INTERNATIONAL CONVENTIONS ON PATENTS

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Abstract

A patent is a limited monopoly that is granted in return for the disclosure of technical information. The right of use of such patent invention is granted to the patent owner only. Many attempts have been made for the protection of patents by international associations such as the Paris Convention, Patent Cooperation Treaty, TRIPs agreement and convention on Biological Diversity to make more and more uniformity and harmonisation among national patent system. In the history, no such system existed that could be considered as international patent system. Over the years, nations realised that patenting should be internationalised because it would improve effectiveness and lower costs. This awareness led to worldwide initiatives and formation of treaties and conventions relating to patents. This paper will discuss patent related treaties and conventions administered by various organisations. The most important international organisations for patent law are WIPO and WTO which will be discussed in this paper how these organisations govern all the treaties and the Trade Related Aspects of Intellectual Property Rights respectively. International conventions always played important role in shaping the patent law at both levels, be it national and international. Therefore, Intellectual property has both a national and international perspective. Such as, patents are governed by national laws and rules depending on a given country, while international conventions on patents provide minimum rights and ensure certain measures for enforcement of rights by the contracting states. The aim of various international conventions is that the patent laws and patent protection should become very similar across the world in all countries. The international conventions on patents will be discussed in detail in this paper with the help of various resources.

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INTRODUCTION

Intellectual property deals with the creations of the human mind such as inventions, literary and artistic works, symbols, names, images and designs used in commerce. Intellectual property is divided into two categories: Industrial property which includes patents, trademarks, industrial designs, and geographic indications of source. Copyright which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works for example drawings, paintings, photographs, sculptures, and architectural designs. Intellectual property rights protect the interests of creators by giving them property rights over their creations.[1] Intellectual property is intangible in nature and it mainly includes patents, trademarks, copyrights, and trade secrets, which collectively are referred to as 'intellectual property'. However, the scope and definition of intellectual property is constantly evolving with the inclusion of newer forms in recent times such as geographical indications, protection of plant varieties, protection for semi-conductors and integrated circuits, and undisclosed information have been brought under the umbrella of intellectual property.[2]

WHAT IS PATENT?

In this paper the main focus will be on international conventions of patent law. Before moving forward it is necessary to know what is patent. A Patent is an exclusive right granted to a person who has invented a new and useful article or an improvement of an existing article or a new process of making an article. The exclusive right is to manufacture the new article invented or manufacture an article according to the invented process for a limited period. During the term of the patent the owner of the patent, can prevent any other person from using the patented invention.[3] After the expiry of the duration of the patent anybody can make use of the invention. A patent is a form of industrial property, or as it is now called, an intellectual property. The owner can sell the whole or part of this property. He can also grant licences to others to use or exploit it. A patent is a creation of statute and is therefore territorial in extent. Thus a patent granted in one country cannot be enforced in another

[1] Available at: http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf (Accessed on 12/02/17)

[2] Available at: http://www.icsi.in/Study%20Material%20Professional/NewSyllabus/ElectiveSubjects/IPRL&P.pdf (Accessed on 12/02/2017)

[3] Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/21666/5/chapter-ii.pdf (Accessed on 12/02/17)

country unless the invention concerned is patented in that country also.[4]

NATIONAL LAW OF PATENT

In India, the national legal regime pertaining to patents is contained in Patents Act 1970 as amended by the Patents Amendment Act, 1999, the Patents Amendment Act, 2002, the Patents Amendment Act, 2005.[5]The fundamental principle of patent law is that a patent is granted only for an invention which must be new & useful. That is to say, it must have novelty & utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was already known before the date of the patent. Patentee gets the right over his invention for 20 years under Indian law.[6]

INTERNATIONAL CONVENTIONS ON PATENTS

International conventions relating to patents have always played an important role in shaping the patent law at both levels, be it national or international.[7] It has increased the efficiency and reduced the costs. Some of the important convention has been explained as follow:

