articles of the GATT on dispute settlement would apply only to disputes arising from trade of counterfeit goods. As to disputes regarding standards of IP protection, the group of 14 developing countries, in their proposal, suggested a simple procedure of consultations between the parties concerned. Eventually, they would be referred to a dispute settlement mechanism that was to be negotiated at WIPO (whose dispute settlement mechanism never materialized).

In the negotiations, and as the idea of a single undertaking took deeper root, the developing countries became more amenable to the submission of disputes under the TRIPS Agreement to the dispute settlement mechanism to be agreed to at the Uruguay Round. That view gained traction as the major trading partners showed increasing acceptance of the commitment to avoid resorting to unilateral trade sanctions against developing countries on questions related to IPRs. The developing countries, eventually, agreed to have the TRIPS Agreement submitted to the WTO's new dispute settlement mechanism, because they considered that it would not only give them better protection against unilateral measures but also reinforce the multilateral trading system.

It was agreed, then, that Articles XXII and XXIII of the GATT would be applicable to disputes under the TRIPS Agreement. But the question of whether or not the subsections (b) and (c) on non-violation of Article XXIII would be included was left to be solved at a later stage (possibly through consultations in the TRIPS Council).

Transition period for pharmaceutical and agrochemical products

As the proposal of the 14 developing countries did not contemplate substantial changes in the IP standards, it did not provide for a transition period. The question came about late in the negotiations as part of a deal that would involve acceptance, mainly by the developing countries, of higher standards of IP protection as proposed by the *demandeurs*.

The transition period concerned not only the time normally needed by national legislative authorities to approve a new agreement but, more concretely, the time needed to draft new national laws and to adjust development, industrial and health policies, mainly in developing countries, in order to give effect to the new IP standards in particular areas or sectors, such as pharmaceuticals and agrochemicals, as well as to adapt their national enforcement systems. Developing countries that, prior to the TRIPS Agreement, did not provide product patent protection, would have up to 2005 (ten years after the entry into force of the Agreement, as per Article 65.4) to do so. This was accepted as part of the deal that would involve a similar transitional period (ten years) for the implementation of the Agreement on Agriculture and Agreement on Textiles and Clothing in the respective negotiating groups of the Round. It was a procedure meant to ensure some balance in the overall concessions exchanged by trading partners in the Round.

However, the pharmaceuticals and agrochemicals producers in the main trading partners (essentially, the United States, the EC, Japan and Switzerland) succeeded in having the delegations of their respective countries introduce clauses (Articles 70.8 and 70.9) to ensure both immediate IP protection and the possibility of monopolistic marketing rights of their products in those developing countries, such as Brazil, that, up until then, did not provide product patent protection to inventions in those sectors. Those clauses established that developing countries in that situation would agree to start accepting the filing of patent applications as of the date of the entry into force of the TRIPS Agreement (1995), and examine the criteria for patentability as of the date of application of the Agreement (five years later or from 1 January 2000) but as if they were established at the date of entry into force (i.e. retroactively to 1995).

Moreover, according to Article 70.9, the developing country authorities must accept to examine applications for exclusive marketing rights to a member, and eventually grant them, even prior to the granting of the patent it had applied following procedure in Article 70.8.

The developing country in question was then obliged to grant a patent for the remaining period of protection counting from the filing date (1995). This could be construed as an exception to the novelty requirement of patentability.

In practice, Articles 70.8 and 70.9 qualified the transition period of ten years afforded to developing countries that, prior to the TRIPS Agreement, did not provide product patents in the above-mentioned sectors. It could even result, as per the case in question, in a substantial reduction of the timespan agreed as the “transition period”. Such drafting creativity was meant to give satisfaction to stakeholders whose patents might fall into the public domain before the expiry of the transition period.

But unlike trade in goods, where the transition period would mean a phase-out of the pre-existing restrictions at the end of ten years, in the TRIPS Agreement, the transition period in such highly valued sectors as pharmaceuticals and agrochemicals could be much shorter than ten years. This is because the national authority in the country (where no product patent was available prior to the TRIPS Agreement) could grant in much less than ten years exclusive marketing rights to the applicant member. As it is known, the owner of an invention for which patent protection is claimed, can start, soon after obtaining marketing approval, putting on the market and selling, on an exclusive basis, the corresponding product, even if the patent has not yet been granted.

Be that as it may, the transition period in any TRIPS agreement, considered critical by the *demandeurs* if they were to agree to a final text, was a "price" deemed acceptable by the developing countries in general, as it would unblock the road to agreements in other areas of their main export interest, and ensure a successful conclusion of the Uruguay Round.

Conclusions

Throughout more than seven years of negotiations, I think Brazil gradually moved from a position of staunch opposition to the negotiations on trade-related aspects of IPRs that would result in the adoption of higher international IP standards and the incorporation of the subject matter into the jurisdiction of the WTO, to a somewhat hesitant acceptance of such an outcome. Though not entirely convinced of the benefit to its economy of the acceptance of higher IP standards, nor that the WTO would be the best place to lodge TRIPS-related disputes for resolution, Brazil eventually agreed to these provisions as it considered them a price to pay in order to have a strengthened multilateral trading system and some satisfaction for its main export interests.

I believe also that a number of factors could have played a role in such a development, most notably:

- pressures from its then main trading partner, the United States – the main proponent of the negotiations on IP in the Round – including by means of trade sanctions (exclusion from the Generalized System of Preferences benefits)
- change in the Brazilian political scenario with the coming to power of a government that was more favourable to market-friendly policies and to an increased share of private sector and foreign investments in the economy
- a rather unified position taken by the major trading partners on issues where Brazil and other key developing countries were the main targets of the proposed new standards, such as in pharmaceuticals and agrochemicals patents or enforcement
- the perception of the strategic value of TRIPS in the overall negotiations as a bargaining chip to achieve Brazil's main goals in the market access and rule-making sectors of the Round (agriculture, textiles, safeguards and dispute settlement)

- given the strong interest of the big corporations in the *demandeurs*' economies, and their robust lobbying in the capitals of the main developing countries, the "inevitability" of Brazil's agreeing to higher or new IP standards to address technological developments in informatics, computer software, pharmaceuticals and agrochemicals, in particular
- the absence of a unified position among the developing countries, which had either little expertise in the subject matter or limited capacity to resist the pressures from the main stakeholders in introducing higher IP standards and restrictions in the action by governments to use IP to promote industrial development.

Notwithstanding the outcome of the TRIPS negotiations and the high degree of unpreparedness by developing countries to engage in such a complex and technically demanding exercise, Brazil and many developing countries, to my mind, succeeded in inserting in the final text a few clauses in order to safeguard their national interests and to give their governments some latitude of action or policy space in implementing their development policies and to defend the public interest. This is exemplified in the provisions on objectives and principles, as well as on use without authorization of the right holder. These negotiations surely ought to be a lesson, especially for developing countries when engaging in future negotiating exercises in the WTO.

Endnotes

1 In the negotiations, *demandeurs* were usually considered those that submitted proposals for higher IPR protection, such as, *inter alia*, the European Communities (EC), Japan, Switzerland and the United States.

2 GATT document MTN.GNG/NG11/W/71, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods – Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, 14 May 1990.

3 GATT document MTN/TNC/11, Uruguay Round – Trade Negotiations Committee – Mid-Term Meeting, 21 April 1989.

4 GATT document MTN.GNG/NG11/W/71.

5 International Union for the Protection of New Varieties of Plants.