INDIAN PATENT LAWS

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PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

INTRODUCTORY PAPERS

CONTENTS

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INDIAN PATENTS ACT VIS-A-VIS PARIS CONVENTION
BACKGROUND AND SALIENT FEATURES

The need of a Patent system in industrialised countries is quite different from that of developing countries. Whereas the developed countries have traditionally been strong advocates of the Patent System, the developing countries have been stressing that the system should help in their development of indigenous manufacturing facilities.

It is interesting to note that 85% of the total patents registered in the world are owned by MNCs of the U.S.A.,U.K.,Germany, France, Switzerland and Japan. Even more interesting is that not more than 5% of these patents are used for local production in the third world. This clearly indicates that it is the business policy of the developed countries to manufacture their patented products at locations of their choice and market them worldwide.

PARIS CONVENTION

In order to protect their patented products, industrially advanced countries signed a Treaty in 1883 called the Paris Convention for the protection of Industrial Property. The original Convention of 1883 has been revised only six times. The Convention had 97 members as on 1.1.1986. The countries to which the Paris Convention applies constitute a Union for the protection of industrial property. Nationals of all countries of the Union have the same protection as their own nationals and the same legal remedies **against infringements.**

INDIAN PATENTS ACT

In 1856 when India was under British rule, the first Patent Act was enacted. In 1911 a comprehensive Patents and Designed Act was enunciated and this Act remained operative till it was repealed by Patents Act 1970. The basic philosophy of this Act is that **Patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale without undue delay.**

A comparison of broad features of the Indian Patents Act, 1970 and the Paris Convention is given in the table on page 2.

TABLE

COMPARATIVE PROVISIONS IN INDIAN PATENTS ACT 1970 & PARIS CONVENTION ON MAJOR ASPECTS OF PATENT SYSTEM

ASPECT	INDIAN PATENTS ACT-1970	PARIS CONVENTION
I. SCOPE	Law permits both product and process patents. Process Patents are for food, medicine, drug, chemical substances: For others : Product Patents Agriculture products and processes for treatment of human beings or animals are not treated as inventions; hence not patentable. Atomic energy inventions are also not patentable.	System provides for product patents. Extends to Industry and Commerce, Agriculture, extractive industries, natural products. Covers patents of importation, improvement and addition.
II. TERM	5/7 years for food, medicine, drugs and chemical substances. 14 years for others.	No period specified. Member countries have different periods viz. U.K.:20 years; Japan : 15 years;U.S.A.:20 years; China : 15 years; Spain : 20 years
III. COMPULSORY LICENSING	Compulsory licences granted after 3 years if reasonable requirement of public interests not satisfied about availability; reasonable prices.	Compulsory licence can be applied on the ground of failure to work or insufficient working after 3 years of grant - shall be refused if patentee justifies inaction by legitimate reason.
IV. LICENCES OF RIGHT	(a) Government may apply after 3 years suo-moto endorsement in public interest for any patent. (b) Licences of Right is deemed to have been endorsed after 3 years in regard to the process patent for food,medicine, drugs and chemical substances.	No provisions for Licences of Right.
V. REVOCATION	Revocation order if first compulsory licence is not worked in 2 years - orders issued within one year thereafter.	Revocation proceedings instituted two years after grant of compulsory licence. Proceedings may take any length of time.
VI. RIGHT OF PRIORITY	No provision.	Right of priority extendable for 12 months in all member countries from the date of registration in any one country.
VII. UNFAIR COMPETITION	Infringement proceedings are possible.	Member countries have to assure effective protection against unfair competition - Reason : contrary to honest practices.

PATENT SYSTEM - HISTORICAL PERSPECTIVE - IMPORTANT COUNTRIES

It is important to note that most countries of the world have adopted the product patent system only at a time when it suited their national interest.

GERMANY

The German Patent Law of 1877 enunciated that in the Chemical field, only process patents were permitted. A view expressed by Dr.Van Ing, one of the authors of the Patent system, clearly indicates how the country formulated its patent system to suit its needs:

> "This Patent Law gave an immense impetus and aid to the development of German Industry. The fact that in Germany henceforth chemical process only, (and not chemical products as such) were patentable, left an open field for the search for new methods of manufacturing known chemicals, was of great advantage to the chemical industry."

