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Reading Material

ONE YEAR ADVANCED DIPLOMA IN PATENTS LAW

1.2 INTERNATIONAL TREATIES AND CONVENTIONS ON IPR

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Introduction

This book focusses on the treaties and agreements that enable international cooperation in the protection of Intellectual Property Rights in the course of trade or other commercial activity. A brief discussion on the origins of the treaties, and of the agreements that form the basis of the international IP framework today offers crucial insights into the underlying political and economic forces that shaped and continue to shape globalisation.

The rules and negotiated principles that govern trade relations today evolved during the early 19th century, among the ‘civilised nations’ with little contribution from other peoples. The term ‘civilised states’ or ‘civilised nations’ served to distinguish European Christian states and those countries fashioned by Europeans on other continents - such as the US, Costa Rica, Paraguay and El Salvador - from countries not thought to possess similar legal systems or values. The principles of reciprocity, most-favoured-nation treatment, and national treatment, which became the norm among the ‘civilised states’ in the 19th century, continue to have an impact today, on national policies and, therefore on trade flows, investment and economic activities that are affected by such policies.

The vast majority of countries that are currently members of the different Unions and non-governmental organisations established by the treaties had no role in their negotiation or structure. They had either been adhered to the system by their colonial rulers or chose to join the system post-Independence to be able to participate in the global economic system. History provides us with important clues to understand and appreciate negotiation strategies, besides generating ideas for refining the system. The profound influence of history and historical figures in the evolution of the treaties today administered by the World Intellectual Property Organisation (WIPO) is not lost on the Organisation. The seminal roles played by eminent persons, such as the Swiss Minister Droz in the early discussions on the Berne Convention, or that of Janos Kadar, the General Secretary of the Hungarian Socialist Workers’ Party, who presided over his country from 1956 to 1988, in the adoption of the Budapest treaty by enabling East-West dialogue, receive due recognition in the 20th and 21st Century publications of WIPO.

An attempt has been made in this book to provide the reader with a comprehensive understanding of the background and salient features of the principle treaties and agreements in the domain of Intellectual Property Protection. The author has also undertaken to introduce the reader to India’s role in relation to the International IP protection environment.

Industrial revolution and globalisation in the 19th Century

From about the 1760s a great many devices and machines of industrial importance were developed in Britain that industrialised production. Some key developments were the Spinning-jenny of Hargreaves (1764); Watt's steam engine patented in 1765, Arkwright's water-frame in 1769, followed by his patents for carding, drawing and spinning machines (1775); the Crompton mule in 1779; Cartwright's power-loom (1785) and the steam engine for blast furnaces in 1788. This initiated the Industrial Revolution in Britain. Aware of their head start, the British forbade the export of machinery, skilled workers, and manufacturing techniques. British inventors soon recognised profitable industrial opportunities in Continental Europe where businessmen sought to lure British know-how to their countries. Belgium followed with France more slowly as she was going through a revolution. The other European nations were slow to catch up, given that they lacked the resources that Britain, Belgium and France enjoyed as rulers of colonies.[1]

> Note: Two Englishmen, William and John Cockerill, brought the Industrial Revolution to Belgium by developing machine shops at Liège (c. 1807), and Belgium became the first country in continental Europe to be transformed economically.

Writers on colonial economics find a direct correlation between the ever-increasing revenues that flowed into England after the decisive victory in the Battle of Plassey (1757) and the intensive invention activity that led to the Industrial Revolution[2]. Scholars have also found that political events in Europe that engendered respect for private property rights[3] also drove the general consensus among nations on 'private ownership of ideas and knowledge'[4] which in turn triggered the industrial revolution. In 1990, Paul Romer, developing on earlier works by Solow and other scholars, demonstrated that technological change was the outcome of intentional investments by economic agents rather than being the by-product of capital investments.

North[5] and Acemoglu[6] propose that the 'institutions' that evolved in Europe to secure property rights from executive power ensured that investments made in capital and ideas provided profitable returns. By the beginning of the 19th century, European nations had achieved relative peace among them, occasioned by shared interest in free trade. This helped to create and sustain stabilising currencies and credit structures to reap the benefits of an internationalising system of productivity and commerce. Domestic courts and administration were responding to the challenges of 'the first globalisation' on the basis of domestic law that took account of the international nature of commercial and private relationships. By the 1830s free

[1] https://www.britannica.com/event/Industrial-Revolution
[2] Dutt,R.P. *India Today,* Manisha Granthalaya (P) Ltd., 1989 reprint, at pg. 108; Tharoor, Shashi, *An Era of Darkness – The British Empire in India*, Aleph Book Company Ltd. 2016.
[33] Mokyr, Joel, *Intellectual Property Rights, the Industrial Revolution, and the Beginnings of Modern Economic Growth,* http://www.aeaweb.org/articles.php?doi=10.1257/aer.99.2.349
[4] Rosen, William, *The Most Powerful Idea in the World,* The Chicago University Press, 2012
[5] North, Douglas, *Structure and Change in Economic History,* W.W. Norton & Co., 1981
[6] Acemoglu et al, *Institutional Causes, Macroeconomic symptoms: volatility, crises and growth,* https://economics.mit.edu/files/4434

trade treaties and customs unions were common in Europe and in the governance of colonies. Multilateral conventions and international institutions emerged as new forms of global government.

Institutionalists argue that institutions – defined as a set of rules, norms, practices and decision-making procedures that shape expectations – can overcome the uncertainty that undermines cooperation. Institutions collect information about State behaviour and make judgements of compliance or non-compliance with particular rules. In particular, institutions reduce transaction costs and provide a forum for regular communication. Early successes with institutionalism in Europe provided the 'civilised' states with sufficient reason to facilitate and stabilise international cooperation in intellectual property rights protection.

By 1851, Britain was confidently heading the list of industrialised nations in technological accomplishments. As part of its effort to exhibit its prowess, Britain decided to hold The Great Exhibition of the Works of Industry of all Nations, to be known as the Great London Exhibition. Ten European and American nations took part in the 140-day long exposition, and 6.3 million people visited the Expo. The event made a profit of GBP 186,000 which was to be used to 'increase the means of industrial education and extend the influence of science and art upon productive industry.' The money was used to set up the Victoria and Albert Museum, the Natural history and Science Museum, the Royal Colleges of Art and Science, the Imperial College and the Royal Albert Hall – the hotbeds of British culture and innovation. Scholarships, now titled Research Fellowships were instituted that continue to support pioneering research.[7]

Besides setting the framework for subsequent World Expos, the London World Expo 'represented a transition from simple commodity exchange to the exchange of new production technologies and new life concepts'[8]. Expositions thereafter were not only spectacles demonstrating the host nation's technological achievements, but promoted the exchange of technology and trade.

Vienna was the location of the fifth World Exposition. 53,000 exhibitors from 35 countries took part in this huge international event in Vienna from May 1, 1873 to October 31, 1873. The Vienna World Exhibition was an impressive mix of technical innovation, culture, productions and entertainment. The machine hall was very popular with visitors: The most modern machines from the industrialised world were shown in operation in a 40,000 square meter exhibition area. An Ethnographic Village of Europeans in farmhouses, the Oriental Quarter and the Japanese garden were magnets for the 7.25 million visitors. Like the London Exhibition, the Vienna Expositions was also intended to demonstrate to the world, the industrial and technological results of the Austro-Hungarian empire's recent economic book. It was also supported by the agricultural and industrial sectors who used the exposition as an opportunity to establish business contacts between the industrial nations in Europe and outside, including Japan and the United States. Vienna, and the empire, benefited from the exposition in spite of having lost the equivalent of €160 million owing to the

[7] https://www.theguardian.com/science/blog/2015/aug/28/how-the-great-exhibition-of-1851-still-influences-science-today

[8] https://www.encyclopedia.com/electronics/international-magazines/brief-history-world-expo#A

devastating combination of the 1873 stock exchange crash, an unforeseen flood of the Danube and Vienna's last cholera epidemic.

Interestingly, the Vienna Exposition was the first to offer a site for international fora of inventors and scientists – 12 congresses and conferences were held in Vienna during the Expo. Among the several important industrial and scientific congresses that took place, the one on patents continues to impact us today. It was a German Engineer, Karl Pieper, who persuaded the Austrians to hold a Congress for Patent Reform. Proposed by the United States government, with Germany supporting, the Patent Congress recognised that other than Switzerland and Holland, that sailed with the 'no patents for inventions' ideology, most other Industrial States recognised patents protection as a necessity[9]. Manufacturers, scientific artisans, political economists and other experts were invited to participate in the deliberations. It was agreed that if the discussion led to a vote in favour of patent protection, the Vienna Congress would declare the 'fundamental principles for an international reform of patent legislation'. This laid the foundation for the two preparatory meetings of 1878 and 1880, and culminated in the adoption of the Paris Convention in 1883 to protect industrial property in the widest sense including patents, industrial designs and trademarks.

> Note: A study of the exhibits in the Great London Exhibition found that in the early Industrial Revolution only 5% of chemical innovations were patented, compared to 30% of innovations in machinery. Perhaps the ease with which mechanical inventions could be reverse engineered necessitated patenting; chemicals and dyes were difficult to reverse engineer and the industry preferred to rely on trade secrets – until the development of the periodic table by Dimitri Mendeleev in 1869, which made it easier to analyse and reverse engineer chemicals and also draft specifications.

Between 1700 and 1851, according to one paper, 13514 patents had been awarded in England, 3879 in Scotland, and 1525 in Ireland. The study also highlights the rapid growth of patenting activity post 1760. A large of number of inventions entered the market, that for one reason or another were not patented, including onerous processes for acquiring patents and the high cost. Some industries preferred alternative methods of protection.

Taking cognizance of the altered international commercial relations that were emerging as a consequence of liberal customs policy, steam and electricity narrowing the distance between seats of industry and mutual exchange of goods, the Congress concluded that a complete solution common to all states was sought to be accomplished by international agreement. A universal rule introduced into the law of nations, would prevent disturbance of international industrial balance and enable harmonious competition[10]. The Congress discussed the recent amendments made to British patent law subsequent to the two London Expositions of 1851 and 1862, and the temporary patent protection granted during the Paris Expositions of 1855 and 1867.

[9] https://archive.org/stream/reportsonviennau00blak/reportsonviennau00blak_djvu.txt
[10] https://archive.org/stream/reportsonviennau00blak/reportsonviennau00blak_djvu.txt

In 1878, again alongside the Paris Universal Exposition, the Paris International Literary Congress, presided over by the influential author, Victor Hugo, asserted the 'right of property' of authors in their works. The *Association Litteraire et Artistique Internationale* (ALAI) was founded, with Victor Hugo as President, to mobilise support for the international protection of authors' rights[11]. At the time, internationally known writers were increasingly concerned about the unauthorised copying of their works in other countries, but existing bilateral copyright treaties were complex and difficult to enforce. The ALAI met in 1883 in Berne, which was the headquarters of the Postal and Telegraph unions, and persuaded the Swiss government to organise and international conference using their draft international copyright agreement as a basis for an international convention on copyright. In the course of the discussion, Victor Hugo also emphasised the importance of the public's right over public domain, Over the next three years, conferences continued in Berne resulting in the completion of the 1886 Berne Convention. The Convention provides for the signatories to the convention to make a declaration of 'adhesion that includes all their colonies or possessions, or expressly indicate only those which are included…'

Note: At that time, a work published in the UK by a British national would be covered by UK copyright in the UK, but could be copied and sold by anyone in Germany or France. Publishers could take works from one country and publish the work, or translated works in another country without paying the original authors. Many prominent publishers opposed the Berne Convention and the movement to protect authors' rights on the ground that it would be detrimental to the publishing and printing industry.

The Paris Convention of 1883 created an international 'Union' – a legal entity in international law with legal and administrative organs - made up of member states, for the protection of industrial property. Significantly, in Article 12, the Paris Convention, required each member country to establish 'a special industrial property service and a central office for the communication to the public of patents, industrial designs and trademarks.'[12] This provision seems obvious today, but in the 1880s, industrial property matters in various countries suffered neglect in the absence of a separate and distinct national industrial property institution. Matters relating to industrial property were often relegated to 'a small unit in one Ministry or another (not always consistently chosen)…'[13]

The original text also laid down common rules of substantive law concerning trademarks and granted temporary protection to exhibits of industrial property including trademarks. The Paris Union met in 1886 in Rome, however the draft proposed by Switzerland and amended by Italy was not adopted. The delegates voted to postpone consideration of the framework at the next Conference of the Union. Madrid was chosen, by acclamation to host the Conference, in 1890 and 1891, when the Madrid Agreement Concerning the International Registration of Marks was signed. The International (Nice) Classification of Goods and Services for the Purposes of the Registration of Marks was established by an agreement concluded in 1957,

11 http://www.alai.org/en/information/history.html

12 Text of the Paris Convention for the Protection of Industrial Property of March 20, 1883, current version, https://www.wipo.int/treaties/en/text.jsp?file_id=288514

13 WIPO Publication, *The Madrid Agreement Centenary*, *ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_880e.pdf*

and subsequently revised in 1967 and 1977. The Vienna Classification, established by the Vienna Agreement of 1973 provides for classification of figurative elements of marks on the basis of their shape.

In 1893, the secretariats established by the Paris Convention, and the Berne Convention combined to form BIRPI – Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (French for "United International Bureaux for the Protection of Intellectual Property"). In 1967, the Convention establishing the World Intellectual Property Organisation – WIPO, was signed in Stockholm. In 1970, the nineteenth century organisation, BIRPI transformed itself into the WIPO, and in 1974 WIPO became a specialised agency of the UN. According to the rules of procedure of the Stockholm Diplomatic Conference, at least four fifths of the members of the Paris Union and at least four fifths of the members of the Berne Union had to vote for the adoption of the WIPO Convention. In fact, they voted unanimously for the adoption of the Convention Establishing WIPO. In a sense, WIPO is the creation of the Paris and Berne Unions[14].

The display of some thousands objects of technical and entrepreneurial interest, over miles of exhibition space necessitated a detailed an comprehensive classification of objects based on the field of technology and field of application. The Catalogue[15] of the 1851 London Expo created a classification with 4 sections and 30 classes; the same classification, with minor modifications implemented in the 1853 New York Exhibition[16]. Each successive exhibition undertook to provide more 'rational' classifications of products. The 1867 Paris Expo provided a methodical classification grouping products by nature of the objects and their nationality. Prizes were awarded in various categories.

Note: The demand of the juries to provide rational classification of objects of diverse technical and scientific nature led to an intensive debate into methods and ways of classifying objects which evolved to support areas of governance such as national statistics, customs duties and tariff and trade statistics.

By 1830, the US had established a classification for the purpose of awarding patents. By the middle of the nineteenth century, patent offices, agents and inventors had come to realise the importance of lists and indexes of existing patents. Bennet Woodcroft, superintendent of the UK office, with his team of clerks produced the first set of indexes by 1855. Through the 19th century, other countries like Germany (1877) and the UK (1880) had also developed patent classification systems. Increasingly, patents and inventions began to be classified according to function or use, rather than broad categories such as 'agriculture,' or 'textiles.' In 1971, the International Patent Classification (IPC) became a world-wide system with the adoption of the Strasbourg agreement.

Industrial Design was a rather late entrant into the categories of Intellectual Property, finding its feet, as a discipline, in the early 20th century. During the industrial revolution, manufactured goods featured some ornamentation, but the focus was on ensuring affordability for the masses. The English devised the first law

[14] Paris Convention Centenary 1883 to 1983, ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/ParisConventionCentenary/ParisConventionCentenary1883-1983.pdf

[15] https://babel.hathitrust.org/cgi/pt?id=mdp.39015009221915;view=1up;seq=26

[16] https://archive.org/stream/cu31924031227105/cu31924031227105_djvu.txt

on designs in 1787. The French law of 1806, inspired the English to reformulate their law in 1839. Industrial design first emerged through the Arts and Crafts movement that was opposed to industrial mass production. Through the movement, primarily led by William Morris and John Ruskin, an attempt was made to take utility objects to a high aesthetic standard, and advocated design engineering, organic shapes and materials, and modernism. The use of new technologies in manufacturing resulted in the use of functional design in industry. The Hague Agreement, concluded in 1925 and revised in 1934 and 1960, created a Union and an international system, known as the Hague System, that allows industrial designs to be protected in multiple countries with minimal formalities. An international classification for industrial designs was established by the Locarno Agreement of 1968.

The other 20th Century Intellectual Property regime concerned protection of Appellations of Origin, and extended to Geographical Indications by the Geneva Act. The Lisbon Agreement for the Protection of Appellations of Origin was concluded in 1958, revised in 1967 and amended in 1979. The Agreement too created a Union and provides for international protection.

India and the international IP framework

Even though, globalisation, as we understand it today, appears to be a twenty-first century concept, a study of the universal expositions demonstrates that globalisation emerged in a mature form in 19th century Europe. Rapid technological innovation, explosive growth of international trade and expansion of markets and inconveniences caused by diversity in national policies, had convinced industrialised countries that common action of all 'civilized states' was required to address transnational IP protection. This nineteenth century framework continues to underlie international IP protection agreements today.

By the time India attained independence, Intellectual Property had become an integral part of the evolving global economy. India had been 'adhered' to the Berne Convention in 1928 under the clause providing for extending the obligations under Convention to colonies and territories of the signatories. In respect of other treaties, including the Paris Convention, obligations were extended to British India through legislation. Ruth Okediji in her 2003 paper[17] emphasises that 'what the Paris and Berne Conventions accomplished was the establishment of a network of relationships between the European member countries – a relationship that consolidated colonial power by expanding the geographic scope of rights acquired in the governing county to the colonies…' She adds that

> 'Intellectual property law was not merely an incidental part of the colonial legal apparatus, but a central technique in the commercial superiority sought by European powers in their interactions with each other in regions beyond Europe… was characterised by efforts to secure national economic interests against other European countries in colonial territories. '

[17] Okediji, Ruth, *The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System,* http://www.commonlii.org/sg/journals/SGJlIntCompLaw/2003/14.pdf

The Ayyangar Committee Report on Patents found that membership of the Paris Convention would be against the interests of the underdeveloped countries[18] and did not recommend joining the Convention; instead, the report urged the country to enter into newly concluded multilateral treaties. The Committee realised that the main challenge for India lay in 'transforming Intellectual Property regimes from a rent-seeking mechanism into an effective mechanism for technological development,' [19]as was the case with most newly independent and industrialising countries. India's stand on many issues, including the 1970 Patent Act which granted patents for processes but not for chemical compounds was considered a case of free-riding by some developed countries including the US.

After the Second World War, more and more developing countries joined the Paris and Berne Conventions. Newly independent countries held a deep mistrust of the Eurocentric law of nations and trade law designed to solve conflicts between European nations. Developing countries were not content to play the role of a veto coalition[20]. Third World scholars believed that international law that does not benefit the Third World should be contested and reformed[21]. However, India like most other newly independent states accepted most of the treaties concluded on her behalf by the European countries. In copyright, led by India, developing countries succeeded in obtaining the adoption of the Stockholm Protocol of 1967, the aim of which was to give developing countries greater access to copyright materials. The Paris Convention became the subject of Diplomatic Conferences of revision in 1980, 1981, 1982 and 1984 with developing countries pushing for liberalising provisions related to compulsory licensing[22].

Attempts were made by scholars and statesmen such as Pandit Nehru to encourage active participation and contribution of India and other Asian and African countries to international law. Nehru's foreign policy was to be shaped by the idea of non-alignment as a means to retain our national sovereignty and cooperate with other newly independent countries. Together the members of the Non Alignment Movement created a strong power bloc in the United Nations. While heavy dependence on the former colonial powers for capital goods, technology and investments, forced India to compromise to a certain extent on the non-alignment position, it also motivated the leaders to consider mechanisms to support and protect the nation's nascent industrialisation process so that the country would not revert to being a junior partner in the global economy.

India is a founder member of the International Monetary Fund (IMF), having ratified the agreements in December 1945, while still a colony. The five-member Indian delegation at the 1944 Bretton Woods Conference that created the IMF and the IBRD, which later became the World Bank, was led by then Finance Minister Sir Jeremy Raisman, assisted by the first Indian RBI Governor Sir

[18] https://spicyip.com/wp-content/uploads/2013/10/ayyangar_committee_report.pdf ; para 305,306, 308.
[19] Braga, Carlos, TRIPS issues, WB discussion paper No. 307, https://ipmall.law.unh.edu/sites/default/files/hosted_resources/IDEA/12.Sherwood97.pdf
[20] Drahos, Dr. Peter, *The Universality of Intellectual Property Rights: Origins and Development*, https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf
[21] Ram Prakash Anand, Towards a New International Legal Order, http://www.publicinternationallaw.in/node/91
[22] Drahos, *Supra* note 13.

Chintaman Dwarakanath Deshmukh. The still colonised India exerted considerable influence at the Conference owing to the size of its economy and played a significant role in the emerging economic order . With the withdrawal of the Soviet Union from the Conference, India was automatically entitled to an executive director without going through the process of election – a situation that continued till quotas were reset several decades later. India also pushed for the IMF to adopt economic development of poor countries as one of its purposes, establishing India's post-Independence role as a leader of the developing world.

The final leg on which the new economic order was to stand was the International Trade Organisation (ITO). However, this failed to take off on account of reservations by the US, and was replaced by the General Agreement on Tariffs and Trade (GATT) as an interim measure. India was one of the 23 founding members of the GATT, having participated in the Preparatory Committee established by the UN Economic and Social Council in 1946 to draft the charter of the ITO. The GATT came into effect on 1 January 1948, and once again Indian delegates served as spokespersons for the less developed world during the Multilateral Trade Negotiations. The Tokyo ministerial meeting of 1973 adopted the Tokyo Declaration a large part of which was devoted to strengthening the negotiating position of the less-developed countries. As traditional tariffs were becoming less important, more attention became focussed on impediments to international transactions in services and Intellectual property. The Uruguay Round of negotiations in 1986 led to the replacement of the GATT by the World Trade Organisation (WTO) in 1995. The Round continued for 8 years, and culminated in the signing of the Marrakesh Agreement in April 1994, following the ratification of which, the contracting parties to the GATT treaty became charter members of the WTO.

After 7 decades, we find that the policy, though it helped sustain growth and sovereignty and established a diversified skilled manufacturing sector, also ensured that 'Indian industry was inefficient, not innovative, and exported very little'[23]. In 1991, changes and reforms were undertaken in the country's economic policies, which were referred to as the 'economic liberalisation in India'. Specific changes included a reduction in import tariffs, deregulation of markets, reduction of taxes and greater foreign investment. Most of these changes were made as part of the conditions laid out by the World Bank and the IMF as a condition for a US$500 million bail out to the Indian Government in December of that year. In September 1988, India deposited it's instrument of accession to the Paris Convention and the Patent Cooperation Treaty with the Director General of the WIPO. In April 2013, India joined the Madrid system for the International Registration of Trademarks.

The India and Brazil led G-10 countries in GATT had resisted the inclusion of services and intellectual property in the discussion preparatory to the Uruguay Round. India's view was that the World Intellectual Property Organisation (WIPO) and the prior intellectual property conventions provided sufficient mechanisms for the protection of IP worldwide. It was feared that the TRIPS

[23] Raghuram Rajan, India: the Past in its Future, January 2006, https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp012006

Agreement would facilitate unrequited transfer of royalties to the rich countries which produce and hold knowledge[24]. India's influence in the Doha Development Round which began in 2001 helped to preserve the development focus of the negotiations and in future ministerial meetings.

The WTO's single undertaking rule meant that participating countries had to accept all multilateral agreements relating to goods and services, and also TRIPS, the dispute settlement mechanism, as well as a Trade Policy Review mechanism incorporated to document national trade policies and assessing their conformity with WTO rules. The inclusion of the Policy Review Mechanism meant a shift in the policy focus from border barriers – as in the GATT - to domestic regulatory and legal systems and institutional infrastructure. Upon becoming a signatory to the TRIPS agreement, therefore, India committed to amending the Indian Patents Act, 1970, in order to bring it into compliance with the TRIPS agreement. As a developing country, India had a grace period of ten years to implement the required changes; this was completed in 2005. The Copyright Act, 1957 and the Trade and Merchandise Marks Act, 1958 were replaced by new legislations in 1999.

The substantive provisions put in place by the Paris Convention and the Berne Convention, which had been incorporated in the GATT, became integral components of the IP protection regimes put in place by the WTO and the TRIPS Agreement. India acceded to the WIPO convention on January 31, 1975, entering into force on May 1, 1975. A full list of India's membership of WIPO treaties, as on

[24] Professor Jagdish Bhagwati, Letter 2001, http://www.columbia.edu/~jb38/papers/pdf/FT_Letter_on_IPP.pdf

May 1, 2019, is found below:

Treaty	Signature	Instrument	In Force
Berne Convention		Declaration of Continued Application: April 23, 1928	April 1, 1928
Budapest Treaty		Accession: September 17, 2001	December 17, 2001
Madrid Protocol		Accession: April 8, 2013	July 8, 2013
Marrakesh VIP Treaty	April 30, 2014	Ratification: June 24, 2014	September 30, 2016
Nairobi Treaty	June 30, 1983	Ratification: September 19, 1983	October 19, 1983
Paris Convention		Accession: September 7, 1998	December 7, 1998
Patent Cooperation Treaty		Accession: September 7, 1998	December 7, 1998
Phonograms Convention	October 29, 1971	Ratification: November 1, 1974	February 12, 1975
Rome Convention	October 26, 1961		
Washington Treaty	May 25, 1990		
WIPO Convention		Accession: January 31, 1975	May 1, 1975
WIPO Copyright Treaty		Accession: September 25, 2018	December 25, 2018
WIPO Performances and Phonograms Treaty		Accession: September 25, 2018	December 25, 2018

In addition to WIPO treaties, India's intellectual property regime is also influenced by memberships of treaties administered by the WTO, the International Union for Protection of New Varieties of Plants (UPOV) and the UN. The full list of Indian laws applicable to the deployment and protection of intellectual property in India, and comprehensive list of treaties notifications and national statements at WIPO meetings can be found at https://www.wipo.int/members/en/details.jsp?country_id=80.

CHAPTER I

From General Agreement on Tariffs and Trade (GATT) to the World Trade Organisation (WTO)

Evolution of the GATT

The General Agreement on Tariffs and Trade (GATT) was a temporary multilateral agreement designed to provide a framework of rules and a forum to negotiate trade barrier reductions among nations. The GATT grew out of discussions between government officials from the United States and the United Kingdom during the Second World War.

The period between end of the First World War (1918) and the start of the Second World War (1939) was marked by a short period of economic progress - *the Roaring Twenties* - followed by the *Great Depression*. This *interwar period* witnessed the rise of fascism in Europe; the rise of Japan, its aggression towards China and clashes with the Soviet Union; the gradual collapse of the League of Nations and of disarmament; and the failure of Collective Security. The 1929 Stock Market Crash in the US initiated a long period of economic downturn known as the Great Depression[25]. During the period, global trade contracted by 30-65 percent owing to declining income, discretionary increases on tariff rates, deflation-induced tariff increases, non-tariff barriers, banking panics and monetary contraction[26]. The US Smoot-Hawley Act of 1930 increased import duties by about 20 percent[27], forcing import prices to go up by 45 percent. This was the second time the US had unilaterally raised tariffs; the first time was in 1922. Europe, just recovering industrial competitiveness after the First World War swiftly retaliated by raising tariffs on US exports[28].

