be conducted within the following parameters: (i) It should be confined to the question of liability for personal injury; (ii) It should cover neither nuclear accidents nor accidents occurring in the transport of goods (both areas amply regulated by international legislation) and (iii) Any action that might be authorized in the light of such study would be undertaken on a step-by-step basis.

Given the pressure on its own human and financial resources, the secretariat is currently engaged in exploring the possibility of obtaining special external financing for the carrying out of such a study.

Legal issues connected with software

A study by the secretariat had suggested Unidroit initiative in the area of specific commissioning of software programmes and the rights to use of the programme by the party commissioning the programme and the party developing it. Agreements concluded with a view to the preparation of such programmes are usually tailor-made from one agreement to another and their terms differ according to the experiences of the parties and their respective bargaining power. It was proposed by the secretariat that Unidroit might usefully consider the drawing up of guidelines regarding the negotiation of such agreements, their purpose being to make the parties more aware of the differing legal consequences flowing from their choice of contractual provisions.

The Governing Council at its 72nd session in June 1993 took note of the Secretariat study but in view of the doubts expressed by certain members as to the usefulness of carrying out work on the subject at the present, as well as of the number of topics on which Unidroit was already engaged, it was decided that further study should only be undertaken as and when the resources of the Institute would permit. The Governing Council, at its 74th session in March 1995, is to decide whether the item should be formally deleted from the programme.

B. The New GATT Accord: An Overview with Special Reference to World Trade Organization (WTO), Trade-Related Investment Measures (TRIMS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS)

The conclusion of the Uruguay Round Negotiations and the signing of the Final Act Embodying the Results of Uruguay Round Multilateral Trade Negotiations (Final Act) by 111 countries on 15 April 1994, has brought about far-reaching changes in the structure of the international economic relations.[1] A new world trade body, the World Trade Organisation (WTO) has formally come into existence to oversee the effective implementation of the Final Act. The objective of the Final Act remains free trade. Nevertheless, keeping in view the recent developments and the emphasis on the environment the WTO seeks to allow "for the optimal use of the world's resources in accordance with the objective of sustainable development... to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[2] It also recognises "the need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."[3]

1. *The outcome of the Uruguay Round: An Initial Assessment, Supporting Papers to The Trade and Development Report, 1994* (UNCTAD, New York), p. 5.
2. *Preamble, Agreement Establishing the World Trade Organization*, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, 15 April 1994), p. 9.
3. *Ibid.*

Despite these peripheral references to the developing countries and the recognition of their problems in regard to economic development and growth, the actual outcome of the Final Act is surely to be decided by multifarious factors, such as trade, technology, flow of investments and the political decision-making processes. Even the whole process of the negotiation at the Uruguay Round had been determined by these factors in one way or the other. Developing countries faced other kinds of problems too. They lacked coherence in outlining their common outlook. The emergence of new technologies and the trade patterns were also not in their favour. In other words, they lacked both the resources and the expertise to meet the challenges posed by the new and emerging areas. Infrastructural deficiencies were also a major factor in the way of developing countries' inability to identify and articulate the possible hindrances inherent in the various provisions of the draft negotiating text.[4]

Be that as it may, the Final Act has been adopted and now the task is to see how best it could be utilized to serve the interests of countries belonging to different categories. The WTO will provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments.[5] Accordingly, the endeavour in this study will be to examine the implications of the Final Act on the Asian-African countries, *vis-a-vis* the new and emerging areas of technology.

Background and Negotiating Approaches

The Uruguay Round of Multilateral Trade Negotiations was launched in September 1986.[6] According to one view the new round was "the most challenging undertaking in the GATT history not only because it was launched against the background of an unprecedented worsening of the world trading conditions with a view, *inter alia*, to developing a more open, viable and durable multilateral trading system but also because of the scope and complexity of its agenda"[7]. This round addressed traditional market access issues also the longstanding ones, such as agriculture, tropical products or safeguards. As regards the institutional framework of GATT, it dealt with dispute settlement procedures, the implementation of certain articles or the functioning of the GATT system as a whole. Another feature of the Uruguay Round was the inclusion for the first time of such issues as trade-related aspects of intellectual property rights (TRIPS), trade-related investment measures (TRIMS) and trade in services.

