
POLICY SPACE UNDER WTO LAW: A COMPARATIVE STUDY OF TRIPS AND TRIMS IN REGULATING DEVELOPMENT STRATEGIES IN INDIA

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INTRODUCTION

The World Trade Organization (WTO), founded in 1995, lies at the heart of the multilateral trading system of today and set out to achieve a reasonable level of smooth and predictable international trade through binding agreements by member states.¹ Among these agreements were the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Agreement on Trade-Related Investment Measures (TRIMS), both of which are very important in the way development strategies for countries such as India, have unfolded.² TRIPS established baseline minimum standards of intellectual property protection in terms of patents, copyrights and trademarks for its member countries.³ TRIPS also sought to balance the incentive created for innovation with the need to protect public welfare including, of course, access to medicines. TRIPS demands that countries change their laws and regulations governing intellectual property and pharmaceutical patent regimes which has required India to make some substantial reforms particularly moving from process patents to product patents. Concern has been raised about the affordability of medicines as a result of the need to comply with TRIPS. However India has been able to utilize clauses TRIPS affords member states such as compulsory licensing, and having fairly strict criteria for patentability, to ensure access to fairly priced affordable medicines, and, improve the health of its citizenry.

By contrast, TRIMS restricts the policy space for regulating foreign investment by specifically prohibiting trade distorting measures like local content requirements and export performance

¹ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154.

² Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement, Annex 1C, 1869 UNTS 299.

³ World Trade Organization, "Overview: the TRIPS Agreement," https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

obligations.⁴ TRIMS facilitated inflows of foreign direct investment and integration into global supply chains and influenced India's ability to promote technology transfer and support domestic industries, even in sectors such as automotive manufacturing. When comparing TRIPS and TRIMS in India we can see the tension between global harmonization and national development priorities and how India managed these WTO obligations, while attempting to carve out policy space for inclusive growth.

WTO AGREEMENTS, TRIPS, TRIMS, AND INDIA'S DEVELOPMENT STRATEGY

Theoretical Foundations: TRIPS and TRIMS in the WTO Framework

The World Trade Organization (WTO) was created to promote free and fair trade by establishing binding rules for member states. Two of its most transformative agreements are the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Trade-Related Investment Measures (TRIMS). Both have had significant implications for developing countries such as India, influencing the shape of their policy space in relation to national development strategies.

TRIPS establishes minimum standards of protection and enforcement of intellectual property (IP) rights (patents, copyrights, trademarks, etc.). Its goals are to harmonize protection of IP across the globe, to stimulate innovation and to encourage technology transfer for developing countries. It also provides a prescriptive level of flexibility so that developing countries have some discretion to ensure they can deal with public health issues, access to technology and support domestic industries.

TRIMS, on the other hand, addresses investment measures that can impact trade in goods. Its main goal is to disallow member states from requiring a foreign investor to satisfy specified requirements such as local content or export performance, because those practices could potentially distort trade and create market access barriers. Therefore, TRIMS is designed to remove barriers and level the playing field for foreign investors and improve transparency and competition with investments.

⁴ World Trade Organization, "Overview: the TRIMS Agreement," https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm

TRIPS IN INDIA: LEGAL REFORM, FLEXIBILITIES, AND SECTORAL IMPACT

Historical Context and Legislative Adaptation

Before becoming a member of the WTO, the intellectual property regime in India had been relatively-publicly oriented and designed to encourage industrialization. For example, the Patents Act, 1970 permitted process patents only for pharmaceuticals.⁵ This meant that Indian companies could reverse-engineer drugs, which allowed them to offer affordable generic copies of worldwide patented drugs in India and globally. The results of this protectionist strategy birthed a vibrant and flourishing pharmaceutical industry, which positioned India as one of the world's largest suppliers of highly affordable medicines.

Before TRIPS came into force, India had to revamp all of its IP laws and take into account product patents and new innovations such as pharmaceuticals and chemicals as eligible subject matter for IP protection. This transition was part of the overall plan developed using the transition periods allowed under TRIPS, specifically the amendments to the Patents Act in 1999, 2002, and 2005.⁶ These changes complied with changes associated with TRIPS and increased the level of scrutiny during the patent application process, but probably also made patents more potentially valuable monetarily and respecting (downstream value as patents are used in R&D) and therefore a more serious asset that would encourage further domestic and foreign investment into R&D.

