

7 ESTABLISHMENT OF SPECIALIZED IP COURTS IN PAKISTAN FOR THE EFFICIENT ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Saad Nusrullah*

ABSTRACT

In the last few years intellectual property has been gaining ever increasing recognition in Pakistan. The Government of Pakistan is concerned about the impact of infringement, counterfeiting and piracy on Pakistan's economy, and is taking steps to curb infringing activities and ensure effective enforcement of intellectual property rights in the country. One such step is the establishment of separate intellectual property courts, as required under the Intellectual Property Organization of Pakistan Act, 2012. This paper examines the previous judicial regime for the enforcement of intellectual property rights in Pakistan, and highlights issues relating to the present system and the need for improvement. In addition, it considers the advantages and drawbacks of establishing separate intellectual property courts in Pakistan, and examines the experience of several other countries.

Keywords: *Intellectual property rights (IPRs), enforcement, infringement, counterfeiting, piracy, special courts, and judicial system*

I. INTRODUCTION

The enforcement of intellectual property rights (IPRs) is a controversial issue among developing¹ and developed countries. Intellectual property rights are the rights which are given to persons over the creation of their minds. They usually give the creator an exclusive right over the use of his or her creation for a certain period of time.² The Paris Convention was the first treaty regarding IPRs and was signed in 1883³. The Convention was revised at Brussels in

* Saad Nusrullah (Pakistan). An engineer and a lawyer; he earned his Bachelor's degree in chemical engineering from the University of the Punjab in 1995 and his LLM in IP degree jointly offered by WIPO and University of Turin, Italy in 2010. Currently, he is working as a teacher, trainer and intellectual property consultant in Lahore, Pakistan.

¹ Instead of using the term 'developing countries' and 'least developed countries' separately, 'developing countries' will be used for both.

² http://www.wto.org/english/tratop_e/trips_e/intel1_e.htm (last visited 15 January 2016).

³ International agreements concerning IPRs occurred in the later part of the 19th Century. In 1873, the Austrian Government held an international exhibition of inventions at Vienna, many inventors were hesitant to exhibit. They feared that in the absence of protection their inventions might be copied. In response, several diplomatic

conferences were held. These culminated in 1883, when 11 States signed the Paris Convention for the protection of Industrial Property. The convention established rules between the Member States concerning patents, trademarks and industrial designs.⁴ Simon Walker, 'The TRIPS Agreement, Sustainable Development and the Public Interest, Environmental Policy and Law' Paper No. 41, IUCN-The World Conservation Union, 2011, pp5-6.

⁴ http://www.wipo.int/treaties/en/ip/parish/summaries/_paris.html (last visited 15 January 2016).

⁵ *ibid.*

⁶ Simon Walker, *The TRIPS Agreement, Sustainable Development and the Public Interest, Environmental Policy and Law Paper No. 41*, IUCN-The World Conservation Union, 2011, pg.6

⁷ Berne Convention for the Protection of Literary and Artistic works.

⁸ https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited 15 January 2016).

⁹ https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who%27sSigned (ast visited 15 January 2016)

¹⁰ Preamble of the TRIPS Agreement 1995.

¹¹ Article 41(1) Section 1. General Obligations. Part III.

II. SPECIALIZED IP COURTS

Since the TRIPS Agreement is an Annex to the Marrakesh Agreement Establishing the World Trade Organization, all WTO Members are bound by it. However different time frames were granted to states according to their status as developed and developing countries⁹, after which states had to start incorporating the standards and laws governing IPRs under the TRIPS Agreement.¹⁰

The agreement generally obliged Member States to comply with the standards for the protection of IPRs and to prevent infringements by enacting laws by providing remedies and taking further steps to promote protection.¹¹ Under the Agreement, Members were obliged to implement a fair, speedy and improved system of IPR enforcement, just like

any other legal system.¹² States were not required to create a separate specialized system or courts in order to deal with IPR disputes distinct from the existing system dealing with the other laws in general. However, states have established separate IPR courts at their own discretion.¹³ Most of the Member States have established separate specialized Tribunals or Courts in order to resolve IPR-related disputes in order to make the system more efficient. These courts are established with different names in different states such as the Specialized Intellectual Property Court¹⁴, the Intellectual Property Court¹⁵, the Patents Court, a specialist court within the Chancery Division of the High Court of Justice of England and Wales¹⁶, the central Intellectual Property and International Trade Court (IP&IT Court),¹⁷ and the Court for Intellectual Property Disputes¹⁸, to name a few. The purpose of all these Tribunals is basically to arbitrate on issues concerning IPRs.