It was only subsequently that the Patent Law was amended in 1961 when West Germany eventually adopted the product patent system after having made sufficient economic progress.

JAPAN

It is a well-known fact that after near-total destruction in World War II, the country brought about a major industrial revolution. Their Patents law provides that food stuffs, beverages, Pharmaceutical & Chemical products and certain other substances are not patentable. However, processes for the manufacture of pharmaceutical and chemical products are patentable.

ITALY

According to the Royal Decree of 1940 on Italian Patent Law, no patent was granted for pharmaceutical processes or products. Thus, any person was free to manufacture any drug discovered and patented abroad by developing a different process of manufacture. However, because of their membership of the Europen Common Market, the Italian Patent System was modified in 1979 to provide for grant of patents for new inventions or processes capable of industrial application. The patents granted for processes also extend to the products obtained therefrom and pharmaceutical products are part of this system.

USSR & CHINA

The USSR Patent Law of 1959 deals with patenting of discoveries, inventions and rationalisation proposals. Unless a product or process is capable of being commercially exploited, it is not patentable. Processes for the manufacture of chemical products and medical composition are, however, patentable.

Similarly, the Chinese Patent Law of 1984 also provides that no patent right shall be granted for food, beverages, pharmaceutical products and substances obtained by means of chemical processes. However, processes used in producing these products are patentable under the Chinese Patent Law.

USSR & China are totally state-controlled economies and it is, therefore, unlikely that a violation of their Patent Law can be pursued through any effective legal system.

Table-I gives a list of countries who are members of the Paris Convention, where, however, food, drugs and pharmaceuticals are not patentable.

Table-II gives the names of the countries who are members of the Paris Convention but who only observe process patents for food, drugs and chemical substances.

TABLE-I

COUNTRIES WHO ARE MEMBERS OF PARIS CONVENTION WHERE HOWEVER FOOD AND PHARMACEUTICAL PRODUCTS OR DRUGS ARE **NOT PATENTABLE**

1. ARGENTINA
2. AUSTRALIA
3. BRAZIL
4. GREECE
5. MEXICO
6. TURKEY
7. URUGUAY
8. YUGOSLAVIA

TABLE-II

COUNTRIES WHO ARE MEMBERS OF PARIS CONVENTION WHERE HOWEVER **ONLY PROCESS PATENT** FOR FOOD, PHARMACEUTICAL PRODUCT AND CHEMICAL PRODUCTS ARE PATENTABLE.

1. AUSTRIA
2. CZECHOSLOVAKIA
3. CHINA
4. HUNGARY
5. JAPAN
6. NETHERLANDS
7. NORWAY
8. POLAND
9. U.S.S.R.

REASONS BEING GIVEN BY PROPONENTS OF INDIA JOINING THE PARIS CONVENTION

1. The two major reasons which are frequently advanced by those who favour that India joins the Paris Convention are:

   (a) that enough technology transfer has not taken place

   (b) that there is no incentive to Indian Scientists because of insufficient protection to Intellectual Property in India.

II. TECHNOLOGY TRANSFER

As far as technology transfer is concerned the attached data clearly indicates that there has been an increasing number of foreign collaborations approved by Government in recent years. While it is true that the number of patents registered has gone down yet technological advancement has taken place both in the National Sector companies as well as those who have set up joint ventures in India with Multinational companies.

III. INDIGENOUS RESEARCH & DEVELOPMENT

As far as encouragement of scientific research is concerned one can only mention that in our country the emphasis has so far rightly been on process development research and not on fundamental or basic research. It is well known that it takes 10 to 15 years of research and an expenditure of over 100 million dollars to discover an entirely new molecule (pharmaceutical product) which can be patented. Furthermore, the research budgets of some of the larger pharmaceutical companies in the world are in the range of 300-400 million dollars a year. As against this, the annual sales of the larger pharmaceutical company in India are only in the region of Rs.150 crores.

The above clearly establishes that at present it is impossible either for any pharmaceutical company or for any CSIR laboratory to seriously engage itself in fundamental research since the funds required are staggering and totally out of line with what is economically feasible in our country.