Leveraging TRIPS Flexibilities

India purposefully leveraged TRIPS flexibilities to find equilibrium between promoting innovation, and protecting public health and access:

- Compulsory Licensing- India maintained the power to issue a compulsory license, which facilitates the production, and sale of unauthorized generic version of any patented drug where there is a public health crisis, or if the price is unaffordable. The compulsory license issued for Bayer's cancer drug, Nexavar is a recent example of this practice.

⁵ Indian Patents Act, 1970 (as amended in 2005), No. 39 of 1970.

⁶ Patents (Amendment) Act, 2005, No. 15 of 2005 (India).

- Section 3(d) of the Patents Act- In order to avoid evergreening, India implemented section 3(d) to limit the number of patents that may be filed related new forms of known substances, unless those new forms demonstrate increased efficacy as compared to existing forms. This was upheld in the case of *Novartis v. Union of India*, which confirmed India's policy to promote access, rather than monopoly.⁷
- Opposition Mechanisms- India has pre-grant opposition, and post grant opposition, allowing stakeholders to challenge patents if they are weak, or frivolous, and limit strong innovation to only innovativeness.

Sectoral Impacts and R&D Orientation

The pharmaceutical sector underwent transition in the aftermath of TRIPS. While the increased patent litigation and some increases in drug prices, have not projected majorly negatively upon the Indian sector, despite an annual growth of 15%, with the shift from exporting to LDCs to exporting to other developed markets. With the increased competition from MNC's for patents, many Indian companies have invested in increased R&D because of the stronger IP protection, and the Indian pharmaceutical sector and office is assisting foreign firms desire patenting work in and coming to India to allow for their originals to get patents, seeing an over 10% increase in the amount of patent applications filed in India since 1995 and having a 12% increase since 2005)(trademarks have seen an increasing rate of 17%, ambitiously protected by the provisions of Section 3(d) of Patents Act, making patenting more challenging than it used to be).

Nevertheless, it still has challenges. There are still some potential threats to access to and affordability with respect to foreign firms patenting traditional Indian medicines and establishing monopolies over product quantities and meds for consumption, in view of a period of patent duration under TRIPS rules. The Indian sector has been able to utilize TRIPS flexibilities, namely they are still generally seen as "the pharmacy of the developing world," whereby they can offer a favorable balance to encourage innovation and commercialization incentives vs availability of access to medicines and what can affordably be made to the Indian public.

⁷ Novartis AG v. Union of India & Others, Supreme Court of India, Civil Appeal Nos. 2706-2716 of 2013.

TRIMS IN INDIA: INVESTMENT POLICY, COMPLIANCE, AND DEVELOPMENTAL CONSEQUENCES

Pre-TRIMS Policy and Transition

Prior to TRIMS, India's industrial policy consisted of strictly regulating foreign investment to stimulate domestic industry, primarily through local content requirements, export obligations, and technology transfer requirements, among numerous other interventions supportive of indigenous manufacturing and economic independence.

TRIMS required India to eliminate such measures, especially those that were inconsistent with GATT's national treatment and prohibition of quantitative restrictions. Upon India notifying the WTO of three inconsistencies pertaining to local content in newsprint and certain medicines, and dividend balancing requirements when investing in consumer goods, the measures were eliminated as part of India's five-year transition period for developing countries, fundamentally changing India's investment landscape.⁸

Features and Effects of TRIMS Compliance

TRIMS prohibits a number of important measures:

- local content requirements
- trade balancing regulations
- limits on foreign exchange use
- export performance requirements
- forced technology transfer

The elimination on these restrictions allowed foreign investors rights that were on equal terms with domestic Investors without restrictions to areas where investment could be made, ceilings on foreign equity or limits on the repatriation of profits. This liberalization increased FDI flows

⁸ World Trade Organization, "India—Measures Affecting the Automotive Sector," WT/DS146/AB/R, WT/DS175/AB/R, 19 March 2002.

and greater integration into global supply chains, particularly for sectors like automotive and electronics.

The government was limited in how far it could redirect FDI when policy tools available were lost as a result of losing local content regulations. FDI could still lead to benefits of increased investment and amenities of technology partnerships in the case of the automotive and electronics industries but was impaired in terms of nurturing suppliers and deeper industrial linkages.