Paris Convention for Protection of Industrial Property

This convention was signed by 11 states in 1883, when this convention came into effect on 7th July 1884, the number of member countries came to 14. After Second World War, the Paris Convention increased its membership more significantly. As on November,'98 there are 151 member states. The Paris Convention has been revised several times. Various revision conferences were held in Rome in 1886, in Madrid in 1890 and 1891 in Brussels 1897 and 1900, in Washington in 1911, and in The Hague in 1925 and in London in 1934, in Lisbon in 1958 and in Stockholm in 1967. Each of these conferences adopted a revised act of the Convention.[8] The provisions of the Paris Convention may be sub-divided into four main categories:

I. The first category of the provisions contains rules of substantive law which

[4] World Trade Organisation ; Intellectual property: protection and enforcement, Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.html (Accessed on 14/02/17)
[5] Dr S.K. Singh, Intellectual Property Rights Laws, 195(2nd Ed., 2013)
[6] Id at 198-199
[7] A Venetian Law of 1474 established a positive system of granting ten year privileges to inventors of new arts and medicines: Mandich/Prager (1948) 30 JPOS. 166
[8] Available at: http://pib.nic.in/focus/foyr98/fo1298/fo3012981.html (Accessed on 14/02/17)

guarantee a basic right known as the right to national treatment in each of the member countries.

II. The second category of the provisions establishes the basic right known as the right to priority.

III. The third category of provisions defines a certain number of common rules - rules establishing rights/applications or rules required for permitting the member countries to enact legislation following those rules.

IV. The fourth category of provisions deals with the administrative frame work which has been established to implement the Convention and includes final clauses of the Convention.[9]

Patents granted in different contracting States for the same invention are independent of each other: the granting of a patent in one contracting State does not oblige the other contracting States to grant a patent; a patent cannot be refused, annulled or terminated in any contracting State on the ground that it has been refused or annulled or has terminated in any other contracting State.

The inventor has the right to be named as such in the patent.[10] In the latter case, proceedings for forfeiture of a patent may be instituted, but only after the expiration of two years from the grant of the first compulsory license.[11] The Paris Convention has proved to be an effective international legal instrument for the protection and propagation of the technical achievements and distinctive signs through industrial property system.

General Agreement on Tariffs and Trade (GATT)

The GATT has started with great expectations. It suggested the full use and development of resources of the world community and the enhancement of production and exchange of goods besides reciprocal and mutually beneficial arrangements involving significant reduction of Tariffs and a gradual elimination to other barriers of trade. Despite the interest of various

[9] Available at: http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf (Accessed on 14/02/17)
[10] Available at: http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (Accessed on 14/02/17)
[11] Id.

nations to protect self-interest, this Organisation continued till 1990.[12] India was a signatory to the GATT, which was a binding contract on 128 countries by 1994.[13] TRIPS were an integral part of GATT. Intellectual Property Rights is to be ensured by a strong patent system, which will confer exclusive rights on an inventor to make, use or sell the product or process of his invention. The purpose of providing the patent is to allow the inventor to enjoy the market exclusivity to generate the returns for the time, money and effort spent on the invention.[14]

World Trade Organisation (WTO)

The World Trade Organisation (WTO) is the international organisation dealing with the rules of trade between nations. As of February 2005, 148 countries are Members of the WTO. In becoming Members of the WTO, countries undertake to adhere to the 18 specific agreements annexed to the Agreement establishing the WTO. They cannot choose to be party to some agreements but not others (with the exception of a few 'plurilateral' agreements that are not obligatory).[15]

The main differences between GATT and WTO are as follows:

a) GATT was ad hoc and provisional. The WTO and its agreements are permanent. WTO has a sound legal basis because members have ratified the WTO agreements and the agreements themselves describe how the WTO is to function,

b) The WTO has members. GATT was officially only a legal text with no legal organisation,

c) GATT dealt with trade in goods. The WTO covers services and intellectual property as well,

d) The WTO dispute settlement is faster, more automatic than the old GATT system, which was based on consensus of all members. Majority cannot block

[12] Amit Sen, *WTO/ TRIPS and Patent Rights in Indian Perspective*, The Law of Intellectual Property Rights, Edited by Shiv Sahai Singh, 70(2002)
[13] Available at: https://www.wto.org/english/thewto_e/gattmem_e.htm (Accessed on 14/02/17)
[14] Ahuja S.D, *GATT and TRIPS- The Impact on the Indian Pharmaceutical Industry*, Patent World, 65 (2nd Ed. 1994)
[15] Available at: http://www.who.int/medicines/areas/policy/wto_trips/en/ (Accessed on 13/02/17)

WTO rulings,

e) GATT 1947 has been updated and exists as GATT 1994. It operates with other WTO Agreements.[16]

Trade Related Intellectual Property Rights (TRIPS)

The TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced (Article 27.1)[17]

There are three permissible exceptions to the basic rule on patentability.

