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INTERNATIONAL TREATIES ON UTILITY PATENTS AND IMMINENT NEED FOR LAWS ON UTILITY PATENT IN INDIA

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INTRODUCTION

Every day so many new inventions or innovative products are being created in India, but some of these products may not satisfy the minimum requirements needed for attaining a patent. But these innovations are novel, utilitarian and creative in their own sectors. Such "utility models" or "petty patents" or "innovative patents" are known as Utility Patents and the same are forms of Intellectual properties that deserve to be protected. Such novel and incremental inventions/innovations which enhance industrial applicability/productivity are protected in many countries across the world. However, in India, we still don't have any laws to protect such an Intellectual property.

Ever since the Vienna Congress of 1873[1], there have been many international treaties and conventions on protection of patents. The Paris Convention, 1883 recognised the rights in the utility patents and since then

[1] Gabriel Galvez-Behar. The 1883 convention and the impossible unification of industrial property. International Diversity in Patent Cultures - a historical perspective, May 2014, Leeds, Royaume-University.

> *"The main aim of the Congress was to find a way to regulate the question of patents, more or less definitively. In Vienna, the German delegation was large, thanks to Verein Deutscher Ingenieure, directed by Werner von Siemens, who was also vice-president of the Congress. His brother, William, presided over the meetings, and Carl Pieper, a Dresden patent agent, was in charge of the secretariat at this meeting, now in the hands of ardent supporters of patent law.*
>
> *Thus it is not surprising to see that the Congress of Vienna consecrated patent rights. Although some critical voices could be heard, all resolutions adopted crowned the rights of the inventor. It is interesting to note that contrary to the resolutions of the British Select Committee on Patents, which basically justified utilitarian reasoning to maintain patent law, the first resolution of the Congress of Vienna asserted that the 'legal consciousness of civilized nations [demanded] the protection of intellectual work'. Thus, the congress made patent legislation a feature of the civilized world without any reference to natural rights. The protection granted by the patent established the payment of an inventor's work; it was also necessary that only the inventor (or his representative) should be granted the patent. This greater level of protection meant real gains for society since all manufacturing secrets were avoided, and the complete publication of patented inventions, demanded by the Congress, would allow others access to technical information. Certainly it was necessary to avoid inventors' rights leading to malpractice. So the principle of prior examination was recommended by the Congress just like that of compulsory licences. As regards to the internationalization of the patent, the Congress remained extremely modest although the law on patents was considered a civilizing element. Indeed, if the same treatment was demanded for foreigners as for nationals, the question of an international understanding was handled in a rather*

there have been several International treaties that have recognized Utility Patents and protection of the same. The Paris Convention, 1883, The Patent Cooperation Treaty (PCT), 1970, Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS), 1995 are significant and landmark convention, treaty and agreement respectively, that discusses about Utility patents and India is a member to all of them.

Although, India itself is a signatory and member to many international treaties on patents and Utility Patents; India still does not have any laws protecting the intellectual rights on Utility Patents. Hence, there is an imminent need for laws on utility patents in India.

PATENTS

Intellectual Property Rights (IPR) is granted to inventors for exclusive rights over the use of such creation for a certain period of time. In India, Section 2(m)[2] of The Patent Act, 1970 defines Patents as *"patent means a patent for any invention granted under this Act"*. Further, invention is defined in 2(j)[3] as "*invention means a new product or process involving an inventive step and capable of industrial application"*

The World Intellectual Property Organization (WIPO) defines patent as "*a patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. To get a patent, technical information about the invention must be disclosed to the public in a patent application".*[4] Thus, a patent is an intellectual property right relating to innovations and is the acquisition of exclusive rights, for a stipulated period of time, provided by the government of India to the patentee in return to full disclosures of his inventions, for stalling others from making, using, selling, importing the patented product or process and producing that product.

