

THE INTERNATIONAL PROTECTION OF PATENTS AND ITS EFFECTS ON THE ALGERIAN LEGISLATION, THE INTERNAL LAWS AND THE INTERNATIONAL (GLOBAL) CONVENTIONS

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Abstract:

The present study undertakes the issue of patent protection within the context of international legislation and Algerian law; it investigates whether there is a suitable environment for inventors to express their innovations freely and confidently without any fear of violations. Patents are considered intellectual property rights that empower inventors economically while contributing to the advancement of technical knowledge in economic, technological, and cultural spheres. This exchange involves preventing others from deceitfully using or exploiting the profits of these innovations. Therefore, international legislators seek to safeguard innovations from harmful exploitation, through establishing agreements, such as the TRIPS Agreement and the 1883 Paris Agreement, expanding the scope of protection internationally. Reflecting global changes, the Algerian legislature endorsed this initiative through the 03/07/2003 order on patents. This order outlines comprehensive procedures for protecting enriched inventions, aligning with the on-going technological and economic developments worldwide.

Keywords: *patent, the legislation of protecting innovations internationally, the Paris Agreement, the TRIPS Agreement, the Algerian patent law, industrial and intellectual property, crimes of forgery and imitation, illegal crimes.*

Introduction:

Inventors are provided with a legal protection that does not exceed the borders of their states, even though in some products often exceeds the scope of the state in which the invention was registered, which makes the inventor vulnerable to an imitation of his invention in another country; thus, the internal protection is insufficient. There is no doubt that due to the expansion of international trade leading to the dangers of unfair competition, an international protection of inventions must be established. Therefore, the efforts of countries in the nineteenth century

and the beginning of the current century turned to holding international conferences in order to reduce the difficulties facing the protection of industrial property's rights.

The international protection of patent was established as a result to several considerations that forced countries to look for a way to protect the inventions in the world. These considerations are the following:

1. The insistence of inventors to ensure the protection and preservation of their financial and moral rights as they are the fruit of their innovations and the product of their mental thought.
2. The losses incurred by the competing projects that own technology resulting from the risk of imitation, fraud, piracy, or theft of the inventions 'ownership.
3. The necessity of establishing a comprehensive and integrated legal framework in the field of patents.

In our modern era the productivity is based, to a large extent, on creativity and innovation, which makes the economic, artistic and industrial sectors exposed to serious risks in the absence of the necessary international protection while developing their inventions. Among these risks is the violation of the industrial property's elements, in addition to the high cost spent on the scientific research and the production of goods. These considerations led to thinking about establishing an international framework for protecting inventions that extends beyond the territory of each country.

The patent is one of the most important forms of industrial property, as it is considered its backbone. The first law to protect inventors in Algeria was issued in 1966 according to the order No. 66-54 of March 8, 1966 regarding the inventors' certificates and invention licenses. This has followed Algeria's accession to the Paris Convention for the Protection of Industrial Property according to the order No. 66-48 of February 25, 1966, which included Algeria's accession to the Paris Agreement relating to the protection of industrial property. Given the shortcomings of the provisions of Order 66-54 and its failure to keep pace with the national and international development, this necessitated reconsidering the establishment of a precise and firm regulation in order to establish guarantees that provide greater protection for the inventor. This is what prompted the Algerian legislator to cancel the provisions of the previous order and issue the legislative Decree No. 93-17 of 1993/ 12/07 relating to the protection of inventions, which was issued prior to the Marrakesh Conference to establish the World Trade Organization in April 1994. However, the Algerian legislator, in keeping with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights

(TRIPS), once again cancelled the previous decree through the order No. 03-07 of July 19, 2003, relating to patents. Additionally, the Algerian legislator has divided the legal protection allocated to patents into national (internal) protection, represented by criminal and civil lawsuits, and international protection realized by international agreements. It has also approved original and consequential (supplementary) penal sanctions.

We have studied the issue of legal patent protection in the Algerian legislation through the following questions: To what extent is the patent legally protected at the international and national levels? Has the Algerian legislator succeeded to protect the rights of inventors by providing special measures for inventions? What are the legal implications of granting a patent? Are the penal sanctions prescribed for the crime of patent counterfeiting and the crimes related to it in international and Algerian legislation sufficient to protect the patent?

Taking into account the above-mentioned facts, we will tackle the issue of international patent protection and its effects on the Algerian legislation within the following two sections:

I: The patent protection

In the primary international conventions

The protection of industrial property rights, including patents, originally stops at the territorial borders of the country in which these rights were registered and announced, as an application of the principle of territoriality of laws. However, internal protection is no longer sufficient, in view of the technical and technological development that the world has witnessed recently, in addition to the inventor's desire to publish his\her inventions in all countries of the world. Therefore, national and international legislations were prompted to search for an international system that provides effective protection for these inventions from the risks of expanding international trade, especially the spread of the phenomenon of counterfeiting.

Based on the foregoing, many international agreements have been concluded to protect industrial property, including patents. The most important of these agreements are the Paris and TRIPS Agreements, in addition to the other international agreements held in relation to patent protection that attempted to enhance and consolidate this protection at the global level. Hence, in the first requirement, we will deal with the primary Paris Convention for Patent Protection of 1883, and in the second requirement, we will address patent protection within the framework of other international agreements.

A. The primary Paris Convention of Patent Protection (1883)

Preface on the first requirement and the issues to be addressed,

When a number of foreign inventors refused to participate in the International Exhibition of Inventions in Vienna, for fear that their ideas would be in risk of plunder and commercial exploitation in other countries, that year witnessed the emergence of the Paris Convention for the Protection of Industrial Property. This latter was the first important international treaty that aims to grant the citizens of a certain country the right to protect their intellectual works in other countries. Accordingly, we will determine the most important provisions of this agreement, by introducing its definition (in Section One) and its most important principles (Section Two) in addition to the special provisions included in this agreement (Section Three). Finally, we will introduce the evaluation of the Paris Agreement by mentioning its advantages and disadvantages in (Section Four).

a. Introduction to the Paris Convention of 1883

It is the first international agreement that aims to help the concerned states to obtain patent protection in other countries¹. This agreement is one of the basic foundations of the international protection of inventions. It was held on March 20, 1883 and was first signed by 11 countries, then the number of member states has been constantly increasing. Afterwards, this agreement entered into force on June 14, 1884.

