Limited Sovereign State— The Issue of Intellectual Property Rights and the Third World

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A. GAJENDRAN

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI-110067, INDIA

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JAWAHARLAL NEHRU UNIVERSITY
CENTRE FOR POLITICAL STUDIES

School of Social Sciences II
New Delhi-110067 India

DECLARATION

This dissertation entitled "LIMITED SOVEREIGN STATE- THE ISSUE OF INTELLECTUAL PROPERTY RIGHTS AND THE THIRD WORLD" submitted by Mr. A. GAJENDRAN in partial fulfilment of the requirement for the degree of Master of Philosophy, has not been previously submitted for any other degree of this or any University. We recommend that this dissertation should be placed before the examiners for their consideration for the award of M.Phil., Degree.

CHAIRMAN
(Prof. BALVEER ARORA)

Chairperson
Centre for Political Studies
School of Social Sciences
Jawaharlal Nehru University
New Delhi-110067

SUPERVISOR
(Dr. RAKESH GUPTA)

Gram: JAYENU Tel: 667676, 667557 Telex: 031-73167 JNU IN

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C O N T E N T S

INTRODUCTION

This dissertation titled,"Limited Sovereign State - The Issue of Intellectual property rights and the third world" aims to analyse the impact of the Intellectual property Rights issue between the Developed Countries and the Less Developed Countries on the concept of Sovereignty of Nation-States. The study has been carried out in the light of Third World countries' experience.

The Issue of Intellectual Property Rights (IPRs) between the Developed countries (DCs) and the Less Developed countries (LDCs) emerged with the DCs' criticism that the LDCs' possess 'very less effective' IPR systems. Subsequently, the DCs, headed by the USA, resorted to make a collective initiative by which the IPR system of the third world becomes more effective. Infact, the various multilateral fora including the GATT have been used by the DCs' to secure a harmonised, uniform multilateral IPR system.

The demand for a uniform IPR system in the world, sought by the DCs, is primarily to strengthen the hands of IPR holders. Their argument is that the inventors of new ideas or products should be given the compensation as they would prefer. For, failing to do so will prevent inventive quest and investment in the technological innovations. Therefore, in the DCs' opinion the inventors and innovators should be given the privilege of profit appropriability as they would deem to be adequate.

The LDCs on the other hand, have criticised the DCs in general and the USA in particular for making a bid to establish such a uniform system without considering the various constraint involved vis-a-vis the Third World. Their argument against the harmonisation of National Laws on IPRs is that the LDCs are in a different stage of development (as against the DCs) and any such bid to harmonise the IPR system should not hamper their speedy progress of meeting the pre-requisites. The LDCs' view is that as the DCs, in their early stages of development, had different IPR system to suit their public needs, the LDCs should also be allowed to have different IPR regimes based on their multifarious developmental compulsions political orientations, cultural diversity etc.

The LDCs arguement is that the establishment of an IPR regime of a country is based on the domestic compulsions and it falls precisely in its domain of internal sovereignty. Any move to harmonise the IPR regime internationally, ignoring the national public interests of nation states and domestic legitimacy in fulfilling the same, will lead to the infringement of the sovereignty of nation-states.

Their (LDCs') view is that the DCs could rely on their soverign right to adapt any IPR law that would meet their pre-requisites and hence they could emerge superiors, technologically, vis-a-vis the Third World. Likewise the third world countries

have the sovereign right to adapt any IPR law as they wish to meet their basic needs. They (LDCs) further argue that any move to prevent such a sovereign, independent IPR system in the LDCs by the DCs, would mean reducing the Third World to the'Dependencia-Syndrome' (on the DCs). That is, enabling the DCs to remain as repositories of technology and securing them oligopolistic(their TNCs') control of the same vis-a-vis the LDCs.

The study has been carried out under four chapters. The first chapter, deals with the definitional aspects of sovereignty of nation-states and the infringement of sovereignty of nation-states by various international forces. The second chapter, aims to initiate the study on the impact of Intellectual Property Rights (IPRs) on the sovereignty of nation - states. Here, the status of the DCs (Developed countries) on the IP (Intellectual Property) and their (DCs') stance on the Issue of IPRs has been discussed. The Third Chapter, deals with the position of the Third World on the IP and the LDCs' (Less Developed Countries) stance on the issue of IPRs has been discussed. The Fourth chapter discusses the stance of India on the issue of the IPRs (a sort of case study).

Scope :

This dissertation restricts itself to the study of the impact of the issue of IPRs (between the DCs and the LDCs) on the sovereignty of Nation - States. Since the issue very well falls under the realm of International Law and Economics, the

following points regarding the present study are made clear at the outset:

(a) The issue of IPRs has been discussed only to the extent of its repercussion, realized on the soveregnity (political theory) of the nation-states.

(b) The study touches only those aspects of International Conventions, Treaties, Conferences etc. on IPRs, that have relevance to the present endeavour.

Since the issue of IPRs has come to the limelight only in the recent past or is not so completely, around the world, the contributions of academicians have not covered the multifarious implications of the IPRs yet. Little literature is available on the IPR issue especially from the point of view of "sovereignty" (political theory). Therefore the study warrants the over reliance on the primary sources as well as on secondary sources like International Journals, and papers.

Thus, this dissertation, with its inter-disciplinary implications, has been carried out with the aforesaid constraints.

CHAPTER - I

Decline of Sovereignty of Nation - States

The concept of territorial sovereignty emerged three hundred years ago. Its origination could be traced to the importance which "the territory" of a nation-state assumed. The word "territory" means portion of the earth and its atmosphere which is such that it may fall under the jurisdiction of anation-state. Modern International Law recognises territorial claims over part of the sea and over air space. The principle of sovereign territoriality serves the twin purposes of (a) protecting the nation-state from external unwarranted influence (i.e., foreign countries' involvement in the affairs of a nation-state) and (b) it seeks to confine each state to that territory currently claimed by it. That is, it holds that a sovereign state ought not to engage in jurisdictional acts outside the limits of the territory.

According to the International Enyclopedia of social sciences, "the subjects in whom inhere the rights and obligations defined by International Law are states; and a

community is not a state unless it is independent of legal control by any other community and is legally free to determine the nature of its relations with all other communities, except in so far as it limits its freedom contractually or voluntarily."

Although the modern concept of sovereignty was first analysed by Bodin in his Republic in 1576, its essential character was not completely known to the classical writers such as Aristotle[1]. Thus Aristotle referred to the "supreme power " of the state. During the Middle Ages, the modern concept of sovereignty could not emerge. Feudal society, with its multiple points of personal allegiance was not able to provide unity of power. The common belief in the supremacy of the law of nature or law of God in the Feudal society, further obstructed the rise of sovereignty.

Sovereignity as an essential attribute of the nation - state was the product of the circumstances prevailing in the 16th Century. The struggle between the monarch embodying in his person the focus of the rising nation-state and his contestant, the church[2], ultimately gave rise to the modern theory of sovereignty. Ultimately,

the king triumphed in the struggle and sovereignty, came to be equated with the authority of the monarch.

"Originally conceived as a personal attribute of the monarch, sovereignty came to be regarded, in the hands of Bodin, as a constituent element of the state."But he located the residence of sovereignty in the monarch. By sovereignty he meant" supreme power over the citizens and subjects unrestrained by the laws" While Bodirn analysed the internal aspect of the sovereignty, Grotius developed and elaborated its external aspect. His writings embodied the theory of equality of sovereign states and their independence of external control or domination.

The existence of International law is based on the recognition of both internal as well as external aspects of sovereignty. That's to say, the commands/sanctions of International Law do not issue from a political superior to a political inferior and there is no impairment of external sovereignty of the units subject to such commands and sanctions. Regarding the internal aspect it recognizes that every state has, as a sovereign community, the legal right to select its own form of Govt. and to regulate as it chooses its own territory and the personal and property

relations of its citizens and subjects,[3] in so far as it does not exercise this right in such ways as to endanger the peace and safety of other states.

International law describes as Semi-sovereign a state which although acting in many essential respects as a self-governing community externally and internally, has surrendered to another state a considerable measure of control over its foreign relations or a right, under certain contingencies, of intervention in its domestic affairs or which has not yet acquired status of complete freedom in controlling its domestic and foreign policy.

If sovereignty in the external sense is defined as "exclusive territorial Jurisdiction" it is only the state unit's real impermeability that has enabled its rules to claim such leagal inpenetrability. It is in this way Hans. J.Morgenthau tried to connect sovereignty with the underlying territorial structure of the modern state by actually applying the term "impenetrability" to it.[4] . Though Morgenthau talked extensively about the legal sovereignty and legal impenetrabilty the study would have attained a greater significance if he had analysed the concept of sovereignty in connection with the actual territorial

impenetrability of the modern state, as Herz says. For, Herz argues that, "great divide" occured between what were still partly medieval situations reflecting a certain permeability of the rising nation state and the full-fledged modern era of clear cut 'closed units',' hard shell' (as Herz calls it), no longer brooking such interference[5]

What is referred to in the title of this chapter is the decline of that specific element of statehood which characterised the units composing the modern state system, the territorial sovereignty, in its both external and internal aspects. The type of International system built upon units of this structure was that of plurality of countries bound together by certain commmon standards, all enjoying certain minimum of protection in and through that system. Moreover, the realisatiron of the states that the world is emerging as an Interdependent global village, enabled the strengthening of "positive sovereignity"[6] of nation states. This has been manifested by the unforced reciprocal dilution of the orthodox aspect of sovereignty by the states, for mutual progress. The remedy to the inequitable status of the developing countries was sought by them, in their willingness to shed their atomistic

sovereignty to strengthen their progress on their own. Such an inforced and reciprocal dilution hardly ever suffer one of theirs (nation-states) to be extinguished.[7]

With the turn of the 20th century, certain trends emerged which tended to endanger one of the cardinal aspects of nation-states, the sovereignty directly or indirectly, all of them had a bearing upon that feature of the territorial state which was the strongest guarentee of its independent co-existence with other states of like nature, its hard shell (in Herz's view), i.e., its sovereignity its defensibility in case of peace and war.

A careful survey of the world events would show up the factors that have nourished such a decline of the concept of sovereignty of nation-states. The manifestaton of such a decline, is more clearly illustrated when the search for the factors is made among the third world countries.

Most of the third world countries, have secured their political independence and freedom from their colonial era, only recently, to assume the status of full fledged nation states. However, the neo-colonial vestiges sceem to prevent them from doing so. The ever widening inequitable

world in general, between the D.Cs (Developed countries) and LDCs, (Less Developed Countries), seems to be nourished further by the DCs' sponsored events in the international arena, which would pose a threat to their (LDCs) very existence, leave apart their redusal as LDCs.

Factors like the functioning of TNCs (Trans National Corporations) which have become the protector of DCs' survival today. Nuclear Holocaust DCs' demand for globalising national resources, Environmental degradation etc, have periodically infringed the protective shield of the enfeebled third world countries, i.e. its territorial sovereignty. An examination of the aforesaid factor in detail would reveal the intensity of such a threat to a principle which has so long strengthened the co-existence of nation-states, despite their inequitable status.

The role of the TNCs'

The UN report defines TNCs as "enterprises which own or control production or service facilities outside the country in which theyr are based. Such enterprises are not always incorporated as private: They can also be co-operative and state owned entities" (1974)

Neil H. Jacoby, in discussing about the role of MNCs, states that TNCs are "...the most powerful agency for regional and global economic unity that our century has produced. It is fundamentally an instrument of peace[8]". "They have had to create whole communities, with their appurtenant infrastructures, out of wilderness environments, usually in countries with unstable governments. and politicially immature populations. It is in the light of this imperative that their occasional interference with local govt should be interpreted."[9]

Such rhetorical statements seek to camouflage the reality and damages perpetrated on the territorial soveriginty of nation-states, especially of the LDCs.

The striking aspect of Industrial development in the post war period (II World War), has been the urgent drive by industry to expand beyond the boundaries of any one country. The creation or growth of modern industrial leviathans is the response to modern technology and of the capitalist system as it is developing in the US and Europe.

Above all the focus is on the extent to which these modern corporations contradict the cardinal aspect of

nation-states and destabilise them in the name of stabilising them. The sovereign nation-state remains the basis for its policies towards, industrial monopolies, towards technology, towards trade through imports and exports etc. In this sovereign framework the International Corporation is an intruder. With the based of modern technology and large scale industrial organization there have developed hundreds of companies, majority of them based in developed countries like US, Japan and from Europe. whose range of industrial activities overrides the national frame work. These new leviathans, with the international existence of their own, dominate the commanding height of modern Industry. Above all, they use their dominance in the new and fast growing science based industries as baits to legitimise their Oligopolistic transnational behaviour as against the LDCs' very existence.

Today, by the Industrial countries the lives of the LDCs are dominated by their propaganda that they live as part of a "modern industrial complex". The TNCs are playing a greater role in shaping this complex. The relative power and influence of these commercial and industrial agglomerations on the sovereign rights of a nation-state is

greatly understated. For whether consciously expressed or not they have clear inevitable social and political consequences . Their interests increasingly conflict and disturb the comfortable and protective conventions of the rights of the sovereign nation state.

The fact that the TNC big business has discovered the institutional form required to move freely without being tied by national boundaries has wrought a fundamental change in the balance of power between industry and government. This simplified, is the whole issue of government regulation, or support, for industry and the supervision of industrial activity to ensure socially acceptable behaviour, through policies. A country tailors (especially the LDCs) its domestic economic policies in order to fulfil national targets for the favourable balance of trade. However, with the emergence of TNCs these practices of a sovereign state have been disturbed.[10] . The capacity of International industry to move its location physically, or the realisation that it could, has significantly altered its relationships with govts[11] .

This changed balance of power, which requires government to make tax concessions and pay money by other

means to some of the world's richest companies, by their (TNCs') saying that they and their citizens whould have the economic advantages that result, has been a permanent theme in the international industrialization of the developing countries. The consequence is that governments will have to increasingly harmonise and compromise their regulations and practices if they are not to be sidelined in the international commercial activities by the DCs. In part, individual governments, especially of the LDCs, have already lost their freedom of action. For that matter, no industrial or developing country today can introduce rules and regulations infavour of its own industry or commerce against the wealth of International Industry (i.e. TNCs).

It is argued that large scale modern Industry, most especially at the high technology end of the spectrum, must increasingly be part of an interlinked and internatioinal network of production and sales. Otherwise it will not be commercially viable. The limited choice within the present structure of nation-states is therefore compelled to change by the persuasion of the industrial countries that either the political social framework is adjusted to suit the requirements of large scale industry

'per se' (Transnational feature) or a social and political experiment of a nation-state is conducted outside the mainstream of industrial advance. The TNCs go to the extent in suggesting that exercising the sovereign rights of a nation now lacks the scope effectively to match that of truly International companies.

A standardised product, mass production or continuous process of manufacturing and rapidly growing research and development costs, these are the primary features of the modern Industry. In the industries with such features the demands of International production come firmly into conflict with traditional policies of the nation states-especially of the LDCs - designed to promote healthy competition and avoid the consequences of monopolies. Indeed, the existence of dominant international groups in these industries has already made an anachronism of individual national policy towards monopolicies cartels and industrial competition in general For these industries are increasingly structured on what economists call oligopolists lines, where a handful of corporations, usually with one or two in a leading position, have the power to set price levels for the market as a whole. In such a situation, resultant monopoly of a few TNCs, highlights the

helplessness of the sovereignty rights of the LDCs, to fight against the anti-national vestiges of the TNCs.

Wide areas of critical decision on economic and industrial policy have been made to become matters within the discretion of corporate managers. These include questions like the flow of imports and exports within a group or company from one country to another[12]. These are the sort of questions that have historically been the province of national governments, especially with the national developmental policy motives. But now, by the coercive nature of international industrialisation of the DCs TNCs, the LDCs' governments have been compelled to adapt their basic attitude and policies..

The growing body of literature about these corporations and their foreign activities has been excessively preoccupied with constructing theories ane classifications to justify their cause. The TNCs as they grow do not fit into the framework of nation-states, for, they affect critically the lives of those who work for them and societies in which they operate legally, politically and socially.

THEORIES ON TNC

Several attempts have been made to understand the process of development of TNCs and the implication of this process in the growth of society in general and of capitalism in particular. "These studies can be broadly classified into two categories. Those supporting the expansion of Tranmational wholly or partially and those critical of their current role "[13]

There are two group of writers representing the school of thought which emphasises the positive aspects of MNCs. One group considers multinationals as paragon of all virtues and therefore would like to provide an unrestricted environment for their growth and the second group perceives their unfettered development associated with sharp conflicts, which should be reconciled by a careful regulation of their activities. The first group is a pure, global neoclassical school which believe in the efficacy of the market mechanism to achieve a fully rational international division of labour. They view the TNCs also the ultimate means for world development. And regard them as the "Work horses of the world, The mighty engines of enlightened capitalism," agents of optimum use of the

world's productive resources and a "genuine vehicle of International cooperation" In their view restriction on the activities of TNCs by Nation-states would result in suboptimal utilisation of the world's resources. Hence they advocate that TNCs shoud be given a free hand in harnessing these resources in any country of the world.

The second group traces the expansion of the TNCs to three factors; the decline in the cost of Internatonal Transportation, the decline in the cost of the International communication and the rise in the cost of generating and launching major industrial innovations. They argue that TNCs are forced to dissociate themselves from the political and economic objectives of both home and host cuntries because that would presumably ensure their business credibility in several countries with diverse political environment; that is, the Transnationals tend to become apolitical, anational institutions and over time grow into independent forces constraining the actions of all the nations they touch. This in the "Sovereignty at Bay" thesis propounded by Raymond Vermon [13a]

Unlike the first group, Vermon and his associates

recognise the existence of market imperfections due to which goal optimum cannot be attained anyway. Therefore, they argue, thet to correct the imperfection and achieve agreed goals state interference is called for. According to their analysis TNCs generate costs as well as benefits to the parent country and to the host country. Benefits accrue to the parent country in the form of repatriated profits, linked export orders and competitive advantage in world markets, and costs have to be incurred in terms of outflow of funds, transfer of producton and the consequent loss of potential employment. To the host countries they argue that TNCs provide a package of new products technology, capital and management skills which contribute to national economic welfare, but they also undermine, they highlight, the growth of domestic industries and "pursue certain productive activities which counter to the national interests"[14]

This school of thought was very right in suggesting that a country should invite those TNCs which offer benefits greater than the costs. In those cases where nation-states have weaker bargaining power than that of the Transnationals, they argue, some regulation of MNCs by supra-national institution is justified.

Despite the fact that the "Sovereignty at bay" school explained the positive aspects of the TNCs by a critical approach, it correctly perceived that the process of global expansion of TNCs leads to conflicts. They say that the TNCs antagonise local economic groups that want to compete with multinational and local govts that want more control over the domestic economy. The consequences of such conflicts on the nation-states have been clearly brought out by "Sovereignty at bay" Theory. Explaining the lacuna of the theory, Dalip.S.Swamy says that after the resultant conflicts the TNCs circumvent the reactions of nation-states and expand their business by sounding indispensible, technologically and financialy and by forming Transnational alliance with the local elites and the host government. This process of cooptation, necessary for TNCs to grow, apparently casts doubts on the thesis of "sovereignty at bay". However the rivalries among Transnationals of different origins lead, in the extreme, to investment wars and thereby increasing their vulnerability to govt. pressure in the countries where they operate. Thus, Swamy says, that the necessity of integrating the local elites and government and the continuing penetration and cross-

penetration of multinational enterprises generate forces that weaken as well as strengthen the nation-states. This complexity has not been explained by Vermon clearly.

The neo-imperialist school considers the TNCs as agents of an economic empire. In their perception during the growth of multinationals, the world capitalist state is strengthened at the cost of individual weaker societies. They argue that the progress of Transnational corporate system consolidates the power of world capitalist state and puts the sovereignties of weaker nations at bay.

The critiques of the TNCs can also be arranged in two groups, the radical economists like Barnet & Muller, Mandel, Murray, Rowthorn etc and the explicitly Marrxists typified by sweezy, Megdoff, Hymmer, Krosigk etc.[15]

The radical economists essentially present the nationalist and "third worldist" view and reject the neo-classical framework surrounding the orthodox view. They argue that the Transnationals derive high profits on the basis of oligopolistic control of domesitc and foreign market, and the growth of transnationals supported by high profit, in turn, enables them to exercise still greater

power in foreign market. As they (TNCs) grow they also undermine the political power of the nation-state. They emphasize that during this process of "global reach" TNEs (Trans Natioanl Enterprise) stifle competition, cartelize world markets, worsen income distribution and create antagonism between developed and the underdeveloped countries and between the rich and the poor everywhere. In a nutshell, in their view, they (TNCs) act as disturbers of the peace on a global scale" Thus, in the perspective of the radical economists the activities of the TNEs require rigorous control to maintain a stable relationship with the national state.

The marxists, on the other hand view, the TNCs as basic institutional forms of th capitalist world economy in its new-imperialist stage. They argue that economic imperialism is a new form of imperialism, a developed and more subtle form of political imperialism, characterised by Lenin as the highest stage of capitalism. In this stage world's resources are controlled and exploited through multinationals in the interests of their parent capitalists, direct political hegemony is replaced by indirect economic control through productive enterprises. They explain that

the TNCs are not only the basic institutional forms of capitalism but also bearers of the forces working within imperialism. They stress that they contain, in miniature form, the contradictions of the capitalist world economy.

Despite the divergent view points of different theories on the role of the TNCs, a careful examination would reveal that there is a semblence of reference to the impact of TNCs on the Nation-states. Even the protogamists of TNCs, do not rule out the TNCs assuming a supra-national existence by sidelining the nation-states; though they fined a remedy in the form of control by a supra-national institution rather than strengthening the nation-states. Therefore, it is a clear justification by various theories of TNCs, that there is a considerable limitation on the sovereign rights of a Nation-States by the operation of TNCs hence, a limited territorial sovereignity.

The Impact of TNCs on the National States

Though sweeping generalizations are made regarding the impact of TNCs on nation-states in general, the LDCs in particular, an analysis of the reality would help a categorical conclusion. The different studies bring out both the positive and negative impact of TNCs on the National-

States, but, the latter discussed at a low key. The benefits from TNCs that may result in a nation-state, in most cases due to trickle-down effect, have been expressed so vociforously as to neglect their counter-productive aspects on the national-states.

TNEs have been under attack in their parent countries (USA, Europe etc) as well as in host countries . In the US several probes and the Senate Hearing have revealed that TNEs have indulged in illegal, improper and questionable practice at home and abroad. In the host countries, they have been criticised because corporate managers have single mindedly pursued corporate profits and insulated themselves from considerations of public interest, and hcnce against the interests of the nation-states.

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Neil.H.Jocoby argues that the economic, political, technological and cultural effects Transnational corporate investment are most striking when the host country is less developed than when it is relatively less advances, for it is in the less developed lands that investment has made a strong impact on development. This conclusion, he says, emerges from thirteen case studies made over a

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fifteen-year period by the . national planning commission(USA)[17] . He explains, that in all cases the American Corporation played an innovating and catalytic role, founding new industries, transmitting technological and managerial skills as well as capital, and in many cases creating entire social infrastructures of schools, housing, health facilities and transportation[18] .

Jacoby justifiss his contention by highlighting the role of TNCs in Mexico, Latin American Countries etc. IN his view, the private business investment is inherently superior to governmental aid as an instrument of development because it combines transfers of managerial and technical assistance with that of capital.

Moreover, he adds, that the superficial cultural consequences of American corporate penetration of the poor countries can be plainly seen in the ready acceptance by native peoples of soft-drinks, packaged foods, brand names, advertising, electrical appliances, autos and all other paraphernalia of American life. At a more fundamental level, he says, it is likely that the status and value system, the social attitudes and behavioural patterns, the arts and the esential cultural foundations of many of these countries

will also undergo profound changes. In his view, such changes ultimately should reduce barriers to communication between peoples, and lay a common basis for a stable world order, the transition from poverty to self-sustaining development[19]. In other words, his contentioin is that the TNCs are the international carriers of advanced management science and technology, and agent for the global transmissioin of cultures, bringing closer the day when a common set of ideals will invite mankind.

But, the whole edifice of Jacoby's stance collapses when he says that the political and social effects of American corporate in poor countries are not clear[20] and the conduct of American business abroad has not been impeccable.

Such views, like Jacoby's, have been lopsided in the sense that they turn their back to socio, political, economic and cultural distortions that the TNCs have perpetrated detrimental to the individuality and sovereignty of national states. Even though the negative aspects of TNCs may not be visible enough to Jacoby's perspective, but the reality illustrates how damaging has been the functioning of

TNCs as against Nation-states. It's been so detrimental enough to make its trickle down effects negligible.

Today, the TNCs in the LDCs, are known more for instilling political instability, cultural crisis etc especially in Latin American and other LDC, precisely for their profit motives than their positive contributions. The fact that the Latin American and other LDCs where the TNCs of the DCs, especially USA's have been very active, are languishing in debt trap and underdevelopment is enough to prove that Tacoby's views are propagandist historic.

The National Planning Commission's Studies on the TNCs, justifying their civilizing burden of LDCs, could be easily refuted by a careful study of the TNCs role in political instability in the LDCs as against their territorial sovereignty. There have been spectacular cases of TNCs intervention, such as Cecil Rhodes' conquest of Southern Africa, the united Fruits company's activities in "banana republics" and oil company ventures in the Middle-east and Mexico. Corporate interests were involved in the C.I.A. sponsored coups in Iran in 1953, in Guatemala in 1954 and 1963, in the Suez war of 1956, in the Katanga

succession 1960-65, in the colonial wars in Indonesia (oil, ruubber), Malaya (rubber, tin), Algeria in the Congo troubles, in the Biafran civil war over the discovery and exploitation of sizeable oil deposits in Nigeria, the Bay of Pig lending in 1961, to exert pressure on Cuba in favour of oil companies, in Bolivia 1971, in Chile in 1972 on behalf of I.T.T.C and so on [22].

The aforesaid instances, explicity clarifies the diabolical role of as well of TNCs as against the National-States. thus, Jacoby's contention that the TNCs are nothing but the saviour of nation-state and mankind in general, seems yet another justification for TNCs strangle hold on the Nation-states.

Goldbery and Kindleberger say that "A resonable analogy is that nations, in the face of increasing effectiveness of international corporations, will be as ineffective in governing themselves as today's cities. [23]. They argue that even at present, the International corporation raise serious complication for political institutions. Because the corporation operates within a wider domain than that of a nation-state, it is capable of reallocating world resources and evading national

jurisdictions. Since the TNCs are able to react to changes in governmental regulations or taxation by moving from one jurisdicatin to another, its mere presence is often perceived as a threat by home and host country alike.Their contention is that the political scientist worries that the Transnational Corporaton acts as a vehicle for the intrusion of the policies of one state in to the jurisdication of other.

Goldbery and Kindleberger further argue that there is an inherent conflict between the objectives of the Internatioinal Corporation and the nation-state. The reason they give in that the corporation strives to rationalise operations so that production occurs where costs are lowest and sales are made where prices are highest. Given good cordination, industrial activities can be managed to take advantage of cost differences, in labor, capital, tax rates and market conditions. Further refinements can be achieved through adjustments in transfer pricing as goods move from one subsidiary to another. The nation, on the other hand, in their perspective, seeks to have the corporation return the greatest net benefit to its jurisdication. Thats to say, the Nation-states seeks from the TNC that its contribution

to the gross national product minus repatriations of earnings to the parent are at a maximum. In their objective conclusion they argue that despite the intangible benefits that may accrue due to TNCs operation such as technology transfer (because they do not show up in the National Income Accounts), it is fair on the part of the Nation states to realise their policy objectives which may not suit the TNCs operation.

The TNCs of DCs seem to pose a threat to nation - states territorial sovereignty legally, from two points of view. One, when the TNC violates the internal laws of nation-state, Two, when the parent country (of the TNC) applies extra-territorial laws. As the former is understood by the TNC's tax evasion etc, the latter needs a list of explanation.

The extra territorial application of laws emanated from the USA, through its Sherman, Anti-Trust Act of 1890 to protect against harmful trusts and monopolies. But in due course, the extra territorial laws, often led to conflicts. The territorial principle is derived from the concept that, given the equal sovereignty of states, their

jurisdications are mutually exclusive and therefore each is limited to its own territory.[24] . The territorial principle is the basis for all legislation and jurisdiction with in a state however the US courts have applied the anti-trust laws to persons, acts and property outside the US. Concurrent jurisdiction by two states over persons, property, or acts in one of them is exactly the situation which the territorial principle seeks to avoid. "A state cannot excercise jurisdiction over property in another state; an order of an American Court to dispose of property or to refrain from performing a contract or an act which is valid under the laws of the locus state would be in violation of the territorial principle[25] "

Thus, though there are seemingly beneficial aspects in the functioning of a TNC to Nation-States, especially the LDCs, but the Nation-states are not completely immune from their detrimental aspects. The most detrimental influence of TNCs on the Nation-States is realised in the threat they (TNCs) pose to their (Nation-states territorial sovereignty, socially, politically and legally.

NATURAL RESOURCES AND SOVEREIGNTY

The sovereignty over natural resources claimed by the; nation-states is another area where the teritoriality of Nation-states is threatened. The UN General Assembley resolutions defined the "permanent sovereignty over natural resources" as the inalienable right of each state to the full exercise of authority over its natural resources fully and freely."[26] For many nation-states, especially the LDCs, this right is regarded as an essential condition of their national independence and of their ability to decide on basic political and economic arrangements. The main thrust of the demand for permanent sovereignty has been to justify either the nationalisation of foreign firms of their transfer of ownership to nationals of the host countries especially in the extractive industries.

The concept of permanent soverignty of Nation-states serves to provide justifiction for a variety of national measures which impose limits and duties on foreign firms, as for example, requiring them to employ nationals of the country in managerial capacities, to meet local supply needs first, to give up repatriation of profits and to renegotiate contracts prior to their agreed expiry. In its

strong form, the principle is asserted to legitimise the refusal of states to submit to international standards or international tribunals disputes relating to nationalization or other takeovers. The UN declaration refers to "the right of nationalisation or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of te state". It adds, "no state may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this alienable right".[27]

The Capital - exporting countries (DCs) insisted on the control by International law over the nation states rights to exercise control over production and distribution arrangements. A careful examinations would reveal that the DCs are not willing to arrive at a comprehensive "code of conduct" to control their TNCs, but seek a International Mechanism to control the natural resources of the nation-states, which would lead to alienating their sovereign territoriality.