In 1927, the League of Nations had organised the first World Economic Conference with 29 states to arrive at a balanced multilateral agreement to end the raising of tariff barriers. A conference in 1930[29] to arrive at a 'customs truce' and 'the establishment of a programme of subsequent negotiations aiming at collective agreements for facilitating economic relations', between the US, UK and France at Geneva led to the World Economic Conference at London in 1933. None of these efforts bore fruit, until the Reciprocal

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[25] Which began with the US stock market crash of 1929 and according to some sources (https://www.britannica.com/event/Great-Depression) ended in 1939 with the Second World War, while others contend that it only ended when the war ended.
[26] Madsen, Jakob B., *Trade Barriers and the Collapse of World Trade During the Great Depression*, https://www.jstor.org/stable/1061574?seq=1#page_scan_tab_contents
[27] https://www.britannica.com/topic/Smoot-Hawley-Tariff-Act
[28] Roots of Protectionism in the Great Depression, https://www.nber.org/digest/oct09/w15142.html
[29] Conference With a View to Concerted Economic Action, https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-222-M-109-1930-II_EN.pdf

Tariff Agreement Act of 1934 became law in the US, that the US was able to negotiate reciprocal treaties with trading partners, and coordinate tariff reductions. Even as economic recovery was being sought, the Second World War broke out.

Even as the War continued, financial experts in the major allied countries came to the recognition that the post-war world would require some stabilising influence in the international financial field through the creation of international institutions. A trio of organisations was envisioned – the International Monetary Fund (IMF), the World Bank (WB), and the International Trade Organisation (ITO). In 1944, the President of the United States issued invitations to the 44 United and Associated Nations – the Allies - to attend a conference to be held at Bretton Woods, New Hampshire in July that year.

The principal accomplishments of the Conference were the drawing up of the instruments relating to the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD). The IBRD was to assist in the reconstruction and development of member countries and to promote balanced growth of international trade by encouraging international investment for the development of the productive resources of member countries. In December 1945, 15 countries began talks to reduce and bind customs tariffs. Their intention was to correct the legacy of protectionist measures which had been in place from the 1930s. This first round of negotiations resulted in a package of trade rules and 45,000 tariff concessions affecting USD10 billion of trade, about one fifth of the world's total[30] value. The tariff negotiations were held at Geneva from 10 April 1947 to 30 October 1947, and the 23 participating countries signed the Final Act which authenticated the text of GATT. The tariff concessions came into effect by 30 June 1948 through a "Protocol of Provisional Application".

In early 1946, the Economic and Social Council (ECOSOC) of the United Nations decided to call and International Conference on Trade and Employment[31]. At the same time, ECOSOC established a preparatory committee to prepare an agenda and a draft charter for an International Trade organisation (ITO) for consideration at the Conference. The UN Conference on Trade and Employment was held at Havana from 21 November 1947 to 24 March, 1948. The Havana Charter was signed by 54 of the 56 countries that participated. An Interim Commission for ITO (ICITO) was established to prepare the ground for the first session of the ITO and for performing interim functions pending the establishment of the organisation[32]. However, there were several postponements. In 1950, the US informed the ICITO, that the Havana Charter would not be submitted to the US Congress for ratification. The Havana Charter, therefore, never entered into force and the ITO never came into existence. The members of the Preparatory Committee had decided to proceed with the tariff negotiations among themselves instead of waiting for the

[30] https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm
[31] https://docs.wto.org/gattdocs/q/GG/SEC/53-36.PDF
[32] Resolution Establishing an Interim Commission for the International Trade Organisation, adopted upon signing of the Havana Charter Final Act 24 March, 1948, E/CONF.2/78 or ICITO/I/4, https://www.wto.org/gatt_docs/English/SULPDF/90180014.pdf

ITO to come into existence. From 1949 onwards, the ICITO provided the GATT Secretariat[33] for the Contracting parties to the General Agreement on Tariffs and Trade (GATT).

The Executive Committee of the ICITO met four times after 1950 – in 1968, 1980, 1993 when the Director-General of GATT was appointed as Executive Secretary of ICITO and in 1995 to adopt the Transfer Agreement.[34] Two other tariff conferences took place at Annecy, France (1949) and at Torquay, England (1950-51). By 1953, 33 countries had adhered to the GATT and some 58,000 tariff rates had been reduced or stabilised. The General Agreement did not provide for membership in an organisation, but provided in paragraph 1 of Article XXV that 'Representatives of the Contracting Parties shall meet from time to time for purpose of giving effect to the provisions of the Agreement. Parties joined GATT under its Protocol of Provisional Application[35] and the provisions of GATT were, binding insofar as they were not inconsistent with a nation's existing legislation.

The General Agreement on Tariffs and Trade (GATT)

The General Agreement gave rise to a *de facto* international organisation, known informally as GATT[36]. The GATT evolved through eight rounds of trade negotiations – 1947 (Geneva), 1949 (Annecy), 1950 (Torquay), 1956 (Geneva), 1960-61 (Dillon Round), 1962-67 (Kennedy Round), 1974-79 (Tokyo Round) and the Uruguay Round from 1986 to 1993. The first five rounds of GATT negotiations were dominated by developed countries. The major exporting countries focussed their negotiation efforts on reducing import barriers in other developed countries which were their import markets. The Kennedy Round brought about a GATT Anti-Dumping Agreement and a section on development. The Tokyo Round was the first major attempt to tackle non-tariff trade barriers, and to improve the system. The eighth, the Uruguay Round of 1986-94, was the last and most extensive of all. It led to the WTO and a new set of agreements.

The central principles of GATT are:

> **Most-Favoured-Nation (MFN) Rule:** the MFN rule in Article I of GATT requires that if one GATT signatory grants to another country 'more favourable treatment' (such as a reduction in customs duty payable on imports of a particular product), it must immediately and unconditionally give the same treatment to imports from all signatories. Every member is entitled not to be discriminated against. The exceptions to MFN rule are found in Article XXIV, which allows members of customs unions and free trade areas to give more favourable treatment to imports from one to another.

[33] ICITO and the GATT, UN Yearbook, 1988, https://read.un-ilibrary.org/united-nations/yearbook-of-the-united-nations-1988_b7e83348-en#page1

[34] GATT institutions and procedures, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/intitu_proced_e.pdf; The Agreement on Transfer of Assets, liabilities, Records, Staff and Functions from the ICITO and the GATT to the WTO.

[35] https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/intitu_proced_e.pdf

[36] http://apeda.gov.in/apedawebsite/about_apeda/understanding_e.pdf

Principle of Reduction and Binding of National Tariffs: This principle requires members to undertake commitments in which they state the maximum level of import duty or other charge or restriction that they will apply to imports of specified types of goods. These commitments, or 'bindings' may result initially from bilateral negotiations, in which one government has agreed to another country's request that it reduce import duty on certain products. Once the commitments are recorded in national schedules under Article II, they become part of the country's obligations under the GATT and apply to imports from any member. Article XXVIII provides the technical rules for modifying schedules.

Quantitative restrictions, are in general banned, by Article XI. Alternative forms of protection of domestic industries are permitted if imports are 'dumped[37]' in the country.

National Treatment: National Treatment in Article III of GATT complements the MFN rule. The national treatment principle puts the products of the country's trading partners on equal terms with the products of the importing country. It requires that, once imports have passed the national frontier – having paid the import duty – they must be treated no worse than domestic products in terms of taxes charged, or laws and regulations affecting their sale, purchase, transportation, distribution or use.

Transparency: This principle stipulates that a country's policies and regulations affecting foreign trade should be clearly communicated to its trading partners. The main provision dealing with transparency is Article X.

The GATT allows countries in balance-of-payments difficulty to introduce trade restrictions as one of the major exceptions to the basic principles of tariff bindings and "tariffs only". Article XII, the only balance-of-payments provisions available to developed countries, allows import restrictions to the extent necessary either to forestall an imminent threat of, or to stop, an imminent decline in its reserves or to rebuild reserves that are very low. Article XVIII:B, available only to developing countries, eases these conditions somewhat by not requiring a threat to be "imminent" and by specifying that reserves be "inadequate" rather than "very low". Both articles provide that in these circumstances the general level of imports may be controlled through restrictions on the quantity or value of imports (GATT 1947 Articles XII:2(a) and XVIII:B:9). In recent years, developed countries have almost ceased to resort to Article XII, and the use of import surcharges or similar price-based measures has been recognized to be preferable to quantitative restrictions.

Members enforced commitments of trading partners by challenging errors and breach of commitments through the **dispute settlement provisions** provided for in Articles XXII and XXIII. The scope of Article XXIII was broad. The Article could be invoked, *inter alia*, when one GATT member claimed that a benefit accruing to it under the General Agreement has been nullified or impaired by another member so that it had suffered some detriment. In such a case, the contracting parties, acting as a group, were required to

[37] Article VI of GATT 1947 provide for Anti-dumping and Countervailing duties when products of one country are introduced into commerce of another country at less than normal value of the products.

investigate the matter and make appropriate recommendations or rulings. If the contracting parties found that the circumstances were serious enough, they could authorise the complainant to take retaliatory action against the respondent to compensate the complainant for its damage. Article XXIII outlined how disputes could be processed under the GATT system, but did not establish any formal procedures for handling them. The general practice that evolved was for the contracting parties to appoint a panel of individuals to consider the dispute, and prepare a report, to enable the contracting parties to take appropriate action. During the first decade the process worked well, however, soon the system fell into disrepute and disuse[38].

The first major overhaul of the GATT was the result of the 1986-94 Uruguay Round of trade negotiations. The overhaul resulted in two legally separate but linked documents: the original GATT as it stood at the beginning of the Uruguay Round, and the Post-Uruguay Round Agreement incorporating the original agreement. Two new Agreements also emerged, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as one of the agreements of the WTO.

Several understandings were reached in the Uruguay Round concerning bindings, state trading enterprises and waivers[39]. Under the binding schedules, countries are now required to include all other charges, besides tariffs, that may need to be paid to clear goods at customs. This measure increases the transparency of border protection. The understanding on state trading enterprises establishes the working definition of state-trading enterprises which have special rights and privileges in the country; such enterprises must be notified to the WTO. Waiver procedures permit decisions to allow individual contracting parties, in exceptional circumstances, to be relieved of particular obligations. The waiver understanding establishes that the final decision to grant a waiver rests with the WTO General Council.

The evolution of WTO

By the early 1980's, changes in global trading environment were undermining GATT's credibility and effectiveness. In particular, the success of GATT in reducing tariffs to ever lower levels, and the series of economic recessions in the 1970s and 1980s had driven governments to device non-tariff barriers to protect their domestic industry and market. Governments in Western Europe and North America sought bilateral market-sharing arrangements with competitors and had embarked on a subsidies race. Issues relating to trade in agricultural products and textiles were also taxing the system. The institutional structure, particularly the dispute settlement system were emerging as causes for concern. Parties were examining the extent to which new rules relating to Trade-related Aspects of Intellectual Property Rights and Trade-related Investment Measures could be negotiated within GATT.

The Uruguay Round, which ended up twice as long as originally planned covered all contemporary outstanding trade policy issue including those relating to services, telecommunication, health and

[38] Davey, William J., *Dispute Settlement in GATT*, Fordham International Law Journal, Volume 11, Issue 1, 1987, https://pdfs.semanticscholar.org/ca6d/2c4362e59ea635b0e158530b8c2776495ff8.pdf

[39] Articles II:1(b) and XVII, XXV and XXVIII

agriculture. The Round began in September 1986, in Punta del Este, Uruguay. The Round continued in Montreal (1988) and was to end in Brussels (1990). However, with lack of agreement on agriculture, the talks were extended. Despite the political disagreements, the technical work continued, and the Final Act of the Uruguay Round known as the Dunkel Draft[40] was tabled in December 1991. In November 1992, the US and EU settled most of their differences on agriculture and by July 1993 the "Quad" (US, EU, Japan and Canada) announced significant progress in negotiations on tariffs and related "market access" issues.

On 18 March 1994, the Chairman of the Trade Negotiations Committee of the Multilateral Trade Negotiations at the Uruguay Round put forward the draft of the Agreement Establishing the WTO with a proposal for formal adoption at the Marrakesh Ministerial meeting concluding the Uruguay Round[41]. The Marrakesh Declaration of 15 April 1994 signed by Ministers representing 124 Governments and the European Communities formally adopted the 'Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,' initiating the transition from the GATT to WTO. The implementation conference of 8 December 1994 in Geneva agreed that the WTO would come into force on 1 January 1995. The Marrakesh Ministerial Meeting had also established a Preparatory Committee to perform such functions as may be necessary to ensure the efficient operation of the WTO immediately as of the date of its establishment. The WTO replaced GATT as an international organization, but the General Agreement still exists as the WTO's umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations.

The World Trade Organisation (WTO)

The WTO came into existence on 1 January 1995 as the only international organisation dealing with the global rules of trade. Its main function is to ensure liberalisation of trade policy and smooth flow of trade. The WTO is based in Geneva, Switzerland, and has a membership of 164 nations. Article II of the Marrakesh Agreement sets out the **Scope of the WTO**. The WTO is to provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to the Agreement. The Annexes 1,2 and 3 (referred to as 'Multilateral Trade Agreements') and Annex 4 ('Plurilateral Trade Agreements') are integral parts of the Marrakesh Agreement.

"The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts" is a daunting list of about 60 agreements, annexes, decisions and understandings. The principles that govern WTO go back to the GATT. The **broad principles** are governed by the General Agreement on Tariffs and Trade (GATT) for goods; the General Agreement on Trade in Services (GATS) for Services and the Agreement on Trade Related Aspects for Intellectual Property Rights (TRIPS) for Intellectual Property. The **additional agreements and annexes** deal with the special requirement of specific sectors or issues. For goods under GATT, additional agreements include those on *agriculture*, *health regulation for farm and food products*

[40] Arthur Dunkel was the Director-general of GATT and responsible for compiling the Final Act.
[41] https://docs.wto.org/gattdocs/q/UR/TNC/W137.PDF

(SPS), Textiles and clothing, Product standards, Anti-dumping measures, Import licensing and Customs valuation and methods among others. GATS annexes include agreements on *Movement of natural persons, Air transport, Telecommunication, Shipping and Financial services.* Finally, there are detailed and lengthy schedules of commitments made by individual countries for GATT, and for GATS. GATS commitments state how much access foreign service providers are allowed for specific sectors and include lists of types of services where countries state that they are not applying the 'most-favoured-nation' principle of non-discrimination.

Plurilateral agreements on civil aircraft and government procurement were signed by some of the members. Negotiations continue under the WTO: in 1997, an agreement was reached on telecommunication services, with Sixty-nine governments agreeing to wide-ranging liberalisation measures that went beyond those agreed in the Uruguay Round. In the same year, forty governments successfully concluded negotiations for tariff-free trade in IT products and seventy members concluded a financial services agreement covering 95 percent of trade in banking, insurance, securities and financial information.

Article XV of the Marrakesh Agreement provides that any member may withdraw from the WTO or its annexes, and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

Structure of the WTO

Article IV of the Marrakesh Agreement provides the structure of the WTO. The basic structure of the WTO agreements is found below[42]:

	Goods	**Services**	**Intellectual Property**	**Disputes**	**Trade policy reviews**
Basic principles	**GATT**	**GATS**	**TRIPS**	**Dispute settlement**	**TPRM**
Additional details	Other goods agreements and annexes	Services annexes			
Market access commitments	Countries' schedules of commitments	Countries' schedules of commitments (and MFN exemptions			

[42] https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf

Article IX of the Marrakesh Agreement states the process for decision-making. Decisions are made by the entire membership of the WTO, typically by consensus as followed under GATT 1947. A majority vote is also possible but has never been used in the WTO, and was extremely rare in the GATT. The WTO's agreements have been ratified in all members' parliaments. The WTO's top level decision-making body is the Ministerial Conference, which meets every two years. The Ministerial Conference is attended by trade ministers and other senior officials from the member states. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.

Below the Conference is the General Council (normally ambassadors and heads of delegation based in Geneva, or sent from the member state), which meet several times a year in the Geneva Headquarters of the WTO. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body. At the next level are the Goods Council, Services Council and Intellectual Property Council who report to the General Council. Numerous specialised committees, working groups and working parties deal with individual agreements and other areas, such as the environment, development, membership applications and regional trade applications.

The WTO Secretariat is based in Geneva. It has around 700 staff members and is headed by a Director-General. The Director-General is selected by the General Council after receipt of nominations by member states[43]. The General Council is to attempt to arrive at its choice of Director-General by consensus and resort to voting only as a last resort.

The current Director-General is Roberto Azevêdo of Brazil, since 1 September 2013. He is serving his second four-year term since 2017.

The Secretariat has no branch offices. It has no decision-making role and its main duties are to supply technical support for the various councils/committees and the ministerial conferences. The Secretariat also provides technical assistance for developing economies, and to analyse world trade. The Secretariat explains the activities of the WTO to the public and the media. During the dispute settlement process, the Secretariat provides legal assistance and advises governments wishing to become members of the WTO. The annual budget of the WTO, contributed by members, is around 197 million Swiss Francs. Article VII of the Marrakesh Agreement states that the scale of contributions by members towards expenses of the WTO shall be proposed by the Committee on Budget, Finance and Administration to the General Council. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the members of the WTO. Each member is to promptly contribute to the WTO its share in the expenses of the WTO.

The **Functions of the WTO** are found in Article III of the Marrakesh Agreement. The WTO is to facilitate the implementation, administration and operation of the Agreement, and the Multilateral and Plurilateral Trade Agreements. The WTO provides the forum for negotiations among its members concerning their trade agreements and for further negotiations, and implementation of results of such negotiations. The WTO is to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes

[43] WT/L/509 dated 20 January 2003, https://www.wto.org/english/thewto_e/dg_e/dg_selection_process_e.htm

and the Trade Policy Review Mechanism. The WTO is to cooperate with the IMF and the IBRD and its affiliated agencies.

Doha Round of Negotiations

In November 2001, a broader work programme, the **Doha Development Agenda**, including agriculture and services were launched at the fourth WTO Ministerial Conference in Doha, Qatar. The Doha Ministerial Declaration provided the mandate for the negotiations, the fundamental objective of which were to improve the trading prospects of developing countries. The new work programme covered negotiations and technical work on about twenty areas of trade including non-agricultural tariffs, trade and environment, anti-dumping and subsidies, transparency in government procurement, Intellectual Property, and significantly, a range of issues raised by the developing economies as difficulties they face in implementing WTO agreements.

Ministers decided to postpone the deadline for some developing countries to eliminate export subsidies and for least-developed countries to provide protection for pharmaceutical patents and test data, and to tackle problems faced by countries unable to make generic versions of patented medicines.[44] Because the negotiations were complex, several Doha Rounds were held after the Doha Ministerial conference, including the Geneva 2003 Round, on special treatment in services for least-developed countries, Geneva 2004 for frameworks for negotiations in agriculture and non-agriculture market access, and Hong Kong 2005 which locked in further narrowing of differences in the negotiations.

The Doha negotiations have resulted in major updates. A revised Government Procurement Agreement was adopted at the WTO's 8th Ministerial Conference in 2011. In 2015, the WTO eliminated export subsidies in agriculture, improving access to domestic consumers, thereby delivering on the UN Sustainable Development Goal of 'Zero Hunger.' In 2017, an amendment to the TRIPS Agreement entered into force, easing access of poor economies to affordable medicines.

Dispute Settlement Process under WTO

The Dispute settlement process under WTO is based on the 'Memorandum of Understanding Governing Dispute Settlement' available as Annex II to the GATT 1994. A panel of three or Five members is set up on an *ad hoc* basis to consider the dispute. The system displays the following main features:

1. **Sui generis:** it stands midway between diplomatic negotiation and jurisdictional settlement. At the Dispute Settlement Body (DSB) level, it is a diplomatic procedure as the DSB consists of all the WTO member states. The creation of an Appellate Body and constrictive proceedings to implement the opinions of the panels provides a distinctly jurisdictional character. The Appellate Body is a permanent body with seven members.

[44] https://www.wto.org/english/tratop_e/dda_e/texts_intro_e.htm

2. **Integrated:** There is only one legally integrated system for a member to approach to settle a particular dispute. In the 1947 GATT system, there were various settlement systems, including the codes adopted during the Tokyo Round.
3. **Resolution of disputes according to the agreements:** the DSB can neither enhance nor lower the rights and obligations of the agreements. The Appellate Body reports must also be in conformity with the WTO agreements.
4. **Exclusion of unilateral solutions:** Members cannot impose unilateral trade sanctions against another member with a view to resolve a dispute. The member must observe the settlement mechanisms deriving from the Marrakesh Agreements.
5. **An interstate system:** Only WTO members can be allowed access to the dispute settlement process. Both parties must be members of the WTO.

The dispute settlement mechanism is an innovative one, building on Articles XXII and XXIII of the GATT 1947. There are two main ways to settle a dispute once a complaint has been filed in the WTO: (i) the parties find a mutually agreed solution, particularly during the phase of bilateral consultations; and (ii) through adjudication, including the subsequent implementation of the panel and Appellate Body reports, which are binding upon the parties once adopted by the DSB.

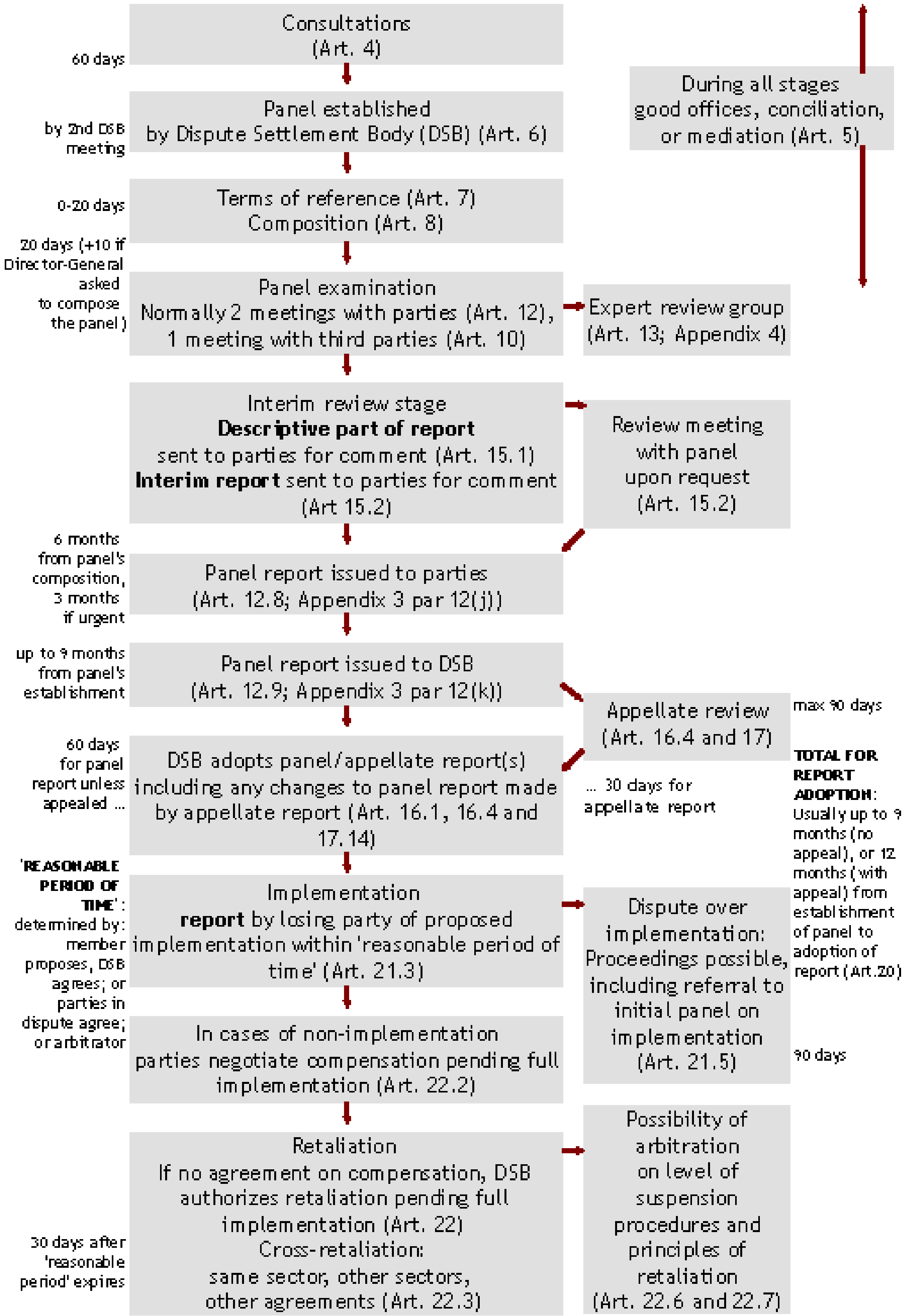
There are three main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.

The complaining and the responding Members are the parties to the disputes. Other Members have an opportunity to be heard by panels and to make written submissions as third parties, even if they have not participated in the consultations. In order to participate in the panel procedure, these Members must have a substantial interest in the matter before the panel and they must notify their interest to the DSB.

Article XXIII.1 of GATT 1994 provides for three grounds for complaints: (1) the failure of another Member to carry out its obligations under WTO Agreements; (2) the application by another Member of any measure, whether or not it conflicts with the provisions under those agreements; or (3) the existence of any other situation. In practice, most complaints brought to the WTO dispute settlement system are of the first type: concerning an alleged failure by another Member to carry out its obligations under WTO agreements, including the TRIPS Agreement. These are commonly known as "violation complaints"[45]. The second and third grounds for complaint allow a government to initiate the dispute settlement proceedings even when an agreement has not been violated, so-called "non-violation complaints" or "situation complaints". While these complaints can be raised about other WTO agreements, Members have agreed on a moratorium on the use of non-violation and situation complaints in the area of TRIPS.

[45] https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules8_e.pdf

Private parties whose rights and interests are affected by implementation of the WTO agreements have no standing in WTO procedures, but must rely on their government to bring or defend an action, or to intervene as a so-called third party.



https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm

The WTO has rarely enjoyed unanimous support in its working, and generally has had to battle through stiff opposition to arrive at decisions impacting global trade. Much has been written about, in newspapers and journals in India, reflecting the difference in opinion between the developed nations on the one hand, and the developing and least developed countries on the other. there are, however, several outstanding issues upon which the developed countries stand sharply divided.

During the discussion of **the Singapore Issues** at the first WTO Ministerial Conference in Singapore in 1996, mandated the establishment of working groups to analyse issues related to trade and investment, trade and competition policy, transparency in government procurement and trade facilitation. These issues were pushed by the Europe Union, Japan and Korea, and opposed by most developing countries. However the US was also lukewarm about the inclusion of these issues as a 'bundle', preferring to support only the first two – market access – issues.

Another area of continuing tensions between developed nations, particularly the US and the EU, is with regard to agricultural subsidy. The tenth Ministerial Conference in Nairobi, Kenya came out with the **Nairobi Package**. The package committed developed countries to immediately end all export subsidies in agriculture.[46] Developing countries were to phase out their own use of export subsidies by 2018. The commitment to negotiate a 'permanent solution' on public stockholding for food security purposes was reaffirmed. Domestic support in agriculture were identified by 'boxes.'

- Green Box subsidy were permitted. In order to qualify, the subsidies must not distort trade, or at most cause minimal distortion. They have to be government funded and must not involve price support. Green box subsidies include environmental protection, direct income support for farmers that are not related to (are 'decoupled' from) current production levels or prices, and could be regional development programmes.
- Amber Box subsidies are measures that support prices, or are directly related to production quantities. 'De minimis' minimal supports are allowed (generally 5% of agricultural production for developed countries and 10% for developing countries. Members committed to reduce these 'trade distorting' supports.
- A Blue Box subsidy is 'amber box with conditions.' It is crucial for countries moving away from amber box without causing too much hardship.

