# INDIA'S ECONOMIC POLICIES AND LAW: THEIR PLACE IN THE GLOBAL SOCIETY

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SUMMARY: I. *Legal and Economic Framework*. II. *Current Economy and Future Projection*. III. *Current Legal Position in the Context of the WTO Regime*. IV. *Conclusion*. V *Bibliography*.

No country can remain isolated or unaffected from the winds of globalization blowing across the globe. Although globalization is an old phenomenon, the intensity and pace of economic globalization (integration of national economies with the world economy) has increased manifold especially after the formation of the World Trade Organization (WTO) in 1995. The WTO envisions a rule based multilateral trading regime that will promote cross border flows of goods and services. After the formation of the WTO the volume of global trade has increased and with it has increased the integration of individual countries in the global economy. Today, even if a country is not an exporter, it is still affected by the international trading regime through imports. In the contemporary world, the debate is slowly shifting from the desirability of globalization to the terms and conditions at which different countries should engage in the process of globalization. What is more debated these days is how best the process of economic globalization could be used to foster development.

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In this changing global world, this paper looks at the case of India and tries to find out how India has changed or adapted itself to the new rules of the game. Whether it is integrating in the global economy on its own terms and rules or is India still not prepared to deal with the forces of globalization. Has India benefited from the economic globalization or has its interests been hijacked? There are no easy answers to these questions. This paper makes a modest attempt to understand some of the legal and economic underpinnings involved in India's tryst with a globalized world and in that process endeavors to answer some of these complex questions.

The paper is divided into three small sections. Part I gives the background of Indian law and economy. Part II deals with the current economic policies and situation of India and part III deals with current legal position.

## I. Legal and Economic Framework

Although India is an ancient land and its past like that of any country plays an important role in shaping its present, our current purpose is well served by picking up our discussion from its current legal and political structures which are represented in its Constitution of 1950. The Constitution is the embodiment of our ideals and goals as well of the means to achieve them that we cherished for ourselves and for the attainment of which we sought our independence from foreign yoke. Addressing the Constituent Assembly, Pandit Nehru, the first prime minister and architect of modern India, reminded the Constituent Assembly that its first task was "to free India through a new constitution, to feed the starving people, and to cloth the naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity". Nehru was expressing the view shared by all the members of the Assembly. After thoroughly discussing different models of the Constitutions that could suit our purpose it adopted the present Constitution which apparently follows the Euro-American model but has its own soul representing the long cherished aspirations of the people.

In line with Euro-American Constitutions the Constitution of India does not lay down any fixed economic policy, nor did India and its leaders very clearly had one; they had a commitment to some sort of socialism.

Although they ranged from Marxists through Gandhian socialists to conservative capitalists, each with his own definition of socialism, nearly everyone was Fabian and Laski-ite enough to believe that socialism is everyday politics for social regeneration, and that democratic Constitutions are inseparably associated with the drive towards economic equality. There is enough evidence to support that the Assembly wanted a democratic Constitution with a socialist bias so as to allow the nation in the future to become as socialist as its citizens desired or as its needs demanded. The Assembly held great belief in adult suffrage as the most powerful instrument of social transformation. Adult suffrage, Assembly believed would empower the weakest and most underprivileged to participate in the formation of the government and its policies. Experience of the working of the constitution has proved that the Constitution makers were prophetical in their assessment.[1]

Although, as already noted, the Constitution does not enshrine any particular economic policy the background and experience of its makers as well as the social plight of the country led them to believe in active participation of the state in the amelioration of the conditions of people. Therefore, early in 1935 in the Karachi Resolution the national leaders resolved to bring the major public services into the hands of the state. Soon after independence, in 1948, the Indian National Congress decided to have a mixed economy. This policy was vigorously pursued by regulating industry and trade. Wherever there was a conflict in implementing the principle of mixed economy with the Constitution, the latter was amended. This process was continued until the doctrine of basic structure was expounded in 1973. The word "socialist", which the constitution makers had omitted, was introduced in the preamble to the Constitution by the 42nd amendment in 1976. It was also interpreted and applied by the courts in a few cases.

Until the end of Mrs. Gandhi's first period in office in 1977 the concept of mixed economy and greater state control and regulation was pursued. With the coming of the Janata Party government at the centre in that year a rethinking started. In a blueprint of the economic policy for the Janata Party, the then deputy prime minister (later the prime minister for a shortwhile, Mr. Charan Singh, who was always critical of too much state ownership and of the public sector) produced an alternative based on the Gandhian

[1] For this and more see, Glenville Austin, *The Indian Constitution*, 1966, 26ff.

ideas of social and indigenous industry. That may not have brought any immediate change in India's economic policy, but it opened the gate for an alternative official level of thinking. Even though Mrs. Gandhi was back in power in 1980, she never pursued her former policies of nationalization and state control-with the same vigor as before. After her assassination in 1984, her son Rajiv Gandhi preserved a visibly liberal economic policy that was pursued without any let up by two short term Janta Dal governments of V. P. Singh and Chandra Shekhar. Not until 1991 when Narsirnha Rao came to power with Manmohan Singh, the present prime minister of India as finance minister, did the government make a clear statement in regard to its economic policy. This policy has been known as the New Economic Policy (NEP). Its package falls into four categories: budgetary, industrial, trading, and financial. They are interlinked. The first lot of polices was announced in the budget for the year 1991-1992 and the new industrial policy on the same day, *i. e.* on July 5, 1991. Trade and financial policies were announced subsequently.