The emphasis placed on the concept of permanent sovereignty over natural resources by almost the entire

community of havenots nation-states reveals their concern over the economic penetration by the transnational companies.[28] Such economic penetration is considered in many cases to be a threat to internal measures of social justice, income distribution, or the greater participation of the disadvantaged groups in the national political process.[29] It is very important to note that several of the DCs have placed importance on their sovereignty over resources in order to reject what they regard as excessive economic penetration by multinational companies.[30]

It would be mistaken to consider the idea of permanent sovereignty resources as anachronistic nationalistic rhetoric. It should be viewed as a fresh manifestation of present aspirations for self-rule and greater equality. As Philppe de Seynes, United Nations under-secretary-general for economic and social affairs said, that "the historical circumstances of decolonization, memories of exploitation and the persistence of unequal bargaining powers have created the atmosphere in which the foreign investment is now being judged". But, it is undeniable that most of the developing countries require foreign capital and foreign entrepreneurship to utilize

their labour force and improve their standard of living. These results an ambivalence, on the one hand their desire for unhampered control and, on the other, the incentives they offer to attract foreign captial. However, as Oscar Schacheter says it should not be dismissed as irrational "it should be understood as reflecting a polarity inherent in the objective circumstances, and in that sense, as a challenge to seek a reconcialiation, that would, to the extent possible, maximize the competing values."[31]

It is important to take into account the changing relationship of host country and foreign investor in a typical resource development project. In the first stage, the govt. of the host country, especially the LDCs, anxious to exploit its natural resources, is conscious of its lack of capital, knowledge and skilled personnel. It has to induce an investor to make a substantial outlay under conditions of considerable uncertainity. But the relationship changes when the investment proves successful and the uncertainity and risk disappear. At that point the original terms of the concession seem excessively favourable to the investor and the host government views its long-range commitment as a mistake. As experience in Latin America and

the Middle-East indicates, the government then feels impelled to increase its share of taxes or royalties or to nationalize the company or compel transfer of ownership to local nationals.

Under the umbrella of sovereignty the LDCs charge the foreign investors of duress or fraud in obtaining the concession. Disclosure of bribery and coercion by MNCs in many LDCs indicate that theremay often be good reasons for governments.[32] To requidiate earlier commitments and as Schacter says, Foreign investors are probably increasingly aware that they risk such repudiation when they engage in illegal practices or in the kind of hard bargaining that may involve coercive or fraudulent aspects.

As the formulation of the code of conduct for the foreign investors has not been successful, to take care of the interests of the underdevelopment nation states or to prevent the exploitation of the foreign investors, the claim by the nation-states for the permanent sovereignty for their natural resources ramains valid. But, as the foreign investors (of the DCs) become technologically powerful day by day and the less developed nation-states languish in

abject undrdevelopment, the threat for such a permanent territorial sovereignty over their National Resources is imminent "Nuclear Cause " in the Decline of Territoriality.

John Herz after witnessing the misuse of the advance made in technology that have been eroding the boundaries of territorial state, made equivocations about he "rise and demise of the territorial state". He arrived at such conclusion , in the context of his analysis of the implications of new weapons technologies for what he christened "the security dilemma". This analysis has been developed mainly in the relationship between military technology and the basic political unit - nation-state. In his view the technological changes accompanied all along the transition from the small weak units of the medieval era to the hard relatively impermeable sovereignty of modern states. But, the crux of his argument is that these (technological) changes from the 19th had its toll on the military technology which rendered the territorial state less impermeable and more penetrable. Thus, he expressed how the world has been converted not to fit into the traditional framework of territoriality[34]

The security dilemma', is a constellation in which

the nation-states find themselves whenever they exist side by side without higher authority that might impose standards of behaviour upon them and thus protect them from attacking each other.[35] Such a situation breeds a feeling of insecurity, emanating from mutual suspicion and fear, compels these nation states to comete for even more power in order to find more security. But, this invitiative proves elusive since complete security remains ultimately unattainable. Therefore, there arises a fundamental suspicion and a mutual dilemma, the dilemma of "kill or perish', of attacking first or running the risk of being attacked or destroyed. "The situation in such that there is no escape from this vicious circle"[36]

When the "impermeability" was still a reality and 'sovereign', 'independent' 'hard-shell' nation-states were relatively small and self - sufficient, the range of their security interest was also limited. It usually would not affect the vital security of the respective nation state whether a piece of territory overseas was gained or lost or as happened so often was traded for another one. The security interests of states was thus identified with the maintenance of a certain relatively stable, balanced status

quo, its protection from disturbance by more aggressive of expansionist nation. In such a situatin the necessities security dilemma, while always existing, could be attended by beconing allies commonly accepted standards of behaviour and 'law' would also provide for mitigation of the fears and distrusts which the dilemma provoked.

However, this status - quo could not persist long for the factors which allowed for the mitigation of the security dilemma receded. During the 19th century the impermeability of the territorial state lessened. The 'security area' meaning the area in which whatever happened concerned the security interest of the nation in question, grew even larger, until (atleast in the case of the big powers) it comprised the whole world. "The world as such emerged as a security area" for the so called world powers.

Whatever the security interest of one side seems to require increases the insecurity of the otherside and hardly anyline can be drawn which would seperate 'defensive' measures and 'security' policies from 'offensive', 'expansionsist' and 'beyond security' action. Where previous alignments of power occured in order to protect the security of the individual territorial stages, today's alignments

protect areas which despite intended geographical delimitation, tend to circle half of the globe and to encircle the other half. Herz say, "It is one of the tragic implication of the security dilemma that mutual fear of what initially may never have existed may subsequeltly actual encirclement..."[37]

Nowhere, perhaps has the compelling force of the security dilemma become more noticeable than in the sphere of armaments. No moral, religious humanitarian, economic or other consideration could prevail against the simple and brutal impact of a "they or us", for instance the statement made by one of the original developers of atomic bombs:

> "Most of us hoped - although we soon knew it was a vain hope - that the bomb could not be constructed, so that no one would be able to use such a terrific weapon. But if it could be build, then we had to build it first"[38]

And what was compelling in war has proved to be compelling in peace, for instance, when the decision to produce the Hydrogen Bomb was made. Pope Pius XII put, "What is meant by

" cold peace" if not the mere coexistence of the various people, based on the fear of each other and on natural disillusionment?... The principal foundation on which the present states of relative calm rests is fear "[39] Here protrays the scenario in a fitting war by making an analogy with marxism. He says that "Marxism maintains that political relations and development form the superstructure over the system and the developments of the means of producton. Within the sphere of international relations, it might rather be said that political developments constitute a superstructure over the system and the development of the means of destruction"[40]

The old reliance on power is no longer valid that survival now involves at least renunciation of total war, and that this renunciation will eventually mean divesting nations of their nuclear power. Such a divestment would not, however, diminish the status or stature of nations in the world. On the contrary, it might imply the restoration of some degree of territorial "impermeability", which in turn would mean the reestabhishment of traditional sovereignty which nation-states have lost under nuclear conditions of permeability . Contrary to what is commonly assumed the

realization of this objective would render the world state unnecessary and give a new lease of life to nation-states. Once they have regained their previous protective functiorns, they can also protect themselves from those more far-reaching encroachments on their independence which the more enthusiastic planners envisage[41]

SPACE AGE AND SOVEREIGNTY.

The traditional concept of sovereignty has prone to the impact of the technological leaps into outer space. That is, the militarisation of space had its repercussion in the sovereign features of a nation-state. Having achieved a saturatd capability and counter capability in the land high seas and air, the military ambitions of some countries (especially the DCs) have reached the outer space, since the second world war, this new development in turn has threatened the very countries (which are after militarising the outer space) sovereign states.

The militarisation of outer space is done by deploying military satellites these artificial military earth satellites include navigation, communication, weather geodetic, reconnaisance and early warning satellites. Each

of these satellites embody different strategic feature. Satellites with different strategic manoeuvreability are launched according to the purpose of the mission. These satellites stationed at different orbits penetrate the enemy nation - state unaware from the space according to the guided mission from the parent country. The mission usually aim at locating the military leases vital rsource bases (natural etc); etc. of the enemy country.

In order to understand the space militarisation infringement of sovereignty of nation-states, it is important that the functioning of the each type of statellites is , at least partially understood. Of the several types of military satellites launched, three kinds are perhaps the most important. They are reconnaissance naxigation and communication satellites.[43]

The reconnaissance satellites can be categorised in four ways; photographic, electronic, Ocean surveillance and early warning satellites. The orbits of each of these types are fixed according to the mission to be performed by the satellite.

Photographic Satellites : These are used for photographic reconnaissance purposes from a low altitude orbit of about

200 km. The two missions that are attributed to this type, Area Surveillance Missions, a large area of a particular country is scanned for objects of potential military interest using a wide angle, low resolution camera for the second type of mission a camera with a high resolution and relatvely narrow field is used to re-photograph areas of particular interest located during the area surveillance mission. " Examples are, the US's - Big Bird, KH-11 etc After the USA & USSR, China, Frane and Japan have acquired the capacity to launch such satellites.

Electronic Reconnaissance Satellites : These are known as "ears" in space. "Such satellites carry equipment designed to detect and monitor radio signals generated by the enemy's military activities. Signals originate from military communications between bases, from early warning radars, air - defence and missile defence radars or from those used for missile control. These satellites also gather data on missile testing. Not only do they locate the systems producing electronic signal but also measure the characteristics of the signals so as to be able to plan penetration of defences"

Ocean Surveillance and Oceanographic Satellites : These satellites were developed in the 1970's. The ocean surveillance satellite, is used to detect and track military surface ships while the other, the oceanographic satellite is used to determine various ocean properties .

Early Warning Satellities: Have been developed primarily for early warning of a surprise attack by ICBMs. This satellite system has enabled interception of enemy missiles and for counter attack.

Communication Satellites : They are used to serve the purpose of highly reliable and secure communication systems for the transmission of military data. The 80% of military communications are carried out using artifical Earth satellites.[45]

Navigation Satellites : is used as a part of the weapon system to know the exact position and velocity of the missiles. Even the naval surface ships, submarines, aircraft and missiles determine their positions and velocities using signal emitted continually by satellites.

Geodetic Satellites : The application of geodesign principles via the saliellite, enables the precise location

and position of military targets and determining of other geophysical aspects which are significant for counter - attack manoeuvres example, extensive knowledge of the values of the Earth's gravitational field throughout the globe to improve the accuracy of delivery vehicles used for Warheads.

Anti-Satellite systems: (The ASAT system)

The ASAT system is basically for disabling satellites in Earth orbit. The methods that are adopted include ground leased ASAT missiles orbitinng killer satellites etc. "The ASAT system may not necessarily be deployed against a spacecraft. It could be aimed at a saltellite command, control and space surveillance systems which are vital to the efficient functioning /operation of the satellites".

Thus, the militarisation of the space using satellites, has proved that between 1957 and the end of 1981 some 1,917 such military satellites as discussed above, had been launched which constitutes about 75 percent of all satellites orbited[46]

The consequence of militarisation of space has had its toll heavily on the survival of the nation - states.

The sovereign rights of the Nation-States have been threatened in three ways by the military ambitions in the outer space. One, the privacy and the sovereign right of nation-states to evolve a military system on their own is threatened by the constant surveillance of others' satellites. Moreover, the satellites (like weather, jeodesic satellite) could be used to jeopardise the developmental programmes of the nation-states, which would go against possessor nation (of satellites). The LDCs, have not, in general yet achieved the technological feat of developing their own satellite. These countries, by the growing outer space penetration by the DCs, could be perpetually subjected to the monoeuvres of the DCs.

Secondly, the use of outer-space has not been equally poised between the Nation-States. As the territorial sovereignty aspect of the Nation-State has been confined to the land, teritorial waters and atmosphere, the outer-space militarisation seems to threaten the same.

Finally, the development of large structure technology in space - the antennae for such system would range from 30 m to 200 mm in diameter - , permanent manned space station, the deployment of space - based high energy

beam weapons - laser and particle beam - would lead to the encirclement of earth by space based weapons.[47] In such a situation, the very concept of sovereignty of nation-states would not only be infringed perpetually but its indispensability in the formation of nation-states is also violated. Thus, both missiles and satellites of one country (especially DC's) stare and eavesdrop on other's territory without violating, physically, the traditional concepts of sovereignty but eventually leading to the same.

Ecology and Sovereignty:

The "Ecology" adds a new dimension to the problem of sovereignty. The Nuclear accidents like Chernobyl, Three Mile Island etc; the resultant Acid Rain; the dumping of nuclear wastes; etc seems to give an impact on the Sovereignty of Nation-states. The escalation of Nuclear establishments for energy and defence purposes seem to take its toll on Ecology. The disturbing aspect of such a toll is that whenever there is a nuclear accident not only the environment of the possessing nation is affected but also the neighbouring nation-states. For example, the nuclear accident at chernobyl had its ecological aftermath not only in the USSR but also in other countries of Europe. Norway

and Sweden were prone to the acid rain, it was said, because of the chermolyl accident.[48] The consequence is that the countries which were not responsible for such nuclear accidents were engulfed in ecological, problems like acid rains, which threaten the Agricultural production and healthy living of citizens in general. Therefore the callous handling of nuclear materials by a few countries (especially the DCs) and the resultant accidents, jeopardise the sovereign existence of Nation-States. The intensity of violation seems to be more, especially when the LDCs' developmental initiatives (agricultural etc,) are prone to such accidents.

The dumping of toxic industrial and radioactive waste by some countries over the others by deceptive means, seems to endanger the sovereignty of nation-states, "The industrialised countries have been dumping toxic industrial and radioactive waste in developing countries for decades; officials of the International Register of Potentially toxic chemicals reckon there have been substantial shipments of toxic waste to Africa for 10 years"[49].

Factors which made the LDCs the dumping ground

a. The public opinion against the hazardous aspects of nuclear waste resulted in stricter and tougher environmental laws in the DCs. Therefore the DCs found the LDCs with no environmental laws as their dumping ground.

b. The environmental legislation in the developing countries in general, especially in Africa, are rudimentary. Some LDCs do not even possess portfolio for environmental affairs. Therefore, the questions of pollution, deforestration, acid rain and use of dangerous pesticides are given less importance than more chronic problems like indebtedness and food scarcities[50].

c. The disposing of the toxic wastes in the DCs itself would cost the companies much. For example, In Europe, where environmental laws dictate that Polychlorinate biphenyls (PCB) have to be incenerated at a very high temperatures, it costs more than US $2000, a tonne to dispose of this type of chemical waste. But, on the other hand, Ecomar Services of Livorno , Italy, was able to dump 2,500 tonnes PCB wastes in Nigeria for a service fee of US $100 a month.[51]

d. The Developed Countries lobby in the LDCs also seem to justify the dumping of the toxic wastes in them. The Industrialised countries' traders' in waste disposal business indulge in "waste swaps" under which some of Africa's bulky waste could be Swapped for cargoes of waste too hot to handle in Europe. They justify such deceptive transportation by their (DCs') persuasion that "there is a trade off between growth and development on one hand and environmental issues on the other". Such persuasions does not make the LD's in general realise that the developmental process and environmental protecttion are inseprable:

Environmentalist pressure groups like Green peace demanded against the toxic waste dumping in the LDCs, that the toxic wastes should be recycled and disposed near to the site of the production; outright ban on waste exports, etc, at the UN Environment programme conference in Caracas, June 1988. But nothing could curb the cross-border movements of hazardous wastes; especially to the LDCs.

For, the Industrialised countries they wanted the efforts by their disagreemeent to key issues such as the

definition of hazardous wastes, the rights of transit countries, and the establishment of a strong agency to assist developing countries in environmentally sound management of hazardous wastes and to monitor transborder movement of wastes.

Observing the DCs deceptive behaviour for toxic waste dumping, Francisco palacio, Latin American project director of Greenpeace said "Instead we are witnessing the establishment of a legalised mechanism for the export of hazardous wastes from developed to developing countries."[52]

The DCs' callousness against the LDCs sovereign security and safety, could be understood from their double standard behaviour in the various international fora. The European Community on one hand, has passed strict environmental laws to protect its member countries from the radioactive waste fall out. But, on the other hand, it has not banned the toxic waste exports to the IIIrd world countries. Thus, the European countries have dumped toxic waste to Guinea-Bissau, Congo, Benin, Nigeria etc.

Thus, the dumping of radioactive wastes in the LDCs, by the DCs, seems to deny them the environmental safety and security which the later enjoy. Moreover, the

DCs' deceptive initatives to keep the LDCs unaware about the hazards of the dumping toxic waste; their refusal to accept an international agency to control the toxic waste dumping; their explorating the developmental needs of the LDCs like debt servicing, financial assistance etc., as a bait for dumping the radio-active wastes; etc[53] have undermined the sovereigty of the developing countries.

Therefore, it is vivid that the Ecological aspects also seem to have contributed to the narrowing of the traditional concept of sovereignty of Nation-States.

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CHAPTER - II

IPRs and the Developed Countries

The previous chapter highlighted the infringement of sovereignty of a nation-state by various international forces. The nation-states, have diluted their sovereign rights (as they originated) on their own, if at all the dilution could influence their development and growth process, i.e., implementing bilateral and multilateral obligations abiding, the decision of the International court of Justice etc. which assure speedy domestic economic development. In the international arena, the compulsions of international economic relations have progressively made the shedding of orthodox sovereign rights as a matter of reciprocity between the developed and the developing countries. However, barring the developmental dilution of the sovereign rights, the milateral discriminatory infringements disturbs the equilibrium i.e., impositions by the developed countries. However, barring the developmental dilution of the sovereign rights, the unilateral discriminatory infringements disturbs the equilibrium i.e., impositions by the developed countries over the developing countries. This disturbance of the equilibrium not only

affects the "sovereign equlaity of nations" norms strengthened by the international laws, but also deprives the Developing Countries to adopt their own sovereign laws of development. Considering the economic doldrums that the Developing countries have succumbed, the sovereign progressive socio-economic laws alone could rescue them and meet their basic necessities. Given the significance of sovereignty in the nation-state's development, especially for the developing countries (LDCs), this chapter will examine the Sovereignty of nation-states with reference to the issue of Intellectual Property Rights (IPRs).

Definition of IPRs:

What is Intellectual Property? To this question there are two answers, one colloquial and one legal. The colloquial description of Intellectual Property (IP) is that it simply comprises all those things which emanate from the exercise of human brain, such as ideas, inventions, poems, designs, microcomputers and micky mouse.[1] The legal description of Intellectual Property differs from the colloquial in that it focusses upon the rights which are enjoyed in the produce of the mind, rather than upon that produce itself. The expression Intellectual Property (IP)

is taken to mean the legal rights which may be asserted in respect of the product of the human intellect, for example, the record company's right to stop anyone making a 'pirate' copy of a sound recording. IP can be divided into two main classifications - Industrial Property and Copyrights. Industrial property includes inventions, trademarks and Industrial designs.*

The IPRs comprise of patents, copyright, neighbouring rights, trademarks, industrial designs, trade secrets, trade dress, appellation of origin and geographical indicators.[2] But, the patents, copyright and trademarks assume a greater significnace generally by subsuming other rights into their fold. Therefore, the discussion,here will be concentrated on these three rights of IP. The UN has defined a patent as "a statutory privilege granted by the Government to inventors and other persons deriving their rights from the inventor, for a fixed period of years, to exclude other persons from manufacturing, using or selling a potential product or from utilising a patented method or

* These terms have no universally accepted definitions - They vary from country to country (Robert P. Benko, Protecting Intellectual Property Rights (Washington D.C: American Enterprise Institute for Public Policy Research, 1987), p.2.

process. At the expiration of the time for which the privilege is granted, the patented invention is avilable to the general public or as it is sometime put, falls into the public domain.[3] So, the patent confers a monopoly (exclusive right) exploitation to the inventing firm or country for a stipulated period. The copyright is the right to make a copy of a work[4] and by implication to stop others doing so. The trademark is defined as .. "a mark ... used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right as proprietor or registered user to use the mark, whether with or without any indication of the indentity of that person."[5]

Nearly all countries have industrial and Intellectual Property laws for the protection of inventions; with a few exceptions all differ from each other.[6] Nevertheless, a degree of generalization about IPRs is possible, for several concepts are common to all national laws. A country's IP Law is territorially limited; it has effect only within the jurisdiction of the country. The Internatioinal Bureau of the World Intellectual Property

Organisation (WIPO) has a collection of laws relating to the protection of inventions in 119 countries, and collects and publishes statistics concerning IPRs in inventions applied for and granted in 113 countries.

Having seen what IPR is, it is important to know their evolution to the present discussion. The Organisation of IPR was found, initially, in the society's appreciation for the innovativeness or unique creativity of a citizen. The innovativeness was to be recognised by providing incentives to the inventor. It was also thought that promoting both innovative efforts and innovative output is a basic requirement for economic growth. Thus, societies which were endowed with necessary infrastructure and man-power started considering that it is a must to provide an incentive to encourage innovative activity by allowing inventors to earn a return form their ideas. A grant of monopoly to encourage artistic activities was made in Sylearis around 500 B.C. Autonius Marini received the first patent invention in 1443 and for twenty years no one else in Venice (Italy), was allowed to build a flour mill that operated without water.[7]

The inventors were given appropriability

(monopoly) for the use of their innovative output. And their IPRs were given legal protection. A brief history about the evolution of patents, copyright and trademarks is necessary to understand the culmination of the present IPR issue between the DCs and the LDCs.

The Evolution of Patents:

The Venetiate Law of 1474:

In its patents, statute, the city sate of Venice distinguished four motives for the grant of a patent, namely the utility to society (i.e., patent as a means of technology transfer for the society's economic development), the encouragement of inventive activity, the refund of costs incurred by the inventors and the inventor's rights to the fruits of his mind. This explicitly provided that it was within the power and discretion of the Government of Venice to use any patented invention subject to the provision that the patentee should be the person who had the right to work the patent on behalf of the Governemnt.[8] This discretionary power of the Government was secured precisely to do away with an absolute monopoly of the patentee. It is discernible that an absolute monopoly of a patent would not provide the society with the new invention for a faster technology dessimination, thus, it would thwart a faster

economic growth. Moreover, the Venetian Law said that apart from the preliminary investigation of an invention, before a patent law was granted, the pratical success of the invention would be evaluated through periodical tests.[10] This provision was strengthened primarily to cause restraints in the abusal of the invention by the patentee (for example, non-working of the patent).[11]

English Patents:

In 1559 the talented Jacobo Aconcio, an elderly Italian Emigre in Britain, attempted the drainage of plumstead marshes, asked for a patent, to avoid others copying his invention. From this date onwards the crown would seem to have granted patents of two distinct kinds; monopolies in inventions, which were favourably viewed by parliament and the public and monopolies over things which were already invented, including a number of consumer staple products, which were viewed with a great resentment by frustrated traders and distressed citizens.[12]

After the case of monopolies in 1602[13] (which struck down a royal monopoly on the manufacture of playing cards) and the statute of Monopolies in 1823, the crown's

prerogative to grant patent monopolies was restricted to the extent that while monopolies for new and useful inventions could be granted, unproductive monopolies for the benefit of the court favourites could not.

During the sixteenth and seventeenth centuries the would be monopolist had to plead with the king or queen for the right to acquire protection for his invention. Often offering the crown some sort of financial inducement in return. During this period there was no general principle that the patent applicant had to tell anyone else the details of his invention. But the early 18th century many of the monarach's functions were dealt with by officers of the state, a change took place. A monopoly in any invention would be granted automatically to any applicant who claimed to be the true and first inventor and who deposited with the crown's officers a description of his invention. The description, later known as 'specification', became raison de'tre of subsequent patent philosophy, the patent monopoly ceased to be an exercise of the royal whim and became instead an effective contract between the crown and the inventor. Under the terms of this contract the inventor had to disclose to the crown (and therefore to the public, on whose behalf the crown ruled) the details of his invention

in return for which the crown granted absolute protection against the unauthorised copying of that invention for a stated term of years.

The French Law of 1791:

The French Law of 1791 placed strong emphasis on the concept that an inventor has an exclusive right in his invention and that the grant of a patent is nothing more than the recognition of that right by the state. "Every novel idea whose realisation or development can become useful to the soicety belongs primarily to him who conceived it and it would be a violation of the rights man in their very essence if an industiral invention were not regarded as the property of tis creator".[14] The Law stressed the requirements of promoting the progress of science and useful arts and thus of industrialization. Of particular interest are three motives for the patent law which were set out in a report supporting the French patent bill. The motives were the backwardness of French Industry, the threats posed to the economy by the penetration of foreign products (to be precise English products) and the desire of the French Government to ameliorate the situation of the French Industrial Worker.

The Austrian Law of 1810:

The Austrian patent law of 1810 took quite a contrary view at a philosophical level from the French Law and stated, "that inventors had neither any property rights in their inventions, nor any rights to patents, the Government reserved its prerogative to grant privileges or to restrict what was called their subjects' "'natural right to imitate' an inventor's idea."[15]

Rejecting, firmly the idea of natural rights of an inventor in his invention, the Austrian law focussed itself on 'natural rights to imitate'. "This law reflects the compulsive logic forced by the their stage of development of Austria. Since, so much of technical knowledge has now been accumulated and since the developing countries can accelerate their industrailization by "learning by doing"[16], including cracking of patents, reverse engineering, slight modification of existing processes, etc. This emphasis of the Austrian law in the very early phase of the country's development has considerable significance even today.

Nineteenth Century Controversy on Patents:

The 19th Century witnessed a considerable

ciriticism an patent laws. Some critics asserted that the national patents laws, by granting temporary monopolies, were almost like prohibitive tariffs as against the liberalization of international trade which was gathering momentum under the banner of 'free trade'. In two European countries discussion led to the repeal (in the Netherlands) and rejection (in Switzerland) of National patents Laws.[17] The antogonists found that a "good law of patents is an impossibility". They meant in their perspective that it is difficult to assign a perfect appropriation (monopoly) to the inventor on the one hand through laws and expect the invention to meet the social goals on its own on the other. Not until 1887, the Federal Legislature of Switzerland was given the authority to pass laws to protect industrial property. In the Netherlands, a patent law was not introduced until 1912. With the heated discussion on patients in the period 1850-1873 and wich resulted in the success of the patent advocates and the initiation in Vienna Conference of 1873 of schemes to develop an international convention for patents. Justification for the grant of patent monopolies was offered on three grounds;

a) Fair and Just reward to the inventor;

b) Encouraging individual invention activity;

c) Giving an inducement to inventor to disclose their secrets to society (so there would be an increase in the stock of the knowledge publicly available).

Establishment of the Paris Convention:

The preparatory work towards a multilateral arrangement for patent protection began with the international conference held at Vienna in 1873. Subsequent to the Vienna meeting conferences on patents were held in 1878 and 1880. Finally in 1883 the international convention for the protection of industrial property[18] was established by an intergovernmental convention, usually called the Paris Convention. Among the signitories to the Government. Convention were Belgium, France, Great Britain, Italy, Netherlands, Portugal, Serbia, Spain and Switzerland (from Europe); Brazil, Ecuador, Guatemala and Elsalvador (from Latin America and Tunisia (from North Africa). It is significant to note here, that the USA which initiated the patent discussion right from the Vienna Conference of 1873, for a multilateral framework acceded only in 1887 to the convention. Tunisia became a member through adherance, on her behalf, by France, Serbia had no national patent law

upto 1918; and Equador, El Salvador and Guatemala withdrew from the International Union, respectively in 1886, 1887 and 1895. Brazil therefore is the only country from the Third World which has been in the Union from the beginning.

The convention states that the protection of industrial property has as its objects patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin and the repression of unfair competition (specific reference is made, in the text revised at Stockholm (Sweden) in 1967 to inventors' certificate in the context of claiming priority). The Paris convention created an international bureau with tasks including liaison between the patent administrations of the members of the Union, the study of questions relating to industrial proeperty, the preparation of revision conferences and the publication of documents and other information. Since, the Stockholm Revision of 1967, the international bureau is provided by the WIPO.

The Spread of National Patent Laws:

By the end of the 19th century, the establishment of national patent laws in nearly all of what are now the developed market economy, socialist and the Southern

European Countries was virtually complete. In sharp contrast, the extension since 1873 of national patent legislation in the developing countries has been recent and very rapid indeed - from 10 countries in 1873 to 84 in 1973; more then eight-fold increase in a century. The rise in members is mainly explained by the fact that former territories and colonial dependencies, whose legal codes included some form of patent system during their dependence (on the colonial country), came to be shown later as independent countries with national legal codes. There are still 18 developing countries so regarded within UNCTAD, which do not have their own national patent laws though some of these countries grant protection through systems of registration of patents granted abroad.

COPY RIGHT:

The birth of Copyright can be dated back to the 16th century. Copyright in common parlance means the right to copy or refuse copying.[19] When the context of copyright originated as an aftermath of Printing Industry. It embodied the author's exclusive right in protection of the products of his imagination, skill and labour materialising in his literary creations. The unrestricted printing of

manuscripts and their mass production helped the authors gain wide fame by dissemination of their works across within and beyond natural boundaries then.[20] But, all the publishers of the same literary work claimed to havae pearpetual common law right in such printed works. Therefore, it was termed as the art of piracy.[21]

The law of copyright was initially confined to preventing of unauthorised reproduction of copies of books. Subsequently the scope of protection ws extended to dramatic, muscical and artistic works, then gramophone records and also films, broadcast and TV performances and published editions. Now, the Industrial countries have included Computer Software into the copyright's fold.

An exhaustive multilateral convention was held at Berne in 1886, by ten European countries. It was called the "Berne Convention for the protection of literary and artistic works". Apart from the Berne convention, there were two other multinational conventions. One was the Pan American Convention and the other was Universal Copyright Convention (UCC).

The Berne Convention's some of the principles (example automatic copyright without formalities and other

related provisions), though conceived by the European Powers, were not completely fulfilling the interests of some of the DCs. For instance, the USA's desire for a complete appropriability protection (as its domestic law served) was not fulfilled in the Berne convention. But the UCC adopted in 1952 was intended to bridge the American Interests and the Berne Convention (BC). Recently the USA is trying to become the BC's member.

The Berne convention which establishes international uniformity of approach in the subject matter of copyright was reviewed and revised on five occasions - 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm) and 1971 (Paris). Right from the inception the Berne and UCC have (with all their revisions) favoured the DCs. The DCs extended the fold of Copyright to many subjects, which would give them their monopoly of profits and prevent faster dissemination of copyright creations in the developing countries.

It was at Stockholm Protocol that the benefit of developing outnries was sought. This revision was only on papers, UK and some other DCs did not ratify the Stockholm Protocol.

As a result of sustained pressure on the part of the LDCs, a diplomatic conference for revising the Berne Convention and UCC was convened at Paris and the revision was adopted in 1971. India as a member of Berne convention and has played a crucial role for the LDCs cause.

Today, the DCs have made the "Copyright" a "Catch-all phenomenon" to include new technolgical inventions like Computer Software, Satellite Communication etc.

Trademarks:

The trademark is a device used by business enterprise to identify its products and distinguish them from those made or carried by other companies. It may consist of fancy and descriptive words, of pictures, figures letters, dress labels, business equipment and the like and a combination of all of these. It may be a business mark, merchandise mark, or a service mark.

The historical evolution of trademark system shows that in the medieval times marks designating the ownership were used. But they were not actually trademarks (i.e., involving in trade by a business enterprise) but proprietary marks (of the then guilds).[23] The trademark rights arise

out of approriation and use, and the exclusive right to a particular mark belongs to the one who first appropriates and uses it in connection with a particular business.

