

# India & The WTO

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## India s Proposals on IPR Issues

### Preparations for the 1999 Ministerial Conference

The TRIPS (Trade Related Intellectual Property Rights) Agreement has as its preambular objective a desire to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. Further, one of its objectives is to contribute to the transfer and dissemination of technology. It has, amongst its principles, the promotion of public interest in sectors of vital importance to the socio-economic and technological development of its Members. At the same time, the Agreement recognises intellectual property rights (IPRs) as private rights. Finally, the Agreement encourages adjustments aimed at higher levels of protection of intellectual property rights. With these objectives, principles and provisions in view, **India would like to**

**initiate a discussion on some of the issues that have been of great concern to WTO Members, including many developing countries.** These issues are by no means exhaustive, nor do they represent the entirety of Members' concerns on intellectual property rights. **They are intended to initiate discussions on issues related to IPRs so that the objectives of the WTO Agreement such as raising standards of living, ensuring full employment, increasing trade and promoting sustainable development are achieved.**

#### Proposal 1 - Transfer of Technology

2. This proposal aims at a more effective implementation of the provisions relating to transfer of technology.

Transfer of technology at fair and most favourable terms to developing countries constitutes one of the key elements in accelerating their economic and social development. The TRIPS Agreement needs to be reviewed to consider ways and means to operationalise the objectives and principles relating to transfer and dissemination of technologies to developing countries. This is among the proposals on key issues relating to intellectual property put forward by India in a paper circulated in the February Inter-Sessional Meeting of the WTO General Council. The other proposals relate to harmonisation of approaches in the TRIPS Agreement and the Convention on Bio Diversity within overall objective of conservation of biological resources and extending the higher level of protection presently available only for wines and services to other goods so that benefits arising out of the TRIPS Agreement in the area of geographical indications can accrue to all, including items of export interest to India. Reproduced here is the full text of India s proposals on IPRs.

Article 7 of the TRIPS Agreement states:

“The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”

Article 8.2 states:

“Appropriate measures, provided they are consistent with the provisions of the Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology”.

3. India believes that Articles 7 and 8.2 are overarching provisions that should qualify other provisions of the Agreement that are meant to protect intellectual property rights. Technology has become one of the most important determinants for economic development. Emerging patterns of technology generation and transfer have been researched intensively. A recent analysis of the mode of technology transfers suggests a reversal of the growing popularity of arm's length licensing in the 1970s and mid-1980s to intra-firm transfers since the mid-1980s. For example, 80 per cent of transfers by US corporations and 95 per cent by German corporations in 1995 were made on internal basis compared to 69 per cent and 92 per cent respectively in 1985. This is only one example of the changing pattern of technology transfers, provided here to highlight the need to address in the WTO issues such as transfer, dissemination and innovation.

4. One of the important objectives of the WTO Agreement, as mentioned in its preamble, is the need for positive efforts designed to ensure that developing countries secure a share in the growth in international trade commensurate with the needs of their economic development. However, the TRIPS Agreement in its current form might tempt IPR holders to charge exorbitant and commercially unviable prices for transfer or dissemination of technologies held through such IPRs. It is important, therefore, to build disciplines for effective transfer of technology at fair and reasonable costs to developing countries so as to harmonise the objectives of the WTO Agreement and the TRIPS Agreement.

5. Similarly, Article 40 recognises that licensing practices or conditions pertaining to IPRs could restrain competition and have adverse effects on trade and may impede the transfer and dissemination of technology. It provides Members with certain rights to ensure that this does not happen. Further, of more importance to developing and least developed countries, Article 67 obliges developed country Members to provide, on

request and on mutually agreed terms and conditions, technical and financial cooperation in their favour. Since developing countries are still availing transition periods under the Agreement, awareness and capacity to seek such cooperation may be lacking. Again, Article 66.2 obliges developed country Members to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed countries. There has been little effort to implement this provision, raising doubts about the effectiveness of the Agreement to facilitate technology transfers.

6. One proposal on technology transfers has already been made in the Committee on Trade and Environment. In that Committee, India has proposed that **owners of environmentally sound technology and products should sell such technologies and products at fair and most favourable terms and conditions upon demand to any interested party which has an obligation to adopt these under national law of another country or under international law.** Similar concerns regarding the need for the transfer of technology have been expressed with respect to electronics commerce also. Concerns have also been raised on the need for transfer of technology in a commercially viable manner for ensuring positive outcomes for developing countries through the increasing linkage between trade and investment.

**7. Transfer of technology at fair and most favourable terms has been highlighted in all discussions and debates on sustainable development.** The Rio Declaration of 1992 as well as most of the multilateral environmental agreements emphasises the need for such technology transfers. The preamble of the WTO Agreement affirms the objective of sustainable development in a manner consistent with the respective needs and concerns of Members at different levels of development. Thus, an obligation is cast upon the WTO to bring about easy access to and wide dissemination of technology relevant for sustainable development.

