WTO-TRIPS-The road ahead

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Understanding WTO

GATT to WTO- TRIPS

- GATT- General Agreement on Trade and Tariff-
- Attempt to start an International Trade Organization as a third institute of the ‘Bretton Woods Institute – World Bank, International Monetary Fund in 1948 at Havanna (Cuba)

GATT to WTO

- Did not succeed but resulted in an agreement of GATT with 50 countries and 23 agreed for tariff concessions to boost trade
- It entered into force in January 1948, while the ITO Charter was still being negotiated. The 23 became founding GATT members (officially, “contracting parties”).

Further Developments

- T

Year	Place	Subjects	members
1947	Geneva	Tariff	23
1949	France	Tariff	13
1951	Uk	Tariff	38
1956	Geneva	Tariff	26
1960	Geneva	Tariff	26
1964	Geneva	Tariff	62
1973	Tokyo	Tariff and Non Tariff	102
1974	Uruguay	WTO	123

GATT to WTO

- General Agreement on Trade Tariff existed from 1948 as a loosely structured multilateral arrangement
- WTO came to existence in 1995 after twenty years of negotiation called uruguay round of talks
- GATT dealt with trade in goods whereas WTO added Intellectual Property Rights through TRIPS agreement

What is WTO ? Official version

- It's an organization for liberalizing trade.
- It's a forum for governments to negotiate trade agreements.
- It's a place for them to settle trade disputes

What happens around the table ?
1.Set of rules

- At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce.
- They are essentially contracts, binding governments to keep their trade policies within agreed limits.
- Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.

2.Rules to facilitate trade

- The system's overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side-effects.

- That partly means removing obstacles.
- It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy.

- In other words, the rules have to be "transparent" and predictable

3.Dispute Settlement

- This is a third important side to the WTO's work. Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting.

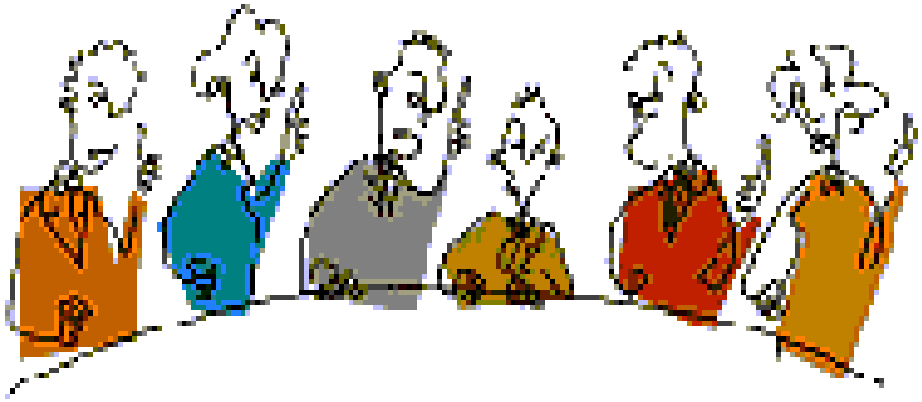
- The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation.

- That is the purpose behind the dispute settlement process written into the WTO agreements.

Undisclosed Information & Trade Secrets

- Trade secrets and other types of "undisclosed information" which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices.
- But reasonable steps must have been taken to keep the information secret.
- Test data submitted to governments in order to obtain marketing approval for new pharmaceutical or agricultural chemicals must also be protected against unfair commercial use.

What it is really ?



Participants in a recent radio discussion on the WTO were full of ideas. The WTO should do this, the WTO should do that, they said.

One of them finally interjected: “Wait a minute. The WTO is a table. People sit round the table and negotiate. What do you expect the table to do?”