One is for inventions contrary to order public or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of order public or morality (Article 27.2).The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)).The third is that Members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective sui generis system of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement (Article 27.3(b)).

The exclusive rights that must be conferred by a product patent are the ones of making, using, offering for sale, selling, and importing for these purposes. Process patent protection must give rights not only over use of the process but also over products obtained directly by the process. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts (Article 28).[18] Members may provide limited exceptions

[16] Harin Wardha, WTO and Third World Trade Challenges, Commonwealth, 2002
[17] Available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.html (Accessed on 14/02/17)
[18] Id.

to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (Article 30).[19]

The term of protection available shall not end before the expiration of a period of 20 years counted from the filing date (Article 33).Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application (Article 29.1).If the subject-matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process, where certain conditions indicating a likelihood that the protected process was used are met (Article 34).[20]

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder. The conditions are mainly contained in Article 31. These include the obligation, as a general rule, to grant such licences only if an unsuccessful attempt has been made to acquire a voluntary licence on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the licence; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority. Certain of these conditions are relaxed where compulsory licences are employed to remedy practices that have been established as anticompetitive by a legal process. These conditions should be read together with the related provisions of Article 27.1, which require that patent rights shall be enjoyable without discrimination as to the field of technology, and whether products are imported or locally produced.[21]

Patent Cooperation Treaty (PCT)

[19] Id.
[20] Id.
[21] Available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.html (Accessed on 14/02/17)

The Patent Cooperation Treaty (PCT) was signed in 1970[22] and came into operation from 1978. The significant feature of the Treaty is that it establishes a system of international application and preliminary examination procedure. Presently, PCT has 151 contracting States.[23] Although the PCT provides for an international application and search methodology, the authority to grant the patent remains with the National Patent Office.[24] Under the PCT, an applicant applies to an international office and an international search and international preliminary examination is undertaken. Thereafter, the application is sent to the designated national offices to decide whether to grant national patents.[25]

Organisation and Administration

The PCT is an ongoing international attempt of WIPO to rationalise and facilitate a cost-effective system for filing patents internationally, conducting prior art searches and for the examination of patent applications.[26] The PCT has created a Union, which has an Assembly. For effective discharge of its responsibilities, the PCT is assisted by a number of organs, as under:

International Patent Co-operation Union

It is constituted by the countries party to the treaty for bringing about cooperation in the filing, searching and examination of applications for the protection of inventions, as well as for rendering special technical services.[27]

Assembly

Every country party to the PCT is a member of the Assembly. Important tasks that are assigned to the Assembly include (i) amendment of the regulation issued under the treaty (numbering 69 Articles), ii) adoption of the biennial programme and budget of the Union, and iii) fixing of certain fees connected with the use of the PCT system.

International Bureau

[22] Available at: http://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct.pdf (Accessed on 15/02/17)
[23] Available at: http://www.wipo.int/pct/en/ (Accessed on 15/02/17)
[24] Available at: https://cyberlawsconsultingcentre.com/wp-content/uploads/history-and-evolution-of-patents1.pdf (Accessed on 15/02/17)
[25] Available at: http://www.wipo.int/pct/guide/en/gdvol1/pdf/gdvol1.pdf (Accessed on 15/02/17)
[26] Available at: https://naarm.org.in/VirtualLearning/vlc/iprpct.htm (Accessed on 15/02/17)
[27] Available at: http://www.wipo.int/pct/en/ (Accessed on 15/02/17)

It performs the administrative tasks concerning the Union. It publishes the PCT Gazette and brings out other publications.

