

## TRIPS SIDE EVENT

19/03/2025

### **Introductory remarks**

1. Good afternoon to all. Let me first thank the organisers of this side event for inviting me to speak here. I'm especially grateful to the Government of India (GOI), particularly Mr. Gaurav Gupta, First Secretary in the Permanent Mission of India to the WTO in Geneva who has been in touch with me. I am truly honoured to be here.
2. It would not be an exaggeration to say that the TRIPS negotiations were by far the most challenging assignment of my working life - at the time I was merely a mid-level career bureaucrat in the GOI. These negotiations required thinking fast on your feet and taking risky calls *ad referendum*, so to speak, as these were rapidly evolving negotiations where much of the TRIPS text was developed – I speak of the period 1989 to 1990. By December 1990, the TRIPS text was almost final. Some crucial changes were made to the text by the end of 1991 and then some minor ones in 1993.
3. Personally, I felt like I was thrown into the deep end of these negotiations, without really knowing how to swim, when my seniors, such as Ambassador B.K. Zutshi and Mr. Anwar-ul-Hoda, who were initially responsible, became busy with other UR negotiations crucial for India such as trade in services, textiles and TRIMS. Mr. A.V. Ganesan, who had selected me to deal with IP in the Ministry of Industry, had left by then to deal with other subjects in the GOI. Mr. Ganesan of course returned later to as India's Chief Negotiator of the UR and was mainly responsible for accepting the scope and coverage

of product patents and then negotiating the transition period provisions of the TRIPS text.

4. It was not until 1989 that the GOI began to seriously analyse IPRs in a trade context. This is because this was the year India was placed on the Special 301 list by the US for its weak IPR regime – a position it has had the unique privilege of occupying every year since! That was the year I was asked to specialise in the subject of industrial property and all other subjects were removed from my portfolio. Mr. Jagdish Sagar from the Ministry of Education was responsible for some time in the area of copyright and related rights.

**How actually did the TRIPS negotiations take place and who were the main players?**

5. Negotiations took place in informal settings with no records kept – this was true of all the 14 negotiating groups in the Uruguay Round, including TRIPS. In the case of TRIPS, a 10+10 group of ‘most interested participants’ was formed. We met quite often in Room F of the WTO building, a room many of you are familiar with - so you can see that it was not a large group. The 10 developed country *demandeurs* for strengthened IP protection were led by the US, EU and Japan, supported by other developed countries – the so-called the Friends of IP group of which Switzerland was a prominent member. The industry associations of the US, EU and Japan had, quite early on in the negotiations in 1988, drawn up a legal text very close to what became the final text of the TRIPS Agreement. The 10 developing countries were from Asia and Latin America. In the end, I would say – in alphabetic order - Argentina, Australia, Brazil, Canada, Chile, the

EC, Hong Kong, India, Japan, Korea Malaysia, New Zealand, Singapore, Switzerland, Thailand and the United States were among the most active in shaping different parts of the text.

6. With respect to Africa's participation, it must be noted that at that time South Africa considered itself to be a developed country and was under a regime of anti-apartheid economic sanctions. Other African developing countries clearly had different priorities such as improved market access for their exports.
7. It was only later in 2001 that Africa led the developing world in negotiating the Doha Declaration on the TRIPS Agreement and Public Health. Developing countries remained united with Africa and confirmed the existing flexibilities in the TRIPS Agreement, a victory that reiterated the pre-existing balance in TRIPS. In 2001 I had a ring side view of these negotiations from the Secretariat side as one of two persons (with Mr. Adian Otten, the then Director of the IPD) facilitating the eventual outcome. Minister Celso Amorim of Brazil played a crucial role in these negotiations.
8. LDCs were carved out right from the start of the TRIPS negotiations with concessions made on transfer of technology (as found in Art 66.2) and the non-application of TRIPS with extended transition periods which still apply today 30 years after the WTO came into being.
9. Another important point to note is that in those days technical inputs to delegations from non-governmental actors almost solely came from industry interests, since NGOs and academics that are today so active in trying to influence outcomes on IP issues in international forums either did not exist then or were not active, with the exception

of environmental and religious groups that opposed the patenting of plant and animal inventions.

**How did IP standards come to be negotiated in GATT and what was the role of WIPO?**

10. As you know, the Uruguay Round was launched in September 1986 at Punta del Este in Uruguay – what is less known is that this was just a couple of years after the failure of the WIPO Diplomatic Conference on the Revision of the Paris Convention on the protection of industrial property. This revision process was initiated by developing countries to loosen the already loose obligations of that treaty. One can only surmise that the developed countries took fright at this development in WIPO where like in the UN one country one vote would be the norm - and shifted discussions on IPRs to a trade forum.
11. As we have already heard, the Punta del Este declaration on IPRs was ambiguous in that it mainly talked of the elaboration of existing GATT disciplines on IP. Most developing countries wrongly thought that TRIPS was about trade in counterfeit goods, a subject that was first broached at the end of the Tokyo Round in 1978-9. For India the focus at Punta del Este was on keeping Services out of GATT. However, the April 1989 mid-term review decision revealed the structure and outline of the Agreement was far wider than just trade in counterfeit goods. This was confirmed with the draft legal text submissions of the US, EC, Japan and Switzerland were submitted in early 1990.
12. The key WIPO conventions were the starting point for TRIPS negotiators, even while some contracting parties of GATT were not parties to these treaties, as was the case of India for the Paris