**8. Facilitating the access to developing countries of technologies selected by them as appropriate to their requirements constitutes one of the key elements in accelerating the pace of their economic and social development.** Such access is generally the result of licences and technology transfer agreements. Prospective technology seekers in developing countries face serious difficulties in their commercial dealings with technology holders in the developed countries. These difficulties are basically of three kinds: those which arise from the imperfections of the market for technology; those attributable to the relative lack of experience and skill of enterprises and institutions in developing countries in concluding adequate legal arrangements for the acquisition of technology; and those government practices, both legislative and administrative, in both developed and developing countries, which influence the

implementation of national policies and procedures designed to encourage the flow of technology to, and its acquisition by, developing countries. These difficulties may have to be addressed specifically in order to fully implement TRIPS provisions relating to transfer and dissemination of technology, particularly in the light of Articles 7,8, 40, 66.2 and 67. Some of these difficulties may be overcome by suitable safeguards in the domestic IPR laws of developing countries, particularly those arising out of the provisions of Articles 30, 31 and 40. Since developing countries have transition periods available under Article 65, these laws may still be in the formulation stage. In addition, the transfer and dissemination needs of the developing countries have to be seen from the point of view of the capacity of those in need of accessing technologies, particularly where the cost of technology may be prohibitive due to economies of scale and other reasons. In such cases, in order to implement the related provisions of the TRIPS Agreement, commercially viable mechanisms need to be found. This could be studied in the WTO, particularly in the light of the need for effective implementation of Articles 7, 8, 40, 66.2 and 67.

**9. The high cost of technology makes it difficult for the smaller, poorer developing countries to acquire appropriate technology on commercial terms.** Such countries may be able to acquire appropriate technology critically needed for their development only through government to government negotiations and with the financial assistance provided by government and other institutions in developed countries or inter-governmental organisations. For those enterprises and institutions in developing countries, which will not have the benefit of external financing, the acquisition of appropriate technology on international commercial terms will impose a burden on the local economy unless the price of the technology can be brought within manageable limits.

**10. The denial of dual-use technologies, even on a commercial basis, to developing countries is another aspect that leads to widening of the technology gap between developed and developing countries.** Under this guise a variety of technologies and products are being denied to developing countries which could otherwise have helped to accelerate their growth process. This issue needs to be carefully examined and seriously dealt with as a trade distorting and restrictive measure.

**11. It is, therefore, proposed that the TRIPS Agreement may be reviewed to consider ways and means to operationalise the objective and principles in respect of transfer and dissemination of technology to developing countries, particularly the least developed amongst them.**

#### **Proposal 2 - Biodiversity**

**12. The scope of this proposal is limited to harmonisation of the approaches to the utilisation of living resources found in the TRIPS Agreement on the one hand and the UN Convention on Biological Diversity (CBD) on the**

**other.** It does not address issues which are likely to come up in the built-in agenda with regard to Article 27.3 (b) or Article 71. It does not address issues relating to patenting of plants and animals or to the issue of benefit sharing in commercial exploitation of ex situ materials. The above issues are being and will be engaging the attention of the international community in WTO and other fora and separate proposals would surely be presented there.

**13. The preamble of the TRIPS Agreement recognises IPRs to be private rights.** Article 27.3 incorporates specific obligations on the issue of patenting life forms to the extent that it obliges Members to provide product patents for micro-organisms and for non-biological and microbiological processes. In addition, Article 27.3 (b) stipulates that all Members shall provide for the protection of plant varieties, either by patents or by an effective sui generis system or by a combination thereof.

14. CBD on the other hand, in its preamble, categorically reaffirms that nation states have sovereign rights over their own biological resources, recognises the desirability of sharing equitably the benefits arising from the use of these resources as well as traditional knowledge, innovations and practices relevant to the conservation of biological diversity and its sustainable use, and acknowledges that special provisions are required to meet the needs of developing countries.

15. These two international agreements are intrinsically linked with one another. **It is important to study the relationship between the provisions of the CBD and those of the TRIPS Agreement and suggest reconciliation of any contradictions therein within the overall objective of conservation of biological resources with sustainable development. CBD unambiguously states that the authority to determine access to genetic resources rests with national governments and is subject to national legislation.** It also states that access, where granted, shall be on mutually agreed terms and shall be subject to the prior informed consent of the resource provider. It also enjoins the international community to respect, preserve and maintain knowledge innovations and practices of indigenous and local communities and encourages the equitable sharing of benefits arising from their utilisation. The conference of parties of CBD have initiated a work programme to give effect to these provisions.