The main features of the new industrial policy were:

- Delicensing of all industries except those specified in the schedule;
- the removal of the Monopolies and Restrictive Trade Practices Act restrictions on size and capacity creation;
- removal of restrictions on expansion, mergers, takeovers;
- raising of foreign equity investments up to 51 per cent in 34 industries;
- automatic clearance of investments of both Indian and foreign companies under the new dispensation;
- abolition of approval for phased manufacturing programs to which was tied phased imports;
- removal of location restrictions outside the radius with one million or more of population;
- private participation to be allowed in some sectors covered so far in the core areas by the public sector, such as defense, atomic energy, minerals and mineral oils;
- a limited exit policy of sick units through their revaluation by the Bureau of Industrial and Financial Reconstruction (BIFR) and disinvestment of up to 20% of the government equity in selected units in the public sector; and

- increase in the limits on investment in the small scale units to the level of one crore of rupees.[2]

The open declaration and adoption of the NEP was expedited by the national unprecedented balance of payment crisis in early 1991 and international failure of the Russian and East European communist economies and the rise of Reagan-Thatcher right wing liberalism. The prevalent paradigm of liberalism is composed of a four-fold political economy: maximum play of market forces by privatization; representative democracy; free trade, and welfare state. To this was added another component: the multi-polarization of the global economy with dollar, yen and mark as the three major currencies forced the major economic powers to compete fiercely but only within the context of a globalized economy. The dominant paradigm was thus extended from the nation-state to the global economy. Ideologically, all this was reduced to free market rhetoric against the rhetoric of state planning.

Some economists had their reservations and continue to have them about the NEP. But with its success they seem to be weakening. It has also been attacked by some lawyers. For example, Baxi observes:[3]

> Indeed, the kind of privatization... currently being globally talked about will require thorough going revisions in the Constitution… Ours, at least explicitly since 1976, is a socialist democratic republic and in interpreting it, as well as laws under it, Indian Courts have to give as complete an effect as they can to the basic socialist structure of the Constitution. Without any amendment of the Preamble, it is not fully open to the proponents of "privatization" to practice unbridled forms of it. Similarly, it is not open to advocate or practice "privatization" without changing the text of articles 38, 39 or 43-A.

Similarly, S. S. Singh and Suresh Mishra say:[4]

> It may not be disputed by anyone, with a clear and unprejudiced conscience, that the "economic reforms", with their overwhelming ideology, involving "disinvestment" in public enterprises, thinning of labor force and tor-

2 One crore is equal to ten million or 1.00.00.000.

3 Baxi, U., "Constitutional perspectives on privatization", *Main Stream*, July 6, 1991.

4 Singh, S. S., and Mishra, S., "Public law issues in privatization process", 40 *Indian Journal of Public Administration*, 396, 1994.

pedoing the existence of the welfare state all of which go against the ideals and spirit of socialism and thereby impinging on one of the basic features of the Constitution.

In view of the fact that since the First World War, socialist thinking in India was predominant and pursued even after Independence and repeatedly incorporated into the Constitution through amendments, the doubts expressed about the constitutional legitimacy and validity of the NEP are not unfounded. The question is, however, whether the Constitution really incorporates any particular economic policy so that the adoption of one or other policy on the part of the government of the day will be unconstitutional? We have noted above that the makers of the Constitution denied that they were incorporating any economic policy in the Constitution. That implied that the Constitution did not incorporate communist or socialist economic principles but adopted the Euro-American model of liberal democratic Constitutions. It is that model that the Constitution has continued to represent even after successive amendments, including the introduction of the expression "socialist" in the Preamble. Of course the Preamble is the soul of the Constitution and contains much of what may be described as the basic structure of the Constitution. That does not mean that the basic structure is static and incapable of adjusting itself with the evolution and development in human thinking and institutions. As Justice Holmes had said about the American Constitution that it did not "enact Mr. Herbert Spencer's Social Statics",[5] the Constitution of India also does not write into it the communist manifesto. Apart from the fact that it has never been authoritatively held or declared by any court or other authority that socialism is part of the basic structure of the Constitution, the word "socialist" is incapable of having any fixed and agreed meaning.

Interestingly, the German Basic Law in article 20 (1) declares that "The Federal Republic of Germany is a democratic and social federal state". This provision is an entrenched provision included in article 79 (3) and its amendment is not permitted. Even then we know what the economic policy and the structure of Germany is. Similarly article 2 of the French Constitution states that "France is an indivisible, lay, democratic and social Republic", yet we know what the French economic approach is.

5 Lochner *vs*. New York, 198 United States, 45, 75.

The Indian courts have not gone far in interpreting the terms "social" or "socialist". Nor did those who introduced these words throw any light on their meaning. The presumption is that they left it to be interpreted in light of the future developments. Of course any such interpretation cannot ignore its core which is social welfare. So long as the NEP keeps social welfare to the forefront it cannot be condemned as in violation of the preamble to the Constitution.

Article 19, Clause (6) (ii) and article 305, which authorize state monopoly to the partial or full exclusion of the individual in any trade, business or industry, are optional enabling provisions and not compulsory obligations to be carried out in any and every situation. They also do not stand in the way of the NEP.[6]

Coming to the directive principles of the state policy laid down in articles 38, 39, 43-A or any other of them, we do not find anything in them inconsistent with the NEP. They talk of social justice, elimination of inequalities, ownership and control of material resources for the common good and workers' participation in the management of industry. The NEP does nothing expressly or impliedly that goes against any of these directives. The only question is whether these directives will be better served by privatization or by nationalization. Our experience so far has proved that they have not been served by nationalization. Why should we then be prohibited from experimenting with the privatization that is the call of the day and which many economists sincerely believe is the only solution to social ills and injustice? Since the early days of doubts about the constitutionality of the NEP the Supreme Court has upheld several measures taken in pursuance of it.[7]

6 For some of the relevant cases see, Excel wear *vs*. Union of India, AIR 1979 SC 25; National Textiles Workers' Union *vs*. P. R. Ramakrishnan, AIR 1983 SC 75; D.S. Nakara *vs*. Union of India, AIR 1983 SC 130; Kerla Hotel and Restaurant Association *vs*. State of Kerala, AIR 1990 SC 913.

7 See, *e. g.*, Delhi Science Forum *vs*. Union of India, AIR 1996 SC 1356; Narmada Bachao Andolan *vs*. union of India, (2002) 10 SCC 366; Balco Employees Union *vs*. Union of India, AIR 2002, SC 350. Also see, Singh, M. P., Constitutionality of Market Economy in P. Singh (ed.), *Legal Dimensions of Market Economy*, 3, 1997.

