Readings in comparative sociology of law

Seidman, Ann

http://hdl.handle.net/2144/20678

Boston University
READINGS IN LAW AND DEVELOPMENT

CHAPTER VIII

ON THE RELATIONSHIP BETWEEN ECONOMIC THEORY AND THE LAW

In the preceding chapter we examined three sets of explanations for Third World poverty -- supply side, basic needs, and socialist. In this Chapter, we examine the relationship between these sets of economic theories and the law.

In the first of the readings, "Legal Drafting and the Defeat of Government Policy: The Experience of Anglophonic Southern Africa", Makgetla and Seidman examine the legal theories that spell out the implications for the law of the three economic theories Makgetla identified: conservative law and economics, based on supply-side theory; liberal law and economics, resting on basic needs theory; and institutionalist legal theory, based on socialist economic theory. Each of sets of legal theories has its own explanation for poverty and oppression in developing countries. Using southern Africa as an illustrative case, the authors show how each differs in terms of the groups perceived as disempowered, the laws that caused that disempowerment, and the meaning of freedom. They summarize their argument in the table at p. xx. How might these alternative legal theories similarly explain the current problems of development in China, and the kinds of proposals for laws that each might offer there?
QUESTIONS

1. Makgetla and Seidman wrote about southern Africa. What relevance, if any, does their paper have to China?

2. What are the main differences in the explanations and proposed laws suggested by each set of theories?

3. Using in turn conservative law and economics, liberal law and economic, and institutionalism, critique China's foreign investment laws [supra, Chapter V].

4. Deng Xiaoping once stated that it made no difference if a cat is black or white, so long as it catches mice. Therefore, he said, not to worry that a law or policy appears to follow a law or policy from a capitalist country; that fact alone ought not deter China from adopting the law or policy. Premier Li Peng said that when China opens the windows to the West, however, it must screen out flies and mosquitoes. Are these metaphors consistent or contradictory? To make them consistent, how must one rephrase each of them?
Every one of China's reforms held the potential for entrapping China in the circle of neo-colonial dependency. Admitting foreign capital might teach China new technologies and train new management, but it might also permit a disastrous drain of available surpluses. Separating management from political control of enterprises might ensure that economic decisions rested only on considerations of economic efficiency; but it also raised the spectre that, under the guise of making 'technical' economic decisions, the managers would enhance their own power and wealth, becoming a new economic ruling class. Decreasing egalitarianism might make possible higher incentives for more productive workers; but extension to development of private owners of the means of production or to the sales of shares in formerly state-owned means of production might also create a new class of owners who grew rich, not by increasing productivity, but by mere speculation and exploitation. Changing price control systems might lead to a more rational pricing structure, but it might also lead to inflation and the consequent decline of real living standards of the mass of the population. Encouraging
imbalanced geographical development might make the Eastern seaboard rich; but it might also lead to an "internal colonialism" which profits from the poverty of the interior. Decentralizing decision-making might lead to less rigidity and delay in making economic decisions; but it also might lead to an economy that too easily could spin out of control. Protecting inventors' interests in new technology might encourage research and development in China; but it could too easily help foreign firms prevent the spread of technology. Emphasizing economic incentives might lead to an abandonment of the 'iron rice bowl' mentality; but it might also lead government officials to believe that to get rich by any means -- even corruption -- is glorious.

Third World experience teaches that every one of China's reform initiatives carries with it potential unwanted side effects. Taken together, these raise a dangerous possibility of re-integrating China into the neo-colonialist trap that has impoverished most of the rest of the Third World.

---

PUTTING UP THE SCREENS: THE TASKS FOR LAWYERS AND FOR LAW AND DEVELOPMENT IN CHINA.

China entered the Reform period while emerging from an epoch in which central political line denigrated law's utility. To solve the problems of poverty and powerlessness, countries
inevitably introduce massive amounts of new law. To accomplish its proposed reforms, China needed -- and needs -- massive amounts of new laws. Like other countries, only through the use of the legal order could China bring about purposeful, directed social, political and economic change. What sorts of laws did it need? Plainly, it needed -- and needs -- reform in almost every legal arena. In economic law, it needed new foreign enterprise law, wage and price control law, monetary, banking and credit law, enterprise law, marketing laws, patent laws, contract and property laws -- the list becomes interminable. In public law, it needed laws to adjust political institutions so that they could deal with the new law. China needed new administrative laws, new local government laws, new laws defining law-making and implementation of law in every locality and every sphere.

The world around, however, these sorts of laws take many forms. For example, the laws concerning foreign enterprise fall into three general classes: Investor protection laws, investment codes, and investor control codes. (5). All concern the legal regime governing foreign private investment. They have very different consequences. Investor protection laws tend to throw wide open the doors to foreign private investment. They ensure that, no matter whether the host country benefits from the


investment, the foreign corporations will ship home the investable surpluses -- in precious foreign exchange -- that the Third World host countries need for development. They make it likely that the Third World country will remain or become mired in the circle of dependency. Investor control laws, on the other hand, admit foreign private investment, but seek to minimize the leak of surplusses. Patent laws come in different sizes and shapes, some more, some less protective of host country interests as against those of transnational corporations. Many sorts of enterprise laws exist. Some liberate managers from political controls that with respect of the enterprise they also liberate the managers to line their own pockets. Other sorts of enterprise laws make careful distinctions, empowering management to make day-to-day economic decisions, but carefully maintaining ultimate political control. In short, for every law in the economic sphere, a variety of choices exist. Some of these will likely achieve the goal of China's Reforms without letting China slip into the sinks of dependency, inflation, poverty, powerlessness and corruption. Others seem to grease the slide into the neo-colonialist trap.

The same applies to law-making concerning political relationships. Almost as many different sorts of local government laws exist as countries. Which ones provide China with the appropriate mix of devolution, decentralization on the one hand, and centralized control on the other, depends upon China's particular circumstances.
For example, many different sorts of administrative procedure laws exist. (6) They have very different sorts of consequences. Some, as in the United States, tend effectively to offer their protections mainly to the rich and powerful. Other forms of administrative procedure law protect less well-advantaged individuals. Administrative laws that favour the rich and powerful of course empower not the mass of the population, but the rich and powerful. These groups emerged not merely as a social strata. They became a ruling class. Where they exercise control, everywhere the end of state policy becomes not to alleviate poverty and powerlessness, but to maintain the status quo.

In drafting a law, its makers must choose between these different possible versions of the law involved. The law, not economic or political pronouncements, determines the effective economic policy. In Third World countries, too often the choices made by the drafters defeated the policy announced by the political authorities. (7) That experience ought to warn Chinese authorities of the importance of examining the laws enacted to ensure that they carry out the policies desired.

In fact, a few anecdotal and impressionistic accounts of some of China's reform laws and their consequences suggest that

6 Seidman, "Drafting for the Rule of Law: Maintaining legality in Developing Countries" 12 Yale J. Int'l L. 84 (1987)

some of these anticipated dangers have already arrived. For example, the patent law grants national treatment to foreign firms, although lawyers concerned with Third World interests have long warned against doing that. So does the Trademark Law, (10) despite analogous warnings. (11).

As interpreted, China's foreign enterprise laws permitted an American firm with (so far as is known) little claim to high technology, Kentucky Fried Chicken, to enter the Chinese market. Newspaper reports state that it will recoup its $20,000,000 capital investment in a year and a half. Every year after that, for the term of the contract (reportedly 30 years) this firm will likely ship about $13,000,000 in investible surpluses, generated in China, in foreign exchange, back to the United States. What in exchange for its substantial cost China receives from this venture does not immediately appear.

8 Patent Law of the People's Republic of China, 1985, Art. 18 (patent application of a foreigner or foreign enterprise with no office in China treated on basis of reciprocity); 29 (priority determined by time of original filing in foreign country). The right to patent in China includes inventions, utility models and designs (Art.2) in most developed countries, the latter two are not patentable. The standard of invention in most developed countries requires a leap in the technology; in China, the standard is"any new technical solution relating to a product, a process or improvement thereof." Regulations on Implementing the Patent Law of the People's Republic of China, 1985, Rule 2.