16. Sustainable development being an objective of the WTO also, it becomes incumbent upon us to examine ways and means to harmonise the approaches to utilisation of living resources in the CBD and in the TRIPS Agreement. In implementing their obligations under the CBD, Members would exercise sovereign rights over their biological resources. In order that this does not impede innovation, intellectual property rights may have to be integrated into such an exercise. At the same time, the right of holders of traditional knowledge to share benefits arising out of such innovation cannot be over emphasised. This could be possible

if commercial exploitation of such innovation is encouraged only on the condition that the innovators share the benefits through material transfer agreements/transfer of information agreements. A material transfer agreement would be necessary where the inventor wishes to use the biological material and a transfer of information agreement would be necessary where the inventor bases himself on indigenous or traditional knowledge. **Such an obligation could be incorporated through inclusion of provisions in Article 29 of the TRIPS Agreement requiring a clear mention of the biological source material and the country of origin.** Article 29 deals with conditions on patent applicants. This apart of the patent application should be open to full public scrutiny on filing of the application. This would permit countries with possible opposition claims to examine the application and state their claims well in time. **At the same time domestic laws on biodiversity could ensure that the prior informed consent of the country of origin and the knowledge holder of the biological raw material meant for usage in a patentable invention would enable the signing of material transfer agreements or transfer of information agreements,** as the case may be. Such a provision in the domestic law should be considered compatible with the TRIPS Agreement. The suggestion basically asks for further transparency in the form of additional information in patent applications, and an approach which allows a harmonious construction of the two international agreements.

### **Proposal 3 - Higher Level of Protection for Geographical Indications of Goods**

17. **Section 3 of Part II of the TRIPS Agreement deals with geographical indications. Article 23 therein provides for additional protection for geographical indications for wines and spirits even where the true origin of goods is indicated or the geographical indications is used in translation or accompanied by expressions such as 'kind', 'type', 'imitation' or the like. Such additional protection is not available to goods other than wines and spirits.**

18. It is an anomaly that the higher level of protection is available only for wines and spirits. **It is proposed that such higher level of protection should be available for goods other than wines and spirits also. This would be helpful for products of export interest like basmati rice, Darjeeling tea, alphonso mangoes, Kohlapuri slippers in the case of India.** It is India's belief that there are other Members of the WTO who would be interested in higher level of protection to products of export interest to them like Bulgarian yoghurt, Czech Pilsen beer, many agricultural products of the European Union, Hungarian Szatmar plums and so on. **There is a need to expedite work already initiated in the TRIPS Council in this regard, under Articles 24,** so that benefits arising out of the TRIPS Agreement in this area are spread out wider.

### **MODERNISATION AND RESTRUCTURING OF THE PATENT OFFICE IN INDIA**

- Government has approved a plan for modernisation and restructuring of the Patent Office in India.
- The need for modernising and restructuring the Patent Office has been felt because there has been no modernisation or restructuring of the Office since its inception. The Office was established in 1911 and has Head Office at Calcutta and branch offices at New Delhi, Mumbai and Chennai.
- In the absence of modernisation and restructuring, the operations in the Patent Office are manual as a result of which over 29,000 patent applications were awaiting examination as in April, 1998. This backlog is likely to go up further as the number of patent applications are expected to increase significantly. As against 3552 applications in 1991-92, over 10,000 applications have been received in 1997-98.
- The major components of the proposal include setting up of a National Patent Office by upgrading the existing office in New Delhi, strengthening branch offices, providing necessary personnel, qualified in existing as well as emerging fields of technology, computerising and re-engineering the work practices, providing the office with necessary infrastructural support and financial and operational autonomy. The proposal also includes a plan to clear the backlog of patent applications within a period of two years.
- The cost of the project, to be implemented during Ninth Five Year Plan, has been estimated at Rs. 75.59 crores .
- Simultaneously, it is also proposed to revise the fee structure so that Patent Office is able not only to meet its recurring expenditure but also to develop surpluses to sustain and strengthen the reforms in this sector.

## The Patents (Amendment) Act, 1999

The Trade-Related Intellectual Property Rights (TRIPS) Agreement, which formed part of the Uruguay Round Accord signed by GATT/WTO member countries in 1994, provides a transition period of 10 years (till 2005) for extending product patent protection to areas of technology not protected so far. Member states who availed of this transition period were required to take certain steps, effective 1 January, 1995. Subsequently, the deadline for taking the necessary steps was 19 April, 1999. These steps were: (a) to provide a means for receipt of product patent applications in the field of pharmaceuticals and agricultural chemicals and (b) Grant of Exclusive Marketing Rights (EMRs), on fulfilment of certain conditions. Following is the text of the gazette notification on the Patents (Amendment) Act, 1999.



