Negotiating the TRIPs Agreement

India's Experience and Some Domestic Policy Issues

The WTO (World Trade Organisation) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) represented a major political failure for India at three levels. First of all in failing to prevent TRIPs being brought onto the negotiating agenda of the Uruguay Round (UR) of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT). Secondly, for failing to block agreement on it in a system that relied on the support of acquiescence of every member state, including those opposed to it. And finally, for not getting anything substantive in return for it.

India's failure in the TRIPs Agreement, however, has to be seen in the context of her negotiating failure in the UR as a whole. The various negotiations pursued in the UR were held simultaneously and in parallel. The TRIPs component of the Uruguay Round cannot be isolated and treated as a separate transaction. Moreover, the Indian approach to the UR (and of most other countries) also treated TRIPs as part of the general package being negotiated. The negotiations were thus conducted clearly within the framework of the multilateral process.

This Briefing Paper attempts to explain the failure of India's negotiating strategy in the context of international and domestic developments during the UR. It further tries to draw lessons from what actually happened and suggests how policy processes could be reformed and reorganised to address the negotiating requirements of a country like India in dealing with such issues in future.

IPR in India

Intellectual property right (IPR) is not a new concept in India. It's origin dates back to the British rule in India. Until the Uruguay Round negotiations, India's IPR regime adopted two distinct approaches. The first was for those areas of creativity, which had only a marginal impact on economic development (copyrights etc.) and secondly, those which were thought to have a decisive influence on this process (patents).

One of the assessments shared by all strands of thinking during the independence movement was that India's colonial status created the organisational and legal framework that effectively promoted the interests of foreign (in this case British) companies at the expense of local industry. As the argument ran, the British effectively destroyed India's manufacturing base, which was mainly artisan and rural based, by using a combination of policies that saw India provide raw materials at cheap rates to British manufacturers who then processed and distributed the finished product at high prices.

The shared perception about economic development contained a vital component that was to shape policies in India towards intellectual property rights generally: property rights had to be weakened as an essential prelude to restoring economic independence, and market access was to be used to advantage in forcing the transfer of technology.

Although property rights became a constitutional right, they were not a fundamental or basic right and were of less importance than, say human and civil rights. This simple constitutional device, which was strengthened by subsequent constitutional amendments, effectively provided the legal space for the Indian states to undertake a programme of restoring Indian control of assets held by foreign companies, and for asset redistribution, of which the most important was land reforms and nationalisation of major sectors of the economy. It also provided the legal space for weakening the intellectual property rights regime.

Thus, a process was set in motion by creating the legal context in which this could take place. Regarding intellectual property rights, two committees considered the issues in detail. The first of these two committees was the Patents Enquiry Committee (1948-50), which in turn, was followed by the Committee for the Revision of Patent Law (1957-59). These two committees considered the issues in some detail and recommended a policy that sought to balance the rights of inventors and innovators with priorities for national development. The resulting legislation was the Patents Act of 1970, which actually went into effect in 1972. This Act came out with three major changes in the 1911 Act (Box 1).

The impact of this weakened patent regime had a dramatic effect on the sectors in which it was most noticeably weakened. In the pharmaceuticals sector alone, the country

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Box 1: The Patents Act of 1970

The Patents Act of 1970 sought to achieve three fundamental changes to the 1911 Act:
- To compel international patent holders to actually work the patents in the local (Indian) market through the device of compulsory licensing. This was meant to deter imports of finished products, particularly in some sectors considered to be of strategic necessity.
- The duration of patent protection was reduced from sixteen to fourteen years for most patents, but in respect of food and drugs from sixteen to five years from the date of sealing, or seven years from the date of filing a complete patent specification, whichever was shorter.
- To confine patent rights only to 'process' patents, thus excluding 'product' patents from the protection of the law.

moved from a situation of almost complete dependency on international supplies in 1947 to a situation in 1996 when India was basically self-sufficient in major pharmaceutical products, with domestic production meeting 70 percent of consumer demand.

By the mid to late 1970s, therefore, the political consensus behind the self-sufficiency approach to development covered virtually the entire political spectrum and had acquired legitimacy rare in any other country. Though, some efforts aimed at a change in strategy regarding foreign investment (which really came to nothing) were made, but at no stage there was any political pressure from within the system to revise the intellectual property regime.

