

Negotiating for Argentina

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Introduction

To prepare a chapter that presents the experiences of a negotiator of the TRIPS Agreement as close as possible to reality is not an easy task. This is because the Agreement is complex as it covers many subjects related to IP and is made up of a set of rules with varied degrees of specificity and detail. Approaching this task 25 years after the negotiations has introduced complications and involuntary distortions that have made this task even more difficult.

After some days of reflection on how to face the challenge, I came to the conclusion that the best contribution within my reach would be an honest attempt to describe what had been the major elements of concern to my delegation, the global context in which the Uruguay Round of multilateral negotiations had taken place and the elements I had been able to count on in order to undertake the negotiations.

This chapter will cover, in its first part, a summary of the main decisions and dates that decisively shaped the development of the Uruguay Round and, in particular, of the TRIPS Agreement. In the second part, I will address the phenomenal changes that took place in the global, political and economic arena that unfolded in parallel with the negotiations, and the inevitable, although sometimes intangible, effects that these had on governments, people and delegates. Substantial changes, but not for the same reasons, also took place in Argentina and significantly affected the finalization of national positions. Third, I will attempt to present in binary opposition (even though it contradicts my way of judging reality) the expression of Argentina's interests under the simple formula "offensive" – that is, gains in agriculture negotiations – vs "defensive" – that is, losses under the TRIPS negotiations. After this, I propose to develop some of the fundamental reasons on which our objectives were based concerning crucial aspects of the TRIPS text, in order to incorporate "breathing space" or "policy space" for national

legislations to implement the most sensitive issues from the “defensive” position. In the last part, I express with candour some of the problems and restrictions an individual negotiator from a developing country has to cope with as compared with delegations benefiting from the support of experts on every element of the proposed TRIPS text. In closing, I take the liberty to share a couple of additional thoughts, which I hope can give some colour and perspective to what is expressed in this work.

What follows is a modest and honest attempt, while revisiting memories left dormant for a long time, to share with the younger generation of negotiators my experiences in dealing with IP in those volatile times. What I call “my experience” is a complex mix of memories of a technical nature, reconstruction of thoughts and discussions of a speculative nature of some 25 years ago and the rediscovery that, under the embers of time and distance, some old and faithful convictions that accompanied me throughout the whole process still survive.

Key events in the TRIPS process

- Punta del Este, Uruguay, September 1986. The decision is made to launch multilateral trade negotiations (the Uruguay Round). For the ensuing years, the mandate of negotiation in the field of IP will be subject to controversial and opposite interpretations between those who emphasize “the need to promote effective and adequate protection of intellectual property rights” and those who consider that “the negotiations shall aim to clarify GATT provisions” in order to “develop a multilateral framework ... dealing with international trade in counterfeit goods ...”.²
- Montreal, Canada, December 1988. Mid-term review at ministerial level. Deep disagreements on four chapters lead to an impasse in the negotiations until a solution is found to unblock those substantial elements: textiles, agriculture, safeguards and IP.
- Geneva, April 1989. An understanding is reached in the Trade Negotiations Committee, substantially reformulating the mandate on IP. From that point onwards, negotiations shall encompass “basic principles”, “adequate standards” and “effective and appropriate means for the enforcement of trade-related intellectual property rights”, as well as a “multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods”.³

- Brussels, 1990. A TRIPS text has been outlined, but with a number of substantial differences still remaining among the negotiators.
- Geneva, December 1991. Draft Final Act of Negotiations – the Dunkel Draft – is put forward by the GATT Director-General, Arthur Dunkel, following the recommendations of the Chair of the Negotiating Group, Ambassador Lars Anell. Dunkel proposes texts on a host of questions not agreed between the delegations. Regarding TRIPS, the proposed solutions are in general in line with the ambitions of the most active promoters of this area of the negotiations.
- Marrakesh, April 1994. Agreement Establishing the WTO. The TRIPS provisions, as an integral part of the new organization, create treaty obligations for its members.
- Bern, December 2014. A dear voice, but distant in time, brought me – totally unexpectedly – 25 years back to the exciting and fascinating moments of the TRIPS negotiations. Jayashree Watal, the clever, forceful and trusted Indian colleague in so many crucial instances during the negotiations – now a member of the WTO Secretariat – wanted me to remove the dust, stir the grey matter in my brains and write a paper, “an account of your personal experience, Tony”, and not a “technical, formal one”.