It should be noted that the principles and rules that governed international trade since the Second World War were generally embodied in the General Agreement on Tariffs and Trade (GATT). The operating mechanism of the GATT system has been summed in the following way: "Such basic premises of GATT as the principles of most-favoured nation and non-discriminatory treatment, as well as differential and more favourable treatment for developing countries, have over-time brought under its auspices nearly 100 trading nations, both developed and developing. Through a series of rounds of trade negotiations, within this multilateral framework of contractual rights and obligations, the GATT Contracting Parties have succeeded in reducing significantly the general levels of tariff protection and in introducing more discipline into the use of a number of non-tariff measures which have become important trade policy instruments."[8]

There were, however, important shifts in the emphasis accorded to various topics. The new "themes", as they were called, were also introduced. The reasons which necessitated the introduction of new themes were stated to be a complex set of factors within the structure of the international trading system itself. According to one view, "the inclusion in the Uruguay Round of the issues of services, trade-related investment measures, and trade-related aspects of intellectual property rights reflects the structural changes which have taken place in the world economy and the evolution of the role of technology and technological progress in world production and trade."[9] The rapid changes in the technological innovations opened up new possibilities such as informatics, telecommunications, biotechnologies and new material applications. These new areas brought in elements in the usage of scientific knowledge and its collection, storage, processing and transfer for practical applications.

4. Supporting Papers, n. 1. p. 202. The UNCTAD Study briefly examines the "Cost of adapting national intellectual property laws and institutional arrangements to TRIPS provisions".

5. For the List of Agreements concluded at the Uruguay Round and of related decisions and declarations see Annex A of the Secretariat Brief No. AALCC/XXXIV/Doha/95/11.

6. The Uruguay Round was officially launched on 20 September 1986 with the adoption of the Ministerial Declaration on the Uruguay Round (generally referred to as the Punta del Este Declaration), but the negotiating process can be considered to have begun as far as back as in early 1982 in the preparatory work for the GATT Ministerial Session of November of that year, which established the work programme that provided the elements for the Uruguay Round Negotiating agenda. See: *Trade and Development Report, 1994* (UNCTAD: New York) p. 119.

7. *Uruguay Round Papers on Selected Issues* (UNCTAD, New York, 1989).

8. *Ibid.*

9. Paolo Bifoani, "Intellectual Property Rights and International Trade" in *Uruguay Round Papers*, n. 7, p. 129.

The negotiating approaches on all these issues were formulated on one basic criterion, namely, the prevalence of economic inequality and dependency existing between developed and developing countries in their relations. In other words, it should be noted as a prelude to the determination of these approaches that the international flow of technology has been regulated by prevailing market conditions and the economic power of the actors involved. Due to these differences, after more than four years of negotiations the Uruguay Round could not be concluded within the agreed timeframe at the Ministerial Meeting of the Trade Negotiations Committee (TNC), held at Brussels from 3 to 7 Decemer, 1990.[10] The UNCTAD's Trade and Development Report 1991 noted: "The negotiations had to be suspended because of a number of political deadlocks, first of all in the area of agriculture, where participants could not agree over "specific binding commitments" in the three related areas of domestic support market access and export competition. There were also wide divergencies in the positions of participants in some other key areas, such as anti-dumping and trade-related investment measures, on which draft texts were submitted to the Brussels Meeting. Moreover, practically all parts of the draft Final Act submitted to in Brussels' Meeting contained fundamental, political or technical points of disagreement, on which difficult compromises still had to be negotiated."[11]

The complex and difficult nature of the negotiations could be seen in the decision of the Brussels Ministerial Meeting (December 1990). This meeting concluded with a request to the Director-General of GATT to pursue intensive consultations in the early months of 1991 with the specific objective of achieving agreement in all the areas of the negotiating programme in which there were still differences outstanding, taking into acount the considerable amount of work carried out by Ministers at the Brussels Meeting, although it did not commit any participant.