India was also a signatory of the Paris Convention of 1883, for the protection of patents and trademarks (known as 'industrial property' in the convention) and the Berne Convention of 1885, which established certain minimum rights with respect to author's rights and artistic rights, while computer software was protected by Indian law from 1983.

As a member of the World Intellectual Property Organisation (WIPO), India was part of an agency that was charged with the responsibility of administering agreements on intellectual property protection including the Paris and Berne Conventions. India was also a signatory of the Washington Treaty of May 1989 (which was concluded during the UR).

There was, therefore, a sense of complacency in India about the pressures building up within the international system for measures to strengthen the intellectual property rights regime, which was based substantially upon US efforts, with occasional support from the European Union and Japan. However, India's regime for the protection of trademarks, industrial designs and trade secrets was generally compatible with internationally accepted standards.

The Negotiating Context

Unlike most international negotiations, the UR lasted for seven years from 1986-1993. The period was also marked by momentous economic and political changes at both national and international levels. The collapse of communism and the resulting ascendancy of the West, fragmentation of developing country solidarity on a host of issues, unilateral economic liberalisation by many developing countries, debt crisis, etc. were some of the important features of the international context that had a significant bearing on the negotiations, though to varying degrees.

Developments in the domestic context, during this period, were even more decisive. The situation was very fluid. Government policy oscillated between strategies for self-sufficiency and global market integration. Punjab, Assam, Mizoram and Kashmir were constant sources of political and security concerns and absorbed much time and attention. India's intervention in Sri Lanka created a crisis in the state of Tamil Nadu.

This instability in the domestic environment turned political attention inwards. The effects of this growing preoccupation with domestic issues at the expense of international issues, meant that there was only limited political interest in developments in Geneva, where negotiations were taking place.

International Trade Policy: A Foreign or Domestic Policy Matter

Before the UR, there was little difficulty in treating trade policy issues as foreign policy issues (in procedural terms) even though, it was dealt by the Commerce Ministry and not by the External Affairs Ministry. This is because international trade agreements are negotiated as treaties.

When the agenda-setting phase of the UR began, the natural reaction within the Government was to presume that no substantial changes were needed in decision or policy making procedures because India could not be forced to negotiate on issues that entailed domestic policy changes. It would appear that Indian officials held to the belief that they could not be compelled to accept new issues on the agenda, and as long as India refused to accept these issues, there was no way in which these issues could be forced on to the agenda.

They could not forsee what would happen if they were so compelled, perhaps because nothing short of coercion could achieve this, and coercion was illegal. They failed to reckon with the new instruments of intimidation that were being used in international trade issues and how they could be operated in other policy areas that had little to do with trade policy. They also failed to reckon with the determination of the US, in particular, to pursue their policy goals and the connection between these goals and their broader strategic priorities.

Secrecy and Outside Consultation

One of the features of cabinet system of government in India is that the rules of confidentially governing procedures largely preclude outside consultation during the process of policy formulation. This was a legacy of pre-colonial cabinet practices in Britain, which no one had thought to modernise to address contemporary requirements. Secrecy rules also cover cabinet committees and most other inter-ministerial official committees.

As things stood on the eve of the UR negotiations in 1986, institutional systems that provide for outside consultation did not exist within the framework of the Rules of Business of the Government of India. There were no approved or

authorised lobbyist who had official access or had a right to be heard in the formulation of policy. There were, and are, a number of recognised trade associations, but they have no right to be consulted and the question of whether they will be consulted and the importance of their inputs is entirely a matter of discretion for the concerned ministry. The only institutions that have a right to be consulted are other concerned ministries, where necessary, state governments.

Policy and Decision-making Procedures for TRIPs and the Uruguay Round

The Commerce Ministry was the administrative ministry in charge of handling the negotiations. Within the Commerce Ministry, authority had been delegated to the Ambassador to GATT in Geneva to represent India, but he was obviously required to obtain approval to major proposals from his Ministry.

In the case of the UR, the Cabinet Secretariat appears to have adopted a sort of modified foreign policy decision-making model, which was slightly as per the requirements of these particular negotiations. The modified procedure introduced one new element into the system. It provided for a Committee of Secretaries (CoS) to advise the Cabinet Committee on Economic Affairs (CCEA) on the issues.