The Paris Convention is also called the “Paris Union Agreement” because it established a union between the organizing countries called the International Union of Industrial Property. The scope of applying this agreement was determined in the paragraphs 2 and 3 of its first article. This agreement also works to combat unfair competition in industrial and commercial matters. As for the persons addressed in this agreement, according to the articles 2 and 3, they are nationals of the countries joining the Paris Union, and the nationals of the non-contracting countries provided that they reside in a contracting country or practice a commercial or industrial activity there in an actual and real manner.²

This agreement was supplemented by an interpretive protocol in Madrid 1891, and was reviewed in Brussels on December 14, 1901, in Washington on June 2, 1911, in The Hague on November 6, 1925, in London on June 2, 1934, in Lisbon on October 31, 1958, and in Stockholm on July 14, 1967, then was amended in 1979³. Algeria acceded to the Paris Agreement by the order No. 48/66 of February 25, 1966, and then ratified it by the order No. 02/75 of January 9, 1975. Moreover, the number of its members in 2008 reached 173 countries⁴.

The international protection granted by this agreement aims to

encourage creative activity and create favourable conditions to facilitate industrialization, investment development and trade relations. This agreement is considered part of the national law of its member states, as well as the states that will join it later.

b. The principles of Paris Convention

The Paris Agreement established a set of basic provisions and principles that required the member states to abide by them, given that the aim of holding this agreement is an attempt to alleviate the fundamental differences between its member states.

By reading the texts of the Paris Agreement from Article 2 to Article 19 and 20, we find that it devotes four general principles to establish a unified international system that responds to the requirements of the member states 'nationals and also to exceed the contradictions in the internal legislations of these states. We will explain these principles as follows:

1. The principle of national treatment

National treatment is considered one of the basic rules established by the Paris Convention to protect the Industrial Property, as it stipulates that the nationals of each country of the Union enjoy the same treatment in all other countries of the Union based on the provisions related to the national treatment. In application of this every person who has the nationality of any of the member states of the Paris Agreement, resides in that country, or owns an industrial or commercial establishment therein has the right to apply for a patent in Algeria, and then enjoys all the rights and privileges that an Algerian has in this regard.⁵

The Paris Convention stipulates in the first paragraph of Article 2: "Nationals of each of the countries of the Union shall enjoy in all the other countries of the Union the benefits that are currently granted or may be granted in the future by the laws of those countries to their citizens, in regard to the protection of industrial property, without prejudice to the rights specifically stipulated in this agreement. Thence, they will have the same protection granted to citizens and the same legal means of recourse against any violation of their rights, provided that they follow the conditions and procedures imposed to the citizens of that country."

2. The principle of the right of priority and independence of patents

Patents granted to nationals of the Union countries within one of the Union countries are independent of the patents granted for the same invention in other countries, whether joined to the Union or not. Accordingly, patents issued during the priority period to nationals of the Union countries are independent of each other, and each of them is

subject to the law of the country in which it was issued.

This principle is stipulated in Article 4 of the second paragraph, as well as Articles 6 and 5 of the Paris Agreement. The fourth article of the Paris Agreement stipulates: **“Anyone who submits in one of the countries of the Union an application to obtain a patent for an invention or to register a utility model or design, in accordance with the law, enjoys himself or his successor a right of priority within the determined dates, with regard to innovation in other countries... This period starts from the date of filing the first application for a duration of (12 months). To claim the right of priority, the following conditions are required:**

- The application for the first deposition must be filed in one of the Union countries in accordance with the text of Article 04, first paragraph of the agreement.
- This deposition must be in accordance with the required law and a unity of subject matter must be achieved between the first application and the following ones.
- The patent applicants can have the right of priority if their first deposition was filed in one of the Union countries, and not necessarily their home countries. For example, an Algerian who requests the granting of a patent in France can exercise his\her right of priority in England, for instance, or any of the other Union countries.⁶

The purpose behind which the Paris Agreement imposed the principle of priority or precedence is to eliminate the risk that might lead to a diminution of the international protection established for inventions. As an example of the right of priority in Algeria, we can mention the verdict issued by El Harrach Court on November 26, 2000, when the judge cancelled the trademark (Lahda) that was registered in favor of the company (ENAPAL). The issue goes back to the lawsuit filed by the French company (BROKHOM), against the company (ENAPAL) as it reported that it has been using the mark (Lahda) since its enrolment in the National Center of Commercial Registry and the International Intellectual Property Organization (OMPI) on 02/12/1992, while ENAPAL had registered the same mark on 05/19/1992.

The court has issued its judgement based on the order concerned with marks, which stipulates that the ownership of a mark belongs to the one who has priority in filing it. It is worth noting that each deposition is recorded by a report that includes the day and the hour of delivering the documents or receiving the postal envelope containing them.

3. The principle of no contravention to the Union agreement

Among the rights embodied in the Paris Agreement is the freedom to

make treaties among themselves in the field of industrial property protection. The aim of this principle is to consolidate the principle of equality between the member states; however, this right is restricted to the condition that this treaty neither opposes nor violates the provisions of the original agreement⁷. This is based on the text of Article 19 of this agreement⁸. Even though this later allowed the contracting states to have the right of holding agreements among themselves to protect the industrial property; whether bilateral or multilateral, it required that these agreements should not disagree with the provisions of the treaty.

c. The special provisions included in the Paris Convention

In addition to the general principles and provisions approved by the Paris Agreement to ensure an effective protection of the various industrial property rights; including patents, it established special provisions for enhancing and strengthening the protection of patents and other industrial property rights at the international level.

Among the special provisions contained in the Paris Agreement is the retention of the patentee's moral right, which is to mention his status as an inventor in the patent⁹, in addition to admitting his material right of exploiting his invention¹⁰. The Paris Convention also regulated the issue of compulsory licenses in the case that the patentee abuses his exclusive right regarding the exploitation or usage of his patented invention. All of this is after three years from the date of granting the patent. However, if the patentee submits a legal excuse, these licenses cannot be granted.

