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Exception and Limitation of Patent Rights: A Case Study of Afghanistan Law in Perspective of TRIPs

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ABSTRACT: the less developed countries have recognized the principle of patent protection and bound the related norms. But, they followed the public policy approach and accepted these norms in the light of public interest and developmental needs. So they always contemplate the flexibilities of patent rights but the question is that what mechanisms and policies they should apply whilst being bound over to international instrument has been accessed to the mentioned aims. This paper examines the exceptions and limitations of patent rights within the framework of Afghanistan's law, particularly in light of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs). As Afghanistan continues to develop its intellectual property regime, understanding the balance between patent protection and public interest becomes increasingly critical. This study explores the compatibility of Afghanistan's patent laws with TRIPs obligations. The finding of this research indicate that for balancing two extremely equally prejudicial rights Afghanistan has accepted some limitations and exceptions to align with TRIPs requirements; however, it has overlooked several essential exceptions that could benefit the public interest and social development. Ultimately, the findings underscore the importance of adapting international standards to local realities, paving the way for a more effective and equitable patent system in Afghanistan.

KEYWORDS: Patent, TRIPS, Exception, limitation, Afghanistan.

INTRODUCTION

In principle, patents confer exclusive rights to patentees during a limited period to prevent others from making, using, offering for sale, selling, or importing a patented invention or discovery without the consent of the patent holder. The granting of such exclusive rights is considered as an incentive for investment in innovative activities and the production of knowledge . While the requirement of fixing a reasonable period, generally not less than 20 years, for a patent is, in fact, the result of balancing the two extremely equally prejudicial rights—the personal rights of the individual inventor to have and enjoy his property, on one hand, and public rights of individual public to participate and enjoy that property, on the other (Amani, 2015). This underlying principle of balancing could be traced in the long back judgement of 1785 of Lord Mansfield as quoted below:

"We must take care to guard against two extremes equally prejudicial: the one that men of ability, who have employed their time for the services of the community, may not be deprived of their just merits and rewards of their ingenuity and labor; the other that the world may not be deprived of the improvements, nor the progress of the art be retarded."

The two separate rights i.e., the private right of the creator and the public right of the individual public, as regards the intellectual property creation are, in the wording of Lord Mansfield, "extremely equally prejudicial," though the judgment of Lord Mansfield, in fact, relates to the copyright matters of intellectual property. The underlying principle, i.e., to protect, on the one hand, moral and economic rights of the creators of their creations and, on the other, the rights of the public in access to those creations, is unequivocally followed by state laws in almost every kind or species of intellectual property.

Many states believe that granting full exclusive rights to patent holders in all circumstances does not meet the ultimate goal of promoting innovation and enhancing public welfare in all circumstances. Therefore, the scope of the enforceable exclusive rights is carefully designed under national legislation in order to strike the right balance between the legitimate interests of the patentee and the legitimate interests of third parties (WIPO, 2010).

The task of patent law, like other intellectual property law, therefore, is, inter alia, to reconcile these extremely equally prejudicial rights relating to invention. Not only to reconcile or balance, but the same must answer to the broad notions of justice, equity, and good conscience. The patent laws achieve this task of balancing in a variety of ways, but each coexists with one paramount method of balancing by granting patent rights for a reasonably fixed period of time within which the patentee, in the absence of any law otherwise, is to claim and enjoy the benefits of his ownership over his invention to the total exclusion of the general public and beyond those limits permits the general public to share the use and benefits of results of the inventor's intellectual efforts, knowledge, and skill .

Article 28 of the TRIPS Agreement provides the exclusive rights conferred by a patent to its holder; Articles 30 and 31 provide certain exceptions and limitations to the exclusive rights that WTO Members may provide in their national laws. Since Articles 30 and 31 are permissive provisions, members are permitted, but not obliged, to provide those exceptions and limitations. Generally speaking, there are two types of exceptions and limitations; these are:

First, provisions that exclude, or allow for the exclusion of, certain types of uses of patented inventions or discoveries from being addressed in infringement proceedings are found in national laws as well as in international treaties. Patent holders cannot enforce their rights against certain acts done by third parties, although they would normally be considered as infringement. In other words, third parties are free to perform those limited acts without having to expect infringement procedures against them. The underlying consideration is that the public interest justifies, under certain circumstances, denying the enforcement of the exclusive rights granted to the patentee.