The Matrix-1959

- "*in the interests of the economy of the country granting the patent or with a view to manufacture there but with the object of protecting an export market from competition from rival manufacturers particularly those in other parts of the world".*

- Rajagopala Iyengar Committee-1959

The Matrix- 1982

- "*The idea of a better-ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death*"

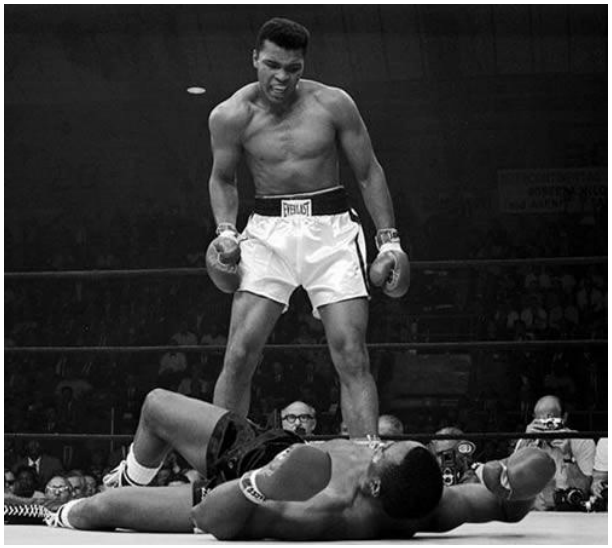
- -Indira Gandhi at the World Health Assembly in 1982

The Matrix 2004

- *India will comply with all provisions and obligations of International trade treaties*

- Prime Minister Manmohan Singh at Hague- November 2004

Is a Global Standard of TRIPS –good or bad



TRIPS- How it works? Standards

- the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.

TRIPS-How it works ?- Enforcement.

- The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights.
- lays down certain general principles applicable to all IPR enforcement procedures.
- provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, for the right holders to enforce their rights.

How it works?
Dispute Settlement

- The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures

The Globalization Conundrum

- *"…in multilateral negotiations, no state can secure its maxima. Every state has to necessarily to make some concessions in order to reach a solution acceptable to the other states"*
- Late Prof.M.K.Nawaz, ISIL –New Delhi

A third world perspective of TRIPS- read India

Trade Related Intellectual Property Services

- TRIPS was incorporated in Uruguay round and it covers
- copyright and related rights
- trademarks including service marks;
- geographical indications including appellations of origin;
- industrial designs;
- patents including the protection of new varieties of plants;
- the layout-designs of integrated circuits;
- undisclosed information including trade secrets and test data

Copyright

- computer programs will be protected as literary works
- to cover rental rights of music, films, computer prog.
- Prohibits unauthorised recording/broadcast of live-for a period of 50 years

TRADE MARK

- defines what types of signs must be eligible for protection as trademarks
- the minimum rights conferred on their owners .
- protects service marks.
- Marks that have become well-known in a particular country enjoy additional protection.

Geographical indications

- A place name is sometimes used to identify a product and characteristics
- The TRIPS Agreement says countries have to prevent this misuse of place names.
- Some exceptions are allowed, if the name is already protected as a trademark or if it has become a generic term. For example, “cheddar” now refers to a particular type of cheese not necessarily made in Cheddar, in the UK.

Industrial Designs

- Under the TRIPS Agreement, industrial designs must be protected for at least 10 years.
- Owners of protected designs must be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design

Patents

- Protection for 20 years
- In all fields of technology
- Can exclude diagnostic, therapeutic and surgical methods, plants and animals (other than microorganisms), and biological processes for the production of plants or animals (other than microbiological processes).
- Plant varieties, however, must be protectable by patents or by a special system

Integrated Circuits Layout Designs

- To protect integrated circuit designs (“topographies.
- The TRIPS agreement adds a number of provisions: for example, protection must be available for at least 10 years.

Undisclosed Information & Trade Secrets

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- But reasonable steps must have been taken to keep the information secret.
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Transitional Arrangement

- When the WTO agreements took effect on 1 January 1995, developed countries were given one year to ensure that their laws and practices conform with the TRIPS agreement.
- Developing countries and (under certain conditions) transition economies were given five years, until 2000.
- Least-developed countries have 11 years, until 2006 — now extended to 2016 for pharmaceutical patents

The Current Situation

- Having signed the treaty, it is legally binding to implement the provisions by suitable legislation
- The Indian legislation is TRIPS compliant on copyright/trademarks/geographical indications/integrated circuits and protection of plant varieties as of now.

