



A TO Z OF TRIPS: AN AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

The Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994 was the most crucial turning point in the history of Intellectual Property Rights. It was negotiated in order to reduce distortions and impediments to international trade law and to provide adequate protective measures. Part I of the Agreement sets out the basic principles to protect intellectual property. As a part of WTO Agreement, the implementation of the TRIPS patent regime was the primary requirement in order to enable participation in multilateral trading system. The researcher has given an in depth view of the factors responsible for and outcomes of the TRIPS Agreement.

Introduction

Emergence of the TRIPS Agreement

The Agreement on Trade related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS), together with the 1967 Stockholm Conference that adopted the revised Berne and the Paris Convention which created the World Intellectual Property Organization (WIPO)

can be termed as the most significant milestone in the development of intellectual property rights in this century. It not only widened the scope of industrial property but also made provision to cover up for failed treaties. Thus, its scope was much vast than any of the erstwhile international agreement. The real worth of the TRIPS agreement was due to its success in enshrining very detailed rules on the issue of enforcement.

For an understanding of the progression of the TRIPS, it is necessary that we should trace the history of intellectual property rights and the vital role played by GATT in enhancing its protection. As already discussed the initiative for establishing ITO was launched in 1946 by a decision of the UN Council for Economic and Social Affairs (ECOSOC).

A committee comprised of representatives from 18 countries were asked to draft the ITO charter for the purpose of promoting the expansion of trade and protection exchange and consumption of goods.¹ Ultimately a couple of conferences lead to the signing of a treaty on October 30, 1947 adopting GATT at Geneva. Failure to adopt ITO charter led to the restructuring of the GATT and its Secretariat from 1948 till the establishing of the World Trade Organization (WTO) on January 1, 1995. The GATT was applied on a provisional basis as a covenant amongst a number of governments. Thus, it was applied to government not citizens and was not self-executing. The interim committee of ITO was the employer of the GATT secretariat staff.

GATT allows contracting parties to adopt or enforce measures which are



necessary to secure compliance with laws or regulations which are not consistent with the provision of this agreement including those relating to the protection of patents, trademarks, copyright etc.¹ The Provisions were invoked in two disputes brought before GATT panels. Apart from this, WIPO also administered two principle international intellectual property covenants- The Paris Convention for the Protection of Industrial Property and the Berne Convention for protection of Literary and Artistic Works. WIPO also administers a number of agreements designed to facilitate acquisition of multi country production for industrial property.¹ But the absence of detailed rules on enforcement of rights in front of national judicial administrative authorities and the absence of binding and effective dispute settlement mechanism were main flaws in the Paris and Berne Conventions. In addition to this the evolution of the world trading system, sky rocketing importance of intellectual property and technology changes, especially generally computerization and digital technology, required a serious updating of intellectual property rules.

The Uruguay Round

To remove the above said shortcomings and bring in new standards, the ministerial conference launched the Uruguay round of multilateral trade negotiations at Punta del est in September, 1986. The United States and Japan submitted proposal to the round's preparatory Committee to cover all intellectual property rights and their enforcement.¹ However Brazil and Argentina opposed the inclusion of it. The ministers included the item "Trade Related Aspect of

Intellectual Property Rights" including trade in counterfeit goods. This round was the broadest and most extensive multilateral agreement in the field of intellectual property. It covered the entire area and added enforcement, acquisition and most favored nation obligation to the existing rules. The negotiations had to essentially address the question of trade in counterfeit goods taking into account the work already done in the GATT.