This establishment of separate systems for the protection of IPRs has been highly appreciated by forums such as the International Intellectual Property Institute (IIPi) and the United States Patent and Trademark Office (USPTO) for a variety of reasons. Such specialized judicial systems develop a better understanding and awareness of IPR-related matters, which ultimately reduces litigation and judicial errors, and brings coherency and certainty making the system effective overall with an increased predictability of case outcomes. There are different models of courts with different names adopted by the various states but having an identical purpose. Some states have one kind of court only and some have more than one for intellectual property-related disputes. These different courts in the various countries are as follows:

Specialized IPR Trial Court;¹⁹

Specialized IPR Appeals Court;²⁰

Specialized IPR Trial Division;²¹

Specialized IPR Appeals Division;²²
Commercial Trial Court;²³

Commercial Appeals Court;²⁴

Trial Court that exclusively hears IP;²⁵

Appeals Court that exclusively hears IPR cases;²⁶

Administrative Tribunal;²⁷

Specialized Judges on Courts of General Jurisdiction;²⁸

Considering Specialized IPR Court, Division, or Tribunal;²⁹ and

Considering Commercial Court.³⁰

In the United States there is one specialized IPR court, the United States Court of Appeals for the Federal Circuit.³¹ It is an appellate court which has jurisdiction over matters related to patents, trademarks, appeals from the United States Court of International Trade, the US Trademark Trial and Appeals Board, the US Patent Trial and Appeal Board and issues, including issues arising from the US International Trade Commission. The court mainly provides guidance to the lower courts concerning IPR cases.³²

As regards specialized courts in China, the government has established a court of general jurisdiction with a specialized division that hears IPR disputes. The Chinese judicial system essentially consists of Basic People's Courts, Intermediate People's Courts, High People's Courts and the

¹² Article 41(2) Section 1.General Obligations. Part III.

¹³ Article 41(5) Section 1.General Obligations. Part III.

¹⁴ Malaysia names its court the 'Intellectual Property Session Court'.

¹⁵ Singapore's 'Intellectual Property Court' is one of the specialist commercial court established under the High Court of Singapore.

¹⁶ United Kingdom

¹⁷ Thailand

¹⁸The Intellectual Property Court, Russian Federation.

¹⁹ First instance court that only hears IPR disputes.

²⁰ Second instance court that only hears IPR disputes.

²¹ Specialized division of a first instance court of general jurisdiction that only hears IPR disputes.

²² Specialized division of a second instance court of general jurisdiction that only hears IPR disputes.

²³ First instance court that hears IPR matters in addition to other commercial, economic, business disputes.

²⁴ Second instance court that hears IPR matters in addition to other commercial, economic, business disputes.

²⁵ First instance court of general jurisdiction that exclusively hears IPR matters.

²⁶ Second instance court of general jurisdiction that exclusively hears IPR matters.

²⁷ Specialized tribunal that is part of an administrative agency and hears IPRs matters.

²⁸ Judges sitting on courts of general jurisdiction who have training or experience in IPR matters.

²⁹ The state is considering implementing a specialized IPR trial or appeals court, a specialized IPR trial or appeals division, or a specialized IPR administrative tribunal.

³⁰ The state is considering implementing a commercial trial or appeals court.

³¹ The court was established under Article III of the Constitution by the Congress on 1 October 1982.

³² <<http://www.caft.uscourts.gov/the-court/court-jurisdiction>> (last visited 15 January 2016).