On 29 January 2019, the EU requested consultations with US concerning the imposition of countervailing and anti-dumping duties on ripe table olives from Spain, as well as the legislation that was the basis for the imposition of those duties. the US has applied a tariff of 34.75% on imports of Spanish black olives in terms of anti-subsidy and anti-dumping duties. The argument is that Spanish producers compete at an unfair advantage because they benefit from the aid of the Common Agricultural Policy (CAP). The EU'S

[46] except for dairy products, swine meat and processed, who were allowed till 2020.

CAP is a comprehensive system of production targets and marketing mechanisms designed to manage agricultural trade within the EU and with the rest of the world[47].

India and the GATT/WTO

India was one of the 23 nations to be represented at the Geneva in 1947 during the tariff negotiations, and subsequently became contracting parties to the GATT. India has been a member of GATT since 8 July 1948 and of the WTO since 1 January 1995. Details on India's bindings and commitments can be found at this link: https://www.wto.org/english/thewto_e/countries_e/india_e.htm

India is a member of the WTO since its founding on 1 January, 1995. The sixth review of the trade policies of India took place in June 2015. The detailed report of the WTO secretariat states, '*India is an original Member of the WTO and provides MFN treatment to all Members and other trading partners. It accepted the Fourth and Fifth Protocols of the GATS. India is a strong advocate of the multilateral trading system and has historically been party to few regional trade agreements. However, despite India's reservations, regionalism has increasingly become an element of its overall trade policy objective of enhanced market access for its exports.*'

India is one of the most active users of anti-dumping measures among WTO Members; it initiated more than 80 anti-dumping investigations against 23 trading partners during the period under review. India grants direct and indirect assistance to various sectors. Most central government subsidies are destined for agriculture. Other key subsidies include those for fertilizers and petroleum. Price controls, which apply to some commodities, including liquefied petroleum gas, natural gas, kerosene, and agricultural products, are mainly aimed at providing subsidies to farmers and the population under the poverty line. In 2012, new price controls on drugs were introduced with a view to ensuring availability of "essential medicines". The services sector, which accounts for more than half of India's GDP, is the main driver of economic growth. Regulatory changes were introduced (notably in financial services, telecommunications, and transport), such as the introduction of a scheme for setting up wholly-owned banks subsidiaries, raising foreign equity limit in insurance to 49%, amending the main securities legislation, adopting the National Telecom Policy 2012, and allowing FDI in railway transportation except in the operation of railways.

India and other developing countries had made substantial contribution to bring about a competitive international trading environment after the 1979 Tokyo Round. The number of signatories to the GATT had expanded dramatically, from 91 in 1986 to 128 in 1995, with a further 25 formally seeking accession to the WTO. Thus the developing world was more heavily represented in the WTO than in the GATT. They are grouped as "developing countries" and "least developed countries". There are no WTO definitions of "developed" and "developing" countries. Members announce for themselves whether they are "developed" or "developing" countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries.

[47] https://www.wto.org/english/thewto_e/glossary_e/cap_e.htm

Initially, there was little demanded of developing countries in terms of liberalisation of their economy, as they were neither major importers nor exporters. Developing countries as a group focussed most of their attention on obtaining preferential access to industrial county markets. Few of them participated actively in the negotiations. Most developing countries had no schedules or bindings in the first decade. Slowly at first, but very rapidly by the late 1980s, developing countries began to undertake liberalisation of their trade regimes, as the collapse of

Since the founding GATT, India had subscribed to an open, rule-based multilateral trading system[48], but there was concern that during the Uruguay Round the industrialised countries appeared to be shying away from the level playing field and 'seeking a tilt in the rules of the game.' Earlier this year, India proposed to host a mini-Ministerial Conference to discuss the interests of least developed countries, and developing countries in global trade rules to address the asymmetries in the system. The Indian economy has experienced a major transformation as a result of the changing multilateral trade discipline within WTO framework. The Intellectual Property Rights laws of India underwent extensive amendments to bring them into compliance with its WTO commitments.

India has been using the dispute settlement mechanism and has had proceedings initiated against her regarding domestic support measures and export subsidies. In December 2018, India requested the establishment of a dispute settlement panel to rule on the controversial unilateral duties imposed by the US on the imports of steel and aluminium under the US Section 232 Security provisions. India's first request made earlier was blocked by the US, but under WTO rules, when a second request is made, the panel is automatically established. Switzerland and India join seven other countries – China, the EU, Canada, Mexico, Norway, Turkey and Russia in securing the establishment of the panel against the US.

Earlier this year, Brazil and Australia have requested WTO dispute consultations with India regarding domestic support measures and alleged export subsidies provided by India to producers of sugarcane and sugar. The EU has also sought consultations with the Indian government for settlement of disputes with regard to tariff treatment that India accords to certain goods in the information and communication technology sector.

[48] Statement by Mr. Pranab Mukherjee, Minister of Commerce at the Marrakesh Ministerial, 12-15,1994, https://docs.wto.org/gattdocs/q/UR/TNCMIN94/ST38.PDF

CHAPTER II

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Background

Intellectual Property Rights (IPR) have evolved as the mainstay of the international framework regarding the movement and transaction of goods across countries. The first systematic legal framework for internationalisation of IPR was achieved in the 19th Century. Prior to TRIPS, virtually all international conventions dealing with IPRs were administered by WIPO, the cornerstone of which was the 1883 Paris Convention.

Prior to the inclusion of TRIPS in the GATT framework, the only GATT provision promoting IP was Art.IX:6 which called on the contracting parties to cooperate with each other in the protection of distinctive regional or geographical names[49]. Certain actions of US law that enforced IP were found to be unjustifiably restrictive or discriminatory, such as the *Manufacturing Clause* of the US Copyright law which prohibited importation of copyright works unless they had been printed in the US; again, under Section 337 of the US Tariff Act, American producers could obtain orders excluding importation of goods found to be infringing US patent and other IP rights. Considerable tension arose between the US and its trading partners such as Korea, Japan, Canada and the EC. By the end of the Tokyo Round in 1979, the US and EC supported a proposed code on trade in counterfeit goods. In 1982, a Ministerial Declaration included an instruction to the GATT council to 'examine the question of counterfeit goods with a view to determining the appropriateness of joint action in the GATT framework on the trade aspects of commercial counterfeiting…' This proposal was supported by Canada, the US, Europe and Japan. It was decided at the end of 1984 to set up an expert group with participation of an expert from WIPO to help the Council decide on the issue. The Council reported in 1985 that there was indeed a growing problem of trade in counterfeit goods and a case for enhanced international action, but did not agree whether the GATT was the appropriate framework for such action[50].

The inclusion of IP in the GATT framework was initiated by a broad coalition of business interests, mostly from the US, whose increasing competitiveness lay in services and IP. The idea of linking IPRs with trade first emerged in the US among the representatives of the pharmaceutical, chemical and computer-related companies, who were facing competition from Japanese industry. The pressure from these sectors succeeded in convincing the US Congress to amend the Section 301 provisions of the US Trade and Tariff

[49] These are now called Geographical Indications, and had been included in the Havana Charter at the instigation of the French and the Cubans.
[50] Otten, Adrian, *The TRIPS Negotiations: an overview,* https://www.wto.org/english/res_e/booksp_e/trips_agree_e/chapter_3_e.pdf

Act, 1974. The 1984 clarifications made failure to protect IPRs by any country actionable with trade sanctions. This enabled the US to use the 'special 301' sanctions to secure bilateral ties in IPR protection[51]. This went beyond the use of border controls to prevent importation of counterfeit goods, to the substantive standards of IP protection and enforcement in other countries.

In 1986, the US Administration made a major policy statement, stating it objective not only to complete an anti-counterfeiting code, but also to conclude a more far-reaching IP agreement building on pre-existing WIPO standards. The proposal was supported by the Organisation for Economic Cooperation and Development (OECD) countries provided the negotiations in the new round on IP concerned the 'trade-related aspects.' IPRs were successfully included, over the objections of developing countries, in the negotiating agenda for the Uruguay Round, as articulated in the Punta del Esta Declaration of 1986. The Declaration stated the commitment of the members to

> *'develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT…without prejudice to other complimentary initiatives that may be taken in the WIPO and elsewhere to deal with these matters.'*

The US was clear from the start that it wanted to negotiate on both substantive standards of IP protection as well as internal enforcement in addition to border enforcement. Many developing countries opposed the agenda as they considered them matters where a balance between domestic interests were to be found, and only marginally trade-related. The 1989 Montreal decision provided clear and precise guidance to the negotiators on TRIPS. Paragraph 4 of the decision represented a readiness to negotiate the full range of IP issues that the developed countries wished to see addressed, while paragraph 3, 5 and 6 contained key safeguards that made it possible for the developing countries to accept the agenda in Paragraph 4.

At its meeting of May 1989, the Negotiating Group on TRIPS requested the secretariat to prepare synoptic tables setting out in a comparative manner the proposals tabled in the group on standards and principles concerning the scope, availability and use of TRIPS, and corresponding provisions of existing IPR treaties. Specific proposals were received from nine developed countries, and seven developing countries (including India). General contributions were also received from the least-developed countries. Trade negotiators had to depend on IP experts to provide important contribution. In June 1990, a composite draft was circulated as in informal document, on the basis of which intensive consultations took place with the delegations. The principle of 'nothing is agreed until everything is agreed' was adhered to over the next six revised drafts. The 1991 draft of the Negotiating Group was forwarded for inclusion in the Draft Final Act (also referred to as the Dunkel Draft). The issues discussed included 'exhaustion' of patents, the definition of 'public' for the purposes of pubic performance and communication to the public under the Berne Convention, protection for products other than wines as GIs, and issues relating to pharmaceutical patents. With a few

[51] Moschini, G., *Intellectual Property Rights and the World Trade Organisation: Retrospect and Prospects,* https://www.card.iastate.edu/faculty/profiles/giancarlo_moschini/moschini-trips-preprint-oct-04.pdf

changes on non-violation disputes[52] and inclusion of semiconductor technology, the final TRIPS Agreement entered the Draft Final Act.

Salient Features of TRIPS

Until the establishment of the TRIPS Agreement, trade liberalisation efforts were concentrated on border measures. TRIPS for the first time reached beyond the borders. The prefix 'trade-related' emphasised the importance of the introduction of IPR protection into the GATT framework, which only dealt with goods. TRIPS bundled together the main provisions of the major, and hitherto independent, international IPR agreements, into a whole and indivisible package that cannot be agreed separately. This is known as: 'Single Undertaking' – or '*Nothing is agreed until everything is agreed.*[53]'

The most significant feature of the TRIPS is enforcement of international IPRs. International enforcement of IPR is non-existent in the treaties administered under the WIPO or the WIPO Convention. Under TRIPS, members can rely on the WTO dispute settlement mechanism and on the threat of trade sanctions for non-compliance with TRIPS standards. A Council for TRIPS was established to monitor the operation of the agreement and governments' compliance with it. Failures of governments can be pursued under the integrated WTO dispute settlement mechanism.

The main principles enshrined in the TRIPS are

National Treatment provided for in Article 3 requires that the same rights be equally available to nationals and foreigners. This principles has been followed in every IPR treaty from the 19th century.

Most-favoured-nation provided for in Article 4 requires equal treatment for nationals of all trading partners in the WTO. This principle is new to IPR agreements, but is central to the other WTO agreements.

Minimum standards of IPR protection to be provided by each member in each area of intellectual property is achieved by spelling out the subject matter to be protected, the rights to conferred along with the permissible exceptions, and the minimum duration of protection. The TRIPS Agreement sets of minimum standards of protection for copyrights and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout designs, and undisclosed information. This is a major departure from the existing IPR agreements. The main obligations of the major IPR agreements are incorporated by reference and must be complied with, except for the Berne Convention provisions on moral rights.

New standards, subjects and restrictions have been introduced in TRIPS which were not provided for in the earlier IPR agreements. These include the minimum duration of 20 years of patent protection for all products and processes, protection of plant varieties by patents or *sui generis* system, and restrictions on

[52] Non-violation nullification of benefits claims are a species of dispute settlement in the WTO incorporated as Art. 64 of TRIPS. Under NVNB provisions, the full range of dispute resolution mechanisms may be invoked, whether or not a breach of any specific trade rule is alleged, provided a "reasonably expected" "benefit" accruing under the relevant trade agreement, has been "nullified or impaired" by a "measure" applied by a WTO member.

[53] https://www.wto.org/english/tratop_e/dda_e/dda_e.htm

local working requirement in domestic law. With respect to geographical indications, a higher level of protection is provided for wines and spirits (which are protected even when there is no danger of the public's being misled). With respect to the protection of layout designs of integrated circuits, TRIPS extends the incorporated treaty provisions by requiring a minimum protection period of 10 years, and that the rights must extend to articles incorporating infringing layout designs. Trade secret protection is explicitly imparted by TRIPS. In particular, test data submitted to governments in order to obtain marketing approval for pharmaceutical or agricultural chemicals must be protected against unfair commercial use.

Transparency under Article 63 requires member governments to publish and make publicly available all laws, regulations, final judicial decisions and administrative rulings relating to IPR that have been made effective by the member state. In addition, the scope of enforcement and prevention of abuse of IPR must also be made available in a national language. Members are required to notify all laws and regulations to the TRIPS Council and also be prepared to supply such information upon a written request from another member. Governments must also ensure that assistance of customs authorities be made available to prevent imports of counterfeit and pirated goods.

TRIPS envisioned a differentiated phase-in period of WTO member states' compliance. TRIPS allowed a one-year transition period for developed countries from 1 January 1950, the date of establishment of WTO. Developing countries were given five years, while least developed countries were allowed an 11-year transition period. This meant that all WTO contracting parties would be in full compliance with TRIPS as of January 2006. The 2001 Doha Declaration on TRIPS and public health, gave the least developed countries an extension until January 2016 for implementing their obligations related to pharmaceuticals.

Under Article 64 of TRIPS, disputes with regard to trade-related aspects of IPR are subject to the WTO's dispute settlement procedures as elaborated and applied by the Dispute Settlement Understanding in GATT 1994. The Council for TRIPS has the responsibility of administration of the TRIPS Agreement. It also constitutes a forum for consultations on any problems relating to the TRIPS arising between members, as well as for clarifying and interpreting provisions of the TRIPS Agreement. The aim is to, whenever possible, resolve differences between Members without the need for formal recourse to dispute settlement.

Contemporary issues under TRIPS

A 2002 report of the IPR Commission of the UK[54] considered how Intellectual Property Rights (IPR) could play a role in helping the world to meet the Millennium Development Goals and 'in particular by reducing poverty, helping to combat disease, improving the health of mothers and children, enhancing access to education and contributing to sustainable development. They concluded that trade flows into developing countries are influenced by the strength of IP protection, but that 'evidence is far from clear.' While these flows may contribute to productive capability…developing countries with weak technological infrastructure, may be adversely affected by the higher prices of importing IP protected goods. Achieving

54 http://www.iprcommission.org/papers/text/final_report/reportwebfinal.htm

the right balance may be difficult for some countries such as India or China where some industries have the potential to benefit from IP protection, but the associated costs for industries that were established under weak IP regimes as well as consumers are potentially high. The Commission concluded that 'any beneficial trade and investment effects are unlikely to outweigh the costs at least in the short and medium term.' In the years since then, the scenario remains much the same.

Some issues that the TRIPS framework has been grappling with since its inception are[55]:

1) **TRIPS and public health.** The interface between TRIPS and the objective of universal and equitable access to public health received attention in the WTO's Doha Round in 2001. TRIPS, as it impacts the levels of patent protection in developing countries, adversely affects price control and production of generic versions of life saving drugs. Strong patents on products and processes also negatively influences pharmaceutical innovation, particularly in underserved regions, and neglected diseases.

   The 2011 Doha Declaration on the TRIPS Agreement and Public Health "recognizes that intellectual property rights should be interpreted and implemented in a manner supportive of the right of Member States to protect public health and, in particular, to promote access to medicines for all, and notes the need for appropriate incentives in the development of new health products."

   While in the pre-TRIPS era, many developing and some developed countries excluded pharmaceutical products and/processes from patent protection, it was no longer possible to do so. The TRIPS Agreement allows for 'flexibilities' to enable governments to mitigate the negative impact of stringent IPR enforcement, but challenges to the free use of such flexibilities have raised concerns among developing countries. For instance, during the HIV pandemic in Sub-Saharan Africa in 1998, the multinational pharmaceutical companies legally challenged the implementation of TRIPS-compatible measures, including parallel importation, by the South African Government. The US Government placed South Africa on its 301 special watch list. The matter only resolved when President Clinton adopted an Executive Order preventing the US Trade Representative from interfering with attempts by the Sub-Saharan African countries to use TRIPS flexibilities to increase access to medicines[56].

   The different flexibilities in TRIPS that impact health include compulsory licensing; the ability of WTO members to determine for themselves what an 'invention' how patentability requirements are to be applied; pre- and post-grant opposition and strict disclosure standards. WTO members can exclude from patentability therapeutic, surgical and diagnostic methods. WTO members are not obliged to provide for a period of exclusivity of test data as implemented by the EU and the US.

[55] https://www.wto.org/english/tratop_e/trips_e/trips_issues_e.htm

[56] UNDP, *The Doha Declaration Ten Years on and its Impact on Access to Medicines and the Right to Health,* https://apps.who.int/medicinedocs/documents/s21425en/s21425en.pdf

The declaration also clarified that 'public health crises' can represent a national emergency or other circumstances of extreme urgency – which may either be a short-term problem or a long-lasting situation.

While some countries, such as South Africa, have taken steps to incorporate TRIPS flexibilities in their national laws, India is yet to fully utilise and implement the flexibilities. The South African development Community (SADC) member countries have taken to implementing TRIPS flexibilities combined with the regional exceptions under Art 31*bis*. The SADC, being a regional block with 50% least developed country members, and bearing a disproportionate burden of HIV, tuberculosis, and malaria, alongside a growing incidence of non-communicable diseases,[57] can make use of the regional exception to facilitate the production or procurement of generic medicines to the benefit of the entire region.

2) **TRIPS and biodiversity.** Article 27.3(b) of the TRIPs agreement requires Members to provide for protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. Often developing countries choose their own *sui generis* system in protecting plant varieties. It is argued that TRIPS rules on the scope of patentable material may violate national sovereignty by giving away rights that are accorded states under CBD[58]. The issues that are at the heart of the debates between TRIPS implementation and CBD are:
    a. Benefit sharing through appropriate access to genetic resources;
    b. Benefit sharing through appropriate transfer of technology;
    c. Private property and national sovereignty; and
    d. Intellectual property and traditional knowledge.

While the UN Convention on Biological Diversity,[59] recognises collective rights of local communities to biological diversity, TRIPS imposes private intellectual property rights on the resources. Article 15 of CBD, recognising the sovereign rights of States over their natural resources, has empowered the national authorities to determine the policy, administrative or legal measures for allowing access to their genetic resources. Article 8(j) contains provision to encourage the equitable sharing of the benefits arising from the utilisation of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

It is argued that it is possible to get patent protection on a natural substance by being the first to describe it in the language of biochemistry and then suggesting an industrial application. While outcomes of 'formal' innovation processes can be protected as patents, traditional knowledge and intergenerational innovations by indigenous populations do not benefit from protection under TRIPS. On the other hand, defenders of

[57] s. http://www.oapi.int/index.php/fr/oapi/etats-membres
[58] For example: Adhikari, Ratnakar, *Emerging Issues Relating to Conflicts between TRIPS and Biodiversity: Development Implications for South Asia,* http://www.sawtee.org/Research_Reports/R2005-05.pdf
[59] Signed at the Earth Summit in 1992.

patents claim that as long as the system operates in accordance with TRIPS standards, it is not possible to patent something as it exists in nature. In the matter of equitable sharing, it is argued that both in bioprospecting and in utilisation of genetic resources, the weaker bargaining position of indigenous communities and developing countries results in unfair deals that benefit private parties and multi-national corporations. The response to this argument is that, in the absence of strong intellectual property protection, there are no monetary benefits to share in the first place.

CBD, under Article 16, requires States to provide and/or facilitate access and transfer of technologies, relevant to conservation and sustainable use of biological diversity, to developing countries under fair and most favourable terms. However, Article 16.5 of the CBD states that contracting parties shall cooperate to ensure that IPRs are 'supportive of and do not run counter' to the objectives of CBD. The uncertainty in the harmonious implementation of the two agreements is that while countries are expected to facilitate fairness, it is generally private firms that are involved at both ends of the processes. For these firms, strong IPR protection is a prerequisite for transfer of technology.

A significant action that has taken place in developing countries to reconcile the goals of TRIPS and CBD is the requirement that patent applicants disclose the source of biological and genetic material, and association traditional knowledge from which the claimed inventions are derived. Farmer Plant varieties, medicinal compounds and traditional methods receive some protection from the laws relating to biodiversity, however, lack of documentation and poor bargaining capacity reduce the effectiveness of these legislative mechanisms.

3) Geographical indications (GI)

Geographical indication is one of the instruments of protecting the quality, reputation or other character of goods essentially attributable to their geographical origin. According to Article 22 of the TRIPS Agreement unless a geographical indication is protected in the country of its origin there is no obligation under this Agreement for other countries to extend reciprocal protection. But Article 23 of the Agreement provides additional protection to geographical indications only in cases of wines and spirits which means they should be protected even if there is no risk of misleading or unfair competition. Article 23 imposes a higher level obligation upon member countries to legislate to prevent the use of geographical indications regarding wines or spirits, which do not originate in the place indicated.

The higher level of protection of geographical indications given only to wines and spirits under Article 23(1) of the TRIPS Agreement, without any particular specification of any unique characteristics, has been a bone of contention with developing countries. India has sought for additional protection for *Basmati* rice, *Kolhapuri Chappals*, *Darjeeling* tea and *Alphonso* Mangoes. It was argued that additional protection would deliver enhanced benefits via increased trade opportunities for members and producers, and would also promote export. Countries like Nicaragua, Pakistan, Kenya, Honduras and others argued that the additional protection should be extended to cover other products of special interest to concerned member countries.

In contrast to other IPRs, the use of GI is considered more appropriate in protecting indigenous knowledge. This is because the knowledge underlying the GI remains in the public domain, and the rights can be held in perpetuity as a collective right, making it consistent with cultural and traditional rights. Products identified by geographical indication are often the result of traditional processes and knowledge carried forward by a community in a particular region from generation to generation. GI may also embody characteristic elements of the traditional artistic heritage developed in a given region. The differentiation from commodities, in terms of the product's association with geographical territories and traditional methods of production and processing that are often difficult to duplicate in other regions, offers a valuable competitive advantage. GI can contribute to the protection of Traditional Knowledge by preserving their commercial and reputational value for future generations. However, the lack of a single or coherent international approach to protection of GIs makes it difficult to seek and enforce protection rights in different countries. In certain countries, like the EU member states, India and China, GI protections is provided under a *sui generis* system; however, in the US, Canada and Japan, indications of geographical origin is protected by means of trademark law. In the US, the regular trademark law provides protection for GIs through the notions of 'certification marks' and 'collective marks.'

In the EU, certain agricultural products and foodstuffs can be registered to protection under Regulation 510/2006, adopted by the Agricultural Council of the European Community on the protection of Geographical Indications (PGI) and Designations of Origin (PDO). The regulation does not so far cover the registration of industrial or non-agricultural goods. It does not also cover wines and spirits which are covered by their own existing Community legislation. PDO protect names of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or foodstuff originating in that region, the quality or characteristics of which are essentially or exclusively due to a particular geographical environment, with its inherent natural and human factors. PGI protection is provided to the name of a region, or a specific place, or in exceptional cases – a country, used to describe an agricultural product or a foodstuff originating in that region, which possesses a specific quality, reputation or other characteristics. An example of indications[60] of source is 'Olives cassées de la vallée des Baux-de-Provence' or broken olives from the Valley of Baux-de-Provence; and examples of a Geographical Indications are 'cidre de Normandie' or Normandy Cider, and 'queso los beyos' or Los Beyos cheese.

In general the OECD countries have the largest and most diverse portfolio of GIs. A vast majority of GIs protected in the developed countries are in respect of wines and spirit. Over 3,000 names of wines, spirits and food products from EU countries and non-EU countries are currently registered in the EU, such as Champagne, Grana Padano, Feta, and Comté. A 2016 report of the WIPO[61] on GI states that many

[60] http://ec.europa.eu/agriculture/quality/door/list.html
[61] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2017-chapter6.pdf

countries are unable to provide statistics on GI, reflecting the difficulty of differentiating GIs from collective and certification trademarks registered.

The success of policy measures promoting GI hinges on careful implementation of effective marketing strategies and maintenance of product specifications, including standards for quality, traceability and safety. In addition, countries must also have negotiation capacity at the international level to protect their GI. This can be emphasised by the case of Thai Jasmine rice, for which Thailand had granted GI protection in 2006 to be labelled as 'Khao Hom Mali Thung Kula Rong-Hai' or Jasmine Rice from Thung Kula Rong-Hai. The Ministry of Commerce of Thailand accepted that the premium Hom Mali rice grown in Thung Kula Rong-Hai has more prominent aroma owing to the natural climatic and soil conditions of the region. However, when protection was sought for the GI in Europe, five EU nations including France, the UK, Italy, Netherlands and Belgium opposed registration, contending that Thailand should protect on Thung Kula Rong-Hai, as the source of origin, and not seek to monopolise 'jasmine rice' which other countries could also grow. It was only in 2013[62], that the European Commission granted protection for the rice, after Thailand stated that they were seeking protection of the whole label rather than just 'Khao Hom Mali'.

4) Technology transfer

Developing countries and least developed countries see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights[63]. The TRIPS agreement aims to achieve the transfer and dissemination of technology as part of its objectives, as stated in Article 7 ("Objectives") of the TRIPS Agreement[64], and specifically requires developed country members to provide incentives for their companies to promote the transfer of technology to least-developed countries.

Article 66.2 casts a mandatory obligation on developed countries to provide incentives for technology transfer to least-developed countries. At the Doha Ministerial, it was agreed that the TRIPS council would 'put in place a mechanism for ensuring the monitoring and full implementation of the obligations'. The Council adopted a decision setting up this mechanism in February 2003, which details the information that developed countries are to supply by the end of each year, on how their incentives are functioning in practice.

A number of obstacles remain in successfully implementing international technology transfer including 'absorptive capacity' and human capital in the developing country recipient. In addition, firms with higher R&D investment benefit from the presence of foreign multinationals[65]. Technology transfer is also

[62] http://ap.fftc.agnet.org/ap_db.php?id=793&print=1
[63] https://www.wto.org/english/tratop_e/trips_e/techtransfer_e.htm
[64] *The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations*, https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm
[65] International Technology Transfer Policies, OECD, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2018)8/FINAL&docLanguage=En

positively influenced by general and specific regulations in the area of FDI facilitation and promotion. These include streamlining of administrative procedures, creation of investment promotion agencies, setting up of information exchange networks and improvement of the business environment, to attract foreign companies. Policies to acknowledge and protect IPRs play a central role in the international technology transfer conditions prevailing in a country, and Article 67 requires developed countries to facilitate technical cooperation in engendering a robust IP protection system.

Given the obstacles of low absorptive capacity, the obligations under Article 66.2 barely meet the requirements of least-developed countries. Scholars studying international technology transfer suggest that technology transfer should be the 'main operation', where the main task is to identify the proper direction which best represents the interests of the developing countries, rather than a *joint product* of FDI, or infrastructure development. Making technology transfer the main operation also shifts the locus of decision-making to local agents in terms of the modes and quality of learning, technology transfer and the choice of the area to be concentrated on.[66]

Other studies[67] find that only a small percentage of technology transfer programmes target least-developed countries; developing countries are preferred. The relatively broad definition of 'technology transfer' enabled developed countries to include incentives for skill building, training, education, providing insurance, building technical components into aid projects, and sending skilled nationals to volunteer in technical capacity in their reports on the implementation of Article 66.2. Studies also proved that reporting by developed countries on Article 66.2, is sporadic and incomplete and therefore it is difficult to identify the actual impact of Article 66.2.