9 Vaitdos, "The revision of the International Patent System: legal Considerations for a Third World Position", 4 World Development. ...


11 Chudnovsky, Foreign trademarks in Developing Countries", 7 World Development. . . (1979)
China has made a vigorous effort to readjust its wage structure, so as to permit those who produce more to receive more. With respect to state enterprise, it has recognized that the new laws (especially, the law on contract administration) might permit state managers to receive grossly disproportionate returns. The new Enterprise Law (12) therefore limits them to ten times the enterprise’s worker’s average pay. In private firms, however, no limit appears in the laws to restrain the owners from reaping millions -- and, by the news accounts, they do so. (13)

A proposed new banking and finance law for Hainan also illustrates the problem. Essentially, the proposal would turn over to foreign private banks the power to participate in the accumulation and reinvestment of Hanoi’s investable surplus, leaving the government only indirect controls. In other Third World countries, these have failed to block an accelerated outflow of investable surplus in the form of scarce foreign exchange earnings. (14)

To implement the reforms, China must enact a great deal of new law. In the first instance, the reforms indicate the general headings for those laws: Patent law, trademark law, enterprise law, foreign investment law, and so forth. Each of these, has a form which permits China to accomplish the Reform without

12 [citation?]

13 See, e.g., CHINA DAILY, Dec. 5, 1988, p. 1, "Private Businesses create Millionaires".

14. See A. Seidman, Memorandum on a Proposal for a Model Financial System for Hainan.
letting in flies and mosquitoes -- or at least, not many. But each also has a form which would remove the screens entirely. In every case, China's lawyers must carefully assess the social and economic consequences of law, and find that form which maximizes China's national interest, always remembering that neo-colonialism and the development of a bureaucratic bourgeoisie are flies the size of elephants, and that they carry death-dealing stings.

CONCLUSION

Sociology of law considers how law relates to society. Law and Development studies the sociology of law in conditions of development. China's great reform movement demands huge quantities of new law, in practically every sphere of human endeavour. It obviously makes no sense to enact laws unless the lawmakers have a sound understanding of the law's probable consequences in the Chinese setting. All law has consequences that are time-and-place specific. That implies, first, that China cannot copy law from another country and expect to enjoy the same consequences attributed to the law there. Shenzhen may copy Hong Kong's laws. (15) That will only accidentally make Shenzhen another little dragon; it might as easily transform it into a near-basket case like the Ghana of today. China, like Shenzhen, must find its own legal solutions to its own problems.

China entered the penultimate decade of the twentieth

---------------

15 CHINA DAILY, October 21, 1988, p. 3, "New Law Way for Shenzhen".
century essentially free of the entanglements of neo-colonialism, and essentially free of an exploitative ruling class. Most of the other Third World countries, however, had not succeeded in escaping those traps. Their laws and institutions fostered the export of their surpluses, and their rule by an exploitative, money-mad, power-hungry bureaucratic bourgeoisie, which long since had abandoned the reality, and in some cases even the rhetoric of development. Underpinning those institutions lay the way these countries employed state power -- and that was defined by the legal order.

In 1979, China decided that in order to develop further, it must open the windows to the outside world. It had to move towards a socialist commodity society shaped by a socialist legal order. To do that, it required laws on many subjects. Those laws, however, come in different colors, sizes, shapes and styles. Which of those would advance the Reforms without miring China in the neo-colonialist swamp? Which would do so? That could only be discovered by empirical research -- mainly empirical reserach with respect to the Chinese circumstnaces, but guided and informed by experience and theory derived from experience the world around.

Premier Li Peng warned against flies and mosquitoes -- that is, potential dangers of the reforms. Lawyers primarily had the task of fashioning legal screens to admit the new fresh air of the Reforms, but also to exclude flies and mosquitoes. Only after a study of the proposed new laws in their social setting could
lawmakers fashion those legal screens. That called for a study of sociology of law and law and development.
NOTES AND QUESTIONS

1. The "Flies and Mosquitoes" article teaches that to solve any particular difficulty, laws come in many different varieties. It warns against using an inappropriate form of a law to solve a perceived difficulty. Review the Makgetla-Seidman reading and assess the use of theory as a possible guide in drafting laws appropriate to China's current reality.

2. If the Deng Xiaoping's "black cat-white cat" metaphor is construed to mean that so long as a law from some other socio-economic system in China would perform its primary task adequately, China need not worry about other harmful consequences ("flies and mosquitoes") that come along with it, does that metaphor (as so construed) contradict the central teaching of the Makgetla-Seidman article? Does it make sense to construe it in so broad a sense?

3. How might the Makgetla and Seidman article -- which directly concerns not Chinese but Southern African experience -- help a Chinese law-maker or drafter in deciding upon a particular law—for example, a new enterprise law? or a new patent law? or a new law concerning foreign private enterprise?
PART II.

CHINA'S PATENT LAW: A CASE STUDY

INTRODUCTION

Chapter III suggested that as their primary task, China's lawmakers must create an appropriate legal framework for the economic reforms, that is, a legal framework promoting a balanced national economy capable of ensuring increasingly productive employment opportunities and rising living standards for the people of China, all the while increasing their control over their own destinies.

As Seidman and Seidman argued in their "Flies and Mosquitoes" article, however, laws come in many sizes and shapes. For example, all three perspectives -- supply side/conservative law and economics; basic needs/liberal law and economics; and socialism/institutionalism -- would admit foreign private capital, but under very different conditions. It does not suffice to recommend that China adopt a law concerning foreign private investment. One must also specify what sort of investment law economic policy requires. It does not suffice to call for land tenure reform; one must specify what sort of new land tenure law economic policy requires.

This set of readings explores these notions with respect to China's 1985 Patent Law. The readings include, first, the law and associated regulations; second, some Chinese author's comments; third, a brief description of the international patent system; and, finally, an analysis of the dangers of some sorts of patent law to Third World countries seeking to acquire new technology to
enhance productivity.

The reader may wish to skim rapidly through China's Patent Law and Regulations, read more carefully the two general readings on the international patent system, and then review the Chinese law and Regulations, and the comments on them, in light of the issues raised by the questions posed at the end of this Part.
Chapter I

General Provisions

**Article 1** This Law is formulated in order to protect patent rights for invention-creations, encourage invention-creations and facilitate their popularization and application, promote the development of science and technology and meet the needs of socialist modernization.

**Article 2** For the purpose of this Law, “invention-creation” means inventions, utility models and designs.

**Article 3** The Patent Office of the People’s Republic of China shall accept and examine patent applications and grant patent rights for invention-creations that conform to the provisions of this Law.

**Article 6** For a job-related invention-creation made by any person in execution of the tasks of the unit to which he belongs or by primarily using the material resources of the unit, the right to apply for a patent shall belong to the unit. For an invention-creation that is not job-related, the right to apply for a patent shall belong to the inventor or designer. After an application is approved, if it was filed by a unit owned by the whole people, the patent right shall be held by such unit; if it was filed by a collectively owned unit or an individual, the patent right shall be owned by such unit or individual.

For a job-related invention-creation made by any staff member or worker of a foreign-owned enterprise or a Chinese-foreign equity joint venture within the territory of China, the right to apply for a patent shall belong to the enterprise or joint venture. For an invention-creation that is not job-related, the right to apply for a patent shall belong to the inventor or designer. After the application is approved, the patent right shall be owned by the enterprise, joint venture or individual that applied for it.

The owners and holders of patent rights are uniformly referred to herein as “patentees.”
Article 11 After the grant of the patent right for an invention or utility model, no unit or individual may, except as provided for in Article 14 of this Law, exploit the patent without the authorization of the patentee, that is, no unit or individual may manufacture, use or sell the patented product or use the patented process for production or business purposes.

After the grant of the patent right for a design, no unit or individual may exploit the patent without the authorization of the patentee, that is, no entity or individual may manufacture or sell products incorporating the patented design for production or business purposes.