Supreme People's Court.³³ All High People's Courts, Intermediated People's Courts and Basic People's Courts have specialized IPR divisions with civil jurisdiction to hear IPR cases. There is also a specialized division in the Supreme People's Court to hear cases related to IPRs. There are specialized IPR judges in these specialized divisions.³⁴ A specialized IPR tribunal, the Chinese Intellectual Property Organization's Re-examination Board, conducts the proceedings of annulment. The People's Courts has the jurisdiction to hear appeals from the board.³⁵ The victims of infringements can also seek reliefs from the administrative organization which enforces quickly.³⁶

Similarly, Japan has also established a separate system for IPR-related issues, comprising a specialized appeals court, specialized divisions of district and appeals court to hear cases regarding IP disputes. Appeals from district courts on patent actions, suits against decisions of the Japan Patent Office, and IPR cases of first instance can be filed before the Intellectual Property High Court. Further, one specialized division of the Osaka High Court, four divisions of the Tokyo District Court and two divisions of the Osaka District Court have been established to hear IPR cases.³⁷

India, as a developing country, has established a specialized administrative tribunal, which hears appeals regarding IPRs. The decisions of the Register Trademarks can be appealed to the Indian Intellectual Property Appeals Board, established in 1999. There must be at least one technical and one judicial member on the board.³⁸ It sits in Ahmedabad, Chennai, Delhi, Kolkata and Mumbai. Trials regarding infringement are under the jurisdiction of the High Court.³⁹

³³ The Supreme People's Court of the People's Republic of China, Intellectual Property Protection by Chinese Courts in 2009, <http://www.court.gov.cn/zscq/znsq/201004/t20100426_4545.html> (Last visited 15 January 2016).

³⁴ *ibid.*

³⁵ Patent Law of the People's Republic of China, Adopted at the 4th Session of the Standing Committee of the Sixth National People's Congress, 12 March 1984, Amended 27th Session of the Standing Committee of the Seventh National People's Congress, 4 September 1992.

³⁶ United Kingdom Intellectual Property Office, Intellectual Property Rights Primer For China 24 (2008).

³⁷ The International Intellectual Property Institute (IPI) and the United States Patent and Trademark Office (USPTO), *Study on Specialized Intellectual Property Courts* (2012)

³⁸ Peter Oller, 'Academics Challenge India's IP Appeals Board' *Managing Intellectual Property* (11 February 2011).

³⁹ Intellectual Property Appeals Board, <<http://www.ipab.tn.nic.in/>> (last visited 15 January 2016).

III. ESTABLISHMENT OF SPECIAL IP COURTS IN PAKISTAN

Pakistan, being a member of WTO since 1 January 1995, is also a developing country and as such the provisions of the TRIPS Agreement and all the obligations regarding IPR enforcement are applicable.⁴⁰ The TRIPS Agreement granted its members classified as developing economies like Pakistan a period of five years, i.e. until 2000, to bring laws governing IPRs in conformity with the obligations required by the Agreement.⁴¹ Formerly, the protection of IPRs was not well developed in Pakistan. The laws governing IPRs in Pakistan can be divided into two regimes: Pre-2000 and Post-2000.

The existence of these two regimes is obvious for the reason that after 2000 Pakistan was obliged to replace its outdated and archaic IP-related laws, in order to comply with the global standards and the requirements of the TRIPS Agreement.⁴² The pre-2000 legislation⁴³ included:

- The Patents and Designs Act 1911 and the Patent Rules 1933;
- The Patents and Designs Act 1911 and Design Rules 1933;
- The Trademarks Act 1940 and the Trademark Rules 1963; and
- The Copyright Ordinance 1962 and the Copyright Rules 1967.

The foregoing laws were replaced with new laws i.e. post-2000 legislation⁴⁴, including:

- The Patent Ordinance 2000 and the Patent Rules 2003;
- The Registered Designs Ordinance 2000;
- The Registered Layout-Designs of Integrated Circuits Ordinance 2000;

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<https://www.wto.org/english/thewto_e/countries_e/pakistan_e.htm> (last visited 15 January 2016).

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<https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who%27sSigned> (Last visited 15 January 2016).

⁴² *Id.*

⁴³ <<http://supremecourt.gov.pk/jjc/Articles/19/2.pdf>> (last visited 15 January 2016).

⁴⁴ *ibid.*

- The Trademarks Ordinance 2001 and the Trademark Rules 2004;
- The Copyright Ordinance 1962, as amended in 2000; and
- The Copyright Rules 1967, as amended in 2002.