5) Extension of 'non-violation' exemption

Under the WTO dispute settlement rules, there are two avenues or bases for challenging partner country actions. The first basis for a challenge is when a partner country has breached the rules of WTO (the 'violation' route). The other basis is when a partner country takes domestic actions that may lead to nullification and impairment even though a rule may not have been explicitly breached – the 'non-violation' route. Developing countries fear that actions such as price controls and other drugs-related policies, which though not in overt contravention of TRIPS rules, could nevertheless be challenged for impairing the benefits under the agreement[68].

Different countries at different stages of economic development must accordingly strike their own balance between incentives to create and the benefits of free competition, while respecting the normative guidelines established by the TRIPS agreement[69]. Least-developed countries were not

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[66] Foray, Dominique, *Technology Transfer in the TRIPS Age,* https://www.iprsonline.org/New%202009/foray_may2009.pdf

[67] Including: UNCTAD Policy Brief, *Does TRIPS Art. 66.2 Encourage Technology Transfer to LDCs?* https://unctad.org/en/Docs/iprs_pb20092_en.pdf

[68] Subramanian, Arvind, *TRIPS and Developing Countries: the Seattle Round and Beyond,* https://pdfs.semanticscholar.org/a3f2/3e999fd48e2e025bafc654022871061ed487.pdf

[69] Article 7, TRIPS agreement

required to implement the TRIPS Agreement, other than Article 3 (national treatment), Article 4 (MFN treatment) and Article 5 (precedence of WIPO procedures), for a period of 10 years from 1 January 1996. Paragraph 1 of the Decision of the TRIPS Council on the Extension of the Transitional Period under Article 66.1 of the Agreement for Least-Developed Country Members has extended this transition period for another 7.5 years which expired on 1 July 2013.

The dispute settlement panels, thus, are required to show a high degree of respect for, or deference to, good faith applications of local law to the facts and issues in dispute. The panels should take into consideration the unforeseen economic hardships that may surface during and after the transitional phase in the enforcement of IPR.

6) Enforcement

The TRIPS agreement implicitly mandates standards on the effectiveness and expeditiousness of national IPR enforcement. The key issue is whether these standards are 'absolute' or 'relative'. On the one hand, national enforcement of IPRs must be 'expeditious,' yet, the agreement 'does not create any obligation to put in place a judicial system for the enforcement of IP rights distinct from that for enforcement of law in general, nor does it affect the capacity of members to enforce their law – suggesting a relative standard. Yet, under the TRIPS agreement, adopting legislation that complies with international minimum standards becomes essential. If rights holders cannot enforce their rights effectively, their own states can choose to trigger the WTO's dispute settlement mechanism against the accused state's judicial and administrative organs.

Article 67 recognises the needs of Least-developed and developing countries for continuing technical and financial co-operation in order to realize the cultural, social, technological and other developmental objectives of the intellectual property (IP) system. The TRIPS Agreement's preamble already acknowledged LDCs' particular need for maximum flexibility in implementing laws and regulations domestically. During negotiations, developed countries often prioritise strong IP protection and enforcement. Developing countries and least-developed countries, on the other hand, prefer to focus on safeguard provisions, flexibilities, limitations to IP rights and provisions reinforcing technology transfer and cooperation with companies in partner countries[70]. Developed countries use different strategies, including 'package deals' where trade agreements contain some type of IP provisions, and the developing country is forced to accept the deal based on export interests and other objectives external to the IP system. Neither party appears to promote the common goal to achieve a mutually advantageous, balanced regulation of IP among the parties.

Part III of the TRIPS agreement state the provisions for Enforcement of Intellectual Property Rights. Article 41 summarises the four principles of enforcement provisions –

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[70] Moerland, Anke, *Do Developing Countries Have a Say? Bilateral and Regional Intellectual Property Negotiations with the EU*, https://link.springer.com/article/10.1007/s40319-017-0634-6

I. Specified procedures must be to made available under the domestic laws to permit effective action against present and future acts of infringement
II. Pertinent judicial and administrative procedures must be fair and equitable and not unnecessarily complicated or likely to cause unwarranted delays
III. Courts and administrators must base decisions on evidence available to all the parties, and should normally deliver written, reasoned opinions
IV. There must be some form of appellate review for decisions handed down by administrative or judicial agencies of first instance

Article 41.5 provides safeguards from the duty to provide foreign rights holders with a more effective enforcement system than which the domestic courts and administrative agencies would normally mete out to local rights holders in similar circumstances. The 'Special Requirements Related to Border Measures,' set out in Articles 51-60 apply to counterfeiting and piracy rather than to other forms of infringing conduct for which member states must make civil procedures and remedies generally available. The procedure enables rights holders to file an application with a competent authority, providing adequate *prima facie* evidence and a sufficiently detailed description of the goods to compel domestic customs authorities to suspend release of the imported goods into the domestic market.

While procedures appear to be drafted in broad legal standards, the substantive standards of the TRIPS agreement reflect the view of the powerful industrial circles of developed countries[71], rather than entrepreneurs in developing countries. TRIPS substantive enforcement standards intervene in the domestic sovereignty of member states. For the developed countries who have already achieved the standards, the benefits are immediately apparent; on the other hand, developing and least-developed countries face difficulties in overcoming the technological lag at socially acceptable costs, and benefits will take time to accrue. The dispute settlement panels have to enable a balance between the self-serving higher standards of enforcement demanded by the technology exporting countries, and the pro-competition interpretations of the developing countries. Further, the dispute settlement mechanisms, if used cooperatively or consultatively could lead to stronger and friendlier trade ties, between the developed and developing countries; confrontational forms of international resolution could lead to short-term or long-term cooling of relations between trading partners.

TRIPS and India

India is an original member of the WTO since 1 January 1995, and also an original member of TRIPS. India has been at the forefront of the TRIPS and health battle since the inception. Unlike many other countries, a large number of Indians fall into poverty on account of catastrophic health spending[72]. While

[71]Reichman, JH, *Enforcing the Enforcement Procedures of the TRIPS Agreement,* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1406&context=faculty_scholarship
[72]Joseph, Reji, *TRIPS and Public Health: Challenges for India and its Response,* https://link.springer.com/chapter/10.1007/978-81-322-3580-4_11

greater innovation and stronger patent rights may developing and least-developed countries, cost of drugs and their availability may have life or death consequences.

India also provides 20 percent of the world's generic drug requirement[73] including 40 percent of the US generic drug needs, and 80 percent of the generic antiretroviral drugs used to treat HIV/AIDS globally[74]. The Indian government, in 2008, set up the *Jan Aushadhi* scheme to open generic drug stores. In 2017, the Department of Pharmaceuticals opened the *Pradhan Mantri Bharatiya Janushadhi Pariyojana* to provide quality medicines at affordable prices, through the *Pradhan Mantri Bharatiya Janaushadhi Kendras*. As many as 850 *kendras* are now functioning over 28 States/Union Territories[75].

India has already undertaken several steps to implement legislative and administrative changes to bring them into compliance with the requirement of TRIPS. In spite of these, India's large share in the global generics market causes discomfort to innovator companies, and leads to friction in trade relations. The US, in particular, objects strenuously to what it perceives as India's 'defensive posture'. India's demands for broadened flexibilities at the WTO, signal greater use of compulsory licensing according to the US[76]. For the 27th year in a row, India made it to the Priority Watch List in the Special 301 Report of the Office of the US Trade Representative, on charges that India is not compliant with TRIPS requirement. The Global IP Centre of the US Chamber of Commerce, releases an annual International IP index covering fifty economies, representing 90 percent of the global GDP. India has constantly been ranked far below other 'compliant' trading partners of the US. In the 2019 index, India's score improved from 44th in 2018 to 36th[77].

Pursuant to signing the TRIPS agreement, India made several changes to the domestic IPR regime. These include:

I. The Copyright Act, 1957 was amended in 1999 to meet the requirements of the TRIPS agreement wherein Article 10 dealing with Computer Programs and Compilations of Data stated that the source or object code, shall be protected as literary works under the Berne Convention (1971), compilations of data or other material due to selection or arrangement of their contents constitute intellectual creations, was included. In addition, the definition of 'author' was expanded to include persons who create musical or artistic work which is 'computer-generated.' Other changes were brought to ensure full compliance with TRIPS.

II. The Trademarks Act, 1999 replaced the previous act to enable figurative elements to be protected as trademarks, in addition to introducing trade dress, and service marks. protection of well-known marks, multi class registration and certification marks were also introduced.

[73] http://www.uniindia.com/generic-drugs-holds-70-pc-market-share-in-pharmaceutical-sector-in-india/south/news/1512004.html

[74] http://pib.nic.in/newsite/PrintRelease.aspx?relid=186696

[75] For more information, please visit: http://janaushadhi.gov.in/index.aspx

[76] Patrick Kilbride, executive director of International intellectual Property at the US Chamber of Commerce's Global Intellectual Property Centre comments in: https://timesofindia.indiatimes.com/blogs/cash-flow/india-is-trips-compliant-our-response-is-who-cares-this-government-has-not-been-as-ambitious-as-we-hoped/

[77] https://www.theglobalipcenter.com/wp-content/uploads/2019/02/023593_GIPC_IP_Index_2019_4Pager.pdf

III. The Patents (Amendment) Act, 1999 brought significant changes in the Patents Act, 1970. The agreement established a mailbox system for countries that did not provide product patents for pharmaceuticals and agrochemicals. A transition period was provided for, during which exclusive marketing rights were provided to the applicants. India had ten years i.e., till January 2005 to amend the law to bring it into compliance with the TRIPS. Product patents were introduced through the amendment, and the term of protection was extended to twenty years. Patents were to be published at 18 months, and would be examined only on request of the applicant. Patenting of microorganisms was introduced. Section 39 of the patent Act permitted Indian residents to file a patent outside India after seeking permission of the controller.

IV. Other legislations were introduced, including the Designs Act, 2002, Geographical Indications of Goods (Registration and Protection) Act, 1999, Semiconductor Integrated Circuits Layout Design Act, 2000, the Protection of Plant and Varieties and Farmers Rights Act, 2001, and the Biological Diversity Act, 2002.

India has actively used the WTO Dispute Settlement Body, since the inception. In recent times, India has also been taken to the panel by other members. More recently: in December 2018, the WTO Dispute Settlement Board agreed to requests from India and Switzerland for the establishment of panels to examine tariffs imposed by the US on steel and aluminium imports. In May 2019, Japan requested consultations on India's continuous and systematic increase of import duties on a wide range of products such as electronic systems, mining, automobiles, renewable energy, defence manufacturing, food processing, automobile components, and textiles and garments. These tariff treatments, according to Japan, were implemented to incentivise domestic value addition under the 'Make in India' programme. Subsequently, the EU also joined in support of Japan.

An interesting development quietly taking place is the negotiation on the Regional Comprehensive Economic Partnership (RCEP), which has been going for the last six years, without a public debate on the outcomes. The members of the proposed Partnership include the whole of ASEAN (Thailand, Singapore, Malaysia, Vietnam, Laos, Brunei, the Philippines, Indonesia, Cambodia, and Myanmar) plus Australia, New Zealand, India, China and South Korea and Japan. India has so far been hesitant to join the RCEP on account of demands for tariff reductions and the TRIPS-plus IPR protection regime that includes patent term extension, patent term restoration and data exclusivity. In addition, India also wanted freer movement of IT and other skilled professionals and workers among RCEP members, which has been all but rejected. RCEP will however, offer India with opportunity to do more labour intensive manufacturing and enter the global supply chain . If India joins the RCEP, a new set of amendments to IPR laws may be required.

Suggested Case Law:

1. Novartis Ag v. Union of India [(2013) 6 SCC 1] - https://indiankanoon.org/doc/165776436/
2. Bayer Corporation vs. Union of India and Ors. (Pronounced on: 22.04.2019) - https://indiankanoon.org/doc/85364944/

CHAPTER III

Paris Convention for the Protection of Industrial Property

Background

The Paris Convention, 1883, was the first major step taken to help creators ensure that their intellectual works were protected in other countries. It applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. There are currently 177 contracting parties to the Convention.

As a follow-up to the 1873 Congress of Vienna for Patent Reform, an international Congress on Industrial Property was convened at Paris in 1878. A draft proposing an international union for the protection of industrial property was prepared in France subsequent to the Congress, and sent by the French Government to the industrialised countries with an invitation to attend the Paris Conference of 1880. The text of what was to become the Paris Convention of 1883 was drafted at the 1880 Conference. Of the 19 delegations who convened in Paris, the text was signed on behalf of 14 of them. The US, Germany and Japan joined shortly after. The Convention came into effect on July 7, 1884.

Any country may become party to the Paris Convention, provided it is in a position under domestic law to give effect to the provisions of the Convention. Several colonies were adhered to the Convention by their imperial rulers. For instance, Tunisia became a member through adherence on her behalf by France and Colony of Queensland was adhered to the Union by Australia. With the independence of many African countries, by 1967, the Paris Union had 42 developing nation members. The reasons for developing countries acceding to the Convention post-Independence are several, including economic cooperation and dependence on the former mother country and 'strong effect of bullying by the developed countries,' that stipulated accession to the Convention as a condition of technical and other assistance, and threat of retaliatory measures[78].

The Paris Convention applies to inventions and to patents, utility models, industrial designs, trademarks and service marks, and indications of source of goods – whether geographical or relating to the manufacturer or distributor. Measures to counter unfair competition are also subject matter of the Convention. The Paris Convention defines unfair competition as 'any act of competition contrary to honest practices in industrial or commercial matters.[79]' The following are provided as examples: (1) all acts of such a nature as to *create confusion* by any means whatsoever with the establishment, the goods, or the

[78]Dhavan et. al, Conquest by Patent: Revisiting the Paris Convention, Journal of the Indian Law Institute, Vol. 32, April – June, No. 2, http://www.elearningilidelhi.org/ILIWEB/ILIShowPDF.aspx?id=1613

[79] 1967 (Stockholm) Act, Article 10*bis*(2)

industrial or commercial activities, of a competitor; (2) false allegation in the course of trade of such a nature as *to discredit* the establishment, the goods, or the industrial or commercial activities of a competitor; (3) indications or allegations the use of which in the course of trade is liable *to mislead* the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods[80].

Conferences for revising the Paris Convention were mentioned in the original text. The Convention has been revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and was amended in 1979.

Salient Features of Paris Convention

A Paris convention application is usually an alternative to the PCT to permit patent applications in non-PCT countries. For non PCT countries like Afghanistan, Taiwan, Argentina, Mauritius, Nepal, and Paraguay, applicants have to file directly with national or regional patent offices under the provisions of the Paris Convention. Convention applications are also strongly preferred when an Applicant is very sure about the patentability (novelty, non-obviousness, and utility) of its/his/her invention, and wishes to secure a patent in the shortest possible time in different countries.

Furthermore, convention applications are preferred when the number of countries in which the Applicant intends to file is small, say only 1-3 countries. Articles 1 to 5 contain the substantive provisions of the Convention. These provisions establish certain minimum international standards to be incorporated into the legislation of member states. Article I of the Paris Convention states that the parties to the Convention constitute a Union.. The substantive provisions fall into three main categories:

1. **National Treatment: Article II** and **Article III** of the Convention provides that, as regards the protection of industrial property, each Contracting State must grant the same protection to nationals of other Contracting States that it grants to its own nationals. Nationals of non-Contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a Contracting State.

2. **Right of Priority: Article IV** of the Convention provides for Right of Priority in the case of patents, utility models, marks and industrial designs. This means that on the basis of a regular first application find in one of the Contracting States, the applicant may, with a certain period of time, apply for protection in any of the other Contracting States. The time period for patents and utility models under this provision is twelve months, while for industrial designs and marks, it is six months.

[80] Paris Convention Centenary 1883-1983, ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/ParisConventionCentenary/ParisConventionCentenary1883-1983.pdf

The subsequent applications based on the first application will be regarded as if they have been filed on the same day as the first application, and will have 'priority' over applications filed by others during the said period of time for the same industrial property. During the prescribed interval, the applications will not suffer damage on account of publication, sale or incorporation of the patent, design or mark in articles.

Article IV*bis* states that patents applied for in the various countries of the Union are independent of patents obtained for the same invention in other countries.

3. **Common Rules** are provided for patents, marks and unfair competition, that apply to every member equally.

The Paris Union, established by the Convention, has an Assembly and an Executive Committee. The Assembly comprises representatives from each member nation and meets every two years and formulates long term policy and direction. An Executive Committee composed of one fourth of the membership of the Union, meets once yearly. The International Bureau, headed by the Director General of WIPO, handles the day to day administrative tasks of the Union.

Every State that is a member of the Union and has adhered to at least the administrative and final provisions of the Stockholm Act (1967) is a member of the Assembly. The 1967 Stockholm Act established the Executive Committee and the Assembly of the Union, and also replaced the International Bureau (IB) of the Paris Union by the International Bureau of the WIPO. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member ex officio. The establishment of the biennial program and budget of the WIPO Secretariat – as far as the Paris Union is concerned – is the task of its Assembly.

Governing Rules of Paris Convention

The Common Rules for patents, marks and unfair competition are:

a. **Patents and independence of protection -** 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 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.

   Article 5*quarter* provides that with respect to product imported into a member country manufactured by a process patented in the country of importation, the patentee will have all rights with respect to the imported product that would normally be accorded the patentee with respect to products manufactured in that country.

Article 5A(2) to (4) allows countries to enact protectionist legislative measures granting compulsory licenses in order to prevent abuses that might result from the exclusive rights conferred by a patent for invention, namely the failure to work or to work sufficiently the patented invention within the member country. Compulsory licenses may also be granted in special cases where the patent affects a vital public interest, for example, in the fields of defence or public health.

b. **Inventor's rights -** The inventor has the right to be named as such in the patent.

c. **Marks -** Where a mark has been duly registered in the country of origin, it must, on request, be accepted for filing and protected in its original form in the other Contracting States. Nevertheless, registration may be refused in well-defined cases, such as where the mark would infringe the acquired rights of third parties; where it is devoid of distinctive character; where it is contrary to morality or public order; or where it is of such a nature as to be liable to deceive the public. The registration of a mark obtained in one Contracting State is independent of its possible registration in any other country, including the country of origin; consequently, the lapse or annulment of the registration of a mark in one Contracting State will not affect the validity of the registration in other Contracting States. Matters relating to protection of trademarks were more fully dealt with under the Madrid Convention, 1891.

d. **Collective Marks -** must be granted protection in every contracting state.

e. **Industrial Designs -** Industrial designs must be protected in each Contracting State, and protection may not be forfeited on the ground that articles incorporating the design are not manufactured in that State.

f. **Indications of Source -** Measures must be taken by each Contracting State against direct or indirect use of a false indication of the source of goods or the identity of their producer, manufacturer or trader.

g. **Unfair Competition -** Each Contracting State must provide for effective protection against unfair competition.

The Paris Convention, in Article 12, requires every Contracting State to establish a special industrial property service and a central register. Countries party to the Paris Convention may 'group' themselves 'in a common office, possessing for each of them the character of a special national service of industrial property.

Article 15 states that the International Bureau (IB), headed by the Director General of WIPO, shall perform the administrative tasks of the Paris Union. In addition the IB shall assemble and publish information concerning the protection of Industrial Property. Contracting Parties are required to promptly communicate to the IB all new laws and official texts concerning the protection of industrial property. Article 19 of the

Convention specifically permits member countries to conclude separate agreements among themselves for the protection of industrial property as long as these separate agreements do not include provisions that contravene those of the Paris Convention. Article 28 provides that disputes not otherwise settled may be brought before the International Court of Justice, but parties adhering to the Convention may, at the time of accession, opt out of this provision.

India and the Paris Convention

India acceded to the Paris Convention and the Paris Convention Treaty on September 7, 1998, the provisions entering into force in relation to India on December 7, 1998. By this time, as member of the WTO/TRIPS Agreement, India was already in compliance with the requirements under the Paris Convention. With the accession to the Convention, India now provides all the filing facilities as mandated under these arrangements to applicants for filing convention and national phase patent applications.

CHAPTER IV

Patent Cooperation Treaty (PCT)

Background

The Patent Cooperation Treaty (PCT) is an international treaty administered by the World Intellectual Property Office (WIPO). Since entering into force in 1978, the PCT has served as an alternative to the Paris Convention route for pursuing patent rights in different countries. The PCT System makes it possible for applicants to delay examination procedures at national patent offices as well as the payment of associated legal fees and translation costs for an invention by filing a single "international" patent application. When it was first established, the PCT System comprised 18 members. By the end of 2017, it comprised 152 Contracting States.

By 1966, a considerably large, and constantly growing, number of patent applications were being filed in all countries that were issuing patents. A substantial number of these were applications concerning the same inventions in different countries, thereby increasing the volume of applications to be processed. If there were a process to provide effective protection for inventions throughout the world, it would benefit inventors, the general public and governments by making processes economical and quicker.

In 1966, on a proposal presented by the US, the Executive Committee of the Paris Union, adopted a recommendation to undertake a study on solutions tending to reduce the duplication of effort both for applicants and national patent offices… In accordance with the recommendation, the Director of BIRPI consulted with experts form the six states which then had the highest number of applications and from the International Patent Institute. The six states consulted were France, Germany (Federal Republic), Japan, Soviet Union, UK and the US. In 1967, a draft was prepared by BIRPI under the tentative title – Patent Cooperation Treaty, which served as the basis for discussions of a Committee of Experts convened by BIRPI at Geneva the same year[81].

Processes such as *international search*, *international application* and *international preliminary examination* were considered in meetings held during 1968. BIRPI prepared a second draft of the PCT and the first draft of the PCT Regulations. These and other working documents were published in July 1968. On the basis of deliberations of the 1968 Committee of Experts, BIRPI further revised the drafts and issued them in March, 1969. Three meetings were convened by BIRPI in April and May, 1969 for the purpose of considering the Drafts and further revisions were incorporated. The Executive Committee of the Paris Union approved the plan the hold the Diplomatic Conference in Washington, and written comments were invited. A Preparatory Study Group was held in March 1970, where India was designed Observer State.

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[81]Post-Conference Documents, Records of the Washington Diplomatic Conference, https://www.wipo.int/export/sites/www/pct/en/texts/pdf/washington_p739_to_764.pdf

The Study Group reached general agreement on a number of changes, and BIRPI issued two new documents for the Diplomatic Conference.

The Washington Diplomatic Conference took place from May 25 to June 19, 1970. The member states of the Paris Union invited to the Conference had a right to vote. Members of the UN and the UN specialised agencies were invited as observers. The PCT and the annexed Regulations were unanimously adopted on June 17, 1970 and opened for signature on June 19 when it was signed by twenty states.

Objectives of PCT

The objective of the PCT system is to save effort and cost for the applicant and the patent offices, and to enable applicants to make decisions about prosecution of the application before the various national Patent Offices. The PCT System is intended to reduce unnecessary duplication among patent offices and to support work-sharing between these offices. Further, applicants who use the PCT benefit by deferring national and regional procedures, thereby gaining time to make decisions on the potential commercialization of their invention and the markets in which to seek patent protection. The reports produced by the international authorities about the relevant prior art and the potential patentability of the inventions, help the applicants to make well-informed decisions. The longer time provided to the applicant for making decision on the technical value, economic interest and selection of countries where patent protection is sought, results in substantial savings for the applicant.

The top six ROs accounted for almost 90% of all applications filed in 2017. The USPTO received the highest number of PCT applications (56,158), followed by SIPO (50,674), JPO (47,425), EPO (36,714), KIPO (15,830) and IB of WIPO (10,212).

- https://www.wipo.int/edocs/pubdocs/en/wipo_pub_901_2

The PCT process ensures that if the application is in the form prescribed by PCT, it cannot be rejected on formal grounds by any Contracting State patent office during the national phase processing. The international fees payable in respect of the filing can be paid at one office, in one currency and at one time, reducing or even eliminating the complications connected with payment, on filing of many fees in many countries, and generally in different currencies. An applicant may file a PCT application with his own national office as Receiving Office, even at the very end of the priority year, and still obtain an immediate automatic filing effect with each of the patent offices and regional offices concerned.

The PCT also aims to provide distinct advantages for applicants wishing to protect their inventions in countries party both to any of the various regional patent treaties. The PCT is fully compatible with the regional patent systems, and provides possibilities for advantageous combined use of both kinds of systems. The system enables applicants to choose to file an international application containing designations of PCT Contracting States for the purpose of obtaining both regional and national patents.

PCT also offers avenues for examiners from different patent offices with complementary skills to work together on corresponding patent applications filed with those patent offices. The IP5 Offices, comprising

EPO, KIPO, JPO, SIPO and USPTO, endorsed a new framework, in 2018, wherein examiners from each of the IP5 offices collaborate for the establishment of a consolidated international search report and the written opinion under PCT Chapter 1, which although remaining the opinion of the chosen ISA, benefits from contributions of the participating offices. This results in a higher quality of search report and opinion. With the aim of establishing high quality international search report and written opinion, the PCT Collaborative Search and Examination Pilot Projects provide an avenue for examiners from different office to work together on one PCT application. Under the USPTO-JPO Collaborative Search Pilot Programme, the examiners exchange search and evaluation results identifying the best prior art and provide a work product that incorporates the efforts of the two offices. The KIPO joint Prior Art Search Programme applies to common patent applications lodged in two countries. Under this programme, KIPO has been cooperating with offices of China, Germany, Japan, UK and US among others to analyse the results of examinations and prior art searches, compare examination practices, and share examination know-how.

Process

Under the PCT System, an applicant must file a patent application with a receiving office (RO) and choose an International Searching Authority (ISA) to provide an international search report (ISR) and a written opinion on the potential patentability of the invention. The international phase usually continues for a period of 18 months and mainly involves the filing and formal examination of the application, international search, international publication, optional SIS and optional IPE. The International Bureau (IB) of WIPO then publishes the application in PATENTSCOPE, its online search database.

Filing. Applicants seeking to protect an invention in more than one country first file a national or regional patent application with their national or regional patent office. Applications may also be filed directly with WIPO, if applicants are permitted by the national security provisions of the Contracting State. These offices act as PCT Receiving Offices (RO). Within 12 months from the filing date of that first application (a time limit set by the Paris Convention), they file an international application under the PCT with an RO – the respective national or regional patent office, or the IB – thus beginning the international phase. Only a national or resident of a PCT Contracting State can file a PCT application. If there are several applicants named in the PCT application, only one of them needs to comply with this requirement.

Applications may be filed in any language which the Receiving Office accepts. If the ISA that is to carry out the international search does not accept the language in which the application is filed, the applicant is required to file a translation.

In the majority of cases, applicants file PCT applications electronically. You can file PCT applications electronically with any competent receiving Offices which accepts such filings. Applicants are entitled to PCT fee reductions when filing electronically. Applicants may also choose to prepare the PCT application using

For the third time since 2014, Huawei Technologies was the top PCT applicant in 2017, with 4,024 published PCT applications. ZTE followed at 2,965 published applications. US-based Intel corporation followed with 2,637 published applications.

- https://www.wipo.int/edocs/pubdocs/en/wipo_pub_901_2018.pdf

WIPO web service (ePCT filing) or the software provided by WIPO (PCT-SAFE).