Article 16 The unit owning or holding the patent right on a job-related invention-creation shall reward the inventor or designer and shall, upon exploitation of the patented invention-creation, reward the inventor or designer in accordance with the scope of its application and the economic benefits derived from it.

Article 17 An inventor or designer shall have the right to name himself as such in the patent document.

Article 18 If a foreigner, foreign enterprise or other foreign organization, having no regular residence or place of business in China files an application for a patent in China, the application shall be handled under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or any international treaty to which both countries are parties, or on the basis of the principle of reciprocity.

Chapter II

Conditions for the Grant of Patent Rights

Article 22 Any invention or utility model for which a patent right may be granted must possess the characteristics of novelty, inventiveness and usefulness.

"Novelty" means that, before the filing date of the application, no identical invention or utility model has been publicly disclosed in domestic or foreign publications or has been publicly used or made known to the public by any other means in the country, nor has any other person previously filed with the Patent Office an application describing an identical invention or utility model which was recorded in patent application documents published after the said date of filing.

"Inventiveness" means that, compared with the technology existing before the filing date of the application, the invention has prominent and substantive distinguishing features and represents a marked improvement, or the utility model possesses substantive distinguishing features and represents an improvement.

"Usefulness" means that the invention or utility model is manufactur-
able or usable and can produce positive results.

**Article 23** Any design for which a patent right may be granted must not be identical with or similar to any design which, before the filing date of the application, has been publicly disclosed in domestic or foreign publications or has been publicly used within the country.

**Article 24** Any invention-creation for which a patent is applied for shall not lose its novelty if, within six months before the filing date of the application, one of the following events has occurred:

1. it was exhibited for the first time at an international exhibition sponsored or recognized by the Chinese Government;
2. it was made public for the first time at a prescribed academic or technical conference; or
3. it was disclosed by any person without the consent of the applicant.

**Article 25** No patent right shall be granted for any of the following:

1. scientific discoveries;
2. rules and methods for mental activities;
3. methods for the diagnosis or treatment of diseases;
4. foods, beverages and condiments;
5. pharmaceutical products and substances obtained by means of a chemical process;
6. animal and plant varieties; and
7. substances obtained by means of nuclear fission.

For the processes used in the manufacture of the products listed in items (4) to (6) of the preceding paragraph, a patent right may be granted in accordance with the provisions of this Law.

* * *

**Chapter V**

**Term, Termination and Invalidation of Patent Rights**

**Article 45** The term of the patent right for inventions shall be 15 years, counted from the filing date of the application.

The term of the patent right for utility models or designs shall be five years, counted from the filing date of the application. Before the expiration of the said term, the patentee may apply for an extension of three years.

Where a patentee enjoys a right of priority, the term of the patent right shall be counted from the date on which the application was filed in China.

* * *
Chapter VI
Compulsory Licence for Exploitation of a Patent

Article 51 The patentee itself shall have the obligation to manufacture the patented product or use the patented process in China, or it shall authorize other persons to manufacture the patented product or use the patented process in China.

Article 52 If, three years after the date of the grant of a patent right, the patentee of an invention or utility model has failed, without any justified reason, to fulfil the obligation set forth in Article 51 of this Law, the Patent Office may, upon the request of a unit possessing the means to exploit the invention or utility model, grant a compulsory licence to exploit the patent.

Article 53 If a patented invention or utility model is technically more advanced than another invention or utility model that was patented earlier and the exploitation of the later invention or utility model is dependent on the exploitation of the earlier invention or utility model, the Patent Office may, upon the application of the later patentee, grant a compulsory licence to exploit the earlier invention or utility model.

If a compulsory licence has been granted in accordance with the provisions of the preceding paragraph, the Patent Office may, upon the application of the earlier patentee, also grant a compulsory licence to exploit the later invention or utility model.

Article 54 Any unit or individual applying for a compulsory licence in accordance with the provisions of this Law shall furnish proof that it or he has not been able to conclude a licensing contract on reasonable terms with the patentee.

Article 55 Any decision made by the Patent Office granting a compulsory licence shall be registered and publicly announced.

Article 56 Any unit or individual that is granted a compulsory licence shall not have an exclusive right to exploit the patent in question, nor shall it or he have the right to authorize exploitation of the patent by others.

Article 57 Any unit or individual that is granted a compulsory licence shall pay the patentee a reasonable exploitation fee. The amount of the fee shall be decided by both parties through consultation. If the parties fail to reach an agreement, the Patent Office shall make a ruling.

Article 58 If a patentee disagrees with the decision of the Patent Office granting a compulsory licence or with its ruling regarding the exploitation fee, it may, within three months from receiving notification of the decision, file suit in a people's court.
Comments on the Patent Law

Chen Muhua, State Councillor and President of the People’s Bank of China

The Chinese patent system combines distinctive Chinese features with prevailing international practice to play a positive role in implementing the policy of opening to the world and enlivening the domestic economy. It will contribute to the advancement of science, technology and the national economy, and will promote the rapid development of China’s foreign economic relations and trade.

The Chinese Patent Law stipulates that any foreign person or enterprise may file an application for a patent and be granted legal protection in China in accordance with any agreement concluded between the applicant’s country and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity. Thus, there is no reason for anyone to worry about their technology being disseminated in China without compensation, and they may feel at ease when selling high technology to China.

Of course, this will be beneficial to the development of joint ventures, co-operative management, co-exploitation and compensation trade. The enforcement of the patent law in China will likewise help Chinese inventors seeking patent protection abroad, thus making it possible for China to export more new products and technology.

Arpad Bogsch, Director General of the World Intellectual Property Organization

The Patent Law contains what seem to be the right solutions in substance and procedure. And it is very clearly drafted with an admirable economy of words.

The law establishes a reliable and detailed legal order in a field which is important for the confidence necessary for the international transfer of technology: Prospective sellers or licensors will enter into contractual relations more readily and under more favourable conditions for the Chinese, since they know that their rights for their inventions and industrial designs will not only be respected by their Chinese contracting partners but also by everybody else in China, by virtue of the Patent Law and with the guarantee of the courts.
Essentials of the Chinese Patent Law

by Hu Mingzheng, Advisor to the Patent Agency of CCPIT

The Patent Law of the People's Republic of China was adopted at the Fourth Session of the Standing Committee of the Sixth National People's Congress and promulgated by Chinese President Li Xiannian on March 12, 1984. It came into effect on April 1, 1985.

The Regulations on Implementing the Patent Law adopted on January 19, 1985 have established a modern patent system in China. This major reform is designed to encourage invention and creativity, advance science and technology and promote international technology exchanges to speed up China's socialist modernization programme.

The framers of China's Patent Law took into consideration the patent laws of other countries, related international conventions and the specific circumstances in China, trying to balance the interests of each.

Here I would like to outline its main provisions.

1) Granting patent rights for inventions, utility models and designs.

This is one point unique to China. The patent laws of most countries only provide for patent rights for inventions which include utility models. The patent laws of some countries, such as the United States, provide patent right for inventions and designs. Others such as Japan, offer protection for inventions, utility models and designs.

Because of the present level of science and technology in China and the special needs of our economic development, we particularly need to protect smaller inventions using somewhat simple technology. We also need to encourage improvements in industrial designs, and patent protection will do that. So, we grant patent rights simultaneously for inventions, utility models and designs which fall under the requirements of Chinese Patent Law.

The patent right for an invention lasts 15 years, and the patent right for a utility model or design lasts five years, with an option to renew for another three years. The procedures for examining and approving an application for a patent for utility model or design are relatively simple.
2) Accepting the principles of national treatment and right of priority.

These principles, as part of the Paris Convention have become general international practice. Accordingly, the Chinese Patent Law says that where any foreigner, foreign enterprise or other foreign organization with no habitual residence or business office in China applies for a patent, the application shall be treated in accordance with any agreement concluded between the applicant's country and China, or in accordance with any international treaty to which both countries are parties, or on the basis of the principle of reciprocity.

The law also says that where any foreign applicant applies for a patent in China within 12 months from the date of first filing for a patent for the same invention or utility model in another country, or within six months from the date of first filing for the same design patent, the applicant may enjoy a right of priority, in accordance with any mutual treaties, agreements or mutual recognition of the right of priority. This right means that the date on which the application was first filed outside China shall be considered the date of its filing in China.