# भारत का राजपत्र The Gazette of India

असाधारण

EXTRAORDINARY

भाग II – खण्ड 1

PART II – Section 1

प्राधिकार से प्रकाशित

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इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।

Separate paging is given to this Part in order that it may be filed as a separate compilation.

## Ministry of Law, Justice and Company Affairs

(Legislative Department)

New Delhi, the 26th March, 1999/Chaitra 5, 1921 (Saka)

The following Act of Parliament received the assent of the President on the 26th March, 1999, and is hereby published for general information:

**The Patents (Amendment) Act, 1999**

(No. 17 of 1999)

[26th March, 1999]

**An Act further to amend the Patents Act, 1970**

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows:-

1. (i) This Act may be called the Patents (Amendment) Act, 1999.

(ii) It shall be deemed to have come into force on the 1st day of January, 1995.

2. Section 5 of the Patents Act, 1970 (hereinafter referred to as the principal Act) shall be renumbered as sub-section (1) thereof and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely:

“(2) Notwithstanding anything contained in sub-section (1), a claim for patent of an invention for a substance itself intended

for use, or capable of being used, as medicine or drug, except the medicine or drug specified under sub-clause (v) of clause (1) of sub-section (1) of section 2, may be made and shall be dealt, without prejudice to the other provisions of this Act, in the manner provided in Chapter IVA”.

3. After Chapter IV of the principal Act, the following Chapter shall be inserted, namely:

#### **‘CHAPTER IVA’**

##### **Exclusive Marketing Rights**

24A. (1) Notwithstanding anything contained in sub-section (1) of section 12, the Controller shall not, under that sub-section, refer an application in respect of a claim for a patent covered under sub-section (2) of section 5 to an examiner for making a report till the 31st day of December, 2004 and shall, where an application for grant of exclusive right to sell or distribute the article or substance in India has been made in the prescribed form and manner and on payment of prescribed fee, refer the application for patent, to an examiner for making a report to him as to whether the invention is not an invention within the meaning of this Act in terms of section 3 or the invention is an invention for which no patent can be granted in terms of section 4.

(2) Where the Controller, on receipt of a report under sub-section (1) and after such other investigation as he may deem necessary, is satisfied that the invention is not an invention within the meaning of this Act in terms of section 3 or the invention is an invention for which no patent can be granted in terms of section 4, he shall reject the application for exclusive right to sell or distribute the article or substance.

(3) In a case where an application for exclusive right to sell or distribute an article or a substance is not rejected by the Controller on receipt of a report under sub-section (1) and after such other investigation, if any, made by him, he may proceed to grant exclusive right to sell or distribute the article or substance in the manner provided in section 24B.

**Explanation** – It is hereby clarified that for the purposes of this section, the exclusive right to sell or distribute any article or substance under this section shall not include an article or substance based on the system of Indian medicine as defined in clause (e) of sub-section (1) of section 2 of the Indian Medicine Central Council Act, 1970 and where such article or substance is already in the public domain.

24B. (1) Where a claim for patent covered under sub-section (2) of section 5 has been made and the applicant has, –

(a) where an invention has been made whether in India or in a country other than India and before filing such a claim, filed an application for the same invention claiming identical article or substance in a convention country on or after the 1st day of January, 1995 and the patent and the approval to sell or distribute the article or substance on the basis of appropriate tests conducted on or after the 1st day of January, 1995, in that country has been granted on or after the date of making a claim for patent covered under sub-section (2) of section 5; or

(b) where an invention has been made in India and before filing such a claim, made a claim for patent on or after the 1st day of January, 1995 for method or process of manufacture for that invention relating to identical article or substance and has been granted in India the patent therefore on or after the date of making a claim for patent covered under sub-section (2) of section 5.

and has received the approval to sell or distribute the article or substance from the authority specified in this behalf by the Central Government, then, he shall have the exclusive right by himself, his agents or licensees to sell or distribute in India the article or the substance on and from the date of approval granted by the Controller in this behalf till a period of five years or till the date of grant of patent or the date of rejection of application for the grant of patent, whichever is earlier.

(2) Where, the specifications of an invention relating to an article or a substance covered under sub-section (2) of section 5 have been recorded in a document or the invention has been tried or used, or, the article or the substance has been sold, by a person, before a claim for a patent of that invention is made in India or in a convention country, then, the sale or distribution of the article or substance by such person, after the claim referred to above is made, shall not be deemed to be an infringement of exclusive right to sell or distribute under sub-section (1):

Provided that nothing in this sub-section shall apply in a case where a person makes or uses an article or a substance with a view to sell or distribute the same, the details of invention relating thereto were given by a person who was holding an exclusive right to sell or distribute the article or substance.

