Proposed Rule amendment in India's IPO patent filing system for National & International application (pre awarded registered patent in different jurisdiction).

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Executive summary

Objective

Recommendations for fast track system for International application to infuse FDI

Goals

To promote and achieve ranking on ease of doing business as well as promote execution of innovation, that benefit India's socio-economic conditions like sanitation, water and clean energy. Patent is key elements for any investor to promote its product and investment in country and legal remedies available to inventor for its investment.

Although DIPP from latest initiative reduce time line in 24 months, even in today and later scenario we need to come up with system where India considers as favorable destination foreign investment. These initiative can be done on bilateral treaty with Nation's same treatment in exchange consider for Indian awarded patents on similar fast track system.

Project Outline

We proposing this recommendation sheet based on details discussion with various Govt. officials, IPR stakeholder, startups inventors and their representative, International chambers, startup system, and other startup system involved with tech and innovation.

Recommendation for International application on the basis of pre granted country patent award:

FAST TRACK programme for business/individual, MSME Corporation who already obtain patent or patent holder in other PCT countries under Fast track programme to achieve 12-18 months timeline period for such specific cases:

Activities/Steps to be taken	Reason	Impact/why it's important
Fast track examination systems for MFN's Inventor & other countries (i.e. PCT member states) that hold patent award or have favorable patent examination report in the respective countries. (12-18 months fast track system). Please note this not limited to only MFN, but to all contracting state by limited this facility to MFN or treaties states will infringe the value of WTO and TRIPS. (See TRIPS & BIT in detail below).	WIPO being central body between contracting parties maintain all records, as well as WTO and TRIPS required to maintain fair treatment and protection of IP between contracting states. Technically if any invention who have granted patent in japan or UK the same patent will not be awarded in any of contracting parties under PCT system to avoid duplication of invention and also fail the basic primary patent requirement of first and true inventor.	*As on date patent life span range between 10-20 years. If investor spent 4 -6 years obtaining a patent and 2- 3 years set up business its half of patent period is already over and also changing technologies & active participation in R&D world wide average patent already become old in technology in one decade. Without protection no business invests 200-500 cr before protection.* Reducing timeline for international applications, increase investment in terms FDI and restore foreign investor faith.

For patent in queue have favorable examination report both national office and contracting office work on novelty search report together by exchanging its report for better understanding of invention and faster decision.

Illustrations: Mr. A (India's national) who wiling to obtain patent invention of already existing or similarly closed technology of other national Inventor Mr. B (Japan's national) i.e. The examiner will not grant award as the novelty check done by IPO examiner done through out the world. In such cases the home country I am referring IPO India office will not grant protection because of already existing technologies or claim in other countries. Providing fast track to these already patented invention or one who reach at the stage of patent process will not infringe TRIPS or WTO rules if done so under treaty and also it will not discriminate between national and International application (please see below the Trips rules explanation). Similar way Indian International application will be treated in participating countries by contracts.

Process Steps (timeline bind on both side):

1. Filing of application with previous registered patent number along with title of application (not in queue, for publishing if not submitted all documents).
2. Submission of application with full application fee and request for search report , if award not granted search request to be made to both IPO office (national & contracting party) for better understanding and reporting of invention
3. Window to discuss the patent scope with examiner, if fall under chapter II sec 3 & 4, examiner can reject and if approve in meeting direct inventor to submit all documents in one month of meeting and send for publication followed by detail examination.

4. Process is time bound if applicant fail to submit documents or vice versa at fault to make request exceed his timeline the application will be rejected and abandoned from system. The process can be detail, if its interest DIPP/MOC officials and see it as possibility to promote FDI. The only concern is that process doesn't guarantee or enforce FDI deals from international patent holder , and if the invention restrain Indian markets this can be solved by bilateral treaty or MOU as well as including competition law policies in line of TFEU or EUC does for SEP for R&D and many important and crucial patent needed for overall development and social welfare.

International Laws provisions to promote such recommendations: Importantly, the TRIPS Agreement does not define any grounds to justify the issuance of a compulsory licence, and the Doha Declaration on TRIPS and Public Health confirms that countries are free to determine such grounds themselves1. BITs may overall include certain exceptions and reservations, usually relating to objectives such as essential security interests, public order, human health, and the environment; force majeur and state of war or civil unrest may also regularly be reasons to preclude the application of the treaty2.

Article 8 (Principles) recognizes public health and the promotion of public interests in sectors of vital importance to Members' socio-economic and technological development as matters members may address that with special measures, if consistent with the provisions of the TRIPS Agreement. Appropriate measures may also be necessary if right holders' practices adversely affect the International transfer of technology3 .

Article 66.2 (Least-Developed Country Members) states that "[d]eveloped country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base4.

Recommendation doesn't infringe International law, TRIPS & national treatment

With regard to IP conventions, the TRIPS Agreement itself provides for MFN treatment[5]. In contrast to

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1 For the text of the Doha Declaration on TRIPS and Public Health refer to the homepage of the WTO,at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (visited last: 13 December 2016).

2 Chapter 10 – Exceptions and Defences, in: Newcombe and Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 481 ff

3 World Trade Organization, Marrakesh Agreement Establishing the World Trade Organization.

4 Ibid.

5 Article 4, TRIPS. The Article also provides for relevant exceptions, exempting any advantage, favour, privilege or immunity accorded by a Member: "(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement; (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination

earlier IP conventions and treaties, the MFN principle was introduced into the TRIPS Agreement in order to underline the intentions of WTO Members to integrate IP firmly into the multilateral trading system[6]. Extending any more favourable conditions deriving for instance from regional trade agreements to all WTO Members, the MFN clause – not unlike the MFN clause in BITs – functions to spread equal rights internationally. The MFN clause in the TRIPS Agreement thus helps in setting the common "floor" of IP rights internationally; while for investment law as represented mostly by BITs, the MFN clause helps to set a common baseline of investment protection. Where investment takes the form of IP, they overlap.

National treatment is one of the key principles regularly found in BITs. Its inclusion in investment treaties is an expression of the recognition that foreign entities might be subject to less favourable treatment in a host country on the basis of their foreignness[7]

Article 41 (2), Part III of the TRIPS Agreement states: "Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."

Article 7[8] (Objectives) of the TRIPS Agreement sets out that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

Recommendations meet Patent Cooperation treaty (PCT) laws PCT treaty doesn't restrict any member states to enter into treaty with member's states. PCT treaty under article 2 (xi) defined "priority date," for the purposes of computing time limits, means:

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

(b) where the international application contains several priority claims under Article 8, the filing date of the earliest application whose priority is so claimed; i.e. the priority date time request can be set up local office.

Article 23 Delaying of National Procedure

Clause (1) No designated Office shall process or examine the international application prior to the expiration of the applicable time limit under Article 22. Where Clause (2) Notwithstanding the provisions of paragraph (1), any designated Office may, on the express request of the applicant, process or examine the international application at any time. i.e. give freedom to priorities cases on request made.

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against nationals of other Members". World Trade Organization, Marrakesh Agreement Establishing the World Trade Organization, first published by the GATT Secretariat in 1994. Reprinted by Cambridge University press, 2004. The WTO Agreement including all Annexes and Documents is also available at the homepage of the WTO, at:, http://www.wto.org/english/docs_e/legal_e/final_e.htm.

[6] Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights - A Commentary to the TRIPS Agreement, Oxford Commentaries on the GATT/WTO Agreements (Oxford and New York, 2007), 66.

[7] Ibid 1

[8] Article 7, TRIPS. World Trade Organization, Marrakesh Agreement Establishing the World Trade Organization .

Article 27 covers the concept of true inventor says “National Requirements sub section (3) Where the applicant, for the purposes of any designated State, is not qualified according to the national law of that State to file a national application **because he is not the inventor, the international application may be rejected by the designated Office”.** Validate my argument of True inventor.

Sec 27 (8) Nothing in this Treaty and the Regulations is intended to be construed as limiting the freedom of any Contracting State to apply ***measures deemed necessary for the preservation of its national security or to limit, for the protection of the general economic interests of that State, the right of its own residents or nationals to file international applications.***