Advantages of PCT

The PCT simplifies the process of getting patents in a number of countries by filing one application. The Specific advantages to the applicant are:

A. By filing one international patent application under the PCT and designating any or all of the PCT countries, the applicant can simultaneously seek patent protection for an invention in each of a large number of countries.

B. Filing one application under the PCT entitles the applicant to obtain an international filing date for his application. This filing date will have the effect of a regular national filing in every country he / she has designated for the grant of patent.

C. The mandatory requirements that the applicant has to comply are very few such as specific requests for filing a PCT application or an indication of his / her nationality. These are mainly to confirm his / her eligibility.

D. By filing one application, the applicant can obtain the effect of regular national filings in a PCT country without initially having to furnish a translation of the application or to pay national fees.

E. A lot of time is gained before the applicant can decide to go ahead with his / her application. Due to the extra time of 18 months (more than under the traditional patent system) gained by the applicant through filing of PCT application, he / she can keep all the options open for protecting his / her invention while still investigating its commercial possibilities abroad.

F. The initial fees payable in respect of the filing of international application can be paid at one time, at one office and in one currency.

G. Through international search report, the PCT provides an excellent opportunity for the applicant to evaluate with reasonable probability the chances of his/her invention being patented before incurring major costs in foreign countries.

During the international preliminary examination, he/she has the possibility to amend the international application to put it in order before processing by the Designated Offices.

H. With the benefit of the international search and preliminary examination reports conforming to the international standards, the applicant can rely upon the patents subsequently granted by the National/Regional Patent Offices.

I. If the applicant files his/her international application in the form prescribed by the PCT, he/she is reasonably assured that it cannot be rejected on formal grounds by any Designated Office during the national phase of processing the application.[28]

PATENT LAW TREATY (PLT)

The Patent Law Treaty (PLT) was adopted in 2000 with the aim of harmonizing and streamlining formal procedures with respect to national and regional patent applications and patents and making such procedures more users friendly. With the significant exception of filing date requirements, the PLT provides the maximum sets of requirements the office of a Contracting Party may apply.[29]

SUBSTANTIVE PATENT LAW TREATY (SPLT)

The Substantive Patent Law Treaty (SPLT) is a proposed international patent law treaty aimed at harmonizing substantive points of patent law. In contrast with the Patent Law Treaty, signed in 2000 and now in force, which only relates to formalities, the SPLT aims at going far beyond formalities to harmonise substantive requirements such as novelty, inventive step and non-obviousness, industrial applicability and utility, as well as sufficient disclosure, unity of invention, or claim drafting and interpretation.[30]

RIO CONVENTION ON BIOLOGICAL DIVERSITY

The Rio Convention on Biological Diversity was signed in June 1992. The Convention extends to all the developing countries a platform to express their concerns over the

[28] Id.
[29] Available at: http://www.wipo.int/treaties/en/ip/plt/summary_plt.html (Accessed on 15/02/17)
[30] Available at: http://www.wipo.int/patent-law/en/draft_splt.htm (Accessed on 15/02/17)

exploitation of indigenous resources by entities and major corporations from the developed world. This convention offers a strong basis to control the use made of traditional knowledge and provides an impetus for conserving biological diversity and propagating its sustainable use.[31]

CONCLUSION

The intellectual property is the result of constant intellectual approach of inventors, author and other creative persons which helps to gain wealth in a modern economy. The whole idea of Intellectual Property is to protect the owner against its unlawful use by any person offering same or similar products or services. It helps in providing exclusive right to creator or inventor, thus motivates the creator to share information and data rather keeping it confidential. The Rights granted under the intellectual property rights enhances socio-economic growth. The most important international organisations for patent law are WIPO and WTO which govern all the treaties and the Trade Related Aspects of Intellectual Property Rights respectively. Therefore, Intellectual property has both a national and international perspective. Such as, patents are governed by national laws and rules depending on a given country, while international conventions on patents provide minimum rights and ensure certain measures for enforcement of rights by the contracting states. The aim of various international conventions as discussed is that the patent laws and patent protection should become very similar across the world in all countries. The sole aim of international conventions is to safeguard the interests of owner.

[31] Available at: https://www.cbd.int/gbo1/chap-02.shtml (Accessed on 15/02/17)