It took nearly two years to finally formulate a final document embodying the conclusions of the negotiations. These negotiations, although open to all the Member States, were at times conducted with too many constraints. Some of the leading developing countries could not consistently maintain their negotiating approaches and strategies. The process of negotiations leading to the final outcome was summed up as "a matter of compromise between the divergent positions of the major trading nations"[12] Further,

10. Prior to its final meeting in Marrakesh, Morocco, the TNC, set up at Punta del Este, has met twice at Ministerial level, at the Mid-term Review of Montreal in December 1988, and at Brussels in December 1990. See *Trade and Development Report, 1994*, n. 6, p. 119.
11. *Trade and Development Report*, 1991 (UNCTAD: New York), p. 141.
12. *Ibid.*

"in order to achieve their objectives more effectively, certain developing countries aligned themselves with groups of developed countries where their interests coincided, as on agricultural reform and improved market access. In other areas, however, particularly that of the "new issues", where developed and developing countries found themselves in radically different situations, developing countries had effectively coordinated their positions and submitted their proposals."[13]

The Trade Negotiations Committee concluded the Uruguay Round in Marrakesh, on April 15, 1994, with the signing of the Final Act and opening for signature of the Agreement Establishing the World Trade Organisation. Of the 125 countries which formally participated in the Round, 111 signed the Final Act and 104 signed the WTO Agreement, in many cases with the indication that their acceptance was subject to ratification. Seven countries were unable to sign the WTO Agreement because of domestic legislative impediments.[14] In addition to twenty-eight agreements, a number of Decisions and Declarations were adopted., including[15] (i) the Marrakesh Declaration containing schedules of concessions on goods; (ii) Decision on the Establishment of the Preparatory Committee for the WTO; (iii) Decision on Acceptance of and Accession to the Agreement Establishing WTO; (iv) Decision on Trade and Environment; (v) Decision on Trade in Services and the Environment; (vi) Declaration on the Relationship of the WTO with the International Monetary Fund; (vii) Decision on Organizational and Financial Consequences Flowing from Implementation of the Agreement Establishing the WTO.

III. Final Act Embodying the Results of the Uruguay Round Negotiations: An Overview

The implementation of the Final Act, it is estimated, should result in the increase of the World trade by more than 200 billion dollars.[16] According to an UNCTAD study, the successful conclusion of the Uruguay Round should also result in a substantial strengthening of the multilateral trading system essentially by: (i) providing much more detailed rules to govern the application of a variety of trade policy measures, particularly those where weak or unclear disciplines had consistently been a source of trade

13. *Ibid.*, p. 142.
14. Australia, Botswana, Burundi, India, Japan, Republic of Korea and United States, See: *Trade and Development Report, 1994*, n. 6, p. 119.
15. See Annex. A Doc. AALCC/XXXIV/Doha/95/11.
16. The current approximate World Trade is estimated $1,000 billion. *The Economic Times, 16 December*, 1994.

tensions and the subject of trade disputes; (ii) devising new multilateral trade rules to cover intellectual property and trade in services; (iii) achieving a substantial degree of tariff liberalization as to maintain the momentum towards ever freer multilateral trade; (iv) reducing the discriminatory aspects of regional trade agreements; (v) effectively raising the multilateral obligations of all countries to broadly comparable levels, with differential and more favourable treatment for developing countries being delineated in a more specific, contractual manner; and (vi) linking together the various agreements concluded within a formal institutional framework (i.e. WTO), subject to an integrated-dispute settlement mechanism. An aspect which probably may need greater consideration at a later date would be the inclusion in the Final Act range of measures previously viewed as falling within the scope of domestic policy.[17]

The present study seeks to concentrate on three major areas concerning the institutional framework i.e. (a) WTO, (b) trade-related aspects of intellectual property rights, and (c) investment measures. These areas are of distinct importance to the developing countries of Asia and Africa. The main functions of WTO, for instance, are to facilitate the implementation, administration and operation of the Uruguay Round Agreements, and to provide a forum for negotiations among members concerning their multilateral trade relations.[18] The provisions relating to investment measures need careful and selective consideration. It should be noted that during the initial stages of the negotiations some developed countries attempted to negotiate multilateral obligations with respect to the treatment of investment *per-se*, in pursuit of their longstanding objective of obtaining the multilateral acceptance of such principles as a "right of establishment" and "national treatment" for transnational enterprises and to link such principles to the multilateral trading system. Due to the strong responses of a group of developing countries, the UNCTAD study notes, negotiations finally concentrated on compatibility within the GATT or measures which linked investment to trade in goods.[19]

The importance of intellectual property rights in the overall context of emerging new technological innovations has already been emphasized. Accordingly, the scope and intensity of the obligations contained in the Agreement on TRIPS go far beyond what had been envisaged at the beginning of the negotiations. There are no specific provisions to facilitate tecnology transfer to developing countries. The norms and standards

17. UNCTAD, *Trade and Development Report*, n. 6, p. 119.
18. Article III, *The Agreement Establishing the World Trade Organization*.
19. UNCTAD, *Trade and Development Report, 1994*, n. 6, p. 136.

envisaged in the Agreement on TRIPS do not take into account the specific problems which may have to be faced by the developing countries. In the following analysis an attempt has been made to address briefly some of these issues which are critical to the Member States of the AALCC.

