

SPECIAL 301 STRENGTHENED, SHOULD INDIA TOE TRIPS?

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The Americans have been putting a lot of pressure on India to bring about changes in the Indian Patent Act and enact legislation in this regard. This is partly to fulfill the conditions that India had accepted as a GATT signatory. Most of the changes that the Americans want however are far in excess of GATT requirements and were negotiated at the last minute when the WTO modalities were being defined and drawn up. Many of the concessions granted under GATT/ TRIPs, like a transition period of 10 years to change our patent laws were taken away.

The ink was scarcely dry on the GATT treaty when Mickey Cantor who was then the US Trade Representative, casually let it be known that irrespective of GATT and its mandate for fostering free and fair trade, the US intended to continue the use of the US trade law "Special 301" to penalise countries. Cantor went on to add that the GATT/ WTO conditions did not adequately protect American interests and that the Americans would use their own instruments to ensure that they got what they thought were legitimate American dues.

Although Cantor is no longer the US Trade Representative, his post GATT statement has now been given an institutional, legal form. According to a recent release from the office of the US Trade Representative, the United States has incorporated the "Special 301" provision into the Uruguay Round Agreements Act. "Special 301" has been amended in the Uruguay Round Agreements Act to clarify that a country can be found to deny adequate and effective intellectual property protection even if it is in compliance with its obligations under the TRIPs agreement.

The Uruguay Round Agreement Act is the national legislation that will guide American policy and actions in everything concerned with the agreements reached in the Uruguay Round. "Special 301" is part of this Act. The provisions of the "Special 301", as amended, require the USTR to determine whether the acts, policies and practices of foreign countries deny "adequate and effective" protection of Intellectual Property Rights or fair and equitable market access for US persons who rely on Intellectual Property protection.

On formalising the Uruguay Round Agreements Act, the US administration reiterated its commitment to ensuring full and effective implementation of the "Special 301" provisions of the Trade Act and rapid implementation of the WTO/ TRIPs agreement. The US administration also said it would continue to "encourage" other countries to accelerate implementation of the WTO/ TRIPs agreement and move to even higher levels of IPR protection.

WTO it will be recalled, did away with the 10 year transition period granted to developing countries in the Uruguay GATT Round. This period was given to countries to reorient and retrain their institutions and staff in order to adjust to a new system of patent laws. Instead of bringing in changes in patent laws in 2004, WTO required that amendments to patent laws be in place by 1 Jan. 1995 when the new body came into being.

It was in order to comply with this demand that the Indian government had introduced a Patent Amendment Act by Presidential Ordinance on the night of December 31, 1994. This ordinance lapsed after its stipulated life. The Patent Amendment Act which was subsequently presented to Parliament was passed by the Lok Sabha but rejected by the Rajya Sabha which declared that its contents were not in the national interest. After that a Select Committee of the Rajya Sabha was appointed to hear evidence on the Draft Bill. The effort was to find a compromise on the contents of the Bill so that it could be presented to the Rajya Sabha again in a form that would be acceptable.

While the Select Committee was still hearing evidence, elections were called, the Congress government lost power and a new coalition government assumed office. During its tenure it appointed a Patent Committee to iron out differences and present a consensus position to the government. The Committee appeared to lack credibility and instant resignations from appointed members followed. The issue of the Patent

Amendment Act remained unresolved. There is yet another government in place now. The Patent Amendment Bill will have to be dealt with afresh. Perhaps a new Select Committee will be formed and be required to make a recommendation to the Rajya Sabha.

There are essential questions that need to be asked now. Should India comply with TRIPs? What meaning would such compliance have? What is the relevance of WTO as a multilateral forum, given the latest shape of the Uruguay Round Agreements Act? If the Americans are going to do what they want anyway, whether we comply with TRIPs or not, does it make sense to bring in harsh, unpopular changes in our laws just to be TRIPsworthy?

If the USA does not recognise TRIPs as a binding agreement then everything of importance related to it will have to be negotiated bilaterally. In that case it makes more sense than ever for us to draft our laws on Intellectual Property Rights in the way that protects our interests best, regardless of TRIPs. These domestic legislation should form the basis of further negotiations. We should in this case take a position on micro-organisms instead of accepting the prevailing TRIPs position by default. We can craft a creative and sensitive sui generis legislation and perhaps even try to get some kind of transition period.

This development in domestic US legislation has great bearing on all countries required to change their patent laws. There is a need for developing countries to coordinate their efforts to resist American pressure. Countries like Argentina, Chile and Australia have already drafted good IPR legislation which protects their national interests. There is no reason India cannot do the same.

Developing countries have always looked to India for leadership in GATT related issues. For the faint hearted in our government, afraid to take on the Americans, let there be a lesson from India's success at the Leipzig conference on Genetic Resources and Farmers Rights. In the face of bitter opposition by the OECD countries, the developing countries united behind India and succeeded in getting the rights of farmers recognised in FAO's Global Plan of Action.