The broader context

The substantial changes in the mandate of the Uruguay Round

The year 1989 was one of dramatic changes. In April, as previously mentioned, the new mandate for the TRIPS Negotiating Group completely altered the direction and substance of the work. Thereafter, negotiations would, *inter alia*, extend to the principles that would be the basis of a future agreement; the standards of protection that would be adopted for each of the IPRs; measures of enforcement that would be designed, including provisions on border measures; and procedures for dispute settlement that would be agreed to. This was a really overwhelming agenda.

The starting point for this new stage brought about difficulties at different levels. Developing countries, especially those that had domestic pharmaceuticals industries of a certain size, were particularly concerned because we were fully aware that the aim of the major trading powers was to ensure, at a global level,

patents for pharmaceutical products. Later, I will specifically address this issue, but it suffices to mention, at this point, that we were deeply concerned by the potential costly effects on national health systems. In the case of Argentina, given the public policies in place on this matter, this was of utmost importance.

At the same time, there was an underlying fear of granting too strong a patent protection in the biotechnological area. Biotechnology was a relatively new field and international experience was scarce; the greatest biological diversity – from which the base material for new developments is often obtained – was found precisely in the developing countries. Understandably, we were afraid that the exercise might head towards a reinforced technological supremacy by international companies based, paradoxically, on our vast biodiversity.

The economic situation in Latin America

In a somewhat broader perspective, but one necessary in order to understand the time and the framework within which the negotiations developed, reference should be made to the so-called “lost decade for development” in Latin America. With greater or lesser intensity, most countries of the region were confronting a drop in economic activity, high rates of unemployment, reduction in real wages, increase in the general level of prices and declining terms of trade.

The combined effect of higher international interest rates and its impact on debt service – an increase of almost six times – with the decline of the inflow of foreign capital and the fall in the terms of trade, was devastating. The transfer of capital towards creditors outside the region was of such magnitude that the ambition of economic development seemed unattainable.

This gloomy picture was exacerbated, if that were possible, by the fact that several countries were undergoing the process of democratic recovery after turbulent *coups d'état* and were forced to deal with legitimate social demands under clearly adverse economic conditions.

1989: The crisis hits harder in Argentina

The same year that saw the redefinition of the mandates within the Uruguay Round, 1989, challenged Argentina with one of its most difficult episodes since the successful restoration of democracy in 1983. International prices of grains and meats – essential components of the trade balance of the country – declined significantly during the 1980s, thus creating further external restrictions in addition to those imposed by the high interests on sovereign debt. This combination of

critically negative factors led to high inflation, unsatisfied social demands and, finally, to the early fall of the government.

The newly elected government decisively changed direction: it put into motion a vast plan of economic deregulation, with privatizations within the utilities sector, dramatically simplified the requirements for foreign investments and made a pledge of reforming Argentina's patent law.

The altered global order: The fall of the Berlin Wall

To add complexity to the overall picture in which the negotiations took place, it should also be taken into consideration that the same year, 1989, saw the fall of the Berlin Wall. With this event, all the certainties that had been brought about by the bipolar order collapsed: the USSR was practically dissolved within months and, with that, the strong ideological references, the economic regimes, the organization of society resulting from the post-war order, disappeared from one day to the next.

It is unnecessary to accentuate the global magnitude of the “revolutionary transformation” that such an event had, but I believe it pertinent to recall it because the shock waves inevitably hit senior policy-makers and negotiators alike, generalizing the feeling of bewilderment and demanding great efforts to comprehend the consequences of the emerging order.

In that context, only the United States remained in the centre of the new global order and, as a consequence, a central reference in the commercial architecture that was being outlined in Geneva. In parallel with this course of events, Europe also went through a period of substantive changes that consolidated its role as major player in the negotiations and as a global trading partner. The fall of the Wall would entail – inevitably – the reunification of Germany, the demand for accession to the European Communities of the vast majority of the countries of Eastern Europe and, therefore, the expansion of the market economy into new territories, populations and industries.

In short, since the end of 1989, changes felt in the global political, economic and social order were of magnitudes unknown up until then and affected hundreds of millions of people in one way or another, by the alteration of a whole set of principles governing existing systems.