## II. Current economy and Future Projection

Economic experts and various studies conducted across the globe envisage India and China to rule the world in the 21st century. According to some experts, the share of the United States in world GDP is expected to fall (from 21 to 18%) and that of India to rise (from 6 to 11% in 2025), and hence the latter will emerge as the third pole in the global economy after the United States and China. By 2025 the Indian economy is projected to be about 60% the size of the United States economy. The transformation into a tri-polar economy will be complete by 2035, with the Indian economy only a little smaller than the United States economy but larger than that of Western Europe. By 2035, India is likely to be a larger growth driver than the six largest countries in the European Union, though its impact will be a little over half that of the United States. India, which is now the fourth largest economy in terms of purchasing power parity, will overtake Japan and become third major economic power within 10 years. As India prepares herself for becoming an economic superpower, it must expedite socio-economic reforms and take steps for overcoming institutional and infrastructure bottlenecks inherent in the system. Availability of both physical and social infrastructure is central to sustainable economic growth. Since independence Indian economy has tried hard for improving its pace of development. Notably in the past few years the cities in India have undergone tremendous infrastructure up gradation but the situation is not similar in most part of rural India. Similarly in the realm of health and education and other human development indicators India's performance has been far from satisfactory, showing a wide range of regional inequalities with urban areas getting most of the benefits. In order to attain the status that currently only a few countries in the world enjoy and to provide a more egalitarian society to its mounting population, appropriate measures need to be taken. Currently Indian economy is facing the following challenges:

- Sustaining the growth momentum and achieving an annual average growth of 7-8% in the next five years.
- Simplifying procedures and relaxing entry barriers for business activities.

- Checking the growth of population. Due to a high population growth, GNI per capita remains very poor. It was only $2,880 in 2003 (World Bank figures).
- Boosting agricultural growth through diversification and development of agro processing.
- Expanding industry fast, by at least 10% per year to integrate not only the surplus labor in agriculture but also the unprecedented number of women and teenagers joining the labor force every year.
- Developing world-class infrastructure for sustaining growth in all the sectors of the economy.
- Allowing foreign investment in more areas.
- Effecting fiscal consolidation and eliminating the revenue deficit through revenue enhancement and expenditure management.
- Empowering the population through universal education and health care. India needs to improve its HDI rank, as at 127 it is way below many other developing countries' performance.

1. *India: a Growing Economy*

According to the latest Economic Survey of Government of India, Indian economy is projected to grow at 8.1% in the year 2005-2006. In the previous two years the Indian economy grew at 8.5 and 7.5% respectively. Growth in the Indian economy has steadily increased since 1979, averaging 5.7% per year in the 23-year growth record.

Many factors are behind this robust performance of the Indian economy in 2004-2005. High growth rates in industry and service sector and a benign world economic environment provided a backdrop conducive to the Indian economy. Another positive feature was that the growth was accompanied by continued maintenance of relative stability of prices.

India's exports have increased significantly post 1995. According to the International Trade Statistics 2004, issued by the WTO, India's share in world merchandise exports increased from 0.6 to 0.8% from 1993 to 2003. From 1995 to 2003 India's share in world exports of commercial services increased from 0.6 to 1.4%. According to the Indian Commerce Ministry from 1993 to 2003 India's overall exports increased from 22,237 million dollars to 51,702 million dollars, which is an increase of 132.5%. In the first ten months of the financial year 2004–2005, India's exports grew by 26%.

However, it is also important to note that in the corresponding period the imports have also increased. India's share in world merchandise imports increased from 0.6% in 1993 to 0.9% in 2003. Similarly, India's share in world imports of commercial services increased from 0.6% in 1995 to 1.2% in 2003.

In trade in goods, growth of imports has outpaced the growth of exports. But, in services trade, the balance of trade is in favor of exports. India's total exports and imports i.e. goods and services for the year 2003 were 81 dollars and 92.3 billion dollars respectively resulting in an overall trade balance of 11.3 billion of dollars It is important to remember that oil imports are largely responsible for India's negative trade balance.

## 2. *Three Sectors of Indian Economy*

### A. *Agriculture*

More than 58% of India's population depends on agriculture, although it produces only 22% of the GDP. The agriculture and allied sector witnessed a growth of 9.1% in 2003-2004, which fell steeply to 1.1% in 2004-2005. The growth of agriculture and allied sectors in 2005-2006 is projected at 2.3%. While looking at some of the agricultural products, one finds that India is the largest producer of Tea, jute and jute like fiber. India is not only the largest producer but also the largest consumer of tea in the world. India accounts for around 14% of the world trade in tea. The total milk production in India is highest in the world. India has also the privilege of having the first rank in total irrigated land in area terms in the world. Among cereals production, India is placed third, having second largest production in wheat and rice and the largest production in pulses.

On external front, India's agricultural exports increased from 2,842.7 million dollars in 1989–1991 to 5,521.6 million dollars in 2002, an increase of 94%. However, India's trade balance in agriculture, which is in favor of exports, decreased from 1,879 million dollars in 1989–1991 to 1,502.1 million dollars in 2002.

The trade balance decreased in spite of exports increasing. Stated differently the increase in agricultural imports has outpaced the increase in exports. In the corresponding period the agricultural imports increased by approximately 317%. The rise in agricultural imports in India has mainly been because of depressing agricultural prices in international markets.

However, the full potential of Indian agriculture as a profitable activity hasn't been realized yet. Agriculture upliftment will not only benefit farmers and a large section of the rural poor, but also will give fillip to overall growth of the economy through the backward and forward linkages of agriculture with the rest of the economy.