Following receipt of the ISR and written opinion, the applicant can choose to request a supplementary international search (SIS) by a supplementary international searching authority (SISA), have an international preliminary examination (IPE) undertaken of this application by an international preliminary examining authority (IPEA) or take no further action. The applicant generally has at least 30 months from the earliest filing (priority) date to decide whether to enter the national phase in the countries or regions in which protection is sought.

The RO transmits a copy of the application to the IB, which is responsible for:

- Receiving and storing all application documents;
- Performing a second formalities examination;
- Translating the title and abstract of the application and certain associated documents into English and/or French, where necessary;
- Publishing the application and related documents in PATENTSCOPE; and
- Communicating documents to offices and third parties.

Fees. PCT applicants generally pay three types of fees when they file their international applications:

(a) an international filing fee of USD 1308,

(b) a search fee which can vary from approximately USD 150 to 2,000 depending on the ISA chosen, and

(c) a small transmittal fee which varies depending on the receiving Office.

Fee reductions are available for electronic filing. To encourage the use of the PCT System by applicants from developing countries fee reductions of 90% for certain fees, including the international filing fee, are available to natural persons. This same 90% reduction applies to any person, whether a natural person or not, who is a national of and resides in a State that is classed as a least developed country by the United Nations. Some ISAs also provide for a reduction of the international search fee if the applicant or applicants are nationals or residents from certain countries, natural persons, not-for-profit research institutes or SMEs.

International Search. Applications are subject to an international search by one International Search Authority (ISA), which identifies the prior art relevant to the patentability of the invention, establishes an ISR and provides a written opinion on the invention's potential patentability. That opinion can assist the applicant in deciding whether to continue to seek protection for the invention. If the written opinion is unfavourable, the applicant may choose to amend the application to improve the probability of obtaining a patent, to withdraw the application before international publication and before incurring additional costs, or to do nothing.

The national patent offices of Australia, Austria, Brazil, Canada, China, Chile, Egypt, Finland, India, Israel, Japan, the Philippines4, the Republic of Korea, the Russian Federation, Singapore, Spain, Sweden, Turkey, Ukraine and the United States of America, and the following regional Offices, the European Patent Office, the Nordic Patent Institute and the Visegrad Patent Institute have been appointed by the PCT Contracting States as International Search Authorities. The availability of a particular ISA to the nationals or residents of a country is determined by the receiving Office where the international application was filed. If the RO provide a choice of more than one competent ISA, the applicant can choose any of them.

The Indian Patent Office issued 1,068 international search reports in 2017, becoming the 12th most popular International Searching Authority. EPO, at rank 1, issued 79,666 reports, followed by Japan at 45, 949 reports.

- WIPO Statistics Database, March 2018

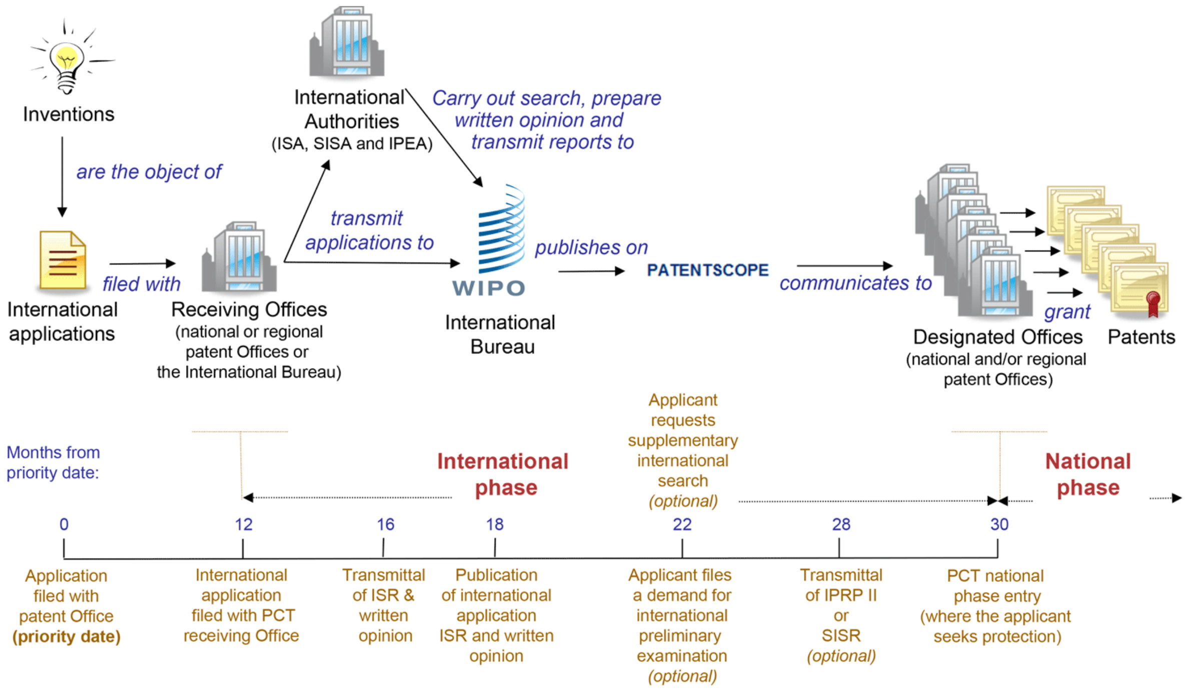
Supplementary international search. Since January 1, 2009, the SIS service has offered applicants the option of requesting additional searches from ISAs other than the one that carried out the initial search. This service aims to give applicants the option of obtaining a more complete overview of the prior art in the international phase by allowing them to have an additional search performed in an ISA's specialty language. Applicants can request an SIS report by an SISA up to 22 months from the filing (priority) date.

International preliminary examination. After receiving the ISA's written opinion, applicants can request an optional International Preliminary Examination (IPE) – a second evaluation of the invention's patentability – to be carried out by an IPEA, usually on an amended version of the application (all ISAs are also IPEAs). The resulting international preliminary report on patentability (IPRP) further assists the applicant in determining whether to enter the national phase and contains useful information for elected offices in the national phase.

National phase. Applicants have at least 18 months from the filing date of their applications before entering the national phase at individual patent offices. This delay affords additional time – compared with that allowed under the Paris Convention – to evaluate the chances of obtaining a patent and to plan how to use the invention commercially in the countries in which protection is sought. In the national phase, each patent office is responsible for processing the application in accordance with its national patent laws, and for deciding whether to grant patent protection, while certain PCT protections continue to apply. The time required for this processing varies across patent offices.

Patent Prosecution Highway. The PCT-Patent Prosecution Highway (PCT-PPH) pilots comprise bilateral agreements between patent offices to enable applicants to request a fast-track examination procedure. Under these agreements, an applicant receiving a written opinion or an IPRP indicating that at least one claim in the PCT application has novelty, an inventive step and industrial applicability may request that the other patent offices fast-track the examination of corresponding claims in corresponding applications. The applicant may request the PCT-PPH procedure when entering the national phase of the PCT in a participating designated state. The advantage for PCT applicants is that patent applications are processed faster and more efficiently by designated (or elected) offices. Participating offices also benefit from a reduced examination workload and additional knowledge sharing.

The Global Patent Prosecution Highway (GPPH) was launched in 2014. The GPPH pilot is a single multilateral agreement between a group of offices. It enables applicants to make a request for accelerated processing at any participating office based on work products (including PCT reports) from any of the other participating offices using a single set of qualifying requirements.



From: https://www.wipo.int/pct/en/faqs/faqs.html

Salient features of PCT

The PCT is used by the world's major corporations, research institutions, and universities when they seek international patent protection. It is also used by small and medium sized enterprises (SMEs) and individual inventors. The PCT also offers applicants the opportunity to amend the claims in the international patent application prior to National Phase Entry, or to withdraw the application before it is published, to ensure that the invention is not disclosed to public. A favourable international search report or supplementary search report or international preliminary report strengthens the position of the application in various national or regional patent offices, and makes the arguments of the applicant more convincing.

Until international publication (18 months after the priority date), no third party is allowed access to the international application unless the applicant requests or authorises it. However, as each international application is published together with an international search report, third parties are in a better position to evaluate the potential patentability of the claimed invention.

Applicants and patent offices of Contracting States benefit from uniform formality requirements, international search, supplementary international search and preliminary examination reports, and centralised international publication. The applicant is able to achieve savings in document preparation, communication and translation because the work done during the international processing is not repeated before each office. Costs are also saved as there is no need to provide each Office with original drawings, or certified copies of the priority application.

The international search report provides guidance, which may be supported by the detailed advice obtained from a written opinion established by the International Searching Authority on the novelty of the invention, inventive step in the invention, and its industrial applicability. This would help the applicant in national phase prosecution. The additional benefit for applicants of filing a demand for international preliminary examination is that it provides the applicant with an opportunity to enter into a dialogue with the examiner at the International Preliminary Examining Authority and to amend the international application in order to influence the content of the international preliminary report on patentability.

The PCT system provides for combined use of the PCT system and regional patent systems such as the ARIPO Harare Protocol, the Eurasian Patent Convention, the European Patent Convention and the OAPI Agreement. The specific PCT routes for combined use of the systems is called the ARIPO-PCT route, Eurasian-PCT route, the Euro-PCT route and the OAPI-PCT route. In the case of the European Patent Convention, it is also possible to obtain patents through combined use of that Convention and the PCT in the states to which a European patent may be extended or where it may be validated. Similar advantages are offered by the use of the ARIPO-PCT, Eurasian-PCT, Euro-PCT and the OAPI-PCT routes in the reverse direction. In addition, the PCT Direct improves efficient and quality of the procedure before EPO as ISA. Under PCT Direct, an applicant filing an international application claiming priority from an earlier application already searched by the EPO will benefit from the simplified assessment of the international application.

India and PCT

India acceded to the Paris Convention and the Patent Cooperation Treaty on September 7, 1998, by simultaneously depositing its instrument of accession to the two international treaties. Both treaties are binding on India since December 7, 1998, from which date it was possible to designate India in international applications. The Indian Patents Act provides for the filing and processing of international applications. Section 7 of the Indian Patents Act states that international applications under the PCT, filed designating India shall be deemed to be an applications under the Act. The filing date of such applications shall be international filing date accorded under the PCT.

On October 15, 2013, an Agreement between WIPO and the Indian Patent Office came into force, whereby Indian became an International Searching Authority (ISA) and International Preliminary Examining Authority (IPEA). In 2017, the Indian Patent Office became the tenth most popular ISAs but in the following year it fell two places to occupy the twelfth position. However, it is interesting to note that the large majority of applicants choose the EPO, JPO, SIPO, KIPO and USPTO for search, in spite of the cost advantage that the Indian Patent Office provides at USD 137 for general applicants and USD 34 for filing by an individual. The comparative fees being charged by the USPTO as ISA is USD 2080 and USD 520, while small entities are charged USD 1040. Rospatent as ISA or IPEA, also considered a low-cost option, is nevertheless considerably more expensive than India at USD 415. The Indian Patent Office as ISA also accepts applications in English, thereby saving the applicant the cost of translation.

For many Indian individuals and SMEs the Indian ISA is a natural choice. However, in terms of quality, inventors still consider the EPO followed by USPTO as good. Applicants also choose EPO if they intend to enter the regional phase in Europe and USPTO, if they are considering the US in the National Phase. By the same token, it also seems like that those who intend to enter India in the National Phase tend to choose the Indian Patent Office as ISA of choice. Unlike EPO, which refuses to search business methods and pure software claims, Indian Patent office will search all subject matter. KIPO is considered to provide fast response. The new draft rules to amend the Patent Rules 2003 indicate that there may be collaboration between the Indian Patent Office as an ISA and other patent offices, in particular, the JPO.

Suggested Case Law:

Michele Caboni vs. Union of India and Anr – Delhi High Court – decided 25.09.2017 - https://indiankanoon.org/doc/76271877/

CHAPTER V

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure

Background

The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, or Budapest Treaty, is an international treaty signed in Budapest, Hungary, on April 28, 1977. It entered into force on August 9, 1980, and has been Ratified by 82 Contracting Parties . The treaty is administered by the World Intellectual Property Organization (WIPO).

Patents are granted by patent offices in exchange for a full disclosure of the invention. For disclosure to be adequate, an invention must be described in sufficient detail to permit a person skilled in the art to repeat the effect of the invention: in other words, the disclosure should enable the average expert with access to the appropriate facilities to reproduce the invention for himself. Disclosure is normally achieved by means of a written description supplemented where necessary by drawings. However, inventions involving the use of new microorganisms (i.e., those not available to the public) present problems of disclosure in that repeatability often cannot be ensured by means of a written description alone. In the case of an organism isolated from soil, for instance, and perhaps "improved" by mutation and further selection, it would be virtually impossible to describe the strain and its selection sufficiently to guarantee another person obtaining the same strain from soil himself. Moreover, if the microorganism is not generally available to the public, the written disclosure of the invention might be held to be insufficient. In such a case, the microorganism itself might be considered to be an essential part of the disclosure[82].

By the early 1970s the depositing of microorganisms in culture collections for patent purposes had become fairly common, as IP Offices in an increasing number of countries either required or recommended that written disclosure of an invention involving the use of a new microorganism be supplemented by the deposit of the microorganism in a recognised culture collection. The culture collection would then make then make the microorganism available to the public at the appropriate point in the patenting procedure.

There was no uniform system of deposit, or perhaps more importantly, of *recognition* of deposit. The criteria to be met by 'recognised' collections was vague and ill defined. In some cases 'recognised' equated with 'internationally known.' When confronted with the variety of national patent laws, the collections were often unsure of how to proceed in respect of the furnishing of samples to requesting parties. Lack of firm guidelines also led some collections to allow the depositor almost complete control over the furnishing

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[82] Introduction to the Budapest Treaty, https://www.wipo.int/export/sites/www/treaties/en/registration/budapest/guide/pdf/introduction.pdf

of samples of his microorganisms, thereby hoping that the collection would be protected from the danger illegitimate release of samples.

Further, applicants were forced to deposit the same microorganism in several collections in different countries to guard against the possibility of any of their applications failing on the grounds of insufficient disclosure. This practice resulted in waste of resources and time for applicants. In order to obviate the need for multiple deposits, the government of UK proposed, in 1973, that the WIPO should study the possibility of one deposit serving the purposes of all the deposits that would otherwise be needed. This proposal was adopted by the Governing Bodies of WIPO, and in 1974, the Director General of WIPO convened a Committee of Experts to discuss the possibilities of international cooperation over the deposit of microorganisms for patent purposes. The solution proposed was that certain culture collections should be recognised as depositary authorities and that deposit made with any of them should be recognised as valid for patent purposes by all the countries in which protection for the relevant invention was sought. The Committee of Experts also found that conclusion of a treaty would be necessary to put the proposed solution into effect. At two further sessions in 1975 and 1976, the Committee of Experts examined drafts prepared by the International Bureau of WIPO of a Treaty and Regulations Procedure. A third draft of the treaty and Regulations served as a basis for the deliberations of a Diplomatic Conference, convened by the Director General of WIPO, organised by him in cooperation with the Government of Hungary.

Hungary, a Soviet satellite state following World War II had played a pivotal role in enabling East-West dialogue during the negotiations leading up to the 1975 Helsinki Conference on Security and Cooperation in Europe. Hungary's new-found negotiating competence and the credibility it had built for itself among the Western Nations, and in particular with the US, made Budapest a convenient venue for the Diplomatic Conference held between April 14 and 28, 1977. The Budapest Diplomatic Conference was attended by 29 member states of the Paris Union, and other non-governmental international organisations, and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure was adopted at the Conference with 18 signatory states. The Treaty came into effect in 1980, when it had been ratified or acceded to by the five requisite minimum number of states. The first five ratifying states were Hungary, Bulgaria, the US, France and Japan. The Regulations under the Budapest Treaty were modified in 1981 and in 2002. European Patent Office (EPO), the Eurasian Patent Office (EAPO) and the African Regional Intellectual Property Organisation (ARIPO) have deposited declarations acceptance in respect of the Budapest Treaty.

Salient Features

The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure, signed on April 28, 1977, eliminates the need to deposit microorganisms in each country where patent protection is sought. Under the Treaty, any Contracting State, or intergovernmental IP Office (such as the EPO) which allows or requires the deposit of microorganisms for the purpose of patent procedure must recognise, for those purposes, a deposit made in any International Depositary Authority

(IDA), whereever that IDA may be. The Any culture collection can become an IDA provided that it has been formally nominated by the Contracting State on whose territory it is located and that that Contracting State has furnished solemn assurances that the collection complies and will continue to comply with the requirements of the Treaty and the Regulations. The IDA is available on the same terms to any depositor, and will accept and store microorganisms deposited with it for the full period specified by the Treaty, and will furnish samples of deposited microorganisms only to those entitled to receive them.

Patent applicants benefit because the need to deposit in many countries in which they seek patent protection is dramatically reduced. A single deposit in any "international depositary authority" will satisfy the national disclosure requirements of any member state, significantly lowering applicants' expenses. Contracting states benefit because they can rely on the treaty's uniform standards to assure effective deposit and public availability. They no longer need to independently establish a 'recognized' depositary to meet national patentability disclosure requirements. There are currently 47 IDAs in 25 different countries[83]. Several countries have more than one depository authority: China has three and India has two IDAs. The top IDAs in terms of deposits are located in China, Korea, Germany, UK and the US.

The Treaty and Regulations make various provisions to guard against the loss and consequent non-availability of deposited microorganisms. If for any reason an IDA is no longer able to furnish samples of a microorganism, a new deposit of the same organism can be made and can benefit from the date of deposit of the original. If for any reason an IDA ceases to function as such, the Treaty provides for the microorganisms deposited with it to be transferred to another IDA. The term 'microorganism' is not defined in the Treaty so that it may be interpreted in a broad sense to include, for example, tissue cultures and plasmids, though they are not microorganisms in the strict sense of the word. Today, the term 'biological material' is more commonly used.

The Guide to the Deposit of Microorganisms under the Budapest Treaty[84] presents in a systematic manner information on the procedures and requirements concerning the deposit of microorganisms. When making an original deposit under the Budapest Treaty, the depositor must comply with Rules[85] specifying minimum information and, any additional requirements of the specific IDA, that the depositor must supply to the IDA along with the microorganism. These include the name and address of the depositor, and the details of the conditions necessary for the cultivation, storage and testing of the microorganism. The depositor is also required to provide a designation by which s/he refers to the organism. Where a mixture of microorganisms is deposited, descriptions of the components of the mixture and methods for checking of their presence has to be provided. An indication of the properties of the microorganisms which are or may be dangerous to health or the environment, or an indication that the depositor is not aware of such properties, must also be included.

[83] https://www.wipo.int/budapest/en/idadb/
[84] https://www.wipo.int/treaties/en/registration/budapest/guide/
[85] Rules 6.1(a) and 6.3(a)

The IDA may require that cultures of microorganisms are submitted to it in the quantity necessary for the purposes of the Treaty and Regulations, and in a particular state, e.g., on agar slants, in liquid suspension, lyophilized, etc.; that a specified number of replicates is provided; that cultures should not be below a specified minimum titre; and so on. An IDA can also require the written statement accompanying the microorganism to be drafted in a language or in any of the languages specified by it. The IDA can charge the depositor for storing the microorganism[86]. The fee must cover the whole duration of the storage and must be a once-and-for-all payment.

Having received and accepted a microorganism for deposit (or having converted an existing deposit), the IDA must notify the depositor of this fact by issuing to him an official receipt in respect of that deposit.[87] The microorganism would be stored for a period of five years after the most recent request for a sample, and in any case at least thirty years[88]. The deposit cannot be cancelled during this period either by the depositor or IDA, regardless of whether a patent is granted, abandoned or withdrawn.

Matters relating to furnishing of samples are governed by Rule 11, which recognises three different situations in which samples may be furnished: (a) to interested industrial property offices; (b) to or with the authorisation of the depositor; and (c) to parties legally entitled. The Treaty permits an IDA to furnish a sample of a particular microorganism only if the request is accompanied by the written authorisation of the depositor or by a certificate from a competent industrial property office indicating the legitimacy of the request, or, alternatively, if a competent IP Office has already notified the IDA that the microorganism may be distributed without the need for such authorisation. The procedures described above, for furnishing of samples, relate only to the right to receive samples according to patent law. They do not override any requirements to be met in respect of import and quarantine regulations, health and safety procedures, plant disease regulations etc. Anyone requesting a sample must ensure that they have obtained any permit or license and comply with any safety requirements necessary for the handling of the organism in question. All procedures, including deposit, request and furnishing of samples, or transfer of microorganisms, in compliance with the Budapest Treaty must be undertaken through the use of forms which are listed in Appendix 3 of the Treaty and Regulations.

India in the Budapest Treaty

India acceded to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure on 17th September, 2001. The Treaty entered into force, with respect to India on December 17, 2001. Section 10(d)(ii) of the Indian Patents Act requires that if the applicant mentions a biological material in the specification which cannot fully or particularly be described, or if the operation or use and method of performance of the invention utilising the biological material cannot be disclosed sufficiently, then the application shall be completed by making a deposit of the material in an IDA at the time of filing the application.

[86] Rule 12.1(b)
[87] Rule 7.1
[88] Rule 9.1

Two Institutes in India have acquired the status of IDAs. These are: the Microbial Culture Collection (MCC) at the National Centre for Cell Science, University of Pune, and the Microbial Type Culture Centre and Gene Bank (MTCC) at the Institute of Microbial Technology, Council of Scientific and Industrial Research, Chandigarh. The MTCC acquired status of IDA on October 4, 2002, while the MCC acquire IDA status on April 9, 2011.

Further details about these IDAs, including fees for storage, is available at https://www.wipo.int/export/sites/www/treaties/en/registration/budapest/pdf/ida.pdf

CHAPTER VI

Madrid Agreement Concerning the International Registration of Marks

Background

The Madrid System for the International Registration of Marks is governed by the Madrid Agreement, concluded in 1891. It was revised at Brussels (1900), Washington (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967), and amended in 1979. The system makes it possible to protect a mark in a large number of countries by obtaining an international registration that has effect in each of the designated Contracting Parties.

The Protocol relating to that Agreement was concluded in 1989. The Protocol aims to make the Madrid system more flexible and more compatible with the domestic legislation of certain countries or intergovernmental organizations that had not been able to accede to the Agreement.

In the 19th century, with the great pace of industrial development, and as a consequence of it, emerged a revolution in transportation, notably the creation of railway networks. Trade and commerce crossed national borders and products reached distant destinations. Trademarks became increasingly valuable and vital for the producers and retailers who wanted to protect the good name of their products, use them for branding, and also protect their markets from counterfeits. In the absence of any international system permitting a single registration valid for several countries by an established procedure, the owner of the trademark had to ensure that the mark was correctly registered in accordance with the laws and procedures in each of the countries where they operated commercially. In order to achieve this, the owner (or his representative) would undertake journeys to the countries concerned, or would have to use agents or agencies as intermediates. Both the processes were expensive[89].

The Paris Convention of 1883 was the foundation for the subsequent Madrid Agreement on Trademarks. Several references in the text of the Paris Convention demonstrated the importance of trademarks to commercial activity. Article 6(1) of the text of 1883 stated: Every trademark duly filed in the country of origin shall be accepted for filing and protected in its original form in other countries of the union. Article 9 laid down that any goods unlawfully bearing a trademark or a trade name might be seized on importation into those states of the union where such mark or name had a right to protection, and that seizure could be at the request of the public prosecutor or the interested party in accordance with the national law of each state. Article 12 of the Convention required the establishment of a special Industrial Property Service, and

[89] WIPO Publication, *The Madrid Agreement Centenary,* *ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_880e.pdf*

paragraph 5 of the Final Protocol required such industrial property service to publish an official periodical journal. The latter mandate also meant the maintenance of a precise visual record of registered marks.

At the Rome Conference of the Paris Union in 1886, a serious attempt was made to arrive at an agreement specific to trademarks. The delegates decided that more time was required to study the draft agreement proposed by Switzerland and amended by Italy and voted to postpone consideration of the special Agreement until the 1890-91 Conference in Madrid. In an unofficial industrial property congress held in Paris in August 1889, four texts were prepared by the International Bureau and the Spanish Government for the Madrid Conference, two of which concerned trademarks: the first proposed a special agreement under the Paris Convention for international registration of trademarks and the second concerned a special agreement for the repression of false indications of origin.

The decision to hold the Conference in Madrid coincided with a period of unprecedented political stability and growing economic prosperity. Spain had suffered most from foreign and domestic political crises and colonial wars. But for the region of Catalonia, imperial Spain was largely agrarian; however, the Great French Wine Blight (caused by Phylloxera) had provided a decade-long[90] market for fine Spanish wines, which helped the economy. In the meanwhile, the more industrialised Western European nations were investing in the industrial development of Spain, including the rail system which depended on French investment, and the iron and steel industry which grew on British financial backing and technical expertise. Other countries like Belgium and the US also had interest in Spanish growth. This created an environment of industrial and commercial cooperation between the industrialised European nations and Spain.

The Conference was originally scheduled in 1889, but the 3-year-old King, Alfonso XIII, had succeeded his father only 4 years prior, and so, it was postponed by a year. The Conference began on April 2nd 1891, and continued till April 14th. An amendment was suggested by Italy to file international registrations through the national Administration, thereby enabling the national offices to continue to benefit from the revenues accruing to them from registration of national trademarks that were being filed abroad. The final text of the Madrid Agreement Concerning the International Registration of Marks was adopted in its entirety by nine votes for, and five abstentions. Great Britain abstained on the ground that there was not yet an international classification of trademarks. Exactly one year later, a technical Conference was Convened on April 14, 1891, in Madrid, to settle issues of supplementary international fees and some clarifications on the Final Protocol of the Paris Convention.

Since its adoption, the Madrid Agreement of 1891 has been revised on seven occasions: at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Nice in 1957, at Stockholm in 1967, and on September 28, 1979[91]. Though the Madrid Agreement was successful in its original intention to reduce the cost and the effort required to file and maintain registrations, in different countries, it did not become a universal international registration system for trademarks. An alternative effort – the Trademark

[90] Before Phylloxera spread to Spain.
[91] Text of the Madrid Agreement with subsequent revisions, https://www.wipo.int/treaties/en/text.jsp?file_id=283530

Registration Treaty of 1973 – failed to gain widespread acceptance. Further, any revisions to the Madrid Agreement to make it more attractive to countries who had not signed the Agreement, was resisted by the parties to the Agreement.

After lengthy discussion in committees of governmental experts convened between 1986 and 1989 by the International Bureau, the idea of a new protocol based on the Madrid Agreement emerged. The Madrid Protocol would contain the modifications necessary to attract non-members of the Madrid Union and the Madrid system. Existing parties to the Madrid Agreement could also become party to the Protocol. A special union was created to administer the Protocol. The Madrid Protocol was adopted on June 28, 1989, and provided for a fourfold modification of the Madrid Agreement. These are:

a) Whereas the Madrid Agreement requires the international application to be based on a national *registration*, the Madrid Protocol allows it to be based on a national *application*, as well as a national registration. Countries whose offices examine applications *ex officio* both on absolute grounds and as to conflict with earlier rights, typically require more than six months to process the applications for registration,, which means that an applicant cannot file an application based on national registration within the six month period as required by the Madrid Agreement.
b) The time limit for refusing the effect of an international registration under Madrid agreement (one year) was perceived to be too short for offices conducting a full *ex officio* examination. Hence, the Madrid Protocol allows eighteen months for refusals and an even longer period in the case of oppositions.
c) The Madrid Protocol provides that the national office of a designated country may, if it so desires, receive the full amount of the fee, or a substantial proportion thereof, that it would charge for a national registration. This is necessary for those countries conducting a full *ex officio* examination, to maintain the resources required for the examination system.
d) The Madrid Protocol allows the transformation of a failed international registration into a national application in each designated country, such national applications having the priority date of the international registration. This was necessary to overcome circumstances where the reasons for cancellation of a mark forming the basis of the international registration were valid only in the country of the national registration.