The second type of exception relates to situations where the right holder cannot stop third parties from using the patented invention or discovery but is entitled to compensation against such use. In other words, although the possibility of obtaining injunctive relief may be significantly limited, a right to compensation is maintained. Compulsory licenses are one type of mechanism used to put this type of limitation in place (WIPO, 2010).

The patent laws are in the form of various limitations and conditions so as to achieve the goal of balancing the two extremely equally prejudicial rights to a maximum and satisfactory extent. This research will investigate the exception and limitation of patent rights and compliance to the TRIPs Agreement.

PATENT RIGHT—A RIGHT WITH TEMPORAL LIMITATION

Patent rights do not continue indefinitely. Because for the purpose of balancing the two extremely equally prejudicial rights, the statute endorses the patent right for a reasonably fixed period of time within which the patentee is to claim and enjoy the benefits of his ownership over his invention to the total exclusion of the general public except where the Act provides otherwise, and beyond those limits permits the general public to share the use and benefits of the invention, that is, to exploit commercially the invention without any permission from the patentee. Because on such expiration the patented invention remains no more patented and, therefore, falls into the public domain to be enjoyed by the individual public. Generally, the term (duration) of a patent, in compliance with the TRIPS, minimum mandate, is 20 years from the date of the filing of the patent application for a patent for an invention in question. To with, in the context of patent law, 2017, the term (duration) of a patent, under its Section 24, is subject to the provisions of this law, for twenty years from the date of the filing of the application for the patent.

PATENT RIGHT—A RIGHT WITH GEOGRAPHICAL LIMITATION

The monopolistic behavior of the patent rights, like any other kind of IPR, gets further restricted by geographical or, say, special limitation in the sense that the rights in its underlying subject matter of a denomination get protected by the law of the country granting the said patent against its unauthorized exploitation or exercise by a third persons. To with, Afghanistan's patent law provides that, "the right given to the patent holders under this law shall commence beginning with the date on which a valid application for the registration is submitted in Afghanistan…" , and the patent rights thereby conferred upon the patentee, under its articles 23.1 and 23.2, are so conferred to be exercised by him only in Afghanistan.

PATENT RIGHT—RIGHT WITH EXCEPTIONS

A patentee enjoys a bundle of exclusive rights given as an incentive for the investment in innovative activities and for the spreading of knowledge to the public. However, these rights are not permanent and can be revoked in exceptional circumstances to balance the interests of the patentee with those of others. Thus, patent rights, so as not to behave like a market monopoly power, and to maintain a balance between the two extremely equally prejudicial rights, the patent law permits certain act or acts, though normally constituting the exclusive right(s) of its owner, to be done in the circumstances specified therein that law even without the authorization or consent of the said owner. These circumstances, thus, operate as various exceptions to (if not exclusions of) the patent exclusive rights and consequently as various defenses to the infringement of the patent rights, under the notions of "permitted uses or actions," for commercial or non-commercial purposes, as the case may be.

It could be said that the exclusive rights conferred by a patent to a patentee and the exceptions or limitations to such rights are two sides of the same coin, seeking to balance the legitimate interests of the patent holder and the legitimate interests of the general public with a view to promote innovation, spreading technical knowledge, and encouraging the transfer of technology. Since the socio-economic conditions in a country and its priorities do influence the public policy considerations that underpin the adjustment of the different interests at stake, it may not come as a surprise that the different laws contain a variety of provisions addressing exceptions and limitations (WIPO, 2010).

The TRIPS agreement is focused on a global standard for protection and enforcing IPR. The basic purpose of TRIPS is to introduce the protection of IP in trade and the granting of exclusive patent rights as a motivation for investment in the production of knowledge. However, allowing the enforcement of the full scope of the exclusive rights in all circumstances may not always meet the ultimate goal of the patent system to increase the public welfare (Lenin and Rohatgi, 2015). Therefore, in order to maintain the correct balance between the interests of the patentee, third parties, and the public, the exclusive rights for patents may be set to certain exceptions and limitations to patent rights.

The exceptions to patent rights not expressly permitted under the TRIPS Agreement are permitted only if they meet the requirements of Article 30 of TRIPS (UNCTAD/ICTSD, 2005), which provides that:

"Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties."

