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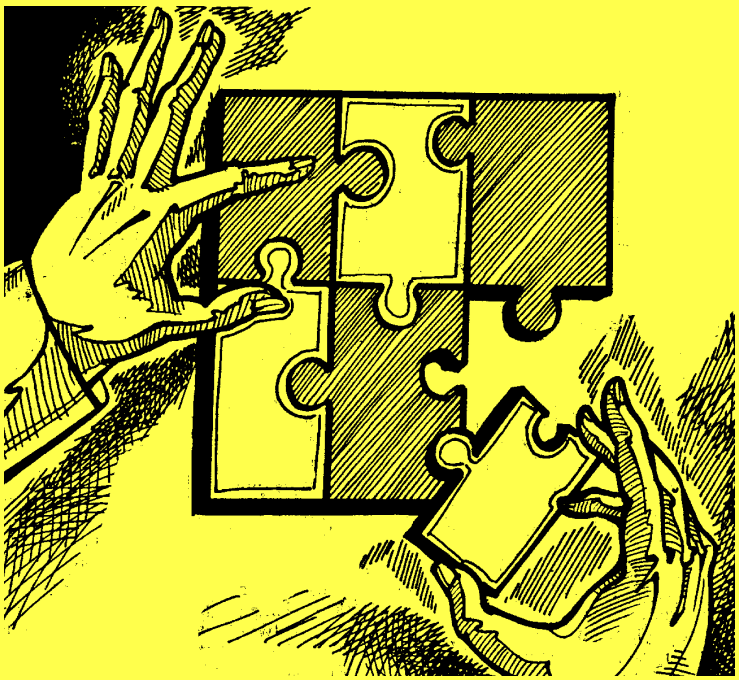
Research Report

Negotiating the TRIPs Agreement

India's experience and some domestic policy issues



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This paper was researched and written by **Julius Sen**, Tutorial Fellow, Department of International Relations, London School of Economics and Political Science, UK. The publishers are grateful to Christoph Spennemann, B. K. Zutshi and others for their comments on the draft, which were suitably incorporated. The opinions expressed in the paper, and any errors of fact or interpretation or omission are the responsibility of the author, and do not reflect the agreed policy positions of the publishers or the commentators or the organisations with which they are associated.

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Foreword

One of the most contentious issues discussed in the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), was that on intellectual property rights (IPRs), which resulted in the Agreement on Trade Related Intellectual Property Rights.

There were several reasons and among them the fundamental one was that a binding international agreement on trade-related IPRs creates monopoly power in the hands of a few and goes against the main goal of the multilateral trading system, i.e. trade liberalisation.

It is this issue, which has found many economists condemning the inclusion of TRIPs under the World Trade Organisation (WTO), which has been best expressed by the noted trade analyst, Professor Jagdish Bhagwati: "We are now using the GATT for the collection of royalty payments, which is not a mutual-gain transaction. In so doing, we have abandoned or diluted a very attractive philosophical basis for organising the GATT – the idea that trade is mutually beneficial to all contracting parties and that therefore all parties should liberalise."

Actually the issue of IPRs is situated at the World Intellectual Property Organisation, but the provision of a strong dispute settlement system and the single undertaking nature of the WTO acquis have been found to be a haven for IPR holders to seek rents from their exclusive rights.

That said, a common fallacy regarding the inclusion of IPRs into the WTO was pharmaceutical (and other) companies' claim that intellectual property has the same status as their tangible property. An essential characteristic of tangible property is the right to exclude other people from its use. However, the last thing creators and inventors want to do is to keep their creations and inventions to themselves. They want to promote them and want recognition, not money alone. The interests of companies in businesses related to creation and invention are different from the interests of creators and inventors themselves. Such companies want to build wide-ranging commercial monopolies, and to exploit the protection offered by intellectual property rights for that purpose.

On the other hand, the public interest lies in ensuring that there is as much innovation as possible, that it happens quickly, and that it is disseminated widely. We need to provide incentives to innovate without allowing a previous generation of innovators to intimidate competition, block entry, or restrict the exploitation of new technologies. That means a balance needs to be struck and the solution lies with the companies. For example, in the case of making the benefits of pharmacology available to those affected, of whom the majority is poor, the pharmaceutical industry must establish mechanisms for making drugs available at low prices in poor countries.

The TRIPs Agreement recognises the right of countries to take protective action to ensure the availability of cheap medicines, and this fact was reiterated at the Fourth Ministerial Conference of the WTO at Doha. However, this is not enough. The issue of a threat to the food security of people due to the monopolistic behaviour of multinational seed producing companies is a potential for future debates.

In this paper, the writer, Julius Sen shows particularities about the subject that distinguished the TRIPs negotiations from the other agreements that make up the Uruguay Round results, and therefore analysed the way in which the TRIPs Agreement was actually negotiated and handled.

The author finds that many of the lessons that can be drawn from India's experience with the TRIPs negotiations are the same as those that can be drawn from the negotiations more generally and true for many other countries. It goes beyond a narrow analysis of events relating strictly to the negotiations during the Uruguay Round and looks at the negotiating context in which these negotiations took place.

The research findings draw lessons from what actually happened and suggests how policy processes can be reformed and reorganised to address the negotiating requirements in dealing with such issues in future.

The paper was not intended to criticise India's failure to strategise and negotiate properly during the Uruguay Round, but to learn from the past mistakes so that countries are better prepared for future negotiations at the WTO. It could not have been published at a more appropriate time than just after the Fourth Ministerial Conference of the WTO, which mandated the WTO Members to start preparations for negotiations on a number of new issues.

Thus, the paper has acquired larger significance and would provide some valuable insights towards better negotiating strategies in future. Our efforts would be better accomplished if trade negotiators make use of this research and acknowledge its importance. It is our pleasure to publish this under our research report series, and we would like to thank Julius Sen for his contribution. Comments and queries, if any, may please be sent to us or directly to the author at: j.sen@lse.ac.uk.

Jaipur
December 2001

Pradeep S. Mehta
Secretary General

Introduction

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

India's failure in the TRIPs Agreement has also to be seen in the context of her negotiating failure in the Uruguay Round as a whole.

Although successive governments have tried their best to convince the public as much as themselves that a new and strengthened regime of intellectual property protection could work to India's advantage, this was not the policy objective they were pursuing during the Uruguay Round. It represented at most an effort to make a virtue out of necessity.

From a negotiating perspective, however, the situation has to be measured against a different standard. Once the agenda was agreed upon, the negotiators had to operate within its terms of reference. Seen from this perspective, the negotiations cannot be said to have been a failure. But this dichotomy only illustrates the deep structural problems within the Indian system.

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

There is also a domestic institutional basis for making this judgement. There were no separate procedures or systems for the TRIPs component of the negotiations.

There is also a domestic institutional basis for making this judgement. The negotiators were the same; the committee set up at the bureaucratic level for the Uruguay Round was the same; the cabinet sub-committee that considered the issues was the same, and of course the minister and ministry dealing with the subject were the same. In short, there were no separate procedures or systems for the TRIPs component of the negotiations.

Although treated similarly in procedural and systemic terms there were some particularities about the subject that distinguished the TRIPs negotiations from the other agreements that make up the Uruguay Round results, and therefore analysed the way in which the Agreement was actually negotiated and handled. Briefly stated these were as follows:

- The protection of intellectual property rights was hardly a trade-related issue and should more appropriately have been negotiated in another forum. The World Intellectual Property Organisation (WIPO) was perhaps the appropriate body for this, but why and how this did not happen is part of the negotiating history.
- Conceptually the TRIPs Agreement also represented a departure from the principles of free trade that underpinned other parts of the Uruguay Round process. TRIPs sought to apply the infant industry argument to intellectual property rights by creating temporary monopoly rights, which was in effect a complete inversion of free trade dogma.
- Strategically, securing an agreement in this particular area was something that the US was absolutely determined upon. They had long since concluded that the key to their global dominance was technological superiority, whether in manufacturing, services, military hardware or other strategic sectors. For the US it was therefore a matter of commercial and strategic necessity, and was thus ready to fight hard and determinedly to achieve this objective. In fact they would probably not have accepted the results of the Uruguay Round without an agreement on intellectual property rights.
- The two issues of protection and standards were additionally treated by the pharmaceuticals and entertainment industry in the US and parts of Europe as moral issues. This put negotiators attempting to defend the intellectual property right (IPR) regimes in their respective countries at a significant disadvantage.
- The TRIPs agenda effectively aimed to extend the principles and procedures relating to intellectual property contained in US domestic law to the rest of the world. This was significantly more pronounced than in their attitude to other areas of the Agreement where they were ready to find compromises.
- And finally, the TRIPs Agreement was perhaps the only major Agreement where internal domestic laws would have to be substantively changed as a consequence. This "domestic dimension" was something of a new feature of international agreements, and posed a special challenge to negotiators and the government[1] . In the Indian context this issue still remains unresolved.

India's experience with the TRIPs negotiations are the same as those that can be drawn from the negotiations more generally. That is why many of the points made in the Conclusion and Summary of Findings are stated in general terms.

Notwithstanding these differences in the subject matter, this paper finds that many of the lessons that can be drawn from India's experience with the TRIPs negotiations are the same as those that can be drawn from the negotiations more generally. That is why many of the points made in the Conclusion and Summary of Findings are stated in general terms. Nevertheless there is a narrower focus on certain issues that were unique to the TRIPs process, which this paper has attempted to identify and highlight.

This paper argues that the effect of international and national developments during the period of the Round played a significant part in the failure of India's negotiating strategy.

This paper also goes somewhat beyond a narrow analysis of events relating strictly to the negotiations during the Uruguay round and looks at the Negotiating Context in which these negotiations took place. It argues that the effect of international and national developments during the period of the Round played a significant part in the failure of India's negotiating strategy. There are many reasons that may account for this, and an attempt has been made to identify some of them.

The paper looks at the negotiations from three perspectives to try and see what lessons can be learnt from India's experience.

- The first relates to the political management of the process;
- The second relates to procedural and organisational issues; and
- The third relates to events in the negotiating forum.

The reason for adopting this approach is simple. The TRIPs Agreement - and the Uruguay Round as a whole for that matter – posed a special challenge to policy makers. It bridged the divide between foreign and domestic procedures, which had implications for the political legitimacy and political accountability of the process. This had major constitutional and political ramifications that even today have yet to be resolved satisfactorily.

In looking at the domestic implications of India's negotiating experience of the TRIPs Agreement, the basic questions that need to be addressed can be summarised as follows:

- How did a highly organised system like that of the Government of India, with a strong internal domestic political consensus on intellectual property rights issues, prove so inadequate to the task of handling the TRIPs negotiations?
- Why were they unable to learn from the examples of other countries that were in much the same position?
- What happened to their friends and allies, of which there were so many at one time?
- Why could they not press for and obtain benefits to compensate for the negotiating disaster of the TRIPs Agreement?
- Why did they not open serious negotiations in the WIPO to take the pressure off negotiating within the framework of the multilateral process?
- Why did they not read and heed the messages from Washington that made it clear that a TRIPs Agreement was considered vital to US strategic interests?

This paper will therefore attempt to draw lessons from what actually happened and suggests how policy processes could be reformed and reorganised to address the negotiating requirements of a country like India in dealing with such issues in future.

Section I

Intellectual Property Protection in India until the Uruguay Round

The history of intellectual property rights protection in India until the Uruguay Round negotiations in effect demonstrates why the issue was so contentious and difficult to negotiate for a developing country. In finding a balance between the rights and interests of those creating intellectual property and the interests of developing countries, nations like India naturally weighted the system towards the latter objective. This did not necessarily apply to all forms of intellectual property however, but mainly to patent protection. Thus India's intellectual property rights regime adopted two distinct approaches. The first was for those areas of creativity which had only a marginal impact on economic development (copyrights etc), and those which were thought to have a decisive influence on this process (patents).