Establishing CoS is a fairly standard device employed to improve the process of consensus building in the bureaucracy, and is especially useful for dealing with complex policy issues involving several Ministries. The Cabinet Secretary chaired the CoS, comprising of secretaries from the Ministries of External Affairs, Finance, Industry, and Commerce.

In establishing this procedure, no distinction was made between the decision-making procedures to be followed for the TRIPs negotiations and those followed for negotiating the Round as a whole. This was perhaps because the Round was being negotiated as a "single undertaking" and it was appropriate to take the broader picture into account while considering specific issues.

Procedural Problems with the System

There were several obvious problems with this arrangement. By choosing to set up a CoS for the Uruguay Round negotiations, the Cabinet Secretary was reacting fairly conventionally to the situation. But more importantly, he was effectively excluding some of the ministries that actually dealt with the subjects under negotiation and also excluding ministerial intervention.

Broadening the consultative process could have generated political disputes within the government. It could also have caused delays, and from a practical point of view this would have added to the negotiators problems. There was, therefore, ample justification for the approach that was finally adopted. Though this arrangement may have been a practical necessity, it again raised questions about its political legitimacy.

Some of the other major shortcomings of the system were: the role of the CoS was not very clearly defined; the various ministries (except industry) concerned with patents, copyrights, trademarks, geographical indications, industrial designs, integrated circuits and trade secrets should have been formally consulted on a continuous basis during the TRIPs negotiations; no effort was made to set up a standing sub-committee on intellectual property rights to aid the CoS or the CCEA, etc.

The problem was that from the outset it was clear that the Indian government (publicly, and at the political level) was against engaging in the negotiations, at least on the terms set out in the agenda agreed at Punta del Este, Uruguay in 1986. This effectively meant that the only instruction they could give to the delegation in Geneva was to oppose everything. Neither the CoS nor the CCEA could, however, really go beyond these parameters so their contribution to the negotiations was minimal at best.

Lack of Institutional Support

In addition to the procedural problems described above, it appears that India lacked the domestic institutional capacity to support the negotiating team, and was also not prepared to approach outside or foreign institutions to undertake this work. They also lacked some of the basic data to make a meaningful assessment of negotiating options. Secrecy laws further inhibited outside discussion. This meant that negotiations were flying blind and had to depend largely on their own experience, skills and instincts (Box 2).

Negotiating Positions Taken by India in the TRIPs Negotiation

Ironically, the first major salvo in the battle to address intellectual property issues as part of the multilateral process was fired in the 1970s by developing countries. While they wanted to strengthen dispute settlement procedures, developed countries wanted to strengthen the conventions themselves to deter piracy and counterfeiting.

Box 2: Lack of Institutional Support

- Information and Data: Most industry-generated data was thought to be inaccurate and thus useless. Government data and information were also of little use, as they were not collected with negotiating requirements in mind.
- In-house Advice: The Indian Institute of Foreign Trade (IIFT), attached to the Commerce Ministry, was really the only institution that the Commerce Ministry could turn to.
- Alternatives: The Commerce Ministry and the negotiating team effectively had no institutional support from within India, and would not have been trusted had they sought such support from outside the country.
- Business Associations: Trade and Industry associations were rarely consulted, partly because they didn't really understand the issues and partly because they were not set up to do anything other than lobby the government for the interests of their members.
- NGOs: A large number of non-governmental organisations (NGOs) took an interest in the TRIPs negotiations and were well informed but had little or no organised or structured interaction with the Government on the issues involved.

However, in the UR much that happened was in response to what the US was doing. US frustration with WIPO and its withdrawal from UNESCO the (United Nations Educational, Scientific and Cultural Organisation) in 1984 further reduced their influence within the key international institutions dealing with intellectual property. At the same time, pressures were building within the US system to do something about the situation, buttressed by a moral perception that they were being ripped off. The response was to combine aggressive unilateralism with a search for bilateral solutions with their principal trading partners. This approach antagonised many developing countries as it depended largely on the extraterritorial application of the US laws. In the lead up to the UR many developing countries sought a strategy to contain this phenomenon, but failed to offer a multilateral alternative. This was probably a tactical mistake.