Perspective of Developing countries (read India)

- Multilateral Trading system will benefit than bilateral agreements
- Accepted minimum standards on TRIPS but with reservations in the area of Patents linked to health care.
- IP was linked to FDI and R&D inflow
- a minimum standard will also bring uniformity of IP laws in developed world
- Issues of Biodiversity/Traditional Knowledge cropped up

Crucial Issues

- TRIPS compliance Vs CBD
- Protection of Traditional Knowledge including folklore
- Patents and health care issues
- Transfer of Technology

Biodiversity

- Compatibility TRIPS-CBD: 3 positions
  - Inherent conflict
    - Need to reconcile CBD and TRIPS part of the review of Article 27.3(b)
  - No conflict
    - There is no legal conflict between TRIPS and CBD
  - No inherent conflict, but potential for conflict
    - Both can and should be implemented in a mutually supportive way
      - At the national level
      - Action required at the international level
        - Amendment to TRIPS required
        - Amendment to TRIPS not required

Biodiversity (contd.)
Disclosure proposal

- Prior informed consent and benefit-sharing - disclosure proposal by Brazil, India and others
  - Make obligatory disclosure in patent applications of:
    - Source and country of origin of genetic resources and/or traditional knowledge
    - Prior informed consent and
    - Evidence of fair and equitable sharing of benefits
  - Amendments to Articles 27.3 and 29 of TRIPS proposed.

Biodiversity

- US, Japan - Patents help in benefit sharing. Voluntary contractual agreements are an appropriate way. Present disclosure requirements sufficient if such knowledge is prior art and essential to invention. Otherwise questionable and ineffective. Proposal of some to amend TRIPS beyond CBD obligations and may tilt balance in Article 62.1.

- EC accepts stand-alone discussion on disclosure with no penalties under patent law
- Switzerland reiterates PCT proposal wherein PCT applicants may be asked to disclose origin

Traditional Knowledge

- **Appropriate forum - WIPO/WTO**
  - On-going work in WIPO
  - Synergies between TRIPS Council and other fora - CBD, WIPO, FAO, UNCTAD should be furthered.
  - Once CBD/WIPO develops appropriate framework can examine to what extent TK protection can be included in TRIPS.
- **Sui generis protection**
  - *Sui generis* protection for TK under TRIPS should be examined as conventional IPRs inadequate.
- **Use of existing IPR system**
  - Educate indigenous and local communities with the basics of contracts, IPRs, their rights and prospects etc.
- **Disclosure requirement**
  - Origin, consent and benefit sharing
- **Contracts**

TRANSFER OF TECHNOLOGY

- Central issue, especially for African countries
- Obligation for developed countries to provide incentives to their enterprises to transfer technology to LDCs (Art. 66.2)
- Concern that obligation not being met
- New and more specific monitoring mechanism agreed to in February 2003, following Doha instructions (Decision of TRIPS Council – IP/C/28) - Complaints that reports not following Decision
- WIPO-WTO joint workshop: Intellectual Property Rights and Transfer of Technology in November 2003
  - Was open to all WIPO member states and WTO members and observer governments

Doha Declaration _ Key Issues

- The purpose of the Declaration was to respond to these concerns that strengthened IPR protection would lead to reduced access to essential medicines, especially in poorer countries
  - Different views about the nature and scope of the flexibility available in TRIPS
  - Whether this flexibility would be interpreted by the WTO and its Members in a broad, pro-public health way; and
  - Fear of coming under pressure from trading partners not to use flexibility

TRIPS AND PUBLIC HEALTH- GENERAL STATEMENTS

WT/MIN(01)/DEC/2 (20 November 2001)

Ministers:

- *Recognize* the gravity of the public health problems…,especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics
- *Recognize* that intellectual property protection is important for the development of new medicines and recognize concerns about its effects on prices
- *Agree* that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health.
- *Reaffirm* commitments made in the TRIPS Agreement and affirm that TRIPS can and should be interpreted and implemented in a manner supportive of Members' right to protect public health and, in particular, to promote access to medicines for all
  - These important declarations signal an acceptance by all WTO Members that they will not seek to prevent other Members from using these provisions.