In addition to that, another factor that had considerable influence on national authorities and negotiators alike was the fact that the United States adopted and

unilaterally applied legal provisions of a punitive nature against selected countries under Section 301 of its Trade and Tariff Act of 1984. At different times, Japan, the Republic of Korea, India, Brazil, Argentina, Mexico and Chile were, among other countries, placed under a regime of special supervision (i.e. watch list, priority watch list or priority foreign country) with the consequent threat of withdrawing Generalized System of Preferences benefits – which were important for many developing countries or by the application of sanctions in the form of higher tariffs on products sensitive for the exporting country.

The prospect of facing threats or trade sanctions in the US market produced a corrosive and divisive effect in many countries – among them, Argentina – pitting companies exporting to the US market against those identified as a “target” of the US action. This divisive effect in the business world did not take long to be felt in the public and political spheres, adding to the elements of controversy.

It is true, looking back at those events, that we all understood that the changes would decisively influence our dealings and that they would lead us to places that we could not foresee. Nor could we foresee what we would find in them.

Argentina: Crucial interests in the Uruguay Round

It goes without saying that, for a country such as Argentina, such complex and comprehensive negotiations as were undertaken in the Uruguay Round cannot come down to two central issues, in a sort of dichotomy represented by the “offensive interests” and “defensive interests”.

Indeed, the multiple interests of the country, of differing intensity, interacted dynamically in a way not always foreseeable. For instance, from the very beginning of the Uruguay Round, it was clear that negotiating areas such as agriculture and textiles had systemic value for the whole exercise; not all the other areas had the same intrinsic value. But the developments that took place in the course of the Uruguay Round altered that equation; the introduction of the notion of “a single undertaking”, for instance, prompted additional demands, due to the fact that we were now confronting an exercise out of which, at the end of the road, an international organization would emerge that would house the results achieved in all areas of negotiations and that would subject those results to a unique and reinforced dispute settlements mechanism.

In this evolution, it soon became apparent in the work of the internal coordination of the Argentine delegation that the different negotiating groups would have a growing relevance, not only for their intrinsic value, but also by the reinforced

importance that inevitably would be brought about by the new multilateral trading architecture.

Having said this, and at the risk of contradicting myself about being uncomfortable when referring to binary dichotomies of the national positions, I will present the tension “agriculture vs TRIPS” in order to transmit, as a sketch with illustrative character, two of the more visible interests of Argentina within the framework of the Uruguay Round.

The “offensive” interests: Agriculture

The original GATT did not contemplate the major exporting interests of Argentina; in fact, it made official in its rules the discrimination that was contrary to our agricultural interests. It is necessary to point out that, for Argentina, agricultural and food production is central, not only for the recognized efficiency of the farmers and the exceptional conditions of the land but also because of its contribution to the gross domestic product (GDP) as a whole and to the trade balance.

Due to the unfair treatment of agriculture in the GATT, it was natural for Argentina to place a high level of ambition on this area of the negotiations. At the same time, given previous experience, the launching of a new round of negotiations in the GATT was received with scepticism and mistrust. For that reason, the whole negotiating exercise was initially received with cautious and measured political support.

Notwithstanding these difficulties, it was clear to the negotiators that the inclusion of agriculture in the Uruguay Round was a unique opportunity to leave behind such discrimination in the GATT. In those years, a coalition of agricultural exporting countries was formed, the Cairns Group, exceptionally overcoming the cleavage between North (developed countries) and South (developing countries) that characterized, to a large extent, these multilateral trade negotiations. This coordinated approach among several countries under the umbrella of the Cairns Group, however, did not lead to an increased convergence or coordination in other matters, such as the TRIPS negotiations.

In Argentina, predictably, perceptions of what the Uruguay Round could hold for us leaned towards either a “defensive” or an “offensive” view, depending on the interests at stake – namely, as a threat to certain industrial sectors, or as an opportunity for the agricultural sector.

This duality was certainly not confined to the private actors directly involved. In the public sector, at both the national and provincial levels, in professional associations, academia and the press, the subject was a matter of lively debate and of uncertainty about the magnitude of what was really at stake for the country. The state of anxiety and distrust remained throughout the negotiations of the Uruguay Round (strictly speaking, there are still many voices expressing deep dissatisfaction over the actual results of the Round for Argentina).

The positive internal reception of Argentina's decision not to conform to the proposals in the mid-term review at the ministerial meeting in Montreal in 1989, therefore, did not come as a surprise. On the side of the "offensive" interests, the positive reception of this outcome was unsurprising, because the process did not give hope for elements of negotiation considered indispensable; the "defensive" interests were positive because no decisions were made that would immediately jeopardize the most sensitive matters.

The "defensive" interests: The national pharmaceuticals industry

In Argentina, foreign and domestic pharmaceuticals industries had lived with manageable tensions between themselves for decades. The relative importance of the industry as a whole is apparent in its several hundreds of millions of dollars' value in terms of production and employment and its role in various health systems. The fact that laboratories of national origin were stronger in relation to their peers in other countries in the region led to a promising phase of expansion of activities in several countries in Latin America, and even in Asia, adding to the adversarial relationship between foreign and domestic pharmaceuticals industries.

The public interest in Argentina is explained not only by the growing economic contribution of this sector but also by the conditions of negotiation of prices/quantities of medicines arising from the particularities of the Argentine health systems. Indeed, under the federal public health system, medicines were supplied free of charge to the network of public hospitals, which were distributed throughout the country. Furthermore, provincial entities were also partially involved in providing health care, and a multiplicity of labour associations granted high subsidies to their affiliates on purchases of medicines and had their own facilities, including hospitals and laboratories. It is thus easy to understand the social and political sensitivity aroused by the issue of drug patents and their impact – real or potential – on prices.

Another element of concern was the fact that Argentina – like so many other developing countries – did not have in place the necessary legislation or experienced institutions dealing with competition laws or consumer protection. I underline this point because, during the negotiations, the question on how to effectively fight potential abuses, including increases in prices, arose repeatedly. The developed countries favoured this type of approach, but for many of the developing countries, the argument was not convincing.

Perhaps it is interesting to point out the way in which the Argentine administration prepared to face the TRIPS negotiations. An Interdepartmental Commission was set up, encompassing all the agencies with responsibilities in matters of IP (Foreign Affairs, Trade, Science and Technology, Agriculture, Public Health, Directorate for Copyright Protection, Customs, etc.), although the diversity of interests at play did not always facilitate the adoption of an agreed position.

The Argentinian pharmaceuticals industry lobbied intensively on several fronts – public agencies, Parliament, consumers' associations, trade unions and mass media – and it kept close contact with partners in countries that faced similar challenges.

I recall an occasion on which an important business delegation travelled to Geneva to get a first-hand impression of the state of the negotiations. It met with the Chair of the Negotiating Group, Ambassador Lars Anell, officials of the GATT Secretariat and the delegations of the United States, the EC, Japan and Switzerland. The message received was blunt: the delegation returned to Argentina with the impression that the industry's room for manoeuvre would be greatly reduced.

The central issues of TRIPS

Once the negotiations moved to define the standards of IP protection, the quandary shifted from the defensive point of view to how to construct a system allowing for flexibilities in future national legislation concerning, in particular, the patent regime. The challenge was not a minor one, given the lack of international experience on a subject that was a typically internal one – in addition to the negotiating imperative of not giving away in advance our positions on crucial points in the negotiations. On top of that, negotiators had to cope with the growing scepticism of national actors on what, they anticipated, would represent an unmitigated defeat.

Thanks to the valuable support of a small number of outside experts and colleagues from other developing countries, particularly those who were the

“preferred target” to change national patent regimes, a reasonably effective combined action, although not necessarily very well coordinated, could be deployed in order to include in the provisions of the TRIPS Agreement a certain “breathing space” for our national legislators.

What were these elements and how did they interact with each other?

The question of “exhaustion of rights”

It is important to state in advance that the TRIPS Agreement leaves the issue of exhaustion open because it was impossible to find a common ground among delegations. Article 6 is a tangible example of this; hence, there is no internationally accepted definition of the principle of “exhaustion of rights”.

Therefore, what I express next must not be seen, in any way, as an attempt to interpret this provision in 2015; rather, it should be seen as my effort to share what moved me 25 years ago to defend this principle.

The joint submission of 14 developing countries⁴ does not specifically include any provision on this issue. However, in the course of discussions, we came to better understand the relevance of the topic. The central idea of exhaustion relies upon the fact that the right holder has the crucial right to decide whether or not to place the product on the market. However, once the right holder places the product on the market, the IPR is exhausted; the product is already on the market, and from there this product “flies with his own wings” (an expression borrowed from a doctoral thesis I studied at the time).

One of the arguments in favour of the inclusion of a clause on exhaustion was that the negotiating mandate itself indicated that new provisions on IPRs should not become barriers to legitimate trade. Following the logic from a commercial point of view – we were in a trade round, after all – if there was no infringement of IP rights, then no artificial barriers to trade should be created.