COMPARATIVE ANALYSIS: TRIPS VS. TRIMS—POLICY SPACE AND DEVELOPMENTAL IMPACT IN INDIA

1. Policy Space: Flexibility vs. Restriction

While TRIPS set out some minimum standards for the protection of intellectual property, it also contains a number of flexibilities, particularly for developing and least developed countries, including transition periods, compulsory licensing, and the ability of member countries to decide on patentability. India was careful to recognise and take advantage of the flexibilities in TRIPS, to allow for public health, and access to medicines, for example, compulsory licensing and the provision of section 3(d) in their Patents Act to ensure that the “evergreening” of pharmaceutical patents was not possible. The Doha Declaration of 2001 reaffirmed the ability of WTO members to interpret TRIPS in a manner which supports public health objectives.⁹

TRIMS is however much more restrictive. It prohibits a number of investment measures, for example, local content requirements, trade balancing, and obligations to export, which were integral features of India's industrial policy. The Agreement also has a few very limited exceptions, and transitional arrangements, but offers not even the option of permanent flexibilities. There are provisions for temporary deviations under certain GATT provisions in Article 4, but these only allow for very narrow exceptions and also subject to rigorous scrutiny. India, like many developing countries, has argued for expanding the TRIMS negative list, to bring back some policy tools that had been removed from them, but developed countries are generally resistant.

⁹ Doha Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 14 November 2001.

2. Implementation and Transition Periods

TRIPS and TRIMS recognized a requirement for phased implementation in developing countries. TRIPS provided India and other economies like it until 2005 to comply with the requirements of TRIPS, even longer for LDCs. TRIMS gave a five-year transition period for developing countries to phase out inconsistent measures, which ended for India in 2000. The transition periods provided India time to make adjustments to domestic laws and to its industrial policy strategies, however, the final removal of policy tools provided for in TRIMS was not as drawn out and deliberate as the phased and flexible path provided for under TRIPS.

3. Sectoral and Developmental Impacts

Pharmaceuticals and Innovation (TRIPS): India's pharmaceutical industry serves as an example of the nuanced implications of TRIPS. Although product patent protection raised access to medicines concerns, India's creative use of TRIPS flexibilities allowed it to continue providing affordable generics to the developing world. India has also been recognized worldwide for its comprehensive opposition regimes and compulsory licensing provisions as good practices for how to balance innovation and public health.¹⁰ There is, however, still discussion over whether TRIPS has inhibited or promoted indigenous innovation; while there is evidence of increased R&D spending, increased monopoly behaviour in the market and concerns over the costs for drugs persist.

Manufacturing and Industrialization (TRIMS): The effects of TRIMS are more constraining than in relation to TRIPS, in regard to its effects on India's manufacturing and industrialization goals. Prohibiting local content and other performance requirements limited the government's ability to support and brood domestic industries, including roots in technology transfer and job creation. While removing local content and other measures facilitated FDI and integration into global supply chains, it also resulted in domestic firms facing and competing with greater levels of competition, while losing national industrial policy as a tool for development.

4. Ongoing Debates and Calls for Reform

Developing countries, notably India, are still raising concerns that TRIMS is impeding

¹⁰ World Trade Organization, "India—Patent Protection for Pharmaceutical and Agricultural Chemical Products," WT/DS50/AB/R, 19 December 1997.

sustained industrialization, and reliance on infant industry protection measures. There are ongoing requests for a review of both agreements, along with proposals to expand the negative list of TRIMS, and increased developmental flexibilities in TRIPS. Moreover, the consequences of the COVID-19 pandemic underscore the need for enhanced exceptions in TRIPS to deal with public health emergencies,¹¹ meanwhile discussions on TRIMS have focused on countries' rights to lean on investment policy options as part of sustainable development.

5. Comparative Table: Key Differences in Policy Space

ASPECT	TRIPS	TRIMS
Flexibility	Transition periods, compulsory licensing, patentability criteria, Doha Declaration.	Limited exceptions, narrow transition periods
Policy tools retained	Retained Some compulsory licensing; public health safeguards.	Most performance requirements prohibited
Developmental impact	Mixed: enhanced IPR, but with access safeguards.	Reduced industrial policy space, more FDI, less domestic leverage
Ongoing debates aspect	Calls for more meaningful special & differential treatment, especially for health.	Calls to expand negative list, allow for more development-oriented measures.

The comparative examination of TRIPS and TRIMS shows that both agreements have influenced India's development trajectory, but in very different ways.¹² TRIPS provides, even with its limitations, some conditional policy space to moderate innovation and public interest, especially in health, while TRIMS limits the most important industrial policy tools and constrains India's ability to mobilize foreign direct investment (FDI) for more general developmental purposes.