These special provisions also included the temporary protection of the patented inventions that are displayed in international or officially recognized exhibitions on the territory of any of the Union countries. The agreement also required the member states to protect the nationals of the Union countries from unfair competition. This was through the text of Article 10, which is considered the legislative basis for the system of unfair competition.

1. The registration

The purpose of creating an international system for registering the element of industrial property, such as a patent or a mark, is to perform a single international filing process that will have effect in many of the member states of the convention after completing certain procedures. This international deposition aims to facilitate the filing procedures and reduce the fees and time necessary to register in each country separately.

2. The compulsory licenses

The Paris Agreement established special provisions for compulsory licenses based on the social benefit from inventions, even coercively if required. The state values its own interests over the private interests of

patent owners, since the use of the invention is not an exclusive right for its inventor, but rather society has a share in that as it has provided the inventor with conditions and means that helped him to bring out this innovation. In Article Five the agreement Madea restriction on the issuance of compulsory licenses in the cases where the owner does not exploit his patent or when this exploitation is insufficient within a certain period. This later was estimated at four years from the date of filing the patent or a period of three years from the date of granting it¹¹. These concepts established by the Paris Agreement remained in effect until the TIPS Agreement was held.

3. Protection in international exhibitions

It states that the countries of the Union have granted temporary protection to the inventions or products displayed in official international exhibitions or commercial markets, the subject of which, in addition to the patent, is utility models, industrial drawings and designs, and industrial and commercial marks throughout the display period. This is what is stipulated in Article 11 of the Paris Agreement for the Protection of Industrial Property. The purpose behind the temporary protection of these products is to prevent others from imitating these inventions displayed in these exhibitions, because inventors take advantage of the opportunity of holding exhibitions to display their inventions and receive comments and criticism from the visitors of the exhibition, including technicians and consumers.¹²

4. The system of dispute settlement

The Paris Agreement tackled a very important topic, which is the methods of settling disputes and the mechanisms that must be followed in case of disagreements between the contracting states in regard of the protection of industrial property. This occurs during the application of this Agreement's provisions or in the case of infringement of the industrial property rights that may be performed by the member states.

These mechanisms or procedures were determined in the text of Article 28, paragraphs 1, 2 and 3. They initially referred to arranging negotiations to reconcile the two states (paragraph 1) and to submitting the dispute to the International Court of Justice if the two parties did not agree through negotiations.¹³

This agreement did not include the submission of disputes among the conditions of joining the Paris Union. This is according to its following text: "Each country may declare, when signing its document of ratification or accession, that it does not consider itself bound to the provisions of Paragraph 1, and the provisions of Paragraph 1 are not applicable in regard of every dispute in that country or any other country

of the Union.”

d. Evaluation of the Paris Convention

Requirement and the issues

After we have presented the general framework of the Paris Agreement, as well as the various specific and general provisions and principles that it came with, we can say that the Paris Agreement is considered one of the most important international agreements that attempted to establish a system of international protection for the industrial and commercial property. Despite its importance at the international level, there is a party that call for the opposite and see that its rules and provisions are incompatible in many developing countries. This is what we will see in detail in a presentation of the advantages of the Paris Agreement (first) and its most prominent disadvantages (second).

1. The advantages of the Paris Agreement

The Paris Agreement shapes the constitution of the industrial property, which is indispensable in the system of international protection of the industrial property and its importance at the international level. Among the advantages contained in this agreement is that it is one of the pillars of the international system of intellectual property on the one hand and industrial property rights on the other hand. The latter refers to the industrial property in its broad sense, that is, its application on the industrial and commercial property, agricultural industries, distillation industries, as well as on natural products. Also, after examining its principles, especially the principle of national treatment, we conclude that this agreement embodies the principle of equality between the nationals of the member states and seeks by all means to protect their inventions without imposing any specific conditions.

It also seeks to achieve cooperation and harmony among the member states by preventing monopolies and the means that aim to mislead the public, in addition to suppressing unfair competition.¹⁴

2. The shortcomings of the Paris Agreement

Despite its merits, the Paris Agreement has been faced by certain criticisms as the accession of the developing countries was only on paper. These countries are weak in the field of creativity and invention while they are progressed in the economic and technological fields at the international level compared to the advanced countries. As a result, this has created inequality between the member states.

As for the provisions and rules on which this agreement is based, they are merely dead letter because they neither embody any protection for the industrial and commercial property rights on reality, nor provide rules to

guarantee their implementation. Furthermore, the International Court of Justice is a useless and failed institution, evidenced by the fact that it has not been resorted to by any contracting state in the Paris Union since its emergence.¹⁵

We also refer its incompatibility with the current international situations and the new international economic and commercial conditions.

As for the position of the Algerian legislation, it regulated industrial property rights. Subsequently, it issued the Order No. 66-54 relating to inventors' certificates and patents, Order No. 66-57 relating to industrial marks and trademarks, and Order No. 66-86 relating to industrial designs and models.

B. Patent protection under the other specialized international conventions

Although it is considered the basic pillar based on which the system of international protection of intellectual property rights was established, the Paris Agreement remained unable to grant the inventor a full international protection. Consequently, international efforts turned to strengthening the international protection that would ensure broader preservation for patents, which resulted in holding many agreements.

Based on the above, we will try to tackle the most important private international agreements that have strengthened the international protection of industrial property rights, especially patents, through the following:

a. Protection within the framework of the Strasbourg agreement 1971 AD

This agreement took place on March 24, 1971, entered into force in 1975 in France, and was amended in 1979. Under the Strasbourg Agreement of 1971, the World Intellectual Property Organization is responsible for managing the international classification of patents without the Council of Europe.

This agreement aims to establish a unified international system for classifying patents among member states, and the latter participates in improving this classification through the duty of applying the symbols of this classification to all the documents relating to patent.¹⁶

The countries that wish to be a member of this agreement must submit their accession documents to the Director General of WIPO. Under this agreement, the International Patent Classification, which divides technology into 08 main sections, was established. This later includes about 20,000 subsections, 116 categories, 614 subcategories, and more than 52,000 subgroups, each of which has a specific symbol.