UTILITY PATENTS

Utility Patent safeguards minor inventions through a system similar to the patent system and protects such incremental inventions by granting exclusive rights to the right holder to prevent others from commercially using or exploiting the protected invention without appropriate authorisation, for a shorter period of time. World Intellectual Property Organization (WIPO) defines Utility Patent / Utility Model as "*Similar to patents, utility models protect new technical inventions through granting a limited exclusive right to prevent others from commercially exploiting the protected inventions without consents of the right holders. In order to obtain protection, an application must be filed, and a utility model must be granted. They are sometimes referred to as 'short-term patents', 'utility innovations' or 'innovation patents'. It is not easy to define a utility model, as it varies from one country to another. In general, utility models are considered particularly suited for protecting inventions that make small improvements to, and adaptations of, existing products or that have a short commercial life. Utility model systems are often used by local inventors*."[5] Thus, Utility Patent protects minor inventions through a systematic framework similar to that of a patent. Utility Patent secures such inventions by vesting a right which enables the competent holder of the Utility Patent right to restrain others profiting from the protected invention without the inventor's consent for a stipulated period of time.

UTILITY PATENTS AND RELEVANT INTERNATIONAL TREATIES AND CONVENTIONS

In the last two decades, there has been a growing belief within the intellectual property fraternity, as to the desirability for and the relevance of a further tier of patent-like protection within the general intellectual property framework. Such laws, usually referred to as utility patent laws, are considered to be conducive to

rapid and superficial way, leading to the adoption of a simple resolution.37 As for the question of the colonies, it did not figure in the resolutions. The Congress of Vienna allowed the controversy to be closed on patents and provided a precise framework to improve these laws, taking English, American and Belgian law as well as the plan of the Verein Deutscher Ingenieure as reference points"

[2] The Patents Act, 1970

[3] *ibid*

[4] https://www.wipo.int/patents/en/topics/utility_models.html

[5] https://www.wipo.int/patents/en/topics/utility_models.html

innovation and growth in two different economic environments. Firstly, within established, developed economies, alternative *sui generis* regimes are viewed as a means of ameliorating the shortcomings of the patent law, especially in relation to small and medium-sized enterprises in nationally important socio-economic sectors. Secondly, legal and economic scholars have praised the utility patent regime as a necessary aspect in promoting a sustainable development space to help struggling economies promote indigenous innovation.[6]

A significant trend blooming across the world focuses on the concept of "utility model," the "petty patent", or generically, the "second tier patent."[7]Many countries such as Germany, Japan, Australia, Brazil, China, Greece, Hungary, Italy, Korea, Mexico, Poland, Russia, etc. incorporated utility patent law. For the purposes of protection and fortification of intellectual property on an international level, various multilateral treaties and conventions were formulated. From these numerous treaties, few related to utility patents are discussed here.

INDIA AS A PARTY TO SIGNIFICANT INTERNTIONAL TREATIES ON PATENTS/UTILITY PATENTS:

- **Paris Convention for the Protection of Industrial Property (Paris Convention) –** "The Paris Convention was adopted on 20th March, 1883 at Paris and implemented on 7th July, 1884. The Paris convention was subsequently revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and was amended on September 28, 1979"[8]. The object of the Paris Convention was to protect industrial property (patents, utility patents, industrial designs, trademarks, service marks, trade names, etc). India is a member to the said convention ever since 7th December, 1998.

  The Paris Convention, 1883 was the first to document on safeguarding of intellectual property, more particularly from the dimension of industrial property rights. The Paris Convention was revised a number of times and many amendments were also made. This is one of the first treaties providing for the fortification of industrial property by the nationals of contracting member countries in other member countries. Utility models or Utility Patents are acknowledged as industrial property under the Convention. India is a member to the Paris Convention ever since the past two decades.

  The Paris convention laid down certain guidelines on the right of priority, patents among the contracting states and compulsory licensing. "The Paris Convention gave the right of priority in the case of patents (and utility models where they exist), marks and industrial designs. This right means that, on the basis of a regular first application filed in one of the Contracting States, the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), 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. In other words, they will have priority (hence the expression *right of priority*) over applications filed by others during the said period of time for the same invention, utility model, mark or industrial design."[9] Also, the applicant has 6 to 12 months time to choose which countries they want to seek protection.