¹¹ World Health Organization, "Public Health, Innovation and Intellectual Property Rights: Report of the Commission on Intellectual Property Rights, Innovation and Public Health," 2006.

¹² World Trade Organization, "World Trade Report 2013: Factors Shaping the Future of World Trade," https://www.wto.org/english/res_e/publications_e/wtr13_e.htm

CASE STUDY: INDIA'S DUAL TRAJECTORY UNDER TRIPS AND TRIMS

India's experience with the TRIPS and TRIMS Agreements provides a valuable case study on how WTO disciplines may both expand and constrain the available policy space for development strategies.¹³ India's double-edged journey of using TRIPS flexibilities to enhance public health and innovation while wrestling with the constraints of TRIMS was a story of both possibilities and constraints of path for developing countries in the global trading system.

1. The Pharmaceutical Sector under TRIPS: From Generics to Innovation

The Indian pharmaceutical sector offers a clear example of the impact of TRIPS on development outcomes. Prior to TRIPS, India's patent system was based on the Patents Act of 1970, which only permitted process patents for pharmaceuticals. Thus, domestic companies could reverse-engineer patented drugs and manufacture and supply affordable generics. This policy has played a significant role in India's ability to build a reputation as the "pharmacy of the developing world" with a vibrant generics sector providing to the domestic and global markets.

Upon the order of TRIPS, however, India had to introduce product patents for pharmaceuticals, leading to questions around access to medicines in a developing country and the impact on India's generics industry. India was able to utilize TRIPS flexibility provisions, including compulsory licensing, the applicability of section 3(d) as strict patentability criteria, and effective opposition processes, to continue focusing on public health. The compulsory license for Bayer's cancer drug 'Nexavar' allowing the manufacturer to produce a generic at a fraction of the cost, has provided an example of how countries can balance innovation incentives with the access to essential medicines.

Simultaneously, the new IP regime motivated Indian firms to invest in research & development, pursue international partnerships and enter regulated markets in developed countries. IP filings were high with trademark and patent applications on the rise and the sector's export growth picked up momentum - the evidence does show that it is possible to have TRIPS compliant policies, paired with effective flexibilities, generate both innovation and access.

¹³ World Trade Organization, "Trade Policy Review: India 2021," WT/TPR/S/418, 6 January 2021.

2. The Automotive Industry under TRIMS: Export Hubs and Supply Chain Gaps

In contrast, the consequences of TRIMS for India's automotive industry illustrate the limitations of performance requirements in a trade agreement. Prior to TRIMS, India's industrial policy had a considerable reliance on local content requirements, export commitments, and technology transfer requirements as a means to build domestic manufacturing and create backward linkages. Performance requirements were a fundamental part of the development of the automotive sector, setting a trajectory for domestic technological capability and local supplier development.

TRIMS required India to remove these policy instruments, and afforded foreign investors the same rights as domestic investors by removing restrictions on areas of investment, foreign equity, and repatriation of profits. While this liberalization did facilitate considerable foreign direct investment and integration into global automotive supply chains, it also curtailed the government's ability to direct investment into local value added and upgrading of technology. Consequently, India became a significant exporter of automobiles; however, the local depth of supply chains and concentration of advanced technology was limited in comparison to countries that retained greater political space for industrial policy.

3. Policy Space, Transition, and Ongoing Adaptation

India's dual experience with TRIPS and TRIMS illustrates the need for transition periods and continuously evolve policy. In the case of TRIPS, India used the transition period to slowly reform its IP laws by bringing in several major amendments just before the 2005 deadline. For TRIMS, a five year transition period provided India with an opportunity to phase out inconsistent measures, however that ultimately led to the contrary - the measures were removed in a much more abrupt process with less allowance for modifications.¹⁴

While mindful of this limitations, India is still creating pathways for innovation under WTO law. In the pharmaceutical sector, India continues to strike a balance between innovation and access through its varied legal and administrative mechanisms. In the manufacturing arena, India has begun to pivot to financial incentives, infrastructure support, and sectoral based

¹⁴ World Trade Organization, "Special and Differential Treatment Provisions," https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm.

development schemes where there is no direct infringement of TRIMS provisions which is focused on advancing domestic development in new ways.

