WTO DISPUTE SETTLEMENT AND THE TRIPS AGREEMENT

The TRIPS Agreement was implemented in the WTO to gain access to a functioning dispute settlement mechanism that could authorize trade sanctions. Yet TRIPS and the WTO Dispute Settlement Understanding are based on systems that developed independently in WIPO and GATT. In this book, Matthew Kennedy exposes the challenges created by the integration and independence of TRIPS within the WTO by examining how this trade organization comes to grips with intellectual property disputes. He contrasts the way intellectual property disputes between governments have been handled before and after the establishment of the WTO. Based on practical experience, this book provides a comprehensive review of the issues that arise under the DSU, TRIPS, GATT 1994 and other WTO agreements in intellectual property matters. These range from procedural pitfalls to substantive treaty interpretation and conflicts as well as remedies, including cross-retaliation.

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WTO DISPUTE SETTLEMENT AND THE TRIPS AGREEMENT

Applying Intellectual Property Standards in a Trade Law Framework

MATTHEW KENNEDY

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CONTENTS

FOREWORD

Until the mid-nineties the legal framework that governed international trade, the General Agreement on Tariffs and Trade (GATT), dealt almost exclusively with issues related to trade in goods. There were no provisions for the rapidly expanding trade in services. The status of agriculture was also uncertain. Trade in textiles and clothing was subject to quotas. The agreement said precious little about protection of intellectual property rights. The system for the settlement of disputes functioned reasonably well because all countries knew how much strain it could take. Strictly speaking, GATT was not even a proper organization; it was an agreement signed by 'contracting parties' who were willing to share the cost for a secretariat. Unlike almost all other international organizations, the show was run by the participating countries.

In view of this, the outcome of the Uruguay Round negotiations, which started in 1986 in Punta del Este and ended in 1994 in Marrakesh, was well-nigh revolutionary. Practically all the basic principles of GATT were clarified and strengthened. In agriculture, prior forms of border protection were transformed into tariffs. Quotas for trade in textiles and clothing were to be phased out. The improved Dispute Settlement Understanding (DSU) gave members automatic access to the system, the right to an appeal and virtually automatic adoption of reports. A whole new agreement covered trade in services (GATS). Even though it was not on the agenda when the Round began, GATT was transformed into the World Trade Organization (WTO). However, the most surprising addition was the comprehensive Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which built on treaties developed in another organization altogether (WIPO).

I had the privilege to chair the negotiating group on TRIPS. When we began in 1986, it was anybody's guess what the outcome would be. The Punta del Este Ministerial Declaration spoke of 'trade-related aspects of intellectual property rights, including trade in counterfeit goods'. Quite early it was clear that several countries wanted a far-reaching agreement

that included minimum standards for intellectual property protection. Many other countries regarded this as something that they had to accept to obtain results elsewhere in the single undertaking. An agreement was reached at a high-level meeting in 1989 that future negotiations should encompass basic principles, minimum standards, enforcement, dispute prevention and settlement, and transitional arrangements. By the end of 1991, the negotiating group had reached a provisional agreement covering all of those objectives.

The negotiations started very slowly and ambiguity about the mandate was not the only reason. TRIPS was truly a new subject in the GATT framework. There were almost no government experts posted in Geneva, and many countries could not rely on qualified expertise in capitals. It had to be a steep learning curve. Regarding minimum standards, there were no GATT provisions that could serve as a basis for negotiations. The numerous texts produced by the participants differed in several respects, and the lack of one common reference text made orderly negotiations very difficult. It was only in 1990 that I was allowed to produce a Chairman's draft. It was a rather unwieldy document since it was based on a commitment to reflect fully all proposals in the submitted texts – but it put the negotiations on a solid track. All negotiators in the room could then refer to the same paragraph on the same page in the same document.

The TRIPS negotiating group was one of fifteen when the Uruguay Round began; later there were seven negotiating groups. There were fora where common issues could be addressed but coordination was patchy at best. All participants kept an eye on the emerging package of what was a single undertaking but the negotiating groups were to a large extent autonomous. Thus – and this is at the heart of Matthew Kennedy's analysis – a comprehensive minimum standards agreement for the protection of private rights was negotiated in parallel with a DSU that primarily dealt with trade issues concerning members' rights and obligations.

The TRIPS negotiations aimed at providing effective and expeditious procedures for multilateral dispute prevention and settlement in intellectual property matters and to reduce the tensions surrounding unilateral redress. The latter objective primarily concerned actions by the United States on the basis of Section 301 of the US Trade Act of 1974. These two objectives have been broadly achieved. Before the Marrakesh Agreement entered into force, there was no functioning enforcement mechanism linked to any of the WIPO treaties and no intellectual property case has ever been referred to the International Court of

Justice even today. The cases dealt with by WTO panels have provided positive solutions in the large majority of cases within a reasonable period of time. For all practical purposes, the WTO has become the forum of first choice for the formal settlement of intellectual property disputes between governments.