IV. R & D PROGRESS IN INDIA

R&D expenditure in the fields of agriculture, health, nuclear energy, space application and industrial research have been noteworthy during the last 10 years and especially during the Sixth Plan Period as can be seen from the following data:

(i) R&D Funds and Expenditure

Total national expenditure on R&D and related scientific activities including Central, State and Private Sectors:

Year	1948-49	1950-51	1970-71	1980-81	1983-84
Rupees in Crores	1.1	4.68	139.64	760.52	1337.87

(ii) Plan Allocation for Science & Technology

Plan-wise, the allocation for Science and Technology has increased from Rs.20 Crores in the First Plan (1951-56) to Rs.3,400 crores in the Sixth Plan (1980-85).

(iii) Council of Scientific & Industrial Research

CSIR was established in 1942. The research expenditure of the Council had risen from Rs.5.6 crores in 1958-59 to Rs.100 crores in 1982-83. There are 5000 highly qualified scientists and technologists supported by 13,000 skilled scientists are working in an infrastructure painstakingly built over the period.

Its network includes 33 laboratories, 2 cooperative research associations and more than 100 extensions/field centres. It is now an apex body for scientific and industrial research under the State auspices.

(iv) Research & Development in Industry

Some of the R&D units in Industry have been existence for more than three decades. There are currently over 900 R&D establishments both in public and private sector.

(v) Science & Technology Personnel

The total number of Science and Technology personnel at present is estimated at 30 lakhs. The number of personnel actually engaged in R&D is, however, much less. In 1982, about 2 lakh personnel were employed in Science & Technology Institutions; 36% were engaged in R&D activity and 31% auxiliary science and technology activities.

(vi) R&D Expenditure in the Pharmaceutical Industry

The R&D expenditure in the Pharmaceutical Industry has risen from Rs.10.50 crores in 1976-77 to Rs.48 Crores in 1985-86. Percentage-wise, this works out to 1.05% and 2.03% respectively of sales turnover.

TABLE

FOREIGN COLLABORATIONS APPROVED IN INDIA

Year	Nos.
1978	183
1980	389
1982	590
1984	752
1986	957

JOINING OF PARIS CONVENTION WOULD NECESSITATE AMENDMENTS TO INDIAN PATENTS ACT - LEGAL OPINIONS

Those who are advocating that India join the Paris Convention continue to emphasize to Government that India can join the Paris Convention without having to change its Patent Act. In this connection, the legal opinion given by eminent legal Jurists of the country have clearly established that India would be forced to amend their Patent Act for the following reasons:

Provisions of the Paris Convention

Article 25 of the Paris Convention reads as follows:

"(1) Any country party to this convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country deposits its instrument of ratification or accession, it will be in a position under its domestic law to give effect to the provisions of this Convention."

Indian Constitutional Provisions

Article 51, relating to the Directive Principles of State Policy under the Constitution of India, reads as follows:

"The State shall endeavour to -

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another."

On the above provisions, opinions have been expressed by:

1. Mr.M.V.Hidyatullah,Retd.Chief Justice,Supreme Court.
2. Mr.Y.V.Chandrachud,Retd.Chief Justice,Supreme Court.
3. Mr.J.C.Shah,Former Justice, Supreme Court.
4. Mr.V.Seturaman,Retd.Judge,Madras High Court

All of them are unanimous in their opinions that, if India joins the Paris Convention, substantial changes in the Patents Act are unavoidable.

ADVERSE IMPACT OF INDIA JOINING THE PARIS CONVENTION/ CHANGING OF PROCESS PATENT INTO PRODUCT PATENT.

If India decides to join the Paris Convention, eminent legal luminaries have opined that it will become mandatory for India to amend its current Patents Act to fall in line with the provisions of the Paris Convention.

The adverse implications of India changing its Patents Act are as follows:

1. PRICES

(i) During one of the hearings in the U.S.Senate in 1962 (prior to enactment of Patents Act, 1970), Kefauver Committee was constrained to comment:

> "Prices of certain drugs and antibiotics in India were amongst the highest in the world and that in drugs, India was one of the highest-priced nations".

