Interview No.12

The patent systems are thus different between India and Japan (1)

Substance patent which concerns national interests

【2010/12/08】

For the Japanese manufacturers to survive, it can be no longer avoidable to advance into developing countries. Especially India, as well as China, is highly likely to become an important industrial stronghold. However, the Indian patent system that is essential to protect and exploit intellectual property rights in India is not well known in Japan. Mr. Vinit Bapat, an Indian Patent Attorney familiar with patent affairs in India, Japan, and the United States, and Mr. Masakazu Ito, a Patent Attorney and the President of Miyoshi & Miyoshi, talked about differences between the Indian and Japanese patent systems.

Attendees:
Mr. Vinit Bapat, Indian Patent Attorney, Representative Director of Sangam IP; and
Mr. Masakazu Ito, Patent Attorney, President of Miyoshi & Miyoshi.

Ito: In the intellectual property protection policy in a developing country, it is important how to balance between evoking the willingness to invest from foreign countries and the national interests. I feel it when reading grounds for considering an invention unpatentable in the Indian patent system. In Japan, too, the substance patent was not recognized, because it was feared to damage our national interests.

Bapat: It was 1995 that India began to accept applications for substance patents. However, the actual examinations were not started until 2005. During the 10 years from 1995 to 2005, it was generally considered that patents should be placed "in a black box."

Ito: I think that exclusion of especially the substance patent is due to a strong feeling toward protecting the national interests. The substance patent is a monopoly of the substance itself. It is difficult to take alternative means such as in the cases of machines and electric circuits. For example, in a case where a substance as defined by a chemical formula has a patent right, a third person is unable to use the substance defined by the chemical formula without a license. It is because of this that drug manufacturers are sensitive to substance patents.

Bapat: In fact, up to 1970, the substance patents were recognized in India, too. However, in order to protect the domestic industries, the Patent Act was revised in 1970, and the substance

patents in three fields of pharmacy, chemistry, and foods have become unpatentable inventions. It continued up to 2005. After 2005, however, in place of recognizing the substance patents, Patent Act Article 3(d) was added. No new forms of existing substances are recognized, and the substances should have been fundamentally changed. There are some opinions that, while the substance patent was recognized, India made an examination condition of the substance patents in the chemical, food, and medical fields more strict by inserting the condition. There is also an opinion that this condition inserted by the revision of the Act in 2005 even violates the TRIPS Agreement.

Ito: Does it mean people were unconscious of the fact until 1970 that the substance patent is against the national interests?

Bapat: Going back to the past, India had taken a closed diplomatic policy since becoming independent from England until 1990. This is because it was afraid of being economically governed by the capital from foreign countries. At that time, under the closed foreign policy, for the development of Indian companies, foreign companies were refused to advance into India, and overseas products had duties of 200 to 300% on them. There were many state-run enterprises protected by the state, there was no need to develop new skills, and no disadvantage even without filing patent applications. It was a most desirable age for Indian companies. However, later changes in environment did not allow such a situation, and India began to take an open policy after 1990. However, so as not to be economically governed by foreign countries, the Government did not open all at once but introduced overseas investment one by one. As a result of the policy, overseas capitals have come into India, new private enterprises were born, and moreover, overseas enterprises advanced into India suddenly. Overseas companies began to file patent applications in India before advancing into India, so that patent applications from foreign countries have increased. Therefore, there arose needs to harmonize the Indian patent system with those of advanced countries.
"Place Name + Product Name" is registrable as geographical indication

Ito: In India, applications from the United States predominate, right? This is because the U. S. is forward in outsourcing of software, I suppose.

Bapat: Since 1995, the United States has built a close relationship with India. Particularly, in the Year 2000 Problem, the software development in India played an important role. The United States is rapidly constructing research and development bases in India.

Ito: I felt, in the revision of the Patent Act in 2003, that the protection relative to the software

was rather conservative.

Bapat: The software by itself cannot be recognized as a patent, but it can be patented when combined with hardware.

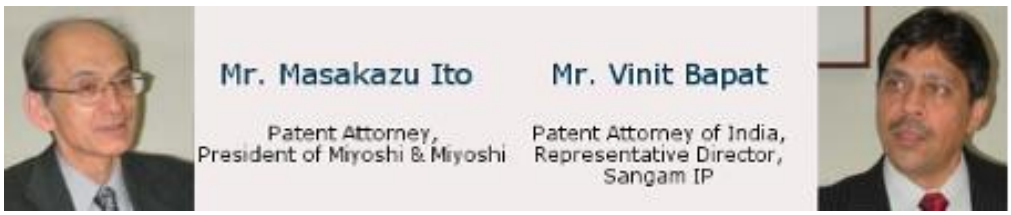
Ito: The way of thinking is close to that in Europe, isn't it? In Europe, in the case of software, it is necessary that the invention has a technical action and effect or merit. On the other hand, as for Japan, there is no such need. Advantage on business will do.

Bapat: For example, only obtaining a result by computation will fail to meet a patentable standard. It is required that the result should be printed by a printer connected to the computer to visualize as an object.

Ito: Is there any other aspect in your patent system different from the Japanese one?

Bapat: It is not exactly in the scope of the patent system, but the industrial property right in India includes "patent," "design," and "trademark" as in Japan, while there is no "utility model." Further, there is "geographical indication" in India, which Japan lacks. For example, "Darjeeling tea" and "Benares silk." The geographical indication consists of a place name part and a goods name part. For example, Darjeeling of the Darjeeling tea is the place name of Northern India, and the tea is a trade name. This is a system to enable anybody to sell any tea made in Darjeeling District, but prohibit to sell teas made in other districts as "Darjeeling tea." An application for the "geographical indication" is filed by a group having a connection with the indicated place name. It cannot be registered with only the place name. Combining with a product name such as "tea" is necessary.

Ito: In Japan, if a place name is used, for example, "Sanuki udon," it is dealt with as a "trademark."



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