The pressure on the developing countries to ratify GATT was immense. A powerful group of US chemical, pharmaceutical, computer, entertainment, publishing and electronic corporation lobbied with the US government¹ to introduce intellectual property issues into the multilateral trade negotiation under the GATT. The chairman of Pfizer, a US based pharmaceutical company, was considered the driving force behind this move. He was made the chairman of the Advisory committee for trade negotiations in 1981 to shape the US trade policy. 13 major US corporations formed the Intellectual Property Rights Committee (IPRC) to set out an agenda for what he wanted to achieve through the international trade negotiation. To enhance the pressure US enacted the Trade and Competitiveness Act, 1988 with an aim to promote US exports and reduce US trade deficit. It invoked section 301 of the Trade Act of 1974 that authorized the United State Trade Representative (USTR) to identify countries that deny adequate and effective protection of IPRS, identify priority countries that are IPR transgressors and do not make progress in negotiations with USTR and initiate accelerated section 301 investigations on practices of identified



priority countries.¹ On May 25th, 1989, office of the USTR, identified 17 countries on intellectual property watch list and 8 countries on Priority Watch List."¹ India was among the later and asked for improved and adequate patent protection for all classes of inventions under USTR's accelerated action plan."¹ Similar the US Pharmaceuticals Manufacturers Association (PMP) filed a complaint on Brazil patent regime for pharmaceuticals and was declared unreasonable. Chile, Argentina and Venezuela were also targeted in similar way. All these countries ultimately adopted law or prepared bill that met US demands. These legislative changes were introduced merely to avoid trade sanctions imposed by US.

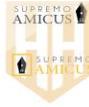
The importance of technology in the development of international trade was considered as primary reason that led to the incorporation of Intellectual Property Rights in the GATT. Apart from this increasing interface between trade, technology and Intellectual Property Rights, the developing countries were continuously arguing against the inclusion of Intellectual Property Rights in GATT. Technology was considered as a strategic factor for national development during 1960s and 1970s and by the year 1980 it evolved as a strategic element to control international markets.¹ The internationalization of high technology and its rapid diffusion created diverse conditions, and the developed countries argued for its effective regulation. The United States sought the inclusion on the ground that failure to respect and enforce Intellectual Property Rights was harmful to trade relations and that such infringements amounted to permitting the existence of NTBS (Non-tariff Barrier) in this area.¹

Most of the developed countries were in consonance with the views expressed by US however Japan, EC and Nordic countries showed some differences. Developing countries argued that setting of norms and standards was beyond the competence of GATT. It is to be noted that at a time when some developing countries had turned from import substitution to more aggressive export oriented policies, the importance of creating a comparative advantage and acquiring technological competitiveness was paramount.¹ This realization saw these states approach GATT and IPRS. The reduction of dependency and a more active participation in technological change along with realization of potentialities of strong science base marked their response to protect Intellectual Property Rights.

TRIPS Negotiations: Main Approaches

Developing Countries

The TRIPS Negotiating Group met twice in July 1989 to discuss, first the applicability of basic GATT principles to intellectual property and secondly the provision of adequate standards regarding the availability, scope and use of intellectual property rights.¹ There were two broad approaches in the TRIPS negotiations. A number of developed countries had made written submissions to the Negotiating Group on TRIPS notably the United States, Japan, Switzerland and EC. These countries stressed that inadequate and discriminatory protection of intellectual property rights constituted a major distortion to trade and should be dealt within the framework of GATT. The developing countries on the other hand maintained that it was not within the mandate of GATT or Negotiating group



to consider the protection of Intellectual Property Rights by elaborating upon substantive norms and standards compulsory for all the states.

India and Brazil were the front runners to oppose the GATT negotiations on TRIPS. The fundamental issues that Brazil raised in the discussions with the negotiating group were:¹

- ❖ The extent to which rigid and excessive protection of intellectual property rights impeded the access to latest technological developments, restricting the participation of developing countries in international trade
- ❖ The extent to which the abusive use of intellectual property rights gave rise to restrictions and distortions in international trade.
- ❖ The implications that a rigid system of intellectual property rights protection held with respect to international trade.

In nutshell, the Brazilian submission restricted its view to the consideration of the trade related and developmental aspects of intellectual property rights. They argued that such a rigid monopoly situation created by excessive protection of Intellectual Property Rights would be a serious restriction on trade.