The task of collecting all patent-related data via computer was assigned to the International Patent Center (INAPADOK), in accordance with the agreement heled in 1972 between the World Intellectual Property Organization (WIPO) and the Austrian government, which makes it easier for all countries to view the patent documents and technological achievements in all the industrial property rights as quickly as possible¹⁷. The number of member states in this agreement is 54, and Algeria is among these countries that joined the Strasbourg Agreement with the aim of facilitating the access to modern technology.

The importance of the Strasbourg Convention (1971) appears in creating a system for the International Standard Classification of Patents that reduces the burden on national administrations charged with examining the patents submitted to them. It also allows countries, especially the developing ones, to benefit from the content of these patents and inventions in an organized manner.

b. Munich Patent Protection Agreement, October 5, 1973

After the failure of the Paris Union Agreement to grant full international protection for the industrial property rights, this agreement was issued on October 5, 1973, signed by 11 countries; including France, and entered into force on October 7, 1977. This agreement brought a new system that unifies the issuance of European patents by establishing a single body responsible for issuing European patent. This jurisdiction was granted to the European Patent Office (Office des brevet européens), which is based in Munich and has an office in The Hague. It is governed by a president and two deputies who are appointed by the Administrative Council. It also includes a group of bodies that vary according to their powers.

This agreement was established as a result of the differences between the standards of obtaining a patent in various countries. Some of them adopt the pre-application examination system, others adopt the post-examination system, while some others go for an intermediate system between them, like in France, which has the same conditions mentioned in the Strasbourg Convention of 1963¹⁸. Likewise, the procedures of European patent application are subject to a common procedure, unified examination and delivery procedures.

One of the advantages of the Munich Agreement is that it allows the applicant to obtain a European patent that grants him protection within all countries that have signed this agreement. In case that the applicants wish to save their expenses, they can submit a single application to a specific country. Additionally, the document delivered to them is subject to the national law of each member state. However, the procedure for

submitting a European patent according to this agreement leads practically to the creation of a network of national patents, which obliged its member states to hold the Luxembourg Convention in order to unify the European law of patents.

c. Luxembourg Agreement of December 15, 1975

This agreement was held on December 15, 1975 in Luxembourg, and was signed by the member states of the European Economic Union. It relates mainly to the European patent of the common market called "Brevet Communautaire"¹⁹. As is the case in the Munich Convention of 1973, the European Patent Office is also responsible for the task of delivering this patent in the Luxembourg Convention. This agreement was later complemented and amended by the treaty concluded in Luxembourg on December 15, 1989, which was about "the territorial patents». Additionally, a "COMMON COURT OF APPEAL" was established to resolve the matters and issues related to patents.²⁰

This agreement has dealt with the issue of the Community patent being subject to a common system. This feature is what distinguishes it from the 1973 Munich Convention, which stipulates that a European patent is granted to all the member states provided that their national laws are respected. It is also noted that this agreement has not entered into force, yet, due to its several problems, especially the constitutional and parliamentary ones that Ireland is known for; in addition to the difficulty of bridging the differences in the national legislations of the European Union countries due to the provisions of the Luxembourg Agreement.²¹

Lastly, Algeria did not accede to these agreements and treaties because they are specific to the European Union (the European patent) on the one hand, and because their content does not fit the Algerian national legislations, i.e., Algeria did not agree to their content, on the other hand.

d. Other international patent protection agreements

In addition to the Paris Agreement, countries sought to prepare conventions and legislations in order to provide greater protection for the industrial property, considering that one of the factors of prosperity and economic growth of any country is the presence of a strong and integrated legal system that guarantees protection for the owners of industrial property rights, and protects the competing projects. Thence, international agreements specialized in protecting each branch of the industrial property were concluded.

1. The Patent Cooperation Treaty of Washington (June 19, 1970)

The origins of the Patent Cooperation Treaty go back to 1966 when the Executive Committee of the Paris Treaty for the Protection of

Intellectual Property requested a study on how applicants and patent offices could seek protection for the same invention in different countries. This treaty was signed in Washington in 1970, entered into force in 1979 and was amended in the following years: 1979-1984, 2001-2004.²²

This treaty helps innovators to obtain patent protection around the world, and encourages small companies and individuals to seek patent protection abroad.

Algeria ratified this treaty with reservation on June 19, 1970 and September 28, 1979, as well as on April 3, 1984, on its executive regulations. This was in accordance with the Presidential Decree No. 99-92 of April 15, 1999.²³

2. Patent Cooperation Treaty (PCT) (2001)

The most important international agreement concerned with protecting patents is believed to be the Patent Cooperation Treaty (P.C.T), which is concluded on 06/19/1970 and amended on 10/03/2001. According to its preamble, this treaty aims to improve the legal protection of inventions and facilitate the procedures of obtaining it at the lowest cost, if the protection is published in several countries. The contracting states shaped a cooperative union in the field of filing, searching and examining the applications for protection of inventions. This union is known as the International Union for Patent Cooperation.²⁴

This treaty was approved in Washington on June 19, 1970, after special provisions were added to the proposed project in favor of the developing countries, represented in the establishment of a committee for technical assistance, which facilitates the acquisition of modern technological information for the developing countries. This agreement entered into force on March 19, 1977, and was reconsidered in 1979. Its first article stipulated the establishment of the union, which includes the implementation of the agreement, in addition to an association that was also established among its member states, known as the "CPT Union." This treaty allows ensuring the protection of the inventions supported with patents in a large number of countries.

3. The Strasbourg Agreement of November 27, 1963

Among the agreements related to patents is the Strasbourg Convention of November 27, 1963, which mainly aimed to unify the laws in terms of patentability conditions and the consequences resulting from them.

In addition to these agreements and treaties, there are other agreements that strengthen the international protection of industrial and commercial property rights, represented in the following:

- *In 1954, a European treaty on the international classification of patents was concluded, according to which the European Council was*

established for the unified classification of patents within market countries.

