Chapter Six

THE TRIPS AGREEMENT

In the previous chapters, we have explained how the growth of free trade and the neo-liberal ideology led to the wide acceptance of a multilateral trading regime among nation-states within the prevailing sovereign state-system. We have also pointed out how the need for better enforcement of rules and for a more comprehensive organization in trade matters gave birth to the WTO. We have outlined the trade-related concerns surrounding the WTO, especially in the context of a developing country such as India. Thereafter, we have addressed the question of how a nation like India opts for a multilateral trading regime and how its negotiating stance is influenced by the response of various stakeholders within India's civil society vis-a-vis the changing scenario in world trade.

This chapter proposes to examine the Agreement on Trade Related Intellectual Property Rights (TRIPS) as an illustrative case-study pertaining to our research problem in this thesis. This agreement has been a contentious issue since its inclusion in the Uruguay Round. Its negotiating history in the Uruguay Round (UR) indicates the North-South divide within the WTO, which questions the rationale of the prevalent multilateral trading regime. This agreement clearly brings forth the imbalances in the WTO regime and is a pointer to the numerous justified grievances of the developing countries. We shall explore this contention in this chapter.

The TRIPS agreement is justified as a case study also because it shows the problems in the agenda-setting of the WTO, another pertinent research problem of this thesis. According to Christopher Arup, it is "a Global Carrier," an agreement, which reaches behind the border into social fields that were not, on the whole, regarded as related to trade-related issue-area. The regulatory reform requirements of the TRIPS imply that the WTO's trade liberalisation
agenda moves beyond "deregulation of those national legalities which are identified as barriers to liberalisation. It can involve the enactment and enforcement of a set of Proactive International Standards." The analysis of the agreement's provisions shows that its impact on national legislations is far-reaching and considerable. This identification of the central issue of the divergence between international and local standards is critical to our finding in Chapter Seven.

We then examine India's role in the negotiations of the TRIPS agreement and analyse the shifts in the policy stances of India vis-a-vis the TRIPS Agreement. This prompts us to examine the effectiveness of our political processes in formulating a credible approach at the WTO. We shall also identify the changes in the Indian Patents Act, consequent to the TRIPS, and the ensuing political response. The impact of the TRIPS on the pharmaceutical sector in India has been widely debated. We analyse this impact to assess whether the TRIPS agreement has led to a price-hike in essential drugs in India.

Lastly, we contend that the TRIPS agreement has significant implications for a developing country like India - rich in natural resources but poor in enforcement mechanisms, trying to integrate with the global economy but feeling the constraints of domestic opposition. The whole process of the successive Indian governments' policy of implementation of the TRIPS and the civil society's opposition to the same, stemming from a fear of losing the cultural ethos of the land, crystallises our entire debate about the costs of integration of India's political economy with the global economy.

The chapter leads us to our key question as to what are India's policy options in absence of a viable alternative to the WTO. It aims to reflect the central point of our argument: what is wrong with the WTO and what is not right with the negotiating strategy of a nation like India. It concludes with exploration
of possibilities of harmonizing the government's stance with the ideological voices emanating from India's civil society with regards to the TRIPS agreement.

6.1 NEGOTIATING HISTORY AT URUGUAY ROUND

At the outset, it is important to recognise that the TRIPS agreement evolved as a trade-issue over time. The regulation of Intellectual Property (IP) norms was a new subject for the WTO. Earlier, the GATT's provisions were only marginal - simply recognising that local procedures for IP protection could be discriminatory. It was only in the Tokyo Round that the lack of IP protection surfaced as a trade issue. Pivotal role was placed by the US in highlighting trade in counterfeit goods as a significant issue. In fact, the US in the guise of targeting cross-border traffic in pirated and counterfeit goods, germinated the idea that Intellectual Property protection was pro-trade and failures to provide effective protection for IP were to be perceived as a barrier to free trade. Though no agreement could be reached at the Tokyo Round, the US started liberal use of its own omnibus trade legislation - Sections 301 and 337, under which the USTR could take wide-reaching actions to protect the IP of US producers (We have indicated in Chapter Three how use of such sanctions gave rise to 'New Protectionism' and how it was one of the important factors in the creation of the WTO. It is ironic that the same organization incorporated the TRIPS agreement as one of its essential part). The newly industrialising nations like India, Brazil South Korea and Taiwan became the main targets of these sanctions. Peter Drahos has also demonstrated, how the US used trade sanctions to secure the agreement on the TRIPS, which heavily favored it, at the UR. All this shows how coercion threats and devious bargaining tactics influence the negotiations in a multilateral trading regime.

It was against this backdrop that the IP issues got on the agenda of the UR. The US initiative was, in fact, the voice of top American industries who claimed heavy losses from the absence of adequate protection of their IP rights
abroad. As far back as 1984, Edmund T. Pratt, chairman of the Pfizer Corporation stated, "we must also work to get more broadly based economics organization such as the OECD and the GATT to develop intellectual property rules, because intellectual property protection is essential for the continued development of international trade and investment". Thus, IP protection became a trade issue only when it reflected the interests of the developed countries in the international trade regime.

While trade in counterfeit goods was included in the works programme for the Uruguay Round in 1982, the developing countries, especially Brazil and India, were quick to resist such an inclusion. They considered intellectual property an issue that was well within the competence of the World Intellectual Property Organization (WIPO). Moreover, they questioned the repercussion of including IPRs in the WTO on the existing IPR conventions such as the Paris Convention on the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, The Rome Convention for the Protection of Performers Producers and Broadcasting Organizations and the Treaty on Intellectual Property in respect of Integrated Circuits. But the US pressure sustained long enough to include IPRs at the Uruguay Round and in fact by 1987, the agenda had broadened beyond trade in counterfeit goods to embrace the trade distortions resulting from the inadequate treatment and enforcement of Intellectual Property Rights generally (Arup, 2000, p.180).

As the European Community and Japan started to support the US, the inclusion of the TRIPS on the agenda was perceived as a political compromise by the developing countries. The international political and economic order acted as a catalyst for this Harakiri. We have already seen that the 1980s were 'a lost decade' for many Third World Countries. The Debt Crises in these nations were further compounded by the bilateral trade sanctions being imposed by the US. Thus, all these factors led to the inclusion of the TRIPS in the UR agenda. The Ministerial Declaration of 20th September, 1986 in Punta-del-Este, containing the mandate of the UR, included the TRIPS as a trade -
issue for negotiation. At the time, the negotiating objectives were stated as follows:

"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."

"Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT. These negotiations shall be without prejudice to other complimentary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters."9

However, the developing countries found it difficult to depart from their view that the WIPO was competent authority for the TRIPS. They tried to argue that if IPRs were to be included in the UR, the negotiations were to be limited to counterfeit trade and more importance was to be given to developmental policies as a quid-pro-quo. This dispute continued and it took three years from the decision to include the TRIPS in the UR in 1986 and the actual agreement to take it up for discussion in 1989, after the mid-term review of the UR in 1988. The commencement on negotiations saw two clear positions - one of the US, the EC, Japan and Switzerland, which envisaged a single TRIPS agreement encompassing all the areas of negotiations. The second position was reflected in the draft proposal of the group of 12 developing nations,10 including India, in 1990 which laid more emphasis on the part dealing with counterfeit goods and minimised the part relating to substantive standards on IPRs.11 The Chairman of the negotiating group produced a composite draft agreement and the draft final act was tabled in December 1991.
This brief negotiating history of the TRIPS agreement highlights many pertinent issues viz.

- The North-South Confrontation,
- The problems in the negotiating System of the WTO, and
- The factors that force developing countries to 'give in' to the pressure of the developed countries.

Watal (2003), while giving an insider's view of the negotiating process, throws light on the above issues. She states that the North-South divide was visible throughout the negotiating process. It was evident that the North led by the US was motivated by the business interests of the MNCs. The Intellectual Property Committee (IPC) founded in March 1986 was dominated by the US research-based industries and had as prominent members- IBM and Pfizer. This committee not only co-ordinated industry position with that of the US government but also worked closely with the GATT and the WTO Secretariats - a fact which has been severely criticised by world-renowned environment leader and activist Vandana Shiva.

Watal goes on to say that since the developing countries had to undergo major changes in their national legislations and patent laws and that too in crucial sectors like pharmaceuticals, their resistance to the TRIPS was inevitable. However, the developing countries failed to use the negotiating process to their benefit. It was poor bargaining on their part not to link progress on negotiation on the TRIPS to progress on the other difficult issue of the Agreement on Textile and Clothing (ATC). "The result of not doing so at Punta del Este or later was that while developed countries agreed under the ATC to phase out their quota on the most sensitive items of Textiles and Clothing on the last day of the 10-year transition period, developing countries accepted the phasing in of product patent for pharmaceuticals, the most sensitive issue in the TRIPS, on the first day of the 10-year transition period." (Watal, 2003, p.20) While we will come back to this crucial example in the next chapter, it is a clear illustration of how developing countries remain unprepared in the multilateral
Watal elaborates some of the reasons for disunity among developing countries. These include:

- the absence of any formal co-ordinating mechanism such as G-77 in the GATT,
- the effective use of Section 301 by US to obtain consent of many developing countries,
- the differing expectations of gains in other areas of the Uruguay Round, the lack of Geneva based expertise and the inability of developing countries to engage constructively, and
- the diversity in legal systems and specific intellectual property laws within the developing countries.

Despite these differences, the final text of the TRIPS was in the end, an 'agreed text'. This shows the fallacy of the principle of consensus used in the decision making at the WTO. This is a significant area for the reform in the working of the WTO. It is also important to analyze as to why did the developing countries agree to accept the TRIPS, despite obvious reservations and resistance expressed by them. Adele14 speaking in the context of Africa, has highlighted three major factors which hold true for other developing countries as well. These are:

a. Expectation of gain in other trade areas as trade offs to the TRIPS Agreement:

The underlying rationale behind the single package approach in the UR negotiations comes from the trade - offs between different subjects and areas. Hence, the UR package was presented to the developing countries, as we have noted in Chapter Three, with possibilities of improved market access and gains in areas such as agriculture textiles and clothing. The developing countries were
“made to swallow” the TRIPS agreement for a successful outcome of the UR.

b. Protection against unilateralism through acceptance of a multilateral resolution of issues, relying on credible procedures and mechanisms:

A multilateral framework came to be perceived by the developing countries themselves as a lesser evil than the bilateral concessions. They felt that within this framework trade conflicts relating to IP issues would be handled objectively and effectively.

c. Possibilities for benefits from improved market-access in general and from market based policies for attracting foreign investments:

A higher degree of protection of IP rights was increasingly perceived as an important part of the general move in many developing countries towards more open, market-based economic policies and towards increasing interest in attracting foreign investment.