In practical terms, the importance that my delegation attached to this provision arose from the possibility of “parallel imports” from the market where the price determined by the right owner was the lowest without the consent of the right holder. It is essential, and goes without saying, that the product should be “legitimate”, that is to say, it should not infringe the rights of the right holder or an authorized licensee. In defending this position, I believed that the ability of the right holder to compartmentalize markets, with the consequent power of imposition of prices, would be moderated.

The solution enshrined in the TRIPS Agreement – a sort of “agreement to disagree” – leaves freedom to national legislators to determine their own regimes of “exhaustion”. There are various, conflicting interpretations on the scope of Article 6 and its reading with the footnote to Article 28 (on rights conferred by the patent), for the insertion of which I am partly responsible. I will not give my interpretation here; I will simply limit myself to recalling, as a former negotiator, some of the issues considered central in those days.

Compulsory licences

As we approached a substantially reinforced patent system, fear was growing of the intensity of the legal monopoly to be granted. On the one hand, we were confronting the risk that national legislation would not be allowed to impose the obligation of “local working” – that is, local manufacturing – of the patented product. That, in and of itself, would have constituted a major concession from developing countries that they were reluctant to make. Their argument was that, if the patent owner was entitled to territorial legal monopoly, he or she had, in turn, to contribute to the development of the industry in that territory.

On the other hand, we watched with increasing concern the possibility that the new agreement would eventually grant to the holder the exclusive right to import the patented product. The conjunction of the non-requirement of local working and the exclusive right of importation was a hard blow against the idea, predominant among many developing countries about the contribution by national patent regimes to industrial development. Adding to this dark picture was the wide latitude that the right holder would have to compartmentalize markets and impose abusive practices, including high prices.

This explains why, as a defensive element, an effort was made to make the clause of the so-called non-voluntary licences as wide as possible; the ability to locally exploit the patent without authorization of the owner as a result of an administrative or judicial decision was of crucial importance.

During the negotiation of the provision on compulsory licences, a convergence of interests emerged on different elements of the provision, sometimes with the support of some developed countries and, on other occasions, with that of others. This gave us, as a result, increased room for manoeuvre in national legislation.

As it was extremely difficult, if not impossible, to agree on the grounds for granting compulsory licences, the exercise continued on a double track: on the one hand, identifying concepts of general order that could be specified in national legislation

(e.g. cases of emergency, anti-competitive practices, public interest), and on the other hand, developing a detailed set of conditions that should be met, such as that decisions must be taken on a case-by-case-basis, compensation must be based on the economic value of the licence, the legal validity of the grant must be reviewed by a higher body and so on.

Conditions to observe to grant this type of authorization were, in general, acceptable and tempered the rigidity introduced by the binary choices of either prohibiting the requirement of local working or permitting the exclusive right of importation. Another significant element of relief was the inclusion, in the same Article 31, of the ample authority given to the national authorities when facing cases of anti-competitive practices by the right holder – a hypothetical situation in which there was no need to observe some of the conditions applicable in other situations.

Control of anti-competitive practices

Another issue of concern to developing countries was how to avoid abuses in licensing contracts that could restrict not only trade but also the transfer of technology – a concern that had been the subject of intense but unsuccessful discussions in the United Nations Conference on Trade and Development (UNCTAD) for almost a decade. The purpose was to establish a comprehensive approach to the harmful effects that such practices may have on the transfer of technology and, therefore, on development.

In accordance with the experience and defensive interests at stake, some developing countries, using the draft Code of Conduct on Transfer of Technology as their model, proposed in the TRIPS negotiations a list of 14 practices to be prohibited in licensing agreements. Developed countries resisted a positive listing of anti-competitive “*per se*” practices, and only admitted to penalize those practices, which, in individual cases, would adversely affect competition.

The final TRIPS Agreement text is very far from the initial aspirations of the developing countries proponents. It does not contain specific obligations for the members of the WTO nor does it contain internationally agreed rules on a list of anti-competitive practices – except in some cases that were admitted as examples.

Despite these weak provisions, the added value of the TRIPS Agreement consists in the freedom that countries have to control and sanction such practices and the admission, in a multilateral treaty, that certain licensing conditions can adversely affect trade and the transfer of technology.

Undisclosed information: Test data

In general, in order to register pharmaceutical products, national authorities require the submission of relevant data relating to a drug's quality, safety and efficacy ("test data"), as well as information on the composition and physical and chemical characteristics of the product.