- *The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedures of 1977.*
- *The Patent Cooperation Agreement (PCT) of 1970, amended on February 3, 1984.*
- *The Brussels Convention of September 27, 1968 which related to the lawsuits of counterfeiting claims regarding national patents.*
- *The Budapest Treaty of April 28, 1977, which includes international recognition for the deposit of microorganisms in order to obtain a patent. It is worth noting that Algeria did not join this treaty.*
- *The Patent Law Treaty (PLT) of 2000.*

This treaty aims to harmonize the formal requirements relating to the procedures of patent application and its maintenance.²⁵

Finally, it is worth to indicate that Algeria has not ratified many of these agreements and treaties, whether because they are specific to the European countries, or because it does not agree with their content.

a. The expansion of protection in the TRIPS Agreement

The new international order has opted to integrate the intellectual property rights into one of its basic topics. In order to achieve this, several international agreements have been concluded, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement was proposed by the United States of America for the purpose of amending the General Agreement on Tariffs and Trade at the end of the Tokyo session in order to combat counterfeiting. This proposal did not please the developing countries at that time, thus, in 1986 the proposal took a new form, which was the form of an agreement to discuss “trade-related aspects of intellectual property rights” by the United States of America. This was after its annual losses resulted from counterfeiting in this field reached 24 billion US dollars. The countries of the European Community were quickly convinced by the argument of the United States of America; thus, they listened to it and supported it, demanding in turn their losses resulted from the violation of trade-related aspects of intellectual property. The latter was established in 1944, and was followed by 8 negotiating rounds, the last of which was the round of Uruguayan negotiations, that began in 1986 and ended in 1994. These negotiations included 177 participant countries, 87 of them were developing countries. it was signed on April 15, 1994 in Marrakesh, Morocco. These agreements resulted in the establishment of the World Trade Organization (OMC), which aims to supervise the global trade and liberalize it to achieve legitimate competition. Accordingly, after these

efforts, the Uruguay Round resulted in the signing of the TRIPS Agreement, which came in 7 chapters. In the second chapter the issue of patents was discussed.

This agreement included substantive provisions contained in some of the previous international agreements, which studied and amended them.

1. The reasons for the emergence of the TRIPS Agreement

The reasons that led to the emergence of the TRIPS Agreement are many and can be stated as follows:

- The counterfeiting industry and piracy were widespread in the developing countries during the seventies and eighties, as entire industries were based on the basis of copying and imitating internationally known trademarks, and selling them at very low prices in world markets. This affected the interests of the developed countries that spend a lot in the field of scientific research and development, which made its need to eliminate these works an urgent need.
- The absence of effective legal protection for the intellectual property rights in many developing countries has encouraged the piracy and counterfeiting industry. Therefore, the international protection through international agreements has not been able to provide an internationally acceptable minimum level of protection.²⁶
- The increasing international importance of intellectual property rights at the international trade level has made the developed countries see that the low levels of protection granted to these rights by the developing countries has a negative impact on encouraging international trade.
- The United States' feeling of the deterioration of its economic situation despite its political and military influence; in addition to its desire to regain control again over the world's capabilities before it loses control of it completely during the twenty-first century, which prompted it to seek to place the other countries within the crucible of intellectual property rights to support its capitalism and enhance its control.

2. The scope of the agreement

Under this agreement, patent protection was adopted in all fields of technology, and based on Article 28 of the TRIPS Agreement, the patentee is granted the right to the following:

- With regard to methods, others are prevented from the actual use of the method, unless the patentee agrees. According to Article 02/28, patent owners have the right to dispose of it, transfer it by inheritance to others or conclude license contracts for granting it.²⁷
- With regard to products, unless the patentee agrees, others are

prevented from manufacturing, using, selling, offering for sale, or importing that product for these purposes.²⁸

Based on Article 01/29, it is required that the applicant for a patent discloses a clear and complete manner that enables the invention to be implemented by those skilled in this specialty, and to indicate the best method he\she knows to implement his\her invention.²⁹

Also, according to Article 30 of the TRIPS Agreement, exceptions to the absolute rights granted for patents must not be granted if they unreasonably conflict with the legitimate interests of the patent owner or do not take into account the legitimate interests of others.

Finally, Article 31 of the same agreement stipulates limiting the granting of compulsory licenses by requiring respect for certain rules when granting the licenses to use inventions except with the approval of the right holder. This was in contrast to what is permitted in Article 30, whether the use is by the government or by the others authorized by the government to have this right.

3. The general provisions of the TRIPS Agreement

The importance of the Trade-Related Aspects of Intellectual Property's Agreement appears in three trade-focused areas represented in the following: it is the first agreement that actually sets minimum standards for the protection of various forms of intellectual property, it stipulates detailed provisions for imposing the civil and criminal laws as well as monitoring the limits. It is also the first international agreement on intellectual property that is subject to dispute settlement, and can be imposed. Additionally, it lays the foundations of the establishment of a strong and modern infrastructure for the intellectual property rights of the global community.

4. The basic principles of the TRIPS Agreement

The TRIPS Agreement included international rules that generally aimed to set a minimum level for the protection of innovations in the field of patents. These rules are entirely new and made changes in the concept, the basis and the scope of protection. We emphasize that the TRIPS Agreement did not aim to create unified substantive rules, but rather what it came up with represented the minimum level of protection to which the member states are committed. These principles are embodied in the following:

• The principle of national treatment:

It can be said that the idea of national treatment is an old idea, as it was contained in the Paris Agreement. This principle means that nationals and foreigners must be treated equally in regard of the protection of inventions³⁰, whether in terms of identifying the

beneficiaries of the protection of this kind of rights, or in terms of their scope, their duration, their enforcement or the way of obtaining them.³¹

The aim of organizing the TRIPS Agreement is to encourage innovations and transfer technology based on the general principles of the GATT. This principle is stipulated in Article 3 of the agreement, which stipulates:

“Each member country is required to grant the nationals of other member countries a treatment that is as favourable as the treatment which it accords to its own nationals in regard of intellectual property protection...”³²

- **The principle of transparency in treatment:**

It requires that the member state of the agreement publishes its laws related to intellectual property, as well as the rulings issued by its courts in this regard. It also requires that this state provides the other states, upon their request, with those laws and decisions, in addition to the need to notify the TRIPS Council of the laws of member states and court decisions for the purposes of supervision and censorship.

- **The most favoured nation principle:**

The TRIPS Agreement is considered the first international agreement to stipulate this principle through the text of its fourth Article, as opposed to other international agreements. According to this principle, there must be no discrimination in treatment among the member states of the TRIPS Agreement. In addition, some principles of this later are adopted with reference to other international agreements, including the Paris Agreement and the Berne Agreement. In this sense, the TRIPS Agreement did not abolish these international agreements, but rather was held to complement them and enhance their role regarding the protection of intellectual property rights, which was stipulated in its second Article. Among these principles are the following:

Emphasizing the principle of national treatment, the principle of patent independence, and the principle of precedence or priority.

