Why India Should Adopt the Dunkel Draft Patent Proposals

— A Reply to Professor Madhava Menon

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In a well reasoned article in the National Law School Journal,[1] the Director of the National Law School, N. R. Madhava Menon, argued that the patent provisions of the Dunkel Draft, if adopted by India as part of the GATT negotiations, would harm India. According to him, it could put India in the grip of "commercial monopolies who may be worse than their colonial predecessors." [2] In this article, I assert that instead of subjecting India to the grip of foreign commercial monopolists, adopting the provisions of the Dunkel Draft will move India along the path to first world status, a status that India should properly enjoy given its immense scientific and engineering capabilities, not to mention its proud commercial tradition. This article urges that India would benefit from accepting the Dunkel provisions and that India should do so for its own interests.

I do not have the space in this article to debate the worth of patent laws in industrial societies. The debate is an old one. It raged in England throughout the nineteenth century and continued in the United States during the Great Depression. Now that the debate is essentially over, Europe, the United States and even Japan agree that strong patent systems are needed to correct a defect that lies at the core of any capitalist order. Without strong patent protection, there is little incentive to invest in the creation of new technology that can be readily copied once commercialized. The result of the victory of strong patent regimes throughout the world has led to the creation in the United States of the Court of Appeals for the Federal Circuit, a court that hears all patent appeals. This court has strengthened the patent system in the United States. In Europe, it has led to the creation of the European Patent Office under the European Patent Convention. The Dunkel Draft is essentially a copy of the provisions of the European Patent Convention. It is definitely not a statement of current patent laws of the United States. American patent law will have to be modified to meet the standards set out in the Dunkel Draft.

Instead of having a strong patent system as befits a country with millions of scientists and engineers, the Indian Patent Act of 1970 is pitifully weak and harmful to India's interests. It is structurally a copy of the British Patent Act of 1949. However, it shortened the general patent period from 16 to 14 years from the date of application, and it further shortened the period for processes to 7 years from the date of application. Moreover, it eliminated product patents for chemicals, foods and drugs. In 1977, the British Parliament enacted the 1977 Patents Act. This patent law follows the outline of the European Patent Convention. With only very limited exceptions, the European Patent Convention provides

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1. (1992) NLSJ 102.

2. Ibid.

for the granting of patents in all technologies both product and process, effective for 20 years from the date of application.

Essentially, Indian process patents have little value because of their short life and product patents that are essential to the development of chemical and pharmaceutical industries are unavailable. Thus, India does not have the legal framework required for the development of chemical and pharmaceutical industries as they are known in the United States, Europe and Japan. The only segments of those industries that can develop in India are those that rely on copying the technology of others. India, with its advanced technological base and large number of scientists and engineers can clearly compete with other advanced countries in these cutting-edge industries.

There is another important aspect of the Dunkel Draft for Indian patent law. India is not a member of the Paris Convention. It is the only major country that is not a member. As a result, Indian inventors do not get the benefit of their Indian filing date when they file patent applications abroad. This is a major impediment for Indian industry. There is no reason to place this burden on Indian industry. Enacting a patent law in accordance with the provisions of the Dunkel Draft would eliminate any reason for not becoming a member of the Paris Convention.

I recognize that Indians are concerned with the question of the costs of pharmaceuticals if India adopts a real patent law that is applicable to pharmaceuticals. The urge to get something for nothing is strong and not only in India. Canada, for years, refused to protect pharmaceuticals preferring to having the American consumer pay for the development of their drugs. Canada, although after much debate, has agreed that it is not fair for it not to pay its fair share of drug development costs. That said, there is no question that the cost of new pharmaceuticals products will go up in India. However, it is mainly the rich in India who will bear this burden since there would be plenty of good unpatented drugs readily available at low cost. There are more than enough unpatented drugs to provide low cost quality medical care for the poor and middle classes in India. Thus, to the extent that the wealthy would like to have whatever benefits flow from the latest pharmaceuticals, they would bear their share of the costs of development a small price to pay for encouraging the development of advanced domestic industries such as pharmaceuticals in India.

To conclude, India without any pressure from GATT should adopt a patent law that follows the guidelines of the European Patent Convention. In doing so, India would become an important member of the first world. This is a win-win strategy both for India and the rest of the industrialized world.