  The Paris Convention has laid down a certain rules with regard to patent that all Contracting States were expected to follow. "The Patents granted in different Contracting States for the same invention are independent of each other: the granting of a patent in one Contracting State does not oblige other Contracting States to grant a patent; a patent cannot be refused, annulled or terminated in any

[6] Uma Suthersanan, Utility models: Do they really serve national innovation strategies, The Innovation Society & Intellectual Property, 2018

[7]Mark D. Janis, Second Tier Patent Protection, Paper 543, Articles by Maurer Faculty, 1999

[8] The Paris Convention for the Protection of Industrial Property

[9] https://www.wipo.int/treaties/en/ip/paris/summary_paris.html

Contracting State on the ground that it has been refused or annulled or has terminated in any other Contracting State. The inventor has the right to be named as such in the patent."[10]

The patent may not be invalidated because of restrictions or limitations from domestic laws of the contracting states.
Also, "each Contracting State that takes legislative measures providing for the grant of compulsory licenses *to prevent the abuses which might result from the exclusive rights conferred by a patent may do so only under certain conditions. A compulsory license (a license not granted by the owner of the patent but by a public authority of the State concerned),* based on failure to work or insufficient working of the patented invention, may only be granted pursuant to a request filed after three years from the grant of the patent or four years from the filing date of the patent application, and it must be refused if the patentee gives legitimate reasons to justify this inaction."[11]
Further, penalty can be given only after expiration of two years from the grant of the first compulsory license.

- **Convention Establishing the World Intellectual Property Organization (WIPO) –**WIPO was established by a convention signed on 14th July, 1967 at Stockholm and the same was implemented on 26th April, 1970. Subsequently, WIPO also became a special agency of the United Nations Organisation (UNO). India became a member of the said organisation on 1st May, 1975
  WIPO was established under the said convention at Stockholm with two main objectives, which are – "to promote the protection of intellectual property worldwide and to ensure administrative cooperation among the intellectual property Unions established by the treaties that WIPO administers."[12]

  WIPO also carries out activities like: framing rules and principles for protection and implementation of IPR through international treaties, program activities, international classification and standardization activities, and registration of filing activities.

  "In addition to performing the administrative tasks of the Unions, WIPO undertakes a number of activities including:
  a. normative activities, involving the setting of norms and standards for the protection and enforcement of intellectual property rights through the conclusion of international treaties;
  b. program activities, involving legal and technical assistance to States in the field of intellectual property;
  c. international classification and standardization activities, involving cooperation among industrial property offices concerning patent, trademark and industrial design documentation; and
  d. registration and filing activities, involving services related to international applications for patents for inventions and for the registration of marks and industrial designs".[13]

  The WIPO Convention has also established three main bodies: the WIPO General Assembly, the WIPO Conference and the WIPO Coordination Committee.[14].

- **Patent Cooperation Treaty (PCT) –** The Patent Cooperation Treaty was signed on 19th June, 1970 at Washington D.C. and came into force from 24th January, 1978. It was subsequently amended on 28.09.1979 and further modified on 03.02.1984 and further modified on 03.10.2001[15]. The contracting states of the PCT form a Union and PCT makes it possible to register patents and protect an invention simultaneously in a large number of countries by filing a single "international" patent

[10] Ibid
[11] Ibid
[12] http://www.wipo.int.portal.html
[13] Ahuja, VK, (2015) Law Relating to Intellectual Property Rights, 2nd edition, Lexis Nexis
[14] https://www.wipo.int/treaties/en/convention/summary_wipo_convention.html
[15] *ibid*

application instead of filing several separate national or regional patent applications. India became a signatory and member of PCT on 7th December, 1998.

The Patent Cooperation Treaty is known as 'PCT' and has been amended and modified several times since its implementation. India is a signatory and member country to this international treaty for more than two decades that is ever since 8th December, 1998.