Enforcement provisions of the TRIPS Agreement:

Compared to the previous agreements, we find that the TRIPS Agreement is completely different in that it cared about setting precise limits and unified application procedures to save the agreement, in addition to stressing the obligation of the member states to adhere to it and not violate it in order to avoid triggering international responsibility. This agreement not only established substantive rules that provide the minimum level of protection, but also formulated procedural rules to ensure protection as well as methods of resolving disputes.

1. Transitional arrangements for implementing the TRIPS Agreement

The Convention has established several transitional arrangements in which the ways of its enforcement were determined for the member states, in addition to the protection of the existing conditions when it enters into force. It has also allocated necessary transitional periods for many countries so that they can adapt their legislative, administrative and judicial systems. The goal of these transitional periods is to enable countries to take the necessary measures to reduce the negative social and economic impact.³³

2. The Procedural aspects of enforcing the TRIPS Agreement

The TRIPS Agreement has established several mandatory procedures for the member states to ensure that their laws are used in accordance with the stipulated procedures, in order to take all the effective measures in case of violating the intellectual property rights.

Furthermore, this agreement has stipulated sufficient judicial guarantees to monitor the enforcement of intellectual property rights³⁴. In other word, it stipulated the necessity of its member states to build a judicial system specific to the intellectual property and the protection of its rights. However, this judicial system should be different from their existing regular judicial system. That is, establishing specialized chambers and appointing judges with sufficient experience in the intellectual property rights and the nature of their rights, on the one hand. On the other hand, we note that the agreement obligates its member states to take some temporary and effective measures to avoid the violation of intellectual property rights and to oblige the violator to provide a guarantee not to use the prescribed procedures for protection.³⁵

3. The dispute settlement system under the TRIPS Agreement

The resolution of disputes was tackled in Article 64 of the agreement, as it ordered in its first paragraph the application of both of the Articles 62 and 63 included in the General Agreement on Trade Tariffs of 1994 (GATT). This latter stipulated holding consultations and attempts to resolve all disputes that may arise between the member states of the World Trade Organization when applying the rights and obligations contained in the text of the TRIPS Agreement on dispute settlement rules, in accordance with what was stated in the Memorandum of Understanding.³⁶

As for the conflicts occurring among the private law people or between them and the member states of the World Trade Organization regarding the interpretation of intellectual property legislations derived from the TRIPS Agreement, they are not subject to the provisions of Article 64 of the Agreement. As for the specialized dispute settlement body, it was

stipulated in the second Article of the Memorandum of Understanding in order to manage all the procedures and provisions of the settlement of disputes contained in the international agreements. It also established the WIPO Arbitration Center, which is considered another means for the conflicting parties to resolve their disputes concerning the Intellectual property when they violate the obligations stipulated in international agreements.

4. Evaluation of the TRIPS Agreement

This agreement is considered the most recent in the field of intellectual rights. Despite these advantages, the agreement has a number of weaknesses, which are the following:

- It is mostly interested in the commercial aspect at the expense of moral rights. Consequently, this lessens its strength as it excludes the real goal.
- This agreement is also criticized for having negative effects on the economies of developing countries because it largely serves the interests of the major industrialized countries.³⁷

II. The effects of the crime

Of patent counterfeiting in the Algerian legislation

Considering that the counterfeiting lawsuits are a protection mechanism that the patentee can use to protect his\her right of monopolising the exploitation of his\her invention, it has resulted in several effects, represented in civil penalties, which are in turn represented in the compensation for the damage resulting from the crime of counterfeiting, in addition to the original and consequential criminal penalties. In Article 61 of the Order 07/03 relating to patents, the Algerian legislator stated that:

The Algerian legislation issued one penalty against each perpetrator of any of the crimes stipulated in Articles 61 and 62 of the aforementioned order. This penalty is divided into an original sanction and a supplementary one. The Algerian legislator permitted the patentee whose right was infringed in one of the previously mentioned forms, to request taking any measure that would repel this violation in accordance with Article 2/58 of the Order 07/03. This is because the penalty prescribed for these crimes is a misdemeanour punishment, as the legislator explicitly stipulated in Article 61 of Order 07/03 that acts of imitation are misdemeanours, and the Algerian Penal Code does not punish for the attempt to commit a crime in general, unless with a provision as an exception. This latter is what Article 31 stipulates in the following: “An attempt of misdemeanour is not punishable except based on an explicit provision in the law...” However, we do not find any text regarding this in

the Order 07/03.

A. The Original Penalties

The original penalty is a compensation, for a committed crime, executed on the person whose criminal responsibility is proven in the criminal courts. This penalty has been stipulated, in regard of the misdemeanour of counterfeiting inventions, by the center of patents and the crimes related to it under the text of Articles 61 and 62 of Order No. 03-07 relating to patents. Through these two articles we find that the original penalties for the misdemeanour of imitation take two basic forms: incarceration penalties and financial penalties. As for the first form of penalties, misdemeanours are punished for the felony of counterfeiting by imprisonment. Whoever intentionally violates the right of patents by imitating an invention becomes subject to whether either of imprisonment and a forfeit, or to only one of these two penalties.

a. In the field of patents and trademarks

The Algerian legislator stipulates: “The misdemeanour of counterfeiting shall be punished by imprisonment from six months to two years and a fine of two million five hundred thousand dinars (2,500,000 DZD) to ten million dinars (10,000,000 DZD), or with one of these two penalties.” These penalties are applied to crimes that affect the exclusive rights relating to patents, including the crime of concealing an imitated thing, concealing several counterfeit things, selling them, offering them for sale, or bringing them into the national territory.³⁸

The Algerian legislator has given the judge a wide discretionary authority in releasing this original penalty represented in imprisonment and a fine. He is allowed to issue the minimum imprisonment, as he may also penalize with these two penalties together.

