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# **ANALYZING THE TRADEMARK PROVISIONS** **OF THE PARIS CONVENTION FOR THE** **PROTECTION OF INDUSTRIAL PROPERTY:** **A LEGAL PERSPECTIVE**

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## **INTRODUCTION**

The reason behind the international recognition of industrial property rights is to ensure a sense of justice in the minds of people, by giving rights over their intellectual creations. Food, health and communication are the fundamentals of the life of individuals and the survival of the human race, these fundamentals improve where international trade is orderly. There will not be orderly international trade without the use of trademarks and the respect of the rights of their owners.

One of the initial developments in the sphere of intellectual property includes the Paris Convention for the Protection of Industrial Property, it covers the industrial properties such as patents, trademarks, service marks, trade names, utility models, geographical indications and appellations of origin. The convention, which initially had 11 member States, now has 179 member States. The convention has been in existence for over a century and it is possible because of the ever-increasing cooperation among States.

The Paris Convention applies to industrial property including patents, trademarks, industrial designs, utility, service marks, trade names, geographical indications and the repression of unfair competition. Trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. Paris convention contains provisions related to trademarks. It is left to the discretion of countries to determine the conditions for filing and registration of marks.

# PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

The diplomatic conferences held at Paris in 1880 and 1883 resulted in the adoption of the Paris Convention. The convention was drafted at the 1880 conference and the convention along with Final Protocol was signed by 11 states on March 20, 1883. It came into force on July 7, 1884. The initial signatories were Belgium, Brazil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Serbia, Spain and Switzerland. The original text of the Paris Convention consisted of the Convention proper, containing 19 articles, and the Final Protocol.

Revisions were made at diplomatic conferences, through which new provisions were introduced, and also many of the existing provisions were modified. After its adoption, the original (1883) text of the Paris Convention was revised six times between 1883 and 1967. The six conferences of revision were held in 1900 in Brussels, in 1911 in Washington, in 1925 in The Hague, in 1934 in London, in 1958 in Lisbon and in 1967 in Stockholm. Conferences of revision were held in Rome in 1886, in Madrid in 1890 and in Geneva in 1980- 1982, but they were not fruitful.

All the texts have been signed in French, but official texts are available in English, Arabic, Chinese, Russian and Spanish. The Paris Convention established the Paris Union for the Protection of Industrial Property, which is the permanent association among the member States and also established a permanent secretariat for that Union called the International Bureau.

## Contracting parties and Administration

The Paris Convention for the Protection of Industrial Property is a multilateral treaty between sovereign States. As of April 21, 2022, the Convention has 179 contracting member countries, thereby making it one of the most widely adopted treaties worldwide. As per Article 25(2) of the Paris Convention, if a country is "in a position under its domestic law to give effect to the provisions of the Paris Convention", then it may become party to the Paris Convention.<sup>1</sup>

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<sup>1</sup> Stockholm Act 1967, Article 25(2)

Any country can become a party to the Convention by depositing an instrument of ratification of, or accession to, the Convention. The Paris Convention is administered by the World Intellectual Property Organization (WIPO), based in Geneva, Switzerland.

## Substantive Provisions

The convention provides for National Treatment and rights of priority. The provisions concerning trademarks are contained in Articles 6, 6<sup>bis</sup>, 6<sup>ter</sup>, 6<sup>quater</sup>, 6<sup>quinquies</sup>, 6<sup>sexies</sup>, 6<sup>septies</sup>, 7, 7<sup>bis</sup>, 8, 9, 10<sup>bis</sup>, 10<sup>ter</sup> and 11.

### *Equal Protection for Nationals and Foreigners (Articles 2 and 3)*

Under the provisions on national treatment, the Convention provides that each Contracting State must grant the same protection to nationals of other Contracting States that it grants to its own nationals. Nationals of non-Contracting States are also entitled to national treatment under the Convention if they are domiciled or have a real and effective industrial or commercial establishment in a Contracting State.

The Paris Convention guaranteed national treatment from the very beginning. The text of the Paris Convention (1883) expressed this guarantee in the following terms: "The subjects or citizens of each contracting State shall, as regards patents, industrial designs, trademarks and trade names, enjoy the advantages that their respective laws now grant, or may hereafter grant, to nationals. Consequently, they shall have the same protection as the latter and the same legal remedies against any infringement of their rights, provided they observe the formalities and conditions imposed upon nationals by the domestic legislation of each State"<sup>2</sup>.

The initial provision was revised mainly in three respects: in respect of clarifying to what objects the national treatment applies; in respect of the exact extent of the assimilation of foreigners to nationals; and in respect of defining what relations a foreigner has to have with a country party to the Convention in order to be able to benefit from the protection provided in the Convention.