Following these principles is part of China's policy of opening to the world on the basis of equality and mutual benefit.
Some Unique Features of the Chinese Patent Law

by Huang Kunyl, Director General of the Patent Office of China

The promulgation of the Patent Law of the People's Republic of China has been welcomed enthusiastically both at home and abroad. Last year in May the Chinese patent law, the world's youngest, and the Venice Acts of 1474, the world's oldest patent law, were shown together at an invention exhibition of the World Intellectual Property Organization.

The Chinese Patent Law has much in common with the many patent laws enacted in the 510 years since the Venice Acts. It follows the principles of the Paris Convention for the Protection of Industrial Property, which are commonly adhered to. In legislative form and procedure, the Chinese Patent Law also incorporates many of the best features of patent laws in other countries. But it also has some unique features of its own. They can be summed up in the following five points.

1) The basic theory behind the Law was formed by taking into consideration Marxist politics and economics and the specific conditions of socialist China.

In the past many patent laws were based on the idea that patent rights are natural rights, that is, that
invention is a mental achievement and therefore an inventor's right to a patent is inalienable. They were also based on a theory of industrial property which held that although patents and trademarks are intangible property they should be treated as tangible property, and a theory of contracts which said that a patent is a contract concluded between society and an inventor. Under the contract the inventor has the obligation to make his technology public by acquiring exclusive right to the invention.

These theories follow the ideas of bourgeois law. But in China we proceed from the idea that inventions and creations are the embodiment of the creative mental labour of inventors and creators. In many cases they are also the result of socialized mental labour. They have inherent value and use value, and may be viewed as wealth, or as a commodity. They demand compensation for value and exchange of information. As such, inventions must be protected under socialism.

Because production and exchange of commodities continue to exist under socialism, they should be broadened and developed. The patent system, born towards the end of the feudal age, developed in capitalist society and still flourishing under socialism, will help towards that end.

2) The main task of patent laws in capitalist countries is to regulate the relationship between the patent owner and the licensee. For the most part, this means it is co-ordinating relationships among capitalists, because inventors, who are employed by capitalists, are generally in a subordinate position.

But the Chinese Patent Law regulates the relationships of all three parties involved — the inventor-creator, the patentee and the licensee. Of all 69 articles under the Chinese Patent Law there are four articles concerning the inventor and creator.

3) Patent laws in capitalist countries, because they are based on private ownership, emphasize the exclusiveness and monopoly of patent rights. But the Chinese Patent Law, based on a diversified socialist economy, sets forth different provisions for patent rights according to different cases.

The second clause of Article 6 under the Patent Law provides: "For a service invention-creation made by any staff member or worker of a foreign enterprise, or of a Chinese-foreign joint venture enterprise, located in China, the right to apply for a patent belongs to the enterprise. For any non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the patent right shall be owned by the enterprise or the individual that applies for it."

The first clause of Article 6 under the Patent Law provides: "After the application is approved,... if it was filed by an entity under collective ownership or by an individual, the patent right shall be owned by the entity or individual."

While the patent rights of these entities and individuals are fully protected by the Law, Article 14 prescribes a licensing system by the state plan. In the case of a patent owned by a collective or an individual, the planned license is limited to patents deemed to be of great significance to the state or public interest, which must be spread and applied. Strict examination
and approval procedures are required so that this license power will not be abused. This makes it impossible to grant such licenses in large numbers. And the owner of the patent must still be compensated for its exploitation.

In the case of a patent belonging to an enterprise owned by the people as a whole, the people's governments directly above it or the State Council may decide that the invention or creation is important and allow designated units to exploit the patent. But even here, the patentee must be paid a fee.

The Chinese Patent Law stipulates that the patent right obtained by an entity owned by the people as a whole shall be treated as a right of property given by the state. This will help enlarge the decision-making powers of individual enterprises, because the State does not directly hold the patent right. Besides the compensation such an enterprise gets for compulsory licensing, it also has the right to license its patented technology elsewhere, including abroad.

Unlike some countries, the Chinese Patent Law does not contain a provision on state expropriation, and restricts both the extent and procedures of compulsory licenses. There are only two situations in which compulsory licensing may be enforced. The first is where the patentee fails to exploit or allow others to exploit the patent within three years. The second is where the exploitation of a patent depends on the ability to exploit an earlier patent.

The entity or individual who is granted a compulsory license must pay the patentee a reasonable fee, to be decided by mutual consultation or, failing that, adjudication by the Patent Office. The patentee who is not satisfied with the decision of the Patent Office may institute legal proceedings in the people’s court. These provisions show that the Chinese Patent Law provides adequate protection for patent owners.

4) In explaining what can be patented, the Law has attempted to give a scientific description of requirements to meet the needs of developing science and technology in China.

For which inventions or creations may patent protection be provided? This is a matter of how to recognize new inventions or creations using a scientific approach, and of how to protect them under appropriate principle and policy.

The Chinese Patent Law says that any invention or utility model must possess novelty, inventiveness and practical applicability in order to be patented. The provisions on novelty are the same as those in the patent laws of the United States and Japan. The ones on inventiveness and practical applicability do, however, have some differences from those in Europe and the Americas.

In those countries inventiveness is judged by what they call non-obviousness, that is, the invention is not obvious to a person skilled in the art. But under the Chinese Patent Law inventiveness is judged by the substantive features of the invention and by the progress it represents over the existing technology. Clearly, the Chinese Patent Law is designed to protect inventions which advance technology.

One of the important features of human labour is that it is an activity with a certain purpose. Invention
is also an activity the purpose of which is creative mental labour. The basic principle guiding the development of science and technology in China is to make them meet the needs of the economy; the ultimate goal is to achieve the four modernizations (of industry, agriculture, science and technology and defense — Tr.). The inventions-creations protected and encouraged by the Patent Law should focus on this ultimate goal.

Guided by this idea, the provisions on applicability stress practicability. That is, the invention "can not only be made or used but can produce effective results."

During a recent visit to France a professor who had been studying the Chinese Patent Law asked me to explain the meaning of effective results. I gave him an example. A tiny clock with a liquid crystal display, if installed in a ball point pen, is a utility model because the watch adds a new function to the pen and makes it more useful. This is what we mean by effective results. If the same device is installed in the heel of a shoe it is inconvenient and easily damaged, although such installation is feasible and does add a special function to the shoe. We would say this does not produce effective results.

The effectiveness of results should be measured by their usefulness to technology, the economy and society. Some inventions might increase energy consumption or cause serious pollution, and so we cannot necessarily call them effective, because they bring only negative results.

5) The most important objectives of patent protection in the Chinese Law are those utility models and industrial designs with widespread applications. The scope of protection is selective; chemical substances, for instance, are not protected at present. The Law also stresses enforcement of patents while taking application and use as its legislative objective.

In protecting patent rights, the Chinese Law offers the double security of administrative and judicial appeal.

All these features show that Chinese Patent Law has been developed to suit the specific political and economic needs of a developing socialist country.

Because problems are inevitable, the Law must be tested in practice and further developed in the future.
THE INTERNATIONAL PATENT SYSTEM

19. ... The international patent system may be regarded as that system which will give the legal protection of inventions which affects developing countries in their international transactions.

110. The rights deriving from patents and inventors' certificates are not absolute outside the jurisdiction of the country under whose laws they are granted. In the case of one agreement already in operation (the Libreville Agreement of 1962 between member States of OICAM) and two draft conventions currently in negotiation (conventions for a European system for the grant of patents and for a European patent for the Common Market), states granted by a single international authority have or are planned to have effect in more than one country. But these examples of advanced international co-operation do not constitute true exceptions to the general principle of the territoriality of patents: States retain the sovereign power to regulate the existence and nature of industrial property rights in their own territories and so far have accepted limitations on that power only in the context of wider arrangements for economic co-operation or integration with neighbouring countries at a comparable stage of development.