For taking a very comprehensive view of the TRIPs negotiation, it is better to divide the entire period of negotiation since 1982 into four phases:

- 1982-1986 – Pre Uruguay Round Period
- 1986-1988 – The First Phase
- 1989-90 – The Second Phase
- 1991- - The Third Phase

1982-86 – Pre Uruguay Round Period

While opposing the US move to include negotiations on counterfeit goods at 1982 GATT Ministerial, developing countries like Brazil and India took the position that WIPO was the only legal and appropriate forum to consider these issues, and that GATT's jurisdiction was limited to trade in tangible goods in any case (Box 3).

The 40th session of the GATT Contracting Parties in 1984 made little additional progress, but did agree to appoint an expert group to study the effects of counterfeiting on international trade. The group was to include a representative from WIPO and would report to the next session. In a sense, this represented a success for India and other developing countries, as their tactics were clearly to delay and prevaricate as much as possible. It was also a success from the US perspective because it kept the issue alive as a trade related item.

Box 3: IPRs in Pre-Uruguay Round Period

- ***Tokyo Round and the Anti-Counterfeiting Code***: With the increase in the production and international exchange of counterfeit goods, developed countries, representing the interests of famous brands, sought disciplines in this area. Preparations by developed countries for introducing an anti-counterfeiting code into GATT disciplines began in earnest during the latter part of the Tokyo Round (1973-79). The objective of this proposed code was to agree to border measures for the interception and eventual destruction of such goods outside the channels of commerce. However, no agreement could be reached before the end of the round in 1979 as only the US and EC supported it. At the 1982 Ministerial meeting of the GATT, only a limited agreement could be reached to consider this issue and authorise the Director General of the GATT to discuss its legal and institutional aspects with his counterpart in the World Intellectual Property Organisation (WIPO).
- ***WIPO and the Revision of the Paris and Berne Convention***: WIPO, the specialised UN agency that deals with IPRs, administers, *inter alia*, two of the oldest IPR treaties, the Paris Convention for the Protection of Intellectual Property, 1983, revised up to 1967, and the Berne Convention for the Protection of Literary and Artistic Works, 1886 as revised up to 1971. These cover two important branches of IPRs, viz. industrial property and copyright. Industrial property includes patents, utility models, trademarks and industrial designs.

Work within the Preparatory Committee effectively re-ignited the debate that had been spluttering along for several years. The Preparatory Committee had a broad enough mandate to consider IPR issue, but the nature and structure of what should be included was to be bitterly contested, with India taking a leading role in opposition to the US.

The 1986 GATT Ministerial Conference in Punta del Este, Uruguay was bitterly divided over the inclusion of TRIPs and other new issues. However, the developing country group led by Brazil and India finally had to relent largely because they were substantially outnumbered.

The Ministerial Declaration tried to embrace the sharply differing perceptions of the developed and developing world on the issues, and the best method to address them. As a salve to developing countries, it concluded by saying that this work would be without prejudice to the activities of the WIPO. The US had got substantially what they were after the inclusion of all categories of intellectual property and minimum global standards of protection. A timeframe of four years was set down to complete the negotiations.

The dam had burst across a wide range of fronts. Services and investment measures were also to be included without a commitment on standstill and roll back; and agriculture was to be included for the first time since the 1950s. Taken together this outcome was not favourable from India's point of view. The negotiators had shown considerable skill in delaying the inevitable for almost four years, but overall this was definitely a negotiating failure.

1986-1988: The First Phase

With the agenda settled, Ministers agreed in early 1987 on the structure and procedures that would be followed for the negotiations on trade in goods. The initial phase was to be exploratory, essentially trying to get a handle on the issues and to set them out clearly, and to see how they related to other subjects under negotiation. The negotiating group on TRIPs formally met five times during 1987 and received specific proposals on attaining the negotiating objectives from the US, Japan, Switzerland, and the EC. It is striking that developing countries including India did not have a position other than to oppose the negotiations altogether.

This suggests that the Government of India had not thought about a fall back position since the prospect of not being able to stop the process had never been contemplated. Moreover, formulating a negotiating position involves intensive domestic consultation and analysis – a process that was completely missing from the Government of India's way of doing business during the course of the Round.