The Indian submission also set out its views on the provision of adequate standards and principles concerning the availability, scope and use of trade related aspects. India identified some particular areas like working of patents, compulsory licenses; product verses process patents,

term of patent and exclusions from patentability as crucial in achieving the development objectives.¹ India maintained that member states should be given freedom to tune their intellectual property protection system with their own needs and conditions. India's basic approach may be broadly described as follows:¹

- The evolution of patent system both in industrialized and developing countries would clearly establish the correlation between the economic, industrial and nature and technological development of country with the nature extent of patent protection granted.
- Patent system is an instrument of national economic policy for the industrialization and technological advancement of a country.
- There should be no attempt at the harmonization of patent laws of the industrialized and developing countries nor there did any imposition on the developing countries as to the standards and principles relevant to develop countries.
- Patent law must focus equally on the duties and obligations of the patent owner.
- Giving due consideration to sectors of critical importance to developing countries like food production, nutrition health care, poverty alleviation and disease prevention.

The essentials of the position taken by India in general, reflected a view of patent protection that could be identified in its own patent legislation. These flexible



features of the Indian patent law were put forth before the Negotiating Group for a more favourable patent regime for developing countries.

Developed Countries

United States

The developed countries, notably the United States, Japan, EC and Switzerland made written submissions to the Negotiating Group on TRIPS. The position of the United States represented the interests of the MNC's and sought to create a favorable domestic and international environment for their smooth working. Thus, its proposals reflected the ideas put forward by the MNCs from time to time. According to them, the protection of intellectual property rights fostered creative activity and innovation and encouraged investment in the commercialization of new ideas and technology. Its main focus was to change the relationship between trade and deficiencies in the protection of intellectual property rights, the identification of deficiencies in intellectual property rights protection and the review of existing disciplines in the GATT and other international convention. In its views, the deficiencies in the protection of Intellectual Property Rights distorted the trade in goods and reduced the value of concessions negotiated in the previous rounds of trade negotiations. The inadequacies identified by the US in the national laws included:¹

- (a) Total lack of patent or copyright laws.
- (b) A narrow scope of protection under intellectual property laws.

- (c) The term of protection was too short to permit the inventor time to test the product, market it and achieve adequate return on investment.
- (d) Misuse of compulsory licensing programs. The United States also regarded the lack of effective enforcement of national laws relating to intellectual property rights as a form of trade distortion.

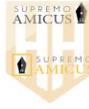
They stressed that the standards laid down in some international conventions were unacceptable as they failed to provide adequate protection to intellectual property rights. In the ultimate analysis, the US sought to create new standards and principles to provide adequate protection. As an immediate step, the US proposal even suggested that interested contacting parties should sign a draft Agreement on measures to discourage the importation of counterfeit goods without modification to the existing text.

European Communities

The European Community (EC) proposals identified trade related issues of intellectual property rights in three areas:¹

- (a) Inadequacies in the availability and scope of rights.
- (b) Inadequate procedures and remedies for the enforcement of such rights and
- (c) National laws which discriminated against imports in favour of domestic economic activity.

The proposal specified the legislative provisions in the patent laws of countries which resulted in inadequacies in protection



particularly relating to food, chemical and pharmaceutical products. Granting of process patent as opposed to product patent in chemical sector gives rise to 'counterfeiting.' The compulsory licensing of pharmaceutical patents of the product patented was also seen as a factor leading to trade distortion which could lead to a negative impact on the recovery of considerable investment needed to sustain innovation in the pharmaceutical sector. Another crucial aspect of discrimination was the 'preferential' treatment of activity on national territory i.e. rules which discriminate against activity abroad.¹ This deprived the European inventors of the possibility of obtaining a patent to which they would otherwise be entitled.

Japan

The Japanese proposal listed problems or cases caused by insufficient protection of intellectual property rights which could create impediments for legitimate trade. The proposal viewed the problem in two ways namely:¹

- (a) The problems resulting from discrepancies in the national intellectual property rights laws and
- (b) The problems concerning the enforcement of intellectual property rights.

More specifically, the Japanese proposal focused on the difficulties faced by Japanese entrepreneurs in getting adequate patent protection. The intellectual property law of Japan was revised in 1987 to incorporate all the major features of the international patent law.¹ Thus diversities in various national laws of member countries

were the chief component of Japanese proposal.