The article thus allows WTO members to carve out exceptions to patent rights that meet the "three-step test," i.e., that the exception: (1) is limited; (2) does not unreasonably conflict with normal exploitation; (3) does not unreasonably prejudice the legitimate interests of the patentee.

Prior to the TRIPS Agreement, countries had been largely free to adopt exceptions to patent rights as they saw fit. However, it was visualized that the TRIPS Agreement would introduce some substantive provisions on exceptions to regulate the validity of such exceptions. During the negotiation of the TRIPS Agreement, the treatment of exceptions to patent rights underwent something of an evolution. In the July 23rd, 1990 draft of the TRIPS Agreement, it was proposed to list a number of exceptions that were agreed to be acceptable, specifically, exceptions to rights conferred. Provided that legitimate interests of the owner of the patent and of third parties are taken into account, limited exceptions to the exclusive rights conferred by a patent may be made for certain acts (UNCTAD/ICTSD, 2006), such as:

- Rights based on prior use.
- Acts done privately and for non-commercial purposes.
- Acts done for experimental purposes.
- Preparation in a pharmacy in individual cases of a medicine in accordance with a prescription, or acts carried out with a medicine so prepared.
- Acts done in reliance upon them not being prohibited by a valid claim present in a patent as initially granted, but subsequently becoming prohibited by a valid claim of that patent changed in accordance with procedures for effecting changes to patents after grant.
- Acts done by government for purposes merely of its own use

Since the socio-economic conditions and priorities of a country differ from one country to another, hence provisions in patent laws on exceptions and limitations vary as well. As Afghanistan is a signatory to TRIPS, the new patent law includes the limitations and exceptions as per the norms of the TRIPS agreement. The following exceptions to the patent rights provided in the law are: (i) (i) use of patent on foreign vessels; (ii) prior use; (iii) unauthorized use of patent (compulsory license); (iv) authorized use of patent. This exception and some other exceptions that Afghanistan, as a least-developed country, should include in the patent law will be discussed one by one.

1. Prior use

There is little or nothing to be gained in granting even a limited patent monopoly for an invention or discovery of which the public is already aware before a patent application is filed. A problem arises, however, where an inventor or discoverer makes an application for a patent for their invention, and it turns out that before this inventor made their application, a third party had already, and independently, been carrying out activities relating to the invention or making substantial preparations to do so, but in secret (UNCTAD/ICTSD, 2006).

Since the public was not in possession of the details of the invention till the inventor or discoverer filed the patent application, or rather till it was published, then it is widely regarded as fair that the inventor should be allowed to obtain the grant of a patent. However, equally, it is widely considered that it would not be fair to permit such a patentee to enforce their patent against the secret prior user, as this would take away the right to do what they had already been doing before the patent application was filed, and therefore the rights of the patentee must be limited accordingly. Hence, a prior use exception may be provided to permit a limited exception to the patentee rights to allow the prior user to carry on doing what they were doing before (UNCTAD/ICTSD, 2006).. Thus, a prior user right is the right of a third party to continue the use of an invention or discovery where that use began before a filing date or priority date for the same invention or discovery.

Prior use rights are provided by the different national legislations, and such provisions in national law only have national effect. National provisions on prior user rights have common ground but also have differences in the conditions under which they may be acquired. In Afghanistan, prior user rights are governed by article 20 of patent law. According to this article, a natural or legal person who, at the time when the patent application was filed, was exploiting the invention or discovery may, notwithstanding the grant of patent, continue such exploiting, provided that:

1. The exploiting of of the invention or discovery in good faith and exploiting is before the filing date or priority date of a patent ;
2. The scope or scale of such use is not increased;
3. The right afforded by this article may only be transferred together with the business, the enterprise,, or the part of the enterprise to which it belongs .

2.Use of patent on foreign vessels

The exception of “foreign vessel” must be beneficial in terms of both facilitating uninterrupted international travel and reducing tension between countries over the treatment of vessels flying their flag [1]. This exception is not mentioned in the TRIPS agreement expressly but is firmly established as a valid exception. The TRIPS agreement provides that “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) .”.