In addition, the Madrid Protocol also establishes the possibility of a link between the Madrid system and the regional trademark systems. The Protocol was signed by 28 countries, including seven that were not party to the Madrid Agreement. The Madrid Agreement and Protocol are open to any State party to the Paris Convention for the Protection of Industrial Property (1883). The two treaties are parallel and independent, and States may adhere to either or both of them. In addition, an intergovernmental organization that maintains its own office for the registration of marks may become party to the Protocol. Instruments of ratification or accession must be deposited with the Director General of WIPO.

Salient features

The application of the Madrid Agreement and the Madrid Protocol are governed by two texts, namely the Common Regulations under the Agreement and the Protocol, and the Administrative Instructions for the Application of the Madrid Agreement and the Madrid Protocol. Together, the Contracting Parties to the Agreement and Protocol constitute a Madrid Union. The Madrid system of international registration of marks is administered by the International Bureau of the WIPO. The current status of all international registrations in force, including data relating to international applications and subsequent designations under examination by the International Bureau, is published by the International Bureau on-line on the Madrid Monitor[92].

The Madrid Agreement requires that a mark may be the subject of an international application only if it has already been registered with the trademark office of the Contracting Party with which the applicant has the necessary connections. Before filing an international trademark application, the goods and services to be covered by the mark need to be determined. The Madrid system uses the Nice Classification[93] for goods and services and the Madrid Goods & Services Manager helps users compile and verify their list of goods and services by providing access to an extensive collection of terms and descriptions. The International Bureau reviews international applications and if they consider items in the list of goods and/or services to be too vague, incomprehensible, linguistically incorrect, or incorrectly classified, an irregularity notice will be issued to the applicant or his representative. The applicant may be asked to refine or narrow his goods and/or services, provide more information, or indicate items are correctly classified in another class.

Where the designations are effected under the Madrid Protocol, the international application may be based on an application for registration filed with the office of origin. The application for international registration – international application – may be filed by a natural person or a legal entity having a connection through establishment, domicile or nationality with a Contracting Party. An international application must be presented to the International Bureau of WIPO through the intermediary of the office of origin. An international registration will have effect only in those countries which have been expressly designated, either in the international application or subsequently.

The designation of a given Contracting Party can be made either under the Agreement or the Protocol, depending on which treaty is common to the countries concerned. If both countries are party to the Agreement and the Protocol, the designation will be governed by the Protocol. International applications can be filed in English, French or Spanish, irrespective of which treaty or treaties govern the application, unless the office of origin restricts that choice to one or two of these languages. The filing of an international application is subject to the payment of a fee. Applications filed by applicants whose country of origin is an LDC are required to pay only ten per cent of the prescribed fee. A supplementary fee for

[92] https://www.wipo.int/madrid/monitor/en/

[93] https://www.wipo.int/classifications/nice/en/preface.html

each class of goods and/or services beyond the first three classes, and a complementary fee for each Contracting party designated is also charged.

Once the International Bureau receives an international application, it carries out an examination for compliance with the requirements of the Agreement, the Protocol and their Common Regulations. This examination is restricted to formalities, including the classification and comprehensibility of the list of goods and/or services. If there are no irregularities in the application, the International Bureau records the mark in the International Register, publishes the international registration in the WIPO Gazette of International Marks (hereinafter referred to as "the Gazette"), and notifies it to each designated Contracting Party. Any matter of substance, such as whether the mark qualifies for protection or whether it is in conflict with a mark registered previously in a particular Contracting Party, is determined by that Contracting Party's trademark office under the applicable domestic legislation.

The office of each designated country shall issue a statement of grant of protection under Rule 18*ter* of the Common Regulations. However, the designated country examines the international registration for compliance with its domestic legislation, and if some substantive provisions are not complied with, they have the right to refuse protection in their territory. Refusal statements should include a indication on the grounds on which registration has been refused, and must be communicated to the International Bureau within 12 months from the date of notification. A Contracting Party to the Protocol may declare that this time limit is extended to 18 months. The Contracting Party may also declare that a refusal based on opposition may be communicated to the International Bureau even after the 18-month time limit. The refusal is communicated to the owner of the mark, or his representative. The procedure subsequent – such as an appeal - against refusal is carried out directly by the competent administration and/or court of the Contracting Party concerned and the applicant. The final decision concerning refusal must be communicated to the International Bureau, which records and publishes it.

Upon registration, the mark is protected in the designated country from the date of the international registration, in the same manner as if it had been registered by the office of the Contracting Party. The registration is effective for ten years, and may be renewed for further periods of ten years on payment of the prescribed fees.

India and the Madrid Protocol

India deposited her instrument of accession to the Madrid Protocol on April 8, 2013. The treaty entered into force with respect to India on July 8, 2013. The Trademarks (Amendment) Act, 2010 made provisions for receiving and filing international applications at the Trademarks Registry.[94] As a country that conducts *ex office* full examination of applications, India made a declaration[95] that the time limit to notify a refusal of protection shall be 18 months and that, where a refusal of protection results from an opposition to the granting of protection, such refusal may be notified after the expiry of the 18-month time limit. Further, In

[94] http://www.ipindia.nic.in/writereaddata/Portal/IPOAct/1_46_1_tmr-amendment-act-2010.pdf

[95] Article 5(2)(b) and (c) of the Madrid Protocol

accordance with Article 8(7)(a) of the Protocol, India declared that, in connection with each request for territorial extension to it of the protection of an international registration and the renewal of any such international registration, it wants to receive an individual fee, instead of a share in the revenue produced by the supplementary and complementary fee.

A detailed guide to using the Madrid Protocol in India is provided by the IP Office[96]. International Applications can be filed online with the trademarks office[97]. The Indian trademark office participates in the TM View platform[98] which is an online trademark information platform built by fifty-one trademark offices from around the world to enable applicants to conduct a search in a designated state prior to filing. Trademark search can also be conducted on the Global Brand Database managed by WIPO[99].

An Indian entity may file an international trade mark application under the Madrid system if: (i) the applicant is a national of India, or a natural person or legal entity domiciled in India, or if it has a real and effective industrial or commercial establishment in India, and (ii) the applicant must have a "basic mark" in India, which means that the mark has already been registered or applied for protection in India at the India Trade Marks Registry.

The WIPO Global Brand Database, 2018, lists India as one of the top ten offices with the most filing activity[100]although activity at the Indian office at around 260,000 applications is considerably less than those at the top of the list. China's share, for instance, accounts for 60% of the estimated 9.11 million trademark applications filed in 2017[101]. Data for applications by origin show that only 308 international applications were filed from India in 2018, up from 234 the previous year. During 2018, 6,900 international applications originated from China; 7,495 from Germany; and 8,825 applications originated from the US[102].

A 2016 Market Research report[103] jointly published by the WIPO and DIPP, Ministry of Commerce and Industry, provides interesting insights into the use of the Madrid system by Indian entities. Although a few years old, the report's findings may have continued relevance. The report found that although a large number of Indian companies had filed trademarks abroad, less then a quarter of them had made use of the Madrid route. Further, the report found that a 'information asymmetry problem' exists for Indian companies in relation to benefits of trademarks in general and the Madrid system in particular.

Suggested Case Law:

1. The Louboutin 'Red Sole' judgements in the Delhi High Court - https://indiankanoon.org/doc/175186752/

[96] The Madrid Protocol: A Route to Global Branding, January, 2018, http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_93_1_THE_MADRID_PROTOCOL.pdf
[97] https://ipindiaonline.gov.in/trademarkefiling/user/frmLoginNew.aspx
[98] https://www.tmdn.org/tmview/welcome
[99] http://www.wipo.int/reference/en/branddb/
[100] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2018-chapter3.pdf
[101] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2018-chapter3.pdf
[102] https://www.wipo.int/export/sites/www/pressroom/en/documents/pr_2019_830_annex.pdf#annex5
[103] https://www.wipo.int/madrid/en/news/2016/news_0015.html

https://indiankanoon.org/doc/173930630/

http://lobis.nic.in/ddir/dhc/YKH/judgement/31-07-2018/YKH31072018SC5032016.pdf

2. Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging – Australia Tobacco Plain Packaging Act, 2011- https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2fds467%2f*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true

CHAPTER VII

World Intellectual Property Organisation

WIPO – the World Intellectual Property Organisation, is the global forum for intellectual property services, policy, information and cooperation. It is a self-funding agency of the United Nations with 192 member states. It is headquartered in Geneva, Switzerland. The stated mission of the WIPO is to lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all.

Background

In 1893, the secretariats established by the Paris Convention, and the Berne Convention combined to form BIRPI – Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (French for "United International Bureaux for the Protection of Intellectual Property"). Originally based in Bern, Switzerland, the BIRPI moved to Geneva in 1960. In 1967, over a five-week long conference of BIRPI member states, in the halls of the Swedish Parliament, an agreement was reached to establish a member-state-driven international organisation, and to revise the treaties and agreements pertaining to the Berne Convention and the Paris Convention.

On July 14, 1967, the Convention establishing the World Intellectual Property Organisation – WIPO, was signed in Stockholm – in English, French, Russian and Spanish – ushering in the era of multilingualism, where the bureaux had formerly used only French. The Agreement entered into force on April 26, 1970 and BIRPI was transformed into the WIPO.

WIPO became a specialised agency of the UN in 1974. The Agreement between the United Nations and the World Intellectual Property Organization in Article 1 recognises that the WIPO is a specialised agency of the UN and is responsible for

> …promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the UN and its organs, particularly the UN Conference on Trade and Development, the UN Development Programme and the UN Industrial Development Organisation, as well as the UN Educational, Scientific and Cultural Organisation and of the other agencies with the UN system.

WIPO's role in facilitating Transfer of Technology to developing countries is again emphasised in Article 10, towards assisting the recipient countries in attaining their objectives in the fields of science and technology and trade and development. The two organisations agreed to strive for cooperation, the elimination of undesirable duplication, the most efficient use of technical personnel and to secure the greatest utilisation of data and information.

To facilitate the implementation of the TRIPS Agreement, the Council for TRIPS concluded with WIPO an agreement on cooperation between WIPO and the WTO, which came into force on 1 January 1996. The agreement provides cooperation in three main areas, namely notification of, access to and translation of national laws and regulations, implementation of procedures for the protection of national emblems, and technical cooperation.

Government offices in charge of drafting laws frequently request advice from WIPO regarding how to use the TRIPS flexibilities so as accommodate particular national interests or resolve issues that are specific to their countries. Advice is provided after careful consideration of the flexibilities, TRIPS-consistency and their legal, technical and economic implications. Four clusters of flexibilities have been identified by the WIPO Secretariat. These are:

- Flexibilities as to the method of implementing TRIPS obligations;
- Flexibilities as to substantive standards of protection;
- Flexibilities as to mechanisms of enforcement; and
- Flexibilities as to areas not covered by the TRIPS Agreement.

Salient Features of WIPO

The mandate of the WIPO, governing bodies and procedures are set out in the WIPO convention. WIPO's two main objectives are (i) to promote the protection of intellectual property worldwide; and (ii) to ensure administrative cooperation among the intellectual property Unions established by the treaties that WIPO administers. The principal sources of income of WIPO's regular budget are the fees paid by the users of the international registration and filing services, and the contributions paid by the governments of Member States.

In addition to performing the administrative tasks of the Unions established under various conventions, WIPO undertakes a number of activities, including: (i) normative activities, involving the setting of norms and standards for the protection and enforcement of intellectual property rights through the conclusion of international treaties; (ii) program activities, involving legal and technical assistance to States in the field of intellectual property; (iii) international classification and standardization activities, involving cooperation among industrial property offices concerning patent, trademark and industrial design documentation; and (iv) registration and filing activities,

Estimate of Income from fees paid by users of WIPO services for the 2018-19 biennium was over 800 million Swiss francs against an expenditure of 725 million Swiss francs. Nearly 95% of the income is derived from fee-paid services provided to users of PCT, Madrid and Hague Systems.

- https://www.wipo.int/about-wipo/en/budget/

involving services related to international applications for patents for inventions and for the registration of marks and industrial designs.

WIPO assists developing countries and least developed countries to develop national IP strategies consisting of measures to encourage and facilitate the effective creation, development, management and protection of IP at national level.

WIPO is also the world's most comprehensive source of data on the intellectual property (IP) system, as well as of empirical studies, reports and factual information on IP. Practitioners, entrepreneurs, inventors and businesspeople can access WIPO's global databases and knowledge sharing infrastructure to support innovation and businesses.

Patentscope provides access to 74 million patent documents, including patent applications submitted under the PCT.

Global Brand Database enables search of brand information including trademarks, appellations of origin and official emblems from multiple national and international sources, including marks registered through the WIPO'S Madrid System. The Madrid Monitor also provides access to up-to-date details on the status of trademarks registered under the Madrid System.

Global Design Database enables search of industrial design registrations from the Hague System and participating national collections, while the Hague Express provides access to details and status of industrial designs registered under the system.

Lisbon Express provides search access to appellations of origin registered under the Lisbon system. The WIPO Pearl is a multilingual terminology database that enables accurate IP and technological terms and concepts in 10 languages, validated by WIPO's terminology experts.

The WIPO Academy provides IP education and training for WIPO member states, in particular developing countries, least-developed countries and countries in transition. Their programs cover general and specialised courses on IP and cater to different target audiences including policy makers and government officials, inventors and creators, business managers and IP professionals, teachers and students and the civil society.

The WIPO Arbitration and Mediation Canter is a neutral, international and non-profit dispute resolution provider that offers time- and cost-efficient alternative dispute resolution (ADR) options. WIPO mediation, arbitration, expedited arbitration, and expert determination enable private parties to efficiently settle their domestic or cross-border IP and technology disputes out of court. The WIPO centre is also the global leader in the provision of domain name dispute resolution services.

WIPO Administered Treaties

According to Article 4 of the WIPO Convention, WIPO shall perform the administrative tasks of the Paris and Berne Unions along with the special unions established in relation to them. In addition, the WIPO is to encourage the conclusion of international agreements to promote the protection of IP, and may assume administration of any other international agreement designed to promote the protection of intellectual property. WIPO today administers twenty-five treaties in addition to the WIPO Convention. These are classified into

- IP Protection Treaties – This group of treaties defines internationally agreed basic standards of IP protection in member states.
- Global Protection Systems – This group of treaties ensures that one international registration or filing will have effect in any of the relevant signatory states. The services provided by WIPO under these treaties simplify and reduce the cost of making individual applications or filings in all countries in which protection is sought for a given IP right.
- Classification Agreements – applicants for national or international IP protection are required to determine whether their creation is new or owned/claimed by someone else. To determine this, huge amounts of information must be searched. International classifications facilitate such searches by organising information concerning inventions, trademarks and industrial designs into indexed, manageable structures for easy retrieval. The Classification Systems administered by the WIPO are:

International Patent Classification (IPC) which is used to classify patents and utility models according to the different areas of technology to which they pertain. The IPC was established by the Strasbourg Agreement in 1971 and is continuously revised by the IPC Committee of Experts

Locarno Classification(LOC) is an international system to classify goods for the purposes of registration of industrial designs established by the Locarno Agreement in 1968 and is continuously revised by the Committee of Experts of the Locarno Union.

Nice Classification (NCL) is a international system used to classify goods and services for the purposes of registration of marks. The Nice Classification was established by the Nice Agreement in 1957 and is continuously revised by the Committee of Experts of the Nice Union.

Vienna Classification (VCL) is a hierarchical system that classifies the figurative elements of marks into categories, divisions and sections, on the basis of their shape. It was established by the Vienna Agreement in 1973 and is continuously revised by the Committee of Experts of the Vienna Union.

Organisation of WIPO

The Secretariat of WIPO is called the International Bureau. The WIPO Convention establishes three constituent organs, which are its highest decision-making bodies:

- the WIPO General Assembly and the Assemblies of Member states of each Union;
- the WIPO Conference; and
- the WIPO Coordination Committee.

The WIPO General Assembly is composed of the Member States of WIPO which are also members of any of the Unions. Its main functions are, inter alia, the appointment of the Director General upon nomination by the Coordination Committee, review and approval of the reports of the Director General and the reports and activities of the Coordination Committee, adoption of the biennial budget common to the Unions, and adoption of the financial regulations of the Organization. The IB of the Paris Union was the Director appointed by the Federal Council of the Swiss Government, the power for doing so being regarded as inherent in the supervisory authority functions of the Swiss Government.

The WIPO Conference is composed of the States party to the WIPO Convention. It is, inter alia, the competent body for adopting amendments to the Convention. The WIPO Coordination Committee is composed of members elected from among the members of the Executive Committee of the Paris Union and the Executive Committee of the Berne Union. Its main functions are to give advice to the organs of the Unions, the General Assembly, the Conference, and to the Director General, on all administrative and financial matters of interest to these bodies. It also prepares the draft agenda of the General Assembly and the draft agenda of the Conference. Where appropriate, the Coordination Committee nominates a candidate for the post of Director General for appointment by the General Assembly.

Any of the governing bodies can constituted committees as required. For example, the Programme and Budget Committee, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, or the Advisory Committee on Enforcement. The International Classification treaties also established permanent Committees of experts mandated to periodically revise and update the classification systems. Ad hoc Standing Committees of experts may also be established by a decision of the General Assembly for a given purpose, such as to determine the need or otherwise for new treaty provisions. In addition, any WIPO standing Committee or other body can also decide to establish a working group to examine a particular question in more detail. If one of the Standing or Permanent Committees determines that sufficient progress has been made to move towards treaty adoption, the General Assembly can decide to convene a Diplomatic Conference – a high level meeting of member states, with the sole purpose of finalising negotiations on a new treaty.

WIPO’S SENIOR Management Team comprises:

- the eight Deputy and Assistant Directors General (DDGs and ADGs)
- Legal Counsel
- Director of Human Resources

They are responsible for assisting the Director General in the strategic direction of WIPO's programmes, and for managing their respective Sectors to deliver the expected results set out in the Programme and Budget.

> Candidates for the 2020 election are likely to be made official in the fourth quarter of 2019. One person to look out for as successor to Gurry is his chief of Staff, Naresh prasad, who distinguished himself as a effective negotiator at WIPO for India, and then joined WIPO!

The election of the Director General of WIPO takes place once in 6 years. Candidates for the post are nominated by their governments by a deadline. Potential candidates are generally chosen from the senior management team. The candidates meet the Member States and answer questions and may make possible campaign promises. The Coordination Committee seeks a consensus if possible. If this fails, the Committee may conduct an informal poll to reduce the number of candidates. If consensus is not possible through consultation, a formal voting by secret ballot takes place, and the WIPO Coordination Committee, nominates the Director General. The current Director General is Francis Gurry, who has held the position since October 1, 2008, having been reappointed in May 2014 for a second term, which runs through September 2020.

WIPO Development Agenda

In 2007, the General Assembly of the World Intellectual Property Organization (WIPO) adopted the decision that formally established the "Development Agenda of WIPO" with the aim of placing development at the heart of the Organization's work and at the core of the global IP system.

The decision consisted of the adoption of a set of 45 Development Agenda recommendations and the establishment of a Committee on Development and Intellectual Property (CDIP). The CDIP was established in 2008 and mandated to:

(i) develop a work-program for the implementation of the 45 adopted recommendations;

(ii) monitor, assess, discuss and report on the implementation of all recommendations adopted, and for that purpose coordinate with relevant WIPO bodies; and

(iii) discuss IP and development related issues as agreed by the Committee, as well as those decided by the General Assembly.

Two meetings were to be conducted in a year, and annual reports and recommendations were to be made to the General Assembly.

The recommendations require a wide range of actions for implementation, ranging from concrete development-oriented projects and activities to the application of certain principles and objectives that should continue to guide the work of the Organization. The 45 recommendations are grouped into six clusters reflecting the main areas of focus of the Development Agenda. These are:

Clusters	**Recommendations**	
A	Technical Assistance and Capacity Building	14
B	Norm Setting	9
C	Technology Transfer	9
D	Assessments and Studies	6
E	Institutional Matters	6
F	Others	1

Examples of the recommendations in Cluster A include

Recommendation 3: increase human and financial allocation for technical assistance programmes in WIPO for promoting, *inter alia*, development-oriented intellectual property culture, with an emphasis on introducing intellectual property at different academic levels and on generating public awareness on intellectual property.

Recommendation 4: Place particular emphasis on the needs of small and medium-sized enterprises (SMEs) and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting-up appropriate national strategies in the field of intellectual property.

Recommendation 14: Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.

Examples of recommendation in Cluster B include:

Recommendation 15: Norm-setting activities shall:

- be inclusive and member-driven;
- take into account different levels of development;
- take into consideration a balance between costs and benefits;
- be a participatory process, which takes into consideration the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations (IGOs) and NGOs; and
- be in line with the principle of neutrality of the WIPO Secretariat.

Examples of Cluster D recommendations include:

Recommendation 35: To request WIPO to undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States.

Recommendation 37: Upon request and as directed by Member States, WIPO may conduct studies on the protection of intellectual property, to identify the possible links and impacts between intellectual property and development.

In keeping with its mandate, the Organization has embarked upon a structured approach to mainstream the Development Agenda recommendations into all its work by integrating the recommendations into all its substantive programs. Its introduction of a results-oriented, project-based methodology has led to a significant move forward in the implementation of the recommendations. Some projects under implementation include:

- Pilot Project on IP and Design Management for Business Development in Developing and Least Developed Countries.
- Project on Capacity Building in the Use of Appropriate Technology-Specific Technical and Scientific Information as a Solution for Identified Development Challenges
- Project on IP and Socio-Economic Development
- IP, Tourism and Culture: Supporting Development Objectives and Promoting Cultural Heritage in Egypt and Other Developing Countries
- Innovation and Technology Transfer Support Structure of National Institutions
- IP, Information and Communication Technologies, the Digital Divide and Access to Knowledge
- Improvement of National, Sub Regional, Regional IP Institutional and User Capacity

WIPO has produced a series of country reports reviewing IP in national innovation systems, determining gaps and challenges and offering recommendations for more effective IP utilisation towards strengthening national innovation systems. Many practical resources for small and medium enterprises, such as Guides on Intellectual Property for Business are provided under creative commons license have been made available for the use of entrepreneurs and other stakeholders.

In the implementation of programmes under the Development Agenda, WIPO takes into consideration its various obligations and strategic goals. For instance: WIPO's programme of assistance to intellectual property offices provides business systems for offices and national/regional institutions in developing and least developed countries, enabling them to participate effectively in the global IP system. Solutions include:

- efficient automated and standardized business processes for IP administration;
- online services, including search, registry and filing systems;
- integration into regional and international systems to enable the electronic exchange of data and documents.

WIPO's assistance programme falls within Strategic Goal IV – Coordination and Development of Global IP infrastructure. Within the WIPO Programme and Budget, technical assistance to IP offices is part of Programme 15 – Business Solutions for IP Offices. Assistance is provided in accordance with the mandate of the WIPO convention (Article 4(v)), provisions of the WIPO-administered treaties such as the PCT, and the recommendations of the WIPO Development Agenda, particularly recommendations 8 and 10.

As a specialised agency of the UN, WIPO, within its specific area of expertise and mandate, also supports the UN Sustainable Development Goals and concerns itself with assisting member states to use the IP system to meet their national development goals. In the view of WIPO, innovation and technology will need to be fully exploited in the interests of sustainable development – and the IP system has a key role to play in supporting such innovation and technological development.[104]

The 2018 report on the Development Agenda was provided to the WIPO Committee on Development and intellectual property in May 2018. According to the report, the WIPO Academy remains the core entity for IP training and human capacity-building in developing and least developed countries and economies in transition. Delegates from the developing countries remarked that the UN Sustainable Development Goals are much broader than the WIPO Development Agenda that the two should not be conflated.

An Independent review[105] of the implementation of the WIPO Development Agenda, conducted in 2016, found that developed countries and the developing countries held divergent views on the programmes. While the developed countries consider that the implementation of the Recommendations is best served through projects and activities, developing countries seek a broader approach including discussions about the relationship between IP protection and development. Other issues that emerged were that the lack of coordination between Geneva-based diplomats and national authorities; the absence of awareness-raising activities about the importance of the Development Agenda at national level; and the fact that the implemented projects were found to be 'less relevant and were not widely used by the intended beneficiaries.' The independent reviewers also called for a periodic review of the sustainability and impact of the projects.

India and WIPO

India joined WIPO in 1975. India is a member of several WIPO treaties; these are

Berne Convention, Budapest Treaty, Madrid Protocol, Marrakesh VIP Treaty, Nairobi Treaty, Paris Convention, Patent Cooperation Treaty, Phonograms Convention, Rome Convention, WIPO Convention, WIPO Copyright Treaty, and WIPO Performances and Phonograms Treaty.

India is represented on several bodies administering the treaties, including the *Executive Committee* of the Berne Union, the *Coordination Committee* and the *Programme and Budget Committee* of the WIPO and the WIPO *Conference.*

The WIPO maintains a statistical profile of each member state, where data relating to filing and grant of Patents, Designs, Copyrights, Trademarks and international applications is recorded. The statistics are

104 https://www.ip-watch.org/2015/10/11/wipo-and-the-sustainable-development-goals-the-ip-agencys-evolution-in-the-un/

105 https://www.ip-watch.org/2016/08/23/review-of-wipo-development-agenda-implementation-good-progress-but-expectations-unfulfilled/

based on data collected from IP offices or extracted from WIPO's operational databases. The statistical profile for India can be found on
https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=IN

Interesting data insights emerge from the study of these datasets, including the fact that trademarks lead by a wide margin as the most important type of IP in India, followed by patents. In 2018, India's WIPO filings grew by 27%. Among the top 20 countries of origin for PCT applications, the only two middle income countries are India and China. The university sector in India accounts for 6.4% of the applications.

CHAPTER VIII

Berne Convention for the Protection of Literary and Artistic Works 1886

Background

The Berne Convention deals with the protection of works and the rights of their authors. It is based on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions available to developing countries that want to make use of them. The three principles are the (i) the principle of national treatment; (ii) the principle of automatic protection; and (iii) the principle of independence of protection. The Convention is open to all States. Instruments of ratification or accession must be deposited with the Director General of WIPO. There are currently 177 Contracting Parties to the Berne Convention.

Association Littéraire Et Artistique Internationale, French for the International Literary and Artistic Association (ALAI), was founded in 1878 by the French writer Victor Hugo to promote the international recognition of the legal protection of authors for their intellectual work. The Association was the first to call for a universal convention for the protection of literary and artistic property and a Literary Property Union. In its Congress at Rome in 1882, the Association decided to meet in Berne in 1883, and the Swiss Government agreed to host the Congress. A *Convention Establishing a General Union for the Protection of the Rights of Authors in their Literary and Artistic Works* was adopted at the four-day Congress in Berne. The draft with ten articles was despatched by the Federal Council of the Swiss Confederation to the governments of 'all the civilised countries', and informed them of a planned Diplomatic Conference in 1884 to adopt a treaty.

Among the countries invited, only the United States was unenthusiastic. American representatives attended the Berne Conference only as observers. The country refused to protect foreign works and had their law provided for a shorter renewable term of protection. The US was a member of the Buenos Aires Convention, a Pan-American copyright convention with lower minimum standards than Berne. Berne hosted Conferences in 1884, 1885 and in September 1886, where with some amendments, three texts were adopted – the Convention, an Additional Article and a Final Protocol. Ten countries signed the Agreement. The Convention text was revised in 1896, 1908, 1914, 1928, 1948, 1967, 1971 and 1979.