Nordic Countries (Finland, Iceland, Norway and Sweden)

The submission of the Nordic countries were focused on two issues concerning the trade related aspects of intellectual property rights namely:

- (a) Inadequate level of protection and
- (b) Adverse trade effects arising from national procedures.

Referring to the problems of inadequate protection, the submission referred to the inadequacies in the international conventions, such as lack of specific obligations on the extent to which intellectual property rights could be protected. Problems are also created by long periods while application for patent is pending and complexities of procedure. Therefore, the Nordic countries supported the need to address trade related aspect of intellectual property rights by developing rules and disciplines multilaterally.

Similar was the Swiss submission favouring negotiations for additional provisions in order to remedy distortions arising from insufficient level of protection of intellectual property. The Swiss submission attempted to equate the protection of physical aspects of goods and the intangible component of products. However, it could not explain in clear terms the exact nature of legal framework which could sub serve the concept of adequate protection of intellectual property. Thus, the major thrust of all the developed nations was a strong patent protection regime. Both the contentions of developed as well as



developing nations were put in form of two basic approaches A and B figuring in the 'chairman's report on the group of 'Negotiation on Goods' drafted by Chairman Lars Anell.¹

Conflict and Compromises

The submission made by both the developing and the developed countries clearly outlined the differences in approaches towards the redefining of regulatory mechanisms concerning intellectual property rights. Among developing countries only India and Brazil gave detailed proposals, however among developed the list was long. The fundamental differences between both the groups pertained to patentable subject matter, limitations on patentee's right, inadequate duration of protection and inadequate enforcement. As regards the main issue i.e. patentable subject matter the US model was accepted that used the phrase "all products and processes," and novelty, inventive step and industrial applicability as criteria of patentability.¹ A brief survey of proposal submitted by different group of countries clearly established the fact that the developed countries in order to protect their technological superiority wanted strict patent regime. These proposals went beyond the limits placed by the Paris Convention which did not make any attempt to define 'patentability' and 'patentable subject matter.'

The final agreement, sought to liberalize major sectors of the economic process except those concerning intellectual property rights. It was evident that the

proposals submitted by the developed countries primarily considered the interests of a few influential commercial groups particularly MNCs. The text of final act incorporated the proposals of developed countries. The removal of distinction between product and process patent was set to leave a far reaching impact on the pharmaceutical and Chemical sectors of many of the developed countries. Till very recently many of the developed countries were granting only process patents in the pharmaceutical sectors to achieve faster economic growth and to provide health care to all by maintaining low prices of drugs. But the draft reflected the negotiating objectives of the developed countries.

During the negotiations in December, 1991, Author Dunkel, Director General of GATT presented a set of proposals, popularly known as 'Dunkel' Proposal.¹ The 108 participating states were given time till January 13, 1992 to respond to the proposals. The final act was adopted in Marrakesh on April 15, 1994.¹

TRIPS – AN ANALYSIS

The Agreement on Trade Related Intellectual Property Rights (TRIPS), signed at Marrakesh was an annex to the agreement establishing the World Trade Organization (WTO). The agreement established a link between international trade and international intellectual property regime. TRIPS is said to be comprehensive agreement on intellectual property dealing with all types of intellectual property rights. The establishment of the new regime had put an end to the sole role of WIPO in the management of international intellectual property regime.¹ The agreement was an



instrument to maintain the technological supremacy of the developed countries. The agreement prescribes minimum standard of protection to the following forms of intellectual property rights:

- Copyright and Related rights
- Trade marks
- Geographical Indications
- Industrial designs
- Patents
- Integrated Circuits
- Undisclosed Information
- Anti-Competitive Practices in Licensing agreements.