The Paris Convention provided that its member states shall not consider the use of devices of board vessels for the needs of the vessel and of devices and accessories of aircraft and land vehicles, which temporarily or accidentally enter the water and territory of the country, as infringement of patent rights. Moreover, the Chicago Convention provided that the authorized entry of aircraft on the territory for the purpose of international air navigation shall not entail the seizure of the aircraft, and the patent rights shall not extend to the storage of spare parts and spare equipment for the aircraft nor to the right to use and install the same in the repair of an aircraft of a contracting State in the territory of any other contracting State (WIPO, 2010). Since a majority of countries are parties to those conventions, such exceptions appear often in national patent laws. Those exceptions are considered to be facilitating the operation of international transport.

As this exception is not optional for countries party to the Paris Convention, Afghanistan’s patent law, in order to comply, incorporated the said exception under article 23(3). According to this article, using spare parts of aircraft, road vehicles, or ships belonging to other countries that enter temporarily or coincidentally the airspace or territorial waters of Afghanistan shall be an exception to patent rights. Provided that, use of such spare parts is exclusively for making or repairing of the aircraft, ships, or road vehicles that entered temporarily or coincidentally in Afghanistan. The exceptions include the following criteria:

1. **Vessel:** the Paris convention does not provide any definition of “vessel.”. The national authorities of the member states will be free to interpret the meaning of vessel (Mikalsen, 2016). And, the Paris convention does not provide any guidance on how to determine a ship’s nationality. A very few countries, like India and New Zealand , have adopted explicit rules to this aim. Afghanistan’s patent law does not provide any provision to define the term of “vessel” or to determine the ship’s nationality.
2. **Temporarily**: the second requirement set out by article 5ter as well as the article 23.3 patent law is the “temporarily.”. The words “temporarily” and “accidentally” were chosen to cover entries into port for more or less brief periods, whether periodically or exceptionally and whether unintentionally or not (Mikalsen, 2016).
3. **Exclusive use**: use on board the vessel of a (patent-protected) in the vessel or its accessories, and where that use is exclusively for the needs of the vessel.

3. Authorized use of patent

A patent holder may, by a license, permit others to make, use, or exercise the invention, which would otherwise be illegal for them to do(Narayanan, 2010) . The license in the patents is granted to work the patented inventions to the fullest extent in the interest of the public. The license to work the patented invention may be granted in the favor of another person voluntarily by the patentee himself. The TRIPS agreement, as well as the patent law of 2017, provides for statutory rights of a patentee to obtain a license in a patented invention that is related to his invention if a license in the related invention is required for the purpose of efficient working of his patented invention to the best advantage to the public.

4. Non-authorized use of patent (compulsory license)

A patent confers a limited monopoly on the patent holder to the exclusion of others. However, the law permits this; it also takes into account the fact that the monopoly granted through a patent may be abused and hence provides for certain restrictions to its enjoyment. The grant of a compulsory license is one such restriction imposed on the absolute exploitation of a patent(Khadar, 2007). Article 31 of the TRIPS agreement provides for a “compulsory license”; however, the term is not expressly mentioned. Compulsory licensing is when a government grants a third party the permission, for other uses, without the authorization of the patent holder, of an endorsement to produce a patented product or process. Patent law provides that a patent is a written document issued by the Intellectual Property Rights Office and on the basis of which a third party makes use of a patented work without the consent of the patent owner. The compulsory license acts to restrain the exercise of private rights of the patentee in the public interest. The compulsory license is one mechanism through which governments limit the private power that resides in the grant of patents. It acknowledges that in various contexts the public interest in having technical knowledge more immediately accessible should take precedence over other patent interests (UNCTAD/ICTSD, 2005).

Compulsory licenses are granted by governments that thereby substitute their authority for the consent of the patent holder. Compulsory licenses are administrative contracts(De Carvalho, 2002). The compulsory licenses may be granted to two categories of users: the government or third parties authorized by the government and private third parties. The problem with compulsory licenses is that they harm both patent holders and the countries where they are granted. First, on the patentees' side, compulsory licenses deny their basic right: the right to say "no." Second, on the side of the countries granting the licenses, they have the consequence of discouraging any attempt to establish an independent, research-based industry that may meet the demands of the local market, and two factors contribute to this. Where technology is easily copied, compulsory licenses will kill any initiative to use creation in the development of new products (De Carvalho, 2002).