The two aforementioned regimes with different legislations highlight the impact of the TRIPS Agreement, which resulted in significant changes in the laws related to IPRs. The Intellectual Property Organization of Pakistan (IPO-Pakistan) established on 8 April 2005 under the cabinet division is the main institution in Pakistan that deals with the management and enforcement of IPRs, creating awareness about their great importance in a modern and digitalized society. It deals with the administration of IPRs, including patents, trademarks, designs and copyrights and promotes protection by taking various steps and proposes legislation.⁴⁵

The concept of specialized courts or tribunals having exclusive jurisdiction over particular subject matters is not novel or without examples in the context of Pakistan.⁴⁶ The constitution of Pakistan allows the establishment of such specialized courts.⁴⁷ Therefore, in order to further strengthen IPR enforcement and to increase efficiency, separate IPR Tribunals having exclusive jurisdiction regarding IPR-disputes have been established in Pakistan, based on modern IP judicial models. However the number of such tribunals is determined by the federal government, according to judicial necessity. At present three courts have been established: one in Punjab, in Sindh and the last in the federal capital territory of Islamabad; the courts became functional on 1 October 2015 after the appointment of presiding officers.⁴⁸ The Tribunals have the exclusive jurisdiction to hear cases regarding the infringement of IPRs or any other offence related to IP.⁴⁹ Then any

⁴⁵ <<http://ipo.gov.pk/Contents/AboutIPO.aspx>>(last visited 15 January 2016).

⁴⁶ Anti-Terrorism courts, Accountability Courts, Banking Courts, Consumer Courts, Child Protection Court, Drug Courts, Environmental Protection Tribunals, Labour Courts to name a few are currently working in Pakistan.

⁴⁷ Article 175. The Judicature. Part VII. The Courts. Chapter 1 of the Constitution of the Islamic Republic of Pakistan.

⁴⁸ <<http://ipo.gov.pk/Common/NewsDetails.aspx?NewsID=253>> (last visited 15 January 2106).

⁴⁹ Section 18(1) and (2) of the Intellectual Property Organization of Pakistan Act, 2012.

High Court having territorial jurisdiction over the tribunal can hear the appeals from the tribunals.⁵⁰

IV. ADVANTAGES AND DRAWBACKS OF SPECIALIZED IP COURTS

A state stands to gain numerous benefits by establishing a specialized IP judicial system as exemplified in some of the systems of developed countries. The establishment of a specialized IP enables governments to legislate according to issues and challenges in this particular area of litigation, in which legislation may include regulations, procedures or laws. Specialized IP courts in Pakistan would give judges of the courts an opportunity to develop expertise in IP law. Such expertise in this area would enable the judges to decide IP cases more efficiently and effectively. The impact of such expertise would be that the judges and advocates would be able to diagnose patterns, intricacies and issues arising from cases, rendering the overall system more effective.⁵¹

Intellectual property-related Issues are becoming more complicated than ever as a result of changing technologies and the rise in the number of innovations. Hence a specialized system with expert and competent professionals would contribute to an incessant development in this legal arena, required to tackle these issues effectively. The establishment of a specialized IP system would ensure protection of IPRs and encourage business and commercial communities to invest. Weak enforcement of IPRs in some developing countries like Pakistan might discourage multinational companies to invest and start business in such countries due to the possibility of loss of their valuable rights. The establishment of specialized IP courts would improve the protection of IPRs and encourage multinational companies to invest more in Pakistan; hence its economy would grow further.

Though there can be many benefits of a specialized IP system, still the hypothesis may not stand equally true and beneficial for every state. There must be a contextualized analysis of the particulars of the given country, taking into consideration the advantages and drawbacks in order to measure the overall efficacy. If a specific model is effective in a particular country, it does not necessarily mean that such a model would be appropriate in any other country. Every state should adopt a model for the protection of IPRs, customized and tailored to its own

⁵⁰ Section 19 of the Intellectual Property Organization of Pakistan Act, 2012.

⁵¹ The International Intellectual Property Institute (IPI) and the United States Patent and Trademark Office (USPTO), *Study on Specialized Intellectual Property Courts* (2012).

conditions, context, requirements and pattern or nature of the issues. These considerations should be taken into account by every government and are crucial, especially for a developing country with quite limited resources like Pakistan. Accordingly, it must be evaluated if the cost is justifiable, because a great deal would be spent on infrastructure and the establishment of such a specialized system.