TRIPS AND PUBLIC HEALTH (CONTD.) - CLARIFICATION ON CL

- Recognize that Members have the right to grant compulsory licenses and freedom to determine the grounds for compulsory licenses.
  - A useful corrective to the views often expressed in some quarters implying that some form of emergency is a pre-condition for compulsory licensing. In TRIPS the usual condition that first an effort must be made to seek a voluntary licence does not apply.

TRIPS AND PUBLIC HEALTH - CLARIFICATION ON EMERGENCY

- Recognize that Members have the right to determine what constitutes a national emergency or other circumstances of extreme urgency (public health crises including those relating to HIV/AIDS, TB, malaria and other epidemics can be an e.g.).
  - Useful clarification

TRIPS AND PUBLIC HEALTH CLARIFICATION ON EXHAUSTION

- Recognize that the effect of the TRIPS provisions relevant to exhaustion of rights is to leave Members free to establish their own regimes for exhaustion, subject to MFN and national treatment
  - Much debate about what exactly TRIPS Article 6 says in regard to a Member's freedom to choose its own regime for exhaustion and parallel imports
  - This provision makes it clear that Members are free to choose and need not fear challenge of their regime

Decision on implementation of paragraph 6

- Assessment of manufacturing capacities in the pharmaceutical sector
  - LDCs deemed to have insufficient or no capacities
  - Others can fall into two categories
    1. Those that can establish that they have no manufacturing capacity
    2. Those that have currently insufficient capacity to meet their needs
       - Once such capacity becomes sufficient, system shall not apply

Bolar Provision

- *RESEARCH EXCEPTION AND "BOLAR" PROVISION*
- Many countries use this provision to advance science and technology. They allow researchers to use a patented invention for research, in order to understand the invention more fully.
- In addition, some countries allow manufacturers of generic drugs to use the patented invention to obtain marketing approval — for example from public health authorities — without the patent owner's permission and before the patent protection expires. The generic producers can then market their versions as soon as the patent expires. This provision is sometimes called the "regulatory exception" or "Bolar" provision.*Article 30*

Bolar Provision

- This has been upheld as conforming with the TRIPS Agreement in a WTO dispute ruling. In its report adopted on 7 April 2000, a WTO dispute settlement panel said Canadian law conforms with the TRIPS Agreement in allowing manufacturers to do this. (The case was titled "Canada — Patent Protection for Pharmaceutical Products")
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Indian Context

- The Copyright Act of 1914
- The Copyright Act of 1957
- Amendments in 1984- 1994
- Proposed amendments
- Currently TRIPS Plus
- Authors life + 60 years (TRIPS-authors life + 50 years)

Copyright- International position

- Berne Convention 1886
- The Berne Convention for protection of literary and artistic works- revised- Paris Act 1971
- Universal Copyright Convention (UCC) in 1952 and revised in 1971
- India is signatory to both conventions

TRADE MARKS

- Device, brand, heading,
- Label, ticket, name, signature,
- Word, letter, numeral
- Shape of goods, packaging or
- Combination of colours or any
- Combination thereof.
- Services
- **New act - Trade Marks Act, 1999**

TRIPS and Trade Marks-

- With the new tm act services have been included
- Indian tm protects international brands even if they are not registered here
- Provisions for criminal action including anton pillar order interpretation are accepted by courts

TRIPS MANDATE AND PGR

- *sui generis* regime for the protection of plant varieties under Article 27.3(b) may provide for a dual system of protection which includes both modern as well as farmers' varieties.
- Research Exception of the PVR Law will be applicable to the Patents Law of a given Member State.