During the TRIPS negotiations, the obligations that should be assumed with regard to the information submitted to the authorities, as well as the rights and benefits to grant to the companies producing these data, were highly controversial.

The international standard in place prior to the TRIPS Agreement was limited to protection against unfair competition – Article 10*bis* of the Paris Convention for the Protection of Industrial Property. The concept was generally considered to mean "acts contrary to honest business practices". National legislators had, therefore, ample discretion on the definition of "unfair competition" and the means of protection.

The questions raised were, ultimately, simple, but of enormous relevance: what would be the legal obligations of the authorities concerning undisclosed data? How could one protect such data under the concept of "unfair competition"? Do the data belong exclusively to the company that originates them? If so, for how long does the data exclusively belong to the company? What treatment should be given to a second or subsequent company that files a submission for regulatory approval of a product based, partly or wholly, upon the information provided by the first company?

The answers to these questions might have serious ramifications on the generic drug industries of countries that did not grant patents on pharmaceuticals and agrochemicals, such as Argentina and India, and also on those countries that granted them but relied heavily on local companies producing generic products, such as Canada. The crux, therefore, was the possibility of using existing data "not unfairly obtained" so as to avoid very expensive and time-consuming duplication of tests that would, if required, keep companies from placing equivalent products on the market once the patent had expired. A substantial part of information on tests relating to approved drugs becomes publicly available, for instance, once published in a scientific journal or made public by the authority.

Historically, some national authorities relied on the first application's data for the evaluation of a second or subsequent entrant's application for similar products. If producers, typically generic manufacturers, are obliged to unnecessarily repeat

long and costly testing, the impact would be felt by small and medium-sized companies – particularly in developing countries – with insufficient resources to undertake such testing. This would reduce the affordability of medicines that are off patent and should, in principle, be broadly available at the lowest price. In those cases, health authorities would normally require that the second or subsequent entrant proves that the product is similar or bio-equivalent to the one already registered.

In response to the strong demand for patent protection and in order to avoid the creation – directly or indirectly – of new forms of exclusive rights not internationally recognized, it was of the utmost importance to elaborate provisions on test data that would not expand the exclusive rights granted by the patent.

In the end, some leeway was allowed; the obligations under the TRIPS Agreement would refer to “undisclosed” information submitted to the authorities for the approval of new pharmaceutical and agrochemical products, and the basic element of data protection would be the obligation not to disclose the data, that is, to keep them confidential and to protect against acts contrary to honest commercial practices.

Clearly then, what a competitor of a pharmaceutical or agrochemical product cannot do is use the originator’s test data through unfair commercial practices. There are “exclusive” rights over this data, and there is indeed the right and obligation of governments to grant protection against unfair conduct. National authorities thus retain a significant margin of manoeuvre.

In a nutshell, this chapter was considered crucial by many delegations that wanted to preserve the interests of national producers of generic medicines and, at the same time, protect sensitive data of the companies against unfair commercial practices.

With the passing of time, Argentina and the United States met several times in order to clarify a number of legal provisions of the Argentinian patent law and administrative measures concerning data protection. In June 2002, a mutually accepted solution on most of the issues involved was notified to the Chair of the WTO’s Dispute Settlement Body; on the question of protection of test data against unfair commercial use, no common ground was reached. Nevertheless, the parties agreed that, if the Dispute Settlement Body should adopt recommendations and rulings to clarify Article 39.3, our national legislation would follow those recommendations.

Negotiating teams: Imbalances

This book affords us an excellent opportunity to share with younger generations of negotiators some of the facts about the conditions and resources available to those with the responsibility for TRIPS negotiations.

First, concerning the experience of national institutions on IP, in Latin America, including national offices dealing with IP, with a few exceptions, notably Brazil, most had a stronger tradition on copyright issues than on industrial property. They generally lacked financial autonomy and had little exposure to international negotiations. Furthermore, the approach on industrial property was mainly of an administrative nature; the task of developing a comprehensive and up-to-date view of the opportunities offered by, and the requirements of, a modern patent system remained in the hands of a small group of experts.

Second, there were imbalances in the limited availability of national experts during the negotiating process. The dynamic, sometimes overwhelming, pace that characterized the negotiations on TRIPS since 1989 allowed us to benefit from the presence of national experts only occasionally, as it was not possible for them to travel frequently from our capitals. Argentina, fortunately, had the permanent support of a prestigious expert, Professor Carlos Correa.