The Rome Revision Conference of 1928 adopted a view to take measures towards preparation of a general agreement on the similar rules of the Berne and the Buenos Aires/Havana Conventions. After World War II, these plans were pursued under the auspices of the UNESCO culminating the in adoption of the

Universal Copyright Convention (UCC), 1952, which came into effect in 1955, after ratification by twelve countries. Most of the Berne Union countries signed it along with the American countries and the USSR. The 1971 Paris Revision Conference of both conventions was held in combination. The amendments adopted accommodated the withdrawal of developing countries from the stricter Berne Union, without losing protection of the UCC. The UCC lost importance in the 1990s as UCC members also joined Berne – the US in 1989, Russian Federation in 1995 and other former Soviet satellite states in the early 1990s. China adhered to the Berne in 1992. Further, the TRIPS Agreement required compliance with Berne substantive standards, so that countries which had to comply with TRIPS decided also to become members of Berne.

Salient features

The expression 'Union' was first used in Article 1 of the original text of the Berne Convention providing that 'the contracting countries constitute a Union…' meaning that a permanent link among the countries is being created. An International Bureau and Conferences of Revision were also included in the text from the very beginning. the Assembly of the Berne Union and the Executive Committee of the Berne Union are organs of the Union established during the 1967 Stockholm revision. The 1967 Stockholm Act also replaced the International Bureau of the Berne Union by the International Bureau (IB) of the WIPO.

As provided by Article 1, the state parties to the Berne Convention constitute a Union for the protection of the rights of authors. Every country that is a member of the Union and has adhered to at least the administrative and final provisions of the Stockholm Act is a member of the Assembly. The establishment of the biennial program and budget of the WIPO Secretariat – as far as the Berne Union is concerned – is the task of its Assembly. The members of the Executive Committee are elected from among the members of the Union, except for Switzerland, which is a member *ex officio*.

The Berne Convention is based on three basic principles and contains a series of provisions determining the minimum protection to be granted.

(1) The three basic principles are the following:

(a) **National Treatment:** By operation of Article 5(3), works originating in one of the Contracting States (that is, works the author of which is a national of such a State or works first published in such a State) must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals.

(b) **Automatic Protection:** Also referred to as Formality-Free Protection, this principle means that protection must not be conditional upon compliance with any formality, such as registration or deposit of copies. Member countries cannot require that authors and publishers give notice of the copyrighted status of the work in order for the work to be protected by law, under Article 5(2).

(c) **Independence" of Protection:** According to Article 5(1), protection is independent of the existence of protection in the country of origin of the work. If, however, a Contracting State provides for a longer term of protection than the minimum prescribed by the Convention, protection may be denied once protection in the country of origin ceases.

(2) The **minimum standards** of protection relate to the works and rights to be protected, and to the duration of protection.

(a) *Works Protected:* The protection must extend to all 'literary and artistic works', which are defined widely in Article 2(1) as every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, including but not limited to books, pamphlets, lectures, compositions, painting, cinematography, applied art, and three-dimensional works relative to geography, architecture or science. The Convention protects translations, adaptations and alterations of artistic work as original works without prejudice to the copyright in the original work.

Countries are free to determine protection to be granted to official texts of a legislative or administrative nature, and to official translations of such texts. Conditions under which public lectures and addresses may be reproduced by the press or broadcast to the public for informatory purposes, is also decided by national legislation.

(b) *Eligibility for protection:* Protection under the Convention applies to authors who are nationals or residents of a Berne Union country, and to works that are first published in a Union country or simultaneously in a Union country and outside the Union. Before the Berne Convention, each country had its own rules for recognition of copyright in a work, and authors were compelled to comply with formalities in every country where they sought protection. The Berne Convention introduces the principle that authors in Union countries need only comply with the formalities imposed by the country of origin. In 1908, the rule was replaced by the current principle of formality-free protection. Thus, there is no requirement for any deposit or registration for the author's copyright to be recognised.

(c) *Owners of Rights:* Article 2(6) provides that protection under the Convention is to operate for the benefit of the author and his successors in title. For some categories of works, however, such as cinematographic works (Article 14*bis*), ownership of copyright is governed by national legislation; for example, India provides that the author and initial owner of a cinematographic work is the producer[106].

(d) *Duration of Protection:* The minimum period prescribed for protection[107] is the author's lifetime and for fifty years after his death. In the case of anonymous or pseudonymous works, the term of

[106] Section 2(d)(v)
[107] Article 7

protection granted by the Convention expires fifty years after the work has been lawfully made available to the public. In the case of audio-visual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public ("release") or – failing such an event – from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of the work.

(e) *Rights Protected:* Authors of literary or artistic works enjoy exclusive rights to authorise translations[108] adaptations, arrangements and other alterations,[109] and of their works. Authors have the exclusive right of authorising the reproduction of protected works in any manner or form[110]. Authors enjoy exclusive right of authorising public recitation of their works, by any means or process[111].

Article 6 provides for protection of the author's moral rights. These are rights independent of the author's economic rights, and subsist even after transfer of the economic rights. They have a right to claim authorship, object to distortion, mutilation or modification, or other derogatory action, that would be prejudicial to the author's honour or reputation.

(f) *Limitations:* The Berne Convention allows certain limitations and exceptions on economic rights of authors. These limitations are commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10bis (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and 11bis(3) (ephemeral recordings for broadcasting purposes). In all cases of free use, the source and author must be clearly indicated.

The 1971 Paris Act was intended to ensure universal effect of the Convention, and to simplify its operation, particularly in relation to the growing number of newly independent States facing difficulties in the early stages of their economic, social and cultural development as independent nations. Developing countries, under certain conditions could depart from the minimum standards of protection provided in respect of the rights of reproduction and translation.

The Appendix to the 1971 Paris Act of the Convention[112] also permits developing countries to implement non-voluntary licenses in respect of (i) translation for the purpose of teaching, scholarship or research, and (ii) reproduction for use in connection with systematic instructional activities (including out-of-school or non-formal education), of works protected under the Convention. In these cases, the described use is allowed without the authorization of the right holder, subject to the payment of remuneration to be fixed by

[108] Article 8
[109] Article 12
[110] Article 9
[111] Article 11*ter*
[112] In Article II and Article III

the law, and subject to the condition, that the country has duly availed itself of one or both of the faculties provided for in the Appendix concerning such compulsory licenses.

Registration plays an important role in facilitating the exercise of rights as a means to prove the existence of the work and/or its ownership. It also helps to delimit the public domain, and facilitate access to creative content for which the author's authorisation is not required. Information in national registries also helps collective rights management organisations to collect data on copyright status and ownership.

Currently Forty-eight Berne Union members have established voluntary national registration systems for copyright and sometimes also for related rights. The vast majority of Berne members entrust this activity to the executive brand of the central government, generally under the Ministry of Justice or the Ministry of Culture. Some countries like Mali, Namibia and Armenia, have allowed the functions of registering copyright subject matter to Collective Management Organisations (CMOs) or private entities[113].

The Berne Convention is interoperable with other Multilateral Copyright Treaties, key among which are the Universal Copyright Convention, 1952, TRIPS and the WIPO Copyright Treaty, 1998. The WIPO Copyright Treaty upgraded Berne's protections by requiring members to provide general rights of distribution, rental, and 'communication to the public' (addressing Internet distribution), as well as anti-circumvention provisions.

India and the Berne Convention

India was adhered to the Berne Convention through the United Kingdom on September 5, 1887, entering into force as relating to India on December 5, 1887. The declaration of continued application by India was deposited on April 23, 1928. Pursuant to Article 1 of the Appendix of the Paris Act, India deposited a notification, on March 28, 2018, availing itself of the faculties provided for under Articles II and III of the Appendix. India has from time to time deposited such notifications. Article II enables India to substitute the exclusive right of translation provided in Article 8 of the Berne Convention, with a system of non-transferable, non-exclusive licenses, granted by a competent authority. Similarly, Article III enables India to substitute exclusive rights of reproduction (in Article 9 of the Convention) by non-exclusive, non-transferable licenses granted by the competent authority. India is also a member of the Universal Copyright Convention.

An International Copyright Order was promulgated in 1999, as provided for under Section 40 of the Copyright Act, 1957, to protect copyright in foreign works on a reciprocal basis.

An interesting case, from before India's accession to the Paris Convention – **Gramophone Company of India Ltd. V Birendra Bahadur Pandey and Others** (1984 AIR 667) lays down the rule relating to application of international law in India. Mr. Justice O.C. Reddy said, 'the doctrine of incorporation recognises the position that the rules of international law are incorporated into national law and considered

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[113] WIPO Summry of the Responses to the Questionnaire for Survey on Copyright Registration and Deposit Systems; https://www.wipo.int/export/sites/www/copyright/en/registration/pdf/registration_summary_responses.pdf

to be part of the national law, unless they are in conflict with an Act of Parliament.' Further, 'Courts are under obligation within legitimate limits, to so interpret municipal statute as to avoid confrontation with the comity of nations or the well-established principles of international law'. The Convention on Transit Trade of Land-locked States and the treaties between India and Nepal, leave either country fee to impose necessary restrictions for the purpose of industrial, literary or artistic property and preventing false marks, false indications of origin or other methods of unfair competition in order to further other general conventions.

The case related to the transportation from Singapore to Nepal of a consignment of allegedly infringing copies of performances, to which the Gramophone Company held copyright in India. The pirated copies were seized at Calcutta port.

Further suggested cases include:

1. The Chancellor, Masters & Scholars Of University of Oxford & Ors vs. Rameshwari Photocopy Services & Ors, Delhi High Court - http://lobis.nic.in/ddir/dhc/PNJ/judgement/09-12-2016/PNJ09122016RFAOS812016.pdf
2. Gramophone Company of India Ltd. vs. Birendra Bahadur Pandey and Ors., (1984 AIR 667) - https://indiankanoon.org/doc/383397/

Annexure 1

Paris Convention for the Protection of Industrial Property

As revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925,at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979.

Article 1

(1) The countries to which this Convention applies constitute a Union for the protection of industrial property.

(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.

(4) Patents shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc.

Article 4

A.—

(1) Any person who has duly filed an application for a patent, or for the registration of a utility model, or of an industrial design, or of a trademark, in one of the countries of the Union, or his successor in title, shall enjoy, for the purpose of filing in the other countries, a right of priority during the periods hereinafter fixed.

(2) Any filing that is equivalent to a regular national filing under the domestic legislation of any country of the Union or under bilateral or multilateral treaties concluded between countries of the Union shall be recognized as giving rise to the right of priority.

(3) By a regular national filing is meant any filing that is adequate to establish the date on which the application was filed in the country concerned, whatever may be the subsequent fate of the application.

B.

— Consequently, any subsequent filing in any of the other countries of the Union before the expiration of the periods referred to above shall not be invalidated by reason of any acts accomplished in the interval, in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design, or the use of the mark, and such acts cannot give rise to any third–party right or any right of personal possession. Rights acquired by third parties before the date of the first application that serves as the basis for the right of priority are reserved in accordance with the domestic legislation of each country of the Union

C.—

(1) The periods of priority referred to above shall be twelve months for patents and utility models, and six months for industrial designs and trademarks.

(2) These periods shall start from the date of filing of the first application; the day of filing shall not be included in the period.

(3) If the last day of the period is an official holiday, or a day when the Office is not open for the filing of applications in the country where protection is claimed, the period shall be extended until the first following working day.

(4) A subsequent application concerning the same subject as a previous first application within the meaning of paragraph (2), above, filed in the same country of the Union shall be considered as the first application, of which the filing date shall be the starting point of the period of priority, if, at the time of filing the subsequent application, the said previous application has been withdrawn, abandoned, or refused, without having been laid open to public inspection and without leaving any rights outstanding, and if it has not yet served as a basis for claiming a right of priority. The previous application may not thereafter serve as a basis for claiming a right of priority.

D.—

(1) Any person desiring to take advantage of the priority of a previous filing shall be required to make a declaration indicating the date of such filing and the country in which it was made. Each country shall determine the latest date on which such declaration must be made.

(2) These particulars shall be mentioned in the publications issued by the competent authority, and in particular in the patents and the specifications relating thereto.

(3) The countries of the Union may require any person making a declaration of priority to produce a copy of the application (description, drawings, etc.) previously filed. The copy, certified as correct by the authority which received such application, shall not require any authentication, and may in any case be filed, without fee, at any time within three months of the filing of the subsequent

application. They may require it to be accompanied by a certificate from the same authority showing the date of filing, and by a translation.

(4) No other formalities may be required for the declaration of priority at the time of filing the application. Each country of the Union shall determine the consequences of failure to comply with the formalities prescribed by this Article, but such consequences shall in no case go beyond the loss of the right of priority.

(5) Subsequently, further proof may be required. Any person who avails himself of the priority of a previous application shall be required to specify the number of that application; this number shall be published as provided for by paragraph (2), above.

E.—

(1) Where an industrial design is filed in a country by virtue of a right of priority based on the filing of a utility model, the period of priority shall be the same as that fixed for industrial designs (2) Furthermore, it is permissible to file a utility model in a country by virtue of a right of priority based on the filing of a patent application, and vice versa.

F.

— No country of the Union may refuse a priority or a patent application on the ground that the applicant claims multiple priorities, even if they originate in different countries, or on the ground that an application claiming one or more priorities contains one or more elements that were not included in the application or applications whose priority is claimed, provided that, in both cases, there is unity of invention within the meaning of the law of the country.

With respect to the elements not included in the application or applications whose priority is claimed, the filing of the subsequent application shall give rise to a right of priority under ordinary conditions.

G.—

(1) If the examination reveals that an application for a patent contains more than one invention, the applicant may divide the application into a certain number of divisional applications and preserve as the date of each the date of the initial application and the benefit of the right of priority, if any.

(2) The applicant may also, on his own initiative, divide a patent application and preserve as the date of each divisional application the date of the initial application and the benefit of the right of priority, if any. Each country of the Union shall have the right to determine the conditions under which such division shall be authorized.

H.

— Priority may not be refused on the ground that certain elements of the invention for which priority is claimed do not appear among the claims formulated in the application in the country of origin, provided that the application documents as a whole specifically disclose such elements.

I.—

(1) Applications for inventors' certificates filed in a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate shall give rise to the right of priority provided for by this Article, under the same conditions and with the same effects as applications for patents.

(2) In a country in which applicants have the right to apply at their own option either for a patent or for an inventor's certificate, an applicant for an inventor's certificate shall, in accordance with the provisions of this Article relating to patent applications, enjoy a right of priority based on an application for a patent, a utility model, or an inventor's certificate.

Article 4bis

(1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for during the period of priority are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration.

(3) The provision shall apply to all patents existing at the time when it comes into effect.

(4) Similarly, it shall apply, in the case of the accession of new countries, to patents in existence on either side at the time of accession.

(5) Patents obtained with the benefit of priority shall, in the various countries of the Union, have a duration equal to that which they would have, had they been applied for or granted without the benefit of priority.

Article 4ter

The inventor shall have the right to be mentioned as such in the patent.

Article 4quater

The grant of a patent shall not be refused and a patent shall not be invalidated on the ground that thesale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law.

Article 5

A.—

(1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee

justifies his inaction by legitimate reasons. Such a compulsory license shall be non–exclusive and shall not be transferable, even in the form of the grant of a sub–license, except
with that part of the enterprise or goodwill which exploits such license.
(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models.
B.
— The protection of industrial designs shall not, under any circumstance, be subject to any forfeiture, either by reason of failure to work or by reason of the importation of articles corresponding to those which are protected.
C.—
(1) If, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction.
(2) Use of a trademark by the proprietor in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered in one of the countries of the Union shall not entail invalidation of the registration and shall not diminish the protection granted to the mark.
(3) Concurrent use of the same mark on identical or similar goods by industrial or commercial establishments considered as co–proprietors of the mark according to the provisions of the domestic law of the country where protection is claimed shall not prevent registration or diminish in any way the protection granted to the said mark in any country of the Union, provided that such use does not result in misleading the public and is not contrary to the public interest.

D.
— No indication or mention of the patent, of the utility model, of the registration of the trademark, or of the deposit of the industrial design, shall be required upon the goods as a condition of recognition of the right to protection.

Article 5bis

(1) A period of grace of not less than six months shall be allowed for the payment of the fees prescribed for the maintenance of industrial property rights, subject, if the domestic legislation so provides, to the payment of a surcharge.
(2) The countries of the Union shall have the right to provide for the restoration of patents which have lapsed by reason of non–payment of fees.

Article 5ter

In any country of the Union the following shall not be considered as infringements of the rights of a patentee:
1. the use on board vessels of other countries of the Union of devices forming the subject of his patent in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily

or accidentally enter the waters of the said country, provided that such devices are used there exclusively for the needs of the vessel;

2. the use of devices forming the subject of the patent in the construction or operation of aircraft or land vehicles of other countries of the Union, or of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter the said country.

Article 5quater

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights, with regard to the imported product, that are accorded to him by the legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country.

Article 5quinquies

Industrial designs shall be protected in all the countries of the Union.

Article 23

After the entry into force of this Act in its entirety, a country may not accede to earlier Acts of this Convention.

Article 25

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this convention.

(2) It is understood that, at the time a country deposits its instrument of ratification or accession, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Article 28

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, he brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply.

(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

https://www.wipo.int/edocs/lexdocs/treaties/en/paris/trt_paris_001en.pdf

Annexure 2

Convention Establishing the World Intellectual Property Organization

(Signed at Stockholm on July 14, 1967, entered into force in 1970 and was amended in 1979)

Article 3 Objectives of the Organization

The objectives of the Organization are:
(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization,
(ii) to ensure administrative cooperation among the Unions.

Article 4 Functions

In order to attain the objectives described in Article 3, the Organization, through its appropriate organs, and subject to the competence of each of the Unions:
(i) shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field;
(ii) shall perform the administrative tasks of the Paris Union, the Special Unions established in relation with that Union, and the Berne Union;
(iii) may agree to assume, or participate in, the administration of any other international agreement designed to promote the protection of intellectual property;
(iv) shall encourage the conclusion of international agreements designed to promote the protection of intellectual property;
(v) shall offer its cooperation to States requesting legal–technical assistance in the field of intellectual property;
(vi) shall assemble and disseminate information concerning the protection of intellectual property, carry out and promote studies in this field, and publish the results of such studies;
(vii) shall maintain services facilitating the international protection of intellectual property and, where appropriate, provide for registration in this field and the publication of the data concerning the registrations;
(viii) shall take all other appropriate action.

Article 12

Legal Capacity; Privileges and Immunities

(1) The Organization shall enjoy on the territory of each Member State, in conformity with the laws of that State, such legal capacity as may be necessary for the fulfillment of the Organization's objectives and for the exercise of its functions.
(2) The Organization shall conclude a headquarters agreement with the Swiss Confederation and with any other State in which the headquarters may subsequently be located.

(3) The Organization may conclude bilateral or multilateral agreements with the other Member States with a view to the enjoyment by the Organization, its officials, and representatives of all Member States, of such privileges and immunities as may be necessary for the fulfillment of its objectives and for the exercise of its functions.
(4) The Director General may negotiate and, after approval by the Coordination Committee, shall conclude and sign on behalf of the Organization the agreements referred to in paragraphs (2) and (3).

Article 13
Relations with Other Organizations
(1) The Organization shall, where appropriate, establish working relations and cooperate with other intergovernmental organizations. Any general agreement to such effect entered into with such organizations shall be concluded by the Director General after approval by the Coordination Committee.
(2) The Organization may, on matters within its competence, make suitable arrangements for consultation and cooperation with international non–governmental organizations and, with the consent of the Governments concerned, with national organizations, governmental or non–governmental. Such arrangements shall be made by the Director General after approval by the Coordination Committee.

http://admin.theiguides.org/Media/Documents/WIPO%20Convention_1.pdf

Annexure 3

Patent Cooperation Treaty

Done at Washington on June 19, 1970, amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001

Article 2

Definitions

For the purposes of this Treaty and the Regulations and unless expressly stated otherwise:

(i) “application” means an application for the protection of an invention; references to an “application” shall be construed as references to applications for patents for inventions, inventors’ certificates, utility certificates, utility models, patents or certificates of addition, inventors’ certificates of addition, and utility certificates of addition;

(ii) references to a “patent” shall be construed as references to patents for inventions, inventors’ certificates, utility certificates, utility models, patents or certificates of addition, inventors’ certificates of addition, and utility certificates of addition;

(iii) “national patent” means a patent granted by a national authority;

(iv) “regional patent” means a patent granted by a national or an intergovernmental authority having the power to grant patents effective in more
than one State;

(v) “regional application” means an application for a regional patent;

(vi) references to a “national application” shall be construed as references to applications for national patents and regional patents, other than applications filed under this Treaty;

(vii) “international application” means an application filed under this Treaty; Patent Cooperation Treaty

(viii) references to an “application” shall be construed as references to international applications and national applications;

(ix) references to a “patent” shall be construed as references to national patents and regional patents;

(x) references to “national law” shall be construed as references to the national law of a Contracting State or, where a regional application or a regional patent is involved, to the treaty providing for the filing of regional applications or the granting of regional patents;

(xi) “priority date,” for the purposes of computing time limits, means:

(a) where the international application contains a priority claim under Article 8, the filing date of the application whose priority is so claimed;

(b) where the international application contains several priority claims under Article 8, the filing date of the earliest application whose priorityis so claimed;

(c) where the international application does not contain any priority claim under Article 8, the international filing date of such application;

(xii) “national Office” means the government authority of a Contracting State entrusted with the granting of patents; references to a “national Office” shall be construed as referring also to any intergovernmental authority which several States have entrusted with the task of granting regional patents, provided that at least one of those States is a Contracting State, and provided that the said States have authorized that authority to assume the obligations and exercise the powers which this Treaty and the Regulations provide for in respect of national Offices;

(xiii) “designated Office” means the national Office of or acting for the State designated by the applicant under Chapter I of this Treaty;

(xiv) “elected Office” means the national Office of or acting for the State elected by the applicant under Chapter II of this Treaty;

(xv) “receiving Office” means the national Office or the intergovernmental organization with which the international application has been filed;

(xvi) “Union” means the International Patent Cooperation Union;

(xvii) “Assembly” means the Assembly of the Union;

(xviii) “Organization” means the World Intellectual Property Organization;

(xix) “International Bureau” means the International Bureau of the Organization and, as long as it subsists, the United International Bureaux for the Protection of Intellectual Property (BIRPI);Patent Cooperation Treaty

(xx) “Director General” means the Director General of the Organization and, as long as BIRPI subsists, the Director of BIRPI.

CHAPTER I
INTERNATIONAL APPLICATION AND INTERNATIONAL SEARCH

Article 3
The International Application

(1) Applications for the protection of inventions in any of the Contracting States may be filed as international applications under this Treaty.

(2) An international application shall contain, as specified in this Treaty and the Regulations, a request, a description, one or more claims, one or more drawings (where required), and an abstract.

(3) The abstract merely serves the purpose of technical information and cannot be taken into account for any other purpose, particularly not for the purpose of interpreting the scope of the protection sought.

(4) The international application shall:

(i) be in a prescribed language;

(ii) comply with the prescribed physical requirements;

(iii) comply with the prescribed requirement of unity of invention;

(iv) be subject to the payment of the prescribed fees.

Article 4

The Request

(1) The request shall contain:

(i) a petition to the effect that the international application be processed
according to this Treaty;

(ii) the designation of the Contracting State or States in which protection for the invention is desired on the basis of the international application (“designated States”); if for any designated State a regional patent is available and the applicant wishes to obtain a regional patent rather than a national patent, the request shall so indicate; if, under a treaty concerning a regional patent, the applicant cannot limit his application to certain of the States party to that treaty, designation of one of those States and the indication of the wish to obtain the regional patent shall be treated as designation of all the States party to that treaty; if, under the national law of the designated State, the designation of that State has the effect of an application for a regional patent, the Patent Cooperation Treaty designation of the said State shall be treated as an indication of the wish to obtain the regional patent;

(iii) the name of and other prescribed data concerning the applicant and the agent (if any);

(iv) the title of the invention;

(v) the name of and other prescribed data concerning the inventor where the national law of at least one of the designated States requires that these indications be furnished at the time of filing a national application. Otherwise, the said indications may be furnished either in the request or in separate notices addressed to each designated Office whose national law requires the furnishing of the said indications but allows that they be furnished at a time later than that of the filing of a national application.

(2) Every designation shall be subject to the payment of the prescribed fee within the prescribed time limit.

(3) Unless the applicant asks for any of the other kinds of protection referred to in Article 43, designation shall mean that the desired protection consists of the grant of a patent by or for the designated State. For the purposes of this paragraph, Article 2(ii) shall not apply.

(4) Failure to indicate in the request the name and other prescribed data concerning the inventor shall have no consequence in any designated State whose national law requires the furnishing of the said indications but allows that they be furnished at a time later than that of the filing of a national application. Failure to furnish the said indications in a separate notice shall have no consequence in any designated State whose national law does not require the furnishing of the said indications.

Article 8

Claiming Priority

(1) The international application may contain a declaration, as prescribed in the Regulations, claiming the priority of one or more earlier applications filed in or for any country party to the Paris Convention for the Protection of Industrial Property.

(2)(a) Subject to the provisions of subparagraph (b), the conditions for, and the effect of, any priority claim declared under paragraph (1) shall be as provided in Article 4 of the Stockholm Act of the Paris Convention for the Protection of Industrial Property.

(b) The international application for which the priority of one or more earlier applications filed in or for a Contracting State is claimed may contain the designation of that State. Where, in the international application, the priority of one or more national applications filed in or for a designated State is claimed, or where the priority of an international application having designated only one State is claimed, the conditions for, and the effect of, the priority claim in that State shall be governed by the national law of that State.

Article 9

The Applicant

(1) Any resident or national of a Contracting State may file an international application.

(2) The Assembly may decide to allow the residents and the nationals of any country party to the Paris Convention for the Protection of Industrial Property which is not party to this Treaty to file international applications.

(3) The concepts of residence and nationality, and the application of those concepts in cases where there are several applicants or where the applicants are not the same for all the designated States, are defined in the Regulations.

Article 10

The Receiving Office

The international application shall be filed with the prescribed receiving Office, which will check and process it as provided in this Treaty and the Regulations.

Article 11

Filing Date and Effects of the International Application

(1) The receiving Office shall accord as the international filing date the date of receipt of the international application, provided that that Office has found that, at the time of receipt:

(i) the applicant does not obviously lack, for reasons of residence or nationality, the right to file an international application with the receiving Office,

(ii) the international application is in the prescribed language,

(iii) the international application contains at least the following elements:

(a) an indication that it is intended as an international application,

(b) the designation of at least one Contracting State,

(c) the name of the applicant, as prescribed,

(d) a part which on the face of it appears to be a description,

(e) a part which on the face of it appears to be a claim or claims.

(2)(a) If the receiving Office finds that the international application did not, at the time of receipt, fulfill the requirements listed in paragraph (1), it shall, as provided in the Regulations, invite the applicant to file the required correction.

(b) If the applicant complies with the invitation, as provided in the Regulations, the receiving Office shall accord as the international filing date the date of receipt of the required correction.

(3) Subject to Article 64(4), any international application fulfilling the requirements listed in items (i) to (iii) of paragraph (1) and accorded an international filing date shall have the effect of a regular national application ineach designated State as of the international filing date, which date shall be considered to be the actual filing date in each designated State.

(4) Any international application fulfilling the requirements listed in items (i) to (iii) of paragraph (1) shall be equivalent to a regular national filing within the meaning of the Paris Convention for the Protection of Industrial Property.