The purpose of the PCT is to simplify the registration of the patent applications in the union that is in all the contracting countries by simplifying and lowering the price of the process. PCT encourages the patentees to protect and fortify their intellectual properties over many countries. PCT provides for "unified search for novelty purpose, international publication and optionally for international examination before entering the national phase of individual member country, but encourages and protects utility models procedurally. The provisions of this treaty enable the inventors or the applicants filing of an international application for the grant of patent claiming priority based on the utility model application."[16] PCT also permits to "file Utility Model application through National phase utilizing the priority date and flexibilities provided therein as applicable for patent."[17]Applicants under the PCT may file a single application in one language with the national patent office. During the filing of such application, they can designate all those signatory countries in which protection is sought. After the examination of the patent, the application is transferred to one of the nine International Search Authorities where a prior art search is conducted. After this it is then up to the patent offices of – or acting for – the designated countries to award the patent.[18] The PCT does not contain any substantive minimum standard of protection.[19]

Article 2[20] of PCT makes it very clear that the references to patent also would include utility patents and hence has better scope of registration of utility patents among the member countries.

- **World Trade Organization (WTO) agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) –** The TRIPS Agreement came into force implemented on 1st January, 1995. The TRIPS agreement is a standardised and uniform regulation to be implemented and followed by all the member nations of WTO. TRIPS sets out minimum standards of protections, with rigid enforcement of IPR's by providing Dispute Settlement Procedures. India became a member TRIPS on 1st January, 1995.

  TRIPS establishes minimum substantive standards for each of the major intellectual property regimes but fails explicitly to mention second tier of utility model protection, thus leaving WTO member countries free to formulate or reject second tier protection regimes as they see fit. TRIPS agreement was signed by India in 1994 and it was implemented on 1st January, 1995. The substantive

[16]Patent Cooperation Treaty, 1970, Article 2(i) – "Application" - means an application for the protection of an invention; references to an "application" shall be construed as references to applications for patents for inventions, inventors' certificates, utility certificates, utility models, patents or certificates of addition, inventors' certificates of addition, and utility certificates of addition.

[17]Dr. K.S. Kardam, "Utility Model –A Tool for Economic and Technological Development: A Case Study of Japan", September 2007

[18]Uma Suthersanen, "Utility Model and Innovation in Developing Countries", ICTSD, February, 2006

[19]WIPO – CDIP, Patent related Flexibilities in the Multilateral Legal Framework and their Legislative Implementation at the National and Regional Level – Document prepared by the Secretariat (CDIP/5/4, 1st March 2010) at 26.

[20]**Article 2 Definitions**

For the purposes of this Treaty and the Regulations and unless expressly stated otherwise: (i) "application" means an application for the protection of an invention; references to an "application" shall be construed as references to applications for patents for inventions, inventors' certificates, utility certificates, utility models, patents or certificates of addition, inventors' certificates of addition, and utility certificates of addition; (ii) references to a "patent" shall be construed as references to patents for inventions, inventors' certificates, utility certificates, utility models, patents or certificates of addition, inventors' certificates of addition, and utility certificates of addition;

scope of TRIPS is defined in its Article 1(2) whereby "the term 'intellectual property' refers to all categories of intellectual property that are the subject of Section 1 through 7 of Part II"[21] of the Agreement. [22]Whilst there is no specific reference to utility model protection under the TRIPS Agreement, it is arguable that by reference to Article 2(1) of the TRIPS Agreement[23], the relevant provisions of the Paris Convention (including Article 1(2) of the Paris Convention[24]) are extended to all WTO countries. But this still does not require World Trade Organization Members or signatories to the Convention to provide utility model laws.[25]

World Trade Organization members are obliged to comply with Articles 1 through 19 of the Paris Convention 1967. That means, the substantive obligations of the Paris Convention, including those on utility models, are made part of TRIPS and hence are obligations under the WTO Agreements.[26] It does not provide for the establishment of utility model by member country but has reference to the provisions of Paris Convention through the provisions of Article 2, 3 and 4 of Part-I of the Agreement.[27] Compliance with these provisions of the Paris Convention can be therefore tested under the WTO dispute settlement system.[28] In case the national laws of a WTO member are found to be inconsistent with this obligation, and the Member fails to correct this inconsistency, the Dispute Settlement Understanding allows the complaining Member, as a last resort, to suspend equivalent obligations vis-à-vis the defendant.[29]