The international system established after the Second World War created the policy 'space' for these objectives to be pursued. International agreements stopped at national boundaries, and so the threat of 'retaliation' was considered illegal in terms of international law. Other forms of intimidation were also ruled out because any threat to use force was also illegal. In these circumstances there was no reason why each country could not establish and pursue its own policy objectives with respect to intellectual property, or any other domestic policy that did not cause a threat to world peace for that matter. For developing countries this was additionally important because of the special needs arising out of their colonial experience and the special policy measures they would need to rectify the structural consequences of colonialism.

India's intellectual property rights regime adopted two distinct approaches. The first was for those areas of creativity which had only a marginal impact on economic development (copyrights etc), and those which were thought to have a decisive influence on this process (patents).

One of the assessments shared by all strands of thinking during the independence movement from early in the 20th century was that India's colonial status created the organisational and legal framework that effectively promoted the interests of foreign (in this case British) companies at the expense of local industry. As the argument ran, the British effectively destroyed India's manufacturing base, which was mainly artisan and rural based, by using a combination of policies that saw India provide raw materials at cheap rates to British manufacturers who then processed and distributed the finished product at high prices. Jobs were created in Britain and profits accrued to these British companies at the expense of the local Indian economy. Profits were thus siphoned out of the country and little of it was reinvested, except to reinforce the process described above. India was thus de-industrialised, wages fell, unemployment increased and people were obliged to pay high prices for ordinary items of everyday use. The economic subjugation that this process entailed reinforced the process of military and political subjugation.

The economic arguments against colonialism were in some ways more emotive and persuasive than the political arguments, which is of course represented by M. K. Gandhi's use of the spinning wheel as an emblem on the Congress Party's flag. The symbolism of this was profound, and

fed later into a body of economic thought and doctrine that underpinned much of what independent India aspired to achieve through its plans for economic development. Moreover, a similar analysis and approach was to be found in independence movements throughout the world, though of course reflecting local differences.

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

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

Thus, the process was set in motion by creating the legal context in which this could take place. In respect of intellectual property rights two committees considered the issues in detail. They were charged with the task of examining the intellectual property rights regime of British India that culminated in the 1911 Indian Patents and Design Act, which actually consolidated provisions in a host of other enactment that had come into force from 1856 onwards. The work of these committees thus took place within the context of a broader set of policies aimed at encouraging companies to set up manufacturing facilities in India and transferring technology to these facilities. The property rights regime of independent India was thus meant to support a broader policy of economic self-sufficiency and focussed on the issue of patent rights as the principal means of achieving this.

The first of these two committees was the Patents Enquiry Committee (1948-50), which in turn was followed by the Committee for the Revision of Patent Law (1957-59). These two committees considered the issues in some detail and recommended a policy that sought to balance the rights of inventors and innovators with priorities for national development. The resulting legislation was the Patents Act of 1970, which actually went into effect in 1972.

The 1911 Indian Patents and Design Act, which actually consolidated provisions in a host of other enactment that had come into force from 1856 onwards. The Patents Act of 1970 sought to achieve three fundamental changes to the 1911 Act.

The Patents Act of 1970 sought to achieve three fundamental changes to the 1911 Act. Firstly to compel international patent holders to actually work the patents in the local (Indian) market through the device of compulsory licensing. This was meant to deter imports of finished products, particularly in some sectors considered to be of strategic necessity where the transfer of manufacturing capacity was considered essential. Secondly, the duration of patent protection was reduced from sixteen to fourteen years for most patents, but in respect of food and drugs from sixteen to five years from the date of sealing, or seven years from the date of filing a complete patent specification, whichever was shorter. And the third was to confine patent rights only to 'process' patents, thus excluding 'product' patents from the protection of the law. If an Indian company could produce the same product by a different process than the patent holder then no violation of the Patents Act of 1970 was involved.

The impact of this weakened patent regime had a dramatic effect on the sectors in which it was most noticeably weakened. In the pharmaceuticals sector alone the country moved from a situation of almost complete dependency on international supplies in 1947 (in which foreign suppliers controlled 90% of the market) to a situation in 1996 where India was basically self-sufficient in major pharmaceutical products, with domestic production meeting 70 percent of consumer demand. Annual growth rates in the period following 1972 were around 12 percent.

The impact of this weakened patent regime had a dramatic effect on the sectors in which it was most noticeably weakened. It was the very success of this strategy, which incidentally was also followed in a number of other strategic sectors (defence, railways, telecommunications, power etc) that reinforced political support for the basic approach of the government since independence.

Similarly in the food and agri-business sector the economy moved from being heavily dependent on food aid and food imports, to being almost entirely self-sufficient in essential food supplies by the mid 1980s.

It was the very success of this strategy, which incidentally was also followed in a number of other strategic sectors (defence, railways, telecommunications, power etc) that reinforced political support for the basic approach of the government since independence. That is self-sufficiency through a strategy of directed investment, tariff protection, and a policy of mandatory technology transfer where necessary. Wars with Pakistan (during which strategic supplies were cut off) further demonstrated the importance of self-sufficiency and served to reaffirm the basic consensus to this policy approach.

By the mid to late 1970s therefore, the political consensus behind the self-sufficiency approach to development covered virtually the entire political spectrum and had acquired a legitimacy rare in any country. Though there were some efforts aimed at a change in strategy regarding foreign investment (which really came to nothing), at no stage was there any political pressure from within the system to revise the intellectual property regime.[2]

Efforts from the 1980s onwards to attract foreign investment into India were pursued largely with the objectives of self-sufficiency in mind. It was premised on the belief that India's market was a major attraction to foreign companies and technology transfers could be ensured by using market access as bait.

Efforts from the 1980s onwards to attract foreign investment into India were pursued largely with the objectives of self-sufficiency in mind. It was premised on the belief that India's market was a major attraction to foreign companies and technology transfers could be ensured by using market access as bait. Again, even though this strategy did not work all that well (and in fact helped create the debt crisis of 1991), there was virtually no talk within India of any need to change the intellectual property rights regime to provide international (meaning American) standards of patent protection as an essential part of the process of attracting foreign investment.

Hence India's amendment of its patent rights regime in 1970 and its general policy of compliance with other conventions arrived at during international negotiations in the areas of copyrights, plant protection, etc. These measures were thought to be entirely within the legal rights conferred on states by the United Nations Charter and international law. If anything India saw itself as a good international citizen in respect of its willingness to honour its international obligations.

Hence India's amendment of its patent rights regime in 1970 and its general policy of compliance with other conventions arrived at during international negotiations in the areas of copyrights, plant protection, etc.

Thus, India was a signatory of the Paris Convention of 1883, for the protection of patents and trademarks (known as 'industrial property' in the convention). The convention established the National Treatment principal for the protection of industrial property, but this did not and could not preclude the passage of laws that addressed the development requirements of developing countries, provided that the law applied equally to nationals and foreigners alike. In effect, this meant weak patent protection for foreigners simply because the rate of innovation in a developing economy was so much less than in developed countries. It

was this perceived imbalance in the system of enforcement that the US was targeting through denial of market access in retaliation for weak intellectual property protection (under US trade law).

India was also a signatory of the Berne Convention of 1885, which established certain minimum rights with respect to authors rights and artistic rights, while computer software was protected by Indian law from 1983. The United States on the other hand did not accede to this convention until 1988 preferring to rely on unilateral domestic measures and bilaterally negotiated agreements.

As a member of the World Intellectual Property Organisation (WIPO), India was part of an agency that was charged with the responsibility for administering agreements on intellectual property protection including the Paris and Berne Conventions.

As a member of the World Intellectual Property Organisation (WIPO), India was part of an agency that was charged with the responsibility for administering agreements on intellectual property protection including the Paris and Berne Conventions. WIPO had an extensive program to assist developing countries in the formulation of appropriate policies, but had no procedures to adjudicate disputes between members and no mechanism to enforce domestic compliance. This was left to each member state to deal with. Thus for the US and most OECD (Organisation for Economic Cooperation and Development) countries the WIPO was not in a position to address their concerns, and GATT was the more appropriate forum. For developing countries of course GATT represented (in 1986) the interests of developed countries.

Similarly, India's regime for the protection of trademarks, industrial designs and trade secrets were generally compatible with internationally accepted standards. And where amendments were necessary, these were largely minor and procedural.

India was also a signatory of the Washington Treaty of May 1989 (which was concluded during the Uruguay Round) relating to layout designs of integrated circuits, and the amendment of domestic laws to bring them into compliance flowed naturally from this process.

There was therefore something of a sense of complacency within India about the pressures building up within the international system for measures to strengthen the intellectual property rights regime, which were based substantially upon US efforts, with occasional support from the European Union and the Japan.

Thinking within the Government of India assumed that even if the US and others were aggrieved by India's patents regime, they could do nothing beyond complaining about it. International law and the UN Charter provided protection to national sovereign space in case any more intimidatory tactics were contemplated. India also felt secure at the alliances she had created, centred mainly on developing country solidarity, and assumed that this alliance would hold firm. Moreover, developed countries (and the European Commission in particular) were hesitant (initially) in confronting the developing world on this issue. Her sense of complacency was further reinforced by the knowledge that the economic arguments in favour of creating monopoly rights were inconsistent with the free-trade orientation of the GATT process.

Thinking within the Government of India assumed that even if the US and others were aggrieved by India's patents regime, they could do nothing beyond complaining about it.

That the US was able to force agreement on this issue in spite of all these factors is a good indication of just how much effort she put into her strategy. It also demonstrates just how many countries like India overestimated their strength.

Section II

The Negotiating Context

Unlike most international negotiations, the Uruguay Round lasted for seven years from 1986-1993. If one adds the work done in preparation and the jockeying for position from the 1982 GATT ministerial conference and the ratification process, then the negotiating cycle covered more than a decade. This is long and arduous by any standard.

This was also a period marked by momentous international changes, which are summarised below. Within India it was also a period of major political realignment and economic crisis, again which are briefly summarised below.

Apart from the usual problems one could expect of trying to hold to a consistent negotiating strategy over a prolonged period, during which time key personnel were rotated, governments changed, ministers changed, and new priorities emerged, developments within India and internationally had a major effect on the way in which the government handled the negotiations.

The International Context

There were eight features of the international context that had a significant bearing on the negotiations, though to varying degrees.

There were eight features of the international context that had a significant bearing on the negotiations, though to varying degrees. The first was the collapse of communism and the resulting ascendancy of the West. This led to a new and assertive phase in international diplomacy, which saw the US and its allies push their agenda forward on a broad front. Trade liberalisation was a major component of this strategy.

The second – which was linked to the first - was the fragmentation of developing country solidarity on a host of issues. This process also accelerated after the collapse of apartheid in South Africa, which was of course the last of the major political issues on the developing country agenda. The defeat of the New International Economic Order agenda, together with the debt crisis, effectively accelerated the process of fragmentation. The non-aligned movement – another forum for developing country interests – also lost its raison d'être with the collapse of bipolarity in world affairs.

The third reason, which was perhaps the most significant, was the debt crisis. This effectively put a large number of countries, including some of the more powerful developing countries, into receivership. International Monetary Fund and World Bank conditionalities were based upon an export dependent strategy, and many of these countries were 'advised' to participate constructively in the Uruguay Round negotiations as part of the strategy for recovery. The debt crisis, and the institutional response, also reflected the intellectual ascendancy of the neo-liberal model.

The fourth, which was closely linked to the two points immediately above, was that a number of developing countries were unilaterally liberalising during the negotiations and changed their negotiating strategy to reflect this shift in domestic policy. Their 'defection' further fragmented developing country solidarity.

The fifth was that the level of intellectual property protection offered by a number of countries was thought (by a few developed countries) to be inadequate. Remedies available were similarly thought to be insufficient and WIPO was thought to be ineffective and toothless. The multilateral system was thus seen to offer the best chance to countries keen on improving levels and standards of protection

The sixth reason was tactical. The US commenced negotiations on the NAFTA (North American Free Trade Area) Agreement and on APEC (Asia Pacific Economic Community) towards the final phase of the Uruguay Round in order to put pressure on the European Commission in particular to come to an agreement over agriculture. This was characterised as the "triple play" and effectively brought the Europeans around to a compromise so as not to lose out to their trading rivals in the US market. Once the EC and the US were united in their determination to conclude a multilateral round, there was little that India or other developing countries could do.

Developments in the domestic context during the period were even more decisive. At one level, his government was in favour of integrating the national economy into the global economy, but at another level it was hampered by internal political compulsions.

The seventh reason was the interest taken by the world's media in the negotiations. Earlier trade rounds – and especially the Tokyo Round – had dragged on inconclusively for years without being noticed. Negotiations during the Uruguay Round were a major media event and governments and politicians were keen to occupy centre stage. By raising the level of awareness the media brought the negotiations on to the international political agenda and kept it there.

And finally was India's position in world trade. India was a very marginal player with a share of less than 0.5 percent of global trade. While this would suggest that India could easily remain outside the global trading system, thus simplifying her negotiating priorities, the attraction of India – to foreign producers and suppliers – was the prospect of a huge new market.[3] Conversely, from India's point of view, were both the threats and opportunities that India's participation could address. There was the danger of providing greater market access would pose to domestic industry and employment, but at the same time being part of a global trading system could offer significant advantages to India's export sectors over the years.

The cumulative impact of these developments was to erode developing country solidarity, isolate them intellectually, and weaken them tactically. India's efforts to defy this process within the negotiating process were therefore a little too ambitious.

The Domestic Context

Developments in the domestic context during the period were even more decisive. Politically, the first half of the decade saw the crisis in Punjab and the assassination of Prime Minister Indira Gandhi in October 1984. This was followed by the roller coaster Prime Ministership of Rajiv Gandhi, which saw two contradictory impulses at work.

At one level, his government was in favour of integrating the national economy into the global economy, but at another level it was hampered by internal political compulsions. Government policy oscillated between

strategies for self-sufficiency and global market integration, and confusion prevailed. Punjab, Assam, Mizoram and Kashmir were constant sources of political and security concern and absorbed much time and attention, while his own party was divided and ultimately destroyed by intense rivalries over the Bofors scandal. India's intervention in Sri Lanka created a crisis in the state of Tamil Nadu. This tragic series of events culminated in the assassination of Rajiv Gandhi during the 1991 election campaign.

This instability in the domestic environment turned political attention inwards – a process that was sharply intensified by the governments change in policy towards reservations for people from 'backward' communities.

Following Rajiv Gandhi's electoral defeat in 1989, India had a series of short-tenure Prime Ministers whose parliamentary majorities were built upon fragile and shifting coalitions. Domestic politics were entering a new phase in which political coalitions were forming and reforming around a host of changing issues – all domestic. Political preoccupations were predominantly domestic and left little time for political parties to consider developments outside India.

This instability in the domestic environment turned political attention inwards – a process that was sharply intensified by the governments change in policy towards reservations for people from 'backward' communities. Political debates no longer referred to international developments and international issues in quite the same way as they had done until the mid 1980s. In effect this meant that crucial international developments largely passed the political leadership by.

When Narasimha Rao became Prime Minister in 1991 atop another fragile coalition, he faced a catastrophic financial crisis, which compelled the Government to approach the IMF and the World Bank for help, and growing internal divisions over the Government's communal policy.[4] He thus spent much of his tenure as Prime Minister shoring up his majority and defending it against the accusation that it had sold out to the IMF and the World Bank. The conclusion of the Uruguay Round during his tenure only added to his problems, and he had to deploy all his considerable skills to nurse the results of the agreements through cabinet and through parliament, though not without the usual drama that accompanies big events in India.

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

The effects of this growing preoccupation with domestic issues at the expense of international issues, meant that there was only limited political interest in developments in Geneva, where negotiations were taking place. This had two effects: in the first place it meant that ministers wanted to avoid the subject of GATT as this would have exposed yet another front to attack from political parties from the right to the left. And secondly, it tended to leave the negotiations to bureaucrats.

Section III

Decision-making Procedures of the Government of India

The Role of the Cabinet Secretariat

The cabinet secretariat administers the decision-making systems of the Government of India. On the assumption to office of any new Government the Prime Minister advises the cabinet secretary of the allocation of portfolios amongst ministers, and the cabinet secretariat then issues detailed instructions advising all ministries of this arrangement and how it will work. This is done by amending the schedules to the Allocation of Business Rules of 1961, which sets out in detail the administrative responsibilities of each ministry, and of the departments within the ministries. The cabinet secretariat also issues the official notifications regarding the various cabinet committees and sub committees, though the Prime Minister actually decides on their composition. This process also involves other ministerial committees, which are generally know as Groups of Ministers (GoM), and committees of senior civil servants, known as Committees of Secretaries (CoS).

The cabinet secretariat also advises all ministries of *how* the business of government is to be conducted – in other words procedures - through the Conduct of Business Rules. These are not however amended very often, as they do not (generally) need to change much over time.

The cabinet secretariat also advises all ministries of how the business of government is to be conducted – in other words procedures - through the Conduct of Business Rules.

There are obviously exceptions to the routine functioning of the Government, and for this a variety of emergency procedures are adopted. These basically provide for the Prime Minister to short circuit consultative procedures and to bring issues before the cabinet without completing all the laborious groundwork. Emergency procedures are meant for emergencies however, and this is generally understood to refer to peace and security issues, and national calamities, and would certainly not apply to multilateral trade negotiations covering a seven-year period.

In setting out these rules the cabinet secretary's job is to enforce collective responsibility (of the cabinet) and ministerial accountability (to the parliament) within the context of constitutional procedures and constitutional law. He is further required to ensure that the political executive is fully accountable to parliament for its actions, and this can only be achieved by a complex system in which ministers take the major decisions (or at least appear to), and are on record as having done so. All governmental procedures basically flow from this.

The cabinet secretariat supervises the system and is particularly strict about ensuring that procedures are correctly applied, especially where proposals have to come up before the cabinet or one of its committees. There is nothing worse than for a cabinet minister to say that he didn't receive the papers, or that proposals that relate to his ministry were not shown to him before coming up for discussion. These are hanging offences basically because they undermine concepts of ministerial responsibility and accountability.

Foreign Policy Procedures

Decision and policy-making procedures in the area of foreign policy are based on provisions in the constitution and certain assumptions about the nature of the policy commitments being considered.

Decision and policy-making procedures in the area of foreign policy are based on provisions in the constitution and certain assumptions about the nature of the policy commitments being considered. This approach assumes that anything other than technical legislative approval would *not* (generally) be required as a consequence, either in the form of ratification or through the passage of new laws, or the amendment of existing laws. It does however allow for policy modifications where necessary, but these should be within the competence and jurisdiction of the executive. Thus foreign policy decisions would at the most require the approval of the cabinet.

This is the general position adopted by the Indian constitution and is similar to arrangements in many other countries. By virtue of this process however, the contents of a treaty do not automatically become domestic law and cannot be enforced by courts. A separate procedure is required which follows the domestic policy procedure set out below, thus complying with the basic tenets of any democratic system that laws will not be enacted without the consent of the governed. Thus foreign policy decision-making procedures only apply to the first part of the process.

In the event that a domestic legislative enactment is needed to carry out the purposes of a treaty, the presumption is that this is a domestic choice.

In the event that a domestic legislative enactment is needed to carry out the purposes of a treaty, the presumption is that this is a domestic choice. Failure to implement legislative does *not* invite penalties or any form of international sanction, though it may require renegotiation of the treaty's provisions. Moreover international law does not permit the use of force (or the threat of the use of force) to compel compliance, and so no country can thus be coerced into enacting domestic legislative provisions without a democratic sanction in order to fulfil its treaty obligations.

Given these assumptions, the procedure for foreign policy decision-making is thus quite relaxed, and does not contemplate the same level of procedural rigour as the domestic system.

The procedure basically requires cabinet approval even if a treaty is contemplated. The decision is then placed on parliamentary record, and this concludes the procedure. The parliament is thus *informed* but not consulted. It is not required to ratify, under Indian constitutional law, and this means that the executive can exercise considerable discretion in its treaty making powers.

Domestic Policy Procedures

The situation with respect to policy making in respect of matters that are exclusively domestic differs substantially from that described above. In the first place there is divided jurisdiction between the Central (Federal) Government and State Governments, with the Central Government empowered to act on anything not listed in the distribution of subjects.

The situation with respect to policy making in respect of matters that are exclusively domestic differs substantially from that described above. In the first place there is divided jurisdiction between the Central (Federal) Government and State Governments, with the Central Government empowered to act on anything not listed in the distribution of subjects. Under the Indian constitution this is complicated by two additional factors. Firstly, the Central Government can make policy and legislation with respect to matters on the state list, but these will be superseded when state legislation on the same subject is passed. And secondly, the question of whether a subject is within the jurisdiction of the federal or state authorities is often ambiguous and the law ministry has to clarify who has jurisdiction in each particular situation.[5]

Once jurisdiction is clear, then an individual ministry is assigned administrative responsibility for a subject. It is their job to consult with and co-ordinate policy-making with other ministries that may have an interest in the subject under consideration, and it is their job to abide by the procedures for doing this laid down in the rules. Finally it is the minister's responsibility to initiate discussion on his ministry's position in cabinet and to answer questions in parliament.

The cabinet secretariat is the guardian of the system insofar as it pertains to the procedures of the central government, as the cabinet secretary is the secretary to the cabinet and controls, with the approval of the Prime Minister, the agenda before the cabinet. These rules are not simply a matter of executive convenience. They are meant to ensure the collective responsibility of Cabinet where necessary and that individual ministers are fully accountable to the parliament.

Before the Uruguay Round there was little difficulty in treating trade policy issues as foreign policy issues (in procedural terms) even though it was dealt with by the Commerce Ministry and not the External Affairs Ministry.

These features are fairly typical of any constitutional democracy, and it is clear that procedure is more important than outcome in these circumstances – the assumption being that democracies may not always take the right decisions, but they are at least legitimate from a democratic point of view.

Within this framework, there is obviously some flexibility. Power and authority are also delegated, though *never* with respect to policy or legislative matters. Individual ministers or senior civil servants are usually empowered to take executive decisions in pursuance of a policy, but cannot pre-empt the policy-making powers of the cabinet.

International Trade Policy: A Foreign or Domestic Policy Matter

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

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

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They failed to consider what would happen if they were so compelled, perhaps because nothing short of coercion could achieve this, and coercion was illegal. They failed to reckon with the new instruments of intimidation that were being used in international trade issues and how they could be operated in other policy areas that had little to do with trade policy. They also failed to reckon with the determination of the US in particular to pursue their policy goals and the connection between these goals and their broader strategic priorities.

Secrecy

One of the features of cabinet system of government in India[6] is that the rules of confidentially governing procedures largely preclude outside consultation during the process of policy formulation. This was a legacy of pre-colonial cabinet practices in Britain, which no one had thought to

modernise to address contemporary requirements. Secrecy rules also cover cabinet committees and most other inter-ministerial official committees.

The problem here is systemic. The cabinet or its committees cannot circulate draft cabinet proposals to anyone outside the bureaucracy as this would violate cabinet rules of confidentiality, and in fact would be taken very seriously as a breach of the Official Secrets Act. At the same time, proposals for the consideration of the cabinet or its subcommittees cannot *originate* outside the bureaucracy (largely for reasons of secrecy, but there are other reasons also). Thus there is no mechanism that can be used to include or consider the views of outside interests unless these are taken on board and absorbed by any one of the ministries involved *prior* to the process of drafting a cabinet note or responding to a cabinet proposal.

The problem here is systemic. The cabinet or its committees cannot circulate draft cabinet proposals to anyone outside the bureaucracy as this would violate cabinet rules of confidentiality, and in fact would be taken very seriously as a breach of the Official Secrets Act.

Confidentiality procedures thus create a catch-22 situation for policy makers dealing with trade matters: the Government needs outside advice on issues that effect the private sector, but the rules governing confidentiality prohibit taking any outside advice as part of this process. Advice can however be taken prior to the commencement of the policy making exercise, but there is no mechanism by which this process can initiated without the government making an initial decision to review its policies in a certain area! There are of course ways around this.

Consultation

The question of whether outside consultation was possible in the circumstances described above is crucial to an understanding of the systemic problems that effected the government's negotiating approach.

As things stood on the eve of the Uruguay Round negotiations in 1986, institutional systems that provided for outside consultation did not exist within the framework of the Rules of Business of the Government of India. There were no approved or authorised lobbyists who had official access or that had a right to be heard in the formulation of policy. There were, and are, a number of recognised trade associations, but they have no *right* to be consulted and the question of whether they will be consulted and of the importance of their inputs is entirely a matter of discretion for the concerned ministry.

As things stood on the eve of the Uruguay Round negotiations in 1986, institutional systems that provided for outside consultation did not exist within the framework of the Rules of Business of the Government of India. There were no approved or authorised lobbyists who had official access or that had a right to be heard in the formulation of policy.

The only institutions that have a *right* to be consulted are other concerned ministries and, where necessary, state governments.

In the area of trade specifically, there were a number of export promotion boards and associations, but these are committees chaired by bureaucrats and with industry representatives as members. They do not represent industry and do not fulfil the function of organised bodies that could be consulted on negotiating proposals relating to trade.

Parliament also has a number of consultative committees, which take written and oral submissions from trade and industry associations. These do not however feed into the decision or policy-making processes of the government, which is an exclusively executive function.

Section IV

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

How the System Functioned

The Commerce Ministry was the administrative ministry in charge of handling the negotiations. Within the Commerce Ministry authority had been delegated to the Ambassador to GATT in Geneva to represent India, but he was obviously required to obtain approval to major proposals from his Ministry. If the Ministry needed approval from the Government, this obviously had to be co-ordinated by them.

The Commerce Ministry was the administrative ministry in charge of handling the negotiations. Within the Commerce Ministry authority had been delegated to the Ambassador to GATT in Geneva to represent India.

As mentioned above, trade negotiations were treated as foreign policy issues because agreements were treaties and these were matters that fell within the competence of the central government exclusively. Since treaty obligations did not entail domestic legislative changes *as a necessity*, foreign policy making procedures were generally considered adequate.

In the case of the Uruguay Round the Cabinet Secretary appears to have adopted a sort of modified foreign policy decision-making model by adapting it slightly for the requirements of these particular negotiations.

The modified procedure really introduced only one new element into the system. It provided for a Committee of Secretaries (CoS) to advise the Cabinet Committee on Economic Affairs (CCEA) on the issues. The CCEA was the same cabinet committee that looked at all issues pertaining to economic policy (and was chaired by the Prime Minister) and was thus an established cabinet committee and had been in existence for years.

Establishing CoS is a fairly standard device employed to improve the process of consensus building in the bureaucracy, and is especially useful for dealing with complex policy issues involving several ministries.

The CoS – which was set up for the negotiations - was chaired by the Cabinet Secretary and also included senior secretaries from the Ministries of External Affairs, Finance, Economic Affairs, Industries, and Commerce. Other senior officials were called and consulted when necessary. It also included the Principal Secretary to the Prime Minister who more often than not is said to have chaired the meetings, as the Cabinet Secretary did not attend many meetings.

No distinction was made between the decision-making procedures to be followed for the TRIPs negotiations and those followed for negotiating the Round as a whole.

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

Problems with the System

There were several obvious problems with this arrangement. By choosing to set up a CoS for the Uruguay Round negotiations the Cabinet Secretary was reacting fairly conventionally to the situation. But more importantly he was effectively *excluding* some of the ministries that actually dealt with the subjects under negotiation (partly where TRIPs was concerned, but also more generally for the Uruguay round), and also *excluding* ministerial intervention. This raised questions later about the legitimacy of the process from a political perspective.

With respect to TRIPs, normal procedures for consultation – that is procedures that would have been adopted had it been treated as a domestic policy issue - should perhaps have involved the various ministries dealing with India's laws, conventions and policies concerned with intellectual property protection.

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

The role of the CoS was also not very clearly defined perhaps because the direction and outcome of the Uruguay round was not very clear to anyone during much of the negotiations. In effect they were simply kept informed about developments in the negotiations and similarly kept the CCEA informed in turn. It appears that they did not provide much advice or policy guidance to the negotiators but did occasionally keep the Commerce Secretary, who was a member of the CoS, briefed of some of the larger political worries that the Prime Minister and others had about the negotiations, and *vice versa*. Their role was therefore largely informational and they acted as a sort of clearinghouse for some of the issues the negotiators were dealing with.

With respect to TRIPs, normal procedures for consultation – that is procedures that would have been adopted had it been treated as a domestic policy issue - should perhaps have involved the various ministries dealing with India's laws, conventions and policies concerned with intellectual property protection. Thus the various ministries concerned with patents, copyrights, trademarks, geographical indications, industrial designs, integrated circuits and trade secrets should have been *formally* consulted on a continuous basis during the TRIPs negotiations once negotiations began in these areas. Formal consultation would however have been a problem for the negotiators since it would entail ministerial approval to every issue, which would have meant delay and possibly a lack of coherence across the subject areas.

In actual fact only the Industries Ministry was really consulted on any extended basis during the negotiations, partly because the Industries Secretary was on the CoS, partly because of the importance of patents, and partly because of the expertise of senior officials.

In actual fact only the Industries Ministry was really consulted on any extended basis during the negotiations, partly because the Industries Secretary was on the CoS, partly because of the importance of patents, and partly because of the expertise of senior officials. This could have been justified on the grounds that proposals relating to patents were particularly troublesome for the Government of India. However, consultation procedures are normally a *formal* requirement even if the ministries have nothing particular to say and their views have just to be noted. There is also an issue of ministerial accountability involved. Ministers in charge are required to formally say that they have nothing to add to a policy document.

At the same time no effort was made to set up a standing sub-committee on intellectual property rights to aid the CoS or the CCEA. This was

somewhat unusual even if one accepts that streamlined procedures had to be adopted.

The problem was that from the outset it was clear that the Indian government (publicly, and at the political level) was against engaging in the negotiations, at least on the terms set out in the agenda agreed at Punta del Este, Uruguay in 1986. They were particularly opposed to the agenda for the TRIPs negotiations. This effectively meant that the only instructions they could give to the delegation in Geneva was to oppose everything. This hardly made for good strategy and would perhaps explain why India was so comprehensively outmanoeuvred at so many crucial moments. Neither the CoS nor the CCEA could however really go beyond these parameters so their contribution to the negotiations was minimal at best, and anything substantive to suggest engaging fully with the process had to be informal.

The problem was that from the outset it was clear that the Indian government (publicly, and at the political level) was against engaging in the negotiations, at least on the terms set out in the agenda agreed at Punta del Este, Uruguay in 1986. They were particularly opposed to the agenda for the TRIPs negotiations.

To get around this hiatus two systems were effectively set up; one formal and the other informal. The first (formal) was established to create the appearance of normal policy processes (with the CoS advising the CCEA), and the second (informal) was created to deal with the reality of the situation and more particularly the diplomatic pressure. The problem was that neither system provided any sort of political legitimacy to the consultative process, which may explain why the final results were greeted with such hostility.

There would thus appear to be three possible explanations for this:

- Firstly that there was little real appreciation or understanding of the importance of the issues and of their domestic ramifications and so the whole process was treated casually in the hope that nobody would notice.
- Secondly, that the Prime Minister and others fully understood the implications of what was being negotiated but couldn't deal with them politically because it effectively meant a reversal of the prevailing consensus on national development. They thus chose to duck the issues by avoiding formal engagement to the extent possible.
- Thirdly, because there was no procedure that could bridge the gap between the need for political legitimacy (which the domestic procedure would have provided), and the need for speed and prompt responses (which the negotiators needed).

At another level it is apparent that senior levels of the Government (both political and bureaucratic) still believed that they could get away with signing the Uruguay Round agreements, including TRIPs, and then *not* complying with its domestic policy obligations. This thinking was a relic of the old and classic divide between foreign and domestic policy jurisdiction.

At another level it is apparent that senior levels of the Government (both political and bureaucratic) still believed that they could get away with signing the Uruguay Round agreements, including TRIPs, and then not complying with its domestic policy obligations.

It was often suggested that the TRIPs Agreement would violate India's domestic economic sovereignty, implying thereby that India would be justified under international law in disregarding these agreements if compelled to sign. They failed to appreciate however that new and more effective entry-into-force provisions, along with tighter provisions to monitor compliance and enforcement, would effectively compel compliance.

Some people did recognise this development and in fact there were serious calls for India to withdraw from the entire negotiation and to pursue its trade policy outside the multilateral process. By and large however, most people in the Government continued to believe that international treaties could not compel a government to do what it didn't want to do, and so stuck with their original assumptions.

Lack of Institutional Support

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

In addition to the procedural problems it appears that India lacked the domestic institutional capacity to support the negotiating team, and was also not prepared to approach outside or foreign institutions to undertake this work.

- Information and data: institutional consideration of issues depends on reliable basic information and data. Most industry-generated data was thought to be inaccurate and thus useless. Government data and information were also of little use, as they were not collected with negotiating requirements in mind. Moreover in the field of intellectual property rights it was not altogether clear as to what data and information was needed to make an impact assessment of a negotiating proposal.
- Contrary evidence: whatever data there was about intellectual property rights tended to confirm that the government's policy since the 1970s had been correct as both the pharmaceuticals and food sectors had achieved a high degree of self-sufficiency. It doesn't help negotiators who are trying to accommodate US and international pressure if the only evidence they have leads to the conclusion that weakening of intellectual property regimes actually helps developing countries.
- Alternatives: the Commerce Ministry and the negotiating team effectively had no institutional support from within India, and would not have been trusted had they sought such support from outside the country. There was therefore no one to either suggest negotiating positions or to analyse negotiating proposals in a manner that would have suited the requirements of negotiators.
- In-house advice: the Indian Institute of Foreign Trade (IIFT), attached to the Commerce Ministry, was really the only institution that the Commerce Ministry could turn to. But the IIFT was staffed mainly with economists and statisticians, and could not have provided the sort of interdisciplinary political-legal-economic analysis that would be of help to the negotiators. Moreover there was very little that they could contribute to the debate on TRIPs, largely because this was not an issue easily amenable to statistical or economic analysis.
- Business associations: trade and industry associations were rarely consulted, partly because they didn't really understand the issues and partly because they were not set up to do anything other than lobby the government for the interests of their members. They therefore had no internal systems that could have considered issues of the sort under negotiation.
    - Pharmaceuticals: in the pharmaceuticals sector, most of the major players in basic drugs and medicines were Government owned or Government dependent, and policy towards this sector was a politically 'settled' issue. Opening a debate would have meant opening a new political front, which would have been foolish given the political situation in the country.

- Entertainment: the entertainment, recording and film industry were either not organised to address TRIPs issues, or were not interested (assuming the Government wouldn't give in) or so unreliable as to be worse than useless. They were also the targets of much US anger over piracy, so hardly the right people to consult.

- Academic institutions: academic institutions had a similar problem as the IIFT – they were sectorally strong but couldn't provide an interdisciplinary assessment at short notice on issues that they understood very little about in any case. Also, because most important academic institutions were funded by the Central Government, whatever expertise they had was largely based on familiarity with the prevailing developmental model of self-sufficiency. There were few academics who were familiar with the issues and concepts that underpinned the Uruguay Round process.
- Think tanks: think tanks had the same problems of academic institutions in terms of their funding and basic orientation, though they were stronger in terms of public policy issues and interdisciplinary capacity. But because they were not part of the government (defined narrowly) consulting them would probably not have been politically acceptable. Moreover think tanks in India have a reputation for taking their time. The negotiating requirements of the team in Geneva would have needed policy positions and assessments in a matter of days or hours.
- NGOs: a large number of non-governmental organisations (NGOs) took an interest in the TRIPs negotiations and were well informed but had little or no organised or structured interaction with the Government on the issues involved. This was largely because the system wasn't proactive enough, but was responding to events. Also, historically NGOs in India have been very suspicious of the bureaucracy and prefer to operate in the political environment. This may partly explain why the amended Patents Act keeps being defeated.
- Foreign devils: the possibility of taking the formal assistance of any foreign institution would have been politically unacceptable.

It is clear from the foregoing that the Government of India was simply not organised to support the negotiating team with substantive advice. What negotiators wanted – and got to an extent – was negotiating autonomy and political support.

It is clear from the foregoing that the Government of India was simply not organised to support the negotiating team with substantive advice. If they went down the route of intensive consultation the process would have taken years and been of no use to the negotiators. If however they didn't go down that route, questions would be raised about the legitimacy of the process. What negotiators wanted – and got to an extent – was negotiating autonomy and political support. The problem was that this process lacked political legitimacy, and was devoid of usable analytical material.

Section V

Parliamentary and Other Committees

Towards the end of 1991, media interest in the draft agreement - the Dunkel draft - was driving a wider political debate in the country about the negotiations generally and the TRIPS agreement more specifically. This triggered a political process that was to threaten the Government's peculiar strategy. As Prime Minister, Narasimha Rao was a master of political management and he appears to have realised that he could not defend his Government's negotiating record if it was exposed to thorough scrutiny. Both procedurally and substantively the Government was very vulnerable. If he confessed to engaging in the negotiations he would be admitting to colluding with a process that effectively reversed India's development policies. If however he asserted that India would refuse to sign up to the agreements, he would be compromising India's position in the international system more generally and also threatening the agreements that had been signed with the IMF and the World Bank on structural adjustment.

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He therefore had to lower the political temperature and get the parliament to acquiesce in the process without actually having to discuss the issues substantively. So he adopted a masterful strategy which should be a lesson to political managers everywhere. He constituted a Group of Ministers (GoM), under the chairmanship of his rival within the party (Arjun Singh) to look in detail at the Dunkel draft. This effectively neutralised opposition from *within* his own party, which had been building on a number of issues. He also allowed the appropriate Consultative Committee of Parliament, under the chairmanship of I. K. Gujral (who was fortuitously later to become PM), to also look at the draft in detail. This move effectively defanged the *opposition*, which had been earlier spoiling for a fight. By immersing these two committees in the endless detail and technicalities of the draft – which they didn't really understand - he effectively removed them from the debate and thus calmed the political atmosphere.

In all this he must have known that any significant inputs at this stage would be meaningless and that the Uruguay Round process would hardly stop while Indian politicians ruminated over its contents. It could therefore only serve a domestic political purpose, which is exactly what happened.

The Consultative Committee's report, which actually came to the conclusion that there was no option but to join the multilateral process, was released on December 13th, 1993, just a few hours before the negotiations concluded in Geneva! This was of no use to anyone.

The recommendation of the GoM was that substantive parts of the draft needed to be renegotiated, especially the TRIPs component. But the importance of this recommendation was submerged in a broader political crisis. Arjun Singh resigned from the Congress Party (over the Government's communal policies) and this side-show took everyone's mind off the importance of the GOM's report. In fairness, it is also quite possible that Arjun Singh had made this set of recommendations to unsettle the Prime Minister, and the Prime Minister had simply outmanoeuvred him politically. Whatever the reasons, the effect was to divert everyone's attention from the Uruguay Round negotiations. The Prime Minister ducked the issue in Geneva as well: India was the only major country that failed to express a formal view on the Dunkel draft.

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Both committees had thus served their political purpose and had effectively defused a lot of the political tension that had been building since the late 1980s. But this did not conceal the fact that there were serious procedural flaws in the Indian system. The political campaign against certain provisions of the Uruguay Round results began substantively *after* the treaty entered into force. The Agreement was widely perceived to lack political legitimacy precisely because there was no real discussion about it at any point of time. This may have been a triumph of political management in some senses, but it was disastrous from the perspective of political credibility or effective policy scrutiny. When this situation is compared to the rigorous parliamentary and congressional scrutiny that other governments had to face in getting the agreement ratified through national parliaments, one realises just how inadequate and deficient the Indian system was.

Section VI

Negotiating Positions Taken by India in the TRIPs Negotiation

Ironically the first major salvo in the battle to address intellectual property issues as part of the multilateral process was fired in the 1970s by developing countries.

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

This was also the first real occasion during which the deep divide between developing and developed country perspectives were seen to clash. An UNCTAD (United Nations Conference on Trade and Development) study of 1974[7] showed that nationals of the US, Germany, France, Switzerland and the UK held 92 percent of patents, whereas nationals of developing countries held only one percent of patents.

Efforts to amend the Paris convention during the 1980s foundered on this very divide. Developing countries wanted to retain the use of compulsory licensing and to reduce royalties payable, while developed countries wanted to tackle the problems of piracy and counterfeiting. This is how matters stood on the eve of the Uruguay Round.

Overall, a feeling grew amongst developed countries that various conventions were not coming to grips with the problem (as defined by them) and nor was the WIPO capable of pushing the agenda any further because of the political deadlock within its system.

The Berne Convention was similarly stymied, though the position of the developed world was somewhat weakened by the fact that the US did not even become a signatory till 1988 – 103 years after its conclusion. From India's perspective however, this was not a major problem as they were already signatories, but of course their enforcement provisions were the subject and target of much criticism.

Initial Moves

Overall, a feeling grew amongst developed countries that these various conventions were not coming to grips with the problem (as defined by them) and nor was the WIPO capable of pushing the agenda any further because of the political deadlock within its system. It would be interesting to speculate about how events would have developed had developing countries showed greater willingness during the early 1980s to address these concerns. In a sense developing countries were responsible for the way in which events eventually unfolded.

Developing countries failed to heed the growing number of alliances forming in the corporate world to press their case upon the US Government. The International Intellectual Property Alliance, and the International Anti-Counterfeiting Association, were two such examples representing major corporate interests.

Developing countries also failed to heed the growing number of alliances forming in the corporate world to press their case upon the US Government. The International Intellectual Property Alliance, and the International Anti-Counterfeiting Association, were two such examples representing major corporate interests. This process culminated in the US Congress concluding that a figure of tens of billions represented the direct loss to US companies of global counterfeiting.[8]

The debate on intellectual property was acquiring a moral dimension that was to cripple developing country confidence in their own position. The use of terms like 'theft' and 'cheating' became part of the debate and it became increasingly difficult for developing countries to justify their policies on economic or political grounds. The ascendancy of neo-liberalism in current thinking at the time also ensured that counter arguments were made to look like an assault on motherhood. From the moment that the issue became a moral and ethical question, developing countries were on the defensive.

During the 1982 GATT ministerial conference the US in particular pushed to include negotiations on counterfeit goods – a position that enjoyed the support of the European Community (from 1979) and Japan and Canada subsequently – but were partially frustrated by Brazil and India.

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

During the 1982 GATT ministerial conference the US in particular pushed to include negotiations on counterfeit goods – a position that enjoyed the support of the European Community (from 1979) and Japan and Canada subsequently – but were partially frustrated by Brazil and India. They took the position that WIPO was the only legal and appropriate forum to consider these issues, and that GATT's jurisdiction was limited to trade in tangible goods in any case.[9] The US had to settle for a modest work program that mandated the GATT Director General to discuss the matter further with his WIPO counterpart to clarify the legal and institutional position.

1984-86

The battle to include intellectual property rights in the new round was beginning to move in the direction sought by developed countries, though India and other developing countries had effectively employed the diplomatic equivalent of guerrilla tactics to delay and harass the process for more than two years.

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

In their report to the GATT Council in 1985, the expert group could not reach a clear determination on the main issues referred to them and asked the Council to make such a determination. This was again because India and other developing countries were active in pushing their perspective. The GATT Council agreed to establish a Preparatory Committee to address the new subjects for a new trade round, which included consideration of this issue.

The battle to include intellectual property rights in the new round was beginning to move in the direction sought by developed countries, though India and other developing countries had effectively employed the

diplomatic equivalent of guerrilla tactics to delay and harass the process for more than two years.

Interestingly, these developments were virtually unknown within India and were of little or no interest to the Indian corporate sector. They were reported in the press – which seemed to have a better idea of the importance of what was taking place – but were treated with blithe unconcern by parliament and the political class generally.

Interestingly, these developments were virtually unknown within India and were of little or no interest to the Indian corporate sector. They were reported in the press – which seemed to have a better idea of the importance of what was taking place – but were treated with blithe unconcern by parliament and the political class generally. The 'achievement' of delaying the whole process of a round can be attributed almost entirely to the skills of the negotiators in Geneva.

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

The US (with the support of Japan) moved initially to include all intellectual property rights within the ambit of the negotiating agenda, while India and Brazil in particular argued vehemently that the issue of counterfeiting of trademarked goods was beyond the jurisdiction of GATT. They also objected to the inclusion of other categories of intellectual property rights because these covered intangible objects. Progress stalled and a coalition of middle level developing and developed countries[10] undertook an initiative to break the deadlock. Though their draft did not enjoy full support it recommended the inclusion of services and intellectual property rights in the agenda. It was forwarded to the Preparatory Committee to be sent on to GATT ministers.

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

Two other proposals went forward to the Preparatory Committee formulated by Brazil and Argentina. Brazil's proposal, which represented the views of nine developing countries including India, rejected the inclusion of services and intellectual property rights. The Argentinean proposal represented a compromise and recommended the inclusion of services but the exclusion of intellectual property rights. Ultimately, and after intense wrangling, the Swiss-Colombian proposal formed the basis of the agenda for the Uruguay Round.

The 1986 GATT ministerial conference in Punta del Este, Uruguay was bitterly divided over the inclusion of this and other new issues. However, the developing country group led by Brazil and India finally had to relent largely because they were substantially outnumbered. They also thought that an acceptable formulation of words was found that allowed negotiations on some of the more contentious issues to run in parallel *outside* the structure of the main negotiations would protect their interests. In the long run this proved to be of little relevance because the results of the round as a whole were to be treated as a single undertaking. Moreover, although TRIPs was to be discussed within the structure of the negotiations on goods – thus implying that only *tangible* intellectual property rights were to be considered, which was one of India's negotiating objectives – this was qualified by the requirement to promote effective and adequate protection of intellectual property rights.[11]

The ministerial declaration tried to embrace the sharply differing perceptions of the developed and developing world on the issues, and the best method to address them. It accepted that better methods for enforcing property rights were needed, provided that they did not themselves constitute barriers to trade.

The ministerial declaration tried to embrace the sharply differing perceptions of the developed and developing world on the issues, and the best method to address them. It accepted that better methods for enforcing property rights were needed, provided that they did not themselves constitute barriers to trade. It also sought to apply minimum standards. As a salve

to developing countries, it concluded by saying that this work would be without prejudice to the activities of the WIPO. A time frame of four years was set down to complete the negotiations.

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The US had got substantially what they were after: the inclusion of all categories of intellectual property and minimum global standards of protection. References to the WIPO were really a sop because it had been developing countries that had blocked progress through that route and it was difficult to see how they could generate an alternative model of intellectual rights protection with developed countries (the bulk of intellectual property rights holders) having shifted their focus to the GATT negotiations.

Taken together this outcome was not favourable from India's point of view. But the reality was that India was a very marginal player in international trade, and her interest in the issues was really only theoretical.

The dam had burst across a wide range of fronts. Services and investment measures were also to be included without a commitment on standstill and roll back; and agriculture was to be included for the first time since the 1950s. Taken together this outcome was not favourable from India's point of view. But the reality was that India was a very marginal player in international trade, and her interest in the issues was really only theoretical. Moreover support for the traditional position of developing countries had eroded steadily over the previous few years, partly because it was so theoretical and didn't help resolve some of the practical issues that exporting countries were trying to come to terms with. The negotiators had shown considerable skill in delaying the inevitable for almost four years, but overall this was definitely a negotiating failure.

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Here again, there was only a vague understanding in India of what was taking place, and almost no interest at all from within the corporate sector. The degree of political ignorance or disinterest was reflected in the speech of India's Finance Minister V. P. Singh (who was later to become Prime Minister) in the proceedings of the ministerial conference. He talked in vague and general terms about poverty and development and sovereignty. There was little grasp of the issues and even less sense of the importance of what was happening.

In 1986 therefore, India faced a stark choice; either accept the inclusion of new issues on the agenda, or leave the negotiations altogether. The second option was simply not acceptable however, largely because India considered itself a good international citizen.

In 1986 therefore, India faced a stark choice; either accept the inclusion of new issues on the agenda, or leave the negotiations altogether. The second option was simply not acceptable however, largely because India considered itself a good international citizen and was proud of being engaged with the international system. She also – mistakenly as it turned out - continued to think that that she could hold her own in the international system, when actually she couldn't.

Perhaps India's policy makers hoped that countries around the world would reassert the principles of the international system and so defy the US; or perhaps they thought that the project would collapse under the weight of its obvious contradictions with constitutional systems around the world; or perhaps they thought – like many politicians in a bind – that time would solve most of the problems anyway.

Perhaps India's policy makers hoped that countries around the world would reassert the principles of the international system and so defy the US; or perhaps they thought that the project would collapse under the weight of its obvious contradictions with constitutional systems around the world; or perhaps they thought – like many politicians in a bind – that time would solve most of the problems anyway. At any rate, in 1986 India compromised over the agenda, allowed intellectual property rights issues on to the agenda (along with services and investment measures – none of which were traditional GATT subjects).

1986-1988: The First Phase

With the agenda settled, ministers agreed in early 1987 on the structure and procedures that would be followed for the negotiations on trade in goods. The initial phase was to be exploratory, essentially trying to get a

handle on the issues and to set them out clearly, and to see how they related to other subjects under negotiation. The negotiating group on TRIPs formally met five times during 1987 and received specific proposals on attaining the negotiating objectives from the US, Japan, Switzerland and the EC. It is striking that developing countries including India did not have a position other than to oppose the negotiations altogether.

A feature of the first half of the Round in particular was the close co-ordination that developed between the Brazilian and Indian delegations. This was built almost entirely on personal factors and was kept away from politicians on both sides.

Since every country had the right to attend every negotiating group meeting, strategies had to be devised by the smaller delegations – of which India was one - to cover negotiating sessions in which they were interested but which they simply couldn't attend. A feature of the first half of the Round in particular was the close co-ordination that developed between the Brazilian and Indian delegations. This was built almost entirely on personal factors and was kept away from politicians on both sides.[12] Thus Brazil and India were negotiating allies in a major international conference but neither Government was aware of it! This was true of many delegations at the negotiations and is one of the reasons why questions of legitimacy and accountability have been raised.

This suggests that the Government of India had not thought about a fall back position since the prospect of not being able to stop the process had never been contemplated. The negotiators could hardly make one up on their own without some degree of direction from the Government.

This suggests that the Government of India had not thought about a fall back position since the prospect of not being able to stop the process had never been contemplated. The negotiators could hardly make one up on their own without some degree of direction from the Government. Moreover, formulating a negotiating position involves intensive domestic consultation and analysis - a process that was completely missing from the government of India's way of doing business during the course of the Round.

Negotiators thus fell back on established positions during 1987 and 1988. While developed countries were anxious to push forward on raising global standards of intellectual property protection and looking at enhanced enforcement and retaliatory procedures,[13] Brazil and Mexico (on behalf of India as well) argued that the negotiations should look at the impact of such proposals on technology transfer and should not concentrate solely on the interests of rights' holders.[14]

This deadlock in negotiating positions carried through to the mid term review in Montreal in December 1988, though a number of developing countries had shifted their position to accommodate developed country demands and progress had been made on some elements of the agenda.

They argued that overly heavy protection of intellectual property rights would deprive them of access to high technology, which would in turn hamper their development. At the same time developed countries were reporting increased pressure from corporate interests at the direct economic harm done to their interests by the problems of inadequate standards of protection and inadequate remedies against violation.

This deadlock in negotiating positions carried through to the mid term review in Montreal in December 1988, though a number of developing countries had shifted their position to accommodate developed country demands and progress had been made on some elements of the agenda. Both agriculture and intellectual property rights negotiations lay at the heart of a broader deadlock,[15] and the session ended without agreement even though six of the fifteen negotiating groups had been able to reach agreement on their reports, and a further five were reasonably close to agreement. Europe was inflexible on agricultural reform, while the US was insistent, and five Latin American countries (members of the Cairns Group of agricultural products exporting countries) insisted that nothing would move on other fronts until agriculture was sorted out.[16]

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Even in the TRIPs negotiations progress had been made but Brazil and India continued to oppose major elements of the draft. Since India generally supported efforts to keep agriculture off the negotiating agenda – at least

on the terms being suggested, she was reasonably satisfied with the outcome even though agreement on textiles and safeguards -issues of interest to her - was still to be reached.

At the same time a broad framework for agreement had emerged in the other eleven areas, which demonstrated that with a little flexibility agreement was possible, provided of course that the EC and the US showed greater flexibility on agriculture. Hence, a short break was suggested to give everyone time to consult and to consider negotiating positions afresh.

Though India still opposed an agreement on intellectual property rights, she was becoming increasingly isolated. The discussions during the mid-term review in December 1988 actually came close to agreeing a framework for negotiations, supported by a broad coalition of developed and developing country interests.

Though India still opposed an agreement on intellectual property rights, she was becoming increasingly isolated. The discussions during the mid-term review in December 1988 actually came close to agreeing a framework for negotiations, supported by a broad coalition of developed and developing country interests. However the hard line taken by Brazil and India effectively prevented this.

India's isolated position – apart from exasperating a lot of countries – was actually beginning to impair her ability to pursue agreements in other negotiating areas that were of interest to her, particularly textiles. It was also beginning to harm her international image more generally. From being a country with a reputation as a good global citizen she was becoming something of a spoiler in the international system. Moreover, this position was becoming increasingly hard to maintain under the intense pressure being brought by the US and her negotiating allies.

In April 1989 India informed Trade Negotiations Committee that she would no longer oppose progress towards an agreement on intellectual property rights, though she continued to question whether a TRIPs agreement should form part of the final results of a GATT negotiation.

1989-90: The Second Phase

It was no surprise therefore that in April 1989 India informed Trade Negotiations Committee that she would no longer oppose progress towards an agreement on intellectual property rights, though she continued to question whether a TRIPs agreement should form part of the final results of a GATT negotiation.[17] This decision was accompanied by a substantive movement in textiles negotiations and allowed work to resume on reaching a constructive agreement not only within intellectual property rights but on a broader range of issues as well.

In fact, it had been clear since Montreal in December 1988 that agreement in textiles and safeguards was contingent upon reaching agreement in agriculture and intellectual property rights. Tactically therefore India had to consider where her interests lay in the broader scheme of things. Although her change of stance was perceived in India as a capitulation to US pressure, in reality it was not so simple. Allowing the negotiations to *proceed* did not in itself suggest that India's interests would be compromised as only the negotiating framework had been agreed. India therefore had much to play for. However, her constructive engagement with the negotiating process probably came too late for her to effectively shape events and significantly influence the drafting of the agreement. With hindsight therefore it is possible to say that tactically she should have conceded earlier in the negotiating process and then tried to shape that outcome from within.

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But this raises questions about when this change of policy was considered and communicated. Evidence suggests that no real consideration was given to the idea of conceding until international pressures built up to the extent that they could no longer be resisted. The trade-off with textiles was not really a balanced result as textiles and clothing could be clearly defined as 'goods', whereas intellectual property could not. This again

suggests that the real lacuna lay in the policy making process in Delhi, which was required to consider alternative strategies around possible variations in the negotiating approach.

With agreement on the framework, negotiations were mandated to consider standards concerning the scope and use of intellectual property rights and the means to enforce them effectively.[18] They were also to consider concerns relating to the underlying policy objectives of national systems, including developing countries – an acknowledgement of developing country apprehensions about the purpose of the negotiations. The negotiations were also to be 'supportive' of the relationship between the WTO and WIPO – another minor concession to the question of jurisdiction, and a decision on the final institutional arrangements was deferred.[19]

With agreement on the framework, negotiations were mandated to consider standards concerning the scope and use of intellectual property rights and the means to enforce them effectively.

Events now began to move rapidly. Two meetings were held in July 1989, which built upon the positive atmosphere of the April meeting. From India's point of view the second of these meetings was significant because it was the first occasion in which India submitted a proposal, thus signifying their willingness to participate constructively in the negotiations. This raises a number of important questions about policy making within the Government. Surely they couldn't have maintained a defiant stance as a viable negotiating option through the duration of the entire negotiations. Surely the Government had considered the alternatives.

Events now began to move rapidly. Two meetings were held in July 1989, which built upon the positive atmosphere of the April meeting. From India's point of view the second of these meetings was significant because it was the first occasion in which India submitted a proposal, thus signifying their willingness to participate constructively in the negotiations.

India's submission made three points. The first that the negotiations should only consider those practices that distorted international trade. The second that GATT principles of Most Favoured Nation (MFN) and National Treatment could apply only to goods. Thirdly, she argued for more favourable consideration of developing countries with respect to patents and trademarks, and suggested that national governments be left free to adapt their systems to address their policy needs.[20] While this was in a sense a restatement of much that India had said on previous occasions, it was said within the context of an agreed negotiating framework and that was the main difference.

1989 saw a large number of proposals circulating for the consideration of delegations, some reiterating well-known national positions with others looking for compromises. While progress at finding a consensus was difficult, views were beginning to coalesce into two distinct streams, with specific agreement on one issue – least developed countries would be given a longer transitional period to implement whatever was finally agreed upon.

Between March and May 1990 five drafts were circulated. Four of these related to developed countries, and the fifth to developing countries. The US, Japan, Switzerland and the EC represented developed country proposals, while Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay tabled a joint developing country draft.[21] Interestingly the EC sided with developing countries on the question of coverage of patent protection. The US wanted there to be no exceptions to patentable material, while the EC and developing countries argued for some exclusions for inventions that would be contrary to public policy and health, plant or animal varieties or the biological process for their production.[22] Developing countries went further and sought exclusion for discoveries, materials or substances already existing in nature, methods for the medical treatment of humans or animals, and nuclear material.

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The EC and the US were also divided on the question of appropriate protection for geographical indications including appellations of origin. The dispute was whether these appellations were generic (which the EC wanted protection for) or non-generic (which the US proposed). The former would give greater protection to products known by their geographic appellation (for example Champagne), while the latter would not.

The emergence of developed country differences was proving to be a problem and the negotiations tended to stall while the EC and the US tried to sort things out. The fact that some of these issues had to do with agricultural negotiations also, further complicated the search for a compromise. Differences were also beginning to emerge between the positions of the US and Japan on rental rights, which would only really be resolved towards the end of the negotiations.

The emergence of developed country differences was proving to be a problem and the negotiations tended to stall while the EC and the US tried to sort things out. The fact that some of these issues had to do with agricultural negotiations also, further complicated the search for a compromise.

As the date for the Brussels ministerial conference scheduled for December 1990 fixed, efforts were made to try and summarise the points of agreement and the points of disagreement in the hope that political intervention would help break the impasse with respect to some of the more important issues. The chairman of the TRIPs negotiating group circulated a draft text of the status of the negotiations. Version A represented the structure of what developed countries hoped to achieve (a single comprehensive TRIPs Agreement), while Version B represented the structure that developing countries hoped to achieve (Two separate Agreements – one on counterfeit and pirated goods, the other on standards to be implemented within the relevant international institution). Within these two structures there were obviously similarities and differences between and amongst the two groups, which further complicated the picture.[23]

This version formed the basis for intensive discussion that ultimately yielded several drafts, and some progress. Negotiations were pursued both formally and informally and their intensity increased towards the end of November 1990, which saw three drafts emerge.

The draft included in the Draft Final Report submitted to the ministers brought out just how much progress had been achieved and also listed the issues on which Agreement could not be reached. The specific issues left unresolved at the conclusion of this intensive phase were:

As the date for the Brussels ministerial conference scheduled for December 1990 fixed, efforts were made to try and summarise the points of agreement and the points of disagreement in the hope that political intervention would help break the impasse with respect to some of the more important issues.

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

At the same time, two big issues remained to be resolved: how exactly would the TRIPs Agreement fit into the GATT process, and the strength of dispute resolution procedures for resolving disputes in intellectual property rights.

A resolution of these issues depended on the architecture and structure of the final Agreement, which could not be decided upon because of continuing and deep differences over agriculture. The Brussels ministerial conference thus ended inconclusively. In restarting the negotiations, it was thought that differences between the EC and the US over agriculture had to be resolved to get movement across a broad front.[24] To keep up the negotiating tempo, the Director General also reorganised the

negotiating groups bringing them down from 15 to 7, and placed emphasis on securing technical agreement where possible, leaving the political questions for final resolution along with agriculture.

Though the Brussels meeting 'failed' it did demonstrate to both developing and developed countries just how far the process of forging a consensus had progressed on a range of technical and complex issues, and despite major differences in approach and opinion. There was growing momentum amongst a critical mass of negotiating countries to ensure that the benefits of what had been achieved would not be lost. There was additionally growing interest in giving the new system an institutional basis through the proposed multilateral trade organisation. This interested a lot of countries that wanted to limit the power of some countries - notably the US - to employ unilateral methods.

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1991: The Third Phase

Negotiations in the reorganised negotiating group revived in June 1991, and delegations generally agreed to negotiate on the basis of the 1990 draft that went before the ministers. Negotiations were both structured and unstructured, with the number of informal meetings intensifying as issues became clear and the outline of possible solutions and compromises emerged. Interestingly, the focus of much of this activity centred on resolving differences within the 'quad' (i.e. the US, EC, Japan and Canada), and between quad members through bilateral discussions. Two issues that illustrate this point involved intensive discussions. The first was with regard to Collective Rights (between the US and France), and the second concerned Rental Rights (between the US and Japan).[25]

The actions of the Director General were crucial at this point. In July he informed the Trade Negotiations Committee that the major ingredients for an Agreement were in place and that to conclude the Round successfully, some political compromises were necessary because all the technical and preparatory work had (almost) been completed. He therefore set in place the systems necessary for a final push, which effectively meant that the DG and his staff would become (more) active and seek to broker agreements and compromises through intensive consultation with the delegations.[26]

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Delegations were increasingly aware of the emerging shape of the final package and this helped focus on resolving outstanding issues. A great deal of 'cross-pollination' between negotiating groups had already taken place and the process now intensified. National delegations were able to get a sense of where they would gain or lose overall, and this gave politicians a clearer picture of the whole. At the same time it was clear that in the TRIPs negotiations in particular, much hinged on progress in the Round as a whole, and a breakthrough had to take place on a number of fronts simultaneously. This was because of the political trade-offs that were needed.

In December 1991, the Director General circulated a Draft Final Act embodying the results of the negotiations across all sectors. The draft of the TRIPs Agreement suggested a number of compromises that the delegations themselves had been unable to reach. These had been included in the report by the chairman of the negotiating group (the Swedish Ambassador) at his own initiative, which he had not done at any stage earlier and which represented a departure from the usual way in which GATT business was conducted.

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The TRIPs draft made compromises in a number of areas: Japan got some protection for its position on Rental Rights, which were now to be 'grandfathered' in Article 11. Article 23 gave additional protection (under geographical indications) for wines and spirits, which the French wanted. The provisions of Article 25 on industrial designs came closer to the positions favoured by the EC, Switzerland and Japan than that favoured by the US. Patent protection (Article 33) would be twenty years from the date of filing, which is what the US had wanted, while Article 27(3) excluded "plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological or microbiological processes[27]" from patentability. This exclusion was favoured by developing countries but not by the quad. Similarly, a compromise was suggested for the period of transition to full implementation. Developing and least Developed countries were given longer transition periods, with further variations in sectors of importance to them (Articles 65 and 66).

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This draft would effectively go through to the end of the negotiations as the final version. Two outstanding issues fell away (on counterfeiting and dispute resolution), and two small changes of substance only remained for the final stages. With the organisational and institutional arrangements for the round as a whole becoming clearer, the TRIPs Agreement could be comfortably "fitted in" to the architecture of the final agreement.[28]

The Draft Final Act was also being offered as a package that had to be accepted or rejected as a whole. This meant that national governments had to assess the impact of the total package before deciding how to react. In respect of the TRIPs draft two countries had serious reservations: India and the US.

Since the Draft Final Act covered all the sectors that were being negotiated in the round, national governments took time to digest and absorb the implications of what was being proposed, and so reaction to the proposals was somewhat muted. There was also the problem of comprehension amongst the general public, which of course still remains. The language used was often technical and opaque and it was difficult for the public to get a measure of what was being suggested.

The Draft Final Act was also being offered as a package that had to be accepted or rejected as a whole. This meant that national governments had to assess the impact of the total package before deciding how to react. In respect of the TRIPs draft two countries had serious reservations: India and the US. India was concerned with the period of transition, which she considered too short. Ultimately India was the only major country that failed to take any position on the acceptability of the Draft Final Act as a whole.[29]

Within India, the Dunkel Draft became the focus of intense political activity, debate and opposition, even though its implications were not widely understood by the general public or even by the corporate sector. The debate centred largely on questions of autonomy and sovereignty, and of whether other countries - the US was implied in this case - could impose an economic model on a sovereign country.

Within India, the Dunkel Draft became the focus of intense political activity, debate and opposition, even though its implications were not widely understood by the general public or even by the corporate sector. The debate centred largely on questions of autonomy and sovereignty, and of whether other countries - the US was implied in this case - could impose an economic model on a sovereign country. The Dunkel Draft also arrived on the political scene when the country was already in the midst of a fierce political debate over the terms of the Structural Adjustment Programme that had been negotiated earlier in the year with the IMF and the World Bank. The Government was on the defensive, yet managed the crisis with considerable skill.

To neutralise opposition within the ruling Congress Party - of which there was a great deal - the Prime Minister established a Group of Ministers (GoM) to study the implications. He appointed his arch political rival as its chairman. And in parliament, the newly formed Consultative Committee for the Commerce Ministry took up a study of the Draft and held a series

of hearings. This effectively kept everyone busy with trying to understand the details of the Draft, and so kept them quiet. India's failure to formalise a response to the Draft was in effect an outcome of the Government's unwillingness to publicly support the overall results, though internally they remained engaged with the process. This was the hallmark of Prime Minister Narasimha Rao's style of functioning.

On the streets however the mood was quite different and very hostile. The TRIPs Agreement was thought to give away too much - including India's cultural heritage - while the Textiles Agreement was thought to have achieved too little. But these protests, though often supported by well-informed and well-organised NGO groups, did not translate into a major political challenge largely because the Prime Minister had co-opted much of the opposition in to the process of studying the Draft!

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Reaction in the US to the TRIPs draft was hostile, particularly from the pharmaceuticals and motion picture industry who thought that the standards and levels of protection offered was too low, and the transition periods for developing and least developed countries was too long. They also wanted international protection to corporate copyrights.

Negotiations generally could not resume however until the EC and the US resolved their differences in agriculture and until countries had time to study the Draft Final Act in its totality. Thus, negotiations only resumed in late November 1992. India put forward proposals to amend the Draft, as did the US. India proposed that the omission of exclusive rights to market patented products from the Agreement. She further recommended that if facilities to 'work' a patent in a market were not established then the patent could be revoked through compulsory licensing. The US argued for 'pipeline' protection for patents, which had not then been incorporated, and for the application of National Treatment principles to corporate copyrights.

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

Negotiations generally could not resume however until the EC and the US resolved their differences in agriculture and until countries had time to study the Draft Final Act in its totality. Thus, negotiations only resumed in late November 1992. India put forward proposals to amend the Draft, as did the US.

The US was initially sceptical of the proposal (which is why it was tabled so late in the proceedings even though it had been talked about informally for quite some time) largely because of the fear of Congressional hostility, and because it would constrain their freedom of action. It was for exactly these reasons, however, that developing countries largely supported the idea, and this imparted a sense of balance to the Round as a whole that many countries that had been troubled by the prospects of US dominance of the system felt they could live with. Moreover, as it became clearer that a unified dispute settlement system would emerge and would operate from within the structure of the WTO (again constraining the rights of members to ignore findings), the overall architecture of the agreement was becoming increasingly attractive from a developing country perspective. This was because the system was now shifting from a power-based system to a rules-based system with independent and binding adjudication of disputes.

In the TRIPs negotiating group compromises were also gradually emerging that addressed some of the concerns that had been raised over the Draft.

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

Compromises were reached with respect to the working of patents and compulsory licensing under certain conditions. Similarly, US concerns about the lack of 'pipeline' protection particularly for pharmaceuticals during the transition period were also addressed.

Other compromises emerged through the use of a number of clever negotiating devices that had been pioneered during the course of the negotiations. In addition to the time honoured device of using ambiguous or vague language, the use of mandated or built-in reviews was one means employed to allay fears that harmful treaty provisions could never be redressed. The use of staggered application schedules for developing and least developed countries helped keep everyone on board.

Attention during the last few months of the negotiations naturally tended to focus on the larger institutional issues.

Attention during the last few months of the negotiations naturally tended to focus on the larger institutional issues. At the same time the negotiating process was continuously convulsed by efforts to reopen some issues that were often the result of political reactions back home.

Conclusion and Summary of Findings

This paper arrives at a number of findings that would have relevance for policy makers. However the issues are complex because they range from larger questions regarding the system and how it could deliver higher standards of political legitimacy, to the specific sectoral requirements of negotiators.

This paper arrives at a number of findings that would have relevance for policy makers. However the issues are complex because they range from larger questions regarding the system and how it could deliver higher standards of political legitimacy, to the specific sectoral requirements of negotiators. These have been summarised below in three categories, which address the principal problem areas of the present approach. The first concerns procedure and institutional support, the second concerns diplomacy, and the third concerns political, legal and constitutional considerations.

The findings would generally apply as much to the TRIPs negotiations as to the Uruguay Round as a whole. The differences are really because of the nature of the subject, while the procedural requirements remain largely the same.

Procedures

- Policy and decision-making: the decision-making procedures of the Government of India were not up to the mark in dealing with an issue that involved international treaty making *and* domestic policy reform at the same time. Government procedures could accommodate either one or the other, but not both. As a result, a sort of hybrid form of decision-making was adopted that was inadequate for satisfying the procedural requirements of either foreign policy processes or domestic policy making procedures. The handling of the negotiations was thus criticised for failing the test of political legitimacy *and* for breaching the principles of political accountability, which the two systems are supposed to provide in one form or another. The system needs to be redesigned to provide for this.

  A sort of hybrid form of decision-making was adopted that was inadequate for satisfying the procedural requirements of either foreign policy processes or domestic policy making procedures.

  The various committees that were set up within the bureaucracy and at the cabinet sub-committee level were never really ahead of the game and were of little constructive use. Consultative systems within the bureaucracy and at the cabinet level should be a more intrinsic part of the process.

  Decisions with major domestic policy implications were thus made largely by a small group of senior officials with only minimal political consultation, or by the delegation in Geneva. While negotiating flexibility is an essential element of any negotiation, so too is credible political support. And this can only be built through procedures that provide for intensive political consultation.

  Decisions with major domestic policy implications were thus made largely by a small group of senior officials with only minimal political consultation, or by the delegation in Geneva.

- Ratification: ratification procedures for international treaties did not require anything more than cabinet approval. While this was originally meant to give the executive the maximum possible autonomy with respect to the new United Nations, it does nothing for principles of political accountability. The whole ratification process is a key area of possible reform.

While ratifying the Uruguay Round Agreement the Indian Government also failed to consider whether to enter any reservations. They were technically correct in doing so because the Agreement specifically forbade this, however international law is a little ambiguous about whether this is permissible or not, and this is generally taken to mean that it is not desirable but possible. However many countries, including the US did so, and it may have served a useful purpose for future negotiations to have flagged some of the more troubling elements of the agreement. Raising the issues at a later date could therefore be related back to expressions of reservations at the time of ratification. While this would not by itself legitimise the action it could have been politically expedient.

While ratifying the Uruguay Round Agreement the Indian Government also failed to consider whether to enter any reservations. They were technically correct in doing so because the Agreement specifically forbade this, however international law is a little ambiguous about whether this is permissible or not, and this is generally taken to mean that it is not desirable but possible.

- Confidentiality: cabinet rules of secrecy and confidentiality precluded the circulation of policy proposals to outside interests, such as trade and industry associations, NGOs and other interested parties. This meant that there was effectively no system of outside consultation that worked during the period of the TRIPS negotiations, or for that matter for the Uruguay Round more generally. This was a major weakness in the Indian system and needs to change.

- Parliamentary oversight: parliamentary systems and practices, which also reflected a clear divide between foreign and domestic policy, did not also know how to categorise this area of policy making and didn't get around to considering issues in committee until very late in the process. Parliamentary scrutiny was therefore inadequate and ineffective, which again fed a sense that issues of political legitimacy and accountability were not properly addressed. This too is a major area of possible reform.

From the negotiators' point of view, the situation was (apparently) ideal. They had virtually no instructions and were left almost entirely to devise their own tactics and strategies. The problem was that this was both a strength and a weakness.

- From the negotiators' point of view, the situation was (apparently) ideal. They had virtually no instructions and were left almost entirely to devise their own tactics and strategies. The problem was that this was both a strength and a weakness. While providing flexibility to the delegation, this situation did not help negotiators use the worries expressed in the domestic context – of which there were many - to advantage. They could not, for instance, do what the Americans repeatedly did and say that "this would not be politically acceptable back home" since they had no idea of what was or was not politically acceptable.

- As mentioned above, the negotiators had little or no help from outside the Government in the shape of institutional support. This is a serious *lacunae* and needs to be addressed as a matter of urgency. Bringing business associations, academic institutions, and NGOs into the process may be difficult but is essential in building support for a negotiating position. Procedures for mandatory consultation could perhaps be considered.

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Thus, it would appear that intrusive multilateral trade negotiations called for policy and decision-making procedures that effectively bridged the gap between established foreign and domestic decision making systems. It further required extensive consultation with outside interests and a well-developed system of institutional support. But these procedures and these features did not exist within the system and no one appears to have foreseen that they would be required. Parliament was also effectively excluded from the process because ratification procedures did not require parliamentary consent. The lack of consultation *at any level* was thus a

remarkable feature of the system. At the same time the political system was constrained by their constitutional obligations and the prevailing political consensus and could not openly support a free trade based development model. The outcome was a system that failed to consult or co-ordinate widely and thus carried little political legitimacy even within the government.

The Commerce Ministry jealously guarded its turf and did not share information with, or take advice from, the External Affairs Ministry. At the same time, the External Affairs Ministry despaired of the Commerce Ministry ever understanding the interconnectedness of global issues.

Diplomacy

- Commercial versus conventional diplomacy: the requirements of commercial diplomacy are very different from those of conventional diplomacy, yet the international context remains the same for both. This suggests that both have to work closely together because there may be trade-offs across the two systems. This further suggests that co-ordination have to extend from the political to official levels. This did not however happen during the TRIPs negotiations or indeed during the Uruguay Round. The Commerce Ministry jealously guarded its turf and did not share information with, or take advice from, the External Affairs Ministry. At the same time, the External Affairs Ministry despaired of the Commerce Ministry ever understanding the interconnectedness of global issues. They felt that the Commerce Ministry failed to understand the importance of the negotiations on the Comprehensive Test Ban Treaty (CTBT), which were proceeding largely in parallel in Geneva and in which India was under a lot of pressure to compromise. The Ministry of External Affairs in fact felt that Uruguay Round issues (and particularly TRIPs) were expendable in the larger interests of protecting national security. This divided perspective caused considerable harm to India's negotiating interests.

There was little or no co-ordination between the negotiators and Indian missions around the world. While the Indian Government in Delhi was ceaselessly lobbied by foreign - mainly western/OECD - Embassies and Delegations on a host of trade issues during the course of the Round, Indian Embassies had no brief for their host governments even in places as important as Brazil.

- Diplomatic co-ordination: there was little or no co-ordination between the negotiators and Indian missions around the world. While the Indian Government in Delhi was ceaselessly lobbied by foreign - mainly western/OECD - Embassies and Delegations on a host of trade issues during the course of the Round, Indian Embassies had no brief for their host governments even in places as important as Brazil. This in spite of many Embassies asking for information and instructions. Similarly, the Commerce Ministry was not particularly interested in obtaining information about the negotiating approach of other countries that Embassies could well have provided. They were thus constantly taken by surprise by the change in policy, particularly of negotiating 'allies', which of course complicated their lives immeasurably.

- Negotiating teams: experience seems to bear out that a small, competent negotiating team has many advantages, as the Indian experience would appear to confirm. It is able to hold the strings of all the negotiating groups together and knows where to focus attention and where and how to find and make trade-offs across sectors. It is also not buffeted by conflicting pressures or drowned by conflicting opinion, as many of the larger delegations were. Simplicity and clarity seem to help in the complex atmosphere of a multilateral negotiation where human qualities count for a lot.

The presence of a large number of experts, economists and lawyers may actually inhibit the effective functioning of the delegation. What they need is quick and ready access to such people without having them sit on their heads, and this needs to be reflected in the structure of the consultative process.

  Thus the presence of a large number of experts, economists and lawyers may actually inhibit the effective functioning of the delegation. What they need is quick and ready *access* to such people without having them sit on their heads, and this needs to be reflected in the structure of the consultative process.

- Negotiating autonomy: the virtually complete autonomy that Indian Ambassadors enjoyed worked, paradoxically, to their great advantage. In the absence of a workable or particularly useful negotiating mandate, the Ambassadors were able to evolve strategies on the spot by drawing upon their sense of the situation, their experience, and the advice of their negotiating colleagues, many of whom were in the same position. In a sense this perfectly demonstrates the importance of giving negotiators autonomy and flexibility, but does little for the problem of political legitimacy or democratic accountability. Finding an effective balance between the requirements of negotiators and the accountability of governments is one of the challenges that the multilateral trading system imposes.

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- Non-official networking: there was similarly little or no effort made to lobby or approach powerful international trade lobbies, particularly in pharmaceuticals and entertainment, which were pushing hard for Agreement on TRIPs related issues. This was again the outcome of a failure to use diplomatic missions abroad, which in turn was because there was no real policy in the first place.

- Media management: international media management was again neglected entirely, with predictable consequences. Here also, better liaison with the External Affairs Ministry could have made a difference, though other solutions would probably need to be explored given the problems that external affairs itself has with media management.

To summarise, international commercial diplomacy cannot work in isolation from conventional international diplomacy yet this is what happened in India's case during the Uruguay Round. Little or no use was made of diplomatic networks or diplomatic contacts, and this meant that the Commerce Ministry was negotiating in a strategic and political vacuum. Taken together with the lack of proper consultative procedures and the lack of institutional support, this meant that negotiators were for the most part flying blind.

Political Considerations

- Constitutional philosophy and political consensus: political debate in India was constrained by constitutional philosophy and the broader political consensus that it created. The constitution weakens property rights and postulates a development model that effectively runs counter to free trade principles. It was therefore difficult for the Prime Minister or any Minister to publicly engage with this debate without exposing themselves to the charge that they were betraying some basic constitutional and political principles.

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- Institutional culture: Constitutional and parliamentary institutions could also not go beyond this debate largely because their own cultures shared the basic approach described above. Thus the Planning Commission and the National Development Council, which should have been the perfect forum for discussion, were never consulted, and if they had been would have rejected any compromise. Again, was the decision to ignore these institutional astute political management, a mistake, or political cowardice.

- Consensus culture: the fact that a revised Patents Law has still to be approved by the parliament is a telling commentary on how deeply embedded is the prevailing consensus. Even if one allows for the

cynical exploitation of political instability to explain the present impasse, it is nevertheless also a reflection of just how difficult it is to reverse a policy approach that has deep intellectual and constitutional roots and that enjoys a widespread consensus.

Apart from the substance of the TRIPs Agreement and whether it was beneficial for India or not, there is also the persistent issue of legitimacy and accountability. No one has yet satisfactorily met the political argument that domestic law made on the basis of international agreements is undemocratic and lacks legitimacy.

- Political legitimacy and accountability: apart from the substance of the TRIPs Agreement and whether it was beneficial for India or not, there is also the persistent issue of legitimacy and accountability. No one has yet satisfactorily met the political argument that domestic law made on the basis of international agreements is undemocratic and lacks legitimacy. Linked to this is of course the issue of accountability; supposing things go wrong as a consequence of this agreement, who is accountable? Who in the international system will answer to the Indian people? There is no satisfactory constitutional mechanism that addresses this issue, and it is not something that can be papered over through a political compromise.

The situation described above suggests that a new constitutional and legal procedures, along with institutional and organisational arrangements, need to be evolved to deal with complex multilateral trade negotiations. There are several measures that can be considered, one of which is to simply submit international trade agreements for ratification; including a ratification process that state governments also need to approve. But this would be a *post facto* process and would not be of much use to negotiators in formulating strategy.

The situation suggests that a new constitutional and legal procedures, along with institutional and organisational arrangements, need to be evolved to deal with complex multilateral trade negotiations.

They need a procedure that requires them to consult intensely – which could even be mandated through legal enactment - a procedure that furnishes them with usable policy options and a procedure that conveys political legitimacy to the overall process. They also need access to reliable, dependable and usable data, information and statistics, and of course analysis. This suggests that an effective institutional arrangement needs to be created to collect, maintain and analyse information across a wide range of sectors. Managing these substantial changes will be a challenge of political leadership.

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Endnotes

1. Commitments made during earlier rounds also entailed domestic policy changes, though non-compliance did not invite retaliation.
2. Moreover, China's success in attracting FDI had nothing to do with IPR protection. In fact China does not even have an independent judiciary, let alone a codified set of civil and criminal laws as understood in most constitutional systems.
3. Media reports in the mid 1980s drooled over India's 200 million strong middle class, and a savings rate of more than 20 percent of national income.
4. Brought on largely by the Babri Masjid crisis and developments in Kashmir.
5. And even then it is still open to judicial challenge.
6. The Official Secrets Act of 1916 was only amended recently. The situation today does not still address the problems created by the rules governing cabinet secrecy.
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10. Led by Switzerland and Columbia.
11. See Croome, P.109.
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13. For the US position see GATT Doc. No. MTN.GNG/NG11/W/14 – Oct. 1987, and for the EU position see GATT Doc. No. MTN.GNG/NG11/W/16 –Nov 20, 1987.
14. For Brazil's position see GATT Doc.No. MTN.GNG/NG11/W/30 – Oct. 31st, 1988, and for the Mexican position see GATT Doc. No. MTN.GNG/NG11/W/28 – Oct.19th, 1988.
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17. Ibid.
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22. See GATT Doc. No. MTN.GNG/NG11/W/68, March 29th, 1990.
23. See GATT Doc. No. MTN.GNG/NG11/W/76, July 18th, 1990
24. See T.P. Stewart (ed.), *Trade-Related Aspects of Intellectual Property Rights*, Kluwer, 1993, P. 32
25. See Croome, P.276.
26. Stewart, P. 33.
27. Article 27(3)(b) of the Dunkel Draft. See GATT Doc. No. MTN.TNC/W/FA, Dec. 20th, 1991.
28. See Croome, P.276-77.
29. Supra note 19. P.40.

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