This was the result of the product patent system that existed in India prior to 1970 because of which finished products were imported into the country at exorbitant prices.

(ii) In contrast to the above, it is well known that prices of pharmaceuticals in India are now amongst the lowest in the world. A Statement giving comparative prices of medicines in India and the U.K. is attached at Table I. The data clearly shows that prices in U.K. are between 3-7 times higher than prices in India. With the changing of vital provisions of our Patents Act, prices would go up substantially.

2. **IMPORTS**

If India is obliged to change its Patent Act, the first implication will be that product patents will get registered and this will increase the import bill for pharmaceutical products very substantially. At present, almost 95% of imports, valuing at Rs.300 crores relate to bulk drugs and drug intermediates. In future large imports would begin to take place in the form of patented finished products at substantially high prices.

3. **EXPORTS**

With cost-effective processes available for the manufacture of basic chemicals, drugs and pesticides in India, export activity has gained momentum in recent years. In these industries, India is today at a take-off stage and it is expected that export of these industries which is currently around Rs.450 crores annually would grow at a rate of 40-50% per year. These efforts will be substantially hampered because indigenous manufacturing of patented products would not be possible.

4. **INTRODUCTION OF NEW DRUGS**

It is relevant to note that where as in earlier years, "new drugs" were introduced in India 10-15 years after their introduction in world markets, after the enactment of the Patents Act, 1970, Indian Companies started setting up production facilities for these drugs by developing their own processes within a period of 4-5 years of their discovery abroad (See Table II). If the Patents Act is changed we would have no control over introduction of new drugs in the country and the manufacture of such drugs would get delayed by 10 to 15 years again as it used to happen in the past.

5. **RESEARCH ACTIVITY**

In the last 10 years, there has been considerable qualitative improvement in the field of process development

research, both in CSIR Laboratories as well as in the private sector. This scientific and technological effort will get a major setback if the Indian Patent Act has to be changed and the benefits of newer drugs being available to our people in a short period of time and at much lower prices will be totally reversed. Table III gives the list of important bulk drugs for which process technologies have been developed in the country and where self-sufficiency has been achieved - in several cases export surpluses have also been created.

6. **PRODUCTION**

Industrial development will get a setback because, as per the provisions of the Paris Convention, the patent holder is not obliged to manufacture the product in all the countries where he takes out the patent. The endeavour of the concerned companies abroad would be to manufacture their patented products in a country of their choice and export the same into India at controlled prices. Thus, indigenous efforts in these new areas would be halted.

TABLE I

COMPARATIVE PRICES OF MEDICINES IN INDIA & UK (1988)

Sl. No.	Products	Patent Expiry Date	India		United Kingdom		Price difference %
			Pack	Current Prices (Rs.)	Pack	Current Prices (Rs)	
1.	ALLOPURINOL TAB 100 mg	1986	10's	5.84	100's	303.81	+ 420*
2.	LOPERAMIDE CAP 2 mg	1990	10's	5.00	30's	81.14	+ 441*
3.	MEBENDAZOLE TAB 100 mg	1989	6's	4.88	6's	37.92	+ 677
4.	PIROXICAM CAPS 20 mg	1986	6's	7.20	30's	184.75	+ 413*
5.	TIMOLOL MALEATE 25%	1988	5ml	14.95	5 ml	125.92	+ 742*
6.	NIFEDIPINE CAPS 10 mg	1986	100's	50.00	100's	296.34	+ 493
7.	RANITIDINE TABS 300 mg	N.A.	10's	36.00	30's	666.82	+ 503*
8.	CLOTRIMOZOLE CREAM	1989	15 gm	6.15	20 gm	44.24	+ 440*
9.	CIMETIDINE TABS 200 mg	1992	10's	8.97	120's	432.72	+ 302*
10.	GLIBENCLAMIDE TABS 5 mg	N.A.	100's	8.88	100's	234.35	+2539
11.	STANOZOLOL TABS 5 mg	N.A.	10's	14.48	56's	540.90	+ 567

*Difference worked out on proportionate basis.

Table-II

PROCESS PATENT IN THE PHARMACEUTICAL FIELD

HAS HELPED PRODUCTION OF NEW BULK DRUGS DISCOVERED ABROAD IN INDIAN MARKETS WITHIN A MUCH SHORTER PERIOD THAN EARLIER:

DRUG	INTRODUCED IN WORLD	INDIA	GAP-YEARS
SALBUTAMOL (ANTI-ASTHMATIC)	1973	1977	4
MEBENDAZOLE (ANTHELMINTIC)	1974	1978	4
RIFAMPICIN (ANTI-TB)	1974	1980	6
NAPROXEN (ANTI-RHEUMATIC)	1978	1982	4
BROMHEXIN (ANTI-HYPERTENSIVE)	1976	1982	6
CAPTOPRIL (ANTI-HYPERTENSIVE)	1981	1985	4
RANITIDINE (ANTI-ULCER)	1981	1985	4
NORFLOXACIN (ANTI-BACTERIAL)	1984	1988	4

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EFFECT OF PROCESS PATENTS

TABLE-III

BULK DRUGS MANUFACTURED BY NATIONAL SECTOR COMPANIES BASED ON INDIGENOUSLY DEVELOPED KNOW-HOW

1. AMITRIPTYLINE
2. AMOXYCILLIN
3. AMPICILLIN
4. BETAMATHASONE
5. Ca.SENNOSIDE
6. CARBAMAZEPINE
7. CHLORAMPHENICOL
8. CHLORDIAZEPOXIDE
9. CHLORPROPAMIDE
10. CHLOROQUIN PHOSPHATE
11. CIMETIDINE
12. CLOFAZIMINE
13. CLOFIBRATE
14. CLONIDINE
15. CLOXACILLIN
16. CYPROHEPTADINE
17. DEXAMETHASONE
18. DEXTROPROPOXYPHENE
19. DIAZEPAM
20. DILOXANIDE FUROATE
21. DIPHENYL HYDANTOIN
22. DOXYCYCLINE
23. EMETINE
24. ERYTHROMYCIN
25. ETHAMBUTOL
26. ETHINYL ESTRADIOL
27. FTORAFUR
28. FRUSEMIDE
29. GENTAMYCIN
30. GLYBENCLAMIDE
31. GUAIPHENESIN
32. HEPARIN
33. HYDROCHLOROTHIAZIDE
34. HYDROXYZINE
35. IBUPROFEN
36. INDOMETHACIN
37. ISOPROPYLANTIPYRINE
38. LORAZEPAM
39. KANAMYCIN
40. MEBENDAZOLE
41. METHOCARBAMOL
42. METAPROLOL
43. METRONIDAZOLE
44. METHYL DOPA
45. NALIDIXIC ACID
46. NITRAZEPAM
47. NITROFURANTOIN
48. NORETHISTERONE
49. NORFLOXACIN
50. PIRACETAM
51. PROPRANOLOL
52. PVP-IODINE
53. PYRAZINAMIDE
54. QUINIDINE
55. RANITIDINE
56. SALBUTAMOL
57. SILVER SULPHADIAZINE
58. SULPHAMETHOXAZOLE
59. SULPHAMOZOLE
60. STERBUTALINE
61. THEOPHYLLINE
62. TINIDAZOLE
63. TRIMETHOPRIM
64. TRIOXSALEN
65. VINBLASTINE
66. VINCRISTINE
67. VITAMINE B-12/OTHER VITAMINS
68. DANAZOL
69. PROGESTERONE
70. TESTOSTERONE
71. HYDROXYPROGESTERONE
72. QUININE
73. CISPLATIN
74. ASPIRIN
75. NIFEDIPINE
76. PYRANTEL PAMOATE
77. PARACETAMOL

Development of alternative processes possible because of the existing Patent Laws.

Fields of exclusion from patentability in selected countries

Field of exclusion	Countries
1. No specific exclusions	Australia,[a] Federal Republic of Germany, Ireland,[a] Netherlands, New Zealand[a], United Kingdom,[a] Cuba, Jordan, Liberia, Malawi,[a], Philippines, Sri Lanka,Sudan, Zambia[a]
2. Food products	Austria, Canada, Japan, Spain,Switzerland Brazil,[b], Chile, Colombia,Egypt, India, Korea, Kuwait, Tunisia, Venezuela,Yugoslavia; Czechoslovakia[c], German Democratic Republic Hungary, Poland,[c] Romania,[c], USSR[c]
3. Plant varieties or kinds of animals,or essential processes for obtaining plants or animals[d]	Denmark, Finland, France, Norway, Sweden, United States of America; Poland, Romania, USSR, Algeria, Colombia,Israel, Nigeria
4. Pharmaceutical Products	Austria, Canada, Italy,[b] Japan,[b] Switzerland, Turkey;Czechoslovakia,[c] German Democratic Republic,Hungary,Poland,[c] Romania,[c] USSR;[c] Argentina, Brazil,[b] , Chile, Colombia, Egypt, Ghana, India, Iran, Iraq, Korea,[b] Kuwait, Lebanon, Morocco, OAMPI countries, Pakistan, Syrian Arab Republic, Tunisia, Urguay, Venezuela, Yugoslavia
5. Chemical substances,	Japan,Switzerland,USSR;Brazil,Chile,China, India, Korea, Mexico
6. Nuclear materials,atomic energy, atomic weapons	Japan,United States of America,Czechoslovakia, Poland,Romania,Brazil,India
7. Programmes for computer machines[e]	France, Poland
8. Inventions related to State monopolies	Austria
9. Items deemed contrary to public or social interest or economic development	Ghana, Iraq, Peru

a "Mere mixtures of known ingredients..." in the case of food or medicines are not patentable.

b Processes are also excluded.

c Inventors' certificates are granted.

d In many of these countries plant varieties,etc are protected by laws other than the patent laws.

e The laws of many other countries exclude accounting..etc.,systems or programmes generally without specific reference to computers.

I – Pitfalls Of The Paris Convention

By SURENDRA J. PATEL

INDIA's position about not joining the Paris convention has remained well-settled since independence. Our three successive Prime Ministers, Pandit Nehru, Shastriji and Mrs Indira Gandhi, had resisted all pressures, particularly from foreign transnational corporations and their domestic supporters, to join the convention. Instead, they had directed our policy towards revising both the national patent and trademark laws and the Paris convention, in order to safeguard India's national interests of rapid development.

Our longstanding position of not joining the Paris convention, unless it is basically revised, is now being reconsidered. A committee of five men, under the chairmanship of Dr S. Ganguly, chairman of the IPCL, has been established to advise the government whether to join or not to join the Paris convention. It is important, therefore, that the basic issues which had guided India for all these long years against joining the convention, are examined once again so that their full awareness would show why there is no case for a Hamlet-like hesitation on the subject.

A public discussion of this esoteric subject is hampered by the general ignorance of what the patent and the trademark system and its guardian, the Paris convention, are all about.

A patent (and a trademark) is an exclusive grant by government to an individual or a legal person to restrain all others from making, importing, offering for sale, selling or using in production the products and processes covered by the grant. It is thus the grant of a monopoly to prevent others from imitating, adapting, improving and producing these items. Quite clearly, the conflict between private gains and public interests or national needs is at the very heart of the system.

The major industrial countries have always been the strongest advocates of the system. The imperial powers — Britain, France, Belgium, the Netherlands, Italy, Germany — imposed it in their colonies upon conquest. And the United States did the same in the Latin American countries under its domination. Indian patent law was introduced as early as in 1859, just a few months after the suppression of India's first rebellion against the British. No wonder, it was among the very first laws given by the crown. It reserved at one stroke and for all time Indian markets for the British exporters. A similar situation was created in all other colonies and semi-colonies.

3.5m. Patents

There are some 3.5 million patents in the world. Of these, the third world countries have only 200,000. The nationals of the third world hold only 30,000 of these, that is, less than even one per cent of the world total. The other 170,000 — or 85 per cent of the total — are held mostly by the powerful transnational corporations of the United States, United Kingdom, Germany, France, Switzerland and Japan. To add injury to insult, not even five per cent of these patents are used in production in the third world. In India too, foreigners held 80 to 90 per cent of all patents, few of which were ever used in production.

The system thus reserves the third world markets for the foreigners. It perpetuates perverse preferences, or reverse reservation. It is a system mainly for the benefit of foreigners, but legalised, operated and even subsidised by the nationals — a system guaranteeing private foreign gains at public cost to the third world countries. In the comity of nations, the third world accounts for 75 per cent of population, 20 per cent of income, 30 per cent of trade, and about 40 per cent of enrolment in higher education. But its share in the world patent system is only 1 per cent. The present system, designed to protect the foreign interests, has thus remained the most unequal and most unjust of all the relationships between the developed and the developing countries.

The Paris convention serves as the guardian of the patent system. It, therefore, legitimises all the inequities of the patent system summarised above. The convention was established during the 19th century on the initiative of the United States. It was signed in Paris in 1893, at the time the Paris world fair of industrial products of "all" nations was underway. Many governments, mostly from the less industrialised countries in Europe, had serious misgivings about such a convention which they felt, would serve the interests of the patent holders in the then "developed countries" (USA, Switzerland, Germany, France and the UK) and thereby adversely affect their national interests and industrial development.

This opposition was skilfully handled. The USA brought with it to Paris, aboard the same steamship, its protectorates—Brazil, Ecuador, El Salvador and Guatemala, and France brought in Tunisia—to create a majority through block-voting.

Since then, the convention has remained for long, "a rich-man's club". It was revised six times—in 1900, 1911, 1925, 1934, 1958 and 1967. But each revision only further strengthened the rights of the foreigners.

Basic Asymmetry

The basic asymmetry between the interests of the foreign patent holders and the nationals of the third world countries, runs all the way through the entire structure of the convention. Its first article is devoted to the definition of the coverage of industrial property. Its very next article guarantees equal treatment to patentees from all countries—both the rich and strong, and the poor and weak. We have come to know well, how such "spurious equality" between the very strong and the very weak, actually perpetuates preferences for the powerful foreign multi-national enterprises. The Paris convention furnishes, yet one more classic example of this, along with nuclear non-proliferation treaty and such "international legislation".

The convention then spells out in detail how the signatory countries have to pass new laws, or adjust the old ones they already have to conform to the basic thrust of the convention—to protect only the rights of the patentees while being silent on his obligations. This is clearly embodied in the watered-down historic compromise contained in article 5. A century-long legal battles have not produced even a few favourable judgments safeguarding public interest.

The convention has a unique system implicit in the provision on its revision—only by complete unanimity. The veto system was thus not invented just for the United Nations security council. The Paris convention had started it long before finally.

The process of withdrawing from the convention is both tricky and a long one. It would involve at least five to six years.

These are the reasons why the summit conferences of the non-aligned movement and the group of 77 have forcefully called for a basic revision of the Paris convention.

(To be concluded)

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II — Pitfalls Of The Paris Convention

THE post-war world saw the collapse of imperialism and the independence of the colonies. The newly independent countries began to perceive the perversity of the patent system, the inequity of the Paris convention.

The third world countries called for a basic revision of both. As director of UNCTAD's technology division, I was closely associated with this process. India was in the forefront of this crusade, acting as the natural spokesman of the developing countries, or the Group of 77, as it came to be called in UNCTAD.

The skill with which Indian representatives marshalled the evidence, won the respect and admiration of the Group of 77.

As charity begins at home, India was, therefore, among the first countries to revise in 1970 its British-imposed patent law. The new law was a long step forward.

Above all, it changed the very objective of the system — denying monopoly to foreigners for the imports of the patented articles and centring the system upon encouraging national inventiveness and securing working of the patents in the production system.

It contained several departures. It excluded critical sectors of national interest from patentability — agriculture, processes of treating human beings and animals, inventions relating to atomic energy (already made unpatentable by section 20 of the Atomic Energy Act of 1962).

It prohibited the grant of patents to products for food, pharmaceutical and chemicals and limited it to only processes.

The duration of the patent grant was cut down to only 5 years in these items of critical national interest. It introduced automatic endorsement for "licences of right" so as to use the patents in production in order to promote national development.

Patent Act

India's 1970 patent Act became a model for other third world countries. They too revised their patent laws. In consequence, the third world pressures for the revision of the Paris convention mounted in UNCTAD.

