COMPATIBILITY OF INDIAN LAW WITH EUROPEAN UNION AND USA

With the introduction of fast track of liberalization, privatization and globalization in Indian Economy and its integration with the WTO, trading in goods, services, investments and intellectual properties has increased manifold. Therefore, there is an emergent need to lay down systematic rules and regulations for the growth of transnational trade and protection of intellectual property rights. This is basically related to the protection of intellectual properties, especially patents which is a contemporary issue in the present Indian and global context. The final agreement of GATT, 1994 lead to the establishment of the WTO. India being a signatory of the final agreement ratified the final text of the agreement in January 1995. The WTO was established to monitor and regulate the trade between contracting member states. According to the provision of the final agreement, all the member states are obliged to rationalize their fiscal and economic laws pertaining to custom duties, tax rates, import duties, export subsidies and the like, having a direct bearing on the transfer of technology and supply of goods and services including trade related intellectual property rights. The enormous effect of the intellectual property rights was recognized at the international platform, and, therefore a separate chapter was devoted in the final text to the TRIPS Agreement. It also seeks to ensure that the intellectual property protection in its adequate standards must be existed in all member countries, talking as a starting point the substantive obligation of the main pre-existing conventions of the WIPO, namely the Paris Convention and the Berne Convention.¹ There are various international conventions and agreements for the maintenance of the minimum standards of the member states for the acquisition and enforcement of the intellectual property rights, which they are obliged to follow in their domestic laws. In the present chapter the comparative study of those standards has been done with relating to the Indian law. Broadly, the chapter is divided in the following headings:-

3. UN Commission on International Trade Law.
4. Compatibility of Indian laws with TRIPS Agreement.

6.1 European Directives for Enforcement of Intellectual Property Rights

There is a need to create an environment which is conducive to innovation and investment so as to increase the research and development in every field of life. To improve the research and development it is necessary to protect the intellectual property rights of the owners. Without the effective implementation of the intellectual property rights the investment in the field of research will be hampered. There are international conventions for the protection of the intellectual property rights, but the liability of the member States are much higher to enact their laws in compatible with the international standards and then enforce them so that protection will be given to the intellectual work, in this field the Council of the European Union ratified on 29th April, 2004 the proposal for a Directive to ensure the enforcement of intellectual property rights.

Even after the TRIPS Agreement there are still major disparities as regarded to the means of enforcing intellectual property rights in the member States. The disparities between the systems of the member States for enforcing intellectual property rights are prejudicial to the proper functioning of the internal market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community.

The objectives of the enforcement directive stipulate a high, equivalent and homogenous level of protection of intellectual property rights. The measures, procedures and remedies foreseen by the directive are deemed to be ensuring the effective enforcement to eliminate the disparities between the intellectual property enforcement systems of the Member States. These objectives are extremely relevant, of a high practical importance to the new EU member States that often face the stepped-up processes related to the

achievement of higher protection of the intellectual property rights, and that still suffer from piracy of intellectual property on a large scale.

The directive leaves unaffected the substantive provisions on intellectual property, international obligations of the Member States and national provisions relating to criminal procedure and criminal enforcement. In short, the directive adds extra measures on enforcement of digital copyright while leaving national law in other areas unaffected. The directive provides for approximating legislative system so as to ensure a high, equivalent and homogenous level of protection in the ‘internal market’.\(^3\) Clause (b) of Article 1 of the Directive provides for the national authorities to collect, analyze and compare data in the field of enforcement of the intellectual property rights.\(^4\) The subject-matter of the directive is defined in Article 1. It applies to enforcement of intellectual property rights which include industrial property rights.

The scope of the Directive is defined in Article 2. It applies to all infringements of intellectual property rights in Community and national law, without precluding more stringent protection that the Community or national law may otherwise grant.

Chapter II of the directive deals with the general measures and procedures for the enforcement of the intellectual property rights. There is general obligation on the member States to provide for the measures, procedures and remedies needed to ensure the enforcement of the intellectual property rights covered by the Directive. These measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays. The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such

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3. The Single European Act (SEA) was the first major revision of the Treaty of Rome that formally established the single European market and the European Political Cooperation. There was tremendous discontent among European Community members in the 1980s about the de facto lack of free trade between members. Leaders from the business and political worlds were eager to harmonize laws between countries and resolve policy discrepancies. A commission formed to analyze whether a common market was possible in Europe, and further, what steps would need to be taken to achieve that goal. The commission put forth the proposals that became the Single European Act. As quoted from http://en.wikipedia.org/wiki/Single_European_market site last visited on 21 March 2008.

a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

**Persons entitled to apply for the Application of the Measures and Procedures**

Member States shall prescribe the persons who are entitled to seek application of the measures and procedures for the infringement of the intellectual property rights. The Directive further specifies who have the locus standi in the infringement of intellectual property rights; these includes:

(i) the holders of intellectual property rights in accordance with the provisions of the applicable law,

(ii) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

(iii) intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law,

(iv) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law.

Section 2 of the directive deals with the evidence. Article 6 gives the power to the interested party to apply for evidence regarding an infringement that lies in the hands of the other party to be presented. The only requirement is for that party to present "reasonably available evidence sufficient to support its claim" to courts. In case of an infringement on a commercial scale, Member States must also take steps to ensure that "banking, financial or commercial documents" of the opposing party are presented. In both cases confidential information shall be protected. The general obligation in the directive is to provide for remedies necessary to enforce intellectual property rights. These shall be "fair and equitable" and must not be "complicated or costly, or entail unreasonable time-

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5. *Id.* Article 4.
limits or unwarranted delays”. They must furthermore be effective, proportionate and dissuasive and must not act as barriers to trade.

Without prejudice to any other measures and remedies available, right holders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder’s industrial property right. Measures for preserving evidence are available even before the proceedings commence. The Directive requires that the member state to empower their judicial authorities to grant interim orders. The directive further provides that such measures may be granted under the same conditions as under Article 6 and include provisional measures such as physical seizure not only of the infringing goods (such as hard drives) but also materials used in the production and distribution. Article 6 provides that such measures may be taken without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed. These are interlocutory, *ex parte* and *in personam* orders known in the English and Irish jurisdictions as *Anton Pillar* orders.

Under Article 8 of the Enforcement Directive, the competent judicial authorities may in a case of infringement of an intellectual property right, order that the information of the origin and distribution networks of the goods or services be provided by the infringer and/or any other person who was found in possession or using the infringing goods or services, or was found providing services used in infringing activities or was indicated by any of the above referred to person as being involved in the production, manufacture, or distribution of the goods or provision of the service. The above provision refers to an infringement of an intellectual property rights on a ‘commercial scale’.

Under Article 10, the competent judicial authorities shall have powers in cases where they have found goods to be infringing an intellectual property right, to recall them from the channels of commerce. The Directive further provides the

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6. *Id.* Article 7.
provisional measures, that the member States shall ensure that the judicial authorities may, at the request of the applicant issue against the alleged infringer an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right, they can also order the seizure or delivery of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

Under Article 13, the member states have to ensure that the competent judicial authorities have in cases of infringement, power to grant damages to the right holder appropriate to the actual prejudice suffered. The directive further makes provisions of the damages under Article 17 that the member States shall ensure that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement. The member States shall encourage the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights.

In case where the infringer did not knowingly, or with reasonable ground to know, engage in infringing activity, member states may empower the judicial authorities to order the recovery of profits or payment of damages which may be pre-established. Apart from the civil and administrative measures, procedures and remedies laid down in the Directive, the member states may apply appropriate sanctions in case of intellectual property rights infringements.

This Directive concerns with the measures and procedures necessary to ensure the enforcement of the intellectual property rights. The term "intellectual property rights" used in the Directive includes industrial property rights. This Directive shall not have the effect upon the States international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights, including those relating to criminal procedures and penalties or any other national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.

The Directive further provides the provisional measures which the member States shall ensure in enforcing their intellectual property rights, where a judicial decision is taken, finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to the provisions of the Directive. The member States shall ensure that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

The Enforcement Directive is often called a TRIPS-plus document improving and adding the enforcement provisions set out in Part III of TRIPS. The Directive provides for the same standard of civil (not criminal or administrative!) measures and procedures applicable to all infringements of any intellectual property rights which are embodied in TRIPS. Its validity is limited to the EU Member States (27 at the moment) which are all Contracting States of WTO and its pillar-TRIPS, though.

The Directive further encourage the development by trade or professional associations or organisations of codes of conduct at community level aimed at contributing towards the enforcement of the intellectual property rights. In India
different statutes deals with the enforcement of the intellectual property rights. In all such statute specific provisions has been made so that the rights of the owner should not be violated.

Infringements appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. The directive is just the guidelines so as to frame the national laws as compatible with this Directive. Where as Indian laws are concern Indian parliament have made Indian laws compatible not only with the Indian scenario but also they are in no way less in comparison with the world standards. The European Union directive aims at harmonization of the national laws of the European Union regarding enforcement of intellectual property rights. There is a need for such harmonization of national laws for better enforcement against intellectual property rights infringement and functioning of the internal market.

Under the Indian laws in case of the infringement of the intellectual property rights the infringement proceedings can be initiated against the infringer. The Indian laws have specific provisions like interim injunctions, final injunction, accounts for the profits, and damages even in certain circumstances specific punishment has also been prescribed for the infringement of the intellectual property right. Not only this, the administrative powers has been vested in the Copyright Board or before the Registrar of the Patents. The Controller General of the Patents, Trade Marks and Industrial Design has been vested with the administrative powers for the proper implementations of the rules and regulations of the intellectual property rights. No doubt, India is a developing country but the laws for the acquisition and enforcement of the intellectual property are of international standards. The Indian laws are in no way lagging behind the European laws on the enforcement of the intellectual property rights.