Beneath the surface, the operation of this system is more nuanced. This book presents an admirably clear, critical – but also constructive – analysis of the uneasy existence of a minimum standards agreement protecting private rights in a framework designed to solve trade disputes between states. Without unduly simplifying the distinction, it is fair to say that the TRIPS Agreement informs countries what they must do, while trade rules usually deal with what countries are not allowed to do in terms of discrimination or restrictions on imports. And there is almost no adaptation in the DSU to accommodate TRIPS.

The book highlights a number of problems. It questions the incautious use of GATT practices by TRIPS panels. In some cases this has led to an injudicious reversal of the burden of proof. There also seems to be a tendency to disregard the implications of public policy concerns. A more mundane, but equally important, challenge is the supply of expertise regarding intellectual property rights. However, the book's most critical comments are saved for the Appellate Body. Only a few TRIPS cases have been appealed, and Professor Kennedy believes that we should be pleased with that.

There is no doubt that one reason why the proponents wanted TRIPS to be part of GATT, or WTO, was the attraction of an enforcement mechanism that could allow the complainant to retaliate. In some quarters it has been proposed that respect for human rights, decent working conditions or protection of the environment should be linked to the WTO. It is therefore important to clarify that the value of the dispute settlement mechanism before and after WTO is that parties bring their legislation or practice in compliance with rulings of panels. Retaliation is a very blunt instrument. It normally allows a country to stop importing products that it wants to import. In other words, a right to retaliate gives you the opportunity to shoot yourself in the foot hoping it would hurt the other party more. If the world community wants to promote or prevent certain actions, there are far more effective measures available.

Professor Kennedy's book is not only a balanced and lucid exposition of how TRIPS has been integrated into the WTO family. It also lists a number of open issues that need to be addressed and gives advice on how

to go about it. Fluent in intellectual property law and in trade law, this volume makes a valuable contribution to both.

Lars Anell
Former Chairman
Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods

SERIES EDITOR FOREWORD

The advent of the new and binding system of dispute resolution of the World Trade Organization, in operation since 1995, fundamentally altered the role and status of law in the international trading system. While before dispute settlement was conciliatory and at the disposition of parties, the new system with its two tiers of panels and the Appellate Body under the Dispute Settlement Understanding strongly reinforced legal disciplines of GATT and its related agreements. Principles and rules, often limiting and containing regulatory powers of States in the process of trade liberalization for goods and services, have been refined in a continuous stream of cases, evolving the law of international trade regulation. Rulings adopted by the Dispute Settlement Body become binding upon parties and, in case of non-compliance, enforceable by means of the imposition of trade sanctions and selective withdrawal of concessions relating to market access rights.

These changes are even more profound for intellectual property, which was so far completely devoid in practice of interstate arbitration. The rules of the Paris and Berne Conventions had no case law prior to their incorporation into the TRIPs Agreement. While these conventions are subject to the jurisdiction of the International Court of Justice, no case law evolved ever since these treaties were adopted in 1883 and 1886, respectively. Application and interpretation was left to domestic legislation and domestic courts, resulting in great variance in the interpretation of scope and effects of international rules relating to the protection of intellectual property rights. Since 1995, the new WTO system also applies to intellectual property protection enshrined in the TRIPs Agreement of the WTO. It has profoundly changed the landscape.

Unlike GATT and GATS, the TRIPs Agreement contains a set of detailed minimal standards. They are essentially of a behind-the-border regulatory nature, both in terms of substance and procedures, which States agreed to adopt and comply with on the basis of the TRIPs Agreement. The normative nature of these rules thus is somewhat

different from those of GATT and GATS. The present thesis examines how these differences play out within the DSU developed and designed for GATT, but equally applied to the rules of intellectual property protection. It examines the case law and the experience of the first twenty years of the DSU. In doing so, it explores commonalities and differences in a horizontal and systematic manner, and assesses to what extent the system is suitable for other and new areas of regulatory convergence, which increasingly dominate modern trade policy.

The treatise was written in Beijing, where Matthew Kennedy teaches international trade law and technology law, and at the World Trade Institute of the University of Bern during longer periods of research. The author regularly attended the doctoral seminars of the WTI doctoral programme, presenting issues and progress in an exemplary clear and lucid manner. He was able to benefit from his extensive experience as a former legal counsellor in the WTO Secretariat in Geneva, combining theory and practice. Supervising his work was a particular pleasure and a learning experience in exploring the intricacies of the new field of IPRs in WTO dispute settlement. The present book, based upon the author's doctoral thesis submitted to the Faculty of Law of the University of Bern, not only amounts to the leading treatise on the subject, but will also provide long-term guidance to other areas of regulatory, behind-the-border issues increasingly dominating international economic law.

Thomas Cottier

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Short title	Full case title and citation
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