111. The 'international patent system' is in fact a system of accumulated practices rather than a set of fixed rules. It is the practice of international relations in the matter of the legal protection of inventions, resulting from and governed by both national legislation defining the treatment to be granted to foreigners and international treaties concerning such treatment. It should be emphasized that a country's laws defining the rights of foreigners form part of the international system even when, as in the case of several developing countries, the country is one of those which are party to no international treaty on the subject, for such laws form the basis upon which national practice is protected in more than one country.

112. The protection of the same invention in more than one country gives rise to substantial administrative and practical problems for the governmental authorities concerned and for the public; for example, the determination of the novelty of an invention requires recourse to a documentary base extending, by and large, some 50 years into the past and increasing at a current rate of over 900,000 patent documents a year in numerous languages.

113. ... Revision of the system is in fact a continuing process: each modification of national industrial property law affecting the inventions of foreigners, each negotiation leading towards new treaty relations or the improvement of existing ones and each activity of technical co-operation constitutes a step in the process of revision of the international system.


A. International treaties of world-wide application

1. The Paris Convention for the Protection of Industrial Property

115. The Paris Convention for the Protection of Industrial Property was adopted in 1883 and has been revised on several occasions, the latest revision having taken place at Stockholm in 1967. The Paris Convention establishes an International Union for the Protection of Industrial Property (Paris Union) of which, at the present time, 80 countries are members. The Paris Convention states that the protection of industrial property has as its object patents, utility models, industrial designs, trade-marks, service marks, trade names, indications of source or appellations of origin and the repression of unfair competition, specific reference being made, in the text revised at Stockholm, to inventors' certificates in the context of claiming priority.

117. The Paris Convention created an International Bureau, with tasks including liaison between the patent administrations of the countries of the Paris Union, the study of questions relating to industrial property, 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 WIPO.

2. The Convention Establishing the World Intellectual Property Organization

118. The Convention Establishing the World Intellectual Property Organization was adopted at Stockholm in 1967 by the same diplomatic conference as that by which the Paris Convention was most recently revised. The two objectives of the WIPO Convention are (a) to promote the protection of industrial property (including industrial property) throughout the world, and (b) to ensure administrative co-operation among the intergovernmental Unions established by international agreements for the promotion of industrial property (including the Paris Union and, for example, the Berne Union for the Protection of Literary and Artistic Works). The WIPO Convention contains no substantive treaty obligations concerning the national laws of member States in the field of intellectual property and is open to States that are not members of any of the Unions which WIPO administers.

119. The new organization is responsible, by virtue of its own Convention and of the revised Paris Convention, for the performance of the administrative tasks of the Paris Union; its secretariat is provided by its International Bureau, which acts as the successor to the previously separate International Bureau of the Paris Union. The Convention includes provision for a programme of legal-technical assistance to developing countries, within which the member States have established the 'WIPO permanent legal-technical programme for the acquisition by developing countries of technology related to industrial property', supervised by an intergovernmental Permanent Committee; the means of action concentrate on licensing, patent documentation and model provisions for national industrial property laws.
LEGAL ISSUES IN THE REVISION OF THE INTERNATIONAL PATENT SYSTEM

Constantine Vaitos

Introduction

After several decades of complacent and unquestioned acceptance, considerable attention has recently been paid by governments in developing countries as well as by international organizations to the possibility of revising the international patent system.

In all these efforts, the debate and possible conclusions to be reached on substantive issues relating to the political economy of patents might escape being translated into the corresponding legal provisions that are appropriate for developing countries. The content and wording of such provisions require careful analysis since the legal language involved need not reflect or achieve the policy objectives pursued through the revision of patent legislations. The subject matter of patents has remained a well-guarded bastion of legal initiative where adequate economic reasoning and political directives have generally been excluded.

The word system in the title of this article indicates the presence of a set of diverse considerations that relate to the privileges granted through patents. Such considerations include among other elements the following:

1. Legal principles and commitments contained in:
   a) the Paris Convention of 1883 and its amendments introduced through various subsequent conferences,
   b) the pertinent provisions on patents included in the Model Law for Developing Countries on Inventions which was drafted in 1964 by the organization presently known as WIPO.
2. Promotional activities related to the advancement and strengthening of the principles of the patent system as undertaken by WIPO and other specialized institutions and the influence that this had on national legislation and practices in the Third World.
3. Conceptual basis of the relevance of, and the repercussions on economic development of, the privileges granted through patents.

It is the integrated understanding of the various elements present in these three categories that can provide an appropriate basis for revising the patent system. [W]e will argue that the existing system of patents constitutes one of the international policy instruments that adversely affects the development prospects of the Third World. Indeed, it has been constructed so as to protect the interests of the patent holders, who in most cases, nowadays...

trolled by transnational enterprises in developing countries? There appear to be two principal reasons:

(a) They are used to preserve import markets in developing countries for the patent holders. Such import monopolies will tend to have adverse effects on the terms of trade of the importing countries. They also create monopoly conditions in forward-linked activities that use products (or processes) covered by patents. It is for this reason that any serious revision of the patent system needs to take into account the provisions on unworked patents (compulsory licences and forms of their application) and the issue of import monopolies as covered by patent privileges.

(b) Patents are used to exclude competitors, including other transnational enterprises, from investing in productive activities in developing countries and from using them as bases for exporting to the rest of the world. Such exports could take place, with varying degrees of difficulty, with or without patent protection in the rest of the world. The most convenient and effective form of erecting barriers to entry through patent protection against possible competitors appears to be at the production level rather than in the commercialization of the products involved. In this way the patent holder protects his interests at the source of production where the know-how used can be more easily verified (in case of presumed infringement) and where the investment risks from adverse court decisions for the competitors could be the highest.

Legal Principles of the Paris Convention

The Paris Convention has 81 members of which more than half are developing countries. There are 60 other developing countries which are not members. Among the latter are included those that have followed the more innovative approaches to patent legislation, like India and the Andean Pact countries. Yet, even among non-members, the Convention has exercised a profound influence. With a few exceptions most national laws in the Third World have by and large included the Convention's key provisions.

The principal rules of the Paris Convention can be distinguished under four categories, according to certain criteria which include (a) the parties to whom the articles of the Convention refer (i.e., states or private parties); (b) the type of legal structure that regulates the relationships involved (i.e., international public law or substantive law in the field of the privileges granted); and (c) the type of requirements that are necessary for the domestic legislations of a member country to apply the principles and rules of the Paris Convention (e.g., 'self-executing' or provisions that require prior appropriate national legislative procedures).

An important additional consideration should be mentioned here. The Paris Convention abstains from specifying the criteria applied and the obligations to be assumed by the signatory countries in four fundamental areas of patent legislation. These areas include: (a) the criteria of patentability, (b) the specific areas or sectors of productive activity where products or processes are or are not patentable, (c) the duration of protection, and (d) the content of certain privileges granted through patent protection (i.e., whether exclusive privileges are granted to production, imports, selling, reselling, storing for the purpose of selling, etc.). These omissions from and the resulting vagueness of the Paris Convention introduce a certain degree of flexibility which reduces the risk of continuous conflicts between changing national legislations and the Convention. It is precisely in these areas that other elements of the patent system have a definite repercussion on the industrial 'property' legislation of developing countries. The latter, often lacking appropriate expertise and knowledge, introduce inappropriate commitments in their national legislations, thus complementing the areas where the Convention remains silent. In other fundamental issues, though, (i.e., compulsory licenses, national treatment of foreign patent holders, priority rights, etc.), the Paris Convention is very rigid and thorough in setting specific commitments upon the signatory parties. It is in these areas that revision of the Convention should be proposed.

We proceed to analyse in some detail the most important of the above-listed principles and provisions by commencing with the four categories into which one can group the rules that correspond to the Paris Convention.

These four categories are:

1. Provisions of substantive law. The most important case in this category refers to the principles of 'national treatment' by which countries have to apply the same treatment to nationals of other (member) states as they give to their own nationals on patent protection. This principle constitutes one of the cornerstones of the present patent system. In effect, the national treatment principle does not permit countries to discriminate between patent holders although the latter can and do apply discriminatory practices between patent granting countries as a result of the monopoly privileges granted through patents. The application of Article 2 of the Convention is in harmony with the interests of developing countries.