A big number of countries have includedd in their national legislation provisions that allow the government or third parties, under certain circumstances and conditions, to use a patented invention or discovery without the authorization of the patent holder. Such provisions differ from other exceptions, since, while the injunctive relief is significantly limited, the right to remuneration for that use is maintained. In general, those provisions are known as an instrument to prevent abuses of the exclusivity inherent in the patent rights. They are also considered tools to ensure that the patent system contributes to the promotion of innovation in a competitive environment and to the transfer and spreading of technology, meeting the objectives of the system and responding to the public interest at large. They are also seen as safeguards for governments to ensure national security and to respond to national emergencies(WIPO, 2010). In order to meet such objectives, national laws contain various conditions and grounds for granting compulsory licenses, taking into account the interests of various stakeholders, including the right holder, third parties, and the public at large.

The WTO Members have to comply with the circumstances and conditions set out by Article 31 of the TRIPS Agreement and are bound by the Decision of the General Council of August 30, 2003, on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. Therefore, the national legislation often contains provisions that are imported from Article 31 of the TRIPS Agreement. In Afghanistan, compulsory licensing is governed by article 25. The provisions for compulsory licenses are made to prevent the abuse of patents as a monopoly and to make the way for commercial exploitation of the invention by interested persons.

5. Government use of patent

A part from compulsory licensing In article 31 of the TRIPS agreement, there is a provision for the use of a patent without permission by the government in similar circumstances as third-party compulsory licensing. This provision requires authorization to be given by the controller to a government department or a contractor for the utilization of the patent, without the patentee's permission. However, government use is usually associated with public non-commercial uses by the government .

A large number of countries include in their national legislation provisions that allow the government, under certain circumstances and conditions, to use a patented invention or discovery without the authorization of the patent holder. Such provisions differ from other exceptions, since, while the injunctive relief is significantly limited, the right to remuneration for that use is maintained. In general, those provisions are considered as an instrument to prevent abuses of the exclusivity inherent in the patent rights. They are also considered tools to ensure that the patent system contributes to the promotion of innovation in a competitive environment and to the transfer and spreading of technology, meeting the objectives of the system and responding to the public interest at large. They are also seen as safeguards for governments to ensure national security and to respond to national emergencies(WIPO, 2010). Afghanistan's patent law provides compulsory licensing but does not make provision for the government use.

6. Non-commercial use of patent and acts for teaching

There is a good deal to be said that a patent provides a monopoly over commercial activity but not extending so far as to catch non-commercial activity. Thus, it is common that the exclusive right of patent does not extend to third parties' activities that are performed for non-commercial purposes only. In some countries, the exclusive right conferred by a patent is limited to prevent the use of the patented invention by authorized third parties for commercial or industrial activities. In some other countries, the exclusive right conferred by a patent includes all kinds of activities by unauthorized third parties, but an explicit exception is provided so that the patent right does not extend to personal or non-commercial activities.

Similarly, a large number of countries exclude acts for teaching from the scope of the patent right so that teachers can use patented inventions or discoveries for educational purposes without having to fear infringing the patent.

7. Experimental use and scientific research

The experimental use is one of the most important exceptions to patent rights, and it grew up out of the concern that patent rights should not hinder the "bona fide" experiments and scientific processes. This form of exception permits third parties to carry out experimental or scientific activities relating to the subject matter of the patent without infringing the patentee's right(Gupta, 2019). Research exemption permits use of a patented invention for experimental purposes without infringing the rights of the patentee. The objective is to promote research and development in the country as well as to ensure that patent rights must not impede or hinder higher education and research. The exception as provided is for the purposes of experiment or research, which includes imparting instructions to pupils. There is no limitation to the scope and extent of research and experimentation (Lenin and Rohatgi, 2015).

A large number of countries provided "research exemption or experimental use" either in their law or through case law in the common law countries. In general, the research exemption enables researchers to examine the stated effects of patented inventions or discoveries and improve such patented inventions or discoveries without having to fear infringing the patent. Such a contribution to a positive environment for research activities is expected to add to the development of technologies, which is exactly one of the objectives of the patent system(WIPO, 2010). In the *Canada-Patent Protection of Pharmaceutical Product* case (DS114), the WTO Dispute Settlement Panel referred to the 'research exemption' in conjunction with its ruling on Article 30 of the TRIPS Agreement:

"We may take as an illustration one of the most widely adopted Article 30 types of exceptions in national legislation. The exception is the use of the patented product or process for scientific experimentation, during the period of the patent and without consent, is not an infringement. It is often argued that research exception is based on the notion that a key public policy purpose underlying patent laws is to facilitate the spreading and advancement of technical knowledge and that allowing the patent owner to prevent experimental use during the period of the patent would frustrate part of the purpose of the requirement that the nature of the invention be disclosed to the public. To the contrary, the argument concludes, under the policy of the patent laws, both society and the scientist have a "legitimate interest" in using the patent disclosure to support the advance of science and technology. While the Panel draws no conclusion about the correctness of any such national exceptions in terms of Article 30 of the TRIPS Agreement, it does adopt the general meaning of the term "legitimate interests" contained in legal analysis of this type."

Various types of activities that might be considered to fall within this exception include experimenting on an invention or discovery to see how it works or to test it against the disclosure that the patentee made in the patent application, experimentation on the invention to "design around" it (in order to develop a functional equivalent that does not infringe the patent) or improve upon the patented invention, and "blue sky" academic interest (Garrison, 2019). notwithstanding such exception, improving the patented invention or discoveries and contributing to a positive environment for research activities is expected to add to the development of technologies, which is precisely one of the objectives of the patent system, but Afghanistan's patent law does not enumerate the excremental use as an exception to patent rights.

8. Bolar exception

Another exception known at the time of the negotiation of the TRIPS agreement is the "Bolar exception.". It's accepted that the bolar exception and research exemption are excluded from rights conferred on a patent holder under Article 28 of the TRIPS agreement .

The Bolar exception originated in the United States; the exemption came into prominence in the case of Roche Products, Inc. v. Bolar Pharmaceuticals Co., Inc. The decision of the court led to a change in the law that addressed Bolar's concerns and culminated in the passing of the Hatch-Waxman Act. Although the court did not decide in favor of Bolar, the Hatch-Waxman Act set out to strike a delicate balance between promoting inventions and the competing interests of brand-name drug companies and generic drug companies to benefit the public by the provision of better access to drugs. The intent of the Hatch-Waxman Act was not only to encourage immediate access to generic drugs but also to ensure their efficiency for their intended purposes. This allowed early Food and Drug Administration (FDA) approval for generic drugs in order to ensure that generics immediately become accessible once the brand-name drug companies' patents either expired or were found invalid or not infringed upon, thereby giving generic drug companies authorization to partially evade patent restrictions (Oloko, 2014).

An important requirement for new medicines is typically that they obtain marketing approval from a regulatory authority before they can be sold. To obtain this approval, it is necessary to demonstrate that the medicine is, for example, safe and effective. In order to prove this to the satisfaction of the regulatory authority, it will usually be necessary to carry out a number of tests and trials and to provide the data from these to the authority. It is often very expensive to carry out this activity (Erfanmanesh, abbasi and Zahedi, 2015). Where an "originator" version of a medicine has already been registered, there is the possibility that a generic version of that medicine will be sought to be registered as well. A tremendously important distinction may be made between these two cases. Instead of requiring that the full set of data provided for the originator medicine be repeated for the generic medicine, it may suffice that it is demonstrated that the generic medicine is equivalent to the originator medicine. This is a far less stringent requirement, which does not, for example, require repeating all the clinical trials. It is often the case now that generic medicines may be registered on this basis(Garrison, 2006).

The Bolar exception is a research exception that enables manufacturers of generic drugs to prepare production and regulatory processes necessary to enable marketing of the generic version of the patented drug as soon as the patent expires. It prevents a situation in which the patent holder will continue to have undue advantage and extend its market dominance. It also reduces the time within which the generic version of a drug gets to the market. Unfortunately, there is no such provision in Afghanistan's patent law.

PATENT RIGHT—A RIGHT WITH COMPETITION LIMITATIONS

The monopolistic behavior of the patent rights gets further restricted by competition laws' limitations in the sense that the patent rights in their underlying subject matter, the invention, get limited by the competition law provisions of the country against their being exercised in the manner operating as various restrictive trade practices and hence as anti-competition. Clearly, there ought to be a balancing of the interests of such persons exercising certain exclusive rights conferred on them under the Patent Law and the need to preserve the process of competition free from restrictive trade practices so resulting in the eventuality of such persons imposing anti-competitive terms and conditions under an agreement with the buyers or licensees, etc., of their patent rights-bearing commodities.' (Ramappa, 2009).

The aim of patent laws is to prevent the imitation of patented products and processes and thus complement competition policies in that they contribute to fair market behavior. On the other hand, competition laws may limit patent rights in that patentees may be barred from abusing their rights. In sum, experience shows that too high or too low protection of both patent rights and competition may lead to trade distortions. A balance has thus to be found between competition policy and patent rights, and this balance must achieve the goal of stopping abuses of patent rights without annulling the reward provided for by the patent system when appropriately used(WIPO, 2019). The Paris Convention for the Protection of Industrial Property, as well as the TRIPS Agreement, recognizes the underlying interplay between patent law and competition laws and offers clues as to how the overlaps may be addressed. Specifically, Article 5(A)(2) of the Paris Convention envisages the grant of compulsory licenses to prevent any abuses that might result from granting monopolistic patent rights. Similarly, Articles 8.2, 40, and 40.2 of TRIPs allow member countries to take appropriate measures to prevent the abuse of intellectual property rights through practices that unreasonably restrain trade or adversely affect the international transfer of technology (Jha, 2019).

The TRIPS agreement permits member states to take appropriate measures to curb "abuse of intellectual property rights having an adverse effect on competition in the relevant market." In the context of Afghanistan, such balancing competition law provides that "the intellectual property right holder and privileges resulting from intellectual property should not incur violation of provisions of articles 7 to 9 of this law." Articles 7, 8, and 9 of competition law prohibit anti-competitive agreements, unfair commercial practices, and abuse of dominant positions, respectively. Competition law eliminates situations where intellectual property can be used to create a monopoly. Thus, competition law operates as a tool to prevent the anti-competitive practices of the owners of the intellectual property rights, and thereby of the patent rights, permitting them only to take steps to restrain any infringement of any of those rights (including patents) or to impose reasonable conditions as may be necessary for protecting such rights.

PATENT RIGHT—A RIGHT EXHAUSTED ON EXHAUSTION

Exhaustion in the context of exclusive rights in simple terms means complete loss of such rights. In a legal sense, it means that all exclusive rights, except the otherwise excepted exclusive right or rights, of commercial activities with respect to its underlying commodity get completely lost, exhausted, terminated, or consumed and, therefore, cease to exist on the first authorized but unconditional sale of that commodity, thereby rendering its owner, in principle, to be no more the owner of those rights to exclude, prevent, prohibit, or stop an independent third person from exploiting, i.e., re-selling, redistributing, or any other sealings of that commodity, even without the authority or consent of the so-called *nonest* owner. 'The first sale of the protected article, therefore, frees it from the protection of such rights', as Sullivan has put it(De Carrvalho, 2002). For once a washing machine has been sold, its buyer is free to do whatever he wishes to do with the machine without being controlled by the seller-owner.

The doctrine of exhaustion addresses the point at which the IPR holder's control over the good or service ceases. This termination of control is critical to the functioning of any market economy because it permits the free transfer of goods and services. Without an exhaustion doctrine, the original IPR holder would perpetually exercise control over the sale, transfer, or use of a good or service embodying an IPR and would control economic life (UNCTAD/ICTSD, 2005).

The exhaustion of rights doctrine is the 'principle that once the owner of an intellectual property right has placed a product covered by that right into the marketplace, the right to control how the product is resold in the marketplace within that internal market is lost'. The basic principle behind the doctrine of exhaustion is that the rights of an intellectual property rights holder do not extend. The boundary of the rights is the point at which the rights are deemed to be exhausted, i.e., terminated (Andrew, 2008).

Whatever may be the rationale, as stated above, for the principle of exhaustion of IPR, it is worth pointing out that exhaustion is purely a legal concept, the key element of which is the consent of the owner, which consequently postulates that for exhaustion to occur there must be in existence (i) an IPR—the exclusive rights on the intellectual property, (ii) a legitimate commercial operation, i.e., valid sale and purchase, and (iii) a free will of the owner of the rights for such commercial operation(De Carvalho, 2002).

Depending on the territory in question, exhaustion of all the property rights with respect to its underlying commodity may be national, international, or regional . applying the general notion of the doctrine of exhaustion of property rights in the context of the IPR of the denomination of patent, it could be said that it imposes certain limitations on articles 23.1 and 23.2, which confer the patentee's exclusive right of activities with respect to the underlying patented invention—be it a patented product or patented process and the product obtained directly by that process. Because the notion of the "exhaustion of patent rights" means that all exclusive rights of commercial activities of the patentee with respect to the patented invention get exhausted, terminated, or consumed on the first authorized but unconditional sale of that invention. In other words, the patent holder cannot *control* any third party's activities with respect to the patented invention that otherwise constitute articles 23.1 and 23.2, which confer the patentee's exclusive rights to activities like making, using, selling, offering for sale, or importing for those purposes the said invention once it is authorized and unconditionally sold(Parsa Manush and Mujadidi, 2024).

Exhaustion of patent rights with respect to a patented invention sold may either, like in the case of the exhaustion of any other rights, be a national, international, or regional exhaustion depending on the territory in question. Thus, by the national exhaustion of the patent rights, we mean the exhaustion or termination of all the rights on the first authorized but unconditional sale of the underlying patented invention within a nation so that its subsequent resale, redistribution, or other dealings could remain confined within the territorial limit of that nation. Regional exhaustion of the patent rights means the exhaustion or termination of all the rights on the first authorized but unconditional sale of the underlying patented invention within a regional block of certain nations as its members, such as the European Union (EU) and the South Asian Region Countries (SARC), so that its subsequent resale, redistribution, or other dealings could be confined within the territorial limit of that region. While the international exhaustion of the patent rights means the exhaustion or termination of all the patent rights on the first authorized but unconditional sale of the underlying patented invention within a foreign nation, a natural corollary of the doctrine of exhaustion is 'parallel imports'.

A parallel importation is an import of non-counterfeit branded goods without permission of the brand owner. Parallel import takes place when a branded good sold by the brand owner in a foreign country is exported by a buyer to another country wherein the same brand, duly registered, is held by a person other than the importer (Lenin and Rohatgi, 2015). The importance of this principle lies in the fact that they permit the importation of cheaper and good-quality products. Under TRIPS, article 6 in view of articles 3 & 4 pertains to the principle of exhaustion and parallel imports. Afghanistan's patent law does not make provisions for compliance with these provisions of the TRIPS agreement.

CONCLUSION

The examination of patent rights exceptions and limitations within the framework of Afghanistna's law, in light of the TRIPS Agreement, reveals a complex interplay between international obligations and domestic legal frameworks. Afghanistan, as a member of the WTO, is bound by the TRIPS Agreement, which mandates the protection of intellectual property rights while allowing certain flexibilities to safeguard public interests. The research highlights that while Afghanistan has made strides in aligning its patent laws with TRIPS, significant gaps remain in effectively implementing exceptions and limitations that balance patent holders' rights with broader societal needs. The Afghanistan's legal framework currently lacks detailed provisions for compulsory licensing, parallel imports, and other TRIPS-compliant flexibilities that could address pressing public health concerns and promote innovation. Therefor, the patent law must be amended in the light of following suggestion:

1. Patent act only excluded those exception set forth by the TRIPS agreement. It is suggested that the following subject matter should be added as exceptions of patentability as part of amendment of patent act.
   a. Method of agriculture or horticulture;
   b. Mathematical methods and computer programs;
   c. Literary, dramatic, musical or artistic work etc.;
   d. Traditional knowledge;
   e. Invention relating to nuclear energy.
2. Certain flexibilities in TRIPS agreement which mitigate the effect of the patent provision are absent in patent act. For instance, exhaustion of rights and parallel imports. It is suggested that a system of international exhaustion should be adopted.
3. The Bolar exception needs to be included as part of the amendment to Afghanistan's patent act. As it allows early regulatory approval for generic drugs and by so doing, ensures that patented drugs immediately become accessible at the expiration of the brand name drug companies' patents. Universally accepted exception such as private and non-commercial use, experimental use, research and teaching purposes should be specifically provided for, in the patent act.
4. A part from compulsory licensing in article 31 of TRIPS agreement there is a provision for the use of patent without permission by the government in similar circumstances to third party compulsory licensing. In patent act such provisions is absent. It is suggested to be include as part of amendment provisions which allows the government, under certain circumstances and conditions, to use a patented product or process without authorization of the patent holder.
5. The provision relating to compulsory license are not completely comply with the requirement of TRIPS agreement. It's suggested that the provisions should suitably modifies and include the requirement of paragraph (k) and (l) of article 31 of TRIPS agreement as well as the requirement of paragraph 6 of Doha declaration on TRIPS agreement and public health.

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