TRIPS- Indian Patent Law

Patents 3rd Amendment-Salient features

Major Amendments –Post TRIPS

- Protection for patents through mail box system will be effective only from the date of the grant of patent and not from the date of application
- This will ensure that there will be no infringement proceedings on Indian companies with retrospective effect- 2nd provisio section 11A(7)
- This also ensures that the life of the patents through the mail box will be calculated from the date of filing in the mail box and will end on 20 years –thus others can manufacture freely after the 20 year period

Major Amendments –Post TRIPS

- Section 107A(b) of the second amendment in 2002 allowed parallel imports (drugs cheaper anywhere in the world can be imported here)where the foreign exporter is duly authorized by the patentee.
- The current amendment replaced the ‘duly authorized by the patentee’ with the words ‘duly authorized by law”
- This has significance as the permission to be granted by the government than depending on the patent owner

Major Amendments –Post TRIPS

- Section 2-ja- inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic signficance or both and that makes that invention not obvious to the person skilled in the art
- New Invention means any invention or technology which has not been anticipated by any publication or used in the country or elsewhere in the world before the date of filing of the application with complete specification

Major Amendments –Post TRIPS

- Sec 3- what are not inventions-
- Salts-esters-ethers-polymorphs-metobolites-pure form-particle size- isomers-mixtures of isomers-complexes-combinations and other derivatives of known substance shall be considered to be the same substance unless they differ significantly in properties with regard to efficacy

Major Amendments –Post TRIPS

- Hearing at Pre-Grant opposition
- 251-where an application for a patent has been published but a patent has not been granted, any person may,in writing, represent by way of opposition to the Controller against the grant of the patent within the prescribed period on grounds of….
- And the Controller shall if requested by such person for being heard, hear him and dispose of the representation in such manner and within such period as may be prescribed

Major Amendments –Post TRIPS

- Facilitation of pharma exports to LDC
- Section 92 A relates to compulsory licence for export of patented products to (based on para 6 of doha declaration) to countries which do not have adequate production capacity
- Provided compulsory licence has been granted by such country or such country has by notification or otherwise allowed importation of pharmaceutical products from India

Multilateralism in IP standards setting: A broke promise

- Developing countries might reasonably have expected the WTO and WIPO to became the ultimate forum for new IP standards negotiations
- Despite these expectations no apparent decline in bilateral trade-based negotiations activity for IP occurred after TRIPS
- **On the contrary, the level and the number of negotiating strategies set by developing countries (USA and UE) roughly increased**

The Post-TRIPS Age: From "old" to "renewed" bilateralism patterns

- The old US Bilateralism – response to its failure to obtain an agreement on counterfeit goods at the end of the Tokyo Round (1979)

  - Section 301: The main enforcement tool of the US Trade Policy to obtain extraterritorial protection for US IP

Post- TRIPS age

- Renewed bilateralism: the same tools of the old bilateralism to impose much stronger rules of IP rights than those of under in force of the WTO
- Old/Renewed bilateralism: involves new rules and powers and, ultimately, it leads to a complex reality of bilateral and regional "TRIPS-Plus" treaties

TRIPS- Plus and Extra Standards

- These standards are being introduced through a range of bilateral, regional and sub-regional agreements between 2 or more countries
- Negotiated outside the multilateral system governed by WTO
- These agreements require higher and extra standards of protection than those provided by TRIPS

TRIPS- Plus and Extra Standards

- The most important of these agreements – in terms of economic power relations – are:
  - Free trade agreements – FTAs (or Preferential Trade Agreement – PTAs)
  - Bilateral Investment treaties – BITs
- There are more than 1,800 bilateral investment treaties currently in force – a five-fold increase since the end of 1980s

TRIPS- Plus and Extra Standards

- With regard to the mantra of National Treatment and Most-Favored-Nation (MFN) principles parties are expected not only to facilitate and open their borders to foreign investment, but also to provide the "The highest international standards" of intellectual property protection
- Parties are expected to allow the full repatriation on IP rights
- No expropriation is allowed

Issues at Stake

- National legislation vs international obligations
- Interpretation of standards of patentability
- Balancing patent and public health issues
- public policy vs business interest

The Divide

A last word

- Thank you for your time
- VISIT www.liiofindia.org- a one stop free portal for Indian Laws and Treaties
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