There are two main reasons for the lack of congruence of this principle with the interests of developing countries. First, practically all patents granted by developed countries are foreign-owned. Thus, the principle of national treatment extends the 'needs' for protection of a relatively small number of national patent holders in developed countries to the foreign-owned ones who constitute the main, if not the exclusive, base of the economically relevant patents in the Third World. Secondly, the majority of patents owned by nationals in developing countries correspond ... to individual inventors, while the foreign-owned ones involve basically the transnational enterprises. The needs for protection of and inducement of inventive and investment activities between the two are obviously quite distinct. Equal treatment of unequals is a questionable principle.
Countries, both developed and developing, often introduce quite distinct treatment and regulations applying to economic activities of foreigners and nationals. This is quite different from the equal treatment usually provided by law for most or all of the civil rights and guarantees as distinct from political rights. For example, in the case of trade, tariffs differentiate between foreign and nationally produced goods. Similar distinctions exist in investment activities and capital flows, currency regulations, technology contracts, etc. Why not then in patents?

There appear to be three practical reasons. First, there is a legal one. Subsidiaries of foreign firms incorporated in a country have a national legal personality, even if they are wholly foreign-owned. Thus, patents can be registered in the name of a subsidiary to avoid discriminatory treatment between foreign and national entities.

Secondly, there is a constitutional issue. Various constitutions in developing countries, like that of the Republic of Colombia, explicitly grant the same treatment to foreign patent holders as they do to nationals. Hence, a revision of the patent system on this issue might necessitate a prior constitutional revision in certain countries, an act which will introduce difficulties of a higher order.

Thirdly, there are the possible political considerations arising from such 'anti-internationalist' behaviour. Also retaliatory acts in other areas, such trade, might be imposed by the affected developed countries. In conclusion, although a revision of the 'national treatment' provisions of the present patent system might be wholly justifiable, its pursuit is not advisable.

Despite this reservation, a worthwhile alternative strategy can be followed by developing countries. This alternative shifts the basis of concern and of status from the level of the patent owners to that of patents. As such, foreigners and nationals would be accorded the same treatment, thus avoiding questions of discrimination according to nationality. Yet, patents covering know-how which was developed locally (by nationals or foreigners alike) could be treated differently from patents covering technological advances realized in the rest of the world.

According to this alternative policy, the substantive issues concerning the interests of developing countries can be safeguarded while preserving equal treatment among patent holders. The basis of the differential treatment rests on the geographical origin of the technology rather than the origin of the inventor. An exactly similar approach is followed in trade relations between countries through the application of tariffs.

2. 'Self-executing' provisions. The provisions are of critical importance, since their applicability is mandatory, either through their 'self-executing' character or, in cases where there exist constitutional constraints on such automatic application, through the requirement imposed on national legislation to incorporate them in their body of national laws. Of these provisions, the key ones on which efforts should concentrate to achieve substantial revision are the following two: (i) Section A of Article 5 of the Paris Convention which deals with compulsory licences for non-worked patents, forfeiture requirements and related issues, and (ii) Article Squater of the Paris Convention which equates privileges granted to patented processes, that have been used in the rest of the world to manufacture products imported by a country, with those privileges granted to domestically-used processes for the production of the corresponding goods.

The importance of this set of provisions rests on the previously stated fundamental issue about patents in developing countries: practically all of these patents are never directly exploited in the developing countries, in the sense that the know-how covered is itself not used in productive activities taking place within their national boundaries. As a result, when we deal with the issues of non-worked patents and of imported products covered by such patents we are dealing, practically, with the whole issue of patent protection in developing countries. The relevant sections of the Paris Convention...
... rests with the patentee and not with other parties or with the public in general that might have legitimate interests in the grant of compulsory licences.

The long delays in obtaining compulsory licences, the costs of litigation, and the production uncertainties, all have to be seen in the context of developing countries’ firms confronting transnational enterprises. The former, even after obtaining a patent licence, might still depend on the latter for the technology to exploit it and for the brand name to sell the resulting product. Also, cross-licensing arrangements and market segmentation limit the possibility of competitive behaviour between transnational enterprises especially in view of the multiple steps and uncertainties involved in obtaining compulsory licences.

The other key paragraph of Section A of Article 5 is the third one, which is also mandatory and refers to the issue of forfeiture due to non-working. According to this paragraph, forfeiture of a patent is a subsidiary measure only after one or more compulsory licences have been granted and have been proved insufficient to prevent the non-working of a patent. The minimum time requirement for forfeiture is two years after the grant of the first compulsory licence and after adequate proof, in the courts or otherwise, of the insufficiency of such a licence to correct the abuses involved. The period can be extended either with new compulsory licences or in view of ‘legitimate’ reasons presented by the patent holder.

Thus, forfeiture for non-working could effectively take place, if ever, only after the ninth or more years from the time of the patent application given the considerations presented above. The long delays, particularly in obtaining a decision through the courts, could imply that forfeiture is obtained only after the end of the life of a patent.

Furthermore, the absence of compulsory licences, as contrasted to the thousands of non-worked patents in developing countries, will ensure, according to the Paris Convention, the absence of forfeiture...

Section A of Article 5 of the Paris Convention includes two more paragraphs that refer to patents. Paragraph 2 is the only one which is not mandatory and thus does not fit into the category of ‘self-executing’ provisions. It leaves optional for each country the decision whether or not compulsory licensing provisions will be applied. If a country, though, introduces such licences, they will have to respect the minimum time element present in Paragraph 4, which is mandatory. It is of interest to contrast the vagueness of this paragraph with others in the Paris Convention that refer to the privileges enjoyed by a patent applicant or patent holder. In the latter case, the Paris Convention demonstrates a high degree of thoroughness and meticulousness in its content... for example, in the provision for establishing priority rights. Yet, in Article 5, Section A, Paragraphs 2 and 4, which are supposed to impose certain limits to the privileges of patent holders on account of third party interests, or of the public interest in general, no reference is made as to the requirements and procedures for determining failure to work. Also, no reference is made to the important issue of burden of proof for the failure to work.

Finally, Paragraph 1 of Section A specifies in a mandatory manner that importation of patented products by the patentee in any of the countries of the Union shall not in itself entail forfeiture of the patent. This principle terminated a heated debate on the fundamental issue of importation of patented products. It gives the impression of being narrowly worded. Yet, its relevance needs to be seen in the context of the other paragraphs of Section A, Article 5, that were examined previously, as well as in connection to Article Squater to which we now turn.

Article Squater is a key one for developing countries, since it deals with aspects of the issue of importation. Furthermore, it is the article in the Paris Convention which comes the closest to the content of the patent privileges themselves, although the precise definition of such privileges is not included in the Convention. It deals only with imported products that have been produced by patented processes and does not cover imported patented products in general. One can guess that the interests behind this article and the ones that, perhaps, promoted its introduction are those of the chemical-pharmaceutical industries.

Article Squater... [in effect, ... concludes that, when a country grants to a product (which is manufactured locally by a patented process) privileges with respect to its sale and use, then the same privileges will be extended to the patentee against any imported product manufactured by the patented process. As a result, under such a system, importation by another party without a licence granted by the patentee will constitute an infringement, whether or not local production exists in the importing country. The outcome of this situation is a complete monopoly for the patentee in countries whose legislation grants not only production but also sale and use privileges to products manufactured by a patented process. Since practically none of the patents are worked within the territory of developing countries, Article Squater entails the acceptance of the import monopoly if sale and use privileges are present in their national legislation. It is also of interest to note that such a monopoly is assured even if the process in question is not patented in the exporting country.

Two other provisions on patents of the Paris Convention fall into the category of ‘self-executing principles’... The first refers to the issue of priority (Article 4) while the second deals with the independence of patents (Article 4bis).