Finally, the Algerian legislator did not stipulate a penalty in the case of recidivism, which was not included in the previous law. While we may find it in the current law, which stipulates: “It is considered a recurrence to imitation if within the previous five years a judgment of imitation is issued against the imitator. In this case the penalties stipulated in Article 35 will be doubled.”³⁹ Thus, the penalty becomes imprisonment from two months to one year, and the fine will range from eighty thousand dinars (80,000 DZD) to eight hundred thousand dinars (800,000 DZD), which we do not see in Order 03-07. It is noticeable by looking at these penalties that there is a significant increase in the value of the financial fine, estimated at a maximum of 1,000,000 DZD, compared to the Order 66/54 at a maximum of 20,000 DZD, and the Legislative Decree 17/93 at a maximum of 40,000 DZD.

The Order 03-07 concerned with patents states: “Anyone who

intentionally conceals an imitated thing or hides several counterfeit things, sells them, offers them for sale, or brings them into the national territory will be punished with the same penalty as the imitator.”

We note that the legislator has equated the degree of punishment between those who commit acts of counterfeiting and those who work in items that imitate a patent, and these works include the following:

- 1. Hiding one or more counterfeit things.⁴⁰*
- 2. Selling counterfeit items.⁴¹*
- 3. Offering counterfeit patented items for sale.⁴²*
- 4. Bringing counterfeit items into the national territory.⁴³*

b. In the field of industrial designs and designations of origin

This field is still relying on the Order No. 86/66 issued on April 28, 1996 to protect industrial designs and models in Algeria.⁴⁴ Therefore, the penalties prescribed for the perpetrators of counterfeiting and the violation of the owners of industrial designs and models' rights remain below the desired level of deterrence, as the legislator stipulates punishing these people with a fine ranging from five hundred dinars (500 DZD) to fifteen thousand dinars (15,000 DZD). In the case of committing the misdemeanour of counterfeiting again or if the person has worked for the harmed party, the ruling issued will include the previously mentioned penalties in addition to imprisonment for one month to six months. The penalties shall be doubled in case of violating the rights of the self-administered sector and the state sector.

As for the illegal acts committed against the holders of designations of origin, the judiciary is also still relying on the Order 65/76 issued on July 16, 1976 regarding appellations of origin⁴⁵, which remains limited to keeping pace with the economic development and the transformations that the country is experiencing. In this matter, the Algerian legislator stipulates that those who violate the rights of the appellations of origin's holders shall be punished with a fine from two thousand dinars (2,000 DZD) to twenty thousand dinars (20,000 DZD), in addition to imprisonment from three months to three years, or one of these two punishments. It is worth mentioning that this punishment is applied to whoever forges the designations of origin and whoever participates in that, as well. Whereas, those who intentionally offer for sale or sell products that bear a forged appellation of origin, the legislator has allocated a lesser penalty for them, which is a fine from one thousand dinars (1,000 DZD) to fifteen thousand dinars (15,000 DZD) and imprisonment for one month, or one of these two penalties.⁴⁶

c. In the field of formal designs of integrated circuits

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The Algerian legislator has issued harsh penalties for those who commit misdemeanours of counterfeiting in this field as it stipulated: "Anyone who deliberately infringes these rights will be punished with imprisonment from six months to two years and a fine from two million five hundred thousand dinars (2,500,000 DZD) to ten million dinars (10,000,000 DZD), or one of these two penalties only."⁴⁷ The adoption of these severe penalties depends on the degree of wealth and profit that imitators of formal integrated circuit designs can benefit from.

B. Accessory (complementary) penalties

In addition to the original penalties imposed on the perpetrator of counterfeiting, the law has also allowed the specialized judicial authority to take other measures or impose complementary penalties that would ensure the implementation of the legal judgement and achieve justice in retrieving the rights⁴⁸. The accessory punishment is the punishment that the court may impose in addition to the original punishment in some crimes determined by the law. It is linked to the original punishment, but it is not attached to it. Rather, it must be ruled upon to prove its existence from a legal standpoint. Additionally, it must not be issued alone as it is the case in the original penalty.

The judge has the authority to resort to imposing accessory and complementary penalties for the original ones in order to ensure the implementation of the legal judgement and the application of justice in restoring the rights and using them in the manner required by the law. Among these procedures are the so-called threatening or secondary procedures, which the Algerian legislator did not explicitly stipulate in the Order 07/03 that is in force. However, it was precisely stipulated in the Order 66/54 relating to inventors' certificates and licenses for inventions, which was abolished by the Legislative Decree NO.93/17.

a. Confiscation

Confiscation falls on the machines and tools used to counterfeit patents because it prevents the owner of those things from using them in the future to commit this crime again. The counterfeit products themselves may also be confiscated then sold by the court to pay fines and compensations by their price. It can dispose them in any other way that it finds appropriate; such as endowing them to charitable societies⁴⁹. Furthermore, the judge may order the confiscation of the counterfeit items and the tools specifically used to manufacture them, even in the case of acquittal due to the absence of a criminal intent for the

perpetrator. The confiscated items can also be delivered to the patentee without prejudice to the compensation that he\she would be entitled to. It is important to note that confiscation is a permissible order for the court⁵⁰. The Algerian legislator did not explicitly stipulate it in the applied Order relating to patents⁵¹, rather, it was implicitly stipulated in Article 58, second paragraph, which states: "The competent judicial authority orders the granting of civil compensation, and can order preventing the continuation of these actions and take Any other procedure stipulated in the currently applied legislation."⁵²

b. The Destruction of Counterfeit Goods

Destruction of counterfeit goods or items bearing any form of imitation is considered an accessory penalty. Nevertheless, the Algerian legislator did not stipulate it in regards of patents. Destruction of counterfeit goods means getting rid of them, whether by burning, smashing, or in any other way. It is noted that the Algerian legislator did not regulate destruction in the Order 07/03, but from another side, it was stipulated in the Customs Law in accordance with Article 44 of the Finance Law of 2008 which amends the Article 22 of the Customs Law through its following text: "Without prejudice to other legal means that the intellectual property owner may resort to, which prove the infringement of his right, the customs administration can take the necessary measures to allow the destruction of goods proven to be counterfeit, or deposit them outside commercial exchanges in a way that protects the right holder without providing compensation in any form and without needing expenses from the public treasury."