It is only fair to mention in this context the priceless support and guidance the developing countries were given in Geneva. The expertise provided by UNCTAD – oddly enough, not by WIPO – clearly contributed to the strengthening of our technical understanding of several elements and facilitated the submission by developing countries of specific proposals,⁵ which was essential to balance the proposals made by developed countries.

Third, I should mention the obvious imbalance resulting from large and small delegations. Most developing countries had very few officials to cover a wide range of issues in all areas of TRIPS. Developed countries, on the other hand, benefited from extended human, technical and financial resources, whether in Geneva or in their capitals.

Finally, the negotiating process itself threw up some additional imbalances. For differing reasons, not all the developing countries who tabled document MTN. GNG/NG11/W/71 could actively take part in the entire negotiating process. Only a handful of those signatories were able to participate in all of the informal consultations of the “10+10” group, a grouping open, essentially, to those delegations with concrete issues on the part or section to be negotiated. On the

developed countries side, the “10” participating were almost invariably the same – inevitably, they were either the *demandeurs* or their close allies. From the developing countries’ side, participation was certainly not so homogeneous, which did not facilitate for all a full understanding of the evolution of the discussions.

A closing reflection

The brief, and inevitably incomplete, preceding comments are a modest attempt to reflect the impressions, experiences and conditions within which a negotiator of the TRIPS Agreement from a developing country discharged his duties.

Certainly, this work does not intend to develop theoretical foundations or extended interpretations of the provisions of the TRIPS Agreement. If that were the case, I would have unintentionally distorted the real positions and ambitions expressed by so many during the negotiations.

On the other hand, it is redundant to mention that the effect of time on memory leads to the emphasis on some elements or nuances over others – especially for someone whose ensuing professional experiences rarely involved the TRIPS Agreement. The accompanying emotions felt during the negotiating process can be part of this distorted lens.

In any case, I have tried to reflect the influence of some of the forces operating at that historical time – and the resulting effect they produced – as well as the constant intention, while negotiating, of not losing sight of the global evolution of the Uruguay Round and of identifying and preserving space for national actions in crucial issues.

I emphasize the historical moment because, whether or not related to what happened in other latitudes around the globe, in Argentina, an essential change concerning economic policy and response to external demands was put in motion. With variable intensity, this influenced the task of the negotiators in Geneva.

Regarding the TRIPS Agreement, the amendment of the negotiating mandate, as well as the tight time frame fixed to conclude the negotiations – a little more than a year and a half – brought about a highly dynamic process in which great attention was required almost each step of the way, thus imposing a substantive weight on the shoulders of smaller delegations.

It is true that, by the very nature of the issues involved in negotiating the TRIPS Agreement, many developing countries did not in practice have substantive

offensive interests to propose. In the case of Argentina, the defensive nature of the exercise was enhanced by its also being a “target” priority country for non-patenting pharmaceutical products.

This imposed a strong emphasis on some of the elements that govern the Agreement, either on the section on principles or on the provisions related to the extension of patent rights, limitations or safeguards that could result from a compulsory licensing regime, or the attempt, which partially failed, to enshrine effective and universally recognized anti-competitive practices. Finally, there was a need to preserve policy space and provide a chance for survival for our domestic industries that would see a dramatically altered environment in which to continue their activities.

I am not judging whether the end result was due to our modest ambition. We have to bear in mind that the TRIPS Agreement does not reflect a perfect agreement among the negotiators on any of its elements. It is part of a broader framework – subject to debate on whether it was realistic or essential – that was arbitrated by third parties (e.g. Chairs of the negotiating groups, Directors-General of GATT) and included the results of bilateral or plurilateral agreements among some delegations on several components of the Uruguay Round.

However, no matter what opinion it deserves, the TRIPS Agreement constitutes unprecedented regulation in the area of IP by virtue of the near-universal membership of the WTO and the harmonizing nature of minimum obligations that must be observed by its members.

Endnotes

- 1 This chapter is dedicated to Ambassador Néstor Stancanelli, who never lost sight of the essential and who knew how to translate into action the notion of "national interest".
- 2 GATT document MIN.DEC, Multilateral Trade Negotiations – The Uruguay Round – Ministerial Declaration on the Uruguay Round, 20 September 1986.
- 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, 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.
- 5 For example, GATT document MTN.GNG/NG11/W/71.