A. World Trade Organisation (WTO)

The World Trade Organisation (WTO) provides the institutional framework to the Final Act.[20] The role which is likely to be played by the WTO in the "new world order" has been described in different ways. Some view it as finally taking the place of the still-born International Trade Organization (ITO) of the Havana Charter and constituting the "missing pillar" of the post-war world economic system—the third "Bretton Woods" institution.[21] On the other hand, views have also been expressed that the WTO "would not be different in character from the existing GATT Secretariat... nor is it expected to be a larger, more costly organization.[22] Some view its role cautiously by noting, "the WTO has no more real power than that which existed for the GATT under the previous agreements."[23]

(i) Organizational Structure

The Organizational Structure, which is open to all WTO Members, consists of a Ministerial Conference, meeting at least once every two years, and a General Council, meeting as appropriate. The General Council will also carry out the functions of a Dispute Settlement Body and a Trade Policy Review Body. Other bodies include a Council for Trade in Goods, a Council for Trade in Service, and a Council for TRIPS. A Committee on Budget, Finance and Administration, a Committee on Trade and Development, and a Committee on Balance-of-Payments Restrictions will be established by the Ministerial Conference. The Council for Trade in Goods, the Council for Trade in Services, and the Council for TRIPS will establish their respective rules of procedure subject to the approval of the General Council, and any subsidiary bodies they may set up will establish their own rules of procedure subject to the approval of their respective Councils. The Council for Trade in Goods will oversee the functioning of the Multilateral Trade Agreements as set out in Annex 1A, while the Council for Trade in Services will oversee the functioning of the General Agreement on Trade in Service as set out in Annex 1B, and

20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*

the Council for TRIPS will oversee the functioning of the Agreement on TRIPS, including Trade in Counterfeit Goods, as set out in Annex 1C.[24]

The Agreement establishing the WTO provides that the General Council will make arrangements with other intergovernmental organizations that have related responsibilities to provide for effective cooperation as well as with non-governmental organizations for consultation and cooperation on matters related to those of the WTO. There will be a Secretariat of the WTO headed by a Director-General. The financial regulations of the WTO will be based, as far as practicable, on the regulations and practices of the GATT 1947. The WTO has a legal personality and will be accorded by its members such legal capacity as may be necessary for the exercise of its functions.[25]

The WTO Agreement stipulates that the Contracting Parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept the Agreement and the Multilateral Trade Agreements, and which have submitted their schedules of concessions on goods (annexed to GATT 1994) and services are eligible to become original members of the WTO. There is an exemption from that basic requirement related to the least developed countries which will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.[26]

(ii) Functional Aspects

Although the WTO Agreement consists of a Preamble, sixteen Articles and four Annexes, it does not incorporate any substantive multilateral rules and disciplines (concerning for example, MFN treatment, non-discrimination, national treatment etc). It has been noted that the preamble, a redraft of the GATT 1947 preamble, is the only place in the Agreement where substantive matters are touched upon. Apart from referring to the "optimal use of the world's resources in accordance with the objective of sustainable development", the preamble recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". It, in general terms, seeks to develop "an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs

24. *Ibid.*
25. UNCTAD, *Trade and Development Report* (Supplement, n. 1, p. 11).
26. *Ibid.*, p 13.

and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations."

The decision-making procedures constitute an important component of the WTO Agreement. According to the UNCTAD Study, the Agreement foresees that the WTO will continue the GATT practice of decision-making by consensus. A decision by consensus, it is noted, is deemed to have been taken if no member present at the meeting when the decision was taken, formally objected to the proposed decision. However, when a decision cannot be arrived at by consensus, the matter will be decided by voting. In this respect, different procedures have been established depending on the issue involved.