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<sup>2</sup> Paris Convention 1883, Article 2

The provision <sup>3</sup>in the revised<sup>4</sup> form reads as:

“(1) Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

(2) However, no requirement as to domicile or establishment in the country where protection is claimed may be imposed upon nationals of countries of the Union for the enjoyment of any industrial property rights.

(3) The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved.”<sup>5</sup>

Article 3 provides for national treatment in certain cases even for nationals of countries outside the Union if they are domiciled or have real and effective industrial or commercial establishments in the territory of one of the countries of the Union.<sup>6</sup>

### ***Right of Priority (Article 4)***<sup>7</sup>

The Convention provides for the right of priority in the case of trademarks. This right means that, on the basis of a regular first application filed in one of the Contracting States, the applicant may, within a period of 6 months, apply for protection in any of the other Contracting States. These subsequent applications will be regarded as if they had been filed on the same day as the first application. They will have priority over applications filed by others during the said period of time. The applicants seeking protection in several countries are not required to present all of their applications at the same

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<sup>3</sup> Ibid

<sup>4</sup> As amended on September 28, 1979

<sup>5</sup> Stockholm Act 1967, Article 2

<sup>6</sup> Stockholm Act 1967, Article 3

<sup>7</sup> Stockholm Act 1967, Article 4

time but have 6 to decide in which countries they wish to seek protection.

The date of filing of the application for registration has some importance in obtaining registration. Under the laws of some countries, the protection of the rights in a mark starts when the mark starts to be used in commerce, that is, publicly. In other countries, such protection starts when the mark is registered, and between several competing applications for registration, the one filed earliest will lead to registration. Even in those countries in which protection starts by use, registration may give more rights than does use alone. It is not practically preferable for an applicant to file applications for the registration of trademark in several countries in the same day. Therefore the period of six months is helpful for the applicants.

The original text<sup>8</sup> of the Paris Convention already provided this right of priority, except that the term was three (rather than six) months and the right could not be invoked where third-party rights existed. At the conference of revision of 1900 (Brussels), the term was extended to four months (an extra month for overseas applications being omitted at the same time). At the conference of revision of 1925 (Hague), the priority period was extended once more, that time to six months, and, at the conference of revision of 1934 (London), the said exception in favour of third-party rights was eliminated.

The applicant is required to make a declaration of the claim of priority and the publication of such claim, the starting date of the computation of the priority period, the subsequent fate of the first application, and the substitution of the first application by another application

### ***Article 6: Marks: Conditions of Registration; Independence of Protection of Same Mark in Different Countries***

As per Article 6 of the original Convention of 1883 every trademark duly filed in the country of origin had to be accepted for filing and protected in its original form in the other countries of the Union, and Article 6, paragraph 4 stated that the above provision was an exception which concerned only the form of the mark, whereas normally each State should apply its domestic law to filings of trademarks. The general rule of the Convention was the application of national laws regarding all trademark

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<sup>8</sup> Paris Convention 1883

registrations in the countries concerned and the applicants were not obliged to first to file trademark in the country of origin. But, if such a filing was made, the Convention gave the applicant the right to demand acceptance and protection of his mark in its original form in the other countries. These provisions were modified by the Revision Conferences of Washington (1911), The Hague (1925), London (1934) and Lisbon (1958).

As per the present form<sup>9</sup>, countries are free to determine the conditions for the filing and registration of trademarks through its domestic legislation. It also states about the independence of the registration, that is, the applications for registration may not be refused or the registration invalidated on the ground that filing, registration or renewal has not been effected in the country of origin. A mark once registered in a country of the Union will be independent of the marks registered in other countries of the Union.

#### ***Article 6<sup>bis</sup>: Marks: Well-Known Marks<sup>10</sup>***

Well-known marks are not defined in the text of the convention. Usually a trademark is considered as well-known if those active in the branch of commerce in which the trademark is used are aware of the existence of the trademark and of the fact that it belongs to a given enterprise.<sup>11</sup>

This Article was introduced into the Convention by the Revision Conference of The Hague in 1925. It was modified by the Revision Conferences of London in 1934 and of Lisbon in 1958. Initially (1925 Hague) the provision concerned only with the refusal or cancellation of the registration of a mark conflicting with a mark which is well known in the country concerned, but later (1958 Lisbon) it was extended to a prohibition of the use of the mark

#### ***Article 6<sup>ter</sup>: Marks: Prohibitions concerning State Emblems, Official Hallmarks, and Emblems of Intergovernmental Organizations<sup>12</sup>***

This provision prohibits the use of armorial bearings, flags and other State emblems of countries of the Union, and official signs and hallmarks, and any imitation from a heraldic point of view, as a

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<sup>9</sup>Stockholm Act 1967, Article 6

<sup>10</sup> Stockholm Act 1967, Article 6<sup>bis</sup>

<sup>11</sup> WIPO PUBLICATION No. 875 (E)/ 1983, page 46

<sup>12</sup> Stockholm Act 1967, Article 6<sup>ter</sup>

trademark or as elements of trademark. The countries can refuse or invalidate such a registration or prohibit, through appropriate measures, the use without authorisation from competent authorities. The same is the case with the armorial bearings, flags, other emblems, abbreviations and names of international intergovernmental organizations of which one or more countries of the Union are members.

The countries should communicate the list of State emblems and official signs and hallmarks to the International Bureau, which will then transmit this communication to other member States. The member States may, within a period of twelve months, notify their objections to the protection claimed.

### ***Article 6<sup>quater</sup>: Marks: Assignment of Marks<sup>13</sup>***

This Article was introduced into the Convention by the Revision Conference of London in 1934. As per the Article, if an assignment is to be considered valid, the exclusive right to the trademark with respect to the goods concerned must be assigned together with the portion of the business or goodwill located in the country. The member States are free not to regard as valid the assignment of a trademark, if the use of such mark by the assignee would be of such a nature as to mislead the public, particularly as regards important features of the goods to which the mark is applied.

### ***Article 6<sup>quinquies</sup>: Marks: Protection of Marks Registered in One Country of the Union in the Other Countries of the Union<sup>14</sup>***

Whenever a trademark is duly registered in the country of origin, the other countries of the Union are obliged to accept and protect it, even if, as regards its form, such trademark does not comply with the requirements of the domestic legislation. The grounds for refusal or invalidation of any mark has to be considered on its individual merits.

The country of origin shall be the country of the Union where the applicant has a real and effective industrial or commercial establishment, or, if he has no such establishment within the Union, the country of the Union where he has his domicile, or, if he has no domicile within the Union but is a

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<sup>13</sup> Stockholm Act 1967, Article 6<sup>quater</sup>

<sup>14</sup> Stockholm Act 1967, Article 6<sup>quinquies</sup>

national of a country of the Union, the country of which he is a national.

***Article 6<sup>sexies</sup>: Marks: Service Marks<sup>15</sup>***

This Article was introduced into the Convention by the Revision Conference of Lisbon in 1958. According to the provision, the member States undertake to protect service marks. They are not obliged to provide for the registration of such marks.

***Article 6<sup>septies</sup>: Marks: Registration in the Name of the Agent or Representative of the Proprietor without the Latter's Authorization<sup>16</sup>***

This Article deals with the relationship between the proprietor of a mark and his agent or representative regarding registration or use of the mark by the latter. It will sometimes be in the interest also of the proprietor of the mark if his agent or representative in a given country, on his own initiative, takes the necessary measures to protect the mark by registration, but grave difficulties may then arise with respect to the exclusive right to use the mark, or once the relationship between the parties is terminated. A person who is the proprietor of a mark in one of the countries of the Union may request application of the provision even if somebody else, and not he, is the proprietor of the mark in other countries, on condition, however, that it is his agent or representative who has applied for registration of the mark without the authorization of the proprietor. This provision was introduced into the Convention by the Revision Conference of Lisbon in 1958.

***Article 7: Marks: Nature of the Goods to which the Mark is applied<sup>17</sup>***

This provision states that the nature of the goods to which a trademark is to be applied shall not be an obstacle to the registration of the mark. In the original text the provision referred only to the filing and not to the registration of a trademark.

***Article 7<sup>bis</sup>: Marks: Collective Marks<sup>18</sup>***

The term collective mark is not defined in the convention, it is generally understood to mean a

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<sup>15</sup> Stockholm Act 1967, Article 6<sup>sexies</sup>

<sup>16</sup> Stockholm Act 1967, Article 6<sup>septies</sup>

<sup>17</sup> Stockholm Act 1967, Article 7

<sup>18</sup> Stockholm Act 1967, Article 7<sup>bis</sup>

trademark that is used under the control of its owner by several persons or enterprises producing or trading in goods which have some common characteristics.<sup>19</sup>They can roughly be said to be signs which serve not to distinguish the goods or services of one enterprise from those of other enterprises, but to distinguish the geographical origin or other common characteristics of goods or services of different enterprises which use the collective mark under the control of its owner. These marks generally imply a certain guarantee of quality.<sup>20</sup>

The Article provides for protection of collective marks belonging to associations, which will generally be associations of manufacturers or sellers of goods produced in a certain country or region or having certain common characteristics or qualities. The existence of such associations must not be contrary to the law of the country of origin.

### ***Article 8: Trade Names<sup>21</sup>***

As per the Article, a trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark. Whether a name constitutes a trade name or not is to be determined in the country where such protection is sought. Article does not prescribe how protection must be given to trade names. The member States are free to regulate such protection either by special legislation or by legislation against unfair competition or by other appropriate means.

### ***Article 9: Marks, Trade Names: Seizure, on Importation, etc., of Goods Unlawfully Bearing a Mark or Trade Name<sup>22</sup>***

This provision provides for the seizure of goods, unlawfully bearing a trademark or trade name, upon importation into a country where such trademark or trade name is entitled to legal protection. If the legislation of a country does not permit seizure on importation, seizure shall be replaced by prohibition of importation or by seizure inside the country<sup>23</sup>.

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<sup>19</sup> WIPO PUBLICATION No. 875 (E)/ 1983, page 51

<sup>20</sup> G H C Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as revised at Stockholm in 1967* (BIRPI 1968) 130

<sup>21</sup> Stockholm Act 1967, Article 8

<sup>22</sup> Stockholm Act 1967, Article 9

<sup>23</sup> 1900 Brussels Revision

**Article 10<sup>bis</sup>: Unfair Competition<sup>24</sup>**

As per this Article, the countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition<sup>25</sup>. Any act of competition contrary to honest practices in industrial or commercial matters is considered as an act of unfair competition.

The following acts are prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; [1925 Hague]
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; [1925 Hague]
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods. [1958 Lisbon]<sup>26</sup>

**Article 10<sup>ter</sup>: Marks, Trade Names, False Indications, Unfair Competition: Remedies, Right to Sue<sup>27</sup>**

The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress: (i) the trade in goods unlawfully bearing a trademark or a trade name which is entitled to protection in the country concerned, (ii) the use of false indications of the source of goods or of the identity of the producer, manufacturer or merchant, and (iii) acts of unfair competition.

They also undertake to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

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<sup>24</sup> Stockholm Act 1967, Article 10<sup>bis</sup>

<sup>25</sup>1911 Washington Revision

<sup>26</sup>Stockholm Act 1967,, Article 10<sup>bis</sup>(3)

<sup>27</sup> Stockholm Act 1967, Article 10<sup>ter</sup>

***Article 11: Inventions, Utility Models, Industrial Designs, Marks: Temporary Protection at Certain International Exhibitions<sup>28</sup>***

As per this Article, the countries of the Union has to grant temporary protection to trademarks, in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of any of them. Such temporary protection shall not extend 6 months. If, later, the right of priority is invoked, the authorities of any country may provide that the period shall start from the date of introduction of the goods into the exhibition. The countries may require, as proof of the identity of the article exhibited and of the date of its introduction, such documentary evidence as it considers necessary.

## CONCLUSION

Though Paris Convention was adopted in the late 19<sup>th</sup> Century, it is still in existence. Even after a century, there are countries which are newly becoming party to the convention. India became a party to the Paris convention in 1998. The reason for India to join the convention was to become party to Patent Co-operation Treaty. The convention provided a general outline about the protection of the trademarks and tradenames. The major portion of the substantive and procedural law was left to be determined by the concerned nations through independent legislations. In that sense the Paris Convention can be said to be recognising the sovereignty of the member States.

The priority rights and national treatment are to be noted in respect of protection of industrial property at international level. The convention provides for the independence of trademarks. The registration and existence of them are not dependent on its existence or revocation in other countries. In respect of trademarks registered in a country of origin, the convention gives certain privileges. The convention also provides for the protection of well-known marks, collective marks and tradenames. Provision for remedies are also ensured by the convention. Overall, the convention covers several important aspects and lays an outline for the national legislators to follow while formulating their respective legislations.

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<sup>28</sup> Stockholm Act 1967, Article 11

With the developments and technological advancements, the way trade was carried out also changed, and it called for changes in IP regime also, but it was not easy to bring amendments to the Paris Convention to meet the needs of the time. By the end of the 20<sup>th</sup> century TRIPS was adopted and it laid down the minimum standards of protection and played a huge role in the harmonization of intellectual property. Compared to TRIPS, the role played by Paris Convention in enhancing the IP regime will be lesser, but the international efforts undertaken at that stage cannot be neglected. All those blocks paved the path for further development.

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