Thus the ‘Grand Bargain’ was concluded and the net result was that “the deception called the TRIPS” that “perpetuates the imbalance between the developed and developing countries”\textsuperscript{15} became a part of the WTO. In this regard, C.Raghavan has also given a detailed account of the North-South differences during the negotiations.\textsuperscript{16}

6.2 THE AGREEMENT: AN OVERVIEW

The TRIPS agreement recognises that IPR are private rights underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives. The agreement can be divided in three broad categories - it establishes the general principles which are to apply such as the norms of national treatment and MFN treatment. It then extends the scope of substantive protection for intellectual property. It
finally introduces new methods of dispute settlement and enforcement.
It covers the seven main areas of intellectual property—

a. Copyright,
b. Trademarks,
c. Geographical indications,
d. Industrial design,
e. Patents,
f. Layout designs of integrated circuits,
g. Undisclosed Information including trade secrets.

In each of the above areas, the agreement specifies minimum standards of protection that governments must provide. It also requires governments to provide procedures to enforce and to provide means of dispute settlement.

These seven parts of the TRIPS are distributed over 73 articles, (see Annexure 7). Arup (2000) gives a detailed analysis of all the seven categories of the TRIPS as well as enforcement provisions and dispute settlement.17

The agreement builds upon and goes beyond the existing international conventions administered by the WIPO. For instance, with respect to copyrights, the WTO members are required to comply with the substantive provisions of the Berne convention. The TRIPS extends copyrights to computerized databases, which was not part of the Berne Convention. Similarly, the provisions on rental rights are also a significant addition. The TRIPS goes beyond the Rome convention by requiring governments to allow recording companies from one country to attack unauthorized reproduction and sale of its products within another country.

The WTO members must also comply with the substantive provisions of the Paris convention on Patents. At least twenty year patent protection is to be provided for almost all inventions including both processes and products. This provision, as we shall take up later, has the most significant impact on a
developing country like India where the patent length was only seven years and covered only pharmaceutical processes.

The Treaty on Intellectual Property in respect of Integrated Circuits provides the basis for the protection of layout designs of integrated circuits. The WTO members are obliged to provide procedures and remedies under their domestic law for effective enforcement of IPR by right holders. Article 40 of the TRIPS recognises that some licensing practices may have adverse effect on trade or impede the transfer of technology. It, therefore, allows for members to specify such practices in their legislation and gives room for government intervention in such areas, thus providing members with the opportunity for competition legislation. The Agreement also provided for transitional periods for implementing the agreement. We now focus on the two categories of the TRIPS that are vital to our argument, in the context of India's political economy.

**Patents**

The Patents provisions contained in Section 5 (Articles 27 to 34) have most significant economic implications for the developing countries. Patents have obvious importance in the pharmaceutical sector. The developing countries tend to grant patent protection to pharmaceutical processes and have resisted product patents due to public health reasons. It is also a fact that many developed countries introduced product patent in pharmaceuticals only after their industries had reached a certain degree of development (France in 1960, Germany in 1968, Japan in 1976, Switzerland in 1977). Steve Lohr rightly comments that “on intellectual property, US forgets its own past” wherein in the 19th century it was a “bold pirate of intellectual property” (*New York Times*, October 16, 2002).

Article 210 of the TRIPS commences the provisions for patents with the application of the Paris convention. The convention obliged its members to offer whatever level of protection their laws promulgate to foreigners as well as
In contrast Article 27:1 requires members to make patents available for any inventions whether product or processes in all fields of technology. This broader scope was a major extension in international protection of patents.

The TRIPS uses the concept of 'invention' to identify patentable subject-matter. It attaches the provisions that the inventions be new, involve an inventive step and are capable of industrial application.\textsuperscript{19} Though this eligibility criteria is generally stated, the Paris Convention did not contain such criteria. Exclusions from patentability are contained in paragraphs 2 and 3 of Article 27. Here the most significant is Article 27:3 (b) which permits member to exclude.

"Plants and animal other than micro organisms and essentially biological processes for the production of plants or animals other than non-biological and micro-biological processes. However, members shall provide for the protection of plants varieties either by patents or by an effective \textit{sui generis} system or by any combination thereof."

There already existed an international treaty for administering the rules on plant variety protection of this type, commonly called UPOV, named after its French acronym.\textsuperscript{20} However, the TRIPS does not mention any adherence to it. Thus the WTO members need not model their \textit{sui generis} legislation on UPOV. There has been considerable debate in India on this matter, which we shall examine later. This was such a hard-fought clause that the article itself contains clause for review of this para after four years from the date of entry into force of the WTO agreement. We shall subsequently discuss how the progress made on this has been surrounded by more controversy.

Another crucial Article 65.4, obligates member-countries that did not grant product patents for pharmaceutical or agricultural chemicals by 1 January 1995, to provide for Exclusive Marketing Rights (EMRs) in lieu of product patents during the transition period. India, as we shall outline later on, had an interesting experience with this provision too.

\textsuperscript{211}
Considering the subject-matter covered by patents and its impact on national legislation and crucial domestic sectors, there is little wonder that patents formed "the greatest source of deviation in negotiating positions, which reflected the provisions in existing laws of developing and developed nations" (Watal, 2003, p. 87)

Geographical Indications (GIs)

Sector 3, Article 22 to 24 of the TRIPS deal with protection of geographical indications, whose main architects were the European Community and Switzerland. Article 22 defines GIs as "indications which identify a good as originating in the territory of a member or region or locality in that territory where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin." All GIs must be provided with protection against use which would mislead the public or constitute an act of unfair competition. However, what created imbalance was Article 23 that obliged additional protection for GIs identifying wines and spirits. This meant that a legal means to prevent use of a geographical indication was to be provided even if the true origin of the goods was indicated. Thus, while many developing countries having well-known geographical indication did not gain any additional protection (specially true in the case of India), they were obliged to give special protection for wines and spirits. This could perhaps be bought by the fact that further negotiation and review were also inbuilt in Article 23 and 24.21

While we examine these contentious provisions of the TRIPS agreement in the specific context of India later, we now address the broader question of whether the TRIPS belongs to the WTO

6.3 TRIPS AND THE WTO

We have already discussed that the TRIPS agreement was the result of
bitter negotiations between the North and the South. Watal (2003) has rightly commented that "the conflict of interests was resolved through constructive ambiguity", which remains embedded in the TRIPS text. What has also continued is the larger debate of whether the TRIPS belong to the WTO. This is also central to our main argument because it has implication for the future agenda-setting of the WTO. In this section, we review the various viewpoints in this regard.

6.3.1 INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE

The TRIPS agreement emerged from an economic rationale for protection for IPRs.

IPRs became a trade issue as international trade in goods embodying IPRs increased significantly. Trade in counterfeit goods led to a growing realisation that inadequate enforcement of IPRs was robbing the manufactures of their competitive advantage. As legislation pertaining to IPRs forms part of domestic regulation, there was need for harmonization of IPRs Laws on an international level. As we have seen, a number of international conventions emerged which laid down various standards for protection of Intellectual property. The World Intellectual Property Organization (WIPO) established in 1967, became the specialised agency of the UN to deal with IPRs. Its main objectives are:

- to promote the protection of the Intellectual Property throughout the world through co-operation among states and where appropriate, in collaboration with any other international organization;
- to ensure administrative co-operation among the intellectual property unions.

Thus, the WIPO had a clear mandate to strengthen IPR protection. Hence the obvious question is that why should the WTO's agenda have the
TRIPS on it. It can be attributed to the developed countries insistence that as the WIPO provided no enforcement mechanism, the integration of IPRs into the existing trade regime was the only reliable solution and hence the US favoured proceeding through the GATT rather than the WIPO. IPR related matters in the GATT were limited and concerned trade in counterfeit goods involving trade and design infringement, certification marks and use of marks of origin. From there, as we have already indicated, the Tokyo Round led to the negotiations in the Uruguay round and the birth of the TRIPS in the WTO.

6.3.2 TRIPS AS AN ECONOMIC OPTIMIZER

Maskus (2000) has argued that IPRs can be of material assistance in a country's attempts to encourage its own technological, industrial and cultural development. The US which progressively increased its IPRs from 19th to 20th century, is a classic example of a causative link between IPRs and development. Similarly the Japanese patent system during the period 1960-93 was designed to encourage increment land adaptive innovation and diffusion of knowledge into the economy. In contrast, developing countries have shown weaker enforcement of IPRs laws. India throughout had patent regime but allowed only process patenting in pharmaceuticals, chemicals and food, leading to a sizable low cost medicine industry evolving around reverse engineering. In China, trade-mark infringement is seen to adversely effect innovative Chinese enterprise. Concerns about weak IPRs have discouraged foreign owned enterprise from fully integrating their Chinese operation. Maskus has concluded that:

a) countries with weak IPRs are isolated from modern technologies,
b) they get fewer spillover benefits form new technologies in their economies, and
c) nations with weak IPRs experience both, limited incentives for domestic innovation and depressed inward technology flows. (Maskus, 2000, p.155)
The argument for stronger global IPRs through a mechanism like the TRIPS is also supported by findings that there are high returns to private R&D in many developed economies. The TRIPS, therefore, contains some promise of increasing the dynamic efficiency of global R&D allocation over time. It also reduces the uncertainty in R&D investments because it improves the appropriability of future inventions. With the TRIPS, major net exporters will reap greater returns on their intellectual property. Maskus, therefore, is of the view that the TRIPS "moves incentives toward greater protection of new information which could expand innovation and open new channel of technology acquisition" (2000, p.194). It is an economic optimizer in the sense that by encouraging countries to recognize IPRs as fundamental conditions for promoting business, it should improve prospects for growth.

Braga and others (2000) have shown that IPRs have become increasingly relevant in selected sectors like agriculture and have gained importance in international transactions of goods and services. This has led to a global demand for their protection.24

From the above, we can concur with Swaminathan S.S. Aiyar's view that strong IPRs help developing countries and that IPRs are central to the evolution of world trade (The Economic Times, January 19, 2000).

6.3.3 THE COST OF TRIPS

Most of the implementation concerns of the TRIPS emerge from the fact that this involves substantial costs for developing countries. These costs can be divided into two categories.

First, it requires money to bring domestic legislation into conformity with the TRIPS. Strengthening the domestic institutions that would enforce the TRIPS also has high costs. Second, there are economic costs as rents are
transferred from domestic consumers to foreign holders of IPRs.

We must again turn to Finger and Schuler (2000) for a detailed analysis of implementation costs.25 They have reviewed World Bank projects in countries like Brazil, Indonesia and Mexico and found that the needed reforms like drafting new legislation (in India’s case for product patents), augmenting administrative structure (modernising the patent office in India is estimated to cost $ 5.9 million), ensuring enforcement and providing extensive training for officers involved, involve substantial costs and additional resources that are a severe strain on the economy of such nations.

Panagariya (1999) has also explained how the TRIPS results in reduced welfare for developing nations. His argument is that the North is much bigger than South in economic terms and has a comparative advantage in innovations This relates to W. Arthur Lewis’s contention about the North-South divide which we had referred in Chapter Two. He illustrates this by using the effect of the extension of Northern Patent regime to the South (which as per the TRIPS becomes a uniform 20 years). This extension transfers a part of the Southern consumers income to the Northern innovators through higher product prices. This, therefore, lowers the income in the South. He refutes the argument that the extended patent regime may lead to generation of additional innovations in the South, through the simple logic that given the small size of the South, extra innovations generated are likely to be few (present figures substantiate his argument- developing countries have a patent share of 6% out of 3.5 million patents in the world).26

The second type of costs are economic because IPRs act to create a temporary monopoly for innovators to recoup their investments in inventions. In economies that are net importers of technologies the rents paid by consumers to right holders of innovations are transferred outside the country. Therefore IPRs may involve significant transfers across countries. This means a terms-of-trade loss to net importers as foreign producers obtain rent from domestic
consumers. There are many studies in rent transfer analysis which conclude that rent transfers specially in awarding pharmaceutical product patents would range from small ones to large ones.

Even Maskus (2000) with his optimistic view of the important and positive role of IPRs in economic advancement, has accepted that "because the ownership and exports of intellectual property are concentrated in the hands of firms in a few developed economies, the effect of the TRIPS will be to shift the terms of trade in their favour, away from intellectual property importers" (2000, p.181). The following table in the next page shows the estimated rent transfers from the TRIPS induced changes:
Table: Estimated Static Rent Transfers from the TRIPS-induced strengthening of 1988 patent laws (1995 $ millions)

<table>
<thead>
<tr>
<th>Country</th>
<th>Outward transfer</th>
<th>Inward transfer</th>
<th>Net transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>USA</td>
<td>92</td>
<td>5,852</td>
<td>5,760</td>
</tr>
<tr>
<td>Germany</td>
<td>599</td>
<td>1,827</td>
<td>1,228</td>
</tr>
<tr>
<td>France</td>
<td>0</td>
<td>831</td>
<td>831</td>
</tr>
<tr>
<td>Italy</td>
<td>0</td>
<td>277</td>
<td>277</td>
</tr>
<tr>
<td>Sweden</td>
<td>13</td>
<td>230</td>
<td>217</td>
</tr>
<tr>
<td>Switzerland</td>
<td>474</td>
<td>510</td>
<td>36</td>
</tr>
<tr>
<td>Panama</td>
<td>0</td>
<td>0.3</td>
<td>0.3</td>
</tr>
<tr>
<td>Australia</td>
<td>177</td>
<td>154</td>
<td>-23</td>
</tr>
<tr>
<td>Ireland</td>
<td>71</td>
<td>12</td>
<td>-59</td>
</tr>
<tr>
<td>New Zealand</td>
<td>79</td>
<td>8</td>
<td>-71</td>
</tr>
<tr>
<td>Israel</td>
<td>125</td>
<td>32</td>
<td>-93</td>
</tr>
<tr>
<td>Colombia</td>
<td>132</td>
<td>2</td>
<td>-130</td>
</tr>
<tr>
<td>Portugal</td>
<td>138</td>
<td>0</td>
<td>-138</td>
</tr>
<tr>
<td>Netherlands</td>
<td>453</td>
<td>314</td>
<td>-139</td>
</tr>
<tr>
<td>South Africa</td>
<td>183</td>
<td>15</td>
<td>-168</td>
</tr>
<tr>
<td>Greece</td>
<td>197</td>
<td>2</td>
<td>-195</td>
</tr>
<tr>
<td>Finland</td>
<td>281</td>
<td>47</td>
<td>-234</td>
</tr>
<tr>
<td>Norway</td>
<td>277</td>
<td>25</td>
<td>-252</td>
</tr>
<tr>
<td>Denmark</td>
<td>330</td>
<td>77</td>
<td>-253</td>
</tr>
<tr>
<td>Austria</td>
<td>358</td>
<td>83</td>
<td>-275</td>
</tr>
<tr>
<td>Belgium</td>
<td>470</td>
<td>111</td>
<td>-359</td>
</tr>
<tr>
<td>India</td>
<td>430</td>
<td>0</td>
<td>-430</td>
</tr>
<tr>
<td>South Korea</td>
<td>457</td>
<td>3</td>
<td>-454</td>
</tr>
<tr>
<td>Spain</td>
<td>512</td>
<td>31</td>
<td>-481</td>
</tr>
<tr>
<td>Mexico</td>
<td>527</td>
<td>1</td>
<td>-526</td>
</tr>
<tr>
<td>Japan</td>
<td>1,202</td>
<td>613</td>
<td>-589</td>
</tr>
<tr>
<td>UK</td>
<td>1,221</td>
<td>588</td>
<td>-633</td>
</tr>
<tr>
<td>Canada</td>
<td>1,125</td>
<td>85</td>
<td>-1,040</td>
</tr>
<tr>
<td>Brazil</td>
<td>1,714</td>
<td>7</td>
<td>-1,707</td>
</tr>
</tbody>
</table>

Source: Maskus (2000 p.184)

This clearly shows that the overwhelming share of rents transferred would accrue to the United States, which obtains an additional transfer that exceeds US $5 billion. This "strategic trade policy, par excellence" by the US clearly explains its insistence on the TRIPS during the UR. Developing countries like India, Mexico and Brazil experience significant losses, which are termed "Short run" by Maskus. However McCalmann's view that these losses...
are similar in magnitude to the benefits, that CGE studies suggested (see Chapter Three) the developing countries would obtain from the market access part of the Uruguay round, thus making the net gains, even negative for some countries, appears more plausible.28

The above analysis shows that the developing countries' stance to oppose the TRIPS in the UR sprang from valid fears. The developed countries rationale that stronger IPRs through the TRIPS are essential to recover the R & D expenditure in crucial sectors, is negated by the fact that profits from sale of many drugs exceed the research cost by many times29 but the cost of the TRIPS for developing countries, even if transitional, is alarmingly high. It is this imbalance which made the liberals of the 19th country regard IPRs as "feudalistic monopolies" and which led to its Marxist criticism:

"The dramatic expansion of intellectual property rights represents a new stage in commodification that threatens to make virtually everything bad about capitalism even worse. Stronger intellectual rights will reinforce class differences, undermine science and technology, speed up the corporatization of the university, inundate society in legal disputes and reduce personal freedoms".30

6.3.4 DOES TRIPS BELONG TO THE WTO

The costs of the TRIPS has generated arguments that the TRIPS does not belong to the WTO. Even a neo-liberal like Jagdish Bhagwati has acknowledged that "the TRIPS does not involve mutual gain; rather it positions the WTO primarily as a collector of intellectual property related rents on behalf of MNCs." He apprehends that this does not augur well for the future of the WTO and gives a rationale to NGOs that the WTO should also includes issues on environment, human rights, etc. This overburdening might well rip apart the WTO "At present, the General Agreement on Tariffs and Trade (GATT),
General Agreement on Trade on Services, (GATS) and the TRIPS form a TRIPOD within the WTO. But the Tripod threatens to turn into a centipede as other issues are introduced. Elsewhere Bhagwati has also stated that the very premise that drug companies are seriously handicapped in their R & D by the lack of Intellectual property protection is flawed. Their true motivation is profitability—they want to use IP protection as a money spinner in the poor countries by shutting off countries like India and Brazil coming into Botswana and providing their generic copies of medicines to diseases like the AIDS at lower prices. In view of this, vociferous lobbying was resorted to by developing countries at various the WTO meets. Finally the pre Cancun drug deal allowing poor countries to import cheap copies of patented drugs gave the WTO a human face. Similarly, provisions for parallel imports came to be regarded as essential to enable poor countries to secure low prices from the drug companies.

Thus the argument that IP protection is not a trade issue and the WTO is all about lowering trade barriers and tackling market access problems, becomes more credible from the above observations. Further, the argument that the TRIPS was incorporated into the WTO so as to make the use of trade sanctions against user countries who used knowledge without paying royalty also cannot be ignored.

Arvind Panagariya has also questioned the appropriateness of the including of the TRIPS into the WTO. He has called the TRIPS and the WTO “an uneasy marriage.” He has argued that the TRIPS is a “fundamentally different animal from trade liberalisation” and its inclusion into the WTO cannot be justified. His economic analysis shows that the TRIPS is a welfare-reducing proposition not only for developing countries but the world as a whole. He rejects the argument that in the absence of higher standards of IP protection developing countries become free riders in the multilateral trade regime on the ground that given different levels of economic development, different countries are bound to choose different levels of IP protection. He concludes that the
TRIPS was incorporated in the WTO only as an exchange deal for the abolition of MFA and even this was an uneven bargain as it was an exchange of trade concession for non-trade concession. Hence "the existence of the TRIPS offers neither a justification nor a model for incorporating more non-trade agreements into the WTO." However, he maintains that the opposition to the inclusion of IPRs into the WTO does not imply opposition to IPRs. There is little evidence to show that nationally chosen IPR regimes will hamper trade; the TRIPS agreement requires all members to adhere to the same IPR standards which approximately equal those already achieved in developed countries, thereby making the entire burden of adjustment fall on developing countries.

A contrary view is expounded by Maskus (2000). He argues that the status of intellectual property protection in the world has been markedly strengthened due to the changes brought about by the TRIPS. The TRIPS obligates countries to take action against copyright and trademark policy and to provide patents for pharmaceutical products, agricultural, chemicals and biotechnological inventions. It also requires countries to prevent the use of integrated circuits that infringe protected designs and advances protection of trade secrets. These significant modifications in national policies will not be without transaction costs but "long-run gains would come at the expense of costlier access in the medium term." Other valid reason for inclusion for the TRIPS in the WTO is the problem of international policy co-ordination as variations in IPRs influence trade flows. Thus, the new IPR regime of TRIPS may be the only "vanguard of future harmonization of standards." While there are concerns about prices of pharmaceutical product and new seed varieties, uncompensated exploitation of genetic resources and the patenting of life forms, Maskus argues that "such costs can be accompanied by even larger benefits though with a time lag" (2000, p.240)

The above analysis shows that there are definite costs to the TRIPS agreement. While there is a significance of stronger IPRs, it is valid to say that the TRIPS has been inappropriately included in the WTO Developing countries
have to ensure that their future bargaining on the agenda-setting of the WTO is more prudent than that exhibited during the TRIPS negotiations. As of now, the developed and the developing countries both need to address the valid concerns emanating from the inclusion of the TRIPS agreement in the WTO.

6.3.5 ADDRESSING THE IMBALANCE

The theoretical concerns as outlined above have led to empirical changes in the WTO implementation of the TRIPS agreement. The idea of finding a balance of interests between the owners and users of intellectual property, especially in the areas of access to essential medicines and protecting biodiversity, grew as the civil societies started reacting to the TRIPS. Oxfam, for instance, launched its worldwide cut-the-cost campaign for life-saving drugs, criticising the WTO rules being used by the drug industry to cripple local competition which in turn inflated the cost of new and patented medicines making them unaffordable to the world's poor. It also brought out a report on pharma giant Glaxo Smithkline, challenging it to meet its publicly stated commitment to poor people's access to medicines.

Similarly, the NGOs like 'Medicins Sans Frontiere's' have spearheaded campaigns for better access to essential medicines. We shall focus on civil society's response especially in the context of India's political economy in the forthcoming section.

Equally significant was the response of many governments. The British government, for instance, set up the Commission on Intellectual Property Rights in 2001 to examine how IP rights would work better for developing countries. In its report 'Integrating Intellectual Property Rights and Development Policy', the commission criticises the WTO and even the WIPO for "failing to take into account the complex links between IP protection and development" and warns that by serving the interests of companies based primarily in the developed world, the IP system increases the cost of access in many fields.
The Panos report also warns that patent legislation is not being debated widely enough in most developing countries and the process of introducing it needs to be more consultative and transparent.

The WTO has not been a blind spectator to all this. The WTO Director General, Supachi Panitchpakdi even commented that "the WTO must not be tripped up by drugs." The TRIPS council, which comprises all the WTO members, is responsible for monitoring the operation of the agreement. As we have noted, the TRIPS already contained an inbuilt agenda for further work. This was in the following areas:

a) the negotiations of a multilateral system of notification and registration for geographical indications for wines,

b) the review of the application of provisions on protecting geographical indications,

c) the review after four years of the option to exclude from patentability, certain plant and animal inventions, and

d) the examination of the applicability of the TRIPS on non violation complaints under the dispute settlement process:

The TRIPS council has been actively engaged in sorting out these concerns. After the Doha meet, it has also been mandated to check misuse of compulsory licensing provisions.

It would not be an exaggeration to say that the WTO ministerial meet at Doha reflected the concerns of civil society on the TRIPS deal. The Doha declaration laid specific stress on the importance of interpreting and implementing the TRIPS in a manner supportive of public health by promoting both access to existing medicines and R &D in new medicines and called for a work programme to implement it. It also called for examination of the TRIPS' relationship with the Convention on Biodiversity (CBD), again a developing countries' demand. Besides, a separate declaration on the TRIPS and public
health was adopted on 14 November 2001 (See Annexure 8) which provided 'flexibilities' in order to protect public health. Significant among these was the right to grant ‘compulsory licenses’. This declaration also contained the now contentious Para 6:

“We recognize that the WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the council for the TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002 “

While the deadline could not be met and caused much furor at the Cancun meet in 2003, the declaration was significant in that “it reaffirmed the rights of the WTO members to make use of measures like compulsory licensing and parallel imports” and it “also politically and legally strengthened the ability and attitude of developing countries to make use of these measures aimed at providing access to affordable medicines for all” 42 We have already seen that the drugs deal pre-Cancun was considered a significant victory for developing countries.

This new drug license regime shows that civil society can play an influential role in the multilateral trading regime. It also shows that developing countries stand to gain if they exhibit cohesive bargaining strategies. Only then they can hope to become part of agenda-setting in the WTO, only then their concerns can become the concerns of the WTO. The debate around the TRIPS captures this intrinsic power play in the international trading regime most emphatically.

6.4 TRIPS and INDIA

We have taken note of the fact that right from the time of its inclusion in the UR, the TRIPS caused a standoff between the developed and the
developing world. India played a crucial role in the contentious negotiations on the TRIPS and displayed a firm stance on its key issues. However, what is more significant is the policy changes within India on TRIPS related matters and the factors responsible for it. We also take note of the civil society mobilization on the two central issues of the TRIPS - effects of Patents on prices in the pharmaceutical sector and the conservation of bio diversity in India. We examine the above issues in the ensuing sections

6.4.1 INDIA, TRIPS AND THE URUGUAY ROUND

The analysis of India's negotiating role on the TRIPS at the UR throws interesting light on our key question of what is wrong in our bargaining capacity. India's negotiating position underwent tremendous shifts during the UR. Watal (2003) gives an in-depth account of the role played by India in the UR. She states that India along with Brazil and Argentina were the strongest opponents to the inclusion of the TRIPS in the negotiating agenda of the UR in the early phase. They continued this position till 1988. Thereafter, there was the first major shift in India's policy when it agreed to include IPRs in the negotiation in 1989. Ramanna has given a detailed analysis of this policy shift. She says though there was external trade pressure in the form of the US sanctions, there were also domestic divisions within the business interests with some associations demanding amendment in the patent laws and others rejecting India's approach. Both Watal and Ramanna state that there was sharp political criticism of India's policy shift forcing the then Minister of Commerce to declare in the Parliament:

"A discussion in the Uruguay Round does not commit us to anything. There has not been a shift in our position, but there has been a shift in the negotiating stand."

On July 28, 1989, the Indian Government issued a Press Statement
taking the position that talks in the UR would be limited to only the restrictive and anti-competitive practices of IPRs. Simultaneously, India submitted a proposal to the negotiating group on the TRIPS, containing a similar view. The main concerns of India as detailed by the above proposal were as follows:

- It was only the restrictive and anticompetitive practices of the owners of IPRs that could be considered trade-related because they alone distorted international trade. However, India had examined other aspects of IPRs and included them in its proposal because they had been raised by other participants and also because they had to be seen in a wider, developmental context.

- The central philosophy behind the TRIPS should be the freedom of member states to attune their IPR protection system to their own needs and conditions.

While from an ideological point of view, the above viewpoint appears proper, it only shows India's ambivalence in its negotiating strategy. Compared to the stance taken by countries like Norway and Switzerland which focused their proposal more on the adequate levels of protection, the contrast becomes even more stark. It is no wonder then, that the Indian proposal drew criticism on the ground that if its line of reasoning was taken to its logical conclusion, it would provide for no improvement in terms of reducing distortions or impediments to international trade.

This restrictive approach adopted by India continued and as we have seen in Section 6.1, by 1990 India was part of the developing countries that demanded that substantive part of the TRIPS be limited to counterfeit goods. In 1991, the EC and India developed a joint proposal under which India agreed to provide for market exclusivity for all products and it was based on this that the Dunkel draft in 1991 proposed for the Exclusive Marketing Rights provisions. Despite opposition to the Dunkel Draft text, mainly on the issue of transitional periods, India accepted it with some amendments.
In the final analysis, India, along with other developing countries, displayed an incoherent, reactive and unassertive approach in the TRIPS negotiations. Insufficient engagement of the civil society, divided business interests as well as an inability to co-ordinate with like minded countries led to constant shifting of position in the UR. This view has been corroborated by Dr. Biswajit Dhar (head, WTO centre, IIFT) during discussion with researcher, on 10 3.2005. Thus, not only did the TRIPS negotiations concede little to the developing countries as a whole and India in particular, but also their poor negotiating strategies later made the implementation of the TRIPS difficult.

6.4.2 POLICY SHIFTS IN INDIA AND MAJOR ACTORS

Before we move on to the stance taken by India, post-WTO on the TRIPS and the changes in its legislation, we analyse the role played by major actors like political parties, industrial groups and the NGOs. This argument draws from our analysis in Chapter Four of this thesis but is now seen in the specific context of the TRIPS.

According to Wendt, “The political process in India has been characterized not only by the external influence from the GATT/ WTO but also and especially by an endogenous cocktail consisting of domestic political conflicts, commercial interests, NGOs and an anti-imperialistic/Swadeshi ideology which is inbreded in India in both the civil society, the trades and industries and in the bureaucracy and the political life.”

During the negotiating history of the TRIPS, there were different Indian Governments in power, and as we have noted they all first resisted and subsequently tried to incorporate their stance on IPRs in the UR. Therefore, the Indian government in 1994, found itself to be a target of criticism by various domestic constituencies

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There had been criticism of the Indian Government for the April 1989 compromise from certain sections of the civil society. The ruling coalition of the National Front government had to pursue the policy of self reliance and during the debates in Parliament in March - August 1990, it stated that India would not participate in any negotiation under threat and retaliation. After 1991, though the government changed its position, it was cautions about tabling its proposal in the Parliament. There was already, as we have indicated earlier, public resistance about the Dunkel Draft. The stealthy approach by the government led to criticism on the lack of information on the subject. B.K. Zutshi, former Ambassador to the GATT has concurred that the government shied away from a public debate on the subject (during conversation with the researcher on 13.3.2005). The Left and the BJP, also attacked the government for not forming a front, together with other developing countries and also wanted that the federal states in India should be heard.51

The National Working Group on Patent Laws (NWGPL) was established in August 1988 as a response to IPR negotiations.52 It was agreed to let it work closely together with NGOs on the patent issue as changes in the patent legislation would lead to change in prices in pharmaceuticals and hence would be of concern to the people of India, a majority of whom belong to the poor and deprived sections of the population.

Various organizations involved in promoting awareness about rational and people-friendly drug policies had already been advocating that access to essential medicines is a prerequisite if health is to be recognised as a fundamental human right. Some of the key players in this regard were-The All India Drug Action Network (AIDAN), Low Cost Standard Therapeutics (LOCOST) and the Jan Swasthya Sahyog.

Post-the TRIPS Agreement, such organizations began demanding that groups who need the essential medicines the most, should not be denied access to them Their argument was that since the TRIPS Agreement doesn't
take into account the fundamental nature of the right to health, it was imperative that the government build its future policies based on equity (Source-Writ Petition, Civil no.423of 2003, Supreme Court Of India)

In contrast, the other major player—the industrial segment, wanted the state to look in the other direction. The TRIPS negotiations were concluded at a time when India’s economic reforms were underway. (See Chapter Four). It was a time, when markets, profits and privatization held sway. The industrial houses had begun to sense their potential for growth in the liberalized political economy of India. Thus, there grew support for the new patents regime. The CII in its statement before the Gujral Committee formed by the Indian Parliament to prepare a report on the impact of the WTO agreement on India, stressed that absence of product patents meant poor technology flow. Similarly ASSOCHAM, stated that India needed to strengthen patent laws in order to attract FDI.53

FICCI established the International Institute of Intellectual Property Development, aimed at promoting the patenting culture and using IPRs as strategic tools in forwarding business interests.

Individual industries like Dr. Reddy's Laboratory strategised as per their belief in their competitive edge in new drug discovery. Ranbaxy declared the need for a radical change. A branch of INTERPAT (an international organization working for a uniform and strong protection of IPRs) was set up by some MNCs in 1990, in India.54 It targeted public opinion by arguing for benefits from strong patent protection.

Thus, we notice that there were contradictory positions among major actors causing continuous shifts in our negotiating history. This has a bearing on our conclusion.
6.4.3 THE PATENT REGIME AND IMPLICATIONS FOR INDIA

India's patents policy, after independence, reflected India's development objectives. It was a mirror of India's overall policy of development planning, discussed in Chapter Four. Patents were viewed as a means for economic development and not as a tool for promoting innovations. The aim was to protect the key pharmaceutical industry and to ensure low-priced drugs for people.

i) Patent Law and the TRIPS

India has a long history of patent law. The patent Act of 1970 was based on the two important reports of the Patent Enquiry Committee (1948-1950) and the Ayyangar committee (1957-59). Ramanna (2002) has provided a detailed account of the Indian Patent position. Patents were restricted to process and had limited tenure and an elaborate system of licenses. Thus, there were wide differences between the existing patent regime in India, and our TRIPS obligations (see table below), mandating legislative change.

Table: Comparison of India’s Patent Act and the TRIPS

<table>
<thead>
<tr>
<th>Indian Patent Act of 1970</th>
<th>the TRIPS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Only process not product patents in food, medicines, chemicals.</td>
<td>Process and product patents in almost all fields of technology.</td>
</tr>
<tr>
<td>Term of patents 14 years; 5-7 in chemicals, drugs.</td>
<td>Term of patents 20 years</td>
</tr>
<tr>
<td>Compulsory, licensing and license of right.</td>
<td>Limited compulsory licensing, no license of right.</td>
</tr>
<tr>
<td>Several areas excluded from patents (method of agriculture, any process for medicinal, surgical or other treatment of humans, or similar treatment of animals and plants to render them free of disease or increase economic value of products).</td>
<td>Almost all fields of technology patentable. Only area conclusively excluded from patentability is plant varieties; debate regarding some areas in agriculture and biotechnology.</td>
</tr>
<tr>
<td>Government allowed to use patented invention to prevent scarcity.</td>
<td>Very limited scope for governments to use patented inventions.</td>
</tr>
</tbody>
</table>

Though India had a transition period of five years effective from January 1, 1995 to apply the TRIPS provisions and an additional period of five years for extending product patent protection, certain obligations were imminent. The mailbox dispute was the first sign of things to come.

**Exclusive Marketing Rights (EMRs) and the Mailbox dispute**

Article 70(8) read with Article 65 (2) and (4) of the TRIPS obligates developing countries to provide for an EMR regime through mailbox provision for receiving patent applications for inventions during the transitional period. The Mailbox system was termed a facility for inventors till the products patent legislation in chemicals, food and drugs was in place. India was required to fulfill this obligation by January 1, 1995. On 31.12.1994 the President, accordingly promulgated the Patents (Amendment) Ordinance to provide for EMRs and India accordingly notified the TRIPS council as required under Article 63(2) of the TRIPS. However, the Ordinance lapsed on March 26, 1995 as the Patent Amendment Bill of 1995 could not be cleared in the Parliament. India had failed to fulfill its obligation in the WTO. Consequently, the US, ever the watchdog of the TRIPS and estimating loss of billions of dollars due to piracy in India, along with the EC, raised a dispute against India at the WTO DSB alleging non-fulfillment of India’s obligations (WT/DS/50 and WT/DS/791). India took the stand that applications were being filed in the patent office and this itself constituted an effective mechanism as required by the TRIPS. India also argued that as a developing country it was entitled to delay such process. India’s arguments were obviously without merit and hence the Dispute Settlement Panel ruled against India and its report was upheld by the Appellate Body of the DSB.

An analysis of the above dispute clearly shows our self-mitigating approach again leading to our final conclusion in Chapter Seven. While the fears in changing the legislation can be attributed to the general public opinion...
about rise in price of medicines and protection for domestic drug companies, there is no justification for our stance at the DSB. It only revealed our recalcitrant methodology in dealing with accepted treaty obligations. It showed that in India, politics cannot be driven by economic sense. A better approach would have been to build the public opinion in this regard and be more forthcoming of our failure to fulfill our TRIPS-related obligations at the DSB.

Ultimately, after the defeat at the DSB, India was forced to opt for the EMR route and the much delayed Patent First Amendment Act was passed in December 1999.

**Patent (First) Amendment Act, 1999**

The first version of the amendment was noteworthy for sticking quite closely to the letter of the TRIPS Agreement. The 1999 draft made use of some of the exceptions and flexibilities provided in the TRIPS but only at a superficial level. In other words, while the bill incorporated exceptions such as those provided in Article 27.2 in the TRIPS, it did not attempt a broader reading of the TRIPS in the light of Articles 7 and 8.2, which provide the objectives and principles that should guide the interpretation and implementation of the whole treaty. What was significant was that this amendment made provisions for EMRs for five years for inventions made in India on or after January 1, 1995 and for which a claim for process patent has been made, or granted. There was much debate on whether this was the best way out for India (See Watal, 2003, p. 124). It was felt that adopting the EMR route was not the best approach for India. India could have gained significant bargaining advantage by straightaway opting for a product patent regime. Lack of a proactive approach has, therefore, made India lose crucial ground on the WTO negotiations.

**The Patent (Second) Amendment Act, 2002**

The Second Amendment Act also comes with an interesting history of political process in India. It was first introduced in 1999 to fulfill other TRIPS
obligations and mainly to introduce product patents by January 1, 2005. The bill generated heated debate in the Lok Sabha when introduced. Opposition parties from the Congress to the Left, criticized it vehemently.\textsuperscript{58}

Rajya Sabha referred it to the Select Parliamentary Committee, which went on an elaborate world tour to study patent changes. This has been called by Raghvan as "one more effort by India just to be stubborn and irrational when dealing with the WTO issues." Legislative delay could well have meant another WTO dispute.

The amended legislation provided for changes in the scope of patentable inventions, grant of new rights, extension of the term of protection, provision for reversal of burden of proof in case of process patent infringement and conditions for compulsory licenses. The amended legislation provided for immediate product patent protection for micro-organisms. This led to criticism as patent applications for a large number of micro-organisms were being filed by foreign corporations.\textsuperscript{59} The amended bill was also criticized for failing to address the issue of patentability for pharmaceuticals in a clear way and to provide for compulsory licensing. This could have been easily done by incorporating Article 31(b) of the TRIPS Agreement as done by many European nations. This approach is even more surprising because the bill came after the Doha meet which as we have seen, confirmed the legitimacy of measures seeking to use the in-built flexibilities in the TRIPS.

This brings us face to face with the inexplicable paradox that while at Doha, (See Chapter Five) India was among the most vocal developing countries in putting forward developing countries' interests, it could not even make full use of allowed measures in its domestic legislation. This indicates the realities of domestic politics that substantially shape our trade-related strategy in engaging with the WTO.
The Patents (Third) Amendment Act, 2004

By the time of the Third Amendment Act, there was a strong public opinion about the changes that the government must adopt so as to make the act pro-people. This was a welcome change from the past experience.

"By rushing through the Third Patents Amendment without proper parliamentary scrutiny, India is short changing its post-Doha obligations to both its own and the world's poor. It is also putting its sovereignty, status, prestige and obligations at risk. Parliament should not rush through the Third Patents Amendment Bill, but deliberate on it through the full committee process - not an ordinance. Medicine without social justice is unacceptable. Patents are not a gift for drug companies to exercise power without responsibility" (see Rajeev Dhavan's article, in the Hindu, 10 December, 2004) However, the government again brought out an ordinance in a stealthy manner on 26th December, 2004. As stated by Kamal Nath, Union Minister of Commerce and Industry,

"This Third Amendment is only the culmination of a process begun ten years ago. The provisions of the Ordinance are to be seen in conjunction with, and in the context of the Act, as well as of the earlier two Amendments of 1999 and 2002. Our Patents Act always provided for process patents in all fields, and product patents in all fields except drugs, food and chemicals. The Act had to be amended in order to provide for product patents in these also with effect from 1st January 2005" (from his statement on the Ordinance relating to Patents (Third) Amendment dated 26th December, 2004 at a news conference in New Delhi on 27th December, 2004). The Minister also assuaged fears of price hike in medicines through various price control mechanisms in place and declared that the ordinance created an "enabling environment" for the sunrise sectors of pharmaceuticals and software in India's political economy.

The ordinance was seen as a "surrender to multinationals" (see Arvind Panagariya's article, in The Economic Times, February 23, 2005). The most
obvious flaw was again in the area of compulsory licensing, wherein instead of making use of the TRIPS flexibilities, the Controller of Patents must determine various factors in case of public health emergencies. Thus, while under the TRIPS, it would be legitimate to issue a compulsory license expeditiously, the provisions in the ordinance amount to bureaucratic delays and even legal objections by the patent holder. (Also see Amit Sen Gupta, “Side Effects” in The Times of India, February 17, 2005.)

Later, the bill when introduced in parliament ran into rough weather with the opposition declaring it was not in ‘national interest.’ (The Times of India, 16th March, 2005) The BJP wanted the Bill to be sent to the Standing Committee of Parliament. The passing of the bill almost became a trial of strength for the UPA government. The Bill could be passed only when the government agreed to accept as many as 13 amendments mainly suggested by the Left. (Times Of India, March 23, 2005) The sudden support of the Left to the Bill, described as “paradox of history”, by CPI-M’s Deputy, Rupchand Pal (The Economic Times, March 23, 2005) shows the political power play in India’s legislative drawings.

The above analysis clearly shows that there is crucial domestic power play that shapes the policy response to our accepted Treaty obligations. This creates the key question of who defines the national interest. It also brings forth the interesting finding that the so called undemocratic agenda setting which we criticize at an international level, is very much at work within the national level.

ii) Patents and Pharmaceuticals

The pharmaceutical industry is one of the most knowledge-driven industries. The process of drug invention is elaborate and expensive (it costs US$ 300 Million to reach a new drug to the market.)60 Proprietary knowledge and hence IPRs, more specifically patents are vital policy tools for this industry. We have already shown how the TRIPS mandated changes meant a new patent regime for a developing country like India. We now take up two important
implications of the changed patent regime-first is the question of price- hike of medicines and second the question of protection of domestic industry.

Price Hike Of Drugs Post –TRIPS: Myth or Reality

We have seen that the entire process of legislative change of patents in India has been influenced by the general opinion that stronger patents would mean rise in prices of drugs causing them to be ill afforded by the country's poor. The national sentiment on this issue is well captured by Indira Gandhi's remarks at the 'World Health Assembly' in 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".

The concerns for the price rise of drugs were therefore deep rooted. There are contrasting viewpoints on this issue. While the general public opinion has been that post the TRIPS period will witness a rise in drug prices,61 empirical studies in this regard point in the other direction.

Notably, only 7 out of more than 250 drugs in the WHO list of essential drugs are on patent. Therefore, about 90% of the essential drugs are off patent in any case. At present, 90% of the drugs used in the country are not patented. The TRIPS does not provide for retrospective patenting. Hence even under the new patent regime, the availability and prices of generic drugs will largely be unaffected. Here what is needed to watch out for the trap of 'ever-greening of patents'62 which would require proactive legislation by India.

India is one of the cheapest producers of pharmaceuticals in the world. The drug prices in the country are much lower than global prices.
## Table: Price Comparisons - Four Largest ‘On-Patent’ Drugs by Sales in India

<table>
<thead>
<tr>
<th>Drug</th>
<th>Container</th>
<th>Times costlier in:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Pakistan</td>
</tr>
<tr>
<td>Ranitidine</td>
<td>300 tabs/10 pack</td>
<td>18.53</td>
</tr>
<tr>
<td>Famotidine</td>
<td>40 tabs/10 pack</td>
<td>18.61</td>
</tr>
<tr>
<td>Ciprofloxacin</td>
<td>500 mg/4 pack</td>
<td>28.40</td>
</tr>
<tr>
<td>Norfloxacin</td>
<td>400 mg/10 pack</td>
<td>39.00</td>
</tr>
</tbody>
</table>


Organization of Pharmaceutical Producers in India (OPPI) has expressed similar view that since patents of over 95% of the drugs available in India and on the WHO list of essential drugs have expired, these drugs will continue to be available at current prices. Globally, only 15 to 20 new drugs enter market every year and only a few of them are commercial successes. OPPI also quotes empirical evidence to show that prices do not rise after IPRs.63

Moreover, drug prices in India are administered by the government, through Drug Price Control Order 1970. (DPCO regulation still extends to 78 drugs) The populist politics of governments would compel them to ensure that government does not let the people be adversely affected. Accordingly, the government from time to time issues statement to this effect 64

Another realistic viewpoint which however defeats our goals of welfare state, is that for nearly 70% of India’s poor who currently do not have access to pharmaceuticals, patent introduction and any consequent price rise is irrelevant 65
Thus, we may conclude that price hike in medicines, if at all a reality, will also be influenced by other market driven factors. The cost-benefit analysis of the new patent regime gives a blurred picture, needing to be cleared through more evidence but giving enough edge to the domestic industry to emerge stronger.

**Pharmaceutical Industry: Protecting an Infant or a Giant**

Rasmus A. Wendt has given a vivid account of pharmaceutical industry in India. The pharmaceutical industry in India is a product of state regulations and controls. It has been a priority zone from 50s onwards. The 1970 Patents Act had a significant impact on the growth of the pharmaceutical industry. The absence of product patents gave drug companies in India comparative advantage in the production of generic drugs. This also led to atypical structure of pharma industry in India. Compared to the rest of the world where patent products ensured monopolistic status to a few large companies, the Indian scene is characterized by a large number of small and medium companies. The amount spent on R&D in India by the pharma companies is less than 2% of their sales value compared to 20% by large US pharma firms.

By 1991, Indian firms accounted for 70% of the bulk drugs and 80% of formulations produced in the country. Many firms are now eyeing the western market for export of generic drugs. Some of the leading pharma companies in India now support change towards a stronger IPR regime. On the other hand, the two national industries association IDMA and BDMA have voiced negative attitude to changes in patent law because the smaller firms will be prevented from selling patented products and will be exposed to competition from new companies, mostly foreign. However, many big Indian firms like Wockhardt, Ranbaxy and Cipla have moved towards joint ventures with foreign giants and others like Dr Reddy's are engaged in new discoveries—all pointers towards the changing face of the Indian pharmaceutical industry.
It is therefore plausible to accept Lanjouw's (1996) conclusion that the introduction of product patents should not have a strong adverse effect on this sector.

iii) Patents and Bio Piracy

The one specific area in the TRIPS patents regime where developing countries are *demandeurs* for higher standards of protection is traditional knowledge and biodiversity. Again, this is one area that is specifically significant to India, because of its rich resources in biodiversity. The patenting of products and processes derived from plants on the basis of indigenous knowledge in the developing countries, has raised accusations of biopiracy from the Third world countries. India in particular, has seen a number of such instances. Rao and Guru (2003) have compiled a list of patents granted to what have traditionally been considered India's ancient wealth, which is given in the table in the next page:
## Biopiracy of India's Traditional Wealth

| 1. Basmati Rice: patented by RiceTec, Texas, USA in 1997 as aromatic rice. Recently on challenge by APEDA, withdrew four claims of its uniqueness. The use of the term 'Basmati' by RiceTec was also challenged on the inappropriate trademark usage (as Texmati) and violation of 'geographical indication.' However, RiceTec still holds the patent for Basmati rice as the patent for use of Basmati remained unchallenged earlier by India. However, the International Centre for Technology Assessment (ICTA, Washington D.C) and the Research Foundation for Science, Technology and Ecology (RFSTE, New Delhi) have filed a suit to restrict the use of the term Basmati (and Jasmine of Thailand) to rice varieties grown in India and Thailand, respectively. |
| 2. Turmeric: patent granted to the University of Mississippi Medical Centre (for wound healing) in the US, was revoked on challenge by CSIR. |
| 3. Neem: patent granted to W.R. Grace and Co., UK and US Department of Agriculture was vacated on challenge. |
| 4. Karela, Jamun and Brinjal: patent granted to Cromak Research Inc., US, on edible herbal compositions comprising the mixtures of the above to reduce sugar levels. |
| 6. Aswagandha: patent granted to Reliv International Inc. as a supplement for healthy joints. US Patent office also granted a dozen patents on aswagandha-centred findings. |
| 7. Herbal products: amla, vasabhr, saptrangi, bel, etc. Natreon Inc. was granted patents for 13 claims of amla by US Patent Office, application also filled with European Patent Office. |
| 8. Hessian (Jute cloth): patent granted to a UK firm by the European Patent Office, patent revoked on challenge by Jute Industrial Research Association of India. |

It may be added that the Indian patent granted to Agaracetus of the US on tissue culture of cotton cells revoked in public interest in view of mounting criticism from the farmer community in India on its impact on the farming of major crop in India.

**Source:** Various reports in the Indian press
Similarly, Vasudeva (2001) has observed that 25% of US prescriptions are filled with drugs which have active ingredients derived from the Indian plants. He also gives instances of biopiracy as under:

Table: The other bio-piracies that have come to the notice of the Indian Government are as under:

<table>
<thead>
<tr>
<th>Plant Name</th>
<th>Patents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amaltas (Cassia fistula)</td>
<td>Three</td>
</tr>
<tr>
<td>Arand (Ricinus communis)</td>
<td>Seven</td>
</tr>
<tr>
<td>Ber (Zizyphus jujube)</td>
<td>Two</td>
</tr>
<tr>
<td>Black Nightshade (Solanum nigrum)</td>
<td>Three</td>
</tr>
<tr>
<td>Brahmi (Centella asiatica)</td>
<td>Five</td>
</tr>
<tr>
<td>Choulai (Amaranthus spinosus)</td>
<td>One</td>
</tr>
<tr>
<td>Garden Balsam (Impatiens balsamina)</td>
<td>One</td>
</tr>
<tr>
<td>Harad (Terminalia chebula)</td>
<td>One</td>
</tr>
<tr>
<td>Isabgol (Plantago ovata)</td>
<td>Two</td>
</tr>
<tr>
<td>Jangli Aranad (Jatropha curcas)</td>
<td>Two</td>
</tr>
<tr>
<td>Kali mirch (Piper nigrum)</td>
<td>One</td>
</tr>
<tr>
<td>Kumari (Aloe barbadensis)</td>
<td>Three</td>
</tr>
<tr>
<td>Pomegranate (Punica granatum)</td>
<td>One</td>
</tr>
</tbody>
</table>

Source: RFSTE (Research Foundation for Science Technology and Ecology, N.DELHI)

Even though Article 27.2 of the TRIPS contains provisions to disallowed patents to prevent commercial exploitation, India has opted to go for domestic legislation in the form of the Bio-Diversity Act, 2002. This aims at promoting the conservation and sustainable use of biological resources and the equitable sharing of the benefits arising out of such resources. This has been criticised on the ideological ground that there is only a weak identification of the sovereign rights of the country over its biological resources. The local communities have not been adequately represented in the National Biodiversity Authority. This again shows that the government is not doing enough groundwork while coming up with such legislations. Perhaps vigorous engagement with the stakeholders would result in creation of better laws that are truly in the national interest.
This brings us to our next section of response of civil society to the TRIPS and government's policies.

6.4.4 TRIPS AND THE CIVIL SOCIETY IN INDIA

Bio diversity is an enduring resource for supporting the continued existence of human societies. The most vehement resistance to the TRIPS has come from civil society because it becomes a major stakeholder in the way of the state's chosen path to integrate with the global economy. Its concerns move beyond trade and development and envelop the bigger question of survival. One of the key exponents of this argument is Vandana Shiva who has vociferously voiced her conjunctions about the role being played by the WTO in destroying nature and civilizations.67

Shiva views the WTO as “an instrument for corporate unilateralism which threatens life on earth and people's livelihood.” She argues that the WTO is designed to exclude democratic decision making in economic affairs. It destroys economic democracy through rules that prevent people, parliaments and governments from providing livelihoods and jobs for their people. It also usurps the space of national decision making and is loaded in process and content by the agenda of rich corporations and powerful countries. Thus, she called the Development Agenda of Doha “an anti-development agenda based on transforming natural resources and labor of the south into environmental and social subsidies for wasteful consumption and non-sustainable commerce.” Similarly she termed the collapse of the Cancun meet “a victory for the alternatives we have all been striving to build to protect the earth and all her peoples.” She projected Cancun as a victory of democracy over dictatorship, of fairness over injustice, of the South over the North, of the poor over the rich, of people over profits and of life over death.

An analysis of this argument shows that it is not just rhetoric but built around an ideology which has broad ethical and civilizational concerns at its
Shiva calls global trade rules as enshrined in the TRIPS and AOA, rules of robbery, camouflaged by arithmetic and legalese making corporations gain and people and nature loose. Her focus has been on patents and biotechnology with a view to “prevent imperialism over life itself.”

On Patents

According to Shiva patents are a “negative tool for creating underdevelopment.” “It’s the privatization of knowledge” and “rent collection from life.” She equates the patents regime of the TRIPS with Colonialism. In her book, *Patents-Myths and Reality*, she denounces the fallacy around which the IPR ideology is built that people are creative only if they can make profits and such profits are guaranteed through IPR protection. The commodification of knowledge makes patents a means for exclusive market control. She refutes the myth that strong IPRs will promote investment research and technology transfer in developing countries by the fact that as countries are forced to implement the TRIPS the outflow of scarce foreign exchange for royalty payments will add to the debt burden, pushing poor countries deeper into poverty.

She concludes that the challenge is to strike a balance - enough protection to encourage innovation but not so much that the social good is not served which the TRIPS has failed to do. She has thus called for a substantive review of the TRIPS and a freeze on its implementation till the review is undertaken.

On Biopiracy

According to Shiva, the ‘enclosure’ of biodiversity and knowledge is the final step in a series of enclosures that began with the rise of Colonialism. Biodiversity has always been a local community-owned and utilized resource for
indigenous communities. Traditional knowledge in medicine, agriculture and fisheries in the primary base for meeting food and health needs. Therefore, biodiversity is intimately linked to traditional indigenous knowledge systems as well as to people’s rights to protect their knowledge and resources. Shiva says that patent claims over biodiversity and indigenous knowledge that are based on the innovation, creativity and genius of the people of the Third World are acts of ‘bio-piracy.’ She attaches a cultural ideological base to this by stating that the West suffers from ‘Columbian blunder’ of the right to plunder by treating other people and their knowledge as available to ownership through the claim to invention. Through various examples like those of neem, basmati and amla (Shiva 2001), she states that biopiracy is an epidemic which is intrinsic to the IPR regime being promoted by the US. This involves

1. Resource piracy in which the biological and natural resources of communities are freely taken to build up global economies,
2. Intellectual and cultural piracy in which the cultural and intellectual heritage of communities is freely taken for claiming IPRs, and
3. Economic piracy in which the domestic and international market are usurped through the use of trade names and IPRs

She also rejects the proposed solution to bio-piracy bio-prospecting, which is based on benefit sharing. It is being promoted as the model for relationships between corporation who commercialize indigenous knowledge and indigenous communities that have evolved this knowledge. In her book Bio-piracy The Plunder of Nature and Knowledge she says “The metaphor of bio-prospecting thus hides the prior use, knowledge, and right associated with biodiversity.” Alternative economic systems disappear and the Western prospector is projected as the only source for medical and agricultural uses of biodiversity. In her view, this model is unsustainable because “it is the equivalent of stealing a loaf of bread and then sharing the crumbs.” Nor in her view, is a case-by-case challenge to instances of biopiracy is the answer. The basic problem is that though one of the criteria for patents is novelty, granting
patents for indigenous knowledge implies that the patents system is about power and control, not novelty. There is need for a systemic change in the IPR system so that it applies an honest criteria of novelty and doesn’t reward piracy A pluralistic IPR regime that recognises and protects indigenous knowledge is the only way to ensure equity.

On Seeds

At the time of finalization of the Dunkel Draft in 1992, Shiva had launched Seed Satyagraha, inspired by Gandhian ideology - "you can’t monopolize this (salt) which we need for life." Her satyagrah is based on three key concepts:

1. **Swadeshi** - the capacity to do your own thing - produce your own food, produce your own goods.
2. **Swaraj** - govern yourself - specifically on three fronts - water, food and seed. This translates into freedom and sovereignty for the three essentials of life-water, food and seed. This is true self - governance where citizens are able to tell the state their functions and obligations, which should provide the direction for state in international negotiations.
3. **Satyagrah** - Non co operation with laws that restrict the above freedom & sovereignty - this is essential for the recovery of democracy which has collapsed because “our leaders are not representing our will.”

   - (See interview of Vandana Shiva “The Role of Patents in the Rise of Globalization,” in Motion Magazine, 27 August 2003.)

Her book *Stolen Harvest, the Hijacking of the Global Food Supply* argues that the WTO has legalized corporate growth based on harvest stolen from nature and people. The TRIPS has criminalized seed-saving and seed sharing. Her seed campaign is against the US multinationals like Monsanto and Novartis which dominate the seed, pesticide and food products industries. The most illustrative case is of the terminator gene patented by Monsanto, which allows its owners to create sterile seeds by selectively programming the plant’s DNA to
Thus, farmers cannot use their own seeds for the next crop, and will be forced to buy new seeds from seed companies every year. Shiva quotes Gen Gnidetti (p. 83). “Never before has man created such an insidiously dangerous, far reaching and potentially perfect plan to control the livelihoods, food supply and even survival of all humans on the planet.” After much outrage, Monsanto has announced that it would abandon its plans to commercialise terminator technology. But the potential danger of seed control cannot be ignored.

The shift to control of agriculture through the control of seed will undermine food security. The only way to prevent this is to recognize that farmers rights are an "ecological, economic, cultural and political imperative. "However, none of India’s legislative reforms post -TRIPS viz. The Patents Amendment Act, The Protection of Plant Varieties and Farmers Rights Act, 2001 and The Biodiversity Conservation Act, 2002, give legal status or protection to collective and cumulative innovation embodied in the traditional knowledge.

In her final conclusion, Shiva feels that alternatives to the WTO are not just possible but inevitable. “One area of hope comes from the fact that the trajectories that have been laid out by these monopolizing monoculture minds are so non-sustainable that something will have to happen. The system will crack.”

Thus, we see that Shiva’s argument has a powerful ideological force. While it may be an extremist view like the Marxist ideology, unlike the Marxist, it has the sustainability of civilization at its core. Its makes us realize that there is more to the TRIPS than Hollywood movies. However, there are certain counter views in this regard which cannot be ignored.

First, is the liberal view towards development, which is the guiding ideology behind the WTO. This has been eagerly bought by developing nations with a great free-market concern with maximizing GDPS with only a passing
concern for ethical issues. It appears that the entire issue of sustainable
development which started from the NIEO and led to the present multilateral
regime has been side tracked.

Secondly, there is no constructive alternative proposed by Shiva which
can be adhered to by India and lead it towards its goal of being an economic
super power. Her argument on food sovereignty based on the Gandhian
ideology, as we have seen above, hints at the larger debate of ‘Glocalism’ but
no model has been brought out on how to achieve this. During interaction with
Bibek Debroy (Director, Rajiv Gandhi Foundation, on 11 3.2005) a similar view
emerged that the onus is not entirely on government to bridge the information
gap In the West, we definitely see a far greater engagement of NGOs with
government leading to more coherent policies. While a multi-lateral trade
regime has its share of ‘give and take’, abandoning it will surely leave us
without a ladder to climb on and reach the top.

Thirdly, though concerns of the civil societies are valid, the question of
appropriate governance at the national level cannot be ignored. The state may
be pulled in different directions but it has to keep the national interest above all.
This requires changes in our own systems as well. There is an undeniable fact
that we have been unable to take advantage of our rich resources and the WTO
cannot take all the blame for it. It is our own approach which borders on the
‘There Is No Alternative’ syndrome which is also responsible

Even Shiva has acknowledged that “The reluctance of Indian scientists
to patent their inventions, thus leaving their work vulnerable to piracy, may in
part drive from a recognition that the bulk of the work had already been
accomplished by generations of anonymous experiments” (2001, p. 61).

This is in stark contrast to the profit-driven, individual-centric approach of
the West. Lastly, our systems have not yet evolved to a degree where
knowledge becomes easily patentable. For instance, we have the case of
someone like V O Sharma, Ayurveda scholar, who “holds licenses for 2,000
medicines but no money and expertise to market them.” Applying for patents brought him face to face with the smug Indian bureaucracy. Similarly, Outlook carried the cover story of innovative Indians (August 2, 2004) committed to making a difference despite struggles with the system.

Hence, the need for introspection on our own lacunae must be taken cognizance of.

6.5 IS HARMONISATION POSSIBLE

Before we come to our final conclusion, we examine an important point of whether the civil society's concerns are reflected in the Government’s negotiations at the WTO. If not, then the critical question is whether harmonization of government's and civil society's stance possible.

India has submitted various proposals on the mandated review of the TRIPS Agreement proposals (all available at www.commerce.nic.in) which are listed in the next page:
<table>
<thead>
<tr>
<th></th>
<th>Document Reference</th>
<th>Date</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>WT/GC/W/354</td>
<td>Dated 11 Oct. 1999</td>
<td>Geographical indications protection to products other than wines and spirits.</td>
</tr>
<tr>
<td>5</td>
<td>WT/GC/W/147</td>
<td>Dated 18 Feb 1999</td>
<td>Transfer of technology, Biodiversity, higher level of protection for geographical indications of goods.</td>
</tr>
<tr>
<td>7</td>
<td>IP/C/W/196</td>
<td>Dated 12 July 2000</td>
<td>Geographical indications protections to products other than wines and spirits, biodiversity, non-applicability of nullification and impairment clause of the GATT 1994 to the TRIPS agreement.</td>
</tr>
<tr>
<td>8</td>
<td>IP/C/W/195</td>
<td>Dated 12 July 2000</td>
<td>Transfer of technology, biodiversity, geographical indications protection to products other than wines and spirits.</td>
</tr>
<tr>
<td>9</td>
<td>IP/C/W/308/Rev.1</td>
<td>Dated 2 Oct 2001</td>
<td>Extension of the protection of geographical indications protection to products other than wines and spirits.</td>
</tr>
<tr>
<td>10</td>
<td>IP/C/W/385</td>
<td>Dated 30 Oct 2002</td>
<td>Non-violation and situation nullification or impairment under the TRIPS agreement.</td>
</tr>
<tr>
<td>11</td>
<td>IP/C/W/353</td>
<td>Dated 24 June 2002</td>
<td>The extension of the additional protection for geographical indications to products other than wines and spirits.</td>
</tr>
<tr>
<td>12</td>
<td>IP/C/W/204/Rev.1</td>
<td>Dated 1 Oct. 2000</td>
<td>Extension of additional protection for geographical indications to products other than wines and spirits.</td>
</tr>
<tr>
<td>13</td>
<td>IP/C/W/204</td>
<td>Dated 18 Sept. 2000</td>
<td>Extension of additional protection for geographical indications to products other than wines and spirits.</td>
</tr>
<tr>
<td>14</td>
<td>IP/C/W/308</td>
<td>Dated 17 Sept.</td>
<td>Extension of additional protection for geographical indications to products other than wines and spirits.</td>
</tr>
<tr>
<td>15</td>
<td>WT/GC/W/352</td>
<td>Dated 11 Oct. 1999</td>
<td>Transfer of technology</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>---</td>
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<td></td>
</tr>
<tr>
<td>16</td>
<td>IP/C/W/161</td>
<td>Dated 3 Nov. 1999</td>
<td>Review of article 27.3 (b) of the TRIPS agreement.</td>
</tr>
<tr>
<td>17</td>
<td>WT/CTE/W/156/IP/C/W/198</td>
<td>Dated 14 July 2000</td>
<td>Protection of biodiversity and traditional knowledge-The Indian Experience</td>
</tr>
<tr>
<td>18</td>
<td>IP/C/W/214</td>
<td>Dated 6 Oct. 2000</td>
<td>Clarifying the TRIPS. A Confidence - Building Measure</td>
</tr>
</tbody>
</table>

The main features of these proposals are as follows.

- Extend additional protection for geographical indications for products other than wines and spirits,
- Amend the TRIPS Agreement to pre-empt granting of patents inconsistent with the CBD;
- Amend Article 64 of the TRIPS Agreement to make nullification and impairment provisions of the GATT 1994 non-applicable to the TRIPS Agreement;
- Operationalize technology transfer provisions in Articles 7 and 8 of the TRIPS Agreement;
- Amend Article 27.3(b) of the TRIPS Agreement in the light of CBD provisions to protect knowledge and rights of local communities and to promote farmers' rights. Further review of Article 27.3(b) should be undertaken to clarify artificial distinctions between biological and microbiological organisms and processes; to ensure the continuation of the traditional farming practices including the right to sell, exchange and save seeds and sell their harvest and prevent anti-competitive practices which will threaten food sovereignty of people in developing countries, as permitted by article 31 of the TRIPS Agreement,
- Address issues such as transfer, dissemination and innovation of technology;
- Harmonise the objectives of the WTO Agreement and the TRIPS Agreement,
- India regrets lack of efforts to implement Article 66.2 of the TRIPS Agreement that obliges developed countries to provide incentives to
enterprises and institutions in their territories for encouraging transfer of technology to developing countries;

- Bring the price of the technology within manageable limits;
- Examine the denial of dual-use technologies regime,
- Review the TRIPS Agreement to consider ways and means to operationalise the objective and principles of transfer of technology;
- The TRIPS Council should recommend to the 5th Ministerial Conference that the violations of the type identified in Article XXIII(b) and (c) of the GATT 1994 be determined inapplicable to the TRIPS Agreement should apply to geographical indications for all products, the exceptions contained in Article 24 of the TRIPS should apply mutatis mutandis, and the multilateral register to be established should be open for geographical indications for all products; and
- Include the issue of extension of additional protection to products other than wines and spirits in the built-in negotiations of the TRIPS Council on issues relevant to the protection of geographical indications.

This makes it clear that while India recognizes that the protection of intellectual property is important, it rejects the mercantilist use of IPRs causing possible loss to public health or biodiversity. It is also in favour of creating a level playing field in the TRIPS agreement, thereby righting the wrong of the UR. However, within India, a more holistic approach is required that would ensure proper use of flexibilities in the TRIPS as well as take into concern the valid interests of its major stakeholders. Both Watal (2003) and Ramanna (2002) have laid out the future tasks for India which would focus on linking the TRIPS with the Right to Health and Human Rights, developing better alliances with other countries, utilizing the power of NGOs and establishing mechanisms to link Industry and NGOs.
6.6 ANALYSIS

Thus, this chapter illuminates many paths towards our conclusion. We see that inclusion of the TRIPS in the Uruguay Round served primarily the interests of the developed countries. The developing countries were forced to accept this inclusion as part of the ‘package’. This reveals the fallacy of consensus which was used to lure the developing countries at the time of its creation in 1995. This establishes our argument given in Chapter Three.

Developing Countries could have displayed better bargaining capacity but failed to come together for mutual benefits.

Inclusion of the TRIPS broadens the agenda of the WTO but this is inappropriate for future negotiations. Such expansion would only mean perpetuating the imbalance in the WTO.

It is also clear that the costs of the TRIPS are real and acute for developing countries. Countries at different level of development cannot have uniform standards of IP protection. The gap between international standards and local standards in IP cannot be bridged at one go.

The debate in India over the TRIPS shows the impact that the TRIPS has in a developing country. It has meant significant changes in the Patent Legislation. These changes reflect the domestic political pressures as well. At the same time, the amendments in the patents act have not taken full advantage of the TRIPS provisions that would have been beneficial to the country. This shows our ambivalent approach. It reveals that we cannot continue to blame the WTO for our ills because it is also a question of appropriate governance at the domestic level.

The civil society concerns on the pharmaceutical sector, bio-piracy and food security are valid. They reflect the need for harmonization of government’s policies with such issues. Hence, the ideal approach is to develop holistic policies so that a consistent negotiating stance emerges at the WTO.
CHAPTER NOTES


2. Details of US reports on action taken against various countries available at the USTR website www.ustr.gov


4. Quoted in “The Political Economy of the TRIPS Agreement. Origins and History of Negotiations by Dr A O Aede (2001). This section draws a lot from this paper.

5. Adopted 20 March 1883, as revised at Stockholm 14th July 1967, in 828 UNTS 305.


7. Adopted 26 October 1961 in 496 UNTS 43.


10. Argentina, Brazil, Chile, China, Columbia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay Later Pakistan and Zimbabwe, made it a group of 14.

11. See Annex 1 GATT. DOC MTN/GNG/NG11/W71 of 14th May 1990


17 Arup, Supra Note 1, p.183 onwards. Also see M B Rao and Manjula Guru, “Understanding the TRIPS Managing knowledge in Developing Countries”(2003).

18. All members had one year following the date of entry into force of the WTO to implement the agreement. Developing countries were entitled to a delay of an additional four years for all provisions except national treatment and MFN LDCs were granted a 12 year period to conform.

19 Article 27 1 of the TRIPS contains this provision.


21. Article 23.4 calls for negotiations for the establishment of a multilateral system of notification and registration of GIs Article 24.2 calls for a continual review of the implementation of the above section Under the first such review in 1996, it was decided to commence negotiations on the multilateral registration system. The TRIPS council has been engaged in working out the modalities for such a system. For details see reports of the TRIPS council meetings available at www.wto.org

22 This section draws mainly from Hoekman and Koestcki, (2001) Ch. 8
23. WIPO was established by the convention establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967. It succeeded the United International Bureau for the protection of Intellectual Property which was founded in 1893.


26. See S K Bhandhani “World Trade Organization and Developing Countries” p 313 He adds that only 1% of the patents are held by the citizens of the Third World. And 90% of all patents granted by developing countries and used to prevent and not to stimulate local production.


29. For example Glaxo’s drug ‘Rannidine’ was developed in the 1970s at the cost of research of less than $ million. When the extended patent term ended in 1997 Rannidine’s total world sales ran into billions of dollars, with sales in the US alone exceeding $1 billion per year Quoted in Rao and Guru (2003) p. 256


31. See Jagdish Bhagwati’s lecture at a seminar organized by the World Trade Issues Working Group at the Department of Foreign Affairs and International Trade in March 2000. “What it will take to get developing countries into a new round of Multilateral Trade Negotiations.”
32. The Drug deal, mainly on request of African nations was hailed as 'a historic agreement' and criticized as a comfort deal for Western Pharmaceutical Industry (The Times of India).


34. See Arvind Panagariya "Yes to IPRs, No to their inclusion into the WTO" The Economic Times, January 26, 2000.

35. In its Cut-the-cost Campaign, Oxfam shows how the EMRs created by patents are driving up prices for drugs for diseases like HIV/AIDS

36. In its Corporate Responsibility Report, 2003, Oxfam demanded that GSK withdrew its legal challenge to S. Africa over its programme for affordable medicines and asked it donate 0.3% of its sales to research fund of WHO.

37. Noble prize winning aid agency MSF has been campaigning on access to essential medicines. Their teams endeavour to counter the tragic effects of people's lack of access to life saving medicines.


39. See the report by Panos Institute, "Patents, Pills and Public Health " Can the TRIPS Deliver?" 2002


41. The TRIPS Council, under Article 68, is required to enjoin compliance with the obligations of members. Its Review meeting in 2001 saw major developing countries wanting all the TRIPS provisions interpreted in the light of Article 7 and 8 of the TRIPS and a paper by the EU demanding flexible interpretations of the TRIPS to allow for compulsory liscensing and parallel imports.


43. See Anitha Ramanna's paper "India's patent policy and Negotiations
in the TRIPS: Future options for India and other Developing Countries (2002), available at IPRsonline.org

44. Quoted in ibid above p. 13

45 ibid p. 13


47. GATT Doc No. MTN GNG/NG11/W/36, and GNG/NG 11/W38, July 1989

48. GATT Doc No MTN GNG/NG11/14, July 1989

49. Watal Supra Note 12, Ch. I

50. See Rasmus A. Wendt’s paper “the TRIPS in India’, presented at NASA conference, August 1999

51. ibid, p.17

52. The NWGPL has been actively engaged in studying the implications of amendments to our patent act. It has been working with PILSARC to scrutinize the 2nd and the 3rd amendments.

53. ASSOCHAM has, via e mail dated 26.8.2004, has stated to the researcher that it has always been in favour of IP protection and has been consistent in its demand for a more stringent IP regime in India

54. Rasmus, supra note 50, p.14


58. Congress MP Prithviraj Chavan accused the government of ‘Prostrating when asked to bend’,

VVI Raghavan (CPI) alleged that the government had insulted the House by not taking it into confidence,

Subramaniam Swamy (JP) said that it was unfortunate that the
government had not done its homework,
Shailendra Kumar (SP) and Geeta Mukherji (CPI) said that amendments would put India in the clutches of MNCs.
Source Times Of India - March 7, 1999.

59. See Dinesh Abrol, "Overriding the Indian interest", June 2002, available at indiatogether org

60. See Rao and Guru(2003), p 256, for details.


62. This refers to a practice, already endemic in US whereby firms manage to extend patent period by switching from capsule to tablets or by finding new uses. This extends the monopoly of patent holder.


64. See Industry Secretary Ashok Jha’s Statement on January 5, 2005, available at Rediff.com

65. Lanjouw, Supra 63, p 23.


67. Vandana Shiva’s argument has been constructed from her various books, articles and interviews which are listed as follows:

- Stolen Harvest
- Patents: Myth and Reality
- Biopiracy: The plunder of nature and knowledge
- Doha: saving the WTO, Killing Democracy, December 4, 2001, ZNet Commentary
- Victory in Cancun, October 10, 2003, ZNet Commentary
- Earth Crusader, an interview by Swati Chopra, for Life Positive, March 2002.
- Interview at St. Louis, Missouri, for In Motion Magazine, July
1998.
- Bioterror and Biosafety, article in Resurgence issue 211.