

## CONCEPT OF PATENT - INDIAN PERSPECTIVE

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The Indian Patents Act, 1970 has been significantly amended in 1999. The amendments cannot be considered as simplistic or minor in nature. They have taken the country in a new direction, a drastic departure from the nation's past policies and have therefore drawn equal flares and bouquets both from its critics as well as from its votaries. This paper takes a balanced view of the challenges and opportunities that the new Act provides for India.

India ratified the Uruguay Round of Multilateral Trade Agreement, establishing the World Trade Organisation (WTO). Nine annexures have been added to it which contains 28 agreements and 130 Tariff and Service Schedules of the member countries. The General Agreement on Trade and Tariffs, 1947 is now a part of it. The agreement now covers three important *new* areas amongst other in the fields of intellectual property rights, services and investments. It also embraces agriculture and textile, which were outside the scope of GATT. The WTO is considered to be third pillar along with the World Bank and the International Monetary Fund (IMF). India wily nilly found that it had not much say in the agreement as its share in international trade was negligent. Leaving the organisation would not have been a wiser step, though it contained many aspects which are disadvantageous to the country, so it joined the organisation. The agreement came into force w.e.f. 1-1-1995.

World Trade Organisation Agreement, *inter alia*, contains an Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). The TRIPs Agreement, *inter alia*, prescribes the minimum standards to be adopted by the member countries in respect of 8 areas of intellectual property. Patent is one of them.

India and other developing countries were given a transition period of 5 years (w.e.f. 1-1-1995) under article 65 to apply the provisions of the TRIPs.

Creation of WTO has brought a sea change. Today, industrialization is not sufficient to a country. What is required is to remain competitive and

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for that technological up-gradation is sine qua non. Yesterday's age of industrialization is now replaced with the age of technologies. India has remained behind in this race. Reasons are not too far to seek. Second World War witnessed the imposition of quota, permit and licensing system throughout the world during 1939-45. However, as soon as the war was over, the developed world removed these restrictions. India continued with them. Indian entrepreneurs found themselves in swimming waters; bonded with chains. With Fifty years of our political independence, now there is realization to some extent, that many of our policies need thorough changes.

Change is the law of nature. Fashions change every 30 years. Economic theories seem to have turn around after 100 years. Today governments are starved of money and cannot afford to invest in public sector. Dis-investment process has started. Government of India may not be rich, but people of India are who can rightly take the country on the path of progress in 21st century. Quota, permit, license Raj must be demolished. Patent Act has rightly been amended.

One of the major causes of our technological backwardness is the failure of our Patent Act, 1970 to fulfill its twin objectives of development and exploitation of inventions. Technology is private property. The function of the patent law is to bring this private property into public domain, for the good of producers and consumers. If technology is made available free of cost, who will bear the cost of innovation. Innovators spend their own money into research. A proper patent law would induce both the inventors as well as entrepreneurs to disclose technological secrets and to invest capita for commercial exploitation, respectively.

Furthermore, Dispute settlement panel of WTO has decided against India. US filed a complaint about failure of India to change its patent law and provide for mailbox facility and Exclusive Marketing Right (EMRs). US argued that according to Article 70.9 of TRIPS, developing countries were obliged to take a decision on the patentability of pharmaceutical and agricultural chemicals products immediately while being able to postpone that decision with respect to all other products until 1 January 2000. The grant of an additional five years in Article 65.4 to implement the provisions on product patent protection in Article 27 had been balanced against the inclusion of obligations to establish fully functional mailbox and EMR systems in Articles 70.8 and 70.9.

The Appellate Body recently had decided in the *Wool Shirts* case<sup>1</sup> in which India had argued that under the Agreement on Textiles and

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1. 1997, WT/DS24/AB/R at 15.

Clothing (ATC) the burden of proof should be shifted to the importing country taking temporary safeguard action. In rejecting the Indian argument, the Appellate Body had clarified that the ATC was a Transitional arrangement containing “carefully negotiated language... which reflects an equally carefully drawn balance of rights and obligations of Members....”

This characterization was equally applicable to the balance between the transitional rules in Article 65.4 and the obligations established in Articles 70.8 and 70.9 of the Agreement.

India has lost the case. Postponing of the amendment of the Patent Act would result into demanding of compensation by US for the loss suffered by its industry. Consequent upon the failure to pay compensation provides for retaliation. US has recently revived its Special 301 clause under 1974 US Trade Act. The clause deals with identification of countries to be placed on “priority watch list”.

A large section of Indian populace is gripped with the foreign domination fever. However, it is overlooked that it results into huge loss to the country on account of brain drain of our scientists and technologists. MNCs in India do not invest in research and development as there is no patent protection. To them, safety of innovations is more important than the costs involved, as it may be argued that in India scientists are available at one-tenth of the costs in developed world. It is further argued that we may have to pay higher prices for the essential drugs. But these critics conveniently forget that price of a commodity is determined by the competition offered by substitute product. Compulsory licensing stays despite amendments; although it does not remain as automatic. It can be exercised in the public interest for the reasons to be given in writing. Here we should remember, that since the inception of the Act, India never exercised its option in this regard. It was always a dead letter provision, which only resulted into adverse climate for foreign investment in India. The provision never benefited India. Similarly the question of imports or domestic production is on the commercial viability of a project. No Indian will produce a product in the absence of commercial viability, even if the patent holder gives permission to produce without any payment.

Patent laws have generated lot of controversy in the following two fields:

- (a) extension of protection of patents to plant varieties affecting farmer's interests.
- (b) change over from process patent to product patent.

*(i) TRIP's Impact on Agriculture*

So far agriculture was not covered by GATT Agreement. Indian farmers will be benefited on the following counts:

- (a) it will open world market for Indian agriculture;
- (b) discrimination between trade in agriculture and trade in other commodities will go;
- (c) GATT will integrate urban and rural people as lot of money will come in the rural areas;
- (d) India may emerge as an important seed market under breeder's right. Increase in productivity can bring wonders in Indian economy.

Today India is the second largest vegetable and fruit producer in the world. It is the third largest producer and exporter of flowers. India has comparative advantage, because when summer goes in Europe, it arrives in India. What India needs is reliable air service, packaging, infrastructure and management. India must develop consortium of producers and exporters.

What India lacks is productivity and utilisation. Value addition is to be done through grading packaging and marketing. Problems of farmers and rural people should be given top priority.

The point to ponder is - Are we ready to take advantage of this new wind of change? We will have to develop culture of patenting. Research and development should be given top priority. Resources should be provided to farmers by providing Assistance Fund. If proper budgetary/ technological supports are provided to agriculture, we can become food providing Nation of tomorrow, within the next five years.

Special attention must be paid in the field of seeds, medicinal plants, endangered species, timber and biodiversity. Genetic Resource Bank must be established in every district. Local innovations should be encouraged through competitions, exhibitions and awards.

*(ii) Subsidies*

Fear regarding removal of subsidies under GATT is unfounded. Indian subsidies are well within the limits. In fact negative subsidies are received by our farmers. When we compare agricultural prices in Indian and international market of 20 primary agricultural products in India, we find that Government provides(-) 24,000 crores rupees, in subsidies. It is done through compulsory procurement. In India prices of food, cotton etc. is kept low, as Government imposes ban on exports. With GATT "Zero Regulation Day" will come in agriculture also, like industry.

It is the West which has to reduce subsidies under GATT, where subsidies are to the tune of 20-30 % particularly in the West. With the reduction in subsidies "Butter Mountains" and "Wine Lakes" will disappear. Subsidized regimes will be replaced with free marketing system, benefiting India.

*(iii) Genes Patenting*

It is estimated that by the year 2010, the human body organs/ genes trade industry will grow to US \$ 60 billion. Today biotechnology companies are seeking patents over the basics that make life, like DNA, genes or complex human body material like hair, blood, semen, perspiration etc. Although 13th amendment of the US Constitution forbids patent rights in human beings, but US patent law does not differentiate between inventions and discoveries. US companies have patents base on Ayurvedic medicinal plants.

Naturally occurring micro-organisms are not patentable, only Genetically Modified Micro-organisms (GMO) are patented. Patent will be available for the trait introduced in medicine or pesticide or for the particular use of the product. GMO per se will be freely available for further research.

Union for Protection of New Varieties of Plants (UPOV) 1991 convention has provided exclusive right of the sale and marketing. If breeder's right is violated, he can stake his claim at both the stages of harvesting as well as processing. The period of protection for wines and trees is 18 years and for other varieties, it is 15 years.

The Convention allows "Farmer's Privileges" to use the saved seed, but only from his "own holding" for growing subsequent crops only in the holding. He cannot grow or sell it as a seed. The farmer is permitted limited non commercial traditional exchange of seeds within the village community. Under " Researcher's privilege" a scientist can utilize patented seed to breed another variety without the authorization of the original plant breeder.

TRIPS Agreement provides to protect plant varieties either by patents or by an effective 'sui generis' or through a combination of both. The countries are free to chose any method. According to UPOV and WIPO these systems are complimentary. They consider that patenting would be more appropriate for bio technological inventions.

India is obliged to provide Plant Breeder's Right to new plant varieties after 31.12.2000. At present, in India plant breeding is confined to hybrid seeds, horticulture and vegetable crops. India possesses a lot of agro-

ecological diversity and plant breeding capability. A vibrant seed industry can be developed in India not only to meet domestic demand but also to make India a player in the world seed industry... PBR protection will draw private investment in the agriculture field. National Seed Corporation and Indian Council of Agricultural Research can also benefit immensely.

*(iv) Medicines/Pesticides*

Engineering goods have always enjoyed product patent in India. Opposition to grant the same to drugs etc stems from the fear of their steep price rises on this account. But price of any product including medicines is determined by the absence or presence of replacement drugs. According to WHO report hardly 10 to 20 new molecules are introduced in the market. Furthermore, one successful product is to cover the expenses incurred on 10 unsuccessful products. Our sale and distribution system being cheaper, our prices will remain low in relation with rich nations. Even if 20 years protection is granted, at present it takes 3 to 5 years in search and granting of patents. It takes another few years to get acceptance with the medical practitioners.

India is to introduce product patent in medicines from 1 January 2005. China has already adopted product patent in 1993. India should utilize transition period for upgrading the Government machinery. Scientists should learn intricacies and pitfalls of the methods of examining the products.

*(v) Exclusive Marketing Rights (EMRs)*

For application filed since 1 January 1995, EMR shall be given to applicants for 5 years or until a patent is granted/ rejected whichever period is shorter. EMR may not create monopoly as in most cases substitute drugs are available.

*(vi) Paris Convention and PCT*

Tekchand Bakshi Committee had recommended that India should join the convention. India formally became a member of the convention from 7 December 1998. Joining PCT was a logical conclusion after our signing TRIPS Agreement. MFN treatment is at the core of the PCT. National Treatment clause provide that all countries of the union shall be treated equally. It will provide a sound information base and will facilitate technology transfer flows into India. It is hoped that in future India will become International Search Authority. TRIPS require documentation of all knowledge. We were successful in removal of patent on Haldi as we could produce proper documentation in this regard.

*(vii) 167th Law Commission Report*

Justice Jeevan Reddy Committee had urged the Government to take advantage of the exemptions in the national interest as provided under Article 27(2) of the TRIPs Agreement. The Agreement allows members to exclude from patentability inventions, the commercial exploitation of which is necessary to protect public order or morality including protection of human, animal or plant life or health or to avoid serious prejudice to environment. Article 27(3) enables the members to exclude from patentability diagnostic, therapeutic and surgical methods of the treatment of humans or animals. Government has pointed out it will bring a separate legislation with respect to bio-diversity and plant protection.

*(viii) Directorate of Enforcement*

It is finally suggested to strengthen strict enforcement of the Intellectual Property Laws; which is our weakest link. Establishment of a Directorate will be a step in the right direction.