4. Lessons and Broader Implications

India's 'dual trajectory' under the TRIPS and TRIMS agreements provides a critical learning experience for developing countries that are trying to move beyond dire imperatives associated with global integration:

- **Strategic Exploitation of Flexibilities:** Strategic exploitation of TRIPS flexibilities provides an effective mechanism for reconciling global obligations with national developmental priorities, in particular, in relation to critical public welfare sectors like health.
- **Limits to Policy Space:** The rigidities associated with TRIMS demonstrate the developmental costs associated with relinquishing critical tools of industrial policy (especially accommodation to emergent domestic manufacturing capabilities).
- **The Reform Imperative:** India's experience provides a crucial reminder of the reform imperative to keep revisiting existing WTO Agreements, in terms of the deliberations and recommendations requests for special and differential treatment (SDT) to develop countries to pursue an inclusive and sustainable development process.
- **Adaptation and Transition:** It is evident that to manage adjustment costs and maximize the potential benefits of global economic integration, developing countries must be open to transition as they follow their own trajectories and engage in adaptive policymaking.

POLICY RECOMMENDATIONS

To enable India's development autonomy within the WTO structure, we propose the following actions:

1. Broaden Policy Space in WTO Agreements

- Advocate for reforms to TRIMS that facilitate local content regulations and technology-

transfer binding commitments for strategic sectors (green energy and pharmaceuticals), and have supported longer transition periods for developing countries to transition to compliance.

- Leverage the idea of public interest exceptions (e.g., pandemics and climate change) to reinforce TRIPS flexibilities, and propose that the process of compulsory licensing be easier than has been attempted during public debates around the development of COVID-19 vaccines.

2. Create Policy Options within Existing WTO Rules

- Identify and create WTO-compliant industrial policies (e.g., R&D subsidies, skill development initiatives, etc.) that enhance domestic sectors without violating TRIMS prohibitions.
- Collaborate with foreign firms on technology-transfer agreements using Article 66.2 of TRIPS to fill in gaps in innovation in key areas such as renewable energy.

3. Form Global Coalitions

- Formulate South-South coalitions (e.g., with the African Group) for policy reforms that emphasize equality such as special treatment for developing countries in relation to digital trade and green industrialization.

4. Anticipate New Dilemmas

- Engage in WTO conversations regarding digital trade and tariffs on climate-aiding policies in order to enshrine a policy space for India to pursue its technology and sustainability policy objectives.

5. Enhance domestic capacity

- Enhance legal capacity to provide support for WTO disputes and exceptions, such as the GATT balance-of-payments exception.
- Institutionalize consultations with stakeholders with industries and states, and assess trade policy against grassroots development needs, especially where things like human rights or

environmental standards are at stake.

CONCLUSION

As the WTO celebrates its 30th anniversary, India's experience illustrates the successes and challenges of the multilateral trading system for developing countries. India has benefited from a rules-based system, stable market access, and opportunities to take the lead in international discussions as a result of its membership in the WTO. However, it has also exposed structural asymmetries that limit policy choices and pathways to development.

India has experienced challenges with global harmonization under the TRIPS Agreement, but it has achieved essential equilibrium between innovation and public health by leveraging flexibilities such as compulsory licensing and stringent patentability. While IP protection has increased, this strategy has allowed India to continue being a major supplier of inexpensive pharmaceuticals. The COVID-19 pandemic and discussions regarding TRIPS waivers underscored the salience of policy space for public health and technology transfer in times of crises.

The TRIMS Agreement, however, restricts India's abilities to use traditional industrial policy tools, including export performance standards and local content, which restricts the government's ability to fund technological modernization and domestic value addition. TRIMS has increased the tension between openness and policy autonomy for India and other developing countries, although it has also promoted FDI flows and global supply chain integration.

Recent momentum for reform is evidenced in calls by the African Group and India to revise the WTO rules in ways that will allow more policy space for technology transfer and green industrialization. The concept of special and differential treatment continues to be critical for the Global South and divisive, as seen by the continual stalemates over food security and agricultural subsidies.¹⁵

The WTO's ability to deal with these imbalances through member-driven, development-oriented reforms will be critical in determining its continued importance for developing

¹⁵ United Nations Conference on Trade and Development (UNCTAD), "Trade and Development Report 2022: Development prospects in a fractured world," UNCTAD/TDR/2022.

countries. The Global South can learn some important lessons from India's dual experiences with TRIPS and TRIMS: the importance of coalition building, active engagement in WTO reform, and the importance of venturing onto the back foot and adopting the use of flexibilities to protect and enhance policy space for inclusive, sustainable growth.