Another aspect to take into account is that there should be sufficient litigation for a separate system in order to justify this cost. Thus the cost must be weighed against the benefits, otherwise it would be merely the misuse of resources and it would be more pragmatic to spend the resources to resolve a number of other issues that a country like Pakistan is facing such as poverty and terrorism. In a country like Pakistan the focus should be on promoting IP education by arranging special courses and training on IPRs for small and medium-sized enterprises (SMEs), lawyers, judges and the business communities. This would be a more pragmatic approach, as it would not only reduce litigation by bringing awareness, but also reduce the need for such tribunals and would save resources for other issues.⁵²

The countries having modern IP judicial systems models have IP expertise in the specialized courts for the IPR matters as exemplified in the aforementioned case-studies. The establishment of a separate IP court system seems logical and justified only if it has the judges who have special knowledge in IPRs, otherwise there is no point in creating a separate system if it lacks this requirement because there will be no novelty, and instead of bringing the intended consistency, certainty and efficiency, it will inevitably lead to various problems.

As regards the situation in Pakistan at present, separate tribunals have been established, but the qualification for presiding officers does not include any expertise in IP. A person who has been judge of the High Court or has been a District and Sessions Judge or an advocate who is qualified to be appointed as a Judge of High Court can be a presiding officer in the IP tribunal, so technically there is no one specialized in the IP tribunals.⁵³

The other issue with the specialized IP tribunals in Pakistan is that only three courts have been

⁵² The International Intellectual Property Institute (IIPi) and the United States Patent and Trademark Office (USPTO), *Study on Specialized Intellectual Property Courts* (2012)

⁵³ Section. 16(4) of the Intellectual Property Organization of Pakistan Act, 2012.

established in the province of Sindh, Punjab and in the federal capital territory Islamabad but no tribunal has been established in *Khyber Pakhtunkhwa* and the province of Baluchistan.⁵⁴ So it has become difficult for litigants to access the tribunals as there are many commercial centres in major cities and this has further worsened the situation, because before the establishment of the aforementioned tribunals, the proceedings regarding IPRs could be initiated in any district court. This is a very important factor which must be considered for tribunals should be easily accessible to the litigants, whether by increasing the number of tribunals or analysing the locations of commercial centres, and the locations of the tribunals should be decided accordingly.⁵⁵

The other issue concerning the establishment of specialized IP tribunals is that, as the judges would remain the same and only a limited number of judges would preside, there is a probability that judges may become prejudiced. As in Pakistan there would be one judge in each IP tribunal and this legal arena is still developing, only a limited number of lawyers are experts on IP-related issues, and they would be frequently appearing before the same judge with the possibility that the judge may become biased, which is detrimental to the essence of the independence of the judiciary i.e. impartiality, and may lead to corruption.⁵⁶

Establishing specialized IP courts dealing with particular IP matters may narrow the vision and the mentality of the judges confined to IP matters and may lead to ignorance of other legal causes of action and matters involved in a case. This would affect cases which involve multiple interlinking issues, need to be resolved collectively.⁵⁷

V. CONCLUSION

Having specialized intellectual property courts may represent both benefits and issues and challenges. Pakistan, being a developing country with limited resources, should focus on bringing awareness to lawyers and judges with special training. Public

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<<http://ipo.gov.pk/Common/NewsDetails.aspx?NewsID=253>>(last visited 21 February 2016).

⁵⁵ The International Intellectual Property Institute (IIPi) and the United States Patent and Trademark Office (USPTO), *Study on Specialized Intellectual Property Courts* (2012).

⁵⁶ The International Intellectual Property Institute (IIPi) and the United States Patent and Trademark Office (USPTO), *Study on Specialized Intellectual Property Courts* (2012).

⁵⁷ *ibid.*

awareness of intellectual property compliance also needs to be enhanced, keeping in view factors such as poverty, corruption, nepotism, lack of expertise and lack of IP education. Thus instead of establishing separate intellectual property tribunals, leading to various issues in the context of Pakistan, a more pragmatic middle ground would be to improve the existing legal system for IP matters by reforming the overall judicial system and diagnosing the root causes of the issues rendering the overall system inefficient. It could be more justifiable in terms of cost and benefits. However, as the specialized intellectual property tribunals have now been established by the Government of Pakistan and are now functional, such tribunals would only serve the purpose if judges receive suitable training on the subject matter and other steps, necessary to maximize the benefits and minimize the issues and challenges related to specialized IP courts, are urgently taken, keeping in view the limited resources and other constraints being faced by the country.

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