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[21] Standards Concerning The Availability, Scope And Use Of Intellectual Property Rights Copyright and Related Rights Trademarks, Geographical Indications Industrial Designs , Patents, Layout-Designs (Topographies) of Integrated Circuits, Protection of Undisclosed Information

[22] General Provisions And Basic Principles -1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice. 2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.3. Members shall accord the treatment provided for in this agreement to the nationals of other members. In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated recruits, were all Members of the WTO members of those conventions. Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

[23] Article 2 1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

[24] Paris Convention, 1883, Article 1(2) - The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

[25]*Supra* 17

[26]*Supra* 16

[27]*Supra* 17

[28]The system for settling disputes over the compliance with WTO treaty obligations is primarily set out in the WTO Dispute Settlement Understanding (DSU).

[29]Dispute Settlement Understanding, Article 22(3) - In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

The main features of the TRIPS Agreement are:

Standards - The TRIPS agreement laid guidelines for minimum standards of protection to be provided by each Member. "Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate."[30] Hence the TRIPS Agreement is sometimes called as 'Berne and Paris-plus agreement'.

Enforcement - TRIPS agreement listed specifications for implementation of IPR. "In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights."[31]

Dispute settlement - The TRIPS agreement follows only WTO's dispute settlement system for any disputes arising between the WTO members.

Also, the TRIPS agreement offers certain standards such as national and most-favoured-nation treatment, and some general rules to protect and maintain IPRs through the agreement. The duties and responsibilities of all the member countries are same, but developing countries have a longer period. Further, there is a special transition arrangement for developing countries that do not provide protection to Pharmaceuticals sector.

The members of TRIPS Agreement are free to provide better comprehensive protection of intellectual property as, this agreement provides only minimum standards. Also, the members of the

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(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefore in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

[30] www.wto.org

[31] Ibid

TRIPS agreement can enforce this agreement; however it is suitable within their country's legal framework.

TRIPS Agreement does not add to the international treaty obligations as a Paris Union Member State has in relation to the utility models. The main non-discrimination obligation flowing from the Paris Convention in case a country decides to introduce a system for protecting utility models however would be enforceable via the WTO dispute settlement system.[32]
Since TRIPS provides only for minimum standards for the protection of intellectual property rights, there is nothing which prevents any member country to adopt utility model system to promote IP protection among the small innovators particularly in the Small and Medium Sized Enterprises (SMEs).[33]

CONCLUSION

India is a signatory and member to many international treaties concerning utility patents, however, India still does not have any exclusive legislation on the protection of Utility Patents. Hence, India requires an effective legal protection system to bridge the gap between the invention and innovation, patentable and non-patentable inventions and to give thrust to our flourishing local and domestic markets. Contemplating on the Utility Patent system utilised by the domestic innovators in countries like China, South Korea and Brazil, the Utility Patent law would definitely benefit our growing economy and also encourage foreign innovators to invest and protect their minor inventions in India. The ranking of India in the Global IPR index is much lower than many other countries as we do not have any utility patent laws in India, this in turn reduces the economic growth of the country, especially, with regard to the contributions made by the MSME sector.
Utility Patent, as manifested in many case studies from different jurisdictions reveal that Utility Patents are affordable, simple, and faster, and if these factors are critically taken care of, Utility Patent will be of huge success in India. We Indians are always better at finding solutions to ease our work by making minor modification to existing machines, like the engine operated/driven sugar cane juice cart; such minor inventions that makes life convenient but falls short of a patentable invention ought to be protected. Therefore, there is tremendous scope for creation of faster, low cost, less complex system of protection for incremental inventions in India, to protect the exclusive rights of our local innovators. Protecting such minor incremental inventions will not only encourage such innovators, but will also increase the economy of our county. Thus, it is imminently necessary for India to legislate a separate law on Utility Patent and implement it.
If laws on protection of UPR are legislated in our country; India like any other country of the world will also progress in the ranking of the global IPR index. Incremental inventions/beneficial innovations are already given recognition and protection in many countries under 'utility patent law' but no such protection is yet available in India. This is despite the fact that the utility patent framework is well recognized in the international treaties and conventions relating to intellectual property, to which India is also a party.

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[32] *Supra 9*
[33] https://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm