CHAPTER 1
INTRODUCTION

Intellectual property is a class of property emanating primarily from the activities of human mind. The agreement on Trade related aspects of Intellectual Property Rights (popularly known as TRIPS), part of the multilateral agreement establishing the World Trade Organisation (referred as WTO) came into force on 1st January 1995. The compliance of this treaty gave raise to various issues such as whether the Indian Constitution empowers the executive to enter into such a treaty which involves the change of the very obligation it imposed on the Parliament in respect of the Sovereign, Democratic and Socialistic India. The various provisions in TRIPS requires the member nation (India) to take steps to modify the Municipal law to be in conformity with TRIPS which paved the way for sacrifice of many valuable principles enshrined in the Constitution and Municipal law of our Nation. In view of the distance of time and the reality of the situation the Nation at large should formulate clear understanding of the possible opportunities and pitfalls for seeking protection and take the challenge in framing Municipal Laws in the light of Article 7 & 8 of the TRIPS agreement so as to continue to serve the welfare of our Nation/people.
TRIPS is a comprehensive multilateral Treaty on intellectual property rights commonly known as IPRs. Historically patents for invention, designs for industrial designs and trade mark for marketing the products were collectively known as industrial property. These three forms of industrial property together with copyright in literary works collectively called as intellectual property in the present treaty. However the agreement on TRIPS introduced in Uruguay Round negotiations, which gave birth to WTO on 1st January 1995 contains three more rights so as to make it seven categories of idea of IPR which are as follows:

1. Copyright and the related rights (Right of performers producers of sound recording and broad casting organisations).
2. Trade Marks including sales Marks, Service Marks.
3. Geographical indications including appellations of origin.
4. Industrial designs.
5. Patents including protection of new varieties of plant.
6. The layout designs topographies of integrated circuits.
7. The undisclosed information including trade secrets and test data.

The basic rationale and objective for a State granting legal rights for the protection and enforcement of IPRs is that the recognition and rewarding of Intellectual property (IP) will stimulate creative and innovative activities, encouragement of investment in
research and development and thereby promote the technological development and dissemination of knowledge to the welfare of the country. Therefore the granting of IPRs is based on the degree of balancing the conflicting interest between the public good and private containment of prices of essential goods, development and dissemination of technology of domestic industries against foreign monopolies and to create an atmosphere of sustainable growth of the countries economy and welfare as a whole. Its rights are national in jurisdiction. Therefore the creator of IP must seek and obtain IPR in each and every country.

The main objective of the provisions of TRIPS are:-

i) To fix the minimum standard of protection to be provided by each member to the agreement.

ii) To provide for the enforcement of IPR in their municipal law.

iii) Failure to provide the minimum standard of protection and the enforcement of the IPRs will lead to face the Dispute Settlement Undertaking constituted under WTO itself.

iv) To provide national treatment to all persons.

v) To provide most favoured nation treatment to all member countries.

The main objectives of TRIPS as mentioned in Article 7 of the agreement states that the protection and enforcement of intellectual property rights should contribute to the promotion of technological
innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations.

The principles of the TRIPS agreement as enshrined in the Article 8 of the agreement provides for adoption of measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement. While carrying out the requirement of TRIPS, the sovereign functions of the Parliament and the basic objectives enshrined in the constitution that is the basic structure of the Constitution is not compatible and therefore an analysis in the present study.

Making treaties and entering into international agreements are usually the wisdom of the Executive and are duly approved by the Parliament and ratified by the President as per the requirement under the Constitution. As per the Articles in the Constitution of India and the nature of treaties entered into and ratified by our Parliament it may be observed that it is a give and take privileges and concession between the Nation in the national level to maintain cordial relationship between them. Most of the treaties that entered into earlier do not warrant the amendment of Municipal laws or changing the Government policies in formulating its economic reforms.
industrial policy and its welfare legislations passed under its peculiar circumstances in conformity to the provisions of Treaty.