The WTO Agreement creates an obligation on its Member States which needs consideration. It says, "each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." This provision does not outline the extent of conformity. Accordingly, it has been noted, "Bearing in mind the complexities of the legal relationship between the GATT and national law in some major trading countries—this provision could be open to different interpretations". It is also a matter of interpretation as to whether this provision and the conformity envisaged could be taken to the dispute settlement mechanism.

B. Trade-related Investment Measures (TRIMS)

The inter-relationship between the investment and the trading system has a long history. The last two hundred years have seen various measures adopted for the purposes of regulating and protecting the flow of international investment. These developments have been summed up in the following words: "In the late eighteenth and nineteenth centuries, the European powers and the United Statesd set minimum standards for the protection of foreign investment based on treatment superior to national treatment, according to which the host countries were not permitted to interfere with foreign assets and seizure and expropriations were prohibited. The standards of treatment were established in a number of commercial treaties, and were often enforced through political pressure or military intervention."[27]

These kinds of enforcement measures had no basis whatsoever in the international legal system. The UNCTAD Report points out that these measures adopted by a number of States "diverged from the general principles of international law, under which foreigners were subject to

27. *Ibid.*

local laws and not entitled to a higher standard of justice than nationals"'[28] Furthermore, interference with the property of foreigners was permissible subject to independent judicial review and full compensation.

With the increase of the movement of capital across the boundaries, particularly after the Second World War, the issue of investment formed a part of the negotiations at the United Nations system. It has, however, been noted that the negotiations which led up to the Havana Charter, and eventually to GATT demonstrated that governments were not prepared to subject their investment policies to international rules and disciplines.[29] Developed countries sought to pursue the investment policies bilaterally through the conclusion of Friendship, Commerce and Navigation (FCN) Treaties and Investment Promotion and Protection Agreements. The purpose of these treaties was to ensure that the property of investors would not be expropriated without prompt, adequate and effective compensation, non-discriminatory treatment, transfer of funds and dispute settlement procedures.

(1) Investment Norms and GATT

There were a number of factors which actually facilitated the linking of investment legislation and the GATT. After the conclusion of the Tokyo Round of Multilateral Trade Negotiations in 1979, the UNCTAD Study notes, there were attempts to bring under the purview of the General Agreement a more focussed consideration of a limited number of performance requirements introduced by host countries with regard to foreign investors, particularly in relation to the use of local content and to export performance.[30] However, several developing countries while opposing these attempts maintained that the issue of foreign direct investment was beyond the jurisdictional competence of GATT. Developed countries continued to argue that such requirements had effects clearly related to trade and should be addressed by the Contracting Parties through a detailed examination of the GATT articles.

Meanwhile, a dispute brought by the United States against Canada on the Administration of the Foreign Investment Review Act (FIRA) in 1982 to GATT was considered to be a significant step in defining the extent to which investment measures were covered by multilateral trade obligations. The United States had claimed that the requirements imposed on the foreign investor by FIRA to purchase goods of Canadian origin in preference

28. *Ibid.*
29. *Ibid.*
30. *Ibid.*

to imported goods, to manufacture goods in Canada which would otherwise have to be imported and to export specified quantities of production were inconsistent with GATT Article III: 4, III: 5, XI and XVI: 3 (c). On the other hand, a large number of delegations had expressed doubts as to whether the dispute between the United States and Canada was one for which GATT had competence since it involved investment legislation, a subject not covered by GATT. Nevertheless, the GATT Council decided to allow the Panel to pursue the matter, limiting its activities and findings within the boundaries of GATT and the legislation as such would not be called into question. Finally, the FIRA Panel found that Canada's practice of allowing certain foreign direct investments were inconsistent with some of the GATT provisions.

Considering some of the issues raised by the above dispute, the United States at the preparatory stages of the Uruguay Round proposed that the negotiations should (i) seek to increase discipline over government investment measures which divert trade and investment flows at the expense of other Contracting Parties; (ii) explore a broad range of investment issues in the negotiations, including national/MFN treatment for new and established direct investment and the right to establish an investment; and (iii) examine various types of trade-related investment measures such as local content requirements, export performance requirements, incentives and product mandating, which should be controlled and reduced in the light of specific articles of GATT as well as its overall objectives. Accordingly, the Punta del Este Ministerial Declaration on TRIMS stated: "Following an examination of the operation of GATT Articles related to the trade restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade."[32]