In the original text of the Paris Convention the priority period for patents was six months. Subsequent ‘Revision Conferences’ extended its duration to one year. During this period the Convention achieved a form of territorial unification with respect to patent protection in its member countries. Furthermore, as a result of the principle of independence of patents, established by Article 4bis, the duration of the life of a particular patent for which priority privileges are claimed will be equal to the time that would have applied had priority not been claimed. Thus, the combination of priority privileges and independence of patents extends the effective period of patent protection and the periods for the application of the compulsory licensing provisions, as well as those of forfeiture for non-working treated earlier. Finally, through Section F of Article 4 of the Convention, chains of interrelated inventions for which patent applications are submitted can enhance
priority rights for a particular area of production through sequential applications over time.

The Paris Convention specifies with great care and legal detail all the relevant issues concerning the establishment of priority privileges, thus safeguarding the interests of the patent applicants. This contrasts with the rather farcical manner by which the Convention treats the public interest as affected by patents.

Obviously, the priority privilege is of considerable importance to patent applicants in view of the costs and, often, because of the physical impossibility of applying simultaneously around the globe. Also, without the priority privilege, the non-simultaneous application for a patent might nullify subsequent patent privileges in countries that accept the 'absolute' rather than the 'relative' novelty criterion for patent granting. Even with the existence of the priority privilege, efforts have been recently undertaken to enhance the territorial unification of patent protection. Thus, an attack on the priority privilege by developing countries could be a useful bargaining instrument for the purpose of modifying and introducing other elements in the Paris Convention that could improve its content.

Article 4bis refers to the independence obtained for the same invention in various countries. It presents an interesting contrast with the previously stated Section of Article 4 which, through the priority privilege, created a dependence of countries with respect to patents. Both provisions are consistent with the over-all philosophy of the Convention in protecting the interests of patent holders.

According to Article 4bis patents which could be nullified or forfeited in one member country—due to lack of novelty or for other reasons—will still be valid in another country if the latter does not undertake actions similar to those of the former. Thus, the principle of 'union' in the Convention is restricted if provisions of extraterritoriality might work against the interests of patentees.

An alternative way of viewing the principle of independence of patents and which might be worth pursuing in a revision of the existing system could include the following provisions:

(i) acceptance of the principle in the granting of patents (i.e., each country establishes its own criteria and procedures for granting patents);

(ii) non-acceptance of the principle and cancellation of a patent granted in a country if it is adequately proved in another (e.g., the country where the application was first made) that the patent in question was 'fraudulently procured' by not fulfilling the requirement of novelty. This alternative formulation becomes particularly relevant if it is taken into account that some countries, whose nationals control a large proportion of the patents held in the world (like the USA), require that their nationals first file applications in their country of origin.

The second provision might be of particular relevance to developing countries which lack sufficient expertise to thoroughly examine patent applications and thus tend to grant patents in a rather loose manner. The following example indicates the repercussions of the presently accepted principle of independence. At the beginning of 1970, the United States Justice Department offered cancellation of the 'fraudulently procured' ampicillin patent and the invalidation of ampicillin trihydrate patents. The 1968 worldwide sales of this semisynthetic penicillin for only one company and its licensees were approximately $170 million. Patents for ampicillin were taken in more than 60 countries. Despite the action taken by the US government, the Patent Offices of other countries continued to grant monopoly privileges to the 'fraudulently procured' patents.

3. International public law provisions. In this category two articles that merit revision in the Paris Convention are No. 26 referring to the denunciation of the Convention by a subscribing country, and No. 19, giving primacy to the Paris Convention over other agreements that might be signed by member countries in the areas covered by the Convention.

In the case of Article 26, the right of denunciation, as established by Paragraph 4, shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Paris Union. This provision was added in the Revision Conference of Stockholm in 1967 in order to prevent hasty decisions, as to the denunciation of the Convention by States which have not had sufficient time to evaluate their experience within the Convention.

This is a provision which is directed basically at developing countries and their relations with the Convention. It was in the 1960s that developing countries, to a great extent through the inducement and activities of WIPO, started becoming members of the Paris Convention in large numbers, while most of the developed ones have participated since the beginning of the century.

The reasons that prompted the adherence of developing countries to the Convention are quite diverse. In some cases, régimes with strong links with foreign interests committed their countries to the Convention... In other instances, lack of proper understanding of the patent issue prompted foreign advice, as in the case of some African countries where WIPO offered its services, leading to the acceptance of the Paris Convention. It also led to the incorporation of the totally inappropriate provisions of the Model Law into national legislations. Other factors in its adoption include domestic vested interests (basically from the legal profession), ignorance and foreign pressure...

The Convention limits its interests to the 'hasty' decision of countries in denouncing it and not the manner by which states adhere to it. In addition to the five-year period stated above, Article 26, Paragraph 3 specifies that the denunciation of the Convention by a Member Country shall take effect only one year after the date upon which the Director General of WIPO has received the corresponding notification. This time can obviously be used for bringing pressure to bear on a country to reverse the decision of denunciation. Revision of Article 26 should, thus, be undertaken by eliminating Paragraphs 3 and 4 from the Convention. Denunciation should take place without the previously discussed time constraints.

Article 19 of the Convention, as it presently stands after the Stockholm Act of 1967, gives primacy to the Paris Convention by stipulating that member countries should abstain from entering between themselves into separate agreements which contravene the provisions of the Paris Union. It is not clear under Article 19 whether two or more member countries can
enter jointly with non-member states into agreements whose provisions might contravene those of the Convention. Such alternative arrangements might include agreements between member countries in their joint participation with non-member states and thus be limited by Article 19. Taking into account that the majority of the developing countries are not members of the Paris Convention such limitations might restrict the scope of co-operation among Third World countries. Furthermore, the objections raised above indicate the special need for developing countries to promote the revision of the Paris Convention and thus foster their economic development. If this will not prove to be possible in key articles (like Article 5) in view of the present structure of the Convention and the orientation of the industrialized member countries, then there could be a need for introducing alternative schemes. The latter might necessitate special agreements between developing countries which in turn might be limited by Article 19. In conclusion, Article 19 should be removed from the Paris Convention.

4. Some additional considerations on the Paris Convention. There exist two formal issues on the revision of the Paris Convention which will be mentioned very briefly in the present article although they raise important legal considerations. The first relates to the fact that the Paris Convention is not homogeneous but includes a series of Conventions (called "Acts") that have been incorporated in the original text of 1883 through periodic revisions. Although all such Revision Conferences "constitute and maintain one and the same Union" and despite the requirements imposed on states according to the most recent Act of the Convention (as established by Article 27 of the Stockholm Act), developing country members are involved in no fewer than 10 different types of arrangements, regarding the substantive provisions of the Convention, with other member states. This is so since a member country is bound only by the particular Acts it has ratified. Since the relations and obligations of each member country of the Paris Union with respect to other members are governed by different sets of rules, the revision of the Paris Convention implies distinct legal requirements and considerations for each one of them.

The second important procedural issue that needs to be mentioned is that of the voting mechanism by which a revision of the Convention can be achieved. It is noteworthy that the Paris Convention remains unclear as to the modalities of its own revision if diverging positions are held among the member states. Developing countries presently hold an absolute majority of the existing membership. Yet, is this a guarantee of their influence on the content of legal provisions? The agenda of the WIPO-organized meeting of the Ad Hoc Group of Governmental Experts on the Revision of the Paris Convention, held in February 1975, included a discussion on the "unanimity rule." The latter implies veto power by each one of the member countries. Obviously this whole issue is a negotiable matter. If the unanimity rule is pressed by the industrialized countries, interested developing countries can form a separate Convention and then seek arrangements for linking the two. Such an alternative formation could (a) bring, at least initially, instability in the whole "industrial property" system, (b) introduce a much more radical position on patents and trademarks for the Third World countries than would have occurred under an "orderly" revision of the Paris Convention, and (c) push some relatively small industrialized countries closer to the Third World position since the former might confront similar problems on patents as the latter. These outcomes will certainly not be of interest to the larger industrialized countries who might thus seek accommodation within a serious revision of the Paris Convention.