However the agreement on TRIPS in WTO that is per se contains a body of rules and regulation, implementing machinery and monitoring of such implementation, self-enforcing global trade and services etc. of agreements, are enforceable within the Municipal Law of a member country since the amendment is mandatory. Further the law making power of the Parliament, the economic reforms and policy making of the Government is subjected to TRIPS. The provisions of TRIPS as approved are under treaty obligation and thereby binding on the nation to amend the municipal law. At this juncture it is worth mentioning that TRIPS does not stop with the approval/ratification by Parliament/President but also mandates the relevant domestic laws to be amended in conformity with the treaty provision. In effect by signing this Treaty-TRIPS the economic policies of the Government, the welfare measures for the development of domestic nationals/industries and the laws are to be changed without any discussion as to the requirement or effect of those amendment in domestic condition. It is a treaty of treaties. Many of the provisions are not compatible with the letter and spirit of the Indian Constitution.

The marked difference between traditional police states and modern welfare states is the obligation accepted by the governments to provide welfare measures to its citizens. Thus, the issues of welfare
of the citizens are sovereign functions of modern day governments. Max Huber in Island of Palmas Arbitration mentions sovereignty in relation to States means independence, in regard to a portion of the globe, is the right to exercise therein to the exclusion of any other State, the functions of a State. Taking this premise, the UNITED NATION CHARTER (article 2(7)) has proclaimed that the members of the UN should abstain from interfering into the domestic matters of other members of the UN. The specialized agencies of the UN had taken up the non-interference as the rule and have contributed to the welfare of the States. Thus the sanctity of the State’s right to administer the government and its people is an absolute right.

Fulfilling international obligations is an essential condition for a political community to be recognized as a State in International law. J. G. Starke in his book observes, “Any state in the modern times has to acknowledge and accept customary restraints on it sovereignty in as much as no State can exist independently and without reference to other States”. However, the pertinent question remains whether a State could accept obligations which would alter the sovereign functions of the State. In case, where a State ratifies a treaty, which imposes obligations to change its sovereign functions, the issue raised is that to what extent a State should harmonize between its sovereign functions and international obligations.
The CONSTITUTION of Our Country is the Foremost Legal, Social & Political Document. The PREAMBLE to our constitution clearly declare and affirm that our Nation shall be a Sovereign, Socialist, Secular, Democratic Republic and to Secure to all its citizens Justice, Social, Political and Economical liberty of thought, expression, belief, faith and worship, equality of status and opportunities and to promote among themselves fraternity assuring the dignity of the individual and the unity and integrity of the nation.

The Constitution further guarantees certain rights as fundamental that cannot be touched upon by any person/body. So also it contains certain duties and obligations that are fundamental for the Government in its governance of the Nation.

Further the Supreme Court of India that is the highest judicial forum and the custodian of the Constitution repeatedly held in number of cases that the basic structure of the Constitution couldn't be altered.

In view of the clear-cut mandate of constitution with social welfare philosophy and the Supreme Court declaration that the basic structure of the Constitution cannot be altered, the TRIPS provisions as to be accepted in Toto and without further negotiations is one major issue before the parliament for acceptance without discussion.
With the trade liberalisations and globalisations of trade, services, IPRs and other related laws and the coming into force of WTO which contains various multilateral agreement require a change of economic policy, welfare measures and municipal law which is inevitable. As per the provisions of TRIPS, the municipal law requires immediate amendment and new laws are to be enacted where it is not available so as to conform to the provisions of TRIPS.

Our nation is a signatory to the agreement establishing the WTO, which has come into existence on 1st January 1995 as the successor to General Agreement on Trade and Tariffs 1948(GATT). Our nation was a founder member of GATT 1947 as well in 1994. There are 142 countries that are members in WTO. To be a member of WTO every country has to accept and abide by all the multilateral trade agreements administered by WTO without any exception or reservation. TRIPS is one of the multilateral trade agreements administered by the WTO. We are therefore committed to abide by all the provisions of the TRIPS agreement. Therefore the study of the provisions of TRIPS and the implication both in law and on our country as a whole is an utmost important factor.

As may be seen from the provisions of TRIPS contain in Article 7 and 8 as the objectives of the agreement which clearly confer upon the member countries that while framing their Municipal Law to conform to TRIPS provisions they can give due importance that the
conferment of the protection and enforcement of IPR should contribute dissemination of knowledge, conducive to their social and economic welfare and to balance of rights and obligation.

Therefore it is the duty of government while enact or amend the Municipal Law should incorporate important provision to be invoked as and when the social need and welfare of the nation demand arose.

Having become a member of WTO, the Government should take all initiatives to propagate the provisions of the Treaty and the importance of safeguarding our Traditional Knowledge and the material resources available in our country. The Government should create a separate wing to look into the concern and pitfalls in implementing the provisions of TRIPS and collect materials in this regard and draw the member countries of WTO to put forth their grievances in a block representation in the next meeting. It is also important for Government to create records for our traditional knowledge and place it in public domain so that no body can claim it as their IPRs.

A case Study of India is done, as India is a Signatory to the TRIPS agreement. An analysis of the Indian legal system is done to study the extent to which the sovereign functions of Indian government and its international obligations could be balanced. The impact on the Indian economic, social condition, cultural sovereignty
is to be analyzed to safeguard the nation/ people and their inherit right to claim such protection.

The study is restricted to intellectual property rights relating to Industrial property.

**Aim and Objectives :-**

The aims of the present thesis are to:

1. Understand the necessity and validity of treaties which would encroach into Sovereign functions of States.

2. Study the repercussions of ratifying treaties that would impose obligations to alter the sovereign functions of the state.

3. The impact on the Indian economic, social condition, cultural sovereignty.

**Its objectives are:-**

1. To describe the historical development of Intellectual property system.

2. To provide an overview of the international Conventions in respect of Intellectual Property rights.

3. To analyse the provisions of TRIPS as to their validity.

4. To equate the IPRs in TRIPS and rights guaranteed and the obligation enshrined in Indian Constitution
5. To study the opportunities and Challenges under TRIPS provisions for India.

6. To explain the actions to be taken by India to maximize the benefits from TRIPS.

7. To describe the steps for harmonizing the Indian Legal system with TRIPS provisions.

**Methodology:-**

The data at hand was classified based on the purpose. Historical method and analytical method had been used to classify and interpret the data.

**SOURCE OF MATERIAL:-**

The data collected for the purposes of research included primary data and secondary data. The primary data included the bare acts of the conventions and Constitution of India. Interviews with experts were also conducted for collecting primary data.

The secondary data was collected from books and journals from the following libraries.

1. Madras University Library.


4. Research and Information System for the Non Aligned and
   Other Developed Countries Library.

5. Ragiv Gandhi Institute For Contemporary Studies.


7. Indian Law Institute of New Delhi.

8. Indian Council for Research on International Economic
   Relations.

9. Center for Study of global Trade System and Development

10. High Court Advocate Association Library.

11. High Court Bar Association Library.

12. High Court Judges Library.

**Chapterisation:-**

1. The impact of TRIPS PROVISIONS on INDIA was discussed with
   specific reference to fundamental rights guaranteed under our
   Constitution and the duties it imposed on the administrators, efforts
   of the Government to gain benefits to our nation and action to be
   taken in this regard in separate chapters as follows.


3. International Conventions in respect of Intellectual Property
   Rights.

4. TRIPS provisions in the WTO Agreement.
5. TRIPS provisions in WTO and Indian Constitution with particular reference to fundamental rights.

6. TRIPS provisions in WTO and Indian Constitution with particular reference to Directive Principles of State Policy.

7. Opportunities and challenges under TRIPS provisions IN WTO for India

8. Actions to be taken by India to maximize the benefits from TRIPS provisions in WTO.

9. Harmonisation of Indian legal system particularly economic legislation.

The object of the present thesis is to study the provisions of TRIPS in an analytical way and compare it for incorporation of required standard of rules and its protection in Municipal Law so as to see how far it is possible and how far it complies not only against the very basis of the Constitutional principles enshrined in ours Constitution but also the present economy of the nation. Whilst, steps have to be taken to meet the challenges posed by TRIPS and evolve strategies to maximize the benefits to our nation.