While developed countries were anxious to push forward on raising global standards of intellectual property protection and looking at the enhanced enforcement and retaliatory procedures, Brazil and Mexico (on behalf of India as well)

argued that the negotiations should look at the impact of such proposals on technology transfer and should not concentrate solely on the interests of rights' holders. They argued that overly heavy protection of intellectual property rights would deprive them of access to high technology, which would in turn hamper their development. At the same time developed countries were reporting increased pressure from business corporations.

India was becoming increasingly isolated because of its continued opposition to an agreement on intellectual property rights. It was also beginning to impair her ability to pursue agreements in other negotiating areas that were of interest to her, particularly textiles. The discussions during the mid-term review in December 1988 actually came close to agreeing on a framework for negotiations, supported by a broad coalition of developed and developing country interests. However, the hard line taken by Brazil and India effectively prevented this.

1989-90: The Second Phase

In April 1989, India informed the Trade Negotiations Committee that it would no longer oppose progress towards an agreement on intellectual property rights, though it continued to question whether the TRIPs agreement should form a part of the final results of the GATT negotiations. Subsequent to this India submitted its first proposal on TRIPs in July 1989 (Box 4). A substantive movement in textiles negotiations accompanied this decision and it allowed work to resume on reaching a constructive agreement not only within the IPR but on a broader range of issues as well.

This change in stance was perceived in India as a capitulation to US pressure, in reality it was not so simple. Allowing the negotiations to proceed did not, in itself, suggest that India's interests would be compromised as only the negotiating framework had been agreed. India, therefore, had much to play for. In fact, India should have conceded earlier in the negotiating process and then tried to shape that outcome from within.

1989 saw a large number of proposals circulating for the consideration of delegations. While progress at finding a consensus was difficult, views were beginning to coalesce into two distinct streams, with specific agreement on one issue – LDCs would be given a longer transitional period to implement whatever was finally agreed upon. The EC and the US were also divided. Interestingly, the EC sided with developing countries on the question of coverage of patent protection.

The US wanted that there should be no exceptions to patentable material, while the EC and developing countries argued for some exclusions for inventions that would be contrary to public policy and health, plant or animal varieties or the biological process for their production. The two trading giants were also divided on the question of appropriate protection for geographical indications including appellations of origin.

The emergence of developed country differences was proving to be a problem and the negotiations tended to stall while the EC and the US tried to sort things out. As the date for the Brussels Ministerial Conference scheduled for December 1990 was fixed, efforts were made to try and summarise the points of agreement and the points of disagreement in the hope that political intervention would help break the impasse with respect to some of the more important issues.

Box 4: India's Proposal on TRIPs in 1989

In July 1989, India for the first time submitted a proposal before the Trade Negotiations Committee, thus signifying their willingness to participate constructively in the negotiations. India's submission made three points:

- The negotiations should only consider those practices that distorted international trade.
- GATT principles of Most Favoured Nation (MFN) and National Treatment could apply only to goods.
- More favourable consideration of developing countries with respect to patents and trademarks, and suggested that national governments be left free to adapt their systems to address their policy needs.

The Chairman of the TRIPs negotiating group circulated a draft text of the status of the negotiations. Version A represented the structure of what developed countries hoped to achieve (a single comprehensive TRIPs Agreement), while Version B represented the structure that developing countries hoped to achieve (two separate agreements – one on counterfeit and pirated goods, the other on standards to be implemented within the relevant international institution).

These two versions formed the basis for intensive discussion that ultimately yielded several drafts, and some progress. The draft included in the Draft Final Report submitted to the Ministers brought out just how much progress had been achieved and also listed the issues on which the Agreement could not be reached. The specific issues left unresolved at the conclusion of this intensive phase were:

- Moral rights;
- Copyright protection for computer programmes;
- Protection for performers and broadcasters;
- Length of protection for sound recordings; and
- Whether plant varieties should be protected and if so by patents or otherwise.

The Brussels Ministerial conference thus ended inconclusively. But it did demonstrate to both developing and the developed countries just how far the process of forging a consensus had progressed on a range of technical and complex issues despite major differences in the approach and the opinion.