Article 12

Transmittal of the International Application to the

International Bureau and the International Searching Authority

(1) One copy of the international application shall be kept by the receiving Office ("home copy"), one copy ("record copy") shall be transmitted to the International Bureau, and another copy ("search copy") shall be transmitted to the competent International Searching Authority referred to in Article 16, as provided in the Regulations.

(2) The record copy shall be considered the true copy of the international application.

(3) The international application shall be considered withdrawn if the record copy has not been received by the International Bureau within the prescribed time limit.

Article 13

Availability of Copy of the

International Application to Designated Offices

(1) Any designated Office may ask the International Bureau to transmit to it a copy of the international application prior to the communication provided for in Article 20, and the International Bureau shall transmit such copy to the designated Office as soon as possible after the expiration of one year from the priority date.

(2)(a) The applicant may, at any time, transmit a copy of his international application to any designated Office.

(b) The applicant may, at any time, ask the International Bureau to transmit a copy of his international application to any designated Office, and the International Bureau shall transmit such copy to the designated Office as soon as possible.

(c) Any national Office may notify the International Bureau that it does not wish to receive copies as provided for in subparagraph (b), in which case that subparagraph shall not be applicable in respect of that Office.

Article 14

Certain Defects in the International Application

(1)(a) The receiving Office shall check whether the international application contains any of the following defects, that is to say:

(i) it is not signed as provided in the Regulations;

(ii) it does not contain the prescribed indications concerning the applicant;

(iii) it does not contain a title;

(iv) it does not contain an abstract;

(v) it does not comply to the extent provided in the Regulations with the prescribed physical requirements.

(b) If the receiving Office finds any of the said defects, it shall invite the applicant to correct the international application within the prescribed time limit, failing which that application shall be considered withdrawn and the receiving Office shall so declare.

(2) If the international application refers to drawings which, in fact, are not included in that application, the receiving Office shall notify the applicant
accordingly and he may furnish them within the prescribed time limit and, if he
does, the international filing date shall be the date on which the drawings are
received by the receiving Office. Otherwise, any reference to the said drawings
shall be considered non-existent.

(3)(a) If the receiving Office finds that, within the prescribed time limits, the fees prescribed under Article 3(4)(iv) have not been paid, or no fee prescribed under Article 4(2) has been paid in respect of any of the designated States, the international application shall be considered withdrawn and the receiving Office shall so declare.

(b) If the receiving Office finds that the fee prescribed under Article 4(2) has been paid in respect of one or more (but less than all) designated States within the prescribed time limit, the designation of those States in respect of which it has not been paid within the prescribed time limit shall be considered withdrawn and the receiving Office shall so declare.

(4) If, after having accorded an international filing date to the international application, the receiving Office finds, within the prescribed time limit, that any
of the requirements listed in items (i) to (iii) of Article 11(1) was not complied
with at that date, the said application shall be considered withdrawn and the
receiving Office shall so declare.

Article 15

The International Search

(1) Each international application shall be the subject of international search.

(2) The objective of the international search is to discover relevant prior art.

(3) International search shall be made on the basis of the claims, with due
regard to the description and the drawings (if any).

(4) The International Searching Authority referred to in Article 16 shall endeavor to discover as much of the relevant prior art as its facilities permit, and shall, in any case, consult the documentation specified in the Regulations.

(5)(a) If the national law of the Contracting State so permits, the applicant who files a national application with the national Office of or acting for such State may, subject to the conditions provided for in such law, request that a search similar to an international search ("international-type search") be carried out on such application.

(b) If the national law of the Contracting State so permits, the national Office of or acting for such State may subject any national application filed with it to an international-type search.

(c) The international-type search shall be carried out by the International Searching Authority referred to in Article 16 which would be competent for an international search if the national application were an international application and were filed with the Office referred to in subparagraphs (a) and (b). If the national application is in a language which the International Searching Authority considers it is not equipped to handle, the international-type search shall be carried out on a translation prepared by the applicant in a language prescribed for international applications and which the International Searching Authority has undertaken to accept for international applications. The national application and the translation, when required, shall be presented in the form prescribed for international applications.

Article 16

The International Searching Authority

(1) International search shall be carried out by an International Searching authority, which may be either a national Office or an intergovernmental organization, such as the International Patent Institute, whose tasks include the
establishing of documentary search reports on prior art with respect to inventions which are the subject of applications.

(2) If, pending the establishment of a single International Searching Authority, there are several International Searching Authorities, each receiving Office shall, in accordance with the provisions of the applicable agreement referred to in paragraph (3)(b), specify the International Searching Authority or Authorities competent for the searching of international applications filed with such Office.

(3)(a) International Searching Authorities shall be appointed by the Assembly. Any national Office and any intergovernmental organization satisfying the requirements referred to in subparagraph (c) may be appointed as International Searching Authority.

(b) Appointment shall be conditional on the consent of the national Office or intergovernmental organization to be appointed and the conclusion of an agreement, subject to approval by the Assembly, between such Office or organization and the International Bureau. The agreement shall specify the rights and obligations of the parties, in particular, the formal undertaking by the said Office or organization to apply and observe all the common rules of international search.

(c) The Regulations prescribe the minimum requirements, particularly as to manpower and documentation, which any Office or organization must satisfy before it can be appointed and must continue to satisfy while it remains appointed.

(d) Appointment shall be for a fixed period of time and may be extended for further periods.

(e) Before the Assembly makes a decision on the appointment of any national Office or intergovernmental organization, or on the extension of its appointment, or before it allows any such appointment to lapse, the Assembly shall hear the interested Office or organization and seek the advice of the Committee for Technical Cooperation referred to in Article 56 once that Committee has been established.

Article 17

Procedure before the International Searching Authority

(1) Procedure before the International Searching Authority shall be governed by the provisions of this Treaty, the Regulations, and the agreement which the International Bureau shall conclude, subject to this Treaty and the Regulations, with the said Authority.

(2)(a) If the International Searching Authority considers (i) that the international application relates to a subject matter which the International Searching Authority is not required, under the Regulations, to search, and in the particular case decides not to search, or

(ii) that the description, the claims, or the drawings, fail to comply with the prescribed requirements to such an extent that a meaningful search could not be carried out, the said Authority shall so declare and shall notify the applicant and the International Bureau that no international search report will be established.

(b) If any of the situations referred to in subparagraph (a) is found to exist in connection with certain claims only, the international search report shall so indicate in respect of such claims, whereas, for the other claims, the said report shall be established as provided in Article 18.

(3)(a) If the International Searching Authority considers that the international application does not comply with the requirement of unity of invention as set forth in the Regulations, it shall invite the applicant to pay additional fees. The International Searching Authority shall establish the international search report on those parts of the international application which relate to the invention first mentioned in the claims ("main invention") and, provided the required additional fees have been paid within the prescribed time limit, on those parts of the international application which relate to inventions in respect of which the said fees were paid.

(b) The national law of any designated State may provide that, where the national Office of that State finds the invitation, referred to in subparagraph (a), of the International Searching Authority justified and where the applicant has not paid all additional fees, those parts of the international application which consequently have not been searched shall, as far as effects in that State are concerned, be considered withdrawn unless a special fee is paid by the applicant to the national Office of that State.

Article 18

The International Search Report

(1) The international search report shall be established within the prescribed time limit and in the prescribed form.

(2) The international search report shall, as soon as it has been established, be transmitted by the International Searching Authority to the applicant and the International Bureau.

(3) The international search report or the declaration referred to in Article 17(2)(a) shall be translated as provided in the Regulations. The translations shall be prepared by or under the responsibility of the International Bureau.

Article 19

Amendment of the Claims before the International Bureau

(1) The applicant shall, after having received the international search report, be entitled to one opportunity to amend the claims of the international application by filing amendments with the International Bureau within the prescribed time limit. He may, at the same time, file a brief statement, as provided in the Regulations, explaining the amendments and indicating any impact that such amendments might have on the description and the drawings.

(2) The amendments shall not go beyond the disclosure in the international application as filed.

(3) If the national law of any designated State permits amendments to go beyond the said disclosure, failure to comply with paragraph (2) shall have no consequence in that State.

Article 20

Communication to Designated Offices

(1)(a) The international application, together with the international search report (including any indication referred to in Article 17(2)(b)) or the declaration referred to in Article 17(2)(a), shall be communicated to each designated Office, as provided in the Regulations, unless the designated Office waives such requirement in its entirety or in part.

(b) The communication shall include the translation (as prescribed) of the said report or declaration.

(2) If the claims have been amended by virtue of Article 19(1), the communication shall either contain the full text of the claims both as filed and as amended or shall contain the full text of the claims as filed and specify the amendments, and shall include the statement, if any, referred to in Article 19(1).

(3) At the request of the designated Office or the applicant, the International Searching Authority shall send to the said Office or the applicant, respectively,

copies of the documents cited in the international search report, as provided inthe Regulations.

Article 21

International Publication

(1) The International Bureau shall publish international applications.

(2)(a) Subject to the exceptions provided for in subparagraph (b) and in Article 64(3), the international publication of the international application shallbe effected promptly after the expiration of 18 months from the priority date of that application.

(b) The applicant may ask the International Bureau to publish his international application any time before the expiration of the time limit referred to in subparagraph (a). The International Bureau shall proceed accordingly, as provided in the Regulations.

(3) The international search report or the declaration referred to in Article 17(2)(a) shall be published as prescribed in the Regulations.

(4) The language and form of the international publication and other details are governed by the Regulations.

(5) There shall be no international publication if the international application is withdrawn or is considered withdrawn before the technical preparations for publication have been completed.

(6) If the international application contains expressions or drawings which, in the opinion of the International Bureau, are contrary to morality or public order, or if, in its opinion, the international application contains disparaging statements as defined in the Regulations, it may omit such expressions, drawings, and statements, from its publications, indicating the place and number of words or drawings omitted, and furnishing, upon request, individual copies of the passages omitted.

Article 22

Copy, Translation, and Fee, to Designated Offices

(1) The applicant shall furnish a copy of the international application (unless the communication provided for in Article 20 has already taken place) and a translation thereof (as prescribed), and pay the national fee (if any), to Patent Cooperation Treaty each designated Office not later than at the expiration of 30 months from the priority date. Where the national law of the designated State requires the indication of the name of and other prescribed data concerning the inventor but allows that these indications be furnished at a time later than that of the filing of a national application, the applicant shall, unless they were contained in the request, furnish the said indications to the national Office of or acting for the State not later than at the expiration of 30 months from the priority date.

(2) Where the International Searching Authority makes a declaration, under Article 17(2)(a), that no international search report will be established, the time limit for performing the acts referred to in paragraph (1) of this Article shall be the same as that provided for in paragraph (1).

(3) Any national law may, for performing the acts referred to in paragraphs (1) or (2), fix time limits which expire later than the time limit provided for in those paragraphs.

Article 23

Delaying of National Procedure

(1) No designated Office shall process or examine the international application prior to the expiration of the applicable time limit under Article 22.

(2) Notwithstanding the provisions of paragraph (1), any designated Office may, on the express request of the applicant, process or examine the international application at any time.

Article 24

Possible Loss of Effect in Designated States

(1) Subject, in case (ii) below, to the provisions of Article 25, the effect of the international application provided for in Article 11(3) shall cease in any designated State with the same consequences as the withdrawal of any national application in that State:

(i) if the applicant withdraws his international application or the designation of that State;

(ii) if the international application is considered withdrawn by virtue of Articles 12(3), 14(1)(b), 14(3)(a), or 14(4), or if the designation of that State is considered withdrawn by virtue of Article 14(3)(b);

(iii) if the applicant fails to perform the acts referred to in Article 22 within the applicable time limit.

(2) Notwithstanding the provisions of paragraph (1), any designated Office may maintain the effect provided for in Article 11(3) even where such effect is not required to be maintained by virtue of Article 25(2).

Article 25

Review by Designated Offices

(1)(a) Where the receiving Office has refused to accord an international filing date or has eclared that the international application is considered withdrawn, or where the International Bureau has made a finding under Article 12(3), the International Bureau shall promptly send, at the request of the applicant, copies of any document in the file to any of the designated Offices named by the applicant.

(b) Where the receiving Office has declared that the designation of any given State is considered withdrawn, the International Bureau shall promptly send, at the request of the applicant, copies of any document in the file to the national Office of such State.

(c) The request under subparagraphs (a) or (b) shall be presented within the prescribed time limit.

(2)(a) Subject to the provisions of subparagraph (b), each designated Office shall, provided that the national fee (if any) has been paid and the appropriate translation (as prescribed) has been furnished within the prescribed time limit, decide whether the refusal, declaration, or finding, referred to in paragraph (1) was justified under the provisions of this Treaty and the Regulations, and, if it finds that the refusal or declaration was the result of an error or omission on the part of the receiving Office or that the finding was the result of an error or omission on the part of the International Bureau, it shall, as far as effects in the State of the designated Office are concerned, treat the international application as if such error or omission had not occurred.

(b) Where the record copy has reached the International Bureau after the expiration of the time limit prescribed under Article 12(3) on account of any error or omission on the part of the applicant, the provisions of subparagraph (a) shall apply only under the circumstances referred to in Article 48(2).

Article 26

Opportunity to Correct before Designated Offices

No designated Office shall reject an international application on the grounds of non-compliance with the requirements of this Treaty and the Regulations without first giving the applicant the opportunity to correct the said application to the extent and according to the procedure provided by the national law for the same or comparable situations in respect of national applications.

Article 27

National Requirements

(1) No national law shall require compliance with requirements relating to the form or contents of the international application different from or additional to those which are provided for in this Treaty and the Regulations.

(2) The provisions of paragraph (1) neither affect the application of the provisions of Article 7(2) nor preclude any national law from requiring, once the processing of the international application has started in the designated Office, the furnishing:

(i) when the applicant is a legal entity, of the name of an officer entitled to represent such legal entity,

(ii) of documents not part of the international application but which constitute proof of allegations or statements made in that application, including the confirmation of the international application by the signature of the applicant when that application, as filed, was signed by his representative or agent.

(3) Where the applicant, for the purposes of any designated State, is not qualified according to the national law of that State to file a national application because he is not the inventor, the international application may be rejected by the designated Office.

(4) Where the national law provides, in respect of the form or contents of national applications, for requirements which, from the viewpoint of applicants, are more favorable than the requirements provided for by this Treaty and the Regulations in respect of international applications, the national Office, the courts

and any other competent organs of or acting for the designated State may apply the former requirements, instead of the latter requirements, to

international applications, except where the applicant insists that the requirements provided for by this Treaty and the Regulations be applied to his international application.

(5) Nothing in this Treaty and the Regulations is intended to be construed as prescribing anything that would limit the freedom of each Contracting State to prescribe such substantive conditions of patentability as it desires. In particular, any provision in this Treaty and the Regulations concerning the definition of prior art is exclusively for the purposes of the international procedure and, consequently, any Contracting State is free to apply, when determining the patentability of an invention claimed in an international application, the criteria of its national law in respect of prior art and other conditions of patentability not constituting requirements as to the form and contents of applications.

(6) The national law may require that the applicant furnish evidence innrespect of any substantive condition of patentability prescribed by such law.

(7) Any receiving Office or, once the processing of the international application has started in the designated Office, that Office may apply the national law as far as it relates to any requirement that the applicant be represented by an agent having the right to represent applicants before the said Office and/or that the applicant have an address in the designated State for the purpose of receiving notifications.

(8) Nothing in this Treaty and the Regulations is intended to be construed as limiting the freedom of any Contracting State to apply measures deemed necessary for the preservation of its national security or to limit, for the protection of the general economic interests of that State, the right of its own residents or nationals to file international applications. purpose of receiving notifications.

https://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct.pdf

CHAPTER II
INTERNATIONAL PRELIMINARY EXAMINATION

Article 31
Demand for International Preliminary Examination

(1) On the demand of the applicant, his international application shall be the
subject of an international preliminary examination as provided in the following
provisions and the Regulations.

(2)(a) Any applicant who is a resident or national, as defined in the Regulations, of a Contracting State bound by Chapter II, and whose international application has been filed with the receiving Office of or acting for such State, may make a demand for international preliminary examination.

(b) The Assembly may decide to allow persons entitled to file international applications to make a demand for international preliminary examination even if they are residents or nationals of a State not party to this Treaty or not bound by Chapter II.

(3) The demand for international preliminary examination shall be made separately from the international application. The demand shall contain the prescribed particulars and shall be in the prescribed language and form.

(4)(a) The demand shall indicate the Contracting State or States in which the applicant intends to use the results of the international preliminary examination ("elected States"). Additional Contracting States may be elected later. Election may relate only to Contracting States already designated under Article 4.

(b) Applicants referred to in paragraph (2)(a) may elect any Contracting State bound by Chapter II. Applicants referred to in paragraph (2)(b) may elect only such Contracting States bound by Chapter II as have declared that they are prepared to be elected by such applicants.

(5) The demand shall be subject to the payment of the prescribed fees within the prescribed time limit.

(6)(a) The demand shall be submitted to the competent International Preliminary Examining Authority referred to in Article 32.

(b) Any later election shall be submitted to the International Bureau.

(7) Each elected Office shall be notified of its election.

Article 32

The International Preliminary Examining Authority

(1) International preliminary examination shall be carried out by the International Preliminary Examining Authority.

(2) In the case of demands referred to in Article 31(2)(a), the receiving Office, and, in the case of demands referred to in Article 31(2)(b), the Assembly, shall, in accordance with the applicable agreement between the interested International Preliminary Examining Authority or Authorities and the International Bureau, specify the International Preliminary Examining Authority or Authorities competent for the preliminary examination.

(3) The provisions of Article 16(3) shall apply, mutatis mutandis, in respect of International Preliminary Examining Authorities.

Article 33

The International Preliminary Examination

(1) The objective of the international preliminary examination is to formulate a preliminary and non-binding opinion on the questions whether the claimed invention appears to be novel, to involve an inventive step (to be non-obvious), and to be industrially applicable.

(2) For the purposes of the international preliminary examination, a claimed invention shall be considered novel if it is not anticipated by the prior art as defined in the Regulations.

(3) For the purposes of the international preliminary examination, a claimed invention shall be considered to involve an inventive step if, having regard to the prior art as defined in the Regulations, it is not, at the prescribed relevant date, obvious to a person skilled in the art.

(4) For the purposes of the international preliminary examination, a claimed invention shall be considered industrially applicable if, according to its nature,it can be made or used (in the technological sense) in any kind of industry.

"Industry" shall be understood in its broadest sense, as in the Paris Convention for the Protection of Industrial Property.

(5) The criteria described above merely serve the purposes of international preliminary examination. Any Contracting State may apply additional or different criteria for the purpose of deciding whether, in that State, the claimed invention is patentable or not.

(6) The international preliminary examination shall take into consideration all the documents cited in the international search report. It may take into consideration any additional documents considered to be relevant in the particular case.

Article 34

Procedure before the International Preliminary Examining Authority

(1) Procedure before the International Preliminary Examining Authority shall be governed by the provisions of this Treaty, the Regulations, and the agreement which the International Bureau shall conclude, subject to this Treaty and the Regulations, with the said Authority.

(2)(a) The applicant shall have a right to communicate orally and in writing with the International Preliminary Examining Authority.

(b) The applicant shall have a right to amend the claims, the description, and the drawings, in the prescribed manner and within the prescribed time limit, before the international preliminary examination report is established. The amendment shall not go beyond the disclosure in the international application as filed.

(c) The applicant shall receive at least one written opinion from the International Preliminary Examining Authority unless such Authority considers that all of the following conditions are fulfilled:

(i) the invention satisfies the criteria set forth in Article 33(1),

(ii) the international application complies with the requirements of this Treaty and the Regulations in so far as checked by that Authority,

(iii) no observations are intended to be made under Article 35(2), last sentence.

(d) The applicant may respond to the written opinion.

(3)(a) If the International Preliminary Examining Authority considers that the international application does not comply with the requirement of unity of intervention as set forth in the Regulations, it may invite the applicant, at his option, to restrict the claims so as to comply with the requirement or to pay additional fees.

(b) The national law of any elected State may provide that, where the applicant chooses to restrict the claims under subparagraph (a), those parts of the international application which, as a consequence of the restriction, are not to be the subject of international preliminary examination shall, as far as effects in that State are concerned, be considered withdrawn unless a special fee is paid by the applicant to the national Office of that State.

(c) If the applicant does not comply with the invitation referred to in subparagraph (a) within the prescribed time limit, the International Preliminary Examining Authority shall establish an international preliminary examination report on those parts of the international application which relate to what appears to be the main invention and shall indicate the relevant facts in the said report. The national law of any elected State may provide that, where its national Office finds the invitation of the International Preliminary Examining Authority justified, those parts of the international application which do not relate to the main invention shall, as far as effects in that State are concerned, be considered withdrawn unless a special fee is paid by the applicant to that Office.

(4)(a) If the International Preliminary Examining Authority considers

(i) that the international application relates to a subject matter on which the International Preliminary Examining Authority is not required, under the regulations, to carry out an international preliminary examination, and in the particular case decides not to carry out such examination, or

(ii) that the description, the claims, or the drawings, are so unclear, or the claims are so inadequately supported by the description, that no meaningful opinion can be formed on the novelty, inventive step (non-obviousness), or industrial applicability, of the claimed invention, the said Authority shall not go into the questions referred to in Article 33(1) and shall inform the applicant of this opinion and the reasons therefor.

(b) If any of the situations referred to in subparagraph (a) is found to exist in, or in connection with, certain claims only, the provisions of that subparagraph shall apply only to the said claims.

Article 37

Withdrawal of Demand or Election

(1) The applicant may withdraw any or all elections.

(2) If the election of all elected States is withdrawn, the demand shall be considered withdrawn.

(3)(a) Any withdrawal shall be notified to the International Bureau.

(b) The elected Offices concerned and the International Preliminary Examining Authority concerned shall be notified accordingly by the International Bureau.

(4)(a) Subject to the provisions of subparagraph (b), withdrawal of the demand or of the election of a Contracting State shall, unless the national law of that State provides otherwise, be considered to be withdrawal of the international application as far as that State is concerned.

(b) Withdrawal of the demand or of the election shall not be considered to be withdrawal of the international application if such withdrawal is effected prior to the expiration of the applicable time limit under Article 22; however any Contracting State may provide in its national law that the aforesaid shall apply only if its national Office has received, within the said time limit, a copy of the international application, together with a translation (as prescribed), and the national fee

Article 42

Results of National Examination in Elected Offices

No elected Office receiving the international preliminary examination report may require that the applicant furnish copies, or information on the contents, of any papers connected with the examination relating to the same international application in any other elected Office.

CHAPTER III
COMMON PROVISIONS

Article 43

Seeking Certain Kinds of Protection

In respect of any designated or elected State whose law provides for the grant of inventors' certificates, utility certificates, utility models, patents or certificates of addition, inventors' certificates of addition, or utility certificates of addition, the applicant may indicate, as prescribed in the Regulations, that his international application is for the grant, as far as that State is concerned, of an inventor's certificate, a utility certificate, or a utility model, rather than a patent, or that it is for the grant of a patent or certificate of addition, an inventor's certificate of addition, or a utility certificate of addition, and the ensuing effect shall be governed by the applicant's choice. For the purposes of this Article and any Rule thereunder, article 2(ii) shall not apply.

Article 44

Seeking Two Kinds of Protection

In respect of any designated or elected State whose law permits an application, while being for the grant of a patent or one of the other kinds of protection referred to in Article 43, to be also for the grant of another of the said kinds of protection, the applicant may indicate, as prescribed in the Regulations, the two kinds of protection he is seeking, and the ensuing effect shall be governed by the applicant's indications. For the purposes of this Article, Article 2(ii) shall not apply.

CHAPTER VI
DISPUTES

Article 59

Disputes

Subject to Article 64(5), any dispute between two or more Contracting States concerning the interpretation or application of this Treaty or the Regulations, not settled by negotiation, may, by any one of the States concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the States concerned agree on some other method of settlement. The

Contracting State bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other Contracting States.

Annexure 4

World Trade Organization

The World Trade Agreement 1994 (establishing the WTO and including GATT Uruguay 1994)

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

Article III

Functions of the WTO

1.The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2.The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3.The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5.With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV

Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5.There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.
8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article XI
Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.
2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XIV
Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter int force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this greement shall enter into force on the 30th day following the date of such acceptance.
2. A Member which accepts this Agreement after its entry into force shall implement those con- cessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time

starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions f that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO

ANNEXES

ANNEX 1ANNEX 1A: Multilateral Agreements on Trade in Goods

General Agreement on Tariffs and Trade 1994

Agreement on Agriculture

Agreement on the Application of Sanitary and Phytosanitary Measures

Agreement on Textiles and Clothing

Agreement on Technical Barriers to Trade

Agreement on Trade-Related Investment Measures

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

Agreement on Preshipment Inspection

Agreement on Rules of Origin

Agreement on Import Licensing Procedures

Agreement on Subsidies and Countervailing Measures

Agreement on Safeguards

ANNEX 1B: General Agreement on Trade in Services and Annexes

ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

ANNEX 2

Understanding on Rules and Procedures Governing the Settlement of Disputes

ANNEX 3

Trade Policy Review Mechanism

ANNEX 4

Plurilateral Trade Agreements

Agreement on Trade in Civil Aircraft

Agreement on Government Procurement

International Dairy Agreement

International Bovine Meat Agreement

General Agreement on Tariffs and Trade 1994

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(*a*) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(*b*) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(*c*) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(*d*) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved

under paragraph 5[114], of Article XXV which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(*a*) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(*b*) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in subparagraph (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex.

Article II

Schedules of Concessions

1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(*c*) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt

[114] The authentic text erroneously reads "subparagraph 5 (a)".

from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(*a*) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(*b*) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

(*c*) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (*a*) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted

or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(*b*) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

PART II

*Article III**

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of

national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(*b*) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article XXVIII bis

Tariff Negotiations

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

2. (*a*) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.

(*b*) The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

(*a*) the needs of individual contracting parties and individual industries;

(*b*) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and

(*c*) all other relevant circumstances, including the fiscal,* developmental, strategic and other needs of the contracting parties concerned

Annexure 5

Trade Related Aspects of Intellectual Property rights

The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994

Article 3
National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection [(3)] of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Article 4
Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

Article5
Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article6
Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Article7
Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Section 5: patents

Article
Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. [(5)] Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect

human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) 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, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Article 28
Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing [(6)] for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

Article 29
Conditions on Patent Applicants

1. 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.

2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

Article 30

Exceptions to Rights Conferred

Members may provide limited exceptions 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.

Article31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use [(7)] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;
(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;
(d) such use shall be non-exclusive;
(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

Article63
Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope,

acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6*ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article64
Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or

to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

Article65
Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Article66
Least-Developed Country Members

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Article67

Technical Cooperation

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

Article70

Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.

3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

Article71
Review and Amendment

1. The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

Article72
Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

https://www.wto.org/english/docs_e/legal_e/27-trips_09_e.htm

Annexure 6

DOHA DECLARATION

The November 2001 declaration of the Fourth Ministerial Conference in Doha, Qatar, provides the mandate for negotiations on a range of subjects, and other work including issues concerning the implementation of the present agreements. The negotiations take place in the Trade Negotiations Committee and its subsidiaries. Other work under the work programme takes place in other WTO councils and committees Declaration on the trips agreement and public health Adopted on 14 November 2001

1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.
3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.
4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.
   Doha Declarations
5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include: (a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
   (b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.
   (c) Each Member has the right to determine what constitutes a national emergency or other ircumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
   (d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.
6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the

TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

7. We reaffirm the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2. We also agree that the least-developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least-developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.

https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf