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Patents.

Patent opportunism

India's trailblazing balance of patent law and necessary access falls foul of an IP index released by US companies

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THE Global Intellectual Property Centre's (GIPC) International IP Index is an indicator of the shape of things to come. Released earlier this year, the Index notes India as having the "weakest" IP environment on the list of 25 carefully chosen countries that figure in the index. As an affiliate of the US Chamber of Commerce, the GIPC does an impressive job of singing the old tune of the deteriorating standards of India's "IPness" — the state of intellectual property protection. The index was critically timed to appear before the GIPC appeared in the Special 301 public hearing before the US Trade Representative (USTR) on February 24. That the GIPC and the US Chamber of Commerce urged the USTR to designate India as a Priority Foreign Country was surprising as the index, though explicit in ranking India at the bottom, makes no mention of whether India is deserving of such designation.

The GIPC Index is an opportune forerunner to the mother of all indices, the Special 301 — the annual naming, faming and shaming exercise of the USTR where the US tells the world what their level of intellectual property protection should be. Every year, the USTR releases the Special 301 reviewing the global state of intellectual property rights protection and enforcement. The exercise involves categorising countries based on their IPness. The good ones are praised and commended for strengthening their IP regime. The not so good ones are put either on the "Watch List" or the "Priority Watch List", indicating that particular problems exist in those countries with respect to IPR protection, enforcement or market access for persons relying on IPR. The really bad ones are named as "Priority Foreign Country" for having "the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on the relevant US products". India has been at the receiving end for uniquely incorporating a remarkable array of TRIPS flexibilities into its patent law, which includes higher standards of patentability, a pre-grant challenge mechanism for patents and a robust compulsory licensing regime. Since becoming a member of the WTO, India has never been categorised as a Priority Foreign Country. The GIPC's push in urging the USTR to designate India as a Priority Foreign Country has more to do with what is happening outside India than within it.

Based on some OECD models, the GIPC Index makes a causal link between the level of protection for IP in a country and the level of foreign direct investment (FDI) and hypothesises that a 1 per cent change in the strength of a country's IP rights environment, as measured by patent rights, may be associated with a 2.8 per cent increase in FDI inflows. The index implicitly makes a case that weaker levels of protection for IP would mean lesser rates of FDI. The index fairly notes that this finding may not be universally applicable as one of the quoted studies notes that IP rights are only one of the factors required for the potential increase of FDI in developing countries. There could be other factors that can attract FDI even if the country offers the worst level of IP protection. India is a case in point.

Widely regarded as the poster-child for victimisation by India's patent regime, Novartis has reiterated, after each defeat it suffered in Indian courts, that it will not invest in R&D in India. After a decade-long court battle that culminated with the Supreme Court's decision against its drug Glivec, Novartis may be right in expressing its angst about not investing in India, given its weak IP regime. However, despite the setbacks it has faced in India, Novartis recently decided to expand its operations in Hyderabad and increase its investment in India with a new pharmaceutical development centre. The move by Novartis is one of the biggest investments in office space in Hyderabad that will have the capacity to have more than 8,000 employees. Apart from the investments made, a significant portion of 4,000 jobs, which Novartis plans to cut in Europe, is expected to come to India. The CEO of Novartis remarked that Hyderabad's highly educated labour pool, with extensive pharmaceutical experience, was one of the reasons for moving to India. India's low-wage labour market seems to have attracted Novartis, overlooking the level of IP protection. If the Novartis example is anything to go by, countries can rest assured that the level of IP protection has nothing to do with FDI and job creation.

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Scorecards can sometimes say more than what meets the eye. The GIPC Index does not stop with suggestions to improve India's deteriorating IP regime. It cautions countries on treading the path taken by India. While noting that the five BRICS economies (Brazil, Russia, India, China and South Africa) continue to face serious challenges, the index mentions that Brazil has made limited progress since the first GIPC Index in 2012 and observes that many of the challenges "that were in 2012 have been supplemented by potential new ones, most notably in the form of a patent reform initiative that appears to emulate the negative experiences from India." The principal cause of this exercise and the follow-up representation before the USTR to designate India as a Priority Foreign Country appears to be directed towards putting an end to the leadership role played by India in devising an alternative TRIPS (Trade-Related Aspects of Intellectual Property Rights) compliant patent regime. No country has incorporated the flexibilities offered by the TRIPS like India, which has set the tone by fine-tuning its patent laws to suit its development needs. The Indian example offers to other countries a legitimate way of complying with the TRIPS agreement — what can now be called the alternative model of patent law, in stark contrast to the dominant model of patent law propagated by the US. Not surprisingly, countries like the Philippines, Brazil and South Africa have either emulated or strongly favour following India's path.

In a world devoid of alternative approaches to protecting intellectual property and promoting access to inventions, India's path is refreshingly fresh and balanced. The GIPC Index is an effort to silence India's resistance to the one-size-fits-all patent regime that masquerades in the garb of promoting innovation and creativity.

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