24C. The provisions in relation to compulsory licences in Chapter XVI shall, subject to the necessary modifications, apply in relation to an exclusive right to sell or distribute under section 24B as they apply to, and in relation to, a right under a patent to sell or distribute and for that purpose the following modifications shall be deemed to have been made to the provisions of that Chapter and all their grammatical variations and cognate expressions shall be construed accordingly, namely:-

##### **(a) Throughout Chapter XVI, –**

(i) working of the invention shall be deemed to be selling or distributing of the article or substance;

(ii) references to “patents” shall be deemed to be references to “right to sell or distribute”,

(iii) references to “patented article” shall be deemed to be references to “an article for which exclusive right to sell or distribute has been granted”:

(b) three years from the date of sealing of a patent in section 84 shall be deemed to be two years from the date of approval by the Controller for exclusive right to sell or distribute under section 24B:

(c) the time which has elapsed since the sealing of a patent under section 85 shall be deemed to be the time which has

elapsed since the approval by the Controller for exclusive right to sell or distribute under section 24B;

(d) clauses (d) and (e) of section 90 shall be omitted.

24D. (1) Without prejudice to the provisions of any other law for the time being in force, where, at any time after an exclusive right to sell or distribute any article or substance has been granted under sub-section (1) of section 24B, the Central Government is satisfied that it is necessary or expedient in public interest to sell or distribute the article or substance by a person other than a person to whom exclusive right has been granted under sub-section (1) of section 24B, it may, by itself or through any person authorised in writing by it in this behalf, sell or distribute the article or substance.

(2) The Central Government may by notification in the Official Gazette and at any time after an exclusive right to sell or distribute an article or a substance has been granted, direct, in the public interest and for reasons to be stated, that the said article or substance shall be sold at a price determined by an authority specified by it in this behalf.

24E. All suits relating to infringement of a right under section 24B shall be dealt with in the same manner as they were suits concerning infringement of patents under Chapter XVIII.

24F. The examination and investigations required under this Chapter shall not be deemed in any way to warrant the validity of any grant of exclusive right to sell or distribute, and no liability shall be incurred by the Central Government or any officer thereof by reason of, or in connection with, any such examination or investigation or any report or other proceedings consequent thereon'.

4. Section 39 of the principal Act shall be omitted.

5. In section 40 of the principal Act, the words and figures "or makes or causes to be made an application for the grant of a patent outside India in contravention of section 39" shall be omitted.

6. In section 64 of the principal Act, in sub-section (1), in clause (n), the words and figures "or made or caused to be made an application for the grant of a patent outside India in contravention of section 39" shall be omitted.

7. In section 118 of the principal Act, the words and figures "or makes or causes to be made an application for the grant of a patent in contravention of section 39" shall be omitted.

8. After section 157 of the principal Act, the following section shall be inserted, namely:

'157A. Notwithstanding anything contained in this Act, the Central Government shall :

(a) not disclose any information relating to any patentable invention or any application relating to the grant of a patent under this Act, which it considers prejudicial to the interest of security of India;

(b) take action including the revocation of any patent which it considers necessary in the interest of security of India:

Provided that the Central Government shall, before taking any action under this clause, issue a notification in the Official Gazette declaring its intention to take such action.

**Explanation.** – For the purposes of this section, the expression "security of India" means any action necessary for the security of India which –

(i) relates to fissionable materials or the materials from which they are derived; or

(ii) relates to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly or the purpose of supplying a military establishment; or

(iii) is taken in time of war or other emergency in matter of international relations'.

9. (1) The Patents (Amendment) Ordinance 1999, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the Patents (Amendment) Ordinance, 1994, which ceased to operate, or under the Patents (Amendment) Ordinance, 1999, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.

(3) All applications made in respect of claims for patent of invention specified under sub-section (2) of section 5 of the principal Act, from the date of cesser of the Patents (Amendment) Ordinance, 1994 till the date on which this Act receives the assent of the President (both days inclusive) shall be deemed to have been validly made as if the provisions of the principal Act, as amended by this Act, had been in force at all material times.

**Raghubir Singh,**  
**Secy. to the Govt. of India**

# Monthly Update from PMI\*/Geneva

(15th February 15th March, 1999)

## General Council

A meeting of the General Council was held on 25.2.99 to consider (a) the Chairman's report on the work done in the Council since the September 98 Special Session; (b) substantive issues arising from the Ministerial Declaration of May 1998, including proposals by Members; and (c) organisations of future work on these issues. Members generally agreed that the second phase of work, in preparation for the Third Ministerial Conference, should be proposal driven. A schedule of monthly formal and informal meetings was agreed upon. It was felt that while Members flexibility of submitting proposals should not be restricted, an endeavor should still be made to ensure that all proposals are submitted before the summer break. The Committee also considered the possible modalities of submitting proposals for the Ministerial Conference.

## Sanitary and Phyto-sanitary Measures

The Sanitary and Phyto-sanitary (SPS) Committee met over a period of three days between 9-11 March 1999 in which the Committee concluded its review of the SPS Agreement. A report on the review of the outcome of the first three and a half years of the WTO agreement on SPS measures, was approved in the meeting. The Committee observed that the extensive discussions on particular implementation problems at its formal meetings had helped to draw attention to specific trade concerns and related issues, and had helped to avoid potential trade conflicts. The report recognises the problems being faced by the developing countries in implementing the provisions of the Agreement. It urges the standard setting bodies to ensure more effective participation of developing countries in the standardising process. It was also agreed that wherever possible countries would provide more time to producers in developing countries to adjust themselves to any new proposed SPS measures. The Committee observed that WTO Members were increasingly fulfilling their obligations to notify fellow Members which had significantly improved transparency in application of SPS measures. The Committee however recognised that there was room for further improvement in transparency. A new format for making the notifications even more comprehensive was also agreed upon. It also welcomed the progress made in setting up specific contact points which fellow member countries could use to enquire about SPS measures.

## Committee of Participants on the Expansion of Trade in ITA Products

At the meeting of the Committee of Participants on the Expansion of Trade in Information Technology Agreement (ITA) Products held on 24 February 1999, the Committee, as mandated, initiated a process of detailed discussions on

non-tariff barriers, including standards and import licensing practices, as they relate to IT products. For facilitating consideration of non-tariff barriers, Australia has proposed the development of a work programme. In light of the preoccupation of the Committee in 1998 on expansion of product coverage of the Information Technology Agreement, consideration of non-tariff barriers had not been possible. There has been no consensus in the Committee on expansion of product coverage. The Committee accepted the participation of new entrants to ITA, namely, the Kyrgyz Republic and Latvia. The next meeting of the Committee is scheduled for 30 April 1999.

## Electronic Commerce

A one-day Seminar on Electronic Commerce and Development, funded by the Government of Canada, was organised by the WTO on 19 February 1999. The Seminar was organised in two sessions: "Potential of Electronic Commerce for Businesses in Developing Countries" and "Infrastructure and Regulatory issues at the Government Level". The Seminar was intended to increase the awareness and understanding of the relationship between electronic commerce and development, to analyse the potential effects of electronic commerce on trade and development prospects of developing countries and to identify ways of enhancing the participation of developing countries in electronic commerce. A number of international organisations such as the UNCTAD, the ITU, UNCITRAL, the ITC, and the ICC made very useful presentations. A number of developing countries, including India, Kenya, Guinea, Senegal, South Africa, Singapore and the Philippines, presented country-experiences. Switzerland, Canada, the European Communities and the United States also made contributions. The deliberations also concentrated on how a small enterprise could seek to create customer confidence on the net as well as development-related constraints to harnessing the growth of electronic commerce. It was believed that a key factor in enhancing the participation of developing countries in international trade was access to hardware, software, electricity etc. at international prices. In addition, it was important for developing countries to address issues relating to jurisdiction, consumer protection, and enforcement of electronic contracts including electronic signatures.

## Financial Services

Negotiations on Financial Services (including insurance) which spilled over from the Uruguay Round in the form of the Fifth Protocol to the General Agreement on Trade in Services (GATS) entered into force on 1 March 1999. 52 Members of the WTO including India accepted the Fifth Protocol. 18 more members have been given time till 15 June, 1999 for accepting the Fifth Protocol.

\* Permanent Mission of India

# Interventions by India at WTO General Council Meeting : Some highlights

The following is the gist of interventions/statement made by N.N. Khanna, Special Secretary, Ministry of Commerce, on behalf of the Government of India at the 4th intersessional meeting of the General Council\*of the WTO in Geneva on 27 January, 1999 and at the General Council Meeting of the WTO on 25 February 1999 :

## Trade & Investment

The work programme that we adopted at Singapore in December 1996 was a difficult decision for India.... Yet, in a spirit of compromise, India agreed at Singapore to the establishing of two Working Groups: one on Trade and Investment and the other on Competition Policy...If there is one thing that is clear after the work done by the Group on Trade and Investment, it is that the issue is **complex, multi-faceted and delicate**. It is complex because the relationship between trade and investment is not a straight-forward one and multi-faceted because it is not just about trade and investment, but also about development. This issue is also a delicate one for several developing countries, because **it is difficult for countries such as India to consider free movement of capital when the same yardstick is not applied to even temporary movement of labour. What is considered politically sensitive and a matter of national sovereignty with regard to one issue (labour for developed countries) must be legitimately considered to be the same for the other issue as well (capital for developed countries)....** Further discussions are necessary to fully comprehend the linkages between trade and investment, the benefits expected of domestic or international policy on investments and the trend of existing arrangements. **Most importantly, we must also integrate into our discussions a full debate on liberalisation of the movement of all factors of production, including labour in particular.** The recent financial crisis in some parts of the world and recession elsewhere, throws up new issues. Investor obligations is one such issue; management of local conflict is another. The need for putting in place appropriate regulatory mechanisms is increasingly being recognised. These issues would need to be discussed further....India's concerns have been articulated sufficiently in the Working Group. **India would like to stress that the educative process in this Group should continue, India will continue to participate actively in this Group as it has up until now.**

## Trade & Competition Policy

The issues relating to the interaction between Trade and Competition Policy are complex and would require further in-depth analysis. While the benefits of having a competition regime have no doubt emerged, it has also become clear that

*\*While the highest authority in the structure of the WTO is the Ministerial Conference, which consists of Ministerial representatives of all WTO members and meets atleast once every two years, it is the General Council which conducts the day-to-day work of the WTO on behalf of the Ministerial Conference.*

no single model,even if found to be successful in a particular country, would necessarily produce the same effect in another country, since Competition Policy, to a very large extent,depends upon local conditions, particularly the ability of the domestic industry to withstand international competition. **It is also clear that while trade policies and competition principles are generally complementary, there are certain areas where the two can be in conflict with each other. For instance, anti-dumping is one such area where there seems to be a clear dichotomy between the objectives of trade and competition policies, since anti-dumping action leads to the suppression of competition with a view to maximising national benefits. Another area which we feel is important is the impact of anti-competitive practices of international enterprises and associations on international trade. Inconsistencies between trade policy measures and competition have also emerged in other areas, notably the effect of anti-competitive practices such as quotas in textiles, tariff quotas in agriculture, subsidies which distort competition, the setting of national technical, sanitary and phytosanitary measures, at levels higher than accepted internationally have been some of the important concerns voiced in the Working Group. Until and unless there is effective implementation of existing WTO commitments, which entails fostering competition, it would be premature to engage in discussions on how WTO provisions can be further strengthened to support competition.... We accordingly feel, that although, a beginning has been made much work still remains to be done.** The introduction of competition policy and law has to necessarily be a progressive activity, specially since domestic industries in developing countries may find it difficult to adjust to international competition laws if these are not introduced gradually. Some members have, in this context, suggested the need to develop multilateral rules in this regard. However, we feel that it is still too premature to talk of a multilateral framework.

## Issues concerning next Ministerial Conference

The only agreed agenda items as far as the next Ministerial Conference is concerned are those which have been included in para 9 (a) and 9 (c) of the General Ministerial Declaration(GMD) that is to say implementational issues, mandated reviews and negotiations and future work already provided for under other existing agreements and decisions taken at Marrakesh as well as decision taken in the High Level Meeting on Least Developed Countries (LDCs). All other issues have to be considered by the Members and their inclusion in the next round of negotiations would depend on whether consensus develops on these issues.

# Q & A TRIPs Agreement

## **Q.1: What is the TRIPS Agreement?**

Ans: The Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS) is a part of the Uruguay Round Agreement which led to the establishment of the World Trade Organisation (WTO). India ratified the WTO Agreement on 30 December, 1994 and the Agreement came into force from 1 January, 1995. The TRIPS Agreement covers 7 categories of intellectual property namely: (1) Copyright and related Rights; (2) Trademarks; (3) Geographical indications; (4) Industrial designs; (5) Integrated Circuits; (6) Trade Secrets i.e. Protection of Undisclosed Information; and (7) Patents (which includes plant varieties).

The TRIPS Agreement, inter-alia, prescribes the minimum standards to be adopted by members in respect of the above categories of intellectual property.

## **Q. 2: What are the provisions of the TRIPS Agreement relating to Patents?**

Ans: The TRIPS Agreement requires product patents to be given in all fields of technology if they are new, involve an inventive step and are capable of industrial application; duration of the patent to be at least 20 years uniformly; compulsory licence to be given on the individual merits of the case but only after approaching the patent owner for obtaining a licence on reasonable commercial terms and conditions etc. In respect of plant varieties, there is an obligation to provide for protection by patents or by an effective

sui-generis system or by any combination thereof. The Agreement does not specify the criteria for judging the effectiveness of the sui-generis (i.e. a system of its own) system and it is left to each country to choose its system of protection of plant varieties.

## **Q.3: What are the transitional arrangements in the TRIPS Agreement?**

Ans: The Agreement permitted developing countries a 10- year transition period — till January 1, 2005 — to extend product patent protection to areas not protected so far. In the interim, they were required to provide with effect from the date of coming into force of the WTO Agreement i.e January 1, 1995, a means for filing of applications for patents in the areas of pharmaceutical and agricultural chemicals and grant of Exclusive Marketing Rights (EMRs) on fulfilment of certain conditions. (The Indian Patents Act 1970 permits only 'process' patents in food, pharmaceutical and chemical sectors — i.e. not product patents in these sectors).

## **Q.4: What are the review provisions of the TRIPS Agreement?**

Ans: Article 71 of the TRIPS Agreement provides for a review of the implementation of the Agreement after 1 January, 2000 and thereafter, review at an interval of every 2 years. The review can suggest any amendment to the Agreement also. However, such an amendment has to be agreed to by consensus .

## Quotes & Excerpts

★ “The range of WTO Agreements, which constitute rule-based system for the governance of international trade, represent a balance of rights, concessions, commitments and obligations on the part of all member countries. India is a founder member of both the General Agreement on Tariffs and Trade (GATT) 1947 and its successor organisation, the World Trade Organisation or WTO, which came into effect on 1 January 1995 after the conclusion of the Uruguay Round (UR) of Multilateral Trade Negotiations. India’s participation in an increasingly rule-based system in the governance of international trade is to ensure more stability and predictability, which ultimately would lead to more trade and more prosperity for itself and the other member nations of the WTO. India also automatically avails of Most Favoured Nation (MFN) and national treatment for its exports from all WTO Members”.

(Commerce Minister, Ramakrishna Hegde,  
in a written reply to an unstarred question  
in the Rajya Sabha on 1-3-99)

★ “Often there is a call that we should come out of the World Trade Organisation since it infringes on our sovereignty. All international agreements, even bilateral agreements, erode a country’s sovereignty to some extent. One gives up certain rights to get some gains which, in turn, means erosion of the sovereignty of another country. Thus, being in the WTO means giving up sovereignty to some extent for certain gains accruing from it. While considering whether or not we should be in the WTO, the gains have to be weighed against the constraints on our sovereignty”.

(B.L. Das, India’s former Ambassador  
and Permanent Representative to GATT)

★ “The debate in our country over the TRIPS Agreement is overwhelmingly focussed on the issue of patents as though it is the only form of IPRs and it is the only IPR covered by the TRIPS Agreement. It is worth remembering in this context that in respect of the first six categories of IPRs (copyright, trademarks, geographical indications, industrial designs, layout designs of integrated circuits and trade secrets), our existing laws, regulations and procedures or the laws and regulations we are prepared to undertake on our own judgement are largely in consonance with the requirements of the TRIPS Agreement. Even if some changes are needed in some of our existing laws, they are of a minimal nature. For example, the TRIPS Agreement requires computer software to be protected as a copyright. Our Copyright Act was amended as far back as 1983 to protect computer software as a copyright. The TRIPS Agreement requires that layout designs of integrated circuits should be protected in accordance with the provisions of the “Treaty on Intellectual Property in respect of Integrated Circuits” (the IPIC Treaty) which was adopted in Washington in May 1989. We are a signatory to this treaty and are committed to enacting a legislation on this subject. With respect to the protection of geographical indications, it is becoming increasingly clear to us that it is in our own interest to enact legislation to protect our products like Basmati rice or Darjeeling Tea in the same manner as Scotch Whisky or French Champagne is protected by the geographic appellation laws of those countries. Our track record in enforcing IPRs in the areas of copyright, trademarks, industrial designs and trade secrets is also very good. The judicial pronouncements of our courts have safeguarded the legitimate interests of the owners of IPRs on a par with the best legal traditions of the world.”

(A.V. Ganesan in a Discussion Paper on  
The Implications of Patents Amendment, 1999)

## Schedule of Meetings at the WTO, Geneva : April 1999\*

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1-4-99	:	Working Group on the Interaction between Trade and Competition Policy
7-4-99	:	Working Party on Accession of Estonia
7/9-4-99	:	Textile Monitoring Body
14-4-99	:	General Council
19/20-4-99	:	Working Group on the Interaction between Trade and Competition Policy
19/20-4-99	:	Council for Trade in Services
20/22-4-99	:	Textile Monitoring Body
21/22-4-99	:	Council for TRIPS
22-4-99	:	Committee on Budget, Finance and Administration
22/23-4-99	:	Committee on Trade and Environment
23-4-99	:	Committee on Safeguards
23-4-99	:	Committee on Rules of Origin
26-4-99	:	Committee on Customs Valuation
26/27-4-99	:	Committee on Anti-Dumping – Ad hoc Group on Implementation
27-4-99	:	Working Party on Taipei
28-4-99	:	Dispute Settlement Body
28-4-99	:	Committee on Anti-Dumping--Information Group on Anti-Circumvention
29-4-99	:	Committee on Import Licensing
29/30-4-99	:	Committee on Anti-Dumping Practices
29/30-4-99	:	Committee on Regional Trade Agreements
30-4-99	:	Committee on Participants on the Expansion of Trade in Information Technology Products
30-4-99	:	Working Party on Albania

\*Source : WTO / Geneva as on 29/03/99

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