(ii) The Agreement of TRIMS

The negotiating approaches at the GATT had two distinct parts: first, whether the disciplines evolved in this area should be limited by existing GATT Articles or expanded to develop an investment regime; second, whether some or all actionable TRIMS should be prohibited or should be dealt with on a case-by-case basis demonstration of direct and significant restrictions and adverse effects on trade. The United States and Japan were in favour of an international investment regime that would establish rights for foreign investors and reduce constraints on transnational corporations. The EC and the Nordic countries focussed on measures

32. *Ibid.*, p. 138.

that had a direct and significant restrictive impact on trade and a direct link to existing GATT rules. Developing countries, on the other hand, called for strict adherence to the mandate and for limiting the negotiating exercise to the effects of investment measures or regulations that had a direct and significant negative effect on trade.

The Agreement on TRIMS does not introduce any new obligations, but merely prohibits those TRIMS that have been judged inconsistent with GATT obligations regarding National Treatment on Internal Taxation and Regulation (Article III) and the General Elimination of Quantitative Restrictions (Article XI). These include, it is noted, (a) local content requirements (inconsistent with national treatment obligation), such as those which require the purchase or use by an enterprise of products of domestic origin in terms of the volume or value of products or in terms of proportion of their domestic production, or that require an enterprise's purchases or use of imported products to be limited to an amount related to the volume or value of the local products that it exports; and (b) trade balancing requirements (inconsistent with the obligation to eliminate quantitative restrictions), such as those which restrict the importation by an enterprise of products used in or related to its local production generally or to an amount linked to its exports or to the foreign exchange inflows attributable to the enterprise, or that restrict exports in terms of volume or value of products or as a proportion of local production. These measures are included in an illustrative List annexed to the Agreement. It has, however, been pointed out that "there would seem to be a "grey area" subject to interpretation, and a variety of investment measures may be challenged after the entry into force of the WTO Agreement."[33]

C. Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Technological advancement and innovation has brought about tremendous changes in the production process itself. Information technologies, in particular, have radically altered the nature of competition due to the inherent vulnerability of such technologies to rapid appropriation.[34] According to a UNCTAD study, "the international convergence of technological capabilities among developed and a limited number of developing countries and the gradual erosion of competitiveness in the traditional areas of production of a number of developed countries have made intellectual property a new basis of comparative advantage."[35]

33. UNCTAD, *Trade and Development Report*, n. 6, p. 136.
34. UNCTAD, *Trade and Development Report* (Supplement). n. 4, p. 185.
35. *Ibid.*

The Punta del Este Ministerial Declaration on the Uruguay Round set the objectives of the negotiation as: "In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines."

(i) GATT and TRIPS: Compatibility

The discussion on intellectual property in GATT was initiated in an altogether different form. It was first introduced into the GATT negotiations during the Tokyo Round in 1978 on the basis of a draft proposal put forward by the United States and the European Communities (EC), with specific regard to anti-counterfeiting measures. As no agreement was reached at that time, the United States circulated a new draft in 1982, and a GATT Group of Experts held several meetings on the matter in 1985.

The issues concerning counterfeiting were acceptable to developing countries and its further negotiation in the GATT forum was agreed. The reasons for this acceptance were: (i) the issue of counterfeiting did not normally involve technological undertaking, the developing countries found it easier to address the latter issues than those concerning substantive standards of protection dealt with in existing international treaties and administered by specialised agencies in the field; and (ii) it was realized that the practice of countrfeiting did not confer advantage in terms of national policy aimed at building up industrial and technological capabilities. It has been, however, noted that "owing to the insistence of the developed countries, the discussions at the TRIPS negotiations centred more on the establishment of substantive and uniform standards involving a higher level of protection for intellectual property rights."[36]

Two distinct views emerged in the process of TRIPS negotiations. The developing countries were initially prepared to discuss only the clarification of existing GATT rules and provisions dealing with intellectual property, such as Articles IX and XX (d) and measures to restrict trade in counterfeit goods that could be understood as clarifying Article 9 of the Paris Convention, which deals with the seizure, on importation, of goods unlawfully bearing a mark or trade name. They regarded any discussion of substantive intellectual property norms as beyond the competence of GATT and within the exclusive jurisdiction of the World

36. UNCTAD, *Trade and Development Report*, n. 6, p. 185.