Priority must be given to livestock's and fisheries, horticulture, organic farming, commercial crops and agro-processing, as these are the potential areas of high growth. Further, rationalization of minimum support price regime and introduction of other risk- mitigation measures, improvements in rural infrastructure are essential for sustaining high agricultural growth. It is conceived that reforms in legislations, strengthening R&D and improvements in post harvest management technologies will give a further boost to Indian agriculture. Also, public investment in agriculture needs to be augmented, especially in rural infrastructure, irrigation, and agricultural research and development. Better access to institutional credit for more farmers, is also high on priority list. The New trade policy gives focus to agriculture and it is expected that all the hurdles in Indian agriculture will be crossed gradually.

B. *Industry*

The rate of growth of industrial sector as measured in terms of Index of Industrial Production (IIP) during April to December 2005-2006 was 7.8% as compared to a growth of 8.6% in the corresponding period of 2004-2005. This growth has been triggered mainly on account of the performance of the manufacturing sector, which grew at 8.9% during this period. The growth of the industrial sector in India saw a decline after achieving a robust growth of 13% in 1995-1996. From 13% in 1995-1996 it came down to as low as 2.7% in 2001-2002. However, after hitting this low, the growth has been steadily improving with almost 8% plus growth rates in the last three years. In this context, one of the critical challenges facing Indian economic policy consists in devising strategies for sustained industrial growth. The phasing out of quotas under the Agreement on Textile and Clothing[8] (ATC) and the tightening of India's intellectual property system have been two significant developments for Indian industry.

[8] Agreement on Textile and Clothing (ATC) came into existence on 1st January 1995 with the formation of the WTO. This agreement provided that quotas in the textile and clothing industry shall be dismantled within a period of 10 years. As a result, quotas

Textile industry is the largest in terms of employment in industry. It is the second largest employer after agriculture. With the elimination of ATC from January 1, 2005, developing countries including India with both textile and clothing capacity may be able to prosper. India's WTO involvement during the last decade has encouraged our pharmacy companies to adopt a strategy of R. and D. based innovative growth. Indian pharmacy exports were 14,000 crore Rupees and accounts for more than a third of the industry's turnover. Apart from manufacture of drugs, the pharmacy industry offers huge for outsourcing of clinical research. A vast pool of scientific and technical personnel and recognized expertise in medical treatment and health care are India's strength. India can take advantages of its strength once patent protection is given to the result of the researches. By participating in the international system of intellectual property protection, India unlocks for herself vast opportunities in both exports as well as her potential to become a global hub in the area of R&D based clinical research outsourcing, particularly in the area of bio-technology.

### C. *Services*

Services contribute more than 50% of India's GDP and is in many ways becoming the engine of India's growth. Services sector growth continued to be broad based. Among the three sub sectors of services, "trade, hotels, transport and communication services" continued to grow at double-digit rates. This double-digit rate was for the third year in succession. According to the latest Economic Survey of Government of India, services exports grew by 71% in 2004-2005 to 46 billion dollars and 75% to 32.8 billion dollars in April-September 2005. In 2004-2005 software service exports of India increased by 34.4%. India's share in the world market for IT software and services (including BPO) increased from around 1.7% in 2003-2004 to 2.3% in 2004-2005 and an estimated 2.8% in 2005-2006.

in the textile and clothing industry have been completely dismantled. This has created opportunities for more trade in textile and clothing and prospects of India benefiting from it has also improved.

## III. Current Legal Position in the Context of the WTO Regime

As the Constitution of India establishes a federal polity, a few issues arise between the centre and the States on the implementation of WTO obligations. Some of them sometimes acquire serious proportions.[9] We need not attend to them at the moment. Let us therefore look in to other legal developments in pursuance of WTO regime.

Article XVI.4 of the Agreement Establishing the World Trade Organization (WTO) states that all the member countries of the WTO shall ensure the conformity of their laws, regulations and administrative policies with their obligations given in the annexed agreements. These annexed agreements are the agreements under the agreement establishing the WTO. So, there is a clear legal obligation on all WTO members including India to bring their laws and policies in conformity with the provisions of the WTO. India has changed many of its laws and policies in order to make them WTO compliant. However, before one talks about these changes it is important to understand the context in which these changes have been made.

It has been argued by many that the multilateral trading regime embodied in the WTO offers both opportunities and threats. Opportunities exist in the form of better market access prospects for goods and services, more investment flows, transfer of technology etcetera. Threats may exist in the form of surge of imports, threats for domestic industry etcetera. The challenge for countries is to have such laws and policies in place that optimize these opportunities and minimize the threats. In other words, it is important not just to look at the changes that have been made in the legal regime but also to find out how effective these changes have been. So, we need to analyze whether the changes in Indian laws and policies have been merely reactive (changes made simply because they

[9] In this context it is important to understand that there are some subjects in the WTO that could create some difficulty between the centre and states in India. Agriculture is one such issue. Under the Indian Constitution agriculture is a state subject. However, in the WTO we have an Agreement on Agriculture (AoA) and presently under the Doha round of negotiations this agreement is under review. If a final agreement is reached, it will impose certain obligations on India. The negotiations are being carried out by the Central government without any participation of the states. So if a new law has to be enacted the role of states will be very important.

were warranted by the WTO) or have these changes been proactive where the laws and policies have been changed or amended to optimize the opportunities and minimize the threats discussed above.

In the discussion below we will look at some of the most fundamental changes made in the Indian legal regime and policies after the WTO came into formation. We will also look at some of the other laws that have been enacted as India's response to counter the potential opportunities and threats of economic globalization.

### 1. *Removal of Quantitative Restrictions*

One of the most significant and far reaching impact of WTO on Indian law has been the removal of Quantitative Restrictions (QRs)[10] on imports. India had a QR regime on account of a Balance of Payments (BoP) crisis that India was suffering in the late eighties and early nineties. However, after the formation of WTO, improving BoP situation and a mindset change of sorts towards an export led growth strategy prompted India to progressively dismantle the QR regime in order to move a step towards integrating with world economy. The dismantling of the QR regime was initially done in a phased manner and later by virtue of a dispute that arose between India and United States of America.