A trademark's existence is not like a patent or a copyright. It is not a Government grant. A patent granted by the Government creates the right to exclude others from practice of an invention. A copyright, issued by the Government creates the right to exclude others from copying a literary or artistic work. The right to use trademark is not granted by the Government. The registration is simply a recognition by the Government of the right of the owner to use the mark in commerce, to distinguish his goods or services. The invention covered by a patent need not be disclosed to the public, yet the patent owner is secured in his rights for the term of the grant. A copyrighted work need never be reproduced after the copyright has been acquired, yet the copyright owner is protected for the term of the grant. However, the rights in a registered mark unlike a patent or a copyright, may be forfeited or lost during the term for which the registration was granted.[24]

The Paris Convention of 1883, apart from patents covers the 'trade mark' also. Its provisions are related to

unfair competition on trademark and protection of the member nations against the same. The 1891 Madrid Agreement on the registration of Trademarks provides for the registration of marks with WIPO which then handled the filing to Individual states in which registration is desired.[25]

Both the DCs and LDCs (not all of them) are members to the trademark conventions. It is important to note that the USA has not acceded to the Madrid agreements yet. For, it seeks a more 'effective' protection of conterfeiting trademarked goods than what is provided by the existing in its (in the USA) views International Agreements. Moreover, the acceptance of the Madrid Agreement of 1891 would expose its domestic market to less effective counterfeit laws, hence affecting the profit-making.[26]

The Position of Developed Countries in the Realm of the IPRs

In order to understand the issue of IPRs it is imperative to know the strong hold that the Developed Countries' (DCs) have in IPRs. A glance at the present geo-political situation regarding the IPRs, would provoke one to ask,

i. Why there is a formation of a consortium of Japanese,

EEC and American businessmen which sponsored radical changes for more effective patent protection without any conditions like compulsory licensing[27] or investment compulsion in the country in which the patent was issued?

ii. Why the DCs pressure other countries (especially the LDCs) to join the Paris convention, with their multinationals' (MNCs') inducement?

iii. Why the USA was hellbent that the GATT should be seized of the issue - i.e., IPRs coming under the GATT's purview?[28]

The developments in the developed economies show, that for them the era of International trade in merchandise is over and the era of trade in technology and trade in Services have begun. For the statistics regarding the DCs' trade show that a major percent of their foreign exchange comes from the export of technology and services. And the MNCs of the DCs play a very crucial role in this foreign exchange earning. Moreover, domestically also, the trend in employment rate shows the increase in the technology and service sectors of the economy. DCs like the USA have experienced severe unfavourable balance of trade i.e., trade deficits because of the emergence of Japan, West Germany and some industrialised developing countries in the realm of

merchandise. And if at all they want to recover from their various economic follies e.g., the USA as the largest debtor, hence to have a favourable balance of trade, the silver-lining is seen in their predominance in the realm of technology. As most of the LDCs continue their perpetual struggle for development and as the 'Technology' has become 'the ideology of development',[29] the DCs capitalize on the same for strengthening the disparity. Though the consortium was spearheaded by the USA but joining the same by EEC and Japan is not without stakes that they have vis-a-vis the perpetual importers, the LDCs. The EEC and Japan, along with the USA, were responsible for nearly two-thirds of global exports in services and technology in 1980.

In the DCs' view, the benefits of protecting IP (intellectual property) evolve from the level of innovative output available to a country. Innovative outputs consist of new products, new processes or new literary works. The DCs, with their TNCs (Transnational Corporations) as repositories have abundance of IP which is not benefiting the LDCs favourably. On the contrary it is just another means for stabilising their dominance over the LDCs who have a very negligible percentage of IP output. The DCs pursue

the IP protection in the LDCs by highlighting the benefits, that it may produce but by camouflaging the costs that it may incur in. They (DCs) argue that both direct and indirect benefits to a country (especially for the LDCs'), result from the innovative output even if foreigners (i.e. DCs') primarily use their (LDCs') IP protection mechanism. They try to justify by saying that direct employment and investment benefits accrue from R&D laboratories, new manufacturing plants and import facilities for creating, producing or processing the output associated with the innovative efforts; Indirect benefits accrue from an increase in local market activity - for example, through the use by foreigners of such local services as banks, insurance firms and legal experts. Moreover they add that if the innovative output is a book, a movie, a painting or a scientific article, the cultural and educational levels of the entire population increase. By all these justifications they (DCs) cover up the simmering social costs that may result due to the sanctioning of perfect appropriation, through IP protection, by not considering the different stages of development between the DCs and the LDCs.

To understand the position of the DCs, in IP as against the LDCs, it would be better if an analysis of the

data of ownership of patents granted to foreigners (DCs) by the LDCs. The table 1 gives the figures for the years 1964 & 1972.

TABLE - 1

ORIGIN OF PATENTS GRANTED TO FOREIGNERS - 1964 & 1972

Group & Country of origin	1964	1972
Developed market economy countries	96.9	95.6
Socialist Countries of Europe	2.3	3.4
Southern European countries	0.4	0.4
LDCs	37.0	33.5
FRG	19.3	20.6
UK	10.1	7.8
USSR	0.4	1.2
SPAIN	0.3	0.3
ARGENTINA	0.1	0.1

Source: UN Document TD/B/Ac.11/19/UN.1 - p.38.

Table 1 indicates the highly skewed nature of ownership as between countries and groups of countries. Thus in 1972 DCs owned 95.6% of all patents granted to foreigners where as the LDCs owned about two-third of 1%.

The US alone held nearly 50 times and the FRG alone about 30 times all such patents granted by the LDCs. On the basis of estimates for 1972 of the world total of patents granted to foreigners, it appears that nationals of LDCs owned no more than about 2000 such patents. By 1970, the annual grant of patents in the selected countries had reached some 391,000 of these 80% were accounted for by the DCs.

Table 2 sets out the principal countries owning patents granted by the LDCs to foreigners in the years 1964 and 1972. It shows that more than 40% of such foreign patents were granted to patent holders from the United States of America and another 40 % to those from four other countries - the FRG, Switzerland, the UK and France. These five countries thus accounted for 80% of the total, the Socialist Countries of Eastern Europe accounted for only about 2% of the patents granted to foreigners in LDCs.

Further an analysis of the evolution of patent ownership between individuals and corporations would let us know the stronghold that the MNCs have got in the realm of IP today. Longterm historical data are not available to see clearly the evolution of patent ownership between individuals and corporations. The available indicators for

a few countries (France, the USA, Canada, Arjentina and Chile) are summarized in Table-3. In the USA some 81% of the patents granted in 1908 were to individuals and the figure for Canada for the same years was as high as 97%.

TABLE - 2

National Origin of Patents grated to foreigners in LDCs in 1964 and 1972. (% share of patents granted to foreigners)

Country of origin	1964	1972
USA	39.1	40.6
FRG	9.8	11.5
Switzerland	13.9	9.6
UK	8.4	8.9
France	7.0	7.3
Italy	1.8	3.4
Japan	3.5	3.3
Netherlands	6.0	2.3
Canada	1.9	1.8
Belgium	1.2	1.5
Sweden	0.6	1.0
GDR	0.6	0.8
USSR	0.3	0.7
Czechoslovakia	0.5	0.3

Source: UN Document 7D/B/Ac.11/19/UN.1 - p.39.

TABLE - 3

Share of Corporations and Individuals in patent grants in selected countries (% of total)

Country & Year		Individuals	Corporations		
			Total	National	Foreigners
France	1964	23	73	28	55
	1968	20	77	17	60
USA	1908	81	19	--	--
	1955	39	59	53	6
CANADA	1908	97	3	--	--
	1967	37	63	--	--
CHILE	1937	50	49	4	45
	1967	13	80	2	78
ARGENTINA	1949	55	45	--	--
	1967	23	77	-7	--

Source: UN Document 7D/B/Ac.11/19/UN.1 - p.39.

With the emergence of the corporate form of commerical and industrial enterprise, the role of the corporations in organised research and hence in obtaining patents grants has grown. In the period for which data have been given in Table-3 a reversal of the relative roles of individual and corporate entities in the grant of patents took place. In the USA, for instance, the grants to

individuals fell from 81% in 1908 to 39% in 1955. For Canada the decline was from 97% in 1908 to 37% in 1967. The share of the TNCs rose correspondingly. In France nearly four-fifths of all record patent grants were owned by corporations with the share of foreign TNCs being about 3 times as high as that of national corporations.

The limited evidence available for two LDCs Chile and Argentina (Table-3) shows the same trend. The comparison of the data regarding patent holdings in the USA and Chile vividly explains the increasing domination by the TNCs in the LDCs. In the case of Chile, in 1967, 90% of the patent grants held by corporations were in the hands of foreign domiciled TNCs whereas the corresponding figure for the US was exactly the reverse - that is only 10%. The individual as the holder of patent grants thus appears to have been mainly displaced by the TNCs, especially in the case of LDCs.

The DCs capitalising on their TNCs dominance as foreign patent holders in the LDCs, resort to "non-use of patents"[30] for the sake of their profit motives, patent are taken out of the LDCs by the DCs, so that goods produced elsewhere but protected under the patent grant may be

imported. In this case the purpose of taking patents out is for the prevention of its use for productive purposes in the LDCs and the reservation of the market of the patent granting country for the benefit of the patent-holder. (There appears to be limited information available concerning the utilization of patents and the diverse reasons that may lead to non-utilization)[31].

An examination of 3,513 patented processes and prodcuts of Colombia showed that 2,534 of them belonged to the pharmaceutical industry and the rest mainly to the textile and chemical industries. Of these only 10 or 0.3% of the total were actually used in the production process in the country in 1970. From a sample of 4,872 patents granted between 1960 and 1970 in major industrial sectors in Peru, only 54 were reported to have been exploited, that is, only 1.1% of the total[32]. An analysis of the patent grants in Mexico suggests the rate of use to be between 5 and 10%[33]. A study on the United Republic of Tanzania placed the utilization of externally held patents below 1% of patent grants[34]. In their replies to a UN-questionaire sent in 1962, Cuba, India and Lebanon stated that foreign patents were obtained to protect or monopolize the flow of imports to those countries[35].

The DCs use their philosophy of free-enterprise as a catch-all-phrase to thrust economic changes all over the world. IPRs are certainly not an exception. The DCs argue that the momentum for a country to protect its rsidents' Intellectual property comes from the emerging trend towards privatization in many developing countries; that is, transferring activities from public sector to the private sector. They add that if a LDC wants to grow, as more private firms are created, it must provide a mechanism to ensure these firms have returned from any investment of resources in invention. But, the reality may not coincide with the aforesaid statements. For we find many LDCs may not have an absolute socialist economy, but they are not pursuing the absolute capitalist path either that's why we find the existence of mixed economy, i.e., both public and private sectors, with the former having a predominance in many LDCs. Hence, the DC's assumption of the concept of free enterprise as an universal phenomenon does not hold validity. Secondly, the DC's remarks that the LDCs do not provide a mechanism to ensure the private firms with returns from any investment of resources in invention is fallible. Because, most of the LDCs have created the provisions which

meet both the private interests as well as the social goals. What the DCs mean by a return from any investment of resources in innovation is the "perfect appropriability" of the inventor which would flourish against the social goals of the LDCs.

The DCs propagandist adventure seem to be playing a crucial role is their pursuit of protecting the IPRs. They claim that the IP protection is receiving more emphasis internationally than it has in the past. The exchange of technology and other ideas is clearly a trade issue. Protecting IP stimulates the exports and imports. Inventors in the home country are encouraged to send their inventions to those foreign countries that assures them a return for their inventive efforts (exports). IP protection in a country encourages the foreign inventors to share their innovative output (imports). Quite contrarily first a handful of DCs with the USA as the sole initiator --with ulterior economic motives whsich would be discussed later -- followed by EEC and Japan, for their own foreign exchange earnings, have made the issue of IPRs as a paramount one in the international relations since the second half of the 80s. The third world nations on the other hand have not even extended their whole hearted support for the Trade

Related Intellectual Property Rights negotiations between the DCs and LDCs in the international fora like GATT.[37] More so, the LDCs are taking a stance which advocates the delinking of IPRs and Trade. In such a juncture declaring that the exchange of technology and other ideas are clearly trade issues, is more a display of unilateral imposition of the DCs over the LDCs.

The DCs argue the "free access" view of Intellectual Property (IP) imposes costs by removing the incentive to develop new ideas and by contributing to economic stagnation. On the benefits side, this approach would allow anyone to use inventor's new ideas at no cost. The DCs say that the advocates of the benefits side usually understate or ignore the magnitude of the costs. Free access to ideas does not provide inventors with exclusive rights to capture returns from their investments in creative activities. Hence, they've less incentive to allocate scarce resources to these activities. A firm can maintain the status quo and earn a relatively certain level of profits from its established products or it can invest in R & D and possibly gain greater profits. The firms' decision involves the probability that engaging in research will

yield a profit enhancing new product or a more efficient process. The probability that a firm will produce any invention is directly related to the resources that the firm allocates to research and development. However the firm incurs the R & D cost whether or not the result is successful. Thus the firm's problem is to choose a level of R & D that maximises its expected profits. Using the above said arguments, the DCs demand that a key consideration in this regard is protection of IP. The DCs further say that as protection of IP increases, the profit from an invention increases. Since the amount invested in R & D is directly related to the expected profits from a successful invention. An increase in such profits will result in an increase in the investments. Further more the probability of discovering a new product will increase as R & D increases. Therefore the expected number of new products or processes will increase as the protection afforded to IP increases.

The aforesaid arguments do not hold the truth enormously. The DCs' 'firms perspective' favours more the firms than the socio economic benefits. The demand for the free access to ideas by the LDCs does not ignore the need to reward the new ideas of the inventors. This can be justified from the national patent laws that most of the

LDCs have which strike a balance between inventor's right and rewards and the socio-economic goals that a nation may have. What strengthens the LDCs' unacceptability as against the complete protection of IP is the DCs' demand for the exclusive rights of the inventor. These exclusive rights in a lop-sided way support the profit motives of the firms per se at the cost of the social benefits. Thereby the need for inventions to utilise the factors of production in a more productive way, in a shorter period is nullified. For the exclusive rights of Intellectual property Protection features a prolonged period of appropriation of profits, until in most of the cases, the invention becomes obsolete.

The DCs seem to be right when they say that the amount invested in R & D is directly related to the expected profits. But they falter when they say that the increase in the profit leads to increase in the investment and successful inventions. The DCs conceal the social costs when they favour investments in R & D and successful inventions of new process and products. For, the increased investments in R & D are not made for the sake of meeting the technological needs of the LDCs nor the new processes and products would anyway enhance a faster percolation of

the same in the less developed economies.[38] On the contrary, it is evident that the investments in R & D are made primarily to keep the competitive edge of the MNCs of the DCs. Profit making, enormously, through new inventions is the reason. This motive is secured further by the creation of IP protection as the DCs wish. Thus, the DCs interpretation of patent laws has a significant impact on their R &D. For example, if their definition of misappropriation or infringement expands to exclude certain hereto-fore allowed limitations, a firm engaging in R & D can expect an increase in profits.[39]

The DCs further justify their demands for a strong IP protection by saying that protection solution enhances the prospects for economic growth to produce long term benefits in exchange for a grant of monopoly power to the inventor. But they refuse to rcognize how contradictory they are to relate free enterprise and monopoly power; secondly, the monopoly power does not result in long run benefits but result in the long-run dependency of the LDCs over the inventions and the leverages attached to them. Because, once the LDCs mould their economic structure with the anticipation of regular inputs of patented foreign (mostly DCs') technology, then it would not be possible for

them to have the kind of R & D that is required to meet the off-sets created by the non-availability of the foreign technology for reasons they could not foresee. The LDCs, would not be able to meet the investments and resources that are needed for such foreign technologies but possible only at the cost of their socio-economic goals. So, what results is perpetual dependence on the strongly protected IP of the DCs, who play the LDCs as per their profit making motives. Moreover the LDCs who restructured their economy to assimilate the modern tchnology would not be able to reach that level at all; for whatever progress they make is made obsolete by the long patent period of the DCs and the vicious circle continues.

DCs influence in the Bio-technology

Susan George, the author of How the Other half dies, recently warned that "the new biorevolution in agriculture with the characterised by new and stronger forms of dominance and manipulation."[40] Very rightly so the progress that have been made in the realm of Bio-technology seems to have profound impact in the relations between the DCs and LDCs. Bio-technology has many applications that have much potential benefits for agriculture in the LDCs.

These range from improvements in yield and quality in crops to genetically manipulating plants so that there resist disease and tolerate various stress and inhospitable environment. But the extent of privatization of the technological developments looms as a shadow over these prospects. The growing ownership of R & D and the resulting prodcuts by a few TNCs shows a widening web of control by a powerful few DCs.

Henk Hobbelink from the Brussels based ICDA (International Coalition for Developmental Action) has shown the extent of involvement in Bio-technology by the world's heading chemical companies like shell, mousants, Ciba-Geigy & Sandoz. He says that exactly the same TNCs that already control the pesticide and pharmaceutical market are now the most active in the field of Bio-technology. Furthermore, all ten leading producers of agrochemicals are also engaged in the seed sector and control 80% of it. "With their focus on research by the TNCs of the DCs, to develop seeds that are genetically manipulated to tolerate particular pesticides - the company's own, the link between the path of research and the control of the markets in LDCs, are not difficult to see".

The DCs are periodically establishing their stronghold in the realm of bio-technological products globally. Each and Every DC which pursues bio-tech research interprets the biotechnological invention in such a way that it is patented in the agreed notion of patentability in the respective countries. Therefore, the different considerations, according to the WIPO report, apply to bio-technological prodcuts, whether animals, plants, microorganisms or biological material which result from conventional breeding or screening techniques or from uncontrolled events. (eg. Mutation)[41], are generalised so that they become patentable. In a number of DCs plant varieties are protected by "special legislation" excluding them from patentability under the laws for the protection of inventions.[42] The strausbourg convention on the unification of certain points of substantiative laws on patents of Inventors of 1963, permits its contracting states[43] not to grant patents for plants or animal varieties or essentially biological processes for the prodcuction of plants or animals.[44] The European Patent Convention of 1973 allowed parties to it to follow the same approach. In the US, prior to the 1930 Patents Act, even artificially bred plants were considered products of nature and thus not patentable.

Under the Patent Act of the US (1930), special 'plant patents' were granted for asexually reproduced varieties (e.g., reproduced other than by seed, such as grafting, budding, cutting, layering, division and the like), whereas for sexually reproduced varieties special titles of protection are available under the Plant Variety Protection Act.[37]

But these considerations of the DCs, in general have undergone tremendous changes now, as the bio-technological products were made commercially viable to suit their motives of profit making. In 1961, the International convention for the protection of plants (UPOV) was concluded in Paris. It has since been revised twice in 1972 and 1978. By the end of 1985, seventeen states were party to that convention[45]. Adoption to the convention has subsequently influenced legislation both at the national and regional level (of the members). The UPOV - Convention is designed to meet the plant specific needs of plant breeders.[46] The plant varieties of natural origin - discoveries - were also made eligible for plant variety protection. Once protction has been obtained, the plant breeder's include prior authorization of any production or propagating material of

the variety for purposes of scommercial marketing, any offering for sale and any marketing of much material, without an exhautions of rights where such acts are effected by using material acquired with the consent of the owner of the right. The UPOV convention also provides protection, with a minimum duration of 15 years or 18 years for vines, fruit trees and their root stocks, forest trees and ornamental trees[48]. Most of the DCs, using UPOV's patent stipulation have strengthened their plant patent laws further for maximum appropriation. In the US, lack of protection for sexually reproduced plants was solved by the 1970. Plant variety protection Act, which took UPOV stipulation into account.[49]

The most important characteristic with regard to plant breeding developments during the past decades has been in the field of molecular biology. Both the Strausbourg Convention and the European Plant Convention exempt from exclusion of patentability microbioligical processes and the products there of. In the US plants were not outside the scope of patentable subject matter. By all these manoeuvres, the result was that the TNCs of the DCs have become the repositories of patented plants and plant

varieties and microbiological processes all over the world. And the consequence of TNC's domination was that they have prevented the LDCs' accessibility to these biological products in easy terms[50].

The obsession with IPRs of the DCs has not only affected plants but also animals. Earlier patentability of animal varieties was expressly excluded from patenting under all patent laws of members of the EPC as well as in China, Cuba, the GDR, Mexico, Sri Lanka, Thailand and Yugoslavia. The USSR while not recognising animal varieties as inventions allows the grant of special types of protection for such varieties. In the US, the animals produced by using patentable Bio-technological processes or products eg. rDNA constitute patentable subject matter.[51] For sure, the processes involved in Animal breeding, their protection seem to be issued under US patent Law. The EPC excludes biological processes for the production of animals; and "methods for the treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body shall not be regarded as inventions which are susceptible of industrial application". However, with the market opportunities that have come, the OECD DCs

seem to head for diluting their earlier stance. And the patents seem to penetrate all naturally occuring life-forms. Therefore, as the leaders of Bio-technology and possessors of microorganisms repositaries the DCs[52] are craving for the kind of IPRs which could assure a perpetual disparity between them and the LDCs.

DCs linkage of Service Sector with IPRs

The DCs do not recognize the uniqueness of IPRs in the realm of Intrnational relations and hence do not advocate the view of settling the disputes regarding IPRs in the international forum like WIPO (World Intellectual Property Organisation, Geneva), an organization which has been created primarily to deal with the issues of IPRs in 1967. But they club IPRs with general international trade, to be precise under the service sector.[53] The difference of opinions in considering the IPRs as part of the services and the need for the DCs to club them together require the revelation of the reasons behind it. It is very clear that the IPR-regime[54] has assumed a different category of its own in the Intrnational relations. The creation of WIPO as an UN agency to meet the administrative requirement of various IPR treaties etc. is basically due to the recognition of

IPRs as an entity quite different from other realms of International Trade. Moreover, the fact that the IPRs have features which could not be linked up absolutely either with services or merchandise has also been confirmed. Though the LDCs have endorsed the above mentioned aspects of IPRs but the DCs, once the issue cropped up, they have subsumed IPRs under Services.

The Service Sector of International trade, again by the move of the DCs, is being negotiated to find its tradeability hence to bring it under the purview of GATT, which controls the International Trade. If, as the DCs demand, the tradeability of the services is recognized under the GATT, at the cost of LDCs progress their predominance in that sector will be strengthened. At this juncture given the lucrative aspects that the DCs stand to benefit, if IPRs are brought under the realm of services, the discriminatory restrictions of GATT, of the IPRs will serve the DCs trade interests as against the Developmental needs of the LDCs.

The interior motives of the DCs for linking up IPRs with Services, could be understood very clearly, from a glance at the international trade in services. There is a unbridgeable gap between the LDCs and DCs. Moreover, some

of the DCs' which were descending in the merchandise trade like the USA seem to recover from their trade deficits in merchandise to favourable balance of trade in services. As statistical analysis would enlighten further in the following way.

World Services Trade: Major Surplus and Deficit Countries

Table - 4

Countries	Total exports in US$ billions	Total Imports in US $ billions	Net Services US $ billions	Imports as % of total Imports	Exports as % of total World receipts
US	138.7	120.5	18.2	16.3	21.5
France	54.5	47.7	6.8	6.5	8.5
UK	47.2	37.8	9.4	5.1	7.3
FRG	45.7	50.7	-5.1	6.9	7.1
Japan	41.2	48.7	-7.6	6.6	6.4
Belgium+ Luxemburg	30.3	28.4	1.9	3.8	4.7
Italy	25.6	23.6	2.0	3.2	4.0
Nether-lands	23.2	22.9	0.3	3.1	3.6
Saudi Arabia	17.2	44.1	-26.9	6.0	2.7
Swiss	17.2	10.1	7.0	1.4	2.7

TABLE 5 Composition of world trade in Services, 1984 (SDR- Millions)

	Transportation		Travel		Investment Income		Others		SDR million Total Balance
	Credits	Debits	Credits	Debits	Credits	Debits	Credits	Debits	
World	118,920	152,683	92,281	87,857	260,316	306,700	172,332	190,611	-94,001
Industrial Countries	89,627	98,603	65,413	68,990	212,055	210,720	128,315	108,337	8760
Oil Exporting L.D.Cs	1,921	17,329	1,054	4,286	25,600	17,906	7,813	47,725	-50,856
Non oil L.D.Cs	27,371	36,752	25,814	14,581	22,662	78,073	36,204	34,549	-51,904
Europe	3,524	3,849	4,854	1,221	1,125	7,041	4,743	3,984	- 1,849

Source : IMF Balance of payments year book 1985.

TABLE 6 Service Sector Receipts and Payments of L.D.Cs and D.Cs.

	Transportation		Travel		Investment Income		Other Services		Total	
	1973	1984	1973	1984	1973	1984	1973	1984	1973	1984
Receipts										
L.D.Cs	86.8	75.4	76.9	70.9	92.3	81.5	82.8	74.5	85.8	76.9
Non oil L.D.Cs	10.9	23.0	20.5	28.0	4.6	8.7	15.4	21.0	12.0	17.4
Oil LDCs	2.0	1.6	1.9	1.1	1.9	9.8	1.4	4.5	1.8	5.7
Payments										
D.Cs	77.4	64.6	85.0	78.5	68.4	68.7	78.8	56.8	76.6	66.0
Non Oil L.D.Cs	17.3	24.1	11.8	16.6	18.2	25.5	14.3	18.1	15.8	22.2
Oil L.D.Cs	4.6	11.3	2.9	4.9	13.2	5.8	6.3	25.0	7.2	11.8

Source: IMF Balance of Payments year book 1985.

The tables (4 & 5) show the performance of leading countries in general and Industrialised countries in particular in global trade of services. The major industrial nations tend to dominate as major surplus nations. In 1984, the US and France are the largest exporters. The top ten trading countries of which only Saudi Arabia is a non-OECD member, account for 68% of world exports and 53% of world imports. The aggregated figures indicate that the bulk of service trade in between developed countries and the net direction of the trade is from developed to developing countries.

Further the tables 5 & 6 shows details of world trade in services by different country income groups. Only one region appears to be a net exporter of services, the industrialised countries.

The largest volume of trade in services is conducted among DCs. In 1984, for example, Industrial developed economies accounted for 77% world service exports and 66% of imports (Table-6). However LDCs increased their share of trade in invisibles from 19% in 1973 to 29% in 1984. An examination of the found service industry groups illustrate major trading differences between Industrial and

LDCs. Developing countries both oil and non-oil, have much larger deficits than DCs. Investment income is strongly correlated with the level of development. The DCs clearly lead in investments abroad, although receipients of investment income include both LDCs & DCs.

Socialist Countries have been neglected in the analysis due to differences in accounting methods and the difficulty obtaining trade data.[55]

1. Most socialist countries particularly USSR and countries in Eastern Europe, use the material product system(MPS) for national income accounting, applying a different classification system of service industries. Services appear to be much less significant in socialist economics that might be expected by the level of their industrial development. Statistics from Eastern European Countries indicate that 29 to 33% of GDP is derived from services (Shelp 1981). The lower contribution of sevices than in western countries of comparable development is possibly due to differences in economic organizaation and ideology. Sociolist economic policy tends to channel resources into basic industries for production of capital goods rather than consumer goods and services.

TABLE 7 Technology of D.Cs - 1965-1981 (US Million) *

	Japan			U.S.			U.K.			FRG			France		
	R@	P@	A/B %	R	P	A/B %	R	P	A/B %	R	P	A/B %	R	P	A/B %
1965	17	166	10.2	1534	135	1136.3	138	131	105.3	75	166	45.2	169	215	78.6
1970	59	433	13.6	2331	225	1036.0	273	255	107.1	119	306	38.9	344	357	96.4
1975	161	712	22.6	4300	473	909.1	493	454	101.9	308	729	42.3	1313	1035	126.4
1980	378	1439	26.3	6860	768	8932	-	-	-	-	-	-	-	-	-
1981	537	1711	31.4	7096	883	803.6	-	-	-	-	-	-	-	-	-

Source: Mingsaru Santikaru, Trade in Technology : ASEAN & AUSTRALIA
ASEAN & AUSTRALIA Economic Papers, No.8
ASEAN & AUSTRALIA Joint research papers 1984.

*The figures in the table are converted from Yen using the implied rate used by the source document.
@ R - Receipts, P - Payments

Table-7 provides estimates of the vol. of trade in technology between 1965-1981 for Worlds major trading countries. The US is by far the larget exporter followed by France and UK. While all three countries are net exporters of the technical services, Japan and FRG were the net importer for this period. More recently, Japan has become the largest exporter as its direct foreign investment flows have increased substantially over the last decade. It is estimated that by far the largest proportion of payments for technical services over this period was associated with intra-firm transactions of TNCs, with only 10% of trade being between non-affiliated Companies or being independently transacted.

The US

The United States (US) is the largest exporter of Services in the World, followed by the European Community (EC) and Japan[56]. Two-thirds of the US GNP and 70% of domestic employment are accounted for by services. About 10% of the US work force has remained in traditional service industries, while more than 60% of the employment has been generated by high-technology information industries. A study by the US office of Technology Assessment points out

that sales of services in foreign markets by the overseas affiliates of American firms exceed direct exports of services.

Virtually unseathed by the turmoil in manufacturing and mining, the service economy of the US continues to expand. Accordingly, to a US Government report, the share of jobs in services rose steadily from 62 to 72% of all non-agricultural employment between 1960 and 1980.[57] Over the same . The trend has continued fully 75% of the nonform jobs in the 1st quarter of 1986 were in services, and only 25% in the production of goods.

As the Service economy has expanded, so has US dependence on the export of Services to other nations. While more difficult to monitor than trade in goods, the International Trade Administration in the US Commerce department estimates that Service exports, including investment income, rose from $ 132 billion in 1983 to more than $ 142 billion in 1984. To date, the US has enjoyed surpluses in its trade in services with the rest of the world, thus reducing the growing deficit in merchantise trade.

In the past, direct exports of services have made

a modest positive contribution to the US balance of payments. More importantly foreign affiliates account for an increasing percentage of services trade. Therefore, it is crucial that barriers to trade in Services beyond the border are removed. That's why we find DCs in general spearheaded by the US, use international fora like GATT to create favourable conditions for their trade (in services) expansion. "Trade Concepts" that would enhance their predominance are demanded by DCs in the International trade.

The IMF has estimated that the top 25 services exporting is generated 87% of total world exports in 1980. The US, the EC and Japan were responsible for nearly 2 - 3rds of services exports in 1980. Their share of world exports was 74% in 1980, now it has gone well over 75% .

The USA factor

Most of the issues that are being negotiated between the DCs and LDCs in the realm of International trade, especially in the international fora like GATT etc. seem to be spearheaded by the USA in favour of the DCs. The EEC and Japan have joined the bandwagon, fighting for uniform IPR multilateral framework of rules and regulations only after the USA's initiation. Because of this

significance that the USA has assumed regarding the international trade it becomes crucial to know the reasons for the same. Therefore, it is necessary to analyse the USA factor.

After 1981, America was running everwidening billion $ trade deficits which in 1983 soared above $ 100 billion as imports fuelled by strong dollar shot up. By 1987, the USA was having a trade deficit of $ 152 billion making it the largest debtor nation in the World. Worse still the US was suffering a deficit in merchandise trade, thus framing a cry of alarm raised by embattled industries that the US was deindustrialising. "The US in decline" thesis became entangled with the trade deficit. And the "unfair trade practices" as US viewed, of the foreigners (precisely the LDCs) were blamed for America's failure in international competitiveness. Therefore, as a retaliation, the omnibus trade and Competiveness Act of 1988, of the US from which the Super 301 (for investments related trade issues and Special 301 (for IPKs) emanated as a resort to unilateralism to remedy the problem of the US economy. But, the former USTR Ambassador Clayton Yentter himself stressed, that it is a myth that the unfair trade practices of

foreigners cause much of the trade deficit "unfair trade practices account only for a small percentage of our trade deficit perhaps 10 to 15% of the total". He also debuts the myth that the US economy has been ruined by its trade deficit, claiming that the US was enjoying the longest peacetime economic expansion in American History.[59]

The aforesaid discussion necessitates the exploration of reasons which make the US pursue IPP as against the LDCs. The earlier discussions highlighted through statistics that the US is the largest reservoir of IP - patents, trademarks, copyrights in various products and processes which extend even to life forms (plants and animals).

It was also found that the USA is the largest exporter of services in the world, followed by the EEC and Japan. Two-thirds of the US GNP and 70% of domestic employment are accounted for the services. About 10% of the US work force has remained in traditional service industries, while more than 60% of the employment has been generated by the hi-tech information industries. A study by the US office of Technology Assessment points out that sales of Services in foreign markets by the overseas affiliates of

American firms exceed direct exports of services. Moreover, by linking IPRs' with services, the USA stands to benefit once again to rule the International trade through its economic power.

Capitalising on the technology superiority that they possess the USA is advocating intellectural property protection to benefit by "Perfect Appropriation" of the profit. This motive of perfect appropriation demands the conducive atmosphere in the importing economies (mostly LDCs) to strengthen it further. Therefore, we find the US demanding for privatisation of the economy (of the LDCs) for the foreign investors (DCs) which should be preceded by the guarantee of a strong IP protection. The argument that a strong IP protection and the subsequent liberaliation for the foreign firm to invest and transfer the technlogy for the benefit of the importer seem to be invalid considering the benefits that the US would enjoy and the costs that the LDCs would suffer. It is relevant here to mention that the top 20 MNCs in the world are from the US, whose diversification in IPRs through R and D has come precisely from the profits that they get by exhorbitant prices that they fix as the monopolists of technology.

The US has termed very enphemistically the barriers for its trade expansion like non-liberalization, lack of strong IP protection etc. as "Trade Distortions" in the International Trade", as against the LDCs. And if the trade distortions are removed the flood gates will be opened in favour of the US economy. Thus the LDCs even some DCs like Japan and EC members are prone to the unilateral actions of the US like the trade act of 1988 - super 301 and special 301 to meet the USA's needs which were not to the interests of the World community as a whole.

Perspective of the DCs

There is growing and strong perception among the DCs that trade and competitiveness the international level will be technology driven in the future and therefore the protection as well as enforcement of IPRs is essential for penetrating the World markets. TNCs with their technological process are increasingly adopting their strategy of boosting their revenues not only from the sale of patented products but also from the sales and licencing of technology per sec. Technology as an item of Commerce is fast, becoming a key element of trade and competitive strength and is gaining as much attention as trade in goods

and services. The commercialisation of technology is prevailing even in universities and academic institutions in the Industrialised world. With the result that there is an increasing trend towards their engaging in commercially oriented research often financed or sponsored by industrty - keeping the research work secret and trying to get intellectual property protection rights for them as speedily as possible.

There is also an increasing perception in Industrialized countries that their enterprises are being part to substantial losses, particularly in the LDCs because of the lack of IP protection and piracy of those rights. It is also argued that the R and D costs are sky-rocketing and unless the inventions arising from such costly R and D are protected and allowed to be commercially exploited, it would be difficult for the enterprises to sustain or recoup their R and D expenditures. As a result of those developments DCs have made the issue of adequate and effective protection of IPRs, effecive enforcement of such rights and effective and expeditious settlement of disputes as a central plant of their trade policy agenda.

This issue has spilled over into the area of

scientific and technological cooperation where the conclusion of bilateral agreements is being made contingent upon their assessment of the adequacy of IP protection in the other country. (eg. the US Vs. India - the S and T agreement and the alter intimidation by the USA to squash the same if adequate IP protection was not given to the technological imports from the USA into India. In particular the LDCs are under a great pressure to change their IP - Regime so as to provide for adequate and effective protection of IPRs as well as their effective enforcement, on standards comparable to those of DCs.

With the rapid changes taking place in the technological field, the DCs are also keen to widen the scope and coverage of the IP protection system a Catch-all phrase. They are focussing their attention not only on the traditional areas of patients, copyrights and trademarks but also on computer software, data bases, industrial designs integrated circuits, neighbouring rights, appelations of origin, geogrpahical indicators, service marks, trade secrets and the like. Furthermore, the DCs are also pressing for a GATT based agreement on the protection and enforcement of these IPRs so that the considerable retaliatory power they wield in the goods sector could be

employed by them against the violation of the accepted standards by the country. The changes in the DCs perspective in the current urgency round of multilateral trade negotiations of GATT would be analysed later.

Notes

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2). Niranjan Rao., "Trade Related aspects of Intellectual Property Right: Question of Patents"

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3). UN. Document., The role of patents in the transfer of technology to developing countries (Un - Publication, Sales No. 65. 11.8.1)

4). i.e. Books, designs, audio-video films and computer software.

5). Phillips., Supra note no. 1 Page. 251

6). UN - Document Page - 1 Supra Note p - 1

7). Richard P., Rozak. Intellectual property and Economic Growth," Economic Impact No - 64., 1989.

8). S.J.Patel "The patent System and the IIIrd world," World Development September, 1974

9). The absolute monopoly is the right of the Intellectual property owner to prevent all other persons from using that property. An example of the absolute monopoly can be found in the rights enjoyed b the holder of a patent for an invention. Not only can be stop anyone copying the novel product, or process covered by his patent, but he can also prevent him from utilising the practical embodiment of his idea as described in the patent specification even if that person has independently invented it himself during the currency of the first inventor's patent.

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11).Working of the Patent means that an invention - a process or product - should be put into production process in the country where the patent is granted. The patentiee in other words should not import the product or process for which a patent has been granted. The working of the patent is insisted precisely to enhance the technolog

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27). Compulsory Licening ensures working of patents. If reasonable requirements of Public interest not satisfied, by the patentee, any interested party can licensed on application.

28). Which will be discussed later.

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32). UNCTAD - Financing Invisibles - IIIrd session (sales No. E. 73.II D.6), Document TD/107, Para 50

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36). The USA's unilateral actions of infringing the sovereignty of the LDCs will be discussed later.

37). Will be discussed later.

38). Will be discussed later.

39). Rajeev Dhavan, Morris,Gopal Jain.,"Power without Responsibility in aspects of the Indian patents legislation". National working group on patent Laws - India - 1988 (mimeograph).

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41). Ursula Wasserman., "Patents and the Biotechnological Industry". Journal of World Trade and Law vol. no. Jeneva 1974.

42). Dhavan.,Supra note -39

43). France, FRG, Iseland, Italy,Liechtenstein, Luxemburg, Sweeden, Switzerland and UK.

44). Parties to the convention ; Austria, Belgium, FRG, Italy, Liechtenstein, Luxemburg, Netherlands, Sweden, Switzerland & UK.

45). Beligium, Denmark, France, FRG, Hungary, Iseland, Israel, Italy, Japan, Netherlands, New Zealand, South Africa, Spain, Sweden, UK and US.

46. Wasserman., Supra note. 41, p.707

47. Ibid., p - 707

48. Ibid., P - 707

49. Ibid., P - 708

50. Will be discussed further - later.

51. The US - Supra Court Decision in rediamond versus chakravoety.

52. The Budapest Treaty of 1977, stimulated the International recognition of the Deposit of Micro-organisms for the purpose of patent procedure.

53. The very definition of service sector involves the difference of opinion between to LDC & DC. The DCs definition,(to the and disagreement of LDCs) is a catch - all - phrase i.e, it encompasses IPRs along with the economic activities other than Agriculture, Mining and Manufacturing.

54. Intellectual property Regime, is nothing but the rules and regulations of IPRs at the international level.

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CHAPTER - III

IPR s and the Position of the Third World

This chapter aims to analyse the position of the Third world in regard to the IPRs. The analysis also reveals the stance of the Third world as against the DCs in the issue of IPRs. Moreover, the very understanding of the issue of the IPRs in relation to the Sovereignity of the Nation-states becomes the crux.

Going by the definition of patents, it is found that the governments by their rules and regulations confer monopolistic rights on patentees. Any grant of a monopoly affects a wide variety of interests, for instance: the national patent holder, the patent granting country, the foreign patent holder and his country and the international community. These are the interests which have been at play in the evolution of the patent system. As the diversity of the interested parties indicate, there is no philosophical and practical basis on which one can suggest that all these interests are always invariably identical. In fact, conflict of interests between the monopolistic rights

granted to private interests and the imperative of safegaurding public or national interest is inherent in the patent system. The patent system has been shaped by these conflicts. The result achieving a balance between private and public interests have varied over time and from country to country. That's why the Intellectual property land of all countries differ from each other.[1]

The Third world countries have faced debates on the usefulness of the IP system for best serving their national interests. These debates have formed the basis for revisions of the IP laws which in several cases were introduced by the colonial powers during the 19th century. India for example had its patent law in 1859, long before any laws on subjects of vital public concern were enacted. The patent law introduced in Liberia in 1864, Maritius in 1875, Zaire in 1886, Sri Lanka in 1892. Those laws had nothing to do with serving the interests of these colonies. They were simply meant to reserve markets for the metropolitan powers. The retrogressive aspects of these colonial patent laws could be remedied only in post 1950 period.

Third World in Patent System

During the 1970's, there were about 3.5 million patents in existence, of these no more than 6% (200,000) were granted by LDCs. As overwhelming majority of these patents as high as 84% were owned by foreigners mainly by the TNCs. Of the five major DCs. Over 95% of these patents were not used in the productive process in the LDCs. The nationals of the LDCs held no more than 1 % (30, 000 in all) of the 3.5 million patents in the world. The LDCs were plainly on the periphery of the world patent system. In comparison they represent 75% of the world population, 40% of enrolment in higher education, 20 to 25% of world GDP, and 15 to 20% of the world industrial output, but only 1% of the World Patent Stock.[2]

Ensuring that the grants of patent monopolies, which always led to higher prices, also served the public interests of the patent granting countries has always remained a subject of public action. The patent laws of most countries have in consequence contained various measures for the limitation, in the public interest, of the monopolistic private rights conferred by the grant of the patent. These have included, compulsory licences, licences

of right, automatic lapse, revocation, use and expropriation by the State; provisions against the failure to work or insufficient working; limitation on the importation of the patented articles and on failure to satisfy national market demand. Moreover other provisions were also inserted into the patent laws to protect the public interest. Several subjects were, for instance, excluided from patentability on the grounds of national interest. The duration of patents granted to different countries was to vary from 5 to 21 years.

The grant of patent monopolies has led to abuses and restrictive practices inserted into licensing agreements like, payment for unused patents, package licensing, excessive pricing etc. These practices have been considered as abuses or are otherwise controlled by most countries, including the DCs. The monopolistic privileges granted to the patentees impose heavy cost burdens on the patent granting countries. They raise the sales prices of the patented products, thereby leading to a fixed transfer of of incomes from the consumers to the producers. But these direct costs are only the tip of the Iceberg for LDCs. The indirect or the hidden costs (transfer pricing, abusive practices, limiting possibilities of development of national

manufacturing etc) are invisible. These costs have not been restricted only to the LDCs, there are quite a lot of instances of such experience by the DCs. And the DCs have by their own laws, have recovered from such abuse of patents, and IPRs in general. For instance, the British Government's order on the TNC, Hoffman La Roche AG of Basel, to cut its selling prices for the transquelisers by 60% to 75% and to refund $ 27.5 million for overcharging. Therefore the importance of all countries being earnest in their monitoring, regulating and prohibiting by law such trade- destroying abusive practices in manifested.

This applies particularly to the LDCs which are proverbially weak in their national technological capacity. Such is the background for the endeavours of the LDCs to regulate in their national interest the operation of the patent system, to make arrangements for safeguarding public interest so that the doctrine of "private gains at public cost" would not prevail.[3] Thus the several initiatives of the Third World Countries for a fundamental revision of the national patent system and of the Paris Convention were made. These revisions have been aimed precisely in meeting the special needs of the LDCs.

The DCs' patents domination in the LDCs could be analysed from the following data regarding India and the foreign patent holders (DCs'). All the patent legislations in India from its controlversial political beginning in 1856 has permitted the foreign ownership of patents. Before, 1950, the right to priority (of Britain) wasl also maintained with Britain. Although the series of statistics are very skeletal and cover different major legislations in 1859, 1888 and 1911, the pattern of foreign patents shows a remarkable consistency.

Table 8. shows the number of applications for patents from persons in India and Abroad.

Year	Total No. of	By Indians	By non-Indians	%of applications applied by	
				Indians	Foreigners
1856	33	-	33	-	-
1876	116	7	109	6%	94%
1886	275	33	242	12%	88%
1900	492	45	447	9%	91%
1935	980	156	824	16%	84%
1940	741	214	527	28.8%	71.2%
1945	1989	246	1743	12.3%	87.7%
1949	1725	345	1380	20%	80%

SOURCE : Report of the patent enquiry committee - 1948 - 50.

Not unexpectedly all the earlier applications were by non-Indians for the first two decades (1856-1876). Twenty years later, the total number has increased but only (6%) applications came from Indians, But, both the number and proportion of Indian applicants increased (33 or 12%) bit better in 1886. Despite the increase in the applications from the mid-thirties, the domination of the foreign applications has not come down phenmomenally. The domination of foreign applicants need not necessarily trace to England; but also America's quest for new markets. The foreign stronghold, continued unabated in the food, chemical and pharmacetical industry as it is with most of the LDCs.

The Indian Patent Act of 1970, was hailed as a salutory compromise, a progressive act which allowed foreign patent holders a free reign whilst by an elaborated system of compulsory licences, licences of right and revocation. In addition, the Govt could appropriate patents for its own use, for a large variety of stipulated purposes. During the passing of the act, it was suggested that legislation was eliptical in denying the full flavour of incentives needed for foreigners to register or work patents in India.

Table 9. below shows the number of applications for patents from persons in India and abroad during 1972 - 1973 to 1986 - 87.

Year	Table No. of applications	By Indians	By Non-Indians	% of applications filed by Indians & Foreigners	
				Indians	Foreigners
1972 - 73	3639	1143	2496	31.4%	68.6%
1973 - 74	3791	976	2515	28%	72%
1974 - 75	3406	1148	2258	33.7%	66.3%
1979 - 80	2980	1055	1925	35.4%	64.6%
1984 - 85	3319	819	2500	24.6%	75.4%
1985 - 86	3625	999	2527	27.6%	72.4%
1986 - 87	3489	983	2506	28.1%	71.9%

SOURCE : Annual reports of the Controller General of Patents, Designs and Trademarks - 1972 - 73 & 1986 - 87.

Table 10. Shows number of patents in force.

Year	No.of patents in Force			% Foreign patents in force	% Indian patents in force
	Indian	Foreign	Total		
1972 - 73	3318	28,718	32,436	83.3%	16.7%
1973 - 74	3948	28,270	32,218	87.6%	12.4%
1974 - 75	3039	24,758	27,797	89.0%	11.0%
1979 - 80	2786	14,474	17,260	83.8%	16.2%
1984 - 85	3008	13,162	16,170	81.4%	18.6%
1985 - 86	2549	10,844	13,393	81.0%	19.0%
1986 - 87	2004	10,059	12,063	83.3%	16.7%

SOURCE : Annual Reports of the Controller General patents, Design and Trademarks. 1988, New Delhi.

Table 10 shows the no. of patents which are actually in force. This excludes those that have expired as a result of the efflux of time or otherwise. But, that of the number of patents actually in force a much higher proportion of patents in force are foreign owned than those applied for by foreigners or scaled in their favour. On the basis of the figures of applications and the sealing, thus proportion will suffer a very slight decline. But, that may be for a very brief period during which the pattern of the immediate merges into the overall total figure. The present figure for 1986-87 is that the total number of patents in force is 12,063 with 83.3% of these patents owned by foreigners, some of whom are residents in India.

By far the large number of patents are held by foreigners in India are the DCs. The American figure dwarfs all the others. However the UK and the FRG have shown a reasonably large, consistent and steady interest. France and Switzerland have continued a sustained interest, while Japanese applications have steadily increased over the years. If we analyse the pattern of foreign applications in someother LDCs, we find the same kind of domination by foreigners, especially by the DCs, is prevailing. The following table justify the same.

Table 11. Shows the number of applications for patents in India, classified according to country - 1972-73 to 1986 - 87.

Country	1972-73	1973-74	1974-75	1979-80	1984-85	1985-86	1986-87
America	740	756	671	650	862	958	857
FRG	291	292	342	282	284	277	307
France	129	107	113	121	168	188	191
Switzerland	133	107	105	89	135	116	137
Japan	88	103	77	93	133	140	135
U.K.	407	383	387	244	244	278	306
Netherlands	66	70	53	57	52	56	73
Italy	84	99	94	58	49	62	67
USSR	54	68	52	61	58	68	64
Australia	24	28	23	25	38	78	86
GDR	47	16	6	22	15	15	37
Canada	30	36	31	24	13	54	24
Brazil	2	2	-	3	2	2	1
Mexico	5	12	10	2	3	-	2
Argentina	-	-	4	-	1	-	2
Korea	-	-	-	-	6	3	2

SOURCE : Annual Reports of Controller General of patents, Designs and Trademarks, 1988, New Delhi.

Table 12. Showing patent applications field in Mexico, India, Argentina and Colombia as compared with to other selected developing countries, 1969 & 1972.

Countries	All (1)	Residents (2)	Non-Residents (3)	31: 1(%)
		1969		
Mexico	8,227	823	7,404	90
India	5,446	1,231	4,215	76
Argentina	7,330	1,832	5,498	75
Colombia	1,269	152	1,117	88
Other selected Developing countries	5,992	1,438	4,554	76
		1979		
Mexico	4,485	692	3,793	85
India	2,932	1,114	1,818	62
Argentina	4,440	1,598	2,842	64
Colombia	420	37	383	89
Other selected Developing countries	9,527	1,427	8,098	85
		Increase or Decrease 1969-1979(%)		
Mexico	- 45	- 16	- 49	
India	- 46	- 10	- 57	
Argentina	- 39	- 13	- 48	
Colombia	- 67	- 76	- 66	
Other Selected Developing countries	+59	+ 0.6	+ 78	

SOURCE : UNCTAD Document TD/B/C.6/AC 5/3.

Table 13. Ownership of patents by foreigners.

Country	Total No. patents granted.	No.of patents granted to Foreigners	% of total patents granted to Foreigners.
USA	57,859	23,105	42.4
Japan	50,904	8,824	17.3
UK	29,590	24,804	84.1
France	23,944	16,100	67.6
Canada	22,447	21,061	93.0
Switzerland	8,627	6,921	80.1
Australia	5,731	5,242	91.5
Korea	2,609	2,235	89.5
India	1,269	856	67.4
Phillippines	560	525	93.7
Bangaladesh	118	105	88.7

SOURCE : N.N. Mehrotra - (1982 data).

Table 12 showing patent applications field in Mexico, India, Argentina and Colombia as compared with other selected developing countries, 1969 & 1972.

Table 12 compared patent applications filed in India, Mexico, Argentina and Colombia with other selected developing countries between 1969 and 1979. A notable common characteristic is the high percentage of the applications filed by foreigners in all these LDCs. While in 12969, it was 76%, 90%, 75% and 88% for India, Mexico, Argentina and Colombia respectively as compared to 76% for other LDCs, it experienced only a slight decline over the decade. In 1979, it was 62%, 85%, 64% and 89% respectively for these LDCs and 85% for other LDCs. This shows that though the strangle hold of the DCs in these four countries was delining in relative terms, their control on the markets of selected LDC, was further increasing. A closer look at trends in patent application particularly in the foreign share of patent applications in India, Argentina and Colombia shows that while in 1970 in India and Argentina the share of the foreigners in patent application was 75% and 72% respectively, in Colombia it was as high as 87% and following year (1971), it increased to the maximum possible

of 100% or a complete takeover by foreigners. In 1975 while the share of foreign patents holding was relatively falling and running neck to neck in India and Argentina (India 66%, Argentina 65%), it continued to be a phenomenal 89% in Colombia.

The stranglehold of the DCs over the LDCs would be exposed more clearly, if a comparison is made with both Developed as well as Developing countries. The following diagram does that job:

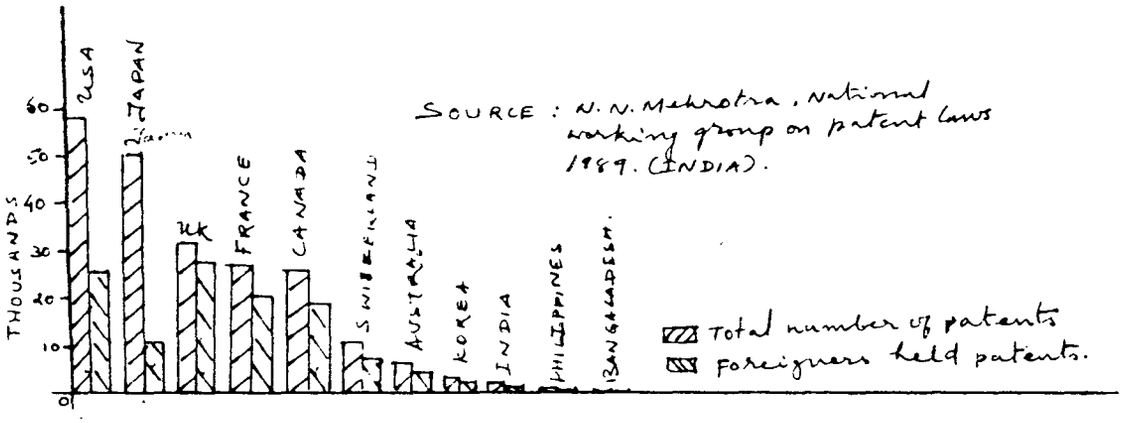

Diagram : Showing the no. and % of patents held by foreigners in some DCs & LDCs - A comparison.

Clearly the ownership of patents by foreigners is by no mean unusual. Although, the diagram & Table-13 represent the figures that belongs to 1982 and are therefore little outdated, but it shows a pattern. There are a lesser proportion of foreign patentees in Japan and America even

though America owns a large number of patents throughout the world. Japanese citizens are increasingly taking out a greater number of patents in LDCs. The large number of foreign patents in Phillipines and Korea tell their own story of nations which are actual and potential zones of industry and manufacture as part of the elliptical development of the world economy in the hands of JNCs. This applies with some force to Canada, Australia and Switzerland whose economies are subject to a considerable measure of foreign domination. The UK depends greatly on foreign envestment.

Third World Perspective :

The differences in the perspectives of the DCs and LDCs in the area of intellectual property protection arise chiefly from the differences in the stage of their economic and technological development. Although the DCs now dispute the proposition, the evolution of the patent systems in the world clearly points to the fact that there is a close correlation between the level of economic, industrial and technological development of a country on the one hand and the nature and extent of the protection of IPRs granted by

it on the other. Till a couple of decades ago, the standards of patent protection in several DCs, particularly in the food, pharmaceutical and chemical sectors were similar to those that are now obtaining in LDCs, and that are being questioned as inadequate. The patent system is an important instrument in a country's macro economic policy, for its technological and industrial development.[5] For LDCs it is of fundamental importance that the patent system does not inhibit or hinder the building up of their own technological capabilities. The LDCs have also to cope with the fact that the extensive and exclusive rights conferred by the patent system can and does lead to artificial prices, particularly in the crucial sectors of the economy as well as to the imposition of unjstifiable restrictions in the transfer and use of technology.

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From the perspective of the Third world countries therefore, the IP protection system must strike a reasonable balance between adequate and effective protection of the rights of the patents on the one hand and the developmental, technological and public needs of the country on the other. The law must not only focus on the right and privileges of the patentee but also on his duties and obligations. It is very crucial that the patent system which has assumed

incomparable significance in the realm of IPRs must address the following factors in the Third world context. First, the commercial working of the patent, whenever it is techno-economically feasible to do so, must be made a fundamental obligation. This is particularly feasible in the Third World countries because they have a fairly sizeable domestic market. The feasibility is further assured considering the vast reservoir of technological and sklled manpower in the LDCs like India. Without the Commercial working there can hardly be any transfer of technology to the country nor will there be any contribution to investment, production and employment within the country. The experience of LDCs would show that a patent can seldom be worked unless the associated know-how is also transferred. Without commercial working on an adequate scale the patent protectiom system would be converted into a mere monopoly for the importation of the patented products and the reservation of the lost country market for the patentee.

Second, in critical sectors of the economy the patent system should be attuned to meet the developmental, technological and public interest needs of the economy. For

this to be realised a flexible approach may be necessary; either a particular sector or sub-sector may be excluded from patentability, such as for example, biotechnology or process patents only may be permitted in crucial sectors such as the food, pharmaceutical and chemical sectors. It would be difficult to follow the proposition that there should be uniform standards of protection in all sectors regardless of their critical nature or regardless of the state of the domestic technological development in those sectors, in the circumstances of the LDCs.

Third, the patent protection system should also discipline the restrictive and anti-competitive business practices in patent and know how licensing arrangements. It is a matter of reality that because of the unequal bargaining power between the LDCs and the foreign suppliers of technology a whole range of such practices are accepted in technology transfer agreements. The intervention of Govt. is necessary to redress this situation. In fact without the commitment of the home country Govt. it is difficult to envisage this problems being tackled in an effective manner.

There are quite a lot of other aspects, like the

duration of the patents, access to the latest technology, trade liberalization, different forms of licensing in place of the patents etc which are crucial to the considerations of the LDCs as against the DCs' proposition of the uniform IP protection system.

IPRs and the Violation of Sovereign Rights of Nation - States.

The role of sovereign rights in the development of Nation States:

The introductory chapter very vividly expressed the value of sovereignty in the existence of nation-states. To recapitulate, the cardinal aspects of sovereignty is (i) to preserve the rights of a nation - State, irrespective of its size, status, wealth etc, to legislate or devise its own rules and regulations (ii), to enjoy the status of equality in the real of International relations, without the influence of independence of nation - states to progress as they wish and the calamity that a nation - states may incur because of a foreign power's unwanted influence, had made history to consolidate this ideal.

In the evolution and progress of nation- states

(both DCs and LDCs) we find their indigenous legislations have played very significant role in meeting their socio-economic motives. The micraculous development of the USSR, within seven decades as a super power from altogether a different socio-economic set up, Japan in two decades from a war turn economy, South Korea, Taiwan etc have been made possible, precisely because of their socio-economic laws which were not at all identical in meeting their targets of progress. Moreover they could come up undeniably because of the absence of intimidating, coercive, retrogressive foreign power influence.

This does not mean to say that the Soverign rights of nation - states have remained rigidly through the years. The recognition of the fact that the inter- dependent nature of the world is growing, by both developed as well as developing nations has resulted in the international dilimitation of absolute sovereignty. For example, obliging the verdicts of the international conventions like the GATT by the members (around 97), accepting the resolutions of the by the members, regional cooperations like EC, SARCC, NAM etc, have diluted the orthodox concept of sovereignty for progressive reasons. In other words, a nation state was

prepared to forego a bit of its orthodox sovereign rights, as a matter of give and take principle, for the benefit to it would accrue in return from the other nation - states or International convention or body. However, it is of crucial importance to understand that the dilution has been done, not by compromising on the developmental values which the sovereign rights assumed for a nation-state, i.e., by the coercions or pressures of a foreign power.

The growing interdependent nature of the world has not come to a level wherein the values of soverign rights of nation-states have been made irrelavant either. Despite the dilution by the inter-dependence of nation-states, the sovereign rights which form the foundation of National laws have become the sine qua non in the progress of the nation - state, especially the LDCs in this inequitable world.

IPRs through National Laws in the Progress of the DCs.

The national laws which personalised the sovereign rights of the DCs enabled them to reach where they are today now. More so with their National IPRs Laws which made them the leaders of technology through the years. The fact that all the DCs are the pioneers in S&T today, has not come

about with their uniform national laws on IPR. A careful study of their progress would let us know that the kind of national laws that they had were directly related to their stage of development. That is, the IPRs laws were enacted with a great consideration for progressive aspects. It is very crucial to mention here that the national laws on IPRs adopted by every DC was not conditioned by any international conventions and obligations as against their economic goals. Any objective analysis would justify the fact that each and every DC today owe its development singularly to the independent progressive national IPR laws, that they had adopted.

The value of national laws on IPRs could be understood from the controversy regarding the public and private interests for IP protection. The results of achieving a balance between private and public interests have varied over time and from country to country. The commitment for public interests through national laws (IP) was directly proportional to the developmental necessities. The very adoption of patent law in different periods, itself is more than a justification.

Further the historical evolution of the patent

system clearly demonstrated that there is a correlation between the relation between the level of economic, industrial and technological development of a country on the one hand, and the nature and extent of the patent production granted by it on the other. In the crucial phase of thier industrial development, many of the industrialised countries of today had 'no patent' or 'weak patent standards' in selected sectors in order to develop their own industrial and technological capabilities.[6] As they attained greater industrial and technological strength, they started tightenning the levels of the their patent protection. And their economy was equipped periodically, to withstand the repercusions of such stronger Intellectual Property Protection (IPP). Hence, it is vivid that framing the national patent system according to the indigenous compulsions, would serve as important instrument of national economic development.

Determining the patentability of different products in different periods also mark the sovereign rights of a nation - state. The supremacy of the DC s in the modern technology, endowing a distingushing uniqueness by every one of them has been made possible primarily because of their differing patnetability. IN an astonishing way,

the subjects of patentability determined by indigenous development enabled a non-patentable backward sector of the economy of a DCs to emerge as a patented world leader. For example, chemical products were not patentable in the FRG upto 1967, in the Nordic countries upto 1968, and in Switzerland until 1978. Spain is not expected to grant such protection before 1992[7]. Japan did not give such protection before 1976. Pharmaceutical substances were not patentable in the FRG and France upto 1967 and in Italy upto 1979. Canada does not grant patents to pharmaceutical products unless produced by processes or their equivalent for which patent is also claimed. The European patent convention has specifically provided for a possible reservation by a member country refraining for a time from granting patents for medical and food products - a reservation which was used by Austria and Greece on their accession to the convention. Regarding patenting the life forms. Very many DCs have different national laws. The statuatory convention of 1963 (Europe) claimed the unpatentability of plants or animals. European Patent Convention 1973 said the same. The Soviet Union has special provision for new varieties and hybrids of agricultural crops and other cultivated plants, which are not considered

as inventions but are entitiled to special protection. This is initially accepted patents only for asexually produced plants, but later it made sexually produced plants also patebtable. The US and EPC excluded biological processes for the production of animals, method for the treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body. Thus the DCs periodically expanded the scope of a their indigenous patentability as per the progress they made. When the adequate development of a particular sector of the economy, for example. pharmaceutical, has not been achieved to meet the public necessitities, most of the DCs did not confer the patent monopoly in that sector. But once the self-sufficiency and infrastructure facilities were made available, a non-patentable became a patentable. And the economy could withstand the repercussions of such monopoly because of its affluent R & D, which not only met the basic necessities but also made sure that special privileges were made available.

National IPR Laws and the Third World

The aforesaid discussion highlighted that the differing National Laws of IPRs enabled the DCs to meet

their socio-economic needs and emerge as the privileged few DCs in this world. And the Third world countries should not be exempted from doing the same. The Third world countries, considering the disparity in the world development, have the sovereign rights to restict patentability of essential things which may be of infrastructural value for their development. The uniform patentablility between the DCs and LDCs would strengthen the monopolies in the LDCs and nourish the inequitable international and intra-national existence further. Realising fully well the consequences of having uniform patentablity with the DCs or obliging to an international convention which aims at the same, the LDCs find their sovereign right to formulate their national laws on IPRs as a great rescue.

The LDCs like India could emerge successfully to the stature where it is today, in the relm of Intellectual property, precisely because of its independent National Law on patents of 1970. This Law was an assertion of sovereign rights of India to revamp the colonial and anti-national vestiges of IPRs of the British. Article 83 of the patent law of 1970, changed fundamentally the very objectives of the patent system. Instead of granting monopolies to the foreign patent holders, this article anchored Indian patent

system firmly on national interestss. The clear definition of International Conventions like the Paris Convention which is a leastious of inequitable development of nations. From the inception the Indian Patent Law was to serve the interest of the nation and never to be a servile instrument to the monopolistic privileges of foreign enterprises.

Moreover, regarding the patentability, Chapter II of the Indian Patent Law, clearly stated the non-patentable inventions. If excluded critical sectors of national significance from patentability like a) agriculture and horticulture b) Processes" fo the medicinal, surgical, curative, prophylactic or other treatment" of human beings, animals and plants. c) inventions relating to atomic energy d) prohibited grant of patents to substances used as food or medicine or drug, etc. The non-patentability of the above mentioned products is due to the developmental compulsions of National interest that India as a LDC should take as against the monopoly regimentation of the same. Likewise, LDCs like South Korea, Taiwan etc could not only take care of their basic necessities but also emerge in international trade - to a level that, an annual survey by the World Bank affiliated International Finance Corporation

(IFC) shows that stock markets in Developing countries generally out-performed those of the major industrial countries in 1984[8] and South Korea, Taiwan, Hongkong and Singapore are called the "four-tigers of Asia in International trade". Primarily because of their sovereign national laws which conceived their ladder of progress.

Infringement of Third World Countries Internal Sovereignty

Having understood the significance of sovereign national laws in meeting the national interests, whether it is a DC or LDC, any disturbance to such a national functioning of sovereign laws by outside process is an infriagement of such a right of the nation- state concerned. Therefore, the involvement of DCs in the LDCs, in revamping their own, sovereign IP Regime by the sheer politico-economic superiority, cannot be an exception to the aforesaid dictum. The DCs like the USA are pursuing their national interests of securing a favourable balance of trade to meet its trade deficit in the merchandise, as against the national interests of the Developing countries. The USA's loblying in various international fora alongwith EEC and Japan seem to coerce the LDCs to accept the dilution of their sovereign rights which would jeopardise their

natioinal interests but favour the DCs further. Undeniably any such attempt is a clear violation of the sovereign rights of the nation-states.

The controversy regarding the patentability of Products Verses Process open up another area where we find the dicrimination of the LDCs by the DCs, which could well prove the violation of their sovereignty. The patents for invention can be granted either as product patents or process patents. An invention that consists of a new substance is a product invention; and the patent granted to it is termed as product patent. On the other hand, an invention that consists of a new method or process of making a known substance is a process invention.

Regarding the question of product verses process patents, it is well know that the basic rationale for granting only process patents in certain sensitive is that the same product can be manufactured by new and different processes, (sensitive sectors i.e of developmental importance). The availablity of cost effective inventions through the discovery of newer and more efficient and economical processes is hamstrung by the operation of the product patent system. It is relevant to note that till the

mid - 1960's and '970's the patent law of a number of DCs allowed only process patents in food, chemical and pharmaceutical sectors. Apart from the already stated examples of DCs having differing patentability, it is worth noting some more. The most significant examples are West Germany and Japan, who had adopted process patents at a juncture when their chemical industries were in their infancies. The German patent law adopted in 1877, has largely beneficial for the chemical industries which in a period of three decades became the leaders in the World Industry. The Japanese act of 1921, adopting process patents, provided similar stimulus to chemical and pharmaceutical sectors to grow. Even now, Finland and Norway provide process patents only in pharmaceutical sector, although they might be thinking in terms of switching over to product patent in the 1990s.

In case of food and pharmaceutical sectors, there are additional reasons of public interest as well for the grant of only process patents. It is important that essential articles such as medicine or food is available at reasonable prices to the public. The monopoly rights granted through the patent system should not either lead to

artificial pricing or inhibit from competitive market. The impact of the patent protection system on the prices of essential drugs is by now a well-known phenomenon both in Industrialised and Developing Countries. The policy options available to LDCs to take care of the technological, developmental and in general public needs, in the critical sectors of their national economy, are to exclude these sectors from patentability or to provide for only process patents in these sectors. Depending on their own needs and conditions the LDCs have considered it necessary to follow one or the other of these two options.

There is also, a whole range of moral, ethical and environmental and other issues involved in the patentising of life forms and genetically enginered mirco organisms. The full dimensions of scientific and technological development in these areas are yet to be comprehended. Even in DCs the legal and other implications involved in the granting of patents of areas such as bio-technology and genetic engineering are in a flux and the wisdom of granting product patents in Biotechnology and for higher forms of life is being subject to serious scrutiny.[9] With such a scenario, the LDC, cannot, should not, at the cost of their indigenous development and needs, adopt a

product patent system. The demand of the DCs to introduce an absolute protection of IP through product patent system wwould result in for reaching consequences. It would mean that the LDCs are compelled to slide in retrogression by forgoing the path of development with which the DCs have come up. The LDCs like South Korea and Brazil have been prone to external pressure, to be precise by the USA, to compromise a lot or their patent principles. This incident certainly proved to be the tip of the Iceberg of the violation of the LDC's national sovereignty in general. Now, India is also in the throes of DCs coercion to change from the process to product patents.

Another area of the the IPRs where the LDCs have been prone to the DCs infringment is the "Duration of Patent Rights " granted. The logic behind the imports of foreign technological invention by the LDCs, granting patents to them, is to effect, through its working [10] ([patent's) a faster transfer of technology. The faster transfer of technology demands a shorter period of monopoly rights of the patent holder so that the idea or technology is made public. As a result the possibility of the technology being assimilated in the economy is more before it becomes

obsolete. The DCs in general, Japan to be precise could come up economically, incrediably because, shorter patent duration was one of the reasons. Today's DCs did not have a patent duration of 15 to 20 years right from the beginning as they became self-sufficient in the basic, infrastructural goods and things as a mark of affluence competition they increased the patent duration. And their economies are able to bear the costs of such a long duration. Moreover, the R and D facility is abundant in their TNCs which could come up with many products which could secure a long patent duration for the perfect appropriation of the profits.

But the situation in the LDCs is altogether a different one. Almost all the LDCs are yet to achieve self-sufficiency in food, drugs and medicines which are basic necessities to them. To meet their socio-economic needs they are to import a technology with the intentions of assimilating them, before they become obsolete. At the same time the LDCs have not neglected the incentive role that the patent duration plays for the innovator. A longer patent term will give the patentee a longer monopoly advantage and a very short term may not provide the needed incentive. So any term decided is a trade off between the provision of incentives and the social cause of monopoly.

Hence, the compulsions and the complexities involved in the patent term as such cannot be the same through-out the world, therefore Countries have to determine the patent term which is in their own interests.[11]

Most of the countries including the LDCs provide for a patent period (duration) oif 10 years or more. The country which gives a less than 4 years patent term is Yugolavia (7 years also). Iran and Tunisia - 5, 10, 15 or 20 years, Haiti - 5, 10 or 20 years, Argentina, Dominican Republic and Turkey - 5, 10 or 15 years, Venezuela 5 to 10 years and Colombia, Equdor and Peru - 5 years with extension 5 more years give patent terms. Hence, the National Patent Laws of the LDCs in general, do not provide for a differentiated patent term seem to take into account such factors as the importance of the technology, the incentives for the applicant, and working of the patent. This is certainly better and more important than a standard patent term for all fields of technology without considering the need and importance of the invention to the country concerned.

The accusal by the DCs that having a national patent law for a shorter duration is a trade distortion,

can be refuted in the context of the Indian Patent duration. In India the patent term is 14 years for general products (but 7 years for food, chemical and medicines). The US proposal suggests a term of 17 years from the date patent is granted. Comparing the Indian patern term of 14 years with the proposed 17 years, what is the amount of trade distortion that is likely to take place in the last three years of the patent system.[12] When the technology is changing very fast, it may not be very much off the mark to assume that there will not be much international trade in the patented product in the last years of its patent's term. hence the trade effects of a short patent duration on the DCs will be very small. Therefore it will be in the interests of the LDCs to give shorter patent term so that they can exploit the patent after its expiry without reference to the inventor. Moreover the DCs which export their technology to a particular LDC may not loose much of their profits, for the world market is at their disposal, the patentees will be able to recover their investment much faster.

Therefore it is very clear that the involvement of the DCs in the LDCs, seeking to effect a chnage in their

national patent laws, regarding the duration of the patent in questionable. It is, as it has been justified, the profit motives of the DCs have made them distort the sovereign patent laws of the LDCs as tools of trade distortion, thus can be accused for infringement of sovereign national law of the LDCs.

Hence, the sovereign rights, in the internal sense, of nation - states, especially the LDCs, have been jeopardised due to the impossition of IP protection by the DCs. The clear disposition above proved that the patentability of IP, whether it is a process of product, its coverage and duration are determined by the national interests of nation - state. According to the socio-economic needs of a nation - states (especially the LDCs) by virtue of the sovereign right it frames the IPR Laws which may not be in uniformity with the DCs. The DCs, on the other hand, having reached the self-sufficiency in their socio-economic motives of basic needs are driven by the profit - mongering attitude. This attitude off-set the acceptable, reciprocal dilution of sovereignty of nation - states in the international economic relations for mutual benefits. Instead the DCs, bilateral, worse further by unlateral, initiatives to squander a perfect appropriation

of profit from the LDCs, is a blantant infringement of their internal sovereign rights which is the sine qua non for their progress.

The infringement of the internal sovereignty of nation - state under the IPR - issues between the LDCs and DCs, could be very well understood the Latin America.

Brazil : The Informatic Law Controverysy.

The idea that the Brazilian nationals should control the Information Industry (computer industry), which was fast expanding to help Brazil technoligically and Economic development in general. This policy unlike the previous Law of Similars,[13] aimed at restricting both imports and TNC investements.

The US involvement

The Informatics Policy of Brazil, resulted in what Albert Hirchman called "import preemption" for restricting the US export of computers and related products and squeezing out some American companies operating there.

The President Mr. Reagan (of USA) reacted that the

Brazilian Law "restricted US exports of computers and related products". Infact, the US exports had not been eliminated and had not even declined. It had grown only less rapidly than the Brazilian market.

The six - year preceding the Informatics Case (1985), showed that the US exports to Brazil in general fell by only about 10%[14] Moreover, despite the restrictions imposed, the US computer related exports to Brazil had grown at essentially the same rapid rate as its computer exports worldwide.[15]

But the real reason for the US's reaction was that their TNCs were at stakes in Brazil. In fact had Brazil chosen to apply the Law of Similars to the computer industry instead of developing an informatics policy, it would have made little difference to the US exporters but substantial difference to the US TNCs. Since, the law of similars does not restrict local production by foreign subsidiaries, it would have given substantial oligopolistic rents to IBM, Burrounghs[16] and other TNCs who were willing to invest in Brazil. Since, the US TNCs of automobile industry etc. have flourished in Brazil, but the Informatics policy of the Brazil restricted the same

seems to have tiggered the administration's wrath.

The Section 301 of the 1974 Trade Act, that was imposed against Brazil, itself is evidence to prove that the US initiatives were to support its TNCs. Section 301 allows US firms to petition the US Govt. to seek redress for foreign commercial practices damaging to their interests. Such practices did not have to be necessarily illegal, they only had to be "unreasonable", which was defined as "any act, policy or practice which while not necessarily in violation of or inconsistant with the international legal rights of the US, is otherwise deemed to be unfair and inequitable"[17]. Therefore, the US' action was basically due to its TNCs' reaction against Brazil.

The informatics case was not the only one initiated in 1985. The US President, at the same time, announced a case against South Korea for restricting the entry of US insurance firms and one against Japan for impeding US tobacco and leather exports. The fact that the case against Brazil was an integral part of an overall strategy aimed at expanding compliance to liberal trade norms lends credence to the idea that the US's action could be interpreted as an attempt to protect the

collectve good of free trade.

But, in a number of aspects, the facts of the case jibe very poorly with the interpretation that the US was pursuing for the collective good of free trade. The fact that the US sdid not seek recourse from GATT, until over a year after the case initiated and then never followed through on its notification suggests that the US administration probably shared the Brazilian view that Brazil was likely to win if it came to a confrontation under GATT rules. For GATT allowed exemptions to Developing Countries under several different circumstances that obtained in the Informations case". In short, if the US aim had simply been defence of the collective good of the International trade regime, the informatics case was far from an obvious case.[18]

In the name of the defence of the International trade regime, the US' economic interest seem to have been paramount. The cases initiated or accelerated in 1985 were carefully chosen to pursue openness in precisely those sectors in which the US felt it had a strong comparative advantage; services (Korean Insurance), agricultural exports to advanced countries (Japanese - tobacco, European

Community - Canned fruits) and Hi-tech manufactured exports to industrialising countries (Brazilian Informatics). The aim was not openness in general so much as particular openings that would help the US diminish its embarrasing trade deficits.[19]

The attack on the Informations Law seem as "an attack on Brazil's aspirations to become a developed country". President Jose Sarney, said that it was "an attempt to freeze countries in their present state of scientific and technological development ..... which would ascribe to US the role within the world's productive system of providers of simple manufactured goods involving little technical expertise".[20] He also made reference to new " sophisticated form of colonialism - scientific cultural colonisation that threaten the national soveriengty"

Brazil was, initally, made it a point that any Software Bill, should not include software under copyright protection. The nationalists in the Brazilian Industry were in favour of protecting software but opposed to doing so by means of copyright. They considered this an issue of principle that was worth confronting the US over.

However, because of US's coercive measures - economic embargoes etc, in the end Sarney was bound to accept a software proposal which included copyright protection as well - a series of concessions were made. The Sarney administration passed a Software Bill, vested the parts of it that the US found most offensive and signed into a law. Therefore, it was a concession to the US's TNCs at the cost of Brazil's Sovereign rights to formulate its own domestic IPR laws. "The victorious has primarily worked to the advantage of .....TNC's interests"[21] which jeopardised the Internal sovereignty of a nation - state (Brazil) to determine its ciourse of development.

Likewise, the pharmaceutical industry of Brazil also has prone to the US's monoeuvres. Brazil's IPR regime was, initially, based on "buy National" campaign. A Govt. sponsered development plan for fine chemicals, many produced by pharmaceutical companies, gave priority to Brazilian Investors. Moreover Brazil, did not recognise patents on processes and products in general, and pharmaceuticals in particular (only country to do so in Latin America).

Since, these laws were to the dissatisfaction of the MNC of US, the US pharmaceuticals manufacturers' Association (PMA) filed a petition inthe Department of Commerce to take action against them. Christina Lund, Director for Brazil and Southern Cone Affairs at the US's trade representative office said that "If they (the Brazilians) do not commit themselves to patent protection, we may decide to retaliate". And added that "Should Brazil find it necessary to give in to the US, it will make it significantly more difficult for any other country to withstand the pressure", "Brazil will be hardest nut to crack".[22]

The US actions like booking Brazil under super 301 and special 301, trade embargo intimidation etc have, eventially cracked Brazil to give way to US interests once again.

Jon Rosenbaum, the US assistant secretary of trade for Latin America, accused Chilean pharmaceutical companies of "Intellectual Privacy" and "theft of property rights". This accusal was due to Chile's unrecognition of product patents. Chile's patent law protects processes but excludes product patents allowing Chilean

laboratoreis to copy products without having to pay for the right to do so. Chileans say the poor will suffer if the patent protection is extended to products - a Catholic University study estimated it would add another US $ 6 millions to Govt's US $ 33 million drug bill.[23]

Like the Brazilians the Chileans also believe that the US action was basically a retaliation against the 1974, Durg Restriction Reform by Chile, giving Chileans more influence in the domestic market.

Chile provides yet another example, that reforms even for domestic development attacked under IPRs by the DCs (the US). Therefore, it is an aggrandisement on Chile's internal sovereignty.

The general secrenario in Latin America reveals that the ECs (especially the US) in order to protect their Hi-tech interests (in Information, pharmaceuticals etc), Therein TNCs, seems to use the issue of IPRs as a leverage against the LDCs in general. This DC's viewing of IPRs as something atomistic from their domestic developmental compulsions, prove their imperialistic interests against the internal sovereignty of Nation - states.

IPRs and the External Sovereignty

The previous analysis of internal sovereignty of nation states in reference to the issue of IPRs, made it clear that the Third world countries' sovereign right to frame their national laws on IPRs has been threatened, precisely because of the DCs unilateral coercive actions. An examination of the external aspect of sovereignty of nation - states also seem to to experience the same. Before going in to the analysis of the corraborative instances, it would be helpful to recapitulate the external sovereignty values of nation - states. In a nutshell, the external sovereignty of nation - states talks about the equality of nations, in their international dealings irrespective of their wealth and size. It implies the state has the discretionary power to conduct relations as it likes without any interference from any outside power or authority. More important is that the nation - states can not be coerced to accept a treaty or a convention or a law, internationally, against its desire to do so. If the sovereignty of a nation - state is so important, then it would not be stretching the definition too far to say that the very conception to infringe the sovereign rights of

a section of its members, would contraverse the essence of sovereignty the equality of states.

While examining the infringement of external sovereignty by the DCs over the LDCs, in its very crucial to analyse the draft of International Law Commission (ILC) (1984), on the sovereign immunity of Nation- States regarding the Intellectual property rights. The ILC was established by the General assembly of UN on November 21, 1947, persuant to the Assembly's powers under the UN Charter to initiate studies and make recommendations for the progressive development of International Law and its classification. The commission has provisionally adopted an exception to state sovereign immunity for intangible property (ie., IP) in its draft in 1984. The doctrine in recognition of the sovereign dignity, equality and independence of states and in the interests of friendly relations.[24] The sovereign immunity enabled, so long, a nation-state especially the LDCs to pursue their domestic policies concerning industrial and socio-economic development even in their dealings with foreign nations. It is the recognition that any nation-state has the sovereign right to pursue its national interest, within the

acceptable limits of the international community, has resulted in the consolidation of "sovereign immunity of nation-states". The LDCs in particular, could use this norm as a great boon for their socio-economic development through international initiatives. The technology transfer, resource transfer etc could be made possible expeditiously because of the recognition of the national developmental necessities of a national state, especially the LDCs, when they deal with foreign states. But, the ILC's drafting of sovereign immunity exception to IPRs has infringed the hither to accepted soverein immunity of nation-states, without giving any considerartion for the inequitable polarisation of the world today (the DCs and LDCs).

The DCs have become the repositories of IP right from the early 80's, as it was mentioned earlier. Their commercial stakes in the superiority of IPRs as against the LDCs, have made their influence the ILCs draft. Their argument is that the exception to state immunity with respect to patents, trademarks and copyrights (the IPRs in general) is of particular interest, because of the increasing commercial activities of states. Moreover, they highlight the states that the IPRs have assumed in the industrial development of a nation-state, in an age of

sophisticated technology.[25] In 1984, the Commission provisional by adopted the Sovereign Immunity Exemption relating to IPRs. In addition, the commission included the IPRs as a catch-all phrase to cover rights which do not fit into any of the three IPRs (Patents, copy right and trademarks) to encompass the existing and future type of IP.[26] Their contention is also that the exemption from Sovereign Immunity have developed over the years as states have expanded their functions. In such cases the interest of a foreign state in avoiding local jurisdiction does not outweigh the interest of the forum state in the regulation of conduct within its territory of jurisdiction. While it is true to say that the functions of the states have expanded, it is fallacious to argue that the expansion has taken place only in the commecrcial aspects of the states. More so, when the DCs' and LDCs' functions are equated. Considering the the under development in which the LDCs are languishing, they have attained the status of pursuing IPRs for commercial interests in par with the DCs. Therefore such an exemption of sovereign Immunity would jeopardise the LDCs developmental activities abroad. And arriving at such a draft by considering the TNC activity of a DC and the developmental IP activity of a LDCs as the same, is more

than the confirmation of a bias against the LDCs' progress and a blatant favouritism for DCs'commercial hegemony.

The ILCs draft further highlights that the DCs have in a stronger protection of IP. The Commission pointed out, An infringement of a patent invention or industrial design or any copy right of literacy or artistic work may not always have been motivated by commercial or financial gains; but invariably impairs or entails adverse effects on the commercial interests of the manufacturers or procducers who are otherwise protected for the production and distribution of the goods involved. From such a statement, it is obvious the ILC have faltered from its status as a forum for the progressive development of International Law. Because, considering the fact that IPRs thrives in the DCs through the monopolisation of their INCs and the perpetual dependence of LDC on the IP, in the Commission's verdict the protection of the patentees (almost all of them represent DCs in the Commission in particular) . The Commission had failed to notice that the sufferers of such a sovereign immunity exemption would be the LDCs. For their, Sovereign Governmental initiatives abroad for developmental purposes will be accused as commercial or the actions that violate

the stronger protection of the IPRs.

The Developing Countries have raised two principle objections to the draft of ILC which provides an exception to sovereign immunity. The first objection concerns the detrimental effect which the intangible or intellectual property exexmtion may have on the ability of a state to pursue its domestic policies concerning industrial or economic development. For example, a state may find it in the interest to refrain from enacting legislation to protect IP so that goods and services, including any technological advancement, may be reproduced in the country for the benefit of the society as a whole. In addition, a state may decide that its developmental goals and economic policies require the exapropriation of certain businesses or industries which may involve intellectual property. Thus in majority of the LDCs, the state plays a very purvasive role in the national economy. The Commission, after the LDCs' objective focussed on one of the major challenges of the LDCs, the rapid transfer of knowledge especially regarding scientific, technological and educational materials. Limited access to translations and reprints of materials published abroad and protected there by copyrights which require costly royalty payments for reproductions were also

discussed.[27] However, they could not find an alternative to the exception of sovereign immunity.

But, what is clear from the ILC's draft in that it advocates the DCs tirrade against the LDCs, for an effective protection of IPRs at the international level. Nontheless the uncertain future of the draft is reflected in the strong continuity reservations expressed by several members of the commission. 'They expressed the hope that the provision of the ILC draft, could be improved so as to take more fully into account the needs of LDCs for transfer of technology[28] essential to their economic and social development.

The Threat to External Sovereignty through International Conventions of IPR

The International conventions on IPR extend the membership for both the DCs and LDCs assuring equal treatment of both and for mutual benefits. But conventions like the Paris convention[29] or patents secure not only to favour the DCs but also increases the costs in the LDCs. From the perspective of protecting the external sovereignty rights of a nation state, apart from an accepted dilution of an obsolute sovereignty on the basis of reciprocity, the Paris convention seems to endanger the LDCs more. The

compulsive socio-economic necessities are such for the LDCs that they accept the membership knowing the fact that a perpetual subservience will be perpetrated by the DCs, than continuing a tirade with their (DCs) for a more equitable world.

The analysis of the standards set by the Paris convention for all the members (around 97 now) both DCs and LDCs (who dominate atleast in numbers) seems to prove the threat for the LDCs' sovereign rights. A disposition is done below regarding the imminent threats to sovereign rights of a nation embedded in the standards set by the Paris convention.

The memebers of the Paris Union have undertaken to adopt certain minimum standards of protection applicable to patents generally, but particularly to foreign patenties. According to the Paris Covention, a country is to give effect through its national laws to certain standards which includes the following :

a) National treatment (or) equality of treatment; the national of any member country of the Union enjoy in all the other countries of the Union the adavntages and the same protection granted to the nationals.

b) Right of Priority : Any person who has duly filed an application for a patent in one of the countries of the Union enjoys a right of priority of 12 months for claiming similar rghts in the other countries.

c) Independence of Patents : Patents applied in the various countries of the Union shall be independant of patent obtained for the same invention in other countries, whether member of union or not, as regards the ground for nullity and forfeiture and as regards their normal duration.

d) Importation of aticles : Importatio by the patents of goods produced in any of these countries of the union or not, entails forfeiture of the patent protection for these goods.

e) Compulsary licensing and revocation : i) Each country may take legislatiom measurres providing for the grant of compulsary licenses to prevent the abuses that might result from the exercise of the exclusive rights conferred by the patents, for example failure to work.

ii) Revocation of the pattern shall not be provided for except in cases where the grant of compulsory licenses would

not have been sufficient to prevent the said abuses.

iii) No proceeding for the revocation of a patent may be instituted before the expiration of two years from the grant of first compulsory license.

iv) A compulsory license may not be applied on the ground of failure to work or insufficient working before the expiration of the period of four years from the date of the application or three years from the date of the grant of the patent, whichever period expirses last.

v) The request for a compulsary license shall be refused if the patent justifies his inaction by legitimate reasons.

vi) Such compulsary license shall be non-exclusive and shall not be tranferable, even in the form of a grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.

Although the paris convention sets these general standards it is supposed to fully recognise basic freedom of member states to legitimate according to their national interest. G.H.C.Bodenhausen, Director General of BIRPI (Later WIPO) from 1963 - 1943 emphasised,

"In the field of patent for example the convention leaves the member states entirely free to establish the criteria to patentability to decide whether patent application should or should not be examined, in order to determine, before a patent is determined, whether these criteria have been met, whether the patent should be granted to the first inventor or to the first applicant for the patent or whether the patent should be granted for products, for processes only, or for both and in which fields of industry and for what term".

But, despite all these universal standards the Paris convention has remained for long a "rich man club". It was revised six times in 1900, 1911, 1925, 1934, 1958 and 1967. But each revision only further strengthened the monopolistic right of the foreign patent holders. The basic asymmetry or conflict between the interests of the foreign patent holders of the technologically advanced countries and the public interests of the LDCs runs all the way through the entire structure of the convention.

Moreover, the discussion regarding the sovereign of nation-states under the Paris convention must proceed with the clear idea of distribution of patent grants around

the world which has been mentioned earlier. It is apparent that the LDCs possess only 6% of the world patent stocks of which 84% have been rendered to foreigners, of whom the most represents the TNCs of the DCs, and the nationals of the LDCs hold only one 1% in the world total. Given the scenario, in the light of what Bodenhansen said regarding the flexibility of patentability and other standards set by the Paris convention one would be able to find the factors which cater the infringement of sovereinty of a nation-state, especially to LDCs.

Though it is interpreted that the Paris convention hails the national law to adopt whatever criteria according to its public interest under patentability, the leverages against such independence are hidden. The LDCs if they want to join the Paris convention, they are expected to rearrange their patentability principles to accommodate the other members interests. In such a circumstance, there is every likelyhood of a LDC with the hope of seeking a latest technology from the DCs are bound to sacrifice their socio-economic policies which would suit them best. They are cornered to change their public policies to the whims and fancies of the DC - members, just because they (LDCs) are depndent of DCs technology. It is precisely to meet the

interests of the foreign patents, most of them are profit mongering TNCs), the LDCs sacrifice their progressive policies. And joining the Paris Union would assure a retrogression. Secondly, the flexibility of product, or processes patent seems to camouflage the reality. It is very clear that most of the DCs are demanding a product rather than a process patent for their sheer monopolistic interests. Therefore, joining the convention would mean the compromise on the process patent policies of the Third World, which assures them of speedier technological development. The sheer technological superiority of the DCs, in the name of uniformity, would sideline the LDCs' cry for the flexible patentability. India serves as a relevant instance. In the recent past, India has come under tremendous pressure to sign the Paris convention. "If India decides to join the Paris convention, the exclusions of patentability provided in the patent Act of 1970, will have to be remodelled so as to comply with the mandate of the article 25th of the Paris convention which calls for the measures necessary to ensure the application of the Paris convention".[33]

The analysis regarding the standards of the Paris

union further exposes the preservation of what may be called from the DCs perspective "sovereign disparity" between the LDCs and the DCs.

National Treatment.

Article 2 of the Paris Union establishes the principle of national treatment which prohibits member states from discriminating between foreign and national patentees. Thus each member state must grant the same protection to nationals of other member states as it grants to its own nationals. Article 3 further provides that the non-member states are also entitled to protection if they are domiciled or have commercial or industrial establishments in any member states.

It is important to note the desperate impact of such formal equality on countries at vastly different stages of development. For producer nations this provision means, the ability to obtain patent protection abroad, but for the non-producer nations this provision wil largely mean granting a discriminatory protection favourable to foreigners, but in their own territory as against their progress.[34] Considering the negligible number of non-producer countries seeking a negligible number of patents

abroad, the picture depicts an one way imposition, in the name of uniform national treatment. The LDCs will have to compromise for both the member as well as non-member DCs as against its sovereign indigenous policies and live with a sub-servience.

Independence of patents :

It promotes the security of the patentee as against the different national laws. It says that even if a patent has been invalidated in a particular country due to some shortcomings it should be indpependent to aspire in other countries. Such a provision was made in recognition of different national patent laws between countries. However, the othetr side of the coin also should be made clear. This provision helps the patentee to get away with malpractices and remain immune between countries. In other words, a patent may be terminated for reasons like nom-working, foregoing compulsory licences etc., which are counter productive to non-producer country. But the same patentee cannot be prevented by other countries pre-emptorily, because of his dubious history.

Therefore, even if some patents are counter

productive by their previous records, a country could not invalidate a patent from functioning. So it is very clear that a non-producer less developed member country is not able to prevent the abuses of patents. More so at the cost of its sovereign rights to control the foreign IPR-holders' activities.

Importation of goods A patentee could prevent the transfer of technology and secure his monopoly in a non-producer country by not working his patents, according to the Paris convention. The Patentee is immunised not only from working the patent but also from the forfeiture for his importation of the patented products from other member countries. Contrary to the idea of giving patents, for speedier technology transfer through its working, the patentee is protected for his exploitation of profits in a LDC which relies on that patented technology to meet its public interests (national). Despite the fact that the host country is able to see the counter-productive aspects of the patent , but it helpless. For, the national interests of a non-producer member is looked down upon than the profits of the patentees of the DCs. This is a very blatant discrimination and underestimation of the sovereignty of the LDCs as against the TNCs of the DCs.

Compulsory license of the Paris convention is another aspect where the patentees are so overtly protected and given an inducement for their exploitative nature. The compulsaory licenses meant for, as per the Parsi conevention, to remedy the abuses perpetrated by the petentees like, failure of working of the patentees, over pricing etc. Evidence avilable from India shows that the patent holders have granted very few compulsory licenses over the years. Between 1950 and 1957, three compulsory licenses were issued to enable production of patented products and again between 1974-80, only two licences were granted. Eventhough India is not a member of the Paris covention, the foreign patentees are so reluctant and do not stop their exploitation as against a more stringent sovereign laws than Paris convention. Then one owuld be able to understand how much a compulsaory license would work under a convention which nourishes such a reluctance and exploitation. The administrative procedures of the convention have been framed in such a tricky manner that the abusive patentess could not be prevented at once from their malpractices. For example, the compulsory license may not be applied before the expiration of the period of four years

from the date of the application or three years from the date of the grant of the patent, which ever expires last. There is a clear indication that the patentee's exploitation is valued more than the detrimental effect of the same to the patent granting country, mostly the LDCs. Moreover, apart from the delaying tactics, the patentees could refuse to grant the compulsory license if they justify their inaction by what the Paris convention calls, legitimate reasons. The destracting jargons like legitimate reasons etc of the exploitative patentees serve as a shield against the sovereign rights of the LDCs. They cannot but remain as a silent spectator for the DCs' neo-colonial nature.

The provision of revocation of the patent exists in the Paris convention to be applied when the compulsory licenses failed to prevent the said abuses of the patentee. But, it is ludicrous for such a principle to exist, for, when a petentee could get away without succumbing to the compulsory license, how could he suffer the next step of revocation. More connivance in favour of the patentee could further be discovered when the Paris convention says that no proceeding for the revocation should be undertaken before the expiration of two years from the grant of first compulsory license. there is no necessity of anything more

authentic to prove the exploitative nature of the patent system prescribed by the Paris convention. More than anything else, the exploitation is done vis-a-vis the LDCs in a legitimate way, as against their sovereign right to progress. Such a spurious uniformity or equality which the Paris convention prescribes between the very strong and the very week, the developed and underdeveloped, has in reality perpetuates preferences for the powerful enterprises of the DCs in the markets of the weaker ones. It would not be too strongly worded to say joining the Paris convention is in other words inviting the economic and political imperialism of the DCs by the LDCs.

The Uruguay Round of GATT and IPRs and the sovereinity of nation-states

IPR have been brought in the ambit of GATT negotiations for the first time in Uruguay Round of trade negotiations that began in 1986 September. The DCs took the intitiative of including the issue of IPRs in the Uruguay round and despite the position of the LDCs that the IPRs should not be brought under the jurisdiction of GATT, the issue was eventually brought to the negotiating table. The ministerial declaration adapted a Puta del Este included

TRIPs - trade related intellectual property rights (trade relatedness implies having an impact on the international trade flows) - for consideration by the Group of Negotiation for goods (GNG) with the following mandate;

- to promote effective and adequate protection of IPRs
- new rules and disciplines on IPRs
- a multilateral framework of principles, rules and disciplining dealing with international trade in counterfeit goods
- no prejudice to other complimentary initiatives of WIPO.

The mandate on TRIPs linked the issue of IPRs to trade in counterfiet goods and this link was used by the DCs to justify the inclusion of IPRs in the GATT negotiations. The DCs have argued that the protection of IP was ineffective in LDCs as a result of which production and trade in counterfiet trade have increased. It's been further argued that counterfieting has led to the erosion of their global matket shares.

It is in seeking protection for their domestic industries by the DCs that the genesis of including the

TRIPs in Uruguay Round of negotiations lies.[35] This negotiation is supposed to result in the formulation of ground rules for IPRs in the member countries (97). By arriving at a common code on IPRs all over the world the DCs are looking for a way to prevent the LDCs from challenging their hegemony over world production of technology. The norms and standards for protection as suggested by the DCs have two very crucial aspects viz.

a) a higher level and wider scope of protection for IPRs than that offered by the existing international covention.

b) to adopt new laws and amend the existing ones in order to bring their national systems of IP protection in confirmity with the agreed set of norms and standards.

This implies that what would emerge from the GATT, would be a set of guidelines much stronger than the Paris Covention for the protection of patents. This point is worth mentioning here, for the Paris convention which has been found to be unacceptable to the LDCs including India for the sole reason...that the covention restricts the process of quicker innovation in their countries.

TRIPs, as is being evolved in the Uruguay round

could have atleat four elements pertaining to patent protection which when compared to the Paris covention, appear to be far more detrimental to the interests of the LDCs. The four elements are discussed in detail down below :

Coverage The Paris convention allowed for the application of patent protection by the member countries in sectors they considered appropriate. The member countries could, depending on the national priorities, exclude sectors from the ambit of the patent laws. This provision under the Paris convention was used by several developed countries in the course of their economic development. For instance, Japan, Switzerland and Italy did not apply patent laws to para-medical sector and had in an indirect manner given infant industry protection. Several other countries excluded food products and other chemicals from being covered by the patent laws.

This provision of exclusion is non-existent in the GATT framework, where all gooods are covered by prescribed rules. The universality of applicability under GATT has been used by the DCs, particularly by the USA, to bring under patent protection two areas where the considerable disagreement exists regarding the applicability of patent

laws.[36] Bio-technology and computer software, the two areas in question are also the areas where the LDCs have the maximum potential to develop their own technology. In both these areas R&D is less capital intensive and more skill-intensive conditions which ideally suits the LDCs. Additionally, in the case of bio-technology, the abundance of genetic resources, the key inputs in LDCs make them potentially stronger than the DCs.

The fear that the superiority and affluence be may lost by the LDCs progress prompted the DCs like USA to seek cover under patent ptrotection. A step in this direction was taken by the US interests in the initial years of the last decade. Then bio-technology was brought under US patent laws. Traditionally all living organisms were excluded first from patent protection and the USA became the first country to allow patenting of living organisms. This element of the US patent laws is now sought to be extended globally through the GATT framework. The victims would predictably be the LDCs. The indigeneous free R & D and inventions of bio-technology will be curbed in the LDCs. The DCs on the other hand, in order to maintain their national interests of being the leaders in such technologies, make them jeopardise the sovereign national interests of the LDCS. Therein LDCs)

national policies of using such advanced technologies, to compensate their other deficiencies will be curbed, by the DCs infringement of their sovereign initiative of progression.

The GATT negotiation have seen the DCs seeking two changes in the clause relating to the making of the patents from that which exists under Paris Convention. There are

a) the removal of the mechanism of compulsory licensing
b) treating importation of a product as working of the product patent.

Removal of compulsory licensing would foreclose all possibilities of technology discrimination and would grant absolute monopoly rights on the patentee. Eventhough, the mechanism of compulsary licensing has not been very effective in ensuring technology discrimination, as experiences in several LDCs including India have shown, it was nonetheless the only means by which the patentee could be forced to share the benefits of the invention with the society at large. In a situation wherein the TNCs have a domination over patenting, the world over, it was important from the point of view of the LDCs that a more effective

fucntion of compulsory licensing was introduced.

The DCs have generally opposed the mechanism of compulsory licensing arguing that by allowing the commercial exploitation of an invention by the license, it does not give adequate incentives to the patentee as a result of which invention and innovations would be affected.

Thus, it is very clear from the stance of the DCs that even in the International conventions on IPRs in general, patents in particular, which is supposed to aim at the progress of both DCs and LDCs, the sovereign rights of the LDCs development are threatened. The patentees of the DCs are almost given an assurance that the developing countries are their new colonial markets, where they (DCs) will have the privilege of securing exhorbitant profits by deceiving them of technology transfer.

Duration of Patents : The Paris convention does not stipulate the period for whcih the member countries were expected to provde patent protection. The member countries were thus free to set their own periods for which patents were valid. In the submission made to GNG (GATT) the DCs have asked for a 20 years patent protection. A number of LDCs grant patents for considerably short period. India, for

instance, grants only 7 years for food, drugs and medicine. The logic behind short patents period is to ensure quicker availability of inventions in the public domain. So that the very purpose of importing an invention, the technology transfer is affected. Moreover it strikes a balance between the recovery of incentives of the patentee and recovery of public interest from such monopoly. But, the DCs provision of 20 years, is aimed to provide not only a recovery of the incentive but also of the soverein indigenous infrastructure that the LDCs having in their economics. Moreoevr, making it a mockery of technology transfer to LDCs to confer them the status as depndents of perpetual obsolescence.

The negotiation on TRIPs have included certain elements of the Paris Convention and at last one element among these violates the fundamental GATT principle of granting preferential treatment to the LDCs. Part IV of GATT codes stipulates that non-reciprocity should be adopted in the case of LDCs and the same sentiment has been expressed in quite unambiguous terms in the Ministerial Declaration on the Uruguay Round adopted in September 1986. Paris Covention on the other hand, threats persons from all member countries as equal, in other words, reciprocal treatment for

individuals in member nations lies behind the convention.

Therefore, the GATT negotiations are tending to a direction which would impose a more restrictive regime governing IPRs. Recognising the inequality between the DCs and the LDCs, regarding the revision of the convention the UNCTAD committee found it "indispensable to establish a system of non-reciprocal preferential treatment in favour of LDCs involving special flexibility". However, in an unjust way the DCs have gone for a stricter equal terms of TRIPs in GATT. The consequences of restrictive regime of IP protection would not only make irrepairable damages to the development of S & T (of the LDCs) but also proves the legitimisation of the DCs' infringement of the Devoloping countries sovereign industrialisation.

As refered before, the international convention on IPRs sponsored by the DCs are the initiatives to secure international sanction for their aggrandisement on the sovereignity of the LDCs. The DCs are ushering in a new era of trade imperialism which apart from threatening the very sovereign political identity of the LDCs reduce them as DCs' non-soverein satellites. When the world opinion moves for a NIEO (New International Economic Order), these International

Coventions on IPRs, initiated by the DCs, sponsor the consolidation of international disorders further which unlike ever before usurps the very sovereign existence of the LDCs from this earth.

Beyond GATT : the international bodies like the GATT are manipulated in such a manner that they cater more for the DCs trade interests at the cost of LDCs progress, more so with the inclusion of IPRs in its Uruguay Round Multilateral Negotiations. However, dissatisfied with its support the US wants a new and more powerful trade organisation to replace the GATT, after the Uruguay round is completed in 1990[37] The US has repeatedly expresseed its dissatisfaction with GATT, when it finds itself in a minority and is unable to have its way for the inclusion of the services, agricultural and TRIPs which are of special interest to it now.

MS. Carla Hills, the United States trade representative in a speech to a Dallas audience empahatically said that a new global trade agency was necessary to administer the free flow of trade among nations. She openly claimed that it would be a "positive vehicle for cooperation among the US, Europe and Japan by keeping the trade channels open".

This proposition of M.S.Carla Hills is yet another initiative, again by the US to form a new configuration of DCs. Such a configuration would reduce all the LDCs as the DCs' satellites. The LDCs cry for a sympahathetic, non-reciprocal and preferential treatment by the DCs regarding the issues like IPRs etc would be considered as far fetched.

If at all, this idea could materialise it would be the last nail in the coffin of the Third World countries science and technology development through a better system of ITRs. More so, on the sovereinity of the developing countries.

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CHAPTER - 4

THE ISSUE OF IPRs AND INDIA

The previous chapters enabled a better understanding of the global scenario about IPRs and related issues. The inquiry will not be complete, if the position and perspective of India do not become a part. As India articulates the Third World issues including the issue of IPRs in international fora, it becomes all the more important to study its stand particularly.

NAM countries behaviour vis-a-vis the DCs has taken two interconnected forms - multilateral form and bilateral relations[1]. NAM has relied on the moral force of public opinion against the DCs to articulate their collective opinions on military doctrines , economic world order, security and developmental strategies vis-a-vis the Third World and the role of the UN. On the bilateral level their behaviour has been governed by structural constraints, political orientations and social pressures at home. All these and the last two are variables, have provided a certain degree of flexibility in their bilateral relations. NAM countries have generally articulated the values of sovereignty, self-reliance, disarmament and development through consensus.

It is also at the bilateral level that the ideals articulated at the international fora and political orientations of the ruling political elites get translated into policy which informs both diplomacy and laws. Ranging from the issues of cultural penetration to security arrangements questions of sovereignty have come into play. The process of policy, diplomacy and law has the underpining of consensus. Tt would therefore be interesting to note how India has responded to the issue of IPRs.

To understand the perspective of India regarding the IPRs, it is necessary to apply a broad framework of analysis encompassing the Indian Patents Act of 1970 and its applicability to pharmaceutical, agro-chemicals and bio-technology industries; the Copyright Act and the Trademarks Act. Moreover, India's stance would be more vivid, only the analyhsis includes the USA's criticism of the Indian IPR regime and its sanctions Super-301 and Special-301. The fact that India is one of the potential few markets of 800 million, for the DCs and she emerges as a trend-setter in the science and technological development and manpower, the inquiry assures more significance.

INDIAN PATENTS ACT OF 1970

"India would also like to emphasise, as mandated by para 5 of the Trade Negotiating Committee decision, the discussion on this agenda items should be governed by the concerns and public policy objectives underlying the national systems for the protection of Intellectual property, including developmental and technological objectives. This is particularly important for developing countries bcause the Intellectual Property system has wide ranging implications for their economic and social development. Any principle or standard relating to the IPRs should be carefully tested against the touchstone of the socio-economic, developmental, technological and public interest needs of developing countries"[1]. This Indian view expressed at the Uruguay Round (GATT) IPR Negotiating Committee is a reflection of the objectives of the Intellectual Property Regime in India, embodied by its Patents Act, Copyright Act and Trademarks Act.

India has a fairly long experience in the area of IPRs. The first Patent Act was introduced in India in 1956. Over the years, the Act underwent many changes and subsequently "the Indian Patents and Designs Act, 1911" came into force which remained in existence for considerable time. However, as these laws/Acts were colonial inception,

they were primarily to safeguard and protect the monopoly interests of the colonial patent owners. Therefore, it was a "reservation of the Indian Market for the metropolitan powers"[T2]. The dawn of Independence gave the impetus to revise the colonial patent laws in particular, the IPR regime in general to meet the developmental and technological needs of the country. In 1948, a Committee was appointed under the Chairmanship of Justice Dr. Bakshi Tek Chand to review the Patents Act of 1911, with a view to ensure that the patent system was more conducive to national interest. Subsequently, in 1957 Government of India appointed Justice N. Rajagopala Ayyangar to advise the Government on the revamping of the Patent Laws. Based on the recommendations of these Committees, a comprehensive Patents Bill was introduced in the Parliament in 1965. In 1970, the Patents Act was adopted. Eventually, the Act came into force on 20th April, 1972.

The objectives behind the Indian Patent Act, 1970, is set out under Section 83 of the Act, viz.,

(a) "patents granted are to encourage invention and to ensure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay"; and

(b) patents are not granted not merely to enable

patentees to enjoy a monopoly for the importation of the patented article into the country".[3]

The crux of the philosophy of the Indian Patents Act is to strike a balance between the Individual Interests of the patentees on the one hand and the sovereign nation interests on the other. The Act seeks to ensure that while offering protection to the inventive activity, the technological progress of the National Economy is not affected perilously.

THE SALIENT FEATURES OF THE INDIAN PATENTS ACT, 1970 ^B

Under the Indian Law,"invention" means any 'new' and 'useful' product or process of manufacture and includes and 'useful' improvement thereof. This definition line with the conventional one. The Indian Law stipulates both product and process patents. However, in the case of "food", "medicine or drug" and 'chemical' sectors, only process patents are available under the Act. The definition of "medicine or drug" under the law includes agro-chemicals such as insecticides, germicides, fungicides, weedicides and the like, while the chemical sector includes, apart from chemical substances normally understood, items such as "alloys, optical glass, semi-conductors and inter-metallic compounds". The Act clearly states that no patent shall be granted for the inventions relating to atomic energy.

All living things, though it is not explicitly stated in the law, are not considered to be patentable under the law. Therefore, plant or animal varieties or essentially biological process for the production of plants or animals will not be considered patentable under the Indian Law [4]. So also, micro-organisms and substances obtained by micro-biological processes (for example, natural microbes or genetically engineered microbes) are not eligible for patents in India.

Regarding the duration of the patents, India has a provision in its own way to meet the individual and societal interests. The normal duration of a patent under the Indian Patents Act is 14 years from the date of filing of the complete specification. However, in case of the 'food' and 'medicine or drug' sectors, the duration is limited to seven years from the date of filing of the complete specification or five years from the date of scaling of the patent, whichever period is shorter.

One of the imperatives on the part of the patentee, under the Indian Patent Act, is the "working of the patent on a commercial scale and to the fullest extent that is reasonably practicable without undue delay" [5]. To fulfil this objective the patent law therefore provides both

for 'compulsory licensing' and 'licence of right'. A compulsory licence may be granted by the Controller General of Patents on application made by any person interested in the working of the patent. It can be granted only under the pretext that "the reasonable requirements of the public with respect to the patented invention have not less satisfied or that the patented invention is not available to the public at a reasonable price". "The grounds for grant of compulsory licence in the Indian Law are very similar to those existing in the Patents Act, 1977 of the U.K".[6]

Despite its stringent nature against the patentee, his interests is still served by the provision that only after the expiry of three years from the date of sealing of the patent that the application for the compulsory licence can be made.

There is also the "licence of right". The sectors under its purviews are food, medicines or drug and chemicals. The patents that are granted in these sectors, shall be deemed to be endorsed with the words 'licence of right' after the expiry of three years from the date of selling of the patent. This provision enables or entitles any person interested in working a patent in these sectors free to do so without the permission of the patent owner or without the intervention of the Controller of Patents, but

after the expiry of the stipulated period. The licencee has only to pay a royalty to the patent owner for the use of the patent. In case any dispute arises between the partners in regard to the royalty that the Controller General of Patents would need to intervene and decide upon the royalty.

The fact that the public interest is placed higher than the interests of the patentee could be gauged from the Patents Act's provision of "Revocation of Patent". This means that the patent may be revoked by Central Government through official gazette if its application is found mischievous to the state or generally prejudical to the public. Patents can be revoked for other reasons also as specified in the Act"[7].

COPYRIGHT

"The Indian Copyright Act (1957) provides for strong protection of copyrights which is on par with the best available in the world". The protection under the Indian Law goes well beyond the requirements of the Berne Convention of which India is a member"[8]. The term of protection prescribed by the law is 'creator's life plus 50 years". Offences under the copyright law have been made "cognizable offences" and stringent penalties have been prescribed against infringement, including imprisonment. As

a measure of its comprehensiveness, an amendment of the law introduced in 1984, incorporated computer software programs for protection under the copyright law.

TRADEMARKS

The protections for trademarks is mainly provided by the Trade and Merchandise Marks Act of 1158. The Act does not discriminate between a national and foreing trademark. "In other words, the principle of national and non-discriminatory treatment as between trademarks owned by Indians and trademarks owned by foreigners embedded in the Indian Law"[9].

Due to the socio-economic reasons, the use of foreign trade marks in the domestic market is regulated. This can be felt more especially in the realms of consumer goods[10]. A stipulation that the foreign trademarks shall not ordinarily be used on domestic sales, is applied in all foreign collaborations. However, it is permitted on export sales.

However, this does not mean that foreign trade marks are not used in India or that the owners of foreign trademarks do not receive remuneration for the use of their trademarks in the domestic market. On the contrary, many of the well-known trademarks are being used on consumer and

non-consumer goods in India by subsidiaries and affiliates of International corporations or their licensees. Moreover, the judicial and administrative system also ensures that adequate remedies are available against the infringement of foreign owned trademarks, regardless of whether they have actually been used in India on a commercial scale by the owners or their licensees.

Thus, the bird's eye view of the intellectual property protection system of India proves that a balance has been struck to take care of both the inventor's interests as well as public interests. The development prospects of India depend heavily on their technological transformation. This invariably means that unless its infrastructural technological capacities are developed, neither there will be economic development indigenously nor the foreign investment and technological flows will benefit her. Therefore, India's speedy technological development is as important as the protection of IPRs. Thus the Intellectual property regime in India, apart from encouraging inventiveness by the statutory rewards, makes sure that such protection is appropriately balanced by the economic, technological and public interest needs of its economy.

The joining of those countries which do not have a strict IPR laws, especially the Third World in particular, in the Paris Convention (as already discussed in the Second Chapter), is advocated as "panacea for the IPR problems, by the DCs. But, as already discussed above, the Indian IPR regime's concern for the national or public interest would not be secured if India joins the Paris Convention which favours the patentees more. Therefore, there are incompatibilities between the Paris convention and the Indian Patents Act of 1970. A small comparative analysis reveal the following incompatibilities:

(a) **Differences in Approach:** The Paris Convention (P.C) aims at maximising the individual rights to create import monopolies (Article-5), whereas the Indian Patents Act's (IPA) objective is to ensure commercial working for technological disseminations, hence to meet public interest. Moreover, PC's approach involves a limited concept of abuse in relation to the non-working of patents but the I.P.A's advocates a wider concept of public interest.

(b) **On Patentability:** The P.C gives a widest possible definition given with no rights to refuse grant. But in the I.P.A., many substances not patentable on grounds of law, morality, health and in the areas of agricultural, horticulture and curing or enhancing human, animal or plant

life and atomic energy. The process patents can be granted for food, medicine, drugs and chemicals only with restriction. Moreover, the P.C endeavours to build product patents out of process patent, (as already discussed in the second chapter), whereas the I.P.A advocates the process patents more in crucial

(c) On Global Controls: In the P.C, the only government controls on the patent right itself is about procedure and compulsory licensing and revocation and to protect forms of industrial property. But the I.P.A provides substantive government controls whereby pre-conditions of grant that patent can be put to government research and educational use, Government's right to maintain conditions of secrecy in defence matters, Governments' power to use and acquire inventions and to revoke patents in the public or state's interest.

(d) On Compulsory Licensing, Licences of Rights and Revocation: The P.C's only reason for compulsory licences is the abuse by patentee, such as failure to work (already discussed in the Second Chapter) the patents, whereas the I.P.A reasons for compulsory licensing, licences of right and revocations are, to meet the requirements of public and to maintain reasonable pricing. The P.C does not mention about the Licences of Right. But the I.P.A makes the

Licences of Right as a crucial aspect for the patents on food, drugs, medicine and chemicals and other substances. Regarding the revocation of patents the P.C provides only when the abuse could not be corrected (in a limited sense of non-working), whereas the I.P.A strictly advocates the provision of revocation if the requirements of public or reasonable pricing could not be achieved in the interest of public.

(e) On treatment: The P.C advocates a princple of equal treatment. That is, both the LDCs and DCs are treated alike without any consideration for their differential economic status and development etc. But, the IPA endorses differential treatment. That is, provisions like FERA (Foreing Exchange Regulation Act) etc., seem to exert a differential treatment on foreign agents for the sake of national interest[11]

Hence, the IPR regime in India orients more towards the public interest, on the contrary, the Paris Convention advocated by DCs aims at the protection of individual interests (patentees) at the cost of the public interests.

Indian IPR Regime and the National Interests

The analysis of the overall scenario of the IPR

regime in India, very vividly reflects its socio-economic public interests. A comparison between pre and post era of Independent IPR regime would prove that the economic and technological development of India would not have been what it is today but for its own independent IPR rules and regulations. The Indian IPR regime aimed at ensuring a remedy to the higher priceds of the monopolised goods of the DCs, lack of technology transfer, hurdles of self-reliant economy etc. Going by the dictum that there should not be any international IPR regime ignoring the inequitable nature of the World, India asserted that the IPR regime of a country should reflect its own developmental exigencies. Industrial development in countries at diffrerent level of technological capabilities, therefore, requires different levels of support from the nation-state. This is corroborated by the fact that all countries have historically followed different regulatory regimes to protect technological innovations and technology transfer.

In case of India, its IPR regime encompassing the Patents Act, Copyright Act, and the Trademark Act, has revolutionised the overall development of the economy. The much needed health measures were made possible primarily because of the influence of the Patents Act in the pharmaceutical industry. Secondly, the agro-chemicals and

pesticides could help reaching self-sufficiency in food-grains because of the Patent Act's constructive provisions. Thirdly, Indian Patent Act has enabled the use of Bio-technology without jeopardising its indispensable aspects that should be preserved for the human heritage. Fourthly, in the field of micro-electronics, the Patent Act and the Copyright Act have enabled India to emerge as an exporter to reckon with. Finally, the IPR regime of India has laid the indispensable foundation for the R&D to function independently and efficiently to meet the needs of the nation-state. It is to avoid the glib generalisations about the success of the Indian IPR regime, the aforeswaid aspects should be discriptively studies in the following manner:

SPECIFIC ADVANTAGES OF THE INDIAN PATENTS ACT OF 1970

The Indian Patent Act encompasses three major advantages in general. The first, apply to Indian entrepreneurs, manufacturers and the government to ensure commercial ,production of a patented product (or through a patented process) in India where a TNC or any other person may have filed a 'blocking patent'[12] The second advantage is that the Indian scientists and technologists can obtain patents on products and processes after modification on existing patents. This was not possible earlier, because of the all encompassing nature of the patents. The third

advantage is concerned with the consumer since a) even a patented product can be imported from manufacturers in the countries where such patent protection may not be available and b) competition in production because of process patents and short patent duration leads to decline in the local prices (especially for food and drug products)[13].

The positive aspects (of the Patent Act) could further be revealed by such principles like 'Revocation of Patents'licences of right and compulsory licence in the public interest. Moreover the Government has the power to use the patented inventions, or import the patented products and processed for the national interests. These aspects of the Indian Patent Act have not only enabled the Indian consumers to make their living cost effective but also provided the infrastructural foundation for a self-reliant economy.

Pharmaceutical Industry

Since the enactment of the Indian Patents Act of 1970, the Indian pharmaceutical industry has achieved diversified growth which has placed it solidly on the world map. Technologically, the Indian pharmaceutical industry had been classified by UNIDO as one of the most advanced amongst developing countries[14]. UNIDO has classified the

Indian pharmaceutical Industry as having acquired the charteristics of -

a. self-sufficiency in raw materials for the production of drugs from basic stages;

b. wide ranging therapeutic groups of drugs produced

c. possessing an efficient distribution system

d. International standards in production, technology and quality of products [15] ;

This progress was primarily due to the Patent Laws of 1970, which opened many avenues for the pharmaceuticalIndustry to diversify.

A Committee on the U.S Senate in 1952 - Kefauer Committee - had commented in the early sixties that "prices Committee - had commented in the early sixties that "prices of drugs in India were amongst the highest in the world" (1952). But with the enactment of Patents Act, 1970, the scenario changed completely. If the Indian public has had access to the drugs earlier than it would have otherwise the Indian Patent Act had a lot to do with it. The patent period of 16 years was reduced to 5 years for drugs. The patenting instead of being for 'product' was restricted to patenting of 'process' and that too for one specific process that the patent holder wanted. These provisions provided the impetus for the national labs and research centres to

evolve different process for production of the drugs. Hence, the prices of drugs in India are now amongst the lowest in the world . Internationally, comparative data about prices at which pharmaceutical products are avoidable to the Indian people can be judged from the following table:-

Sl. No.	Products	Year of patent expiry	India Pack	India Price	U.K Pack	U.K Price	Price diff.
1.	All OPURINOL TAB 100mg.	1986	10's	5.84	100's	303.81	+420*
2.	LOPERAMIDE CPAS 2 mg	1970	10's	5.00	30's	81.14	+441*
3.	MEBENDAZOLE Tab 100mg	1989	6's	4.88	6's	37.92	+677*
4.	PIROXICAM CAPs, 20mg	1986	6's	7.20	30's	184.75	+413*
5.	GHBENCLAMIDE 5 mg	N.A+	100's	8.88	100's	234.35	+2539

* Differences are worked out in proportionate basis
\+ Not available

Source| Parvinder Singh, Ranbaxy Laboratories Ltd., 1989

Apart from the fact that the Indian Pharmaceutical industry has progressed to atleast near self-sufficiency level, it is doing well in the Export Sector also. In fact, the export performance of the industry during the recent past has been excellent. During the last three years, the exports have risen from Rs.194 crores in 1985-86 to Rs.290

crores in 1987-88. Well before the turn of the century, it is estimated that the performance could exceed Rs.1000 crores per annum. It is an achievement on the part of the pharmaceutical industry to make its presence felt in the developed countries. The buyers of the Indian drugs percentage-wise (%) of total export (1987) are as follows:

Exports to DCs

USSR	33%
USA	14%
FRG	6%
France	4%
UK	4%
Japan	4%

Source: Parvinder Singh, 1989

Technologically, Indian companies were free to develop technology for a large number of drugs for which international patents were to expire much later and they actually produced and marketed these drugs. Obviously, these developments would not have been possible but for the Indian Patents Act. While technology for only nine bulk drugs was developed by TNC between 1965 and 1982, the four public sector companies introduced technology for 51 bulk drugs and the 10 private sector companies for 36 bulk drugs[16]. The scientific achievements in introducing new drugs (discovered abroad) in the country has been appreciable. The period of introduction of the new bulk drugs discovered abroad has already been reduced to 4/5

years than a much longer period in the past ais evident from the following data:

Introduction of New Drugs	Introduced in World	Introduced in India	Gap years
1. Salbutamol (anti-asthmatic)	1973	1977	4
2. Mebendazole (anthelmintic)	1974	1978	4
3. Rifampicin (Anti-T.B)	1974	1980	6
4. Naproxen (Anti-Rheumatic)	1976	1982	6
5. Ranitidine (Anti-ulcer)	1981	1985	4
6. Norfloxacin (Anti-Bacterial)	1984	1988	4

Source: Parvinder Singh, 1988

There is yet another aspect of technological development, namely, of "historical transfer of technology" which has helped a large number of small scale companies to develop technology for bulk drug production. Moreover, the internal competition has been encouraged among the small-scale bulk drug manufacturers in India. This is another positive aspect of the Indian Patents Act.[17]

Looking at yet another role of the patents, viz., to encourage technology transfer, it is clear that the Patents Act of India has in no way adversely affected the same[18]. This has been proved by the fact that the number of collaboration agreements by Indian companies has increased from 183 in 1970 to 1041 in 1985. A large number of small and medium size firms have also been transferring their drug

technologies to India, thus encouraging an atmosphere of competition in technology transfer. The small firms from abroad have been patenting in India in considerably strength. These companies transfer their technologies with less restrictive terms and conditions than larger TNCs and in a manner as to allow "far greater participation and barring by doing by local firms of the host country[19]. On the contrary the TNCs did not give any impetus to the pharmaceutical Industry in India for technology transfer, in the early seventies, as they did not support indigenous technological activity, as it was revealed by a study then[20]

Thus, the Indian Patents Act, 1970 has served the pharmaceutical Industry in a multifaceted way. "It has enabled the national (pharmaceutical) sector to make an increasingly significant contribution towards self-reliance and self-sufficiency, utilising innovative and appropriate technology, based essentially on indigenous raw materials and resources[21]".

AGRO-CHEMICALS INDUSTRY

It was primarily due to enactment of the patent laws in 1970, the pesticides and agro-chemicals production in India could develop to meet the needs. Before the enactment of the 1970, patent laws, the previous IPR laws strengthened

monopolies. And the indigenous self-reliant development of the agro-chemical sector was thwarted. The prevalence of product patents and longer duration for the patents enabled the MNCs to have a stranglehold. The public infrastructural necessities, especially for agriculture, were, for their development, dependent upon the whims and fancies of the patent holders. In fact, most of the pesticides and drugs were made by the subsidiaries at their own convenience and at a price which the country could ill afford. Moreover, such dependence led to unfavourable financial terms and hence a drain in the foreign exchange.

However, the Patents Law of 1970 gave a new life to the agro-chemical industry in India. "The national laboratories and many private sector companies started R&D efforts earnestly to develop indigenous capability which is now paying off handsomely [22]". The advanced pesticides like endosulphan, glyphosphate, isoproturon and synthetics pyrethroids like feuvalerate and cypersucthrin are being produced in India indigeneously. Such indigeneous production would not have been possible but for the patent laws of 1970, which advocated a process patent and not a product patent. Thereby, the vested interests of the MNCs could be curbed considerably.

Thus "Pesticides Industry is a very pertinent case to show how, by taking advantage of the 1970 Act, the indigenous effort both at the national laboratories and at the in-house R&D Units of industry have contributed to the self-reliant industrial base. The concerted effort initiated in early seventies has resulted in capability building for technology absorption at various level. In the wide spectrum of technological capability building, this is a very crucial step especially for developing countries to have a strong self-reliant technological base. But for the 1970 Patents Act, this would not have been feasible. In India, now most of the pesticides are produced based on the technologies developed by CSIR labs or by the in-house R&D units of the firms" [23] ".

BIO-TECHNOLOGY

Despite the fact that Bio-technology has been known to mankind for centuries, discoveries in the last decade have revolutionised the entire field. It has assumed such a significance that it is considered by some that the recent phase of industrial revolution to be based largely on Bio-technology (BT). Therefore, it is considered as a "New" or "Frontier Technology".

There are some special features of BT which give impetus for adopting them in the road to industrial development. Bio-technology is (i) highly energy efficient (ii) enables introduction of desire characters in the living beings in a very short span, (iii) precision and specificity of introduction of these desired characters, (iv) highly research intensive (v) leads to reduction in the sizes of operation at the level of agricultural or animal farm as well as industry, [24] etc. These features have, apart from their positive aspects, embody negative aspects as well. For example, the BT influences both the social as well as

industrial relations, influencing academic industrial relations, urge to monopolise, threatening environmental safety etc.

Realising the adverse effects of the BT, the Indian Patents Act of 1970 did not allow patenting of (i) A method of Agriculture or Horticulture (ii) Any process for medicinal, surgical etc. Treatment of human beings or any process for a similar treatment of animals or plants to free them of disease or increase their economic values.

It is the realisation that Bio-technology involves ethical socio-philosophical questions, resulted in Indian Patent Act's prescription that the lifeform as universal property and the course of evolution should not be allowed to be disturbed or directed. Moreover, India was awake to the fact that the gene banks, which are mostly in the DCs, which preserve the germo-plasm (genetic materials) are mostly controlled by the MNCs. Therefore, the MNCs' monopolised manipulation has also made India to be extremely cautious regarding its IPR policies on Bio-technology.

Between 1982-1989, in the areas of Bio-technology, Fermentation, Enzyme Engineering and Bio-molecules no patent entry was reported in the area, with key words as Bio-

technology or enzyme engineering under the Indian Patents Act. However, 24 entries were reported in the area of fermentation and bio-molecules. A closer look at the distribution of these Indian patents reveals that the largest number of patents were in the names of MNCs.[25] This revelation, has made the Indian Patents Act to be a safeguard against the unruly exploitation of the Indian germ plasm by the MNCs. Moreover, the fact that Government resources play a crucial role in the premier research institutions in India, also make them immune from private profit motives at the cost of public interest.

Thus, the IPR regime of India embodies significant progressive aspects, which have been hailed by many countries, including UN agencies like UNCTAD, UNIDO etc. It is precisely the basic approach to strike a balance between the interests of an inventor and those of a consumer or common man and to ensure that the benefits of new technological developments reach common man and may not be exploited by the inventor alone for monopoly control, has made the Indian IPR regime a commandable one. It has thwarted the "dependencia syndrome" and made the Indian R and D helping in technology absorption, upgradation and

self-reliance. In a nutshell, the Indian IPR regime reflects in general what P.J. Michel said regarding the patent system, "patent systems are not created in the interest of the inventor but in the interest of national economy. The rules and regulations of the patent system are not governed by civil or common law but by political economy."[26]

US's Criticism on the Indian IPR Regime:

The developed countries have become highly critical of the Indian IPR rules and regulations, especially from the seocnd half of the 80's. Having attained the technological advantages, they seek an international IPR regime which would convert their advantage into a perpetual superiority as agianst the Third World countries. As it has been clearly dealt in the Second Chatper, the desire for complete appropriation of profits has made them criticise the LDCs ' National IPR regime which tries to strike a balance between its socio-economic compulsions and the profit motives of the inventor.

The USA has, right from the beginning been the vociferous spokesman from the DCs (self proclaimed) in the

tirade against the LDCs' IPR regime (for its own ulterior motives which were discussed earlier - Chapter II) It has adopted a multi-pronged approach[27] to influence the Third World especially to concede to its demand of an uniform International IPR Regime. But all along its motive has been that, "before the US supports the codification of rules on an international basis, it should be sure it knows what it wants in its own national interest"[28].

India has an IPR regime, basically to realise its own socio-economic needs which are altogether different from the DCs'. And, its (India's) IPR rules and regulations, as has been seen earlier, has helped the economy to progress by leaps and bounds. But, the fact that the DCs' access in general, USA in particular, to the Indian Economy has been restricted because of its IPR regime, has sparked the USA's criticism on the same. To understand India's stance as against the foreign pressure, to realise its national interests, the study of the criticisms of the DCs in general and the USA in particular, on the Indian IPR regime is indispensable.

The main areas of criticism against the Indian IPR rules and regulations, mainly from the USA are the

following:

i) Broadly, the USA accuses LDCs in general, and India in particular for not providing inventors "perfect approriability" (monopoly) for the use of their innovative output.[29] In the USA's view the advocacy of socio-economic national interests at a higher level as against the individual (inventor's) interest is counter- productive to development.

ii) Product Versus Process Patents : The Indian IPR laws provide only for process patents in food, pharmaceuticals and chemical sector. In the USA's view, the process patents lead to unfair trade practices as against the original invention . In fact, the USA seeks adaptation of product patents only in the multinational pharmaceutical and chemical (especially the agrochemicals) indutries as well.

iii)Duration of the Patents : The Indian IPR laws provide for a patent term of 7 years in the food and pharmaceutical sectors and for 14 years in all other sectors including the chemical sector. The USA demands that for the full recovery of the investments in the R and D of a product, long term patents are necessary (as it is 20 years in the USA).[30]

iv) Compulsory Licensing: Regarding the compulsory licensing, the USA accuses it as an infringement in the rights of the inventor and distort trade. It has been proposed that it "should not generally grant compulsory licences to patents ..... no compulsory licence should be exclusive."[31]

v) Licence of right: The US has suggested that the provision for grant of automatic "licence of right" in food, pharmaceutical and chemical sectors should be eliminated.

vi) Patent Coverage: The Coverage of patents to certian fields of technology is regarded by the DCs in general and the USA in particular as trade distorting. The distortion is explained that if certin technology fields are not patentable in a country, a patent owner cannot take a patent in that country. He cannot import in that country on a monopoly basis either. Using that technology, goods may be produced without the licence from the patentee. Hence, the USA proposed to the negotiating group on patents under the GATT that, "patents should be available for inventions in any technological field"[32]

vii) Compelling India to join the Paris convention: The USA's contention, from the beginning of the IPRs issue with India, is that India joining the Paris convention would neutralise many IPR issues with it. It means, in other words, the Indian Patents Law of 1970 (and other IPR rules and regulations) should be amended to the satisfaction of the US and other DCs,[33] so that the protection afforded to the intellectual property in India, is as strong as it is in the DCs.

The USA's insistence on India joining the Paris convention is to strengthen the monopoly of patentees and to extend the IPR regime in India to cover all the new technologies that are coming up, like pharmaceutical, bio-technology, computer software etc.

viii) The USA's another demand for the inclusion in the Indian IPR system is that, "where, for justified legal, technical or commercial reasons the patent is not worked but importation is authorised, the requirements of the working of the patents should be treated as satisfied".[34]

ix) The USA has also demanded that the burden of proof

on the patent holder, stipulated by the Indian IPR rules should be reversed and made applicable to infringers to prove that they are not guilty.

x) Finally, in general the USA accuses India of possessing an IPR regime which is inadequate and also ineffective against infringements; especially in new technology areas.

US's Super 301 and Special 301

The USA, with its consideration of the Indian IPR system as unfair trade principles, has resorted to sort it out with India by its unilateral trade measures. The outcome was that the Super 301 and Special 301 provisions of the Omnibus Trade and Competitiveness Act of 1988 of the US, were imposed on India.

Under the Super 301* provision of the Act, the USTR (United States Trade Representative) would be required to identify countries that maintain a consistent pattern of unfair trade barriers and identify those practices, the elimination of which would present the best expansion of export opportunites.[35] Once a country is identified, the

* Though Super 301 is not directly related with the IPR issue between India and the USA,but a brief study about the same would make explicit the US motives behind the IPR issue against India especially through the provision of Special 301.

USTR's investigation and negotiations will begin. This process will go on for a maximum 18 months. If by that time the issues have not been solved, the USTR, within 30 days, would resort to retaliatory action against the concerned country.[36]

In addition, the Special 301 provision relates to patents, copyrights and trademarks as far as India is concerned. It requires the USTR to identify the countries that do not adequately protect American Inventions and to initiate investigations against such cases. The investigations are required to be completed within six months, after which the USTR would propose retaliatory actions.[37]

Under the Super 301, in regard to India, the US would like to see changes to two trade fields, which it considers trade distorting. They are,

i) Trade Related Investment Measures (TRIMS)

ii) Insurance Market Practices

Regarding TRIMS, they accuse the Indian Government trade policy of making the foreign collaborators (a) use locally produced goods or raw materials (b) meeting the

export targets. They say such "performance requirements" burden foreign investors and result in trade distortions.

Under the Special 301, the US expects India to make the following changes in its IPR regime:

i) Improved and adequate patent protection for all classes of inventions,
ii) Elimination of discrimination against use of foreign trademarks,
iii) Registration of Service marks,
iv) Effective protection of well-known marks,
v) Improved access and distribution for US motion pictures,
vi) Improved enforcement against piracy,
vii) Conclusion of an intellectual property annexe to the bilateral science and technology agreement,
viii) Constructive participation in multilateral IPR negotiations[38].

The US President George Bush defensively claimed that the Super 301 and Special 301 provisions were meant to be a tool to open markets (foreign). And hence, he handed over a crowbar, to Ms. Carla Hills, the USTR, to pry open them.[39] He (Bush) explained that it was the lack of

multilateral rules and enforcement which had forced the US to act unilaterally.

On May 25, 1989 the USTR announced the Super 301 hit list of "priority countries" engaging, as she called "unfair trade practices". They were Japan, Brazil and India.

The USTR however, declined to identify any priority country under the Special 301 provision of safeguarding IPRs. Instead eight priority watch list countries were named. Along with India and Brazil, six others were also identified. They were China, Mexico, South Korea, Saudi Arabia, Taiwan and Thailand.[40]

India's Stand:

As a contributor to the National Working Group on Patent laws, V.R. Krishna Iyer (former Judge, Supreme Court), said ".... it admits of no argument in our country that, so far as equal treatment of the DCs and the LDCS are concerned, the constitutional mandate is a clear "no". There is express and explicit provision in the equality mandate that unequals shall be classified as unequals and you shall not have a kind of uniformity, what they call

procrastian uniformity, imposed upon a system, consisting of two components which are grossly dissimilar".

Very rightly so, any international economic policy should not ignore the disparity among nations of the world. Considering the developmental fetters of the Third World, it is all the more important for them not to ignore in their National Economic Developmental policy, the inequality perpetrated by the developed few. The IPR system is an important national economic developmental policy for India, as it is for any other developing country. The IPR system is considered as an indispensable vehicle to build up India's technological capabilities. Considering the monumental develomental objectives, it is not appropriate for India to provide an exclusive protection for the IPR holders by sidelining its destabilising implication for the national economy as a whole.

To understand India's stand on IPRs as against the USA's criticism, its developmental concerns as a point of reference, is therefore, sine qua non.

Product Versus Process

The basic rationale behind providing process patents as against product patents in certain crucial sectors, is to manufacture the same product by a different process which would make it qualitatively significant and cost effective. By providing a prouct patent, the patentee by his monopolised term, hinders the economising of the scarce resources by different processes and hence the prevention of meeting the basic needs of India, (LDCs in general) by viable means.

Moreover, the Indigenous Research and Development activities are curbed.[41]

As one third of India's population is below the poverty line, the compulsion to meet the basic necessities through food, pharmaceuticals, chemicals etc, the process patents enables the availability of food and medicine at a reasonable price through an efficient R and D. But the strengthening of the patentees would lead to artificial prices hamstrung R and D, inhibition of competition etc.

The DCs in general and USA in particular, have all gone through the phase from process to product patents, in

their earlier stages of development . Some examples are given:

The German patent Law of 1877 enacted with only process patents for chemical products to encourage development of inovative and cost effective processes for the same product.

UK had process patents between 1918 and 1949.

Switzerland: Unexpired process patents for medicines and chemical substances are still valid. Only in 1978, the process patent was changed by product.

Spain: Only process patents for drugs and chemicals have existed so far.

Italy: The Royal decree of 1940, abolished all patents for chemicals and pharmaceutical products and processes.

Several countries still have only process patents for Chemical substances, viz.

Argentina, Czechoslovakia, Egypt, GDR, Holland, Hungary, Norway, Pakistan, Poland, Thailand, USSR etc.

The above instances show that most of the DCs have been through the same phases in their earlier stages of development. Very rightly Keayla asks, "if it was OK for

USA and other DCs why is not ok for Developing countries now?"[42] Thus, the policy options available to India to take care of the developmental, technological and public interest needs in critical sectors are to exclude these sectors from patentability or to provide for only process patents in these sectors.[43]

Duration of the Patents As Sherer said that is essential to "tailor the life of each patent to the economic characteristics of its underlying invention,"[44] India accords differntial patent duration. Since, food and pharmaceutical sectors are crucial sectors to meet its economic compulsions, they have been given ony 7 years, others 14 years. India supports a shorter patent term, primarily to induce exploitation of the patent after its expiry without providing any leverages to the patentee. It's stance reflects the opinions that; (i) a longer patent term to the patentee leads to unproductive monopoly and (ii) the speedy technological dissimination through the working of the patent is delayed (as the patent is worked as per the patentee's whims and fancies).

Apart from India many other countries provide differentiated patent term. Like India, they also seem to

take into account such factors as the importance of the technology, the applicant's wishes and working of the patent.[45]

Compulsory Licence: India's IPR system provides compulsory Licence, basically to act as a deterrent against the possible abuse of the monopoly rihgt of the IPR holder. Indian IPR regime provides a compulsory licence on the following grounds;

i to meet the public interests,

ii patented invention not being commercially worked,

iii against importation of patented products instead of working the patents,

iv refusal by the patentees to grant licences,

v if the functioning of the patentee is prejudiced to the host country (India).

India's argument is that taking into account its own needs and conditions, each country must be free to specify the grounds on which compulsory licences can be granted under its law.[46] The USA's accusal of compulsory licence as trade distortion is unfounded as it ignores the importance of working of the patents, in particular, the abuses of the patentees, in general, as against India.

Licences of Right:

Despite the provision for Compulsory Licence in the Indian IPR regime, the IPR-holder could escape by protracted litigation as against the demand for the same. Therefore, the remedial effect as against the abuses of the patentees, especially in critical sectors like Food and Medicine is thwarted. Hence, to counter the escape from the compulsory licence, the Indian IPR regime, has instituted licence of Right, which is non-voluntary in nature, in the Food, Pharmaceutical and Chemical Sectors. However, there is a provision for compensation also, for the patentee in the Indian IPR laws.(47)

Revocation of Patents: The US's criticism that Compulsory Licence, licence of right and revocation of patents, as provisions against the right of the inventor ignores the national public interests completely. When the patentees could not be controlled by the compulsory licence and licence of Right, it is necessary to have a mechanism which would protect the national interests. It is beyond doubt that the patentees could save themselves from the commercial working of the patent (to maintain their monopoly) or work inadequately or work in a manner prejudicial to the

nation's interest. In such circumstances, India, could not but prevent the retrogressive aspects of IPRs by revocation, which alone could mitigate, as a final resort, such abuses by IPR holders.

Commercial working as against Importation of the patented products:

In case of India, despite its growing technological capabilities, nearly three-fourths of the patents granted numbering about 3000 per year belong to nationals or firms of DCs. In such a situation, if the patents are granted merely to enable the patentees to monopolise or to adopt restrictive and anti-competitive practices in the use and licensing of the patents, the technological diffusion and dissemination will come to a standstill. Therefore, it is inevitable for any Third World Country, especially to India, to make commercial working of the patents an imperative integral aspect of the IPR system.

The insistence on the commercial working of the patents assumes more importance when one takes a closer look at the functioning of the IPR holders in the Third World countries in general and India in particular. Firstly, the

commercial working of the patents is neglected in many cases, even when they are techno-economically feasible to do so. Secondly, but for the working of the patents, there can never be technological transfer and hence, promotion of industrial activity. Thirdly, the working of the patents helps cost-effective products and saves foreign exchange. Finally, but for the provision of the working of patents, India, would become a reserved market for the IPR holders.

Thus, the Indian IPR regime makes it unambiguous that the mere importation of the patented product does not amount to its working.(48)

On Patentability:

The US has accused India, for not providing complete coverage of patentability for all innovations. It's argument is that because of exclusions from patentability of certain sectors, the inventions in those sectors are not rewarded . Hence the inventor is at a loss.

This argument ignores once again, the difference in the stages of development between the US and India. Moreover, the US did not arrive at such an all encompassing IPR system right from its inception. An examination of the

patent laws of the world show that every nation specified and specifies the inventions that are patentable according to its socio-economic needs and the stage of development.(49)

The Indian patent system accords a differential treatment to the food, pharmaceutical and chemical sectors because of the critical nature of these sectors to their socio-economic and public needs. The granting of patents to such critical sectors would lead to irreparable damages in their efforts to raise the standard of living, especially to the vulunerable section of the society. It was clear from the earlier discussion on pharmaceutical and agro-chemical sectors in India, that but for the indigenous patent system the exhorbitant price of the TNCs' pharmaceutical and agro-chemical products would not have been controlled. Moreover, the TNCs' monopoly on these sectors did not provide India the technological infrastructure. It's only because that the Indian Patent system reflected the developmental imperatives, the R and D facility in India could meet its pharmaceutical and agro-chemical basic needs, at least for its sustenance.

Therefore, having perceived the unproductive consequences, the Indian Patent system gives only process patents, that too for a limited duration, for the pharmaceutical, food and chemical sectors on which India relies to meet its basic necessities. Thus, the US criticism on Indian IPR system prescribing differential patentability between its critical sectors (food, pharmaceutical and chemical) and other sectors, reflects not only its unhelpful but also its destabilising prescriptions (monopolising the patents as against developmental aspects) vis-a-vis the LDCs in general, India in particular.

In the realm of new technologies the patentability in India, involves a whole range of moral, ethical, environmental and other factors. As stated before, India does not provide patenting on Biotechnology. The primary reason is that the socio-economic and other implications seem to be counter productive for India. Moreover, their implications have not been completely comprehended as yet. In such a situation, it is the sovereign right of India to exclude Bio-technological products and processes from patenting so that its long term developmental initiatives are not jeopardised.

Talking about the IPR negotiations in the GATT, P.R.Mooney the American Third World activist against the stranglehold of IPR regime, he says, "current discussions.. "industrialise" biology and make manipulated genes and altered species patentable"(50) Commenting on the adverse consequences of patenting Bio-technology and life forms, the South Commission observed that, "growing commercialisation of plant breeding research in D.Cs, supported by plant rights, poses a great threat to plant breeding and development of food and agricultrure in the Third World."(51) Providing patent protection to such adverse factors would lead to, "transforming of biological community of the planet from a common heritage to the private preserve of major corporations. The patent protection sought by the TNCs, for life-forms aims only at detrimental profit motives as against (a) the rights of people to living resources, as a heritage held in common for satisfaction of basic needs, (b) the rights of people to be free from man-made hazards and risks, (c) the right of plants and animals to their survival and integrity."(52)

The ethical and social aspects of patenting life-

forms could be gauged from the fact that living things are robbed of their species identity and species integrity by genetic manipulations. The TNCs which spend huge investments in life-forms R and D, seek to control the genetic resources and diversity, especially in the Third World. The U.S which is so aggressive in getting patent protection world-wide has been equally aggressive in denying the Third World the right to its own resources. "At the FAO conference, 66 countries largely from the LDCs adopted the international undertaking on Plant Genetic Resources according to which plant germplasm is a heritage mankind to which all countries should have access both in its natural as well as manipulated forms. The US has not signed the undertaking and continues to insist that special genetic stocks should not be included in the category of germplasm in considered common heritage"(53) Even when the European Parliament could adopt the resolution, the US still considers life-forms as private property.

The US criticism of the Indian IPR system not providing patents for life-forms is also to gain accessibility to the Indian Germplasm resources. In other words to aid its TNCs' profit mongering motives. The

depositories of the Internatioal Bank for Plant Genetic Resources (IBPGR) in US, which have germplasm resources collected from various LDCs have been declared as the property of the US Government.(54) For political reasons, the US contradicted its own dubious policy of free exchange of germplasm, excluding the countries from having any accessibility to the depositories, that too, those countries from where the germplasm was collected. Example, Nicaragua, China, Turkey, Ethiopia etc. Therefore it is not world development or public interest that matters for the US, but the protection of its TNCs' profits. On April 7, 1987, the US patent office approved the patenting of animals with new traits produced through Genetic Engineering. Companies holding patents on the new animal forms have the authority to require farmers to pay royalties on the sale of the patented animals and on generations of their offspring produced through the 17 year life of the patent.

The inclusion of Biotechnological life-forms for patenting, would further consolidate the monopolised exploitation of the TNCs of the DCs, which in turn would restrict the use of the patented material in any future research programmes of India. For instance, the US patent

on low oleic acid sunflower lives in 1986 has virtually restricted further quality improvement research, of this valuable material. Likewise its patent on low linolenic acid containing line of linseed restricited the development of the edible grade linseed varieties.(55)

The corporate profit interest of the US seek the introduction of genetically engineered animals that could cause serious ecological disruption. Apart from polluting the native gene pools with altered genes, they carry the danger of spreading epidemics.. Therefore, the Indian patent law not only bans the patenting of new life forms but also resists the US initiatves to do the same. Thus the Indian Patent Law does not compromise on the nature's and public interests for the sake of the USA's TNCs monopolisation and profiteering.

On India joining the Paris Convention (PC)

The economic development in countries at different levels of technological capabilities, require different levels of regulatory systems and state support for technological innovations and their transfer. Such regulatory systems are determined as mentioned earler, by

the political economy of each country. It is in this context that the US insistence on India joining the Paris Convention and its impact on India's technological development and self-Reliance should be analysed.

The Paris Convention embodies a philosophy according to which the protection of the Industrial Property and hence the patentee's rights are given supremacy over the public interest of any country. Despite its six revisions, the PC instead of diluting, has reinforced the patentee's monopoly rights periodically. That's why, around 20 countries have not yet signed the subsequent amendments which were considered averse clauses as against their interests.(56)

The averse provisions of PC include; Right to patent restrictions and limitations (which will be discussed later); No Revocation of patents despite their non-working; Convenient excuses against compulsory licensing; No Government power over the patents, to import etc; No control over unfair competition; binding of atleast six years before any country can leave the convention after joining; Amendment of the domestic law to give effect to the

provisions of the Paris Convention; etc., Thus the countries which grant the above mentioned privileges to the patentees will not have any control over them and hence over the deleterious misuses. A member country will not be able to remedy the non-working of the patents by imports but from the patentee only (Providing Import monopolies). Above all, the member countries should legitimise these deleterious, destabilising and detrimental clauses by its own law as against its soverign national interests.

Having seen the diabolic features of the PC, the relevance of India joining the same should be examined. Features like procedural advantages of filing patent, abroad, getting information on patents and priority rights in the member countries are mentioned to woo India. But a closer analysis would reveal, that India has not reached the level of a DC in the technological development to accrue these advantages. Regarding the information about patents India seems to have accessibility to places like European Patent Office, WIPO (World Intellectual Property Organisaztion), Bearne convention membership etc., being a member of PC. (57).

Regarding the filing of the patents abroad, Indians are able to do so, even in the PC-member countries. India, exports not only technology but also their products even to the DCs (58). The case of pharmaceutical Industry, as discussed earlier, stands out as an example, which the Indian Inventors and Industry could achieve only because of the Indian Patent Act and India not being a member of the Paris Convention.

The argument that India lags behind in technology transfer because of not being a member of PC, becomes void when the technology market is becoming internationally competitive to allow access to technology even without PC's membership. The fourth Reserve Bank of India Survey corroborated that 40% of the Indian Companies covered, could get technical collaboration agreements, despite India being a non-member of PC, compared to 35% of the companies covered in the third survey. Moreover, the Indian R and D and innovative activity is presently at a level where its incremental nature is helping in technology absorption, upgradation and industrial self-reliance. (59)

Thus if India joins the PC, it means a support for

stronger monopoly patent system which will protect the innovativity of TNCs from the DCs like the USA and not the endogenous capacity. Therefore, India is not willing to jeopardise its innovative activity, technological development and Industrial self-reliance by joining the Paris Convention as suggested by the USA.

Super 301 and Special 301:

The sanction of Super 301 and Special 301 by the USA is nothing but a clear unilateral action as against India. The very act of President Bush giving a Crow bar to pry open the foreign markets, literally, proved the confrontational unilateral aproach of the US. Craig Vangrasstek, a Consultant for the UNCTAD, said "It was a confrontational approach and use of bilateral threats and unilateral trade measures to secure US goals in the multilateral negotiations, and a high risk strategy" (60)

Section 301, "required the President of the US to take all apropriate action", against the so called " Unfair trade practices by foreign countries", "including retaliation to obtain the removal of any act, policy or practice of a foreign government which violates an

international agreements or is unjustifiable, unreasonable or discriminatory and burdens or restricts US Commrce" (61). But this approach, symbolised the US' intereference in the Soverign Nations. India has been victimised under Super 301 and Special 301, as against its domestic policy measures, just because it was not to the interests of the US.

The US's criticism of India's Trade Related Investment Measures (TRIMS) and Insurance Investments (Super 301) becomes meaningless, as India possess the soverign right to pursue self-reliant policies of development. The Indian Government as the vehicle of development would decree that its approval is required for all sorts of foreign investment expansion. Moreover considering the aftermath of 'Open Economy' for a developing country like India, the need to stipulate terms and conditions for achieving its national interest becomes sine qua non. Therefore, the conditions like using locally produced goods and raw materials, meeting the export targets, higher Indian Equity etc., promote the indigenous development and protect the Indian Economy from the foreign Investor's overriding influence. Likewise, the US demand for opening up the Insurance market for the DCs, seems to ignore the Governmental initiatives for progress.

The two Insurance Companies in India are Government owned. These Companies seem to function well enough to meet the Indian needs and demands. But the US's demand of liberalising this (Insurance) service sector, is basically to exploit the Indian Market. Carla Hills - the United States Trade Representative said "Liberalisation of India's insurance market would create significant makret opportunities for US Insurance Companies which are competitive worldwide". Thus the motivies behind Super 301 are nothing but making India, yet another reserved market for the USA.

The Special 301 stated that the Indian IPR regime is highly restrictive. The US argued that patents in India do not provide a complete coverage of innovations, process patents are advocated, limited duration, and compulsory licencing and licence of right are encouraged. As stated earlier the differential stage of development of India and the compulsions of the Indian political economy make such an IPR system indispensable. The transplanting of the US model of IPRs would undoubtedly make India a satellite state of the DCs. It is also evident that the US is not interested in allowing India to follow the same path of development, as

it did (process to product patents, i.e., graudal strengthening of the IPR regime directly proportional to the stage of development).

The US's criticism becomes all the more unfounded when the statistics about the usage of the provisions of compulsory licence and licence of right is analysed. "In actual practice, only one compulsory licence has been give in India under the law, so far in 19 years and as on 31st March, 1989, only 15 applications are pending with the Comtroller General of patents for grant of a compulsory licence" Likewise, "Since the coming into force of the Patents Act in 1972, the total number of patents worked in the country by the utilisation of the licence of right by any person other than the patent owner has perhaps not exceeded 25" (62). Therefore, the US's accusal becomes meaningless.

The US's branding of the Indian IPR system as restrictive is self-contradictory if the restrictive and anti-competitive behaviour of the US's TNCs is analysed. The restrictive and anti-competitive conditions are imposed by the patent owing and supposedly technology suplying TNCs

of the US, DCs in general are :

(i) Tried purchases of inputes from the licensor or sources designated by him,

(ii) Restriction of exports from the host country,

(iii) Restrictions on the use of patents, trade marks, know-how especially in matters such as the volume of production, marketing, distributin and pricing of the products

(iv) Restriction on the use of technology after the expiry of the patent agreement

(v) Restriction of competition as between various licences

(vi) Package licencing obliging the licensee or the recipient to make unwanted purchases

(vii) Use of patents as a device for carving up markets among patent owners. etc., (63)

These conditions make the US's contention that the Indian IPR regime is restrictive as ironically prejudiced.

The US's criticism that its trade marks should be given a wide recognition in the domestic market, does not give its concern for India's developmental objectives. These are several implications, to the socio-economic

objectives of India in using the foreign trade marks. The UN studies have proved that "foreign trade marks tend to encourage the production and consumption of non-essential and luxury goods in poorer societies, thereby distorting their socio-cultural objectives and values".

Having understood the tendency to imitate the consumption pattern of the affluent DCs and thereby to avoid the misallocation of resources on goods irrelevant to meet the basic needs, Indian, IPR regime imposes restrictions on the indiscriminatory availability and use of foreign trade marks (especially of the DC's) in general.

Secondly , the use of foreign trade marks would also means the drawing of foreign exchange, not only by way of royalties but also by imports of raw materials etc., for the production of non-essetial goods.

Thirdly, there is no productive transfer of technology in the luxury goods.

Finally, the use of foreign trademarks backd by the enormous advertising and market power of the TNCs have

an adverse effect on the growth of indigenous industry in India. The infrastructural and enterpreneurial base that are being established by the incipient small and medium enterprises would therefore be paralysed by such trademarks of foreigh enterprises (TNC)

Thus the socio-economic compulsion make India regulate the use of foreign trade marks in their domestic markets. And the soverign right of India to make such regulation is jeopardised by the US's criticism on the same.

The Implication of Super 301 and Special 301 on India as a nation-state:

If one goes by the balance of trade of the US, it is ironical to include India which enjoyed a trade surplus of 851 million dollars in 1989, along with Japan (which enjoyed 49 billion dollars in 1989's overall US. -Japanese trade of $138.2 billions (India's surplus is just 1/60th of Japan) (66) And Brazil had 5 billion dollars but that paled into relative insignificance in comparision with the approximately $13 billion US's deficit with Taiwan and $ 9 bm with Korea (South).

Stuart Anerbach (67) said that India and Brazil were placed on the hitlist to provide "cover" for Japan. The relationship with Japan should not be jeopardised as against the US interests by a singular action on her. Therefore, Japan was to be named but the blow was to be softened, hence, India and Brazil become the victims of the coverup.

"Regarding India's concern that it can not have unfettered entry of drug MNCs and tough laws on patents at this stage of its deelopment". But the USTA - Carla Hills said that "We do not see a connection between levels of development and the guarding of Intellectual property". She added that "the entry of drug MNCs would result in the closure of some drug companies who survive by copying other people's formula" On the possible disappearance of necessary drugs from the market the USTR argued "that could be handled through other mechanisms as a price issue"(69)

Such unilateral prescriptions reflect the US's unconcern for the Indian self-reliant (Indigenous research orient) technologicl progress and could influence Brazil and India more deleteriously because of their relative disadvantage in the bargain. But, as far as the EC, they

had hit back publishing an embarrasing catalogue of 43 unfair US trade practices.[70]

The EEC report says that the US does not support international arrangements that would be of benefit to foreign interests in the IPR field in the US and demands enactment of legislation which would benefit the US commercial interest abroad [71]. The OECD further said that the US authorities should "refrain from any action which would threaten the integrity of the GATT System" (72).

The ICC- International Chamber of Commerce has also extended its supports in favour of Indian IPR regime as against the US action under Super 301.[73] Prof. Jagdish Bhagwati said that "the tariff retaliation that Super 301 and Special 301 rely on for their efficacy in almost certainly illegal under GATT rules .....The US administration would find itself in the position of having to violate its international commitments to implement a controversial domestic law".[74]

The Indian Stand on the demand for revamping its IPR regime, was expressed by the Special Secretary, A.V. Ganesan at the GATT meeting on IPRs in Geneva, that the demand is to impose"monopolistic and restrictive character"

and its purpose" is not to liberalise but to confer on exclusive rights on their (DCs in general, the US in particular) owners".[75]

The US action (Super 301 and Special 301) was viewed as blatant infringement of India's Soverignty. Answering in response to calling Attention Notice in the Lok Sabha on 4th August, 1989, the Commerce Minister Dinesh Singh said "The U.S. has listed certain aspects of our policies on investment and insurance as priority practices whose elimination it must seek within a time bound period (initially it was set as Nov 1, 1989, and then extend till June 15, 1990). The U.S. is seeking to assume jurisdiction to determine whether certain aspects of our domestic economic policies are fair or equitable. The step is unwarranted encroachment on India's Soverignty..... We are free to pursue policies in pursuance of our domestic objectives".[76]

At the special ministerial meeting of the "Group of 77" in Caracas, Venezuela, on June 23, P.V. Narasimha Rao, India's External Affairs Minister, noted that "Super 301, is a coercive attempt to penetrate India's markets in the name of liberalisation. The US forgets that every

country has a soverign right to formulate its macro-economic policies to serve its socio-economic objectives and broader national interest. Surely a nation has absolutely no obligation to subject these policies to any outside scrutiny except to the multilateral forum within which such obligations have been assumed and strictly in accordance with the procedure laid down for this purpose".[77] Talking about the implication of Super 301 and Special 301, a member of the powerful Senate Finance Committee, Senator Dave Durenburger (Republican) said that India has been unjustly included in the list of countries accused of unfair trade practices by the Americamn Administration. "I feel that India needs a fair amount of development encouragement and the question is "Are we being helpful or are we being harmful" he stated. He added "If there had not been a Japan there would have been no India".[78]

Therefore, the U.S. initiative (Super 301 and Special 301) reflects that relatively weaker bargaining power of India as against USA is used to undermine, even its own Soverign rights. And, the soverign National developmental concerns of India become void as against the national interests of the USA. As a consequence, India is

made a Scaepgoat for Japan's folly and economically bullied. It was rightly pointed out that "Although she would not dare admit, the top US trade negotiator, Carla Hills.....is actively trying to weaken competition and strengthen monopolies in one of the most crucial areas of business activity. This is Intellectual property, a portmantean term covering patents, copyright, trademarks and trade secrets.[79]

The National Working Group on Patent Laws (a body constituted in 1988, in the wake of aggressive compaign launched by the US for substantial amendment to the Indian Patents Act, 1970, has been voicing its opinion through seminars and publications against such a move or to join the Paris Convention - resolved that the Indian Patents Act, 1970 (Indian IPR regime in general) in its scope and purpose, continues to represent Indian Interests and requires no amendments. (80) "Thus the Interest of the people i.e, public Interest is the golden thread which runs throughout the texure of the Indian Law of Industrial property. If India joins the Paris Convention (i.e., catering only to the DC's interests) this golden thread of public interest will have to be violently removed from the texture and it is bound to distort the entire fabric"[81].

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CONCLUSION

A REIVEW OF THE PREVIOUS CHAPTER

The study was undertaken to find out the repurcussion of the issue of IPRs (between the DCs and LDCs) on the Sovereignty of Nation-states in general and on the (LDCs) Third World in particular. The hypothesis that the sovereignty of the nation - states has been limited because of the changes sought on the International IPR regime by the DCs has been analysed and investigated in the following manner.

The Chapter I, delineates the theory of sovereignty. This theory of Sovereignty has been discussed both in its internal and external aspects. It also discusses, how the traditional concept of sovereignty that has secured the nation-states identity,has been periodically infringed by various itnernational influences. The international factors like the role of TNCs, the issue of permanent sovereignty over natural resoruces, the Nuclear cause, the space age and the Ecological factor, and their infringement in the sovereignty of Nation - States have been

discussed.

The Chapter II, undertakes the invitation of the discussion as to how the sovereignty of the nation states has been infringed by the DCs stance on the issue of IPRs. First, the intellectual property and the related rights have been defined which is followed by discussion on the evolution of Intellectual property system. Secondly, the position of the DCs with an emphasis on the USA factor, on the IPRs has been discussed. Thirdly, the perspective of the DCs in regard to the issue of IPRs has been stated.

The Chapter III has been devoted to the understanding of the position and perspective of the IIIrd world in the relation of IPRs. Moreover, the analysis as to how the issue of IPRs backed by the DCs interests has violated the Sovereign rights of nation-states (especially the LDCs) is also carried out. This violation of Sovereignty of the LDCs, has been viewed from both the internal and external aspects. The violation of the internal sovereignty of the LDCs by the DCs prescription of IPRs, has been corroborated by the Latin American LDCs experience. The external sovereignty infringement of the LDCs has been discussed in regard to the secondary treatment

meted out to them in their international dealings i.e., in the international for a multilateral treaties etc.

The Chapter IV, undertakes the discussion on India and the issue of IPRs. Firstly, the progress made by the Indian Economy under the independent IPR regime of India has been discussed. This is corroborated by the successful functioning of the Indian pharmacentical industry, agro-chemicals and pesticides and Bio-technology sectors. Secondly, the USA's criticism as the spokesman of the DCs on the Indian IPR regime and its retaliation against India by Super 301 and Special 301 have been discussed. Thirdly, India's stance as the spokesman of the LDCs have been discussed.

The study carried out in the four chapters builds up the argument that the emergence of the issue of the IPRs between the DCs and LDCs, has evnetually led to the infringement sovereignty of the less Developed states. Then DCs demand for the harmonization of the IPR system internationally undermine the sovereign right of nation-states to adopt independent developmental policies. Moreover, such a demand ignores the different stages of development between the LDCs and the DCs.[7]

By demanding for a uniform International (GATT based) agreement on IPRs the DCs, are seeking to establish a system which would suit their interests more as agaist the LDCs. The successful establishment of such a GATT regime would mean strengthening their TNCs interest as against the LDCs Sovereign national interests.

It is very clear from the stance of DCs on the IPRs issue, that they link it (IPRs) with the service sector of International trade (which the LDCs find unacceptable). This link becomes alarming to the LDCs, because of the Service Sector's imminent approval under the GATT framework. Once the Service Sector with IPRs comes under the GATT framework the DCs would apply the hard and fast rules of GATT that would hamper the technological growth of the LDCs. Therefore, what is vivid is that the DCs demand for a GATT based IPR regime is basically to secure their interests at the period of the LDCs.[2]

As the USA, EEC and Japan emerge technologically superior they rely on the same to build the international trade in their favour. The drive to secure the technological edge makes the DCs to make "IPRs as a Catch-

all-phrase" which would absorb every new technology that is invented. Therefore, computer Software, Satellite communication, above all the life forms (Bio-technology) etc. have been incorporated under the IPRs. Because, of such an all encompassing nature of the IPRs the LDCs access to new technologies is curbed. Moreover, their (LDCs) own resoruces like Germplasms (plantgenes etc) are patented against their own accessibility.[3] As the new technologies are in the hands of the TNCs of the DCs, the IPR system is used to perpetuaate their dominance. Through the artificial restrictions they impose on the right to use or imitate certin key industrial techniques". Morever, the patents are used to "prevent rather than foster investment (national or foreign) and preserve the markets of developing countries for imports sold under conditions of monopoloy". Therefore, "the highest social cost of the patient (IPRs in general) system results from the restrictions they put, on a country's (LDC's opportunities to use its own and the rest of the World's resources as it chooses.

The USA heading the DCs, demands harmonisation of the national IPR Laws. This demand of the US Government has been proved as the fulfilment of the interest of its domestic exporters.[5] This US interest is Camouflaged in

their argument that IPRs are breaking down national boundaries thus challenging the traditional theories of international relations, which are based on the nation-state. With the erosion of national sovereignty, events taking place is one country will increasingly to be felt in others. Consequently, intellectual property divisions, that were once considered exclusively domestic concerns, will now have to be made with International considerataions in mind".[6] Such arguments have a deleterious impact on the Third World Countries. For, to say that there is a complete breakdown of boundaries and erosion of sovereignty of Nation-states would be far reaching statement in the International relation today. Secondly, it completely undermines the diverse indigenous national policies of nation - states especially of the LDCs. And brings them (Nature-States under an umbrella of International determinants which, firstly does not take into consideration the different stages of development of nation - states; secondly, it enables the DCs to set standards which would augment their interets further than rescuing the ideas from their economic developmental hassles. Therefore, the demand of the US, that there should be a "Harmonization of Disparate National Intellectual Property System"

irrespective of the economic status of the Nation-States, is in otherwords, a prescription of DCs aggrandisement on LDCs national laws, hence, on its sovereignty.

It is a contradiction in terms, when the US on the one hand demands a harmonised multilateral PR system, and on the other hand encourages a bilateral and unilateral settling of IPR issues. Such a stance would mean that when the multilateral principles go against the US interest it would forego the same and adopt a unilateral decision in its favour. Moreover, it implies that the US's disregard to abide by an interdependents unilateral (between the DCs and the LDCs) decisions and secondly, securing its national interests by imperialist overtimes as against the national interests of th LDCs.

The dubious nature of the US's prescription of a multilateral IPR regime, would be evident from the much criticised semi-generis semi-conductor chip protection Act of 1984 and its absence in the Berne Convention of copyrights for it "might threaten the integrity of traditional US intellectual property law".

The US's accusal that the LDCs seek technological

progress by piracy on patents, copyright and trademark and by a feeble enforcement mechanism,[8] proves that it does not want the LDCs to progress by the same sovereign independent ladder as it did. The developmental metamorphosis of the DCs in general indicates that each of them had loose enforcement mechanism of IPRs initially, to enable a speedy dissemination of technical knoweldge in theri societies. "Japan, after the last world war, decide not to observe the copyright law. If they had not done that, they would not have progressed as much as they have because they would not have had books available. there were no Japese books; all the books were foreign ..... They translated them but did not observe any copyright laws. It was the fall out of that practises that enabled this country to have cheap books"[9] Like, Japan, other DCs have also used a loose patent, copyright and trademark laws for their developmental leaps. Therefore, preventing the LDCs to use their own IPRs regime is an encroachment in their Sovereign Right by the US. Moreover, then the LDCs like India, tries to strike a balance between the Innovator's and public interests in their IPR laws, by demand for what they clal, a fool-proof IPR enforcement mechanism, the US suggests that the LDCs public interests should be subserviant to a few monopoly IPR

holders. This is a balatant demand for the trade - off sovereign national intersts of the LDCs.

There is a controversy regarding IPRs whether it is trade related or not.[10] But its (TRIPs - Trade Related Intellectual Propety Rights) deleterious consequence on the LDCs technological progress has been voiced. In such a situation, the US has given it USTR (United States Trade Representative) to play a major role regarding TRIPs. Its responsibilities include monitoring foreign nations' efforts to protect intellectual property and as a rsult, recommending whether such nations should be eligible to recieve trade preference.[12] Such initiatives exhibit the US' big - brotherly attitude against the LDCs and compels the LDCs to accept its standrads on IPRs.

It is a paradomical irony. That a nation (the US) in which the piracy on IPRs is relative more[13] (and in otehr DCs[14]) and possess a discriminatory IPR regime[15], seeks the control of the same in the LDCs. The unilateral extension of its (US's) domestic law[16], coupled with coercive measures like trade embargo, sanctions etc.[17] have undermined the sovereignty of the LDC nation - states. The US has accused the EEC also for what it called "trade distortion" in

agiruclturaI practices. But the EEC has not proved to US sanctions like the Super 301 or sepcial 301, that would infringe their sovereignty.[18] (Instead the US adopted multilateral negotiations as a means to settle the dispute with them (EEC)).

The US hegemonic tendencies regarding the IPR issue, have made the other DCs also victims of its dictation. Japan's policy of import restrictions on the US forest products, supercomputers and satellites has been revamped because of the US's sanctions like Super 301.[19] Likewise, the EEC, Canada, etc. are being coerced to accept the US's dictation.[20]

As discussed earlier, the EEC, in turn has extended its support to the IIIrd World to prevent the US's unilateralism and bilateralism that would hamper the multilateral initiatives.[21]

Though some of the DCs themselves have suffered becuase of the US's unilateralism but as against the LDCs they are cooperating with the US in regard to the IPR issues. Because, in regard to GATT (where the settlement of IPR issue with the DCs standards determintal to the III Wolf is favoured), a successful completion fo teh uruguay round

is crucial for the US and more so for the EEC which is working towards its unified market system of 1992"[22]. Therefore, what is clear is that even the DCs that are proved to the US's dictations have not come out to criticise the US's actions regardint its harmonised, judgemental IPRs from the point of vieaw of infringing the sovereignty of the LDCs.

The Third World patent convention which was held on march 15-16, 1990 in India had expressed their stance on the IPR issue. Though the "New Delhi Declaration" (of the Third World patent convention) recommendatory in nature; Nevertheless, it delinates the IIIrd World's perspective, in the following way;

i) The DC's (headed by the US) proposals in general, as in GATT, in particular regarding IPRs, are completely contrary to development needs of the Third World. They aim at establishng a uniform patent system which serves only the interests of the DCs.

ii) Since the DCs and the LDCs are in different stages of development, their (LDCs') IPR system should give precedence to public interests over the commercial and

monopolistic protection granted to the IPRs owners.

iii) The TRIPs proposals in GATT would legalise the internationalization by the MNCs (whose monopolistic hold over the new technologies distort the world development process) of their benefits. The TRIPs proposals further aim at reserving the domestic markets of the Third World for the manufactured goods of the DCs, which would arrest indigenous technological growths.

iv) There can be no uniform set of standards and norms of equal validity applicable to a wide range of LDCs which are obliged to respond to the imperative of their cultural and socio-economic needs. The holding of a global monopoly of patents representing a massive stock of science and technology by a group of DCs is no justification for common standards. or a price for being admitted to a global multilateral system of trade and exchange.

v) A rational international system of IPRs must represent the interests and aspirations of the people of each country participating. The national laws on IPRs of LDCs must increasingly influence and devisively change

the International regime of IPRs. and it is not the other way.[23]

Though there has been an infringement of the Sovereignty of the LDCs by the DCs various IPRs prescriptions, nevertheless each LDC has responded in its own way. Brazil, after giving some resistence, to the US's moves in the GATT, bilateralism and unilateralism on IPRs, eventually it (Brazil) has revamped its national policies in USA's favour.[24]

South Korea, responding to the US's sanctions. has created a task force for the vigorous implementation of the IPR standards and rules that would cater to the DCs. Taiwan, apart from creating a task force, it has initiated bilateral copyright agreement with the US. and amended its trade mark law.[25]

India, despite various threats by the USA (its super 301 and Special 301 etc.) has not succumbed yet to the DC's wishes. It has come out very clearly that there is a blatant imperialist tendency in the DCs prescriptions on the IPRs. And hence an unwarranted encroachment on its sovereignty.[26] Moreover, by holding, conventions of the Third world regarding IPRs etc. it is persuading the other

LDCs to take a stance that any IPR system (multialteral or national) which compromises the sovereign, national interests is not acceptable. India has also expressed such a stance on behalf of the Third World in various multilateral fora.

Thus, to put it in a nutshell, this study has found out that the IPR issue between the DCs and the LDCs is a very complex one. The IPR issue, serves as a means for the DCs' neo-imperialism on the LDCs. The sovereignty of the LDC nation-states in general has been undermined by the DC's initiatives for a multilateral IPRs system (which favours their interests more like the GATT based one).

Despite the fact that the LDCs in general have been prone to the infringement of their sovereignty, each of them has responded in its own way determined by their socio-politico-economic and cultural imperatives. Nevertheless, there is a realisation among the Third World countries about the impending peril on their sovereign rights because of the establishment of a multilateral IPR regime based on the DCs Standards and Intersts. Hence, they strive to do away with the same in various multilateral fora.

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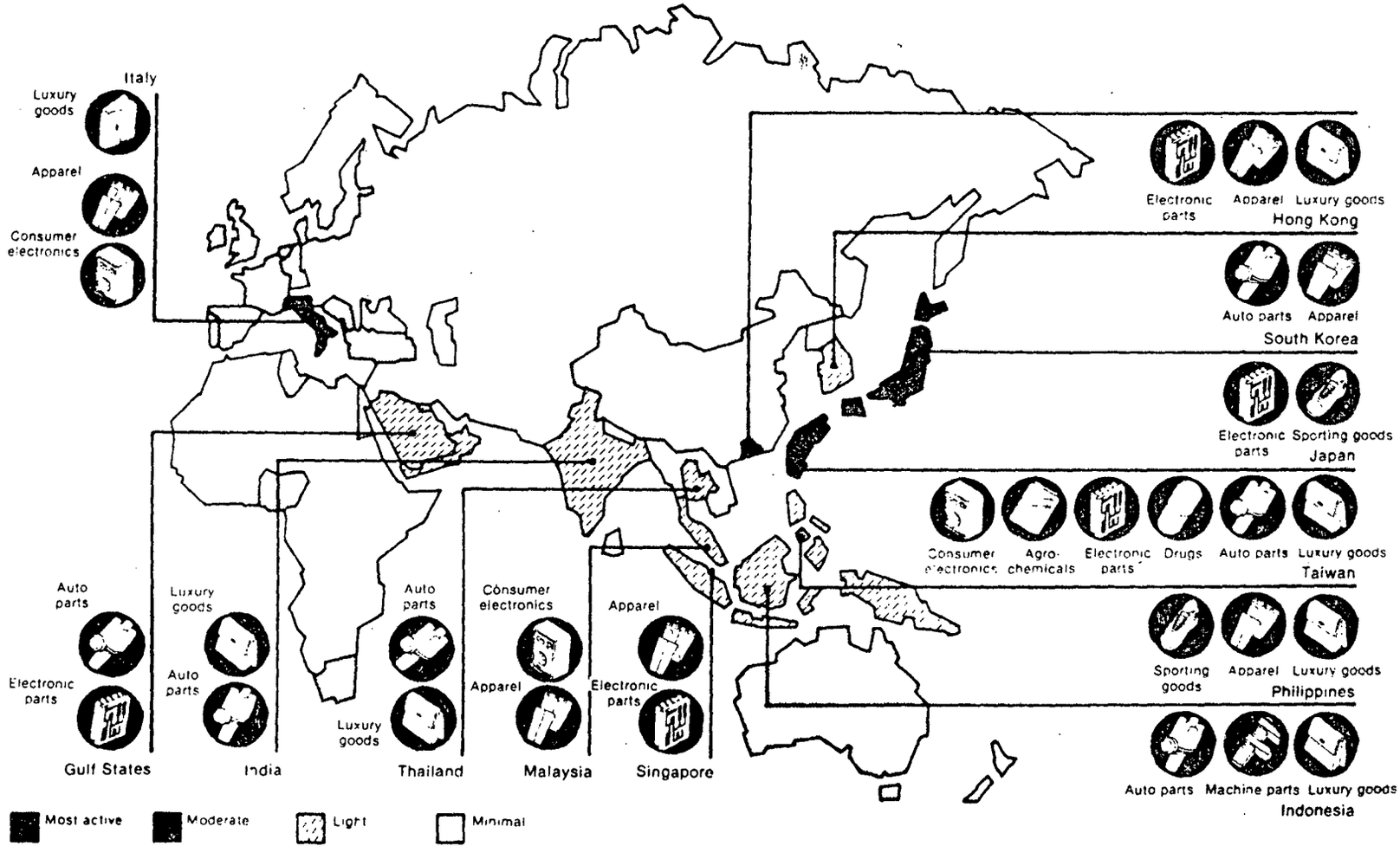
APPENDIX - I(a)

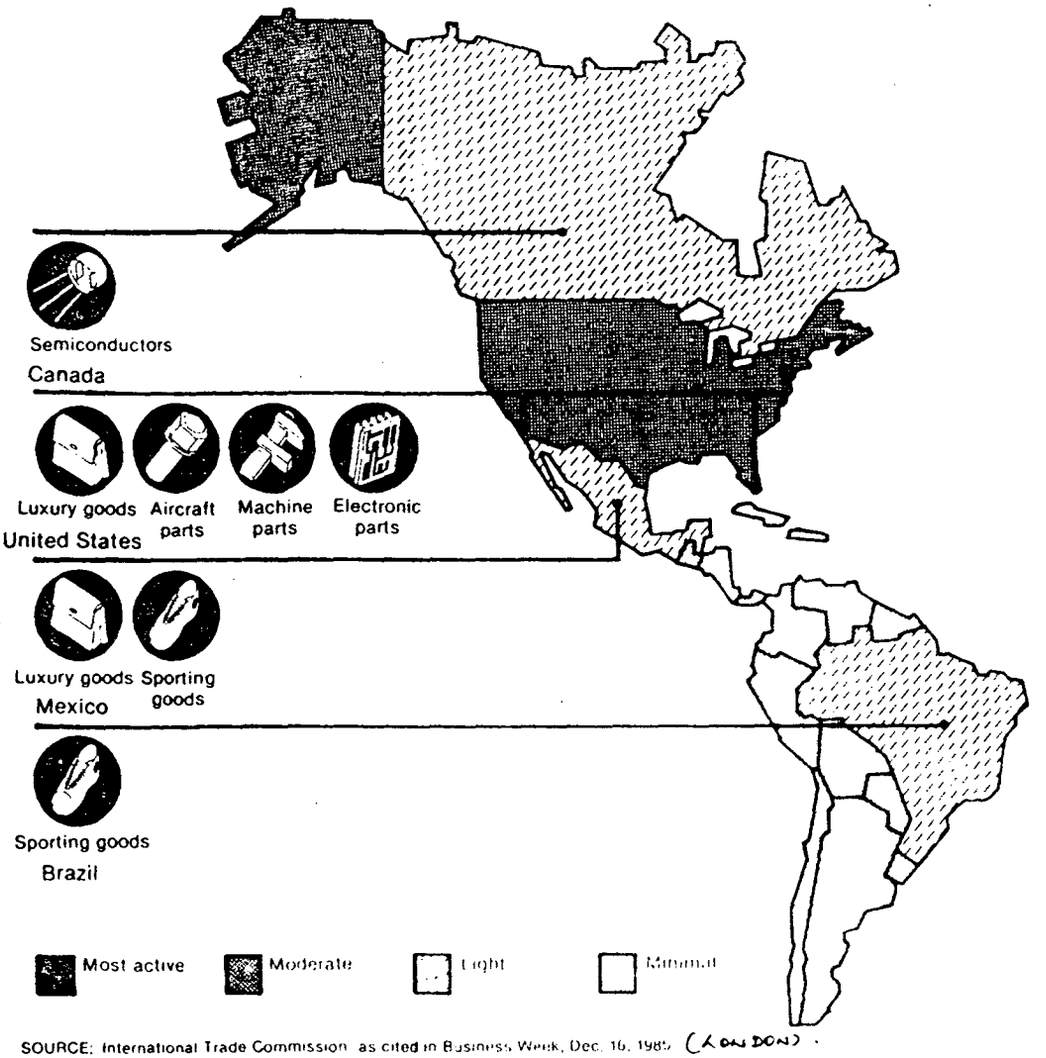
The Level and Location of International Counterfeit Activity of U.S. Products.



SOURCE: International Trade Commission, as cited in Business Week, Dec. 16, 1985. (LONDON)

APPENDIX - I(b)

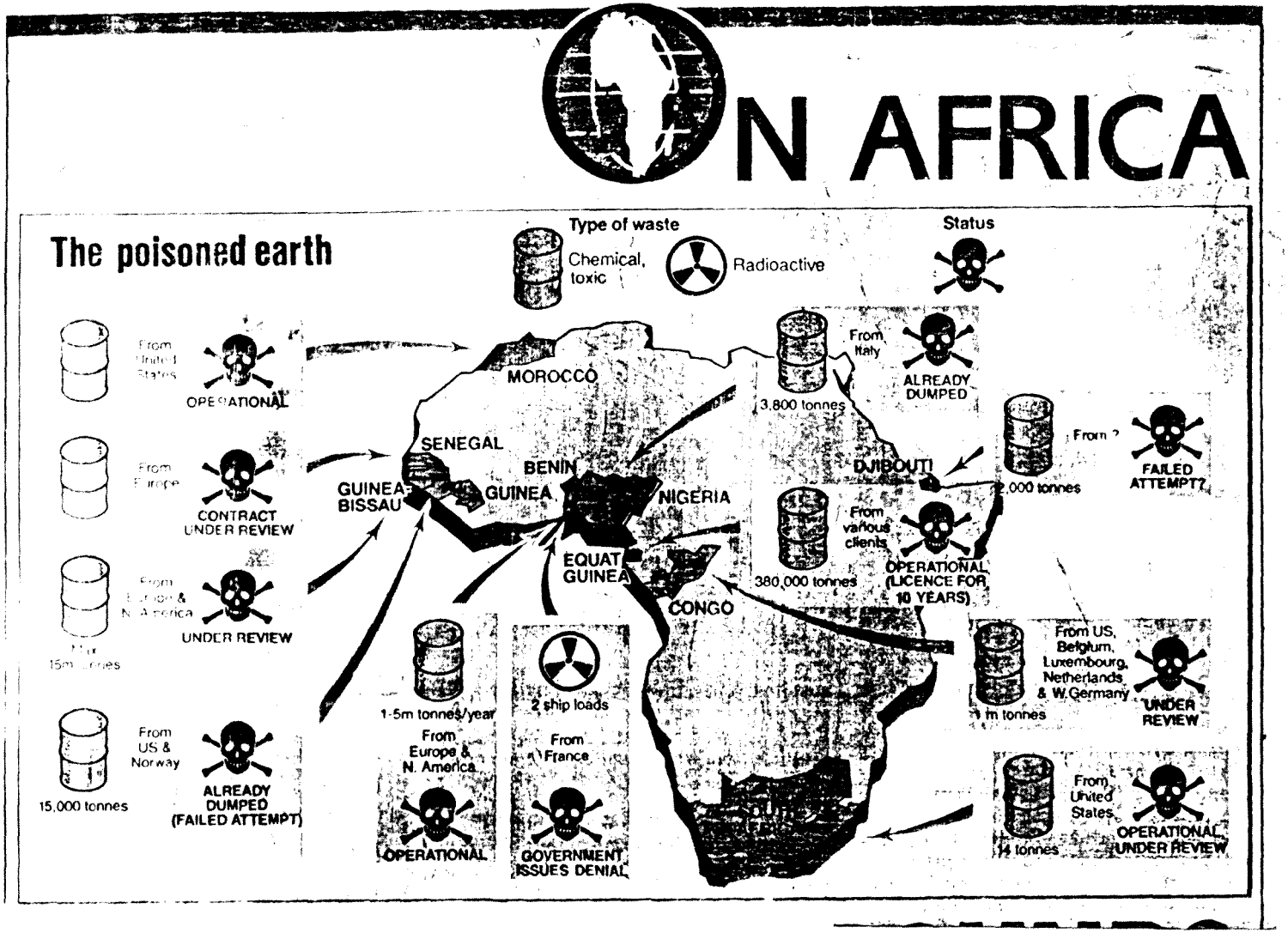
The Level and Location of International Counterfeit Activity of U.S. Products.



SOURCE: International Trade Commission as cited in Business Week, Dec. 16, 1985 (LONDON).

APPENDIX - II

The Countries of Africa that are prone to the toxic wastes dumping by the D.Cs.



Source: South (London), 1988, (JULY).