Convention. WIPO secretariat also assisted in technical matters when asked by the GATT secretariat. For some time developing countries argued that WIPO was the right forum to negotiate IP standards and later that it was the right forum for lodging the results of the negotiations. But they eventually realised that the content of the agreement was far more important than where it was lodged. Developing countries only received some assistance in early 1990 from UNCTAD – mainly from Mr. Abdulqawi Ahmed Yusuf, an international law expert, who later became a judge in the International Court of Justice. UNCTAD helped draft the initial submission made by 14 developing countries in May 1990 – this submission was not really a counter to the developed countries’ legal texts – it was more general and was not defended very effectively once the technical discussions began. UNCTAD could not help much once negotiations became more technical and moved rapidly in an informal setting. WIPO preferred to remain credible with the developed world by launching negotiations in parallel on an ambitious Patent Harmonization Treaty, a process that was overtaken by the TRIPS Agreement – this treaty never saw light of day.

13. Later, in 1995 the WTO signed a MOU with WIPO to help in TRIPS technical assistance, given the very few staff members in the WTO secretariat dealing with IP matters as compared to WIPO. This involved Mr. Adrian Otten, the then Director of IPD giving extensive lectures on TRIPS to WIPO’s senior staff, a subject they knew little about, just as he also did with some of the NGOs representatives in the room today.

**What were India's key concerns in the TRIPS negotiations, and did it form alliances to alleviate its concerns and improve the outcome?**

14. India had fewer defensive concerns in the areas of copyright, trademarks, GIs, industrial designs, trade secrets and enforcement, where its standards largely matched the demands being made or required only minimal changes. India had some concerns with respect to trademarks, but was most concerned about demands being made to enhance patent standards. India was keen on preserving the rights of its thriving generic drug industry to copy important patentable drugs – drugs patented elsewhere but not in India. This was an industry that had been deliberately nurtured since Independence through policy instruments such as the patent law revisions to virtually remove pharmaceutical patent protection in 1970 and also – and I would argue equally importantly – by obligations on pharmaceutical MNCs to manufacture in India from the basic stage (instead of mere formulations based on imported components) as well as the setting up of public sector undertakings in the pharmaceuticals sector. Working together, these policies resulted in the thriving generic drugs industry that we still see in India today.
15. India saw the writing on the wall by 1990 that product patents for pharmaceuticals would have to be conceded. Around October 1990, before the scheduled Brussels final meeting of the UR in December that year, I tried to save its compulsory licensing provisions first by trying to make an alliance with other Commonwealth countries that had similar provisions drawn from the UK law.

16. Other developing countries, especially those in ASEAN and in Latin America, were wary of earning the US' wrath if they sided with India on this issue. The attempt at a Commonwealth alliance quickly collapsed due to pressures from the *demandeurs*, notably the US, on Australia and others. I have explained my negotiating tactics in the chapter "Patents: an Indian Perspective" in the WTO book, 'The Making of the TRIPS Agreement', and I urge you all to read my chapter, if only to learn how -in a multilateral context - a relatively unimportant player could isolate a major *demandeur* for stronger IP protection at a time when US was virtually the only super power. To counter a US proposal that would allow very restrictive grounds for CL, India made a proposal on 'Use Without Authorisation of the Right holder', now in the title of Article 31, combining the until then two separate draft articles of CL and government use into one provision, subject to a common set of conditions. The EU, Canada and Japan supported this approach leaving the US isolated in the then Quad that led the UR negotiations overall.
17. That the TRIPS Agreement provides the right to grant CLs and allows the freedom to choose the grounds for such grant is clear now from the plain language of the Doha Declaration. In its implementation of TRIPS, India also took advantage of the fact that there is no definition of 'invention' or inventive step' in the patents section by disallowing incremental inventions that do not result in significantly improved efficacy, interpreted by India's highest court as therapeutic efficacy that applies to medicines. I will leave it to others in the room who are in the know of how this provision came into the Indian law.

### **Concluding remarks**

18. Having reached the end of the time allotted to me, let me conclude. India eventually decided it could live with the agreement that emerged from the UR negotiations and has, as I said, incorporated all the flexibilities that TRIPS allows into its IP laws. Given the intense political controversy in India at the time of the TRIPS negotiations around the fear that prices of essential medicines would skyrocket in India, there has been relative quiet on this subject even up to now, 30 years after pharma product patent applications first began to be filed in India. However, it is true that this is still a sensitive issue as India has had to fend off bilateral demands to strengthen its IP laws, especially for pharmaceuticals. These demands are unlikely to disappear and in fact are very likely to re-emerge even more strongly in the bilateral trade negotiations scheduled for this year. We will have to see how India deals with these kinds of demands.
19. With this, I'm happy to respond to any questions should time permit this. Thank you for your attention.