Article 14 of the decision dated on 02/15/2002 issued by the Customs Directorate also adds: "The Customs Administration takes the necessary measures to allow the destruction of goods that have been proved to be counterfeit."

c. Publishing

Based on the plaintiff's request, the court may publish the verdict issued against the person who imitated the products, or who sold them, or offered them for sale, or imported them with the intention of selling, or concealed them with the intention of selling, or falsely claimed that he had obtained a patent.⁵³ This was stipulated in the old legislation, where the ruling related to counterfeiting is published, when necessary, provided that the crime is proven and a conviction of the crime is occurred by the competent court.⁵⁴ The conviction may be completely or partially published in one or more newspapers that it designates, by posting in the places specified by the court, with mentioning the costs of publication and commentary about the expense of the convict. The

purpose of publication is, on the one hand, to inform the consumer about the matter of counterfeiting so that he will not be deceived, and on the other hand, it is considered a moral compensation and remuneration for the patentee.⁵⁵

d. Cessation of activity

Legislations related to the protection of industrial property in Algeria stipulates that the court must order practical measures to stop all forms of infringement of these rights, by preventing the continuation of these actions, ordering the temporary or final closure of the institution that implement counterfeiting, or stopping the illegal use of counterfeit items and products, whether after it is occurred or when it is about to occur, in addition to placing counterfeit products outside the scope of commercial dealings.

e. The deprivation of some civil rights

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Some laws in patent crimes stipulate that the perpetrator, during the execution of the penalty, should be deprived from exercising certain civil rights, such as membership in public, sectarian, or union services, as well as the membership in chambers of commerce and charitable societies, and participation in state council elections. It must be pointed out that the Algerian legislator did not include this type of penalties in his texts related to patents. However, these sanctions have a major role in protecting patentees from the phenomenon of counterfeiting. This is through the text of Article 2/58 of the Order 07/03, which stipulates the protection in a broad and vague manner without specifying its meaning, as opposed to what the old law stipulated in Order 54. /66, which included a text on the precautionary measures that can be taken in this field.⁵⁶

Conclusion

The patent is classified within the scope of industrial and commercial property rights, and the intellectual rights in general, to indicate the importance of innovation and the need of human societies for it. This latter led to encouraging and pushing innovators to greater creativity, thinking, and exercising the mind in what serves humanity and facilitates their lives in various fields, which was something that was required appraising the innovator for his effort first, then giving him the opportunity to benefit from the returns of his creativity, so that he can

have exclusive rights to exploit it and use it as an owner would. This is through granting his invention legal protection for a specific period of time, then after the expiration of the legal protection period, the invention returns to the public domain and for the public benefit.

After this brief study of the legal protection of patents in the international and Algerian legislation, we conclude the following:

First: *The reality of the patent system remains incapable of encouraging the creativity and innovation, because the regulatory framework guaranteed by legislations or laws is necessarily dependent on the implementation of various economic and social policies of countries, especially commercial and industrial policies. Additionally, the organization of its protection expanded on the Internet in view of the changes and developments that the world is witnessing in the field of globalization and technology, as well as the spread of the phenomenon of piracy and counterfeiting on the Internet.*

Second: *The Algerian legislator introduced new forms in regards of industrial property rights under Order No. 03-08 of July 19, 2003 relating to the protection of formal designs of integrated circuits, but it did not stipulate the protection of undisclosed information or confidential information stipulated in Article 39 of the TRIPS Agreement, which was taken into account by both the Egyptian legislator in Articles 55-62 of the CFR and the French legislator in Articles 621-1 and what follows it of the French Intellectual Property Law.*

Third: *Most of the comparative legislations regulating patents referred them to the general rules in civil law as well as commercial law, and did not stipulate any special conditions for whoever applies for the patent, rather, it only specified his\her information during the registration procedure, whether he\she is a natural or moral person, and whether he\she is a national or a foreigner. The Article 57 of the Algerian Patent Order 03-07 stipulates that the facts preceding the application for registration of the patent are not considered to affect the rights resulting from it. Therefore, the scope of legal protection must be expanded at the registration stage by granting the applicants the possibility of stopping their infringement, as well as demanding compensation in case of damage, and from it appears the importance of compulsory licensing as a legal means to advance the development of the national economy and protect the public interest, as well as providing the requirements for practical application locally, Arably, and even globally, based on securing the means of promoting creative ideas, in addition to the necessity of amending the law related to patents nationally and internationally in a way that allows identifying the acts of unfair*

competition against patents as a legal basis for a lawsuit. Add to that, there-examination of inventions system adopted by most modern legislations.

Fourth: The Paris and TRIPS Agreements are considered among the most important international agreements in the field of patent protection, thanks to approving the legal provisions and principles that would activate legal protection for them, in addition to the special international agreements concerned with the protection of patents, including the Washington Agreement, related to international registration, and the Strasbourg Agreement.

Fifth: The penalties imposed by the Algerian legislator to the patent counterfeiter in Article 2/61 of Order No. 03-07 relating to patents are the same penalties imposed on a trademark counterfeiter in Article 32 of Order No. 03-06. Additionally, complementary and accessory penalties should be stipulated; Such as confiscation, publication of verdicts, and destruction of the items subject to the crime of counterfeiting a patent.

Sixth: We request the legislator to amend the text of Articles 61 and 62 of Order 03-07 concerning patents to re-state the penalty of recidivism in the crime of counterfeiting, so that the term “recidivism” includes all the forms mentioned in Article 61 as follows: “Anyone who intentionally conceals one or more counterfeit things, sells them, offers them for sale, or brings them into the national territory will be punished with the same penalty as the imitator. «Hence, in the two articles, the punishment becomes just and fair.

Seventh: it is necessary to activate the role of specialized bodies in the field of intellectual property and paying attention to them, especially the National Institute of Industrial Property, by creating an administrative body specialized in settling disputes. This latter includes experts and specialists in all fields at the level of the National Institute of Industrial Property without resorting to the judiciary, especially in the disputes related to patents.

What can be said in the end is that despite the demerits and shortcomings observed in the international agreements and the Algerian patent law, they came with effective legal protection to preserve patents, in contrast to the previous repealed laws, especially those related to the rights granted to the patent owner, as well as the legal procedures related to its issuance.

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