A final comment needs to be made about the present content of the Paris Convention. Its text lacks a preamble that defines the objectives of the protection granted through industrial "property" instruments and/or the specific provisions of the Convention. Its only reference as to overall objectives appears in Article 1, Paragraph 1, which states: "The countries to which this Convention applies constitute a Union for the protection of industrial property." This aim is consistent with the rest of the text of the Convention. A revision of the Paris Convention should explicitly include in a preamble as well as in its articles the overall concern for the public interest. Additional provisions should also be included covering the developmental needs of Third World countries.

Concluding Remarks and Some Further Recommendations

The provisions contained in the Paris Convention . . . neglect two issues of fundamental importance for patent policy in developing countries:

First, they do not distinguish between the "need" to protect inventive activity (if such protection is needed and if it is socially beneficial) and the oligopoly power exercised by transnational enterprises in the world market. In the latter case certain "rules of the game" operate. They are imposed through overall political and business considerations and/or they are translated into contractual arrangements in the sale and purchase of technology. In their strategy on patents developing countries should concentrate on considerations of the technology market rather than accept provisions that reinforce the oligopoly position of transnational enterprises. . . . Secondly, existing patent provisions do not confront adequately the fundamental link between patent protection and imports of the corresponding products in developing countries. Protection of imports should be handled through the commercial policy of a country rather than through patents.

A revision of the patent system should, thus, concentrate its priorities on the above two issues. In terms of the Paris Convention, the key article to be changed is Article 5. In particular Section A of Article 5 should be fundamentally altered to include the following provisions:

1. Establishment of an "automatic compulsory licence of right" immediately from the time of the grant of a patent with complementary provisions to cover the period between patent application and patent grant. Such a provision will eliminate the monopoly element of patents through non-exclusivity. Patents will offer, instead, a rent through the royalties paid for the automatic compulsory licence of right and thus meet certain "rules of the game" of the technology market. The latter cannot be changed unilaterally by developing countries.

2. Establishment that the burden of proof for the exploitation of patents should rest with the patentee and make forfeiture automatic if such proof is not provided within a certain period of time.
(3) Elimination of Article "quater" from the Convention in order to avoid any imposition of patents on imports.

In addition to the above issues there is need to introduce changes in the articles of the Convention that cover the issue of national treatment (by placing the emphasis on differential treatment on patents rather than on their owners), priority privileges (as a negotiating element), independence of patents and the denunciation provisions (according to the terms discussed above). Furthermore, adherence to the Paris Convention should not condition or be an obstacle in the promotion of special international agreements covering patent legislation in developing countries.

Finally, at the national level, efforts should be made to introduce in domestic legislation the following principles, which are not covered by the Paris Convention:

1. The criterion of 'contribution to economic development' as a prerequisite for patentability.
2. Limitation of patent privileges to local production and explicit exclusion from imports.
3. Introduction of various areas or sectors where patents cannot be granted.
4. Acceptance that the burden of proof rests with the patentee in the diverse conflicts or disputes that might arise in the administration of the patent system; and,
5. Establishment of administrative, rather than judicial, procedures in the application and management of most of the provisions of the patent legislation.

The efforts undertaken for a serious revision of the international patent system which will be in congruence with the development objectives of the Third World necessitate, as an integral part of the legal changes, the presence of an additional factor. The latter concerns the establishment of a body of specialized expertise, distinct to those of WIPO, who can advise developing countries on these matters and serve as a permanent observer of the evolution and performance of the patent system in the international economy.
NOTES AND QUESTIONS

1. Consider the following two difficulties. State how the Patent Law apparently (implicitly) explains them, and its proposed solution for them:

   a. Relatively low level of invention inside China.
   b. Relatively low level of technology available within China, compared with developed countries.

   Is it likely that the explanation and solution for the first problem will be the same as for the second one? Does the Patent Law attempt the same solution for both? If it does, by what mechanism does it do so? What does Vaitsoos state about that mechanism? Can you see problems for China in the use of that mechanism?

2. No State can by the law's command require people to invent. It can induce them to devote more resources to research and development ("R. & D"). To induce greater Chinese R. & D. expenditures, what devices does the Patent Law adopt? Do you think it likely that in China's situation, promising inventors a patent monopoly will induce greater R. & D. expenditure? (For example, is the constraint on increasing R. & D. activity, the absence of incentives to invest in R. & D. activities, the absence of capital to finance the large start-up costs for R. & D., the absence of income sufficiently large to finance R. & D., the absence of adequate trained manpower, or the absence of adequate laboratories and libraries?) Which of these several possible explanations for inadequate R. & D. does the Patent Law address?

3. Consider the Patent Law in light of the readings in Part A
of this Chapter. How would these authors critique the Patent Law and the Regulations?

4. Huang Kunyi, Director General of the Patent Office of China, defends the Patent Law as in conformity with Marxist thought. To what extent do you agree or disagree with his position? Why?

Note that Mr Huang defends the Patent Law entirely in terms of its consequences for invention within China. Do these arguments hold for the Patent Law's national treatment of foreign patents?

(Note that the Patent Law incorporates national treatment of foreigners in Article 18) Most cases will fall under the last clause of Article 18, that is, "on the basis of the principle of reciprocity". That means that if the foreign country treats Chinese inventors in the same way it treats nationals, China will treat inventions from those countries in the same way that it treats Chinese inventors -- i.e., it will give the invention "national treatment". In practice, if the United States gives Chinese inventors national treatment, China must give U.S. inventors national treatment here. Who would you guess benefits more from national treatment -- U.S. inventors or Chinese inventors? The United States does not permit its own inventors (or foreigners) to patent many inventions that China's Patent Law would patent. The U.S. law requires much higher standard of inventiveness than the Chinese law, and it does not permit the patenting of utility models, which Chinese law does permit. Should "reciprocal treatment" imply that China should permit U.S. citizens to patent in China inventions, designs and utility models they could not patent in the United States? What
consequences for China might flow from that?

4. Critique the Patent Law from Vaitos's perspective. Do you agree with that perspective?

5. Japan had no patent law for many years. Like Taiwan, Hong Kong, and other "little dragons" of development, Japan developed its technology by copying the technology of other countries, without paying for it. Like Hong Kong and Taiwan today, for many years Japan copied inventions, utility models and designs from other countries with impunity— and developed swiftly. Is there a reason why China should not adopt the same strategy? Does the Patent Law make that strategy impossible?

6. Arpad Bogsch, Director General of WIPO, states that the Patent Law will establish the confidence necessary for international transfer of technology. To do China much good, however, technology transfer requires more than sending into China little black boxes to which Chinese workers merely hook up wires to a terminal. The technology must be unpacked, and Chinese workers must learn how to repair, to make and ultimately to design in the technology. If as a drafter you received instructions to design a law that would facilitate technology transfer in that sense, what provisions would you include? Critique the Chinese Patent Law from the perspective of the international transfer of technology.

7. What alternative strategies for increasing invention in China might you suggest, either in conjunction with or as an alternative to the Patent Law?

8. Most patented technologies are sold on the open market in the
developed world. Unless also patented in China, a Chinese purchaser can buy it there, and (in most cases) ship it to China for use and manufacture there. Does the Chinese patent law serve in any sense as an incentive to foreign firms to transfer technology to China in such cases? Is the patent protection here a pure gift without any compensation for China? In some cases, no doubt, a foreign firm will not disclose technology to a Chinese buyer without patent protection in China. Could you write a patent law to address that specific issue, without granting general national treatment in all cases?

9. Consider the compulsory licensing provisions of the Chinese Patent law. How would Viatsos criticize them? How might you amend the law to meet Viatsos's critique?

10. Every patent involves an enormous cost to society, for it grants a monopoly for the duration of the patent -- and in either a planned or a market economy, that means that the best practice will not spread through the economy for the duration of the patent, leading to monopoly prices and scarcity. Can you think of an alternative device to reward invention, besides granting a patent monopoly?

11. Good theory ought to instruct the investigator where to look for useful information. Reconsider the theoretical articles in this and the preceding Chapter. For what do those articles advise a drafter to look when making an investigation concerning a law that addresses closely issues of development? In connection with patent law, to what issues would these direct attention -- even if you had not read the Viatsos article?