India and Brazil, supported by the rest of the Group of 77 and the socialist countries, finally succeeded in mid-70's to initiate the formal process of the revision of the Paris convention — a revision in a direction completely different from that in the earlier six revisions of the convention.

This time the pendulum was to be pushed in the other direction — safeguarding the interests of rapid industrial development of the third world. But even after eight years of negotiations, the revision process is still stalled by the fierce opposition of the western industrialised countries.

During discussions on the revision of the Paris convention in various forums of the World Intellectual Property Organisation (WIPO), Geneva, the group of developing countries have maintained that any industrial property system must fulfil the developmental needs of the non-industrialised countries.

Today, India has about 1000 in-house R and D units in public and private sector industrial companies, and major investments in public-funded R and D through the Council of Scientific and Industrial Research, Indian Council of Agricultural Research, department of atomic energy, department of space, department of defence research and institutes of higher technical/scientific education.

Trump Card

India is, therefore, at a stage of making a competitive entry into international markets on technology. It is at this stage that the highly industrialised countries through the Paris convention can do maximum damage by blunting the edge of India's developing innovative capability.

This is the background for India's refusal to join the Paris convention. India's remaining outside the convention has served as the strongest card in the negotiations to revise the Paris convention. It has enabled it to adopt a new patent law safeguarding its national interests.

Thus there is no change in the fundamental reasons why India has all along refused to join the Paris convention.

In fact, the needs for India's social, economic and industrial development in the present phase, make the arguments against joint the convention still more valid.

The appointment of the Ganguly committee has, therefore, understandably caused widespread concern that this position may now be compromised.

Several recent developments have in fact reinforced the grounds for India's refusal to join the convention. Joining it will compromise some of the most important provisions of our 1970 patent law. That will undermine the development of national industries, particularly in the pharmaceutical field. According to Dr S. Vedaraman, former controller general of patents, sections 5, 10(5), 47, 66, 87, 88, 91, 93, 99 and 102 of the Patent Act would require modification if India joined the convention.

According to justice V. Sethuraman of the Madras high court, section 23(1) of the trade and merchandise Marks Act and section 28 of FERA are inconsistent with the Paris convention. Similarly, section 20 of the Atomic Energy Act of 1962 will face modification.

There is a formidable legal consensus among four former justices of the supreme court, who have come out against joining the Paris convention. They are justices J. C. Shah, Y. V. Chandrachud, M. Hidayatullah and V. R. Krishna Iyer.

As is widely known, these four justices have in the past differed on several issues. But they are unanimous that joining the convention will require "abrogation" of several provisions in our patent law and "will seriously harm the economy of the country."

Drug Element

Justice Shah considers that in his opinion, joining the convention "is legally impermissible because it is in violation of directive principles of state policy enshrined in article 39" of the constitution. It will also lead to "the infringement of fundamental rights" as protected by statute laws.

The Indian drug manufacturers' association has expressed its strong opposition to joining the convention. It considers that such an Act would undermine the progress we have made in developing rapidly our national drug industry.

Since 1976, drug production in the national sector has increased 3.4 times, with that by multi-nationals more or less unchanged. The FICCI had established in early 1986, a special sub-committee on this question, which came out against joining the Paris convention. FICCI's views were communicated to the government on May 7, 1986.

Our foremost scientists working on drug research and manufacture are against our joining the Paris convention. These include Dr Nitya Anand, former director of the Central drug research institute.

They have warned that joining the Paris convention would cripple R and D and technology development not only in the traditional drug industry, but also in the new area of bio-technology, which holds enormous promise of creating a whole new drug and vaccine industry.

In summary then, economists of all shades, supreme court justices, outstanding scientists, FICCI and IDMA have added their strong voices to reinforce India's determined stand not to join the Paris convention.

That stand was forcefully articulated by the late Prime Minister, Mrs Indira Gandhi, in an address delivered at the 34th session of the world health assembly on May 6, 1981 in Geneva. There she stated: "My idea of a better ordered world is one in which medical discoveries would be free of patents and there will be no profiteering from life or death."

(Concluded)

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