1991: The Third Phase

Negotiations in the reorganised negotiating group revived in June 1991, and the delegations generally agreed to negotiate on the basis of the 1990 draft that went before the Ministers. The actions of the Director General (DG) were crucial at this point. In July he informed the Trade Negotiations Committee that the major ingredients for an Agreement were in place and that to conclude the Round successfully, some political compromises were necessary because all the technical and preparatory work had (almost) been completed.

In December 1991, the DG circulated a Draft Final Act embodying the results of the negotiations across all sectors. The TRIPs draft made compromises in a number of areas. For example, Japan got some protection for its

position on Rental Rights; Article 23 gave additional protection to wines and spirits, which the French wanted; Article 27(3) excluded plants and animals other than micro-organisms, favoured by developing countries; developing and least-developed countries were given longer transition periods, with further variations in sectors of importance to them (Articles 65 & 66).

The Draft Final Act was also being offered as a package that had to be accepted or rejected as a whole. This meant that the national governments had to assess the impact of the total package before deciding how to react. In respect of the TRIPs draft, two countries had serious reservations – India and the US. India was concerned with the period of transition, which she considered too short. Ultimately, India was the only major country that failed to take any position on the acceptability of the Draft Final Act as a whole.

India's failure to formalise a response to the Draft was in effect an outcome of the Government's unwillingness to publicly support the overall results, though internally they remained engaged with the process.

Negotiations on the Draft Final Act once again resumed in late November 1992. India put forward proposals to amend the Draft, as did the US. India proposed the omission of exclusive rights to market patented products from the Agreement. It further recommended that if facilities to 'work' a patent in a market were not established then the patent could be revoked through compulsory licensing. The US argued for 'pipeline' protection for patents, which had not then been incorporated, and for the application of National Treatment principles to corporate copyrights.

With a broad agreement in view, negotiations across a number of sectors moved quite rapidly in 1993, though a great deal of informal and formal consultation was still needed to broker agreements across a wide range of sectors. Proposals to establish a new institutional structure, the WTO, also helped 'settle' a number of issues, though not without creating its own convulsions.

As it became clearer that a unified dispute settlement system would emerge and would operate from within the structure of the WTO, the overall architecture of the agreement was becoming increasingly attractive from a developing country perspective. This was because the system was now shifting from a power-based system to a rules-based system with independent and binding adjudication of disputes.

In the TRIPs negotiating group, compromises were also gradually emerging that addressed some of the concerns that had been raised over the Draft. Also, with the shape of the final Agreement becoming clearer, the acceptance of a single TRIPs Agreement by India within the structure of the Round was just a matter of time.

Conclusion and Recommendations

This paper arrives at a number of findings that would have relevance for policy makers. The findings would generally apply as much to the TRIPs negotiations as to the Uruguay Round as a whole. These have been summarised below in three categories, which address the principal problem areas of the present approach (Box 5). The first concerns procedures and institutional support, the second concerns diplomacy, and the third concerns political, legal and constitutional considerations.

As regards procedures, it appears that intrusive multilateral trade negotiations called for policy and decision-making procedures that effectively bridged the gap between established foreign and domestic decision making systems.

It further required extensive consultation with outside interests and a well-developed system of institutional support. But these procedures and features did not exist within the system and no one appears to have foreseen that they would be required.

Parliament was also effectively excluded from the process because ratification procedures did not require parliamentary consent. At the same time, the political system was constrained by their constitutional obligations and the prevailing political consensus that could not openly support a free trade based development model. The outcome was a system that failed to consult or co-ordinate widely and thus carried little political legitimacy even within the government.

On the diplomatic front, there was a need to distinguish between the commercial and the conventional diplomacy. The requirements of the commercial diplomacy are very different from those of conventional diplomacy, but at the same time both cannot work in isolation.

This did not, however, happen during the TRIPs negotiations or indeed during the Uruguay Round. Further, little or no use was made of diplomatic networks or diplomatic contacts. Taken together with the lack of proper consultative procedures and institutional support, the negotiators were for the most part flying blind.

At the political level, the situation demands new constitutional and legal procedures along with institutional and organisational arrangements to deal with complex multilateral trade negotiations.

There are several measures that can be considered, one of which is to simply submit international trade agreements for ratification; including a ratification process that the State governments also need to approve.

But this would be a *post facto* process and would not be of much use to negotiators in formulating strategy.

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