6.2 Alternative Dispute Resolution Provisions

The WTO provides for a strong and effective multilateral grievance settlement mechanism for settlement of disputes between member Nations. The procedures were prepared during the Uruguay Round which is innovative and significant. It is based on security and predictability which are necessary for traders and market participants. The procedure is called the Dispute Settlement Undertaking and is administered by the Dispute Settlement Board.

The General Council of the WTO functions as the Dispute Settlement Broad and is chiefly responsible for implementation of the rules and regulations relating to inter-governmental disputes. The disputes arising under multilateral trade agreements are first sent for consultation alternative dispute settlement procedure such as conciliation, good office, mediation and arbitration and arbitration are primarily employed. After the failure of the efforts for mutual settlement the parties should after 60 days bring the dispute to the dispute settlement body.

In general, the doctrine of precedent is not applicable to international proceedings but this concept is not totally given up by the international adjudicating forums. The Marrakesh Agreement establishing the WTO requires that the WTO “shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947...” It has also been stated by the Appellate Body that WTO is part of general legal landscape for world affairs and thus in interpreting the WTO Uruguay Round Text, it shall apply the customary rules of general public international law which are expressed in the Vienna Convention on the Law of Treaties, 1969. The major areas of disputes among the member nations are on subsidies, duties, patent protection, domain name etc. India challenged the patenting of the Basmati rice, turmeric and neem by the United States firms which was later withdrew by them.

6.2-1 Alternative Dispute Resolution Provisions in India

The alternate dispute resolution is not a new concept; it has been historically recognized in Indian villages. In the Ancient India there are three
types of popular courts i.e., Puga (local courts), Sreni (local business guilds)\textsuperscript{11} and Kula (social matters of community). During ancient time arbitration, conciliation and mediation were the means for settlement of disputes outside the formal legal system. These alternative means were recognized not only in India but also in other parts of the world. Thus, settlement of dispute outside the scope of the formal legal system may be called as an alternative means of settlement of disputes. In the Medieval India the Panchayats resolve the disputes between the parties. At that time the Panch were treated as Parameshwar (God). In India, Panchas’ decision was considered a sacrilege and to suspect or to even think of the Panchas being partial was like blasphemy. With this background, it should not be difficult to identify the areas, which are obstacles in our goal to once again reach the ideals of alternate dispute resolution. The settlement of dispute, outside the scope of the formal legal system was prevailing in India before the advent of Mugal regime. India is a country of villages and among the rural folks the settlement of disputes used to be resolved by rural intellectuals and by prominent persons of villages. On the arrival of Britishers in India this system diminished by the inception of formal legal system.\textsuperscript{12} Under the British Rule in India Lord William Bentick (Act VIII of 1859), had Sections 312-327 dealing with the arbitration. Above provisions formally separately enacted under the Arbitration Act, 1940.

The judicial system developed by the Britishers was very expensive and time consuming and due to these reasons the people’s faith on such legal system was being diminished. After the independence it was realized that there is a need to have such an alternative means of dispute resolving system or machinery which may be economical and less time consuming.\textsuperscript{13} Realizing the limitations of the present legal system all the countries throughout the world paid attention towards the traditional alternative means of settlement of disputes as these means are less expensive and speedier than normal legal system.

Alternative Dispute Resolution (ADR) was conceived of as a dispute resolution mechanism outside the courts of law established by the Sovereign or

\textsuperscript{11} Guilds means an association of persons of the same trade or pursuits, formed to protect mutual interests and maintain standards.


\textsuperscript{13} Ibid.
the State. In this sense, it included arbitration, as also conciliation, mediation and all other forms of dispute resolution outside the courts of law, which would all fall within the ambit of ADR. However, with passage of time, the phrase “Arbitration and ADR” came in vogue, which implied that arbitration was distinct from other ADR forms. In arbitration, there is a final and binding award, whether the parties consent to it or not, but in other forms of ADR (which came to be more commonly associated with phrase “ADR”) there would be no finality except with the consent of the parties. The protagonists of ADR in this sense claimed that, whereas in arbitration one party may win and the other(s) may lose, may be both may lose— as in a court case, in ADR it is a “win-win” situation because the parties would agree to a disposal of the matter on terms comfortable to each of them. In ADR, in this sense, it is not the “dispute” or “difference” between the parties that is addressed, but the mindset of the parties, so that with gradual change in the mindset eventually both sides come to a meeting point. The most practiced forms of ADR, in this sense, are “conciliation” and “mediation”. In western countries, neutral evaluation is also frequently resorted but in India this or other forms of ADR have not yet come in vogue.

6.2.2 Arbitration in Intellectual Property Rights

As part of the process of specialization, since it is difficult to get judges experienced in intellectual property rights or matters relating thereto, arbitration has to be a preferred course for dispute resolution because the parties can choose an arbitrator knowledgeable and experienced in the field. However, development in this direction is at an early stage, which does not provide adequate data for any realistic assessment of arbitration in intellectual property related matters. It must be borne in mind that several intellectual properties related matters arise between parties who do not have an agreement inter se. In all such matters, only Courts can push the matters to Arbitration.

Keeping in mind the developing trends of globalization and international competition in commerce and industries, the Indian judicial mechanism has to cope up with the new challenges by alternative non-judicial methods of adjudication. The Indian Council of Arbitration (ICA) is engaged in examining the different ways in which mediation, arbitration and other modes of ADR could be
used to provide a just, prompt and cheaper means of resolving disputes relating
to commercial transactions.\textsuperscript{14}

As regards utilization of ADR mechanism for the redressal of disputes involving intellectual property rights there is presently no specialized institution in India which exclusively provides arbitration and conciliation in this very specialized area. However at the international level, the WIPO\textsuperscript{15} renders specialized services by way of arbitration and mediation in intellectual property matters to the member states. Generally, the parties include a WIPO clause in their international contracts dealing with international property rights.\textsuperscript{16} Mainly the disputes are related to licensing agreements or the infringement of the intellectual property rights.

6.2-3 Reasons for the growth of Alternative Dispute Resolution

The proceedings in the court adversarial in nature as the winner take all and there is a permanent rupture of relationship. The procedure followed by the courts is complex and time consuming which required various steps to be followed by the court. As the courts are overburdened, hence there is a slow dispensation. The courts are also ill-equipped to handle certain intellectual property disputes like patents which required specialization in the field. There is also lack of judicial appreciation of intellectual property dispute. The judicial system is very costly. As summarized by Warren Burger\textsuperscript{17}

\textit{....the system is too costly, too painful, too destructive, too inefficient for a truly civilized world.}

Hence the businessman, jurists, and judiciary itself realizes the need of some alternate measure, so they moved towards the methods of mediation and arbitration and presently the Supreme Court and other courts have repeatedly emphasized that the ADR deserves the serious look.

Prior to the British rule, the laws in India were not codified. The age-old system prevalent in India was of making oral agreement to submit to arbitration and of making oral awards. In the ancient times in India, there existed a system

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17. Ex-Chief Justice, U.S. Supreme Court.
\end{flushleft}
of administration. This was in the form of Panchayats presided over by a Surpanch. In Panchayats, Panchas were chosen by virtue of their personal qualities of being fair-minded, impartial and knowledgeable. The panchayats were held in great veneration. They proceeded in an informal way, untrammeled by technicalities of procedure and laws of evidence. Also, arbitration was governed by social sanctions. But, the simple and informal system of arbitration through the Panchayats, though useful, was ineffective to deal with the complexities arising out of advancement in social and economic spheres.

When the East India Company started taking over administrative control, the Presidency Governments in Bengal, Madras and Bombay enacted ‘Regulations’. The Bengal Regulation XVI of 1793 authorised the courts to recommend to parties to a suit to submit the decision on matters in disputes which had already arisen to arbitration. Later, the Madras Regulation V of 1816 and the Bombay Regulation IV of 1827 were also made. They introduced substantial changes in the Panchayat system in the Presidency towns.

It was after the coming into existence of the Legislative Council of India in 1834 that the procedure of the Courts of Civil Judicature was codified by Act VIII of 1859. Sections 312 to 325 of the Act dealt with arbitration between parties to a suit while Sections 326 and 327 dealt with arbitration without the intervention of the Court. Section 312 of that Act enabled the parties to a suit to apply to the court, if they so desired, that an order be passed that the matters in dispute be referred to arbitration. The procedure for arbitration, making and filing of awards was also laid down in subsequent section. The provision for filing and enforcement of awards on such arbitrations was made in 1882 Act No. XIV.

In the Indian Arbitration Act, 1899 provision was made for arbitration of disputes that might arise in future. In 1925, the Civil Justice Committee recommended several changes in the arbitration law. On the basis of the recommendations by this Committee, the Indian legislature passed the Arbitration Act of 1940. After the end of the Second World War in 1945, particularly after independence in 1947, the trade and industry received a great fillip and the commercial community became more and more inclined towards arbitration for

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19. not confined or limited.
settlement of their disputes, as against litigation in courts, which involved long delays and heavy expenses. With increasing emphasis on arbitration, there was more and more judicial grist exposing the infirmities, shortcomings and lacunae in the Act of 1940.

One of the problems faced in international arbitration related to the recognition and enforcement of an arbitral award made in one country by the Courts of other countries. This difficulty was sought to be removed through various international Conventions such as the Geneva Convention 1927 and the New York Convention 1958. Since India was signatory to both the Conventions, the Arbitration (Protocol & Convention) Act, 1937 was enacted for enforcement of foreign awards made under the Geneva Convention, 1927 and the Foreign Awards (Recognition & Enforcement) Act, 1961 was enacted for enforcement of foreign awards under the New York Convention, 1958.

A number of enactments have been amended or repealed in recent years in India with a view to reforming the economy. It was felt that these reforms would remain incomplete if corresponding changes were not made in the law dealing with settlement of disputes. After India opened its economy and undertook several measures of economic reforms in the early 90’s and after the development in the international trade and commerce, with the increasing role of GATT and later WTO, there was a spurt in trading in goods, services, investments and intellectual property. Disputes arose between the trading parties, which were diverse in nature and complex, involving huge sums. Such disputes required quick and amicable settlement since the parties could not tolerate the prolonged legal process in courts, appeal, review and revision.

A number of foreign investors, in particular, had expressed the view that they would not like to invest in India unless disputes arising out of their investments are settled abroad. Under the 1940 Act, the parties had to go to the court to make the awards final. Interference by the law courts at the instance of one party or the other and a considerable delay in disposal of matters gave rise to demands to repeal the 1940 Act. Thus it became imperative for India to devise


287
a new legal regime relating to both domestic and international commercial arbitration. To attract the confidence of the international mercantile community in the context of growing volume of India’s trade and our commercial relationship with the rest of the world after the new liberalization policy of the Government, the Arbitration and Conciliation Act, 1996 Act was passed. This Act is in harmony with the UNCITRAL Model Law on International Commercial Arbitration, 1985. In India the Arbitration and Conciliation Act, 1996 was enacted to update the law of Arbitration in India on the lines of the Model law of the UNCITRAL. This Act has been enacted to make it more responsive to contemporary requirements. The process of economic liberalization has seen the advent of huge foreign investment in India. The Arbitration and Conciliation Act, 1996 repealed the Arbitration Act, 1940 as well as the other two Acts for enforcement of ‘foreign awards’. Part II of the Act consolidates the two Acts for enforcement of ‘foreign awards’. Part III of the Act provides for conciliation. The basic features of the 1996 Act are party autonomy, minimum judicial intervention and maximum judicial support.

Intellectual property right is an exclusive right but many a times disputes might arises between the persons and that can be settled in a friendly manners by the arbitration, mediation, conciliation and good office. At the international level also, in GATT and WTO provisions have been made regarding the settlement of the disputes by negotiations between the parties. There is no specific provisions been made but Article 63 to 69 of the TRIPS Agreement provides for the disputes prevention and settlement, transitional arrangements and international cooperation in order to promote the international trade and to protect the intellectual property rights.

### 6.2-4 Reasons for the Arbitration and Conciliation (Amendment) Bill, 2003

Ever since the commencement of the 1996 Act, requests have been voiced for its amendment. The main problem with this Act is that the UNCITRAL Model which was meant as a Model for international arbitration was adopted also for domestic arbitration between parties in India. In several countries, the laws of arbitration for international and domestic arbitration are governed by different...
statutes. Also, in many cases we have lost the letter and also the spirit, and in some cases, we have kept the letter, but lost the spirit of the UNCITRAL Model Law.

Since various anomalies were pointed out, the Law Commission of India undertook a comprehensive review of the Act and made recommendations in its 176th Report. The Report also contains a draft Arbitration and Conciliation (Amendment) Bill, 2001. The Government, after inviting comments of the State Governments and certain commercial organisations on the Report and the draft Bill, has decided to accept almost all the recommendations. In addition, some suggestions made in a special seminar organized by the Law Ministry by the leading senior lawyers, judges and representatives of commercial organisations have also been accepted. On 22nd July, 2004, the Government of India, the Ministry of Law and Justice and the Department of Legal Affairs constituted a Committee to make in-depth study of the implications of the recommendations of the Law Commission of India contained in its 176th Report and all aspects relating to the Arbitration and Conciliation (Amendment) Bill, 2003 and make suggestions to the Government. The Committee, known as "Justice Saraf Committee on Arbitration" submitted its Report on 29th January, 2005. That was the step forward in the direction of arbitration in India. In case of infringement of intellectual property rights or any dispute in the matter of intellectual property rights can be referred to the arbitrator for arbitration.

The Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration international commercial arbitration, and enforcement of foreign arbitral awards as also the law relating to conciliation and other incidental matters. The Act is mainly based on the United

23. Government of India, Ministry of Law and Justice constituted a Committee popularly known as "Justice Saraf Committee on Arbitration", to study in depth the implications of the recommendations of the Law Commission of India contained in its 176th Report and the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee was headed by Justice Dr. B.P. Saraf, Retired Chief Justice of the High Court of Jammu & Kashmir. The final Report of the Committee was presented to the (then) Minister of Law and Justice, Shri H.R. Bhardwaj by the Chairman of the Committee, Justice Dr. B.P. Saraf. The Report, running into more than 200 pages, has analysed the recommendations made by the Law Commission in its 176th Report on the Arbitration and Conciliation Act, 1996 and has made a detailed evaluation of the recommendations of the Law Commission apart from suggesting suitable lines on which the 1996 Act can be amended for improving the present system of arbitration in the country.
6.2-5 Advantages of Arbitration

(i) Final, Binding Decisions

A final and enforceable decision can generally be obtained only by recourse to the courts or by arbitration. In arbitration, since both the parties agree to the terms and conditions, they are bound by the decisions. It depends ultimately on the goodwill and cooperation of the parties.

(ii) International Recognition of Arbitral Awards

Over 134 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. The Convention facilitates enforcement of awards in all contracting states.

(iii) Neutrality

In arbitral proceedings, parties can place themselves on an equal footing in five key respects viz. place of arbitration, language used, procedures or rules of law applied, nationality and legal representation. Arbitration may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally possible to structure a neutral procedure offering no undue advantage to any party.

(iv) Specialized Competence of Arbitrators

Judicial systems do not allow the parties to a dispute to choose their own judges. But arbitration offers the parties the unique opportunity to designate persons of their choice as arbitrators. This enables the parties to have their disputes resolved by people who have specialized competence in the relevant field.
**Speed and Economy**

Arbitration is faster and less expensive than litigation in the courts. Although a complex international dispute may sometimes take a great deal of time and money to resolve even by arbitration, the limited scope for challenge against arbitral awards, as compared with court judgements, offers a clear advantage. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Furthermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow.

**Confidentiality**

Arbitration hearings are not public, and only the parties themselves receive copies of the awards. This is of great significance in commercially sensitive disputes.

**Institutional Alternative Dispute Resolution**

The modern trend is to prefer institutional alternative dispute resolution mechanism. The parties generally stipulate in their agreement an ADR clause stating that in case of any dispute arising between them, it shall be referred to a particular institution for redressal. Some of the leading ADR institutes in India are:

- i) Indian Council of Arbitration (ICA);
- ii) International Centre for Alternative Dispute Resolution (ICADR);
- iii) FICCI Arbitration and Conciliation Tribunal.

Among the International ADR institutions, the following have earned a global reputation:

- i) International Chamber of Commerce, Paris (ICC);
- ii) American Arbitration Association, New York (AAA);
- iii) Permanent Court of Arbitration, Caregieplein, Netherlands;
- iv) London Court of International Arbitration (LCIA);
- v) The Chartered Institute of Arbitration, London;
i) **Indian Council of Arbitration (ICA)**

In most of the industrialised countries, central or national arbitral organisations have been established which provide facilities for arbitration of commercial disputes. They enjoy unique prestige and confidence of the trade and industry. In India, the Indian Council of Arbitration established in 1965 is the apex arbitral organisation at the national level. The main objective of the Council is to promote the amicable and quick settlement of industrial and trade disputes by arbitration. The Government of India, the Federation of Indian Chambers of Commerce and Industry, the other important Chambers of Commerce and trade associations in India as well as export promotion councils, public sector undertakings, companies and firms are in its membership.²⁴

The Council provides facilities for settlement of international commercial disputes also by arbitration. Its Rules of Arbitration have recently been revised based on the Arbitration and Conciliation Act, 1996. These Rules are of international standard and they provide a guarantee wished for by the trade for quick and just settlement of the dispute. It maintains a panel of arbitrators consisting of Retired Judges, Advocates, Shipping Experts, Chartered Accountants, Chartered Engineers, Businessmen, Foreign Nationals and Executives having specialization in more than 20 fields. The Council has entered into arbitration service agreements with important foreign arbitral institutions in more than 45 countries to administer arbitrations under their rules if arbitration is held in India.²⁵

India is a Signatory to the New York Convention. In order to provide arbitration services under the Rules of Foreign Arbitral Organizations, ICA has entered into International Mutual Co-operation Agreements with important foreign arbitral institutions in more than 40 countries. The Council has established a high international profile and provides legal and arbitration facilities. ICA has signed cooperation agreements with 40 major arbitral centres around the world.

The Council has framed its Rules of Conciliation based on UNCITRAL Conciliation Rules to provide conciliation proceedings in an economical and expeditious manner. Conciliation is carried out mainly through correspondence

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with a view to bring the parties around to an amicable settlement of disputes. Sometimes personal meetings with the concerned parties are also arranged. As a result of conciliation a number of trade complaints are settled amicably to the satisfaction of both the parties.

In order to provide arbitration services under the Rules of Foreign Arbitral Organisations, the Council has entered into arbitration service agreement with important arbitral organisations including international in different parts of the world viz. USA, UK, Russian Federation, Canada, Italy, Germany, Singapore, Australia etc. Some agreements provide for conduct of arbitration proceedings by the Council under the rules of respective foreign arbitration organisations, if the arbitration hearings are held in India. The Council has developed its infrastructure facilities and has its regional offices at Kolkata, Chennai and Mumbai and also state-level offices of Ahmedabad, Bangalore, Bhubneshwar, Hyderabad, Pune, Cochin, Guwahati, and Jaipur in order to cater to the needs of users of arbitration in respective regions and to generate awareness about the advantages of arbitration in trade disputes.26

ii) International Centre for Alternative Dispute Resolution (ICADR)

Hon’ble Chief Justice of India, Mr. A. M. Ahmadi, delivered the Parton’s Address at the inauguration meeting of the ICADR, observed that the ICADR was required because the changing pattern of business, the commercial transactions taking place between international organizations, etc. could be more effectively and expeditiously disposed of at the centre.27 The ICADR is an autonomous organization working under the aegis of the Ministry of Law & Justice, Govt. of India with its headquarters at New Delhi and Regional Centres at Hyderabad and Bangalore. The Regional Centres of ICADR are fully funded and supported by the respective State Governments.28

International Centre for Alternative Dispute Resolution (ICADR), New Delhi, is the designated authority to appoint the arbitrators if the parties fail to choose their arbitrators. The arbitral tribunal has power to rule on its own

26. Ibid.
jurisdiction and to give interim orders. The place of arbitration is at New Delhi or at any Regional Office of ICADR. The arbitral tribunal can decide on the languages to be used. Within 30 days of the constitutional of the arbitral tribunal, the claimant has to submit his claims and reliefs, the respondent has to send his defence within three months and after 15 days the applicant can send his rejoinder.

**Objectives of the International Centre for Alternative Dispute Resolution**

The objective of the International Centre for Alternative Dispute Resolution\(^\text{29}\) includes:

i) to expand, encourage and popularize the scientific means for settlement of local, national and international commercial disputes;

ii) to provide assistance and render facilities for arbitration, conciliation and mediation;

iii) to develop the alternative means of dispute resolution among the communities in accordance with their social, economic and other requirements;

iv) to appoint conciliator and mediator on the request made by the parties in the dispute. In accordance with the Arbitration and Conciliation Act, 1996 if the parties are unable to appoint the mediator or conciliator or arbitrator they can designate or nominate any person or institution for the appointment of the mediator;

v) to provide training and skill and also confer diploma and degrees in the field of the alternative dispute resolution;

vi) to provide infrastructural facilities for education, research and training in the field of alternative means for settlement of disputes;

vii) to provide scholarship, stipended and fellowship in the matter relating to alternative means of dispute resolution.

**Procedure to be followed at International Centre for Alternative Dispute Resolution**

The arbitral tribunal can hold a pre-hearing proceeding and oral hearing. The parties can witness to give evidence. The arbitral tribunal can appoint one or

\(^{29}\) Supra note 12 at 203.
more experts to report to it on the specific issues. In arbitration other than an international commercial arbitration, the applicable law is the substantive law in force in India. In international commercial arbitrations, the dispute has to be decided in accordance with the rules of substantive law of the country designated by the parties. An arbitration award is to be given in writing with reasons and signed. During arbitral proceedings, the parties can settle the dispute which at their request can be recorded as an arbitral award on agreed terms. When the final arbitral award is made, the arbitration proceedings are terminated.

Section 34 of the Arbitration Act gives certain grounds under which an application can be made for setting aside an arbitral award under certain circumstances like, where the party is under some incapacity or the arbitration agreement is not valid or the party making the application was not given proper notice of the appointment of the arbitrator or was unable to present his case, or the arbitral award deals with a dispute not contemplated in the submission to arbitration, or the composition of the arbitral tribunal was not in accordance with the provisions of the Act.

**Enforcement of the Foreign Awards**

Part II of the Arbitration Act, 1996 deals with enforcement of foreign awards under the New York Convention and the Geneva Convention which are considered as commercial under the Indian Law. If the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that court. Under Section 48, which is similar to the provisions of Section 34 regarding the setting aside of an arbitral award, the foreign award made under the New York Convention can be enforced. Similarly, Geneva Convention awards are enforceable under Chapter II in the courts in India. However, any foreign award which is in conflict with the public policy of India, when it was induced or affected by fraud or corruption would make the award unenforceable in India. When the Court is satisfied that the foreign award is enforceable, it shall be deemed to be a decree of the court.
International Centre for Alternative Dispute Resolution Conciliation

Part III of the Act deals with conciliation of dispute of parties. The parties have to agree to conciliation proceedings of the subject of dispute. A party may also request the ICADR to recommend the names of individuals to act as conciliators under the Act and ICADT Conciliation Rules 1996. The conciliators shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their disputes. During the conciliation proceedings the parties cannot initiate any arbitral or judicial proceedings in respect of the same dispute.

International Centre for Alternative Dispute Resolution Mini-trial Arbitration

The ICADR Mini-trial Rules 1996 are the Rules which apply where the parties have agreed in writing that a dispute which has arisen or may arise between them will be resolved by mini-trial under these Rules. The parties can either appoint their own neutral advisors or a party may request the ICADR to appoint a neutral advisor from its panel of neutrals. The parties are to be represented at the mini-trial by their senior executives authorised to take decisions which shall be binding on the parties. At the end of the presentation of their cases by the parties, the neutral advisor will proceed to discuss with the senior executives of the parties, the silent features, and his view of the case. The senior executives will thereafter enter into mutual discussions with a view to arriving at a settlement. The neutral advisor is to assist in the discussion as a facilitator, but not as a judge of the dispute. At the conclusion of the mini-trial any statement is to be reduced to writing. If there is no settlement, then the parties are at liberty to resort to remedies available under the law.

International Centre for Alternative Dispute Resolution Services

The ICADR offers several dispute-resolution procedures like negotiation, which is a non-binding procedure; conciliation/mediation by an impartial third party to assist in the settlement of dispute; arbitration where an award which is binding on the parties is given; and mini-trial where a neutral adviser tries to negotiate a settlement between the parties and fast track arbitration. The globalization of trade and commercial transactions give rise to many intellectual
property disputes which call for effective and expeditious solutions that cannot often be provided by national courts. The objective of resolution of intellectual property disputes lies more in solving the problems of the parties. Hence, for intellectual property matters, alternative means of resolving the disputes are better than the traditional courts. An arbitration proceeding for instance is less formal than a court proceeding and generally more effective.

In the context of multilateral trade and WTO, intellectual property rights travel fast in business globalization. When intellectual property owner get bigger markets they also face greater competition. Generally in most jurisdictions, courts are overburdened or are unable to cope with the specialized technologies. The need has been felt to evolve Alternative Dispute Resolution systems which are fair, just, equitable, and avoid unnecessary delay, and which are less dependent on variables in national regimes or laws.

iii) FICCI Arbitration and Conciliation Tribunal

Set up in 1927, the Federation of Indian Chambers of Commerce and Industry (FICCI) is the largest and oldest apex business organization of Indian business. In order to provide arbitral services for settlement of commercial disputes of a domestic as well as international nature, FICCI, in the year 1952, established FACT (formerly known as the FICCI Tribunal of Arbitration. FACT was set up to offer dispute resolution services primarily to FICCI members and other parties who may desire to submit their disputes to FACT. FACT, headquartered at New Delhi with offices spread all across the country and overseas, has an active panel of prominent arbitration experts on its board. Besides, it has signed international co-operation agreements with several arbitration organisations around the world for facilitating international arbitration.

Increasingly, arbitration is recognised as the most effective method of solving commercial disputes, especially those of an international dimension. It can achieve equitable solutions more quickly than litigation, and at less cost; it allows parties to adopt whatever procedure they choose for the resolution of differences; it enables parties to decide where disputes shall be heard. The Indians have long been aware of the advantages of arbitration, acknowledging its value as a method of resolving disputes, and more recently has extended
tradition by the statutory adoption of the UNCITRAL Model Law for international commercial arbitration and the UNCITRAL Rules of Arbitration, with relevant modifications to fit into its institutional framework.\textsuperscript{30}

**Arbitration and Mediation**

While dealing with arbitration and mediation in the context of intellectual property, it is pertinent that it is a contractual and noncompetitive relationship where finality of the decision is important. To minimize ambiguity and difficulty in enforcement, a complete dispute resolution clause should be framed, indicating the rules, forum, and modalities of giving an award by the arbitrators. If the parties get a fair and equitable resolution of their dispute in a spirit of cooperation, the chances are that the arbitration will be accepted. Since intellectual property rights involve a certain degree of specialization in technical knowledge, arbitrators chosen from a panel of experts in various fields will be beneficial. It will also preserve the confidentiality of intellectual property like trade secrets and know-how and help to maintain good business relationships.

In mediation, the process can be even less formal than in arbitration, faster, cost-effective and confidential. The mediator acts as a facilitator to try to bring the parties to an agreement to an acceptable decision which either the parties agree to enforce, or is done through the court. The parties voluntarily participate in the mediation proceedings to arrive at a compromise. In case mediation fails, the parties can agree to go to arbitration or take recourse to courts for obtaining reliefs.

Court proceedings may be preferable to alternate dispute resolution provisions where one of the two parties is not prepared for arbitration. Also where one of the parties is interested in establishing a public legal precedent with regard to its rights, a court proceeding and judgment will be more appropriate than an alternate dispute resolution.

At one time, there was a view that intellectual property rights are granted by the national authorities and the disputes relating to those rights are settled by the public bodies within the national system of the country. It is now accepted that the dispute relating to intellectual property rights can be the subject matter of

arbitration as the parties have the right to mutually agree on the settlement of those rights.

6.3 United Nation Commission on International Trade Law (UNCITRAL Model Law)

UNCITRAL is a specialised commission of the United Nations created by the General Assembly in 1966 in order to harmonise and unify international trade law. The General Assembly approved the Model Law described UNICITRAL as: \(^{31}\)

> the core legal body within the United Nation system in the field of International Trade law with a mandate to coordinate legal activities in the field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law.

The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.\(^{32}\)

Taking into consideration the value of arbitration and its importance in the field of international trade law, UNCITRAL has taken a number of significance projects in the field of commercial dispute resolution. In 1976 it completed the UNCITRAL Arbitration Rules.\(^{33}\) The United Nation Commission on International Trade also adopted a set of conciliation rule in the year 1980 which were recommended by the General Assembly of the United Nation to be followed by the member countries were the practice in international commercial disputes.

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31. Supra note 18 at 7.
33. Supra note 18 at 7.
intended to settle their dispute amicably without taking recourse of strict legal system.\textsuperscript{34}

The advent of the UNCITRAL Model Law on International Commercial Arbitration constitutes the most remarkable development and influential accomplishment in the field of commercial arbitration in the eighties. The UNCITRAL Model law constitutes the third major contribution of the United Nation to the development of a fair and efficient process of resolving disputes in international commercial transactions, the first being the Convention on the recognition and Enforcement of Foreign Arbitral Awards and the second being the UNCITRAL Arbitration Rules.\textsuperscript{35} At the international level it was felt that the increasing arbitration and conciliation acceptance in trade and industry is the most important requirement of the present commercial activities, and the United Nation Commission on International Trade Law (UNCITRAL) too adopted the Model Law with focus on International Commercial Arbitration in the year 1985. Subsequently the General Assembly of the United Nations affirmed and all member countries were directed to give recognition to the United Nation Commission on International Trade's Law, which was introduced with the object to make arbitration procedure and practice in the matter of international commercial activities uniform and simple.\textsuperscript{36} Both the Model Law and the conciliation rules of the United Nation Commission on International Trade had the object of uniform, universal application of the arbitration and conciliation in respect of international commercial disputes with special intention to abstain from different legal system of the countries.\textsuperscript{37}

Although, Model Law and Conciliation Rules provided international commercial arbitration and conciliation yet there was a need to legislate law on domestic arbitration and conciliation on the pattern of the Model Law and Conciliation Rules. With this object and based on the UNCITRAL Model Law and New York Convention and Conciliation Rules- the Arbitration and Conciliation Bill, 1995 was introduced in both the Houses of Parliament on 8\textsuperscript{th} May, 1995. The Bill contains the reflection of the International Chamber of Commerce Arbitration

\textsuperscript{34} Supra note 12 at 1-2.
\textsuperscript{35} Supra note 33.
\textsuperscript{36} Supra note 34.
\textsuperscript{37} Ibid.
Rules and in their 1993 resolution- the Chief Ministers and Chief Justices emphasized the requirements of settlement of dispute by such method. The resolution was on the pattern of the United Nations Commission on International Trade’s Model Law and New York conventions and conciliation Rules after the recommendation. The General Assembly of the United Nations in the matters relating to the International Commercial disputes thus provided the harmonious settlement of the dispute by adopting procedure and practice of the arbitration and conciliation.38

Amendments to Articles 1 (2), 7, and 35 (2), a new Chapter IVbis to replace Article 17 and a new Article 2A were adopted by UNCITRAL on 7 July 2006. The revised version of Article 7 is intended to modernise the form requirement of an arbitration agreement to better conform to international contract practices. The newly introduced Chapter IVbis establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version.39

The UNCITRAL Model Law provides a sound framework within which international arbitrations can be conducted. The general philosophy behind the Model Law of giving more autonomy to the arbitrator is one which is more likely to appeal to lawyers and parties who are not infused with English concepts of arbitration. If the Model Law is adopted widely it will encourage international arbitration as a way of settling commercial disputes.

6.4 Compatibility of Indian Laws with TRIPS Agreement

The TRIPS Agreement recognizes seven types of intellectual property and lays down the minimum standards to be accepted by the member states for the protection of the same. In India, there are different statute for the acquisition and enforcement of the intellectual property laws. The Part II of the TRIPS Agreement has divided the intellectual property rights into seven categories these are:-

38. Supra note 12 at 1-2.
39. Supra note 32.
1. Copyright,\textsuperscript{40}
2. Trademarks,\textsuperscript{41}
3. Geographical indications,\textsuperscript{42}
4. Industrial designs,\textsuperscript{43}
5. Patents,\textsuperscript{44}
6. Layout-designs (topographies) of integrated circuits,\textsuperscript{45}
7. Undisclosed information, including trade secrets.\textsuperscript{46}

6.4-1 Copyright

Article 9 to 14 of the TRIPS Agreement specifically deals with the copyright and the related rights. It prescribes the extent of protection of the copyright that there is no protection on the ideas, methods of operation or mathematical concepts. The Indian Copyright Act, 1957 also specify that copyright persist in the work and not in the ideas. Section 13 of the Copyright Act clearly provides the subject-matter of the copyright. In \textit{Gopal Das v. Jaganath Parsad},\textsuperscript{47} it was held that the law of copyright does not protect ideas, but they deal with the particular expression of the ideas. The protection of ideas falls not within the laws as to copyright but within the patent laws.

Under Article 10 of the TRIPS Agreement computer programs, whether in source or object code, shall be protected as literary works. Similar provision has been made in the Copyright Act, 1957 as "literary work" includes computer programmes, tables and compilations including computer databases. Section 14,\textsuperscript{48} further clarify that copyright covers the computer programme. Article 11,\textsuperscript{49} further provides that computer programs and cinematographic works shall not be rented to the public without the authorization of the author or their successors in the title. Under the Copyright Act Section 14(1)(b)(ii) which was substituted in the

\textsuperscript{40} Section 1 of the TRIPS Agreement.
\textsuperscript{41} Id. Section 2.
\textsuperscript{42} Id. Section 3.
\textsuperscript{43} Id. Section 4.
\textsuperscript{44} Id. Section 5.
\textsuperscript{45} Id. Section 6.
\textsuperscript{46} Id. Section 7.
\textsuperscript{47} AIR 1938 All 266 at 268, as quoted from Vikas Vashishth, \textit{Law & Practice of Intellectual Property in India} (2006-07) at 887.
\textsuperscript{48} The Copyright Act, 1957.
\textsuperscript{49} The TRIPS Agreement.
year 1999 which now covers the provisions as specified in the TRIPS Agreement regarding to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme be the exclusive right of the author. In Raj Video Vision v. K. Mohana Krishanan,\textsuperscript{50} it was held that author has all the rights over the film. Section 14(1)(d)(ii) gives right to the producer to sell or give on hire, or offer for sale or hire any copy of the film regardless of whether such copy has sold or given on hire on earlier occasions. This section clothes ample power on the film even it has been sold or given on hire is based on the lawful right conferred on the producer.

The term of protection of the copyright work under the Copyright Act is, in fact, more than the TRIPS Agreement. The TRIPS Agreement prescribes the minimum term of protection and the Copyright Act protects the work more than minimum term. In fact Section 22 to 29 of the Copyright Act is in compatible with the Article 12 of the TRIPS Agreement.

Article 14 of the TRIPS Agreement protects the right of the performers, producers of phonograms and broadcasting organizations these rights were similar to that of the Indian Copyright Act. Chapter VIII of the Copyright Act, 1957 deals with rights of broadcasting organisation and of performers.\textsuperscript{51} The broadcast reproduction right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the broadcast is made. The performer’s right will subsist until fifty years from the beginning of the calendar year in which the performance is made. The provisions made in the Indian Copyright Act are compatible with the TRIPS Agreement as it fulfills the required conditions as laid down in the Agreement.

6.4-2 Trademarks

Article 15 to 21 of the TRIPS Agreement specifically deals with the trademarks.\textsuperscript{52} Article 15 of the TRIPS Agreement specifically prescribes the protectable subject matter of the trademarks. It specifies what can be registered as a trademark. The Article further specifies that there should be no refusal for the registration of the trademarks because of the nature of the goods or services

\textsuperscript{50} AIR 1998 Mad 294.
\textsuperscript{51} Section 37 to 39A.
\textsuperscript{52} http://www.wto.org site visited on 21 March, 2008.
to which a trademark is to be applied. As comparison to the TRIPS Agreement the Indian Trade Marks Act has given very wide definition of the trade mark. It is also observed by the Delhi High court in *Anglo-Dutch Paint, Colour and Varnish Works Pvt. Ltd. v. India Trading House*,\(^{53}\) that the definition of the ‘mark’ as contained in the Act is not exhaustive and the definition is such that there is practically no limit to the combination of various types of marks. Article 15 further prescribe that member States shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Member State may afford an opportunity for the registration of a trademark to be opposed. Section 20 of the Trade Marks Act, 1999 corresponds with the Article 15 of the TRIPS Agreement as it provides for the advertisement of an application, either after or before acceptance, so as to afford the public an opportunity to oppose the registration of the mark.

Article 16 of the TRIPS Agreement conferred the rights of the owner of a registered trademark to prevent all others from using the same or similar mark in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. Section 28 of the Trade Marks Act, corresponds to Article 16 of the TRIPS Agreement which conferred the exclusive right on the registration of the mark to the proprietor.

Section 25\(^{54}\) corresponds to Article 18 of the TRIPS Agreement, it prescribe that the registration of a trade mark shall be for a period of ten years, but may be renewed for the indefinite period of time. Article 21 lays down a condition on the licensing and assignment of trademarks which correspond to Chapter V of the Trade Marks Act, 1999. In Indian Trademarks law there is no provision for the compulsory liciensing and this is also denied by the TRIPS Agreement. The Trade Marks Act adopted the same provision for the transmission of the trade mark as in the TRIPS Agreement. Owner of a registered

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53. *AIR 1977 Del 41.*
54. *The Trade Marks Act, 1999.*
trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs. The provisions of the Indian trade marks law are compatible with the provisions of the international standards as laid by the TRIPS Agreement. The standards as fixed by the TRIPS Agreement have been fulfilled by the Indian law.

6.4-3 Geographical Indications

Article 22 to 24 of the TRIPS Agreement deals with the protection of the geographical indication. The TRIPS agreement makes it mandatory for all governments to provide legal means to interested parties so that they can prevent the use of marks that mislead the public about the geographical origin of the good. According to the agreement, "In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition." Under the Geographical Indications of goods (registration and Protection) Act, 1999 specific provisions has been made as to the registration and protection of the registered geographical indication.

The grant of US patent to Ricetect Inc a US multinational company in the name of Basmati necessitated the urgency of enacting law for the protection of geographical indications. The Basmati controversy was an eye opener and India enacted the Geographical Indications of goods (registration and Protection) Act, 1999. Section 25 and 26 corresponds to the Article 22 of the TRIPS Agreement. Section 25 prohibits the registration of a geographical indication as a trade mark. Section 26 protects a trade mark which contain or consists of geographical indication which has been applied for or registered in good faith under the trade marks law or where such trade marks have been used in good faith before the commencement of the proposed legislation or before the date of filing an application for registration of a geographical indication.

55. Section 39 of the Trade Marks Act, 1999.
Article 23 provides additional protection to wines and spirits even though the agreement does not put forward any case for granting special protection to wines and spirits. From the language of the Article it is evident that the general protection provided under Article 22 applies to wines and spirits but, in addition, member countries must provide specific extra protection for wines and spirits. So, in the case of wines and spirits, nations must ensure the availability of legal means to interested parties to prevent others from using terms or adjectives like 'kind', 'type', 'similar', etc, alongside a reputed geographical indication even if the exact place of origin (which is different from the one referred to in the geographical indication) is clearly mentioned.

Article 24 of TRIPS provides exceptions to the protection of geographical indications that are particularly relevant in the case of geographical indication for wines and spirits. Geographical indications are protected in accordance with international treaties and national laws under a wide range of concepts, including:

i) special laws for the protection of geographical indications or appellations of origin,
ii) trademark laws in the form of collective marks or certification marks,
iii) laws against unfair competition,
iv) consumer protection laws, or
v) specific laws or decrees that recognize individual geographical indications.

In India not only the Geographical Indications of Goods (Registration and Protection) Act, 1999 but also few other laws protects the rights of the general persons like the Consumer Protection Act, 1986, the Competition Act, 2002, the Trade Marks Act, 1999 etc. To exclude the unauthorized persons from misusing geographical indications, to protect the interests of the consumers from deception the Indian Parliament has enacted the Geographical Indications of Goods (Registration and Protection) Act, 1999. In India prior to the TRIPS Agreement there is no such legislation for the protection of the geographical indications and by enacting the Geographical Indications of Goods (Registration and Protection) Act, 1999, the Act fulfill the required need in the field of protection of the rights of the consumer and the protection of the rights of the producers.
6.4-4 Industrial Designs

Article 25 and 26 of the TRIPS Agreement deals with the promotion and protection of the industrial design. Article 25 of the TRIPS Agreement obliges Members to provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations. Section 2(d) of the Designs Act, 2000 corresponds to Article 25 of the TRIPS Agreement, which defines the design as the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark or property mark or any artistic mark.

Article 25 further contains a special provision aimed at taking into account the short life cycle and sheer number of new designs in the textile sector. Requirements for securing protection of such designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation through industrial design law or through copyright law.

Article 26 requires Members to grant the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. Article 26 further allows Members to provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate
interests of the owner of the protected design, taking account of the legitimate interests of the third parties.

Under the TRIPS Agreement the duration of protection available shall amount to at least 10 years where as in the Designs Act, 2000 the term of protection is fifteen years. Hence the Indian Designs Act, 2000 is in compatible with the standards as laid down in the TRIPS Agreement.

6.4-5 Patents

While United States have been attempting to integrate with the rest of the world, India has been doing the same. India acceded to the World Trade Organization, and thereby to the TRIPS (Agreement on Trade Related Intellectual Property Rights) in 1995. The TRIPS agreement, a result of GATT, came into being on 1st Jan., 1995. The agreement states that patents shall be made available to all types of inventions irrespective of place of origin and field of technology. It mandates granting of both product patents in all the member States. Most of the developing nations, who had signed the agreement, were not granting product patents earlier. However, now having signed the agreement, all these States including India have been mandated to grant product patents in all the fields of technology, including food and pharmaceuticals. As a result, India was obliged to grant patents for pharmaceutical products from January 1, 2005. Accordingly, India had amended the Patents Act, 1970 in 2005 to provide patent protection for substances capable of being used as pharmaceutical products or drugs. Article 27 to 34 of the TRIPS agreement specifically prescribes the patentable subject matter and the rights conferred there to.

Article 27 deals with patentable subject-matter it provides that patents shall be available for any inventions, whether products or process, in all fields of technology if they are new, involve an inventive step and are capable of industrial application. Subject to Para 4 of Article 65, Para 8 of Article 70 and Para 3 of Article 27, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, in the field of technology.

Article 27 further provides that to protect public order or morality, including protection of human being, animal or plant life or health or to avoid serious

58. Ibid.

308
prejudice to the environment the members may exclude any invention from patentability if so necessary but not merely because the commercial exploitation is prohibited by domestic law. Article 27 further provides that members may also exclude from patentability:

i) diagnostic, therapeutic and surgical methods for the treatment of human or animals,

ii) 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.

Article 28 confers exclusive rights on patent owner where subject matter is a product, to prevent third parties, without the consent of the owner making, using, offering for sale, selling or importing for these purposes, that product; or where the subject matter is a process, without consent of the owner to prevent third parties from the acts of using, offering for sale or importing for these purposes. Article 28 further provides that patent owners shall also have right to assign, transfer by succession, or by way of licensing contracts. Under the Indian law Section 48 of the Patents Act, 1970 corresponds to the Article 28 of the TRIPS Agreement which gives the patentee the right to exploit patent, to assign and licence and to sue for the infringement.

Article 33 provides that the term of protection available shall not end before expiry of the period of twenty years counted from the filing date. The Indian Patents right too remains with the inventor for the period of twenty years.

Under Article 34(a) if the product obtained by the patented process is new, (b) if there is a substantial likelihood that the identical product was made by the process and the owner is reasonably unable to determine the process actually used, then the members shall provide that any identical product produced without the consent of owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process. Para 2 provides that burden of proof must be on alleged violator if conditions are fulfilled according to Para 3 and the legitimate interests of the defendant in protecting his manufacturing business secrets shall be taken into account. This corresponds to
Section 104A of the Patents Act, 1970 which is inserted in 2002 so as to make Indian Patent compatible with the TRIPS standards.

There is a lot of fear among common people that product patenting would deny them access to necessaries since patent holders enjoy monopoly till 20 years and they may fix very high prices to the products. However, the Government states that there should be no such fear since compulsory licence\textsuperscript{59} can be granted if the price of the patented invention (including product patents) is kept high. The objective behind patent grants is to serve the purpose of the society by encouraging and stimulating further research and development. The purpose of any research should be the benefit of common man. There is an obligation on the part of the Government to guarantee the common man access to patented inventions especially necessaries at affordable prices. The Indian Patent law is fully compatible with the international standards. So far as engineering and electronic product is concerned product patent can be granted subject to following WTO-TRIPS provisions considering domestic circumstances and advancement of the country where India is self sufficient to compete with the world. This will not create conducive atmosphere but will also positively encourage inventions.

The development of the society depends on the development of science and technology. The development of science and technology to a large extent depends on the encouragement and support provided through rewards. Patent is a reward for the efforts and labour in producing new and novel innovations. Patents encourage further research and development in the concerned field, which ultimately benefits the society at large. Today patent law has reached unprecedented and unforeseen destinations. The current trend of patent law in patenting intangible things like computer programs and software at the same time patenting non-natural living beings and living processes has been able to reward the efforts and innovations in the field of information technology and biotechnology. In a way it stimulated further research and development in the fields which resulted in inventions with enormous utility and commercial value.

\textsuperscript{59} Section 84 of the Patents Act, 1970.
Since information technology and biotechnology have been considered as the driving force of the modern world, patent in these fields played an important role.

The agreement says that the governments of the member states have to ensure that intellectual property rights:

i) can be enforced under their laws,
ii) penalties for infringement are tough enough to deter further violations,
iii) procedures must be fair and equitable,
iv) not unnecessarily complicated or costly,
v) should not entail unreasonable time-limits or unwarranted delays,
vi) ability to ask a court to review an administrative decision or to appeal a lower court’s ruling.

The TRIPS Agreement also prescribes:

i) how enforcement should be handled, including rules for obtaining evidence, provisional measures, injunctions, damages and other penalties,
ii) that courts should have the right, under certain conditions, to order the disposal or destruction of pirated or counterfeit goods,
iii) that willful trademark counterfeiting or copyright piracy on a commercial scale should be criminal offences,
iv) for assistance of customs authorities to prevent imports of counterfeit and pirated goods.

Basically the TRIPS agreement covers five broad issues:

i) basic principles;
ii) protection to intellectual property;
iii) enforcement of intellectual property;
iv) settlement of disputes on intellectual property between members of the WTO;
v) special transitional arrangements during the period when the new system is being introduced.

The Indian legislature has followed the TRIPS Agreement by amending the law relating to the protection of intellectual property rights. India not only amended the Patents Act, 1970, the Copyright Act, 1957, the Trade Marks Act
but also enacted the Geographical Indication of Goods Act, 1999 and The Semiconductor Integrated Circuits Layout-Design Act, 2000 so as to make the Indian laws compatible with the international standards as prescribed by the TRIPS Agreement.

6.4-6 Layout-designs (topographies) of Integrated Circuits

All electronic goods or goods which involve some electronic work are made up of electronic circuits or integrated circuits consisting of layout designs. The law relating to layout designs and integrated circuits deals with the protection and enforcement of layout designs and integrated circuits. Before the TRIPS agreement, there was no law in India in this area. However at the international level, the Treaty on Intellectual Property in respect of Integrated Circuits was governing the field.

Article 35-38 of the TRIPS Agreement deals with the Layout-designs (topographies) of integrated circuits. Being a signatory to the TRIPS agreement in fulfillment of its obligations there under in protecting integrated circuits, India enacted the Semiconductor Integrated Circuits Layout-Design Act in 2000. Protection is offered under the Act through registration on the fulfillment of certain requirements. In India new, original and distinctive integrated circuits which have not been commercially exploited anywhere in India or in a member state of the TRIPS agreement are offered protection. An integrated circuit is considered original if it is the result of its creator’s own intellectual efforts and is not commonly known to the creators of layout designs and manufacturers of semiconductor integrated circuits at the time of its creation. An integrated circuit is new and distinctive if it is not a part of the existing knowledge in the public domain and if it is different when compared to the existing circuits.60 Article 38 of the TRIPS Agreement provides that the registered layout designs or circuits are protected for a period of ten years.

6.4-7 Undisclosed Information, including Trade Secrets

Traditional knowledge (TK) is the information that people in a given community, based on experience and adaptation to a local culture and

environment, have developed over time, and continue to develop. This knowledge is used to sustain the community and its culture and to maintain the genetic resources necessary for the continued survival of the community. Information relating to the affairs of any particular business or trade or manufacture may constitute trade secret. It may be a secret regarding the manufacturing of any particular product or conduct or management of business or trade.

Intellectual property rights have a pre-independence history. After independence the new patent laws were put in the form of the Indian Patent Act 1970. In fact, according to Section 3(p) of the Patents Act, 1970, there is a clear provision that an invention which in effect is traditional knowledge is not an invention. In the year 1999 the Apex Court in a PIL directed the government of India to take suitable measure to protect the biodiversity of the country in conformation with the Convention on Biological diversity and such other conventions. In pursuance of this the Government of India enacted the Biodiversity Act, the Geographical Indications Act and the Plant Varieties Act. In these Act, there are adequate safeguards for protection of traditional knowledge from commercial exploitation and biopiracy.

In India, the common law and the contract law govern trade secrets and confidential information to a large extent. However, the Article 39 of the TRIPS agreement mandates member states to provide for a framework to protect confidential information. As per the agreement there are few essential requirements that an information or secret must satisfy in order to constitute confidential information or trade secret. The owner of the trade secret should demonstrate that:

(i) The public does not know the information or the information is not in the public domain.
(ii) The information has some commercial value.
(iii) The person in control of such information has taken reasonable steps to maintain the secrecy or confidentiality of the information.

(iv) The information if made known to competitors results in advantage to them and a great loss to the person in control of the information.

Any information, which satisfies the above requirements, shall be protected. As per the law of contract, any secret or confidential information exchanged between the employer and the employee shall be secret. The employee shall not use such information in a way detrimental to the interest of the employer during and after his employment. The employee owes fiduciary duty towards his employer in keeping the information confidential. If the employee does violate his duty, he could be prosecuted for breach of trust. Further, common law remedies such as injunctions, damages and accounts of profit are available against the breach of the confidentiality of the information or misuse of trade secret.

The TRIPS agreement says that any information satisfying the above requirements shall be protected by the member states through legal means. The agreement considers the misuse of trade secrets as unfair competition. The agreement mandates the member states to evolve some legal framework for the protection of trade secrets and confidential information. However, in India no law exists for protection of confidential information or trade secrets. Countries like USA have enacted stringent legislation, i.e., Uniform Trade Secrets law to regulate trade secrets. Few other countries enacted unfair competition laws to protect trade secrets after coming into being of the TRIPS agreement. However, in India in the absence of a specific law, trade secrets are governed by the common law principles and the contract law.

6.5 World Intellectual Property Organization (WIPO)

The roots of the World Intellectual Property Organization go back to 1883, when Johannes Brahms was composing his third Symphony, Robert Louis Stevenson was writing Treasure Island, and John and Emily Roebling were completing construction of New York’s Brooklyn Bridge. The need for international protection of intellectual property became evident when foreign exhibitors refused to attend the international Exhibition of invention in Vienna in
1873 because they were afraid of their ideas being stolen and exploited commercially in other countries.  

WIPO is an international organization dedicated to helping to ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are, thus, recognized and rewarded for their ingenuity. This international protection acts as a spur to human creativity, pushing forward the boundaries of science and technology and enriching the world of literature and the arts. By providing a stable environment for the marketing of intellectual property products, it also oils the wheels of international trade. WIPO is one of the 16 specialized agencies of the United Nations. The mission of the WIPO is to promote through international cooperation the creation, dissemination, use and protection of works of the human mind for the economic, social and cultural progress of all mankind. WIPO has over 184 member States as its member along with some 1,000 staff drawn from around the world.

WIPO carries out many tasks related to the protection of intellectual property rights, such as administering international treaties; assisting governments, organizations and the private sector; monitoring developments in the field and harmonizing and simplifying relevant rules and practices. The main motive of the WIPO is efficiency, communication and international cooperation.

**Objectives of WIPO**

Today WIPO administers 24 treaties and carries out a rich and varied program of work, through its member States and secretariat that seeks to cooperation and coordination among the member States. The Objectives of WIPO are:-

i) Promotion of intellectual property protection worldwide,

ii) Promotion of creative and intellectual activity,

iii) Facilitation of technology transfer and dissemination of literary and artistic works,

iv) Modernization and strengthening of administrative systems,

v) Harmonize national intellectual property legislation and procedures,

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vi) Provide services for international applications for industrial property rights,

vii) Exchange intellectual property information,

viii) Provide legal and technical assistance to developing and other countries,

ix) Facilitate the resolution of private intellectual property disputes, and

x) Marshal information technology as a tool for storing, accessing, and using valuable intellectual property information.

A fundamental and enduring part of WIPO’s activities in promoting the protection of intellectual property is the progressive development and application of international norms and standards. The Organization currently sets out internationally agreed rights and common standards for their protection that the States which sign them agree to apply within their own territories. WIPO is constantly alert to the need to develop new norms and standards in keeping with advances in technology and business practices, as well as in response to specific concerns such as traditional knowledge, folklore, biodiversity and biotechnology. Rapid technological development and globalization of trade have resulted in the need for mechanisms providing speedy protection for new inventions and commercially valuable assets, such as trademarks and industrial designs in multiple countries. A cluster of four WIPO treaties, covering inventions (patents), trademarks, and industrial designs, ensure 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 the countries in which protection for a given intellectual property right is sought.

Provisions on Intellectual Property Enforcement in the WIPO Treaty

Article 3 of the Convention establishing the World Intellectual Property Organization (WIPO) states as a primary objective the promotion of the protection of intellectual property throughout the world, in cooperation with its Member States.64 The protection of intellectual property rights requires the enactment of

intellectual property legislation as well as the effective enforcement of the rights, which are conferred through the laws and regulations.

Accordingly, as a general obligation, Contracting Parties to the various WIPO-administered treaties on the protection of intellectual property are bound to adopt measures, which are necessary to ensure the effectiveness of these treaties in their territories. In addition, several of the treaties administered by WIPO include special enforcement provisions over issues covered in the respective treaty. Articles 9 and 10 of the Paris Convention for the Protection of Industrial Property require seizure or equivalent measures on importation of goods unlawfully bearing a trademark or trade name or certain false indications. Under Article 10ter(1) of the Paris Convention, members of the Paris Union “undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress” certain acts which are prohibited under Articles 9, 10 and 10bis of the Convention.

Article 15 of the Berne Convention for the Protection of Literary and Artistic Works contains a presumption that the person whose name appears on the work is entitled to institute infringement proceedings in the countries of the Union for the purpose of enforcing right protected under the Convention. Article 16(1) and (2) of the Berne Convention provides that infringing copies of a work are subject to seizure in any country of the Berne Union where the work enjoys protection, even when the copies originate from a country where the work is not or no longer protected. Article 13(3) of the Berne Convention also provides for the seizure of copies of certain recordings of musical works imported without the permission of the author or other owner of copyright in the country of importation.

Article 11 of the WIPO Copyright Treaty (WCT) and Article 18 of the WIPO Performances and Phonograms Treaty (WPPT) require Contracting States to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures. Moreover, Article 12 of the WCT and Article 19 of the WPPT require Contracting States to provide adequate and effective legal remedies with respect to certain obligations relating to the protection of rights management information.
**WIPO Arbitration and Mediation Center**

Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center was established in 1994 to offer Alternative Dispute Resolution (ADR) options, in particular arbitration and mediation, for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property. This need has increased in recent years with the growing importance of international trade. WIPO's Arbitration and Mediation Center helps to meet those needs for companies and individuals anywhere in the world.

The objective behind the establishment is to promote the efficient and cost/effective resolution of intellectual property and information technology disputes through arbitration and mediation. In the center a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.\(^{65}\) Arbitration can only take place if both parties have agreed to it (usually through an insertion of an arbitration clause in the relevant contract). In contrast to mediation, a party cannot unilaterally withdraw from arbitration. The parties can select a sole arbitrator or choose to have a three-member arbitral tribunal. In addition to their selection of neutrals, parties are able to choose such important elements as the applicable law, the language, and the venue of the arbitration.

The WIPO Arbitration Rules specifically protect the confidentiality of the existence of the arbitration, any disclosures made during that procedure, and the award. The decision of the arbitral tribunal is final and binding. The parties agree to carry out the decision of the arbitral tribunal without delay. Decisions are enforced by national courts under the New York Convention. More than 130 States are party to this Convention (including India).

In a mediation procedure, a neutral intermediary/the mediator, helps the parties to reach a mutually satisfactory settlement of their dispute. Mediation is a non-binding procedure controlled by the parties. A party to mediation cannot be

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forced to accept an outcome that it does not like. Unlike an arbitrator or a judge, the mediator is not a decision-maker. The mediator's role is to assist the parties in reaching a settlement of the dispute. Even when the parties have agreed to submit a dispute to mediation, they are free to abandon the process at any time after the first meeting if they find that its continuation does not meet their interests. Mediation is a confidential procedure and the existence and outcome of the mediation are also confidential. Mediation's confidentiality allows the parties to negotiate more freely and productively, without fear of publicity. Mediation is an interest-based procedure. In court litigation or arbitration, the outcome of a case is determined by the facts of the dispute and the applicable law. In mediation, the parties can also be guided by their business interests.

As mediation is non-binding and confidential, it involves minimal risk for the parties and generates significant benefits. Even when a settlement is not achieved, mediation never fails, as it causes the parties to define the facts and issues of the dispute, thus in any event preparing the ground for subsequent arbitration or court proceedings.66

The award shall be final and binding if the same is not challenged within 4 months’ of Award Date. It is enforceable on Decree of Court (no need for separate execution proceedings). As India has ratified New York Convention and Geneva Convention hence the Foreign Awards (Foreign venue or Law) are also enforceable.

Advantages of Alternative Dispute Resolution (ADR)

Alternative dispute resolution procedures offer several advantages:67

i) A Single Procedure

Through ADR, the parties can agree to resolve in a single procedure a dispute involving intellectual property that is protected in a number of different countries, thereby avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results.

66. Supra note 65.
ii) Party Autonomy

Because of its private nature, ADR offers parties greater control over the way their dispute is resolved. Unlike in court litigation, the parties may choose the procedural rules, the applicable law, the place and the language of the proceedings. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute. This can result in material cost savings.

iii) Neutrality

ADR can be neutral to the law, language and institutional culture of the parties, thereby avoiding any home court advantage that one of the parties may enjoy in court-based litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.

iv) Confidentiality

ADR proceedings are private. Accordingly, the parties can agree to keep the proceedings and any results confidential. This allows them to focus on the merits of the dispute without concern about its public impact, and may be of special importance where commercial reputations and trade secrets are involved.

v) Finality of Awards

Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal.

vi) Enforceability of Awards

The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review on the merits. This greatly facilitates the enforcement of awards across borders.

There are, of course, circumstances in which court litigation is preferable to ADR like ADR's consensual nature makes it less appropriate if one of the two
parties is extremely uncooperative, which may occur in the context of an extra-contractual infringement dispute. In addition, a court judgment will be preferable if, in order to clarify its rights, a party seeks to establish a public legal precedent rather than an award that is limited to the relationship between the parties. In any event, it is important that potential parties, and their advisors are aware of their dispute resolution options in order to be able to choose the procedure that best fits their needs. As India is also the Member State of the WIPO, hence any dispute relating to the intellectual property disputes can be settled by the WIPO arbitration and mediation centre.

To sum up, the main objective of the European Directive for the Enforcement of the Intellectual Property Right is to protect the rights of the intellectual persons so as to motivate them for the research and development. In order the provisions of the Directive are applicable (differently from EU Regulations which are directly applicable), they should be first implemented into the national legislation i.e., the national legislators must enact certain legislation in intellectual property field transposing the Directive provisions, because generally EU Directives have no direct effect. As reported, most of the countries, for instance, France, Italy, UK, Eastern and Central European Countries (the new members of EU) have already implemented the Directive. Germany is however behind the deadline of implementation, but the implementing legislation is planned to be passed this summer.

Defining intellectual property policies to promote growth and innovation will be greatly enhanced by focusing on the process of forming such policies. In the EU there is a greater need for an inter-agency and intra-agency coordination. Such coordination can ensure that the EU's strategic goals are better reflected in the EU Directive. The main motive for the enactment of the European Directive for the Enforcement of the Intellectual Property Right is to enforce the laws in the European countries. The Enforcement Directive is often called a TRIPS-plus document improving and adding the enforcement provisions set out in Part III of TRIPS. Where the general obligation of the member states has been prescribed so as to enforce the intellectual property laws in their States. There is nothing new prescribe in the Directive as it provides the same standard of civil measures
and procedures applicable to all infringements of any intellectual property rights which is embodied in TRIPS. Its validity is limited to the EU Member States (27 at the moment) which all are Contracting States of WTO and its pillar - TRIPS, though.

The new intellectual property regime in India is expected to stimulate large foreign investments, increase international trade and technology transfer. Disputes in these areas will need to be resolved fast and intellectual property rights are certainly be one of the main issues. The alternate dispute resolution provisions in this field are very valuable for solving the disputes between the parties. The Parliament of India have enacted the Arbitration and Conciliation Act, 1996, which was on the UNCITRAL (United Nations Commission on International Trade Law) Model and was widely acclaimed the world over as being an ideal piece of legislation. The Arbitration and Conciliation have been recognized as valuable adjuncts to the Court system and have been practiced as such in many parts of the world as viable methods of Alternative Dispute Resolution.

In India there is no exclusive institution of the settlement of the disputes relating to the intellectual property rights, but there is Indian Council of Arbitration (ICA); International Centre for Alternative Dispute Resolution (ICADR); and FICCI Arbitration and Conciliation Tribunal who are the forerunner in the field of the arbitration and mediation. There is a need for the establishment of the specialized agency to deal with the arbitration and mediation exclusively for the intellectual property rights.

For the advancement of the trade relationship among the States in the Global village there is a need for the uniformity in the laws by which they are governed. There are many conventions and treaty where the member States has realized that there should be some soft provisions in the laws in case of some disputes so as to settle the same with the help of some arbitrator or mediator to which both the parties agreed to. The UNCITRAL Model Law also focuses on the International commercial Arbitration and it is the aftermath of this Model Law that India has amended its Arbitration and Conciliation Act, 1996 so as to enforce the foreign arbitral awards in India. The UNCITRAL Model law has contributed for the establishment of the unified legal framework for the fair and efficient settlement of disputes arising in the international commercial relationships.
The Agreement on Trade-Related Aspects of Intellectual Property Rights plays an important role in the enforcement of the intellectual property rights. Part III of the TRIPS Agreement deals with the proper implementation of the decisions against the infringement of the intellectual property rights. The Agreement lays down the guidelines for the proper utilization of the rights of the owner of the intellectual property. Indian laws on the intellectual property rights has followed the TRIPS Agreement, no doubt, Indians laws are older than the TRIPS Agreement but that is meant for the implementation in the Indian territory, but after the enforcement of the TRIPS Agreement India has amended all its Intellectual property laws so as to make them compatible with the TRIPS standards.

The World Intellectual Property Organisation has played an important role not only in the field of acquisition and enforcement of the intellectual property rights but also for the settlement of the disputes among the States. The WIPO give the assistance to States in the matter of drafting and revision of national legislation; comprehensive education and training programs at national and regional levels; for officials dealing with intellectual property and for traditional and new groups of users, on the value of intellectual property and how to create their own economic assets through better use of the intellectual property system; extensive computerization assistance to streamline administrative procedures for managing and administering their own intellectual property resources; financial assistance to facilitate participation in WIPO activities and meetings. In fact the WIPO plays a major role in the promotion of the intellectual property rights throughout the world.