Initially, QRs were removed on 488 items in 1996, on 391 items in 1997 and 894 items in 1998. India had plans to completely dismantle its QR regime by 2003. However, it had to do this at least two years before in 2001 because United States challenged India's QR regime in the dispute settlement Body (DSB) of the WTO.[11] In this dispute United States argued that India's QR on more than 2,700 agricultural and industrial products was inconsistent with India's obligations under articles X1.1 and XVIII.11 of General Agreement on Tariffs and Trade (GATT).

Article XI.1 of GATT states that no country shall institute measures that restrict import apart from duties, taxes or other charges. However, article XI.1 is not absolute and is subject to other articles of GATT such

[10] Quantitative Restrictions (QRs) on imports means limiting or restricting the quantity of imports of a particular commodity coming into a country. QRs could be levied for a number of reasons such as BoP crisis, sudden surge in imports that is affecting a country's industry etcetera.

[11] India–Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R.

as article XII.1. This article states that any country in order to safeguard its external financial position and its balance of payments may restrict the quantity of imports (impose QRs) provided such imposition is not more than what is necessary. Both these articles read together state that imposing QRs or other restrictions on imports can be maintained only if there is a BoP crisis or difficulties in external payments. This implies that once the BoP situation improves counties should dismantle the restrictions on imports. This is exactly what article XVIII.11 of GATT states. According to this article countries shall progressively relax any restrictions imposed on imports due to crisis in BoP if the situation improves.

According to United States, India's BoP situation was improving and therefore India should progressively eliminate the QRs much before than what it had originally slated to do. The Appellate Body (AB) agreed with United States argument and directed India to remove QRs on the remaining products. Finally, India and United States entered into an agreement under which India agreed to eliminate the QRs on many products by 1 April 2000 and on remaining 715 items by 1 April 2001. Today, India does not follow the QR regime except for certain products on grounds such as security, health, safety or other grounds mentioned under article XX of GATT.

### 2. *Intellectual Property Rights*

India has made widespread and detailed changes to its Intellectual Property Rights (IPR) such as patents, trademarks, copyright etcetera, regime to make it compliant with the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the WTO.

Before one endeavors to understand the changes in the Indian IPR regime it is important to briefly understand the background and context of the TRIPS agreement.

Bringing IPR in the multilateral trading regime embodied in the WTO was vociferously opposed during the Uruguay Round of negotiations by developing and least developed countries (LDCs). These countries argued that IPR is not a trade issue and hence should not be part of an international trading agreement. The rationale for this argument is that the World Intellectual Property Organization (WIPO) is already covering both the procedural and substantive aspects of international IPR law and

hence there was absolutely no need to bring it within the WTO. WIPO should be allowed to deal with the international IPR issues. However, developing countries lost the battle and IPR was made an integral part of the WTO as a result of the Uruguay Round of negotiations. Many have argued that developing countries had to agree for an agreement on IPR in the form of TRIPS in lieu of the Agreement on Textile and Clothing (ATC) whereby developed countries agreed to remove the quotas on textile and clothing in a phased manner.

Developed countries were keen to have the IPR regime in the WTO because of the strong enforcement mechanism available in the form of a dispute settlement mechanism. The possibility of strong enforcement and hence policing of patenting rights of large transnational companies made the proposition of integrating IPR in WTO attractive. This strong enforcement mechanism was missing in WIPO.

### A. *Patents*

The most fundamental and radical changes in IPR have been made in the field of patents. Due to these fundamental changes the architecture of the Indian patent law has been completely revamped. After the adoption of TRIPS in the WTO, the challenge for countries like India was to ensure that any adverse consequence that TRIPS imposed was successfully diluted or taken care off. The adverse consequence that was expected from the integration of TRIPS in WTO was the adoption of the product patent regime for pharmaceuticals and medicines. Product patenting of medicines implies monopolization of medicine production, which in turn could hamper public health concerns.

It is important to bear in mind that the Indian Patent Act of 1970, before the present amendment, did not recognize product patent for pharmaceuticals.[12] In fact, the Patent Act of 1970 came into existence after repealing the Patent and Designs Act of 1911, which recognized product patents. In the era before 1970, India experienced difficulty in controlling the prices of medicines and hence make medicines easily accessible to the public at large. This was because of a strong patent law that allowed monopoly in pharmaceutical industry, which in turn kept

12 The Indian Patent Act of 1970 recognised product patents for all the products except food, medicines and drugs.

the prices of the medicine high. In order to allow cheaper access to medicines, India brought in a new patent law that did not recognize product patents in pharmaceuticals. In other words, the new law allowed the production of the same medicines through different processes. This provision of producing the same medicines through reverse engineering fostered the growth of the Indian pharmacy sector enabling it to bring down the prices of the medicines.

This historical context is important to understand the new patent law that has come into force after the formation of the WTO. Now, the Indian Patent Act, as amended by the third Patent Amendment Act, recognizes product patent on pharmaceuticals. Life has come full circle as far as patent law in India is concerned.

India had to grant product patent protection to pharmaceuticals due to its obligation under the TRIPS agreement. However, given the fact that India had opposed the inclusion of IPR in WTO, one would have expected that the changes India will make in its patent law would be minimal. In other words, India will bring about only those changes that are absolutely necessary for it to comply with the TRIPS agreement. It was expected that these changes would be carried out with the objective of minimizing the adverse consequences of the TRIPS agreement (in this case minimizing the consequences of product patenting of medicines). These consequences could be minimized by exploring the flexibilities in the TRIPS agreement. However, as we will see in the discussion that follows, India did not make full use of the flexibilities in the TRIPS Agreement and has in fact gone overboard and made even those changes that were not necessary or required by the TRIPS Agreement. The result has been that today India has an IPR regime which is "TRIPS plus".[13]

WTO gave developing countries a 10-year transition period to bring in their indigenous IPR laws in conformity with the TRIPS Agreement. The most important issue was to introduce product patent regime for food, drugs and medicines. The TRIPS Agreement also states that pending the introduction of the product patent regime, developing countries will start receiving patent applications and grant Exclusive Marketing Rights (EMR).

[13] TRIPS plus implies those change that are more than what the TRIPS agreement warrants.

India made its first amendment in the Indian Patent Act of 1970 in 1999. This amendment introduced the EMR regime and started receiving the product patent applications in a mailbox. This mailbox was to be opened after 31 December 2004. The purpose of the mailbox was to collect all the patent applications and assess them after 31 December 2004. This amended Act also stated that EMR for a product could be granted only if other member country of the WTO has awarded a patent to that product and the said application has not been rejected in India on grounds of not being an invention.

The second patent amendment bill was introduced in the Indian Parliament in December 1999. This patent amendment bill, which was the second step to make the Indian patent law comply with the TRIPS Agreement, made some path breaking changes. The most important change was the transformation of the Compulsory Licensing[14] (CL) regime. Before, we analyze the changes that have been made in the CL regime, it is important to understand the significance of CL in a patent law. CL is an effective instrument to thwart the negative implications of the product patent regime. It is used by state to intervene in scenarios of escalating prices or non-availability of products in right quantities. Countries often look at CL as a useful weapon to counter the monopolistic intentions of large companies. However, the second patent amendment act failed to develop CL as a useful weapon to counter adverse effects of product patenting.

The TRIPS agreement does not place any restriction on the grounds under which a CL could be granted. Article 31 of the TRIPS Agreement only states that in cases of third party production of a patented product certain provisions need to be respected. Even in the cases of these provisions that need to be protected, the TRIPS Agreement gives enough flexibility to the countries. For instance article 31 (b) of the TRIPS Agreement provides that before a CL is issued, the proposed user should have tried to obtain authorization directly from the patentee on "reasonable commercial terms" and "within a reasonable period of time". It is important to note that the TRIPS agreement does not define terms like "reasonable commercial terms" or "within a reasonable period of time". Countries

14 A compulsory license is a license granted by the government to use patents and other types of intellectual property to intervene in the market in the event of market failure *i.e.* patented product not being available in right quantities or at affordable prices.

should make full use of these flexibilities and define these terms in such a manner in their domestic patent laws that the process of issuing CL is simple and effective and whenever a situation arises where the patentee is trying to take benefit of his monopoly situation, a CL could be issued.

However, the amendments that have been made in the Indian Patent Law do not make use of these flexibilities. For instance, the Indian Patent Act does not define the terms "reasonable commercial terms", which it could have easily done. In section 84 (6) (iv) of the Indian Patent Act, as amended by the third amendment, states that in considering the application for issuance of CL, the controller shall take into account "*whether the applicant has made efforts to obtain license from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period of time"*.

The act should have defined the meaning of "reasonable terms and conditions" in a manner that would have made the issuance of CL much easier. As the law stands today, the patentee may argue that he denied voluntary use of the patented product because the proposed user was trying to get the license on terms and conditions that were not reasonable. This will result in arguments and counter arguments and hence delay in the issuing of CL. The fact that patentee will make such arguments cannot be brushed aside, as it is very natural for anybody who is in a monopoly situation to protect his position.

The second potent amendment bill also did not define the term "reasonable period". This again meant that the patentee could always delay the process of granting voluntary license by citing that "reasonable period" has not lapsed. It was only in the third patent amendment bill that it was mentioned that "reasonable term" shall be construed as a period not ordinarily exceeding a period of six months.

It is important to understand that even by defining these terms the Indian Patent Act would have been very much in accordance with the TRIPS Agreement. In fact, these definitions would have allowed India to dilute the onerous provision of the TRIPS Agreement.

Section 84 of the Indian Patent Act, as amended by the third Patent Amendment Act, also states that an application for CL could be made only after three years from the date of grant of a patent. This is again a TRIPS plus provision. The TRIPS agreement nowhere states that there has to be a gestation period of three years before an application for CL would be entertained. In fact, paragraph 5(b) of the Declaration on

TRIPS and Public Health clearly states that each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.[15] It is difficult to understand why India did not make use of these flexibilities.

The story of the third patent amendment is even more interesting. India had to fully comply with the TRIPS Agreement by the 31 December 2004. The Parliament failed to pass the new bill. Hence, India had to pass an ordinance on 26 December 2004 so as to meet the deadline of 31 December, 2004. The fact that for such a serious change, government had to bring in an ordinance in the twilight hours speaks volumes about the preparation of the government. This ordinance with some changes was finally adopted by the Parliament in the early months of 2005. The third patent amendment bill also went overboard and made many changes, which were TRIPS plus in nature.[16] The most important was expanding the scope of patentability *i. e.* expanding what can be patented. The Indian Patent Act of 1970 limited the scope of patentability in order to ensure that frivolous claims are not made and there is no evergreening[17] of patents. However, the third patent amendment bill has increased the possibility of evergreening. For instance, the third patent amendment bill changed the definition of an inventive step. According to section 2 (ja) of the Indian Patent Act, as amended by the third patent amendment bill, an inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art. In other words, economic significance could be sole criteria for constitution inventive step, even if it does not involve a technical step. This has expanded the scope of what constitutes an invention, which is again a TRIPS plus position.

From the above discussion it follows that India has changed its patent laws in order to comply with the provisions of the TRIPS agreement. However, in the process of complying with the agreement it has done

15 Declaration on TRIPS Agreement and Public Health, Adopted on November 14, 2001, WT/MIN (01)/DEC/2

16 *Op. cit*., footnote 3.

17 Evergreening of patents refers to a strategy adopted by pharmaceutical companies to take advantages of loopholes in the definition of what can be patented (scope of patentability) to obtain separate patents for multiple attributes of a single product or by citing marginal improvements in the original product.

more than what was necessary. Therefore, the changes in patent law in India is clearly a case of a law that may promote monopoly in pharmaceutical business and also lead to a situation where accessibility to medicines may be hampered. TRIPS agreement imposes certain threats and challenges and from the analysis above it can be said that the changes in the Indian patent law have failed to minimize these threats.

### B. *Geographical Indication*

Another important legislation that India enacted by virtue of its membership within the WTO is the Geographical Indications of Goods–Registration and Protection (GI) Act of 1999. It is important to note that India never had a geographical indication law. It was only in 1999 that India enacted a GI law. This is different from the patent act. In the case of patent act, there was a law, which was amended whereas in the case of GI an all-together new law was enacted.

Geographical Indications is the name of a place (or words associated with a place) used to identify products (for example, Champagne, Tequila or Roquefort), which have a particular quality, reputation or characteristic because they come from that place. The need for India to have a GI law arose after India was involved in a legal battle with Rice Tec, a United States of America (United States of America) based company over the patenting of Basmati. Rice Tec was granted patent by the United States Patent and Trademark Office (USPTO) in 1997 for its aromatic rice "Basmati". India opposed this patent arguing that "Basmati" was a rice variety grown in parts of India and Pakistan and a United States based company cannot patent it. India achieved partial success in this legal battle.

However, this legal battle made India realize the need of having a legal framework to protect those products whose quality, reputation or other characteristics, are essentially attributable to their geographical origin. Hence, India enacted the GI Act to protect those products that are found in India and are known for their source of origin from a particular geographic area. Darjeeling Tea is one such example. Through the enactment of this law, India has now provided indigenous protection to many products, which are known for their geographical source of origin. Though the enactment of this legislation was a little late, it can still be

said that India has been proactive in putting a legal institution in place that will protect India's GI.

### C. *Trademarks*

India has also enacted a new trade mark law called the Trade Marks Act, 1999 which replaces the Trade and Merchandise Marks Act of 1958. This new trade mark law is also a part of India's obligations under the TRIPS agreement. The new trade mark law is a major advancement over the old law. The new law has enlarged the scope of trade mark to include shape of goods, packaging and combination of colours, registration of service and collective marks, provision for the recognition and protection of well known trade marks.

## 3. *Protection of Plant Varieties and Farmers' Rights Act, 2001*

The Protection of Plant Varieties and Farmer's Rights Act (PPVFR) has been a path breaking legislation for India. The basic objective of this law is to provide for an effective system for the protection of plant varieties. This law provides for registration of new plant variety on the criteria of novelty, distinctiveness, uniformity and stability. This law also owes its origin to the TRIPS Agreement. Article 27.3 (b) of the TRIPS Agreement states that all countries shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. In other words, this article makes it mandatory for countries to provide protection to their plant varieties. It further states that this protection should be provided either through patents, which has been interpreted by many as an internationally developed system of patents or through any other indigenously developed mechanism.

Hence, countries have the freedom to explore one of these options. The choices under option one are following the international system for the protection of plant varieties that is provided under the International Union for the Protection of Plant Varieties (UPOV).[18] UPOV talks of providing patent protection only to the plant breeders and does not talk

[18] UPOV is an intergovernmental organisation with headquarters in Geneva. UPOV was established by the International Convention for the Protection of New Varieties of Plants. This convention was adopted in Paris in 1961 and was revised in 1972, 1978 and 1991.

of extending any benefits to the farming community. Nor does it require the plant breeder, which in most of the cases will be a multinational company, to share benefits with the indigenous community. Hence, this option is completely loaded in favor of plant breeders and does not serve the interest of farmers.

However, the TRIPS agreement provides the option to all the countries to develop their own laws to protect their plant varieties. India is one of the few countries that has explored this option and enacted the plant variety protection law. The Indian plant variety protection law recognizes the rights of the breeder along with the rights of the farmer. Section 39 of the PPVFR Act states that a farmer who has bred or developed a variety shall be entitled for registration and other protection in the same manner as a breeder. It also states that the right of the farmer in this regard shall have supremacy over all other things mentioned in the Act. Section 39 also states that a farmer shall be deemed to be entitled to save, use, sow, resow, exchange all his farm produce including seeds of a protected plant variety. This provision has put an end on patenting of seeds. The new Act in Section 26 also provides for the sharing of benefits accruing to a breeder from a plant variety developed from indigenously derived plant genetic resources. In sum, this law balances the interest of all the stakeholders. This law also for the first time provides for a legal framework whereby plant varieties could be protected in India.

This law is a case of proactive action intended to maximize the benefits and minimize the threats posed by the WTO (in this case TRIPS greement). This law is also a good example of how the flexibilities available within the WTO (in this case TRIPS agreement) could be used to develop indigenous laws that could take care of our concerns unlike the patent law, which did not use the flexibilities available.

### 4. *Biological Diversity Act, 2001*

India is a land of rich biodiversity with varied flora and fauna. Today, this rich biodiversity is under a threat from the global patenting regime especially from the TRIPS Agreement. Before one comes to the Biological Diversity Act of India it will be relevant to understand the threat that Indian biodiversity faces from the TRIPS Agreement. TRIPS Agreement talks of allowing private IPR rights on biological resources. The TRIPS

Agreement also does not require the patent holder to share the benefits with the indigenous community who may be the donor of that material. The patent holder is also not required to seek prior informed consent from the government of the country where the potential patent holder is going to access biological resources. In other words, the TRIPS agreement states that anybody from any part of the world can walk into any country to access and later patent a biological resource without any concomitant obligations.

These provisions of the TRIPS agreement is completely in contradiction with the Convention on Biological Diversity (CBD), which is an international treaty signed in 1992. CBD recognizes the principles of benefit sharing and prior informed consent. This conflict between TRIPS and CBD was taken onboard during the Doha ministerial conference of the WTO. However, the negotiations towards resolving this conflict have moved at snail's pace.

India realized this threat and hence to protect its rich biodiversity from biopiracy has enacted a biodiversity law. The biodiversity law of India provides for conservation and sustainable use of biological diversity. It recognizes principle of benefit sharing. It also states that no body can apply for IPR without taking prior permission form the National Biodiversity Authority (NBA).

This law is also an example of ingenious legislation where the flexibility of TRIPS Agreement has been used to maximum. TRIPS Agreement is silent on the core biodiversity principles as enshrined in the CBD. However, this does not mean that there is any inconsistency in recognizing the core biodiversity principle in a country's domestic law and the TRIPS Agreement.

Critics have argued against some of the provisions of the Biological Diversity Act. For instance, the Act, although makes prior permission necessary by stating that all IPR applications will go through the NBA, does not state what kind of IPR will be permissible. Further, the provision on benefit sharing has not been properly laid out. There is no indication in the act as to how to decide the nature and extent of benefit sharing. Some have also argued that since these laws are new, the real efficacy of these laws will be known only after they have been implemented and tested on ground. All these concerns should be looked into and the law should be accordingly fine tuned.

### 5. *Trade Remedial Measures*

Trade Remedial Measures are an effective escape clause built into the multilateral trading regime aimed at allowing countries to take care of the cases where international trade starts hurting their domestic industry or their economy. The WTO recognizes three types of trade remedial measures. These measures are anti dumping duties, countervailing duties and safeguard measures. India has introduced these trade remedial measures through amendments to the Customs Tariff Act in 1995 and subsequently in 2002. Trade remedial measures are in the form of duties, which is in addition to the customs duties in force.

Anti dumping, safeguard and countervailing duties were introduced as amendments to the Customs Tariff Act 1975, in 1995.

#### A. *Anti Dumping Duties*

Anti dumping duties is one of the most important trade remedial tools used by countries to protect domestic industry from the injurious impact of international trade. Legally speaking, anti dumping duties can be levied if the following three conditions are satisfied:

1. Dumping[19] of goods has taken place.
2. There was an injury to the domestic industry.
3. There exists a causal link between dumping and injury.

Article VI of GATT states that if the abovementioned conditions are satisfied, then, countries can impose anti dumping duties.

Section 9 A of the Customs Tariff Act of India empowers the imposition of anti dumping duties. According to this section the Central Government can impose a duty when an article is exported to India at a price lower than the price at which it is sold in its home country and is causing injury to the domestic industry. In case there are no sales in the home country, then, there are other methodologies for determining the "normal value" of the article.[20]

19 Dumping is defined as sale of goods below the normal price. The normal price of a product may be the domestic price of the commodity.

20 These methodologies relate to comparing the export price with the price at which the same product is sold in the market of a third country or comparing the export price with the cost of production plus a reasonable amount of administrative costs and profits.

B. *Safeguard Duties*

Section 8 B of the Customs Tariff Act empowers the Central Government to impose Safeguard Duties as an "Emergency Measure". This imposition of safeguard duty is in pursuance of article XIX of GATT. According to article XIX of GATT if an article is being imported into a country in such increased quantities and under such conditions so as to cause or threatening to cause serious injury to domestic industry already established in that country, then, that country may impose a safeguard duty on that article. Section 8 B of the Customs Tariff Act captures these issues and empowers government of India to impose safeguard duties if the conditions given in article XIX are fulfilled.

A provisional safeguard duty may also be imposed. The final duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of four years from the date of such imposition, which may be extended for another six years, but not beyond a total of ten years. The rules enacted pursuant to this section, require that domestic industry restructure its operations for efficiency, during the period in which the duty is in force.

C. *Countervailing Duties*

According to article VI of GATT countries can impose countervailing duties if an exporting country bestows, directly or indirectly, a subsidy on the merchandise products. Section 9 of the Customs Tariff Act permits the central government to impose a duty where any country or territory pays, bestows, directly or indirectly, any subsidy upon the manufacture or production of an article which is exported to India. Such a duty can be levied only if the subsidy causes injury to Indian industry.

The incorporation of the WTO Trade remedial laws in the Indian law is an important step forward. It arms the Indian industry to protect them in cases where there is surge of imports that is causing injury to them.

6. *Food Bill 2005*

Food safety concerns and regulations are an integral component of international trade. The Sanitary and Phytosanitary (SPS) agreement in the

WTO impose an obligation on countries to follow proper and adequate food standards. For the health of human beings the agreement states that all the countries shall follow the standards laid down by Codex, a standard setting body under the Food and Agricultural Organization (FAO).

Food safety and regulation in India is governed by a number of legislations. The most important legislation in this regard is the Prevention of Food Adulteration Act (PFA) of 1954. Apart from this there are scores of other acts that talk of regulating food safety. However, India needs a comprehensive and self-contained law on food safety in order to completely comply with the standards laid down by Codex. In this regard, India is about to enact a Food Act. A bill to this effect has been introduced in the Parliament and hopefully soon India will have an up to date and comprehensive food law.

Although, India is a little late in going for a comprehensive food law, it is always better late than never.

## IV. CONCLUSION

Indian policy makers, economic thinkers and academicians have come a full circle in the last 50 years about India's economic policy. Today, in India, there is almost a consensus on the direction of economic reforms though there are differences on the pace of the reforms. We have tried to show the changes that have occurred in the Indian economy and policy especially after 1991, which many call the watershed year in the Indian economy and after 1995 the formation of the WTO. It is important to bear in mind that to sustain the pace of reforms and growth it is necessary to have institutional and legal changes.

We have endeavored to show the legal changes that have been made in India after the formation of the WTO in particular and after major embracing of economic globalization in general. In some cases India has responded well to the challenges by proactively enacting laws that would bring benefits from economic globalization. Examples of such laws are the Protection of Plant Varieties and Farmer's Rights Act and Geographical Indication Act. These laws have been enacted by making full use of the flexibilities available to countries in the WTO agreements. However, there are also cases where Indian laws have been found wanting such as the amendments in the Indian Patent Act.

Whether India has gained from an increasing integration with the world economy is a moot issue and cannot be answered in simple 'Yes' or 'No'. However, the answer to this question directly depends on how India prepares itself to face the new challenges of economic globalization. One of the ways by which can India can prepare itself to face the challenges of economic globalization and optimize its gains from integrating with the global economy is by making sure that the rules of integration or engagement are fair. For this, the need of the hour for India is to be proactive and make changes in the legal regime that will optimize the returns from the process of globalization. India also needs to enact new laws if the need be and repeal old laws that have outlived their utility. What is needed is a certain degree of foresightedness mixed with circumspection and action.

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