Apart from prescribing the minimum standards of protection the agreement sought to follow the standards set by other Intellectual Property treaties.¹ This made a party to the agreement to be ipso facto member of the other treaties viz. Bern Convention, Rome Convention, Paris Convention and Washington Treaty on integrated circuits. The agreement consists of VII parts viz. General provisions and basic principles, standard concerning the availability, the scope and use of intellectual property rights, enforcement of intellectual property rights, acquisition and maintenance of intellectual property rights and related interparty procedures, the dispute prevention and settlement, mechanisms transitional arrangements, institutional arrangements and final provisions. Some main features are:

- Scope of Patentability (Article 27)
- Conditions on Patent Applications (Article 29)

Rights and exceptions to Rights conferred (Article 28 and 30)

Compulsory Licensing (Article 31)

Burden of Proof (Article 34)

Enforcement (Article 41-64)

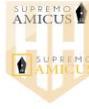
Dispute Settlement (Article 64)

Transitional Arrangements (Article 64)

The states which are a party to these arrangements are obliged to legislate their Intellectual Property laws in a manner which makes it compatible with the agreement per se. Thus the implementation of the TRIPS should be done in a manner conducive to the specific context of each country. The scope and length of protection should be limited in order to strike an appropriate balance between creations and dissemination.

Objective and Scope of the TRIPS Agreement

According to the preamble of the Agreement on Trade Related Aspects of Intellectual Property Rights the main objective of the agreement is **“to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights such that they do not themselves become barriers to trade.”** Further it states,¹ **“The underlying public policy objectives of national system for the protection of intellectual property including developmental and technological objectives.”** Article 7 and 8 of the agreement elaborates them. According to Article 7 objectives of, 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 technical knowledge in a manner conducive to social and economic welfare and to balance of rights and obligation.

Further, the agreement gives freedom to the states in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition and to promote public interest in the sectors of vital importance.¹ It also authorized the states to formulate rules against abuse of patent rights. State could implement the TRIPS agreement according to its socio economic conditions provided it is not inconsistent with the agreement.¹ Thus, the TRIPS provisions could be implemented by the states within the frame work provided by Article 7 and 8.

Scope of Patentability (Article 27)

The scope of patentability is the scope of an invention to get patent protection. Article 27 provides minimum protection to inventions irrespective of the field of invention. Patents are now available for any inventions, whether product or process in all fields of technology provided they are new, involve an inventive step and are capable of industrial application.¹ It also ensures that patent rights shall be available and enjoyable without discrimination as to the place of invention, field of technology and whether products are imported or locally produced.¹ The Article further allows the member states to exclude certain inventions from patentability on grounds of morality, decency and plant, animal or human life to

avoid serious prejudice to the environment. However, the Agreement protects inventions of micro-organism, non-biological and microbiological products of plants and animals.

A clear cut distinction needs to be drawn between discovery and invention. The concept of invention has under gone change in the industrialized nations. Thus, every state which is a party to the Agreement has freedom to define what an invention is. The term discovery is used to mean the mere recognition of what already exists. It is the finding of causal relationship, properties or phenomena that exist in the nature.¹ However, an invention entails developing a solution to a problem by applying technical means. This distinction prevents certain items from being patented. According to the dominated practice; an invention should be new in absolute terms in order to qualify for patent protection. The absolute novelty demands that the invention should not be part of the prior art in any part of the world. However, the US practice varies. In US, novelty will not be lost when invention is divulged in non-written means such as public use and sale.¹ It was this concept of US that resulted in the patenting of traditional Knowledge for e.g., patent on neem and turmeric etc.

Regarding the requirement of inventive step there are divergent practices. According to the US practice, the critical date of examining inventive step is the date of the invention. In other countries it is the date of the patent application. Further in the US obviousness is judged on the basis of a claimed invention using the prior art and the level of ordinary skill.¹ In Europe, the



emphasis is on the extent to which the invention solves a technical problem.

Lastly, the industrial application requirement is synonymous with the term 'useful' given under the Agreement. Hence in the US one invention needs to be capable of satisfying some function of benefit to humanity. However in Europe it is the industrial application that matters. This means that the EC would not allow the patentability of purely experimental inventions. This is specifically enacted in Argentinean Patent Law which requires that invention causes an industrial result or product to be obtained.¹ As a result the patentability of methods of surgical, therapeutically and diagnostic methods, methods of treatment of humans and animals are not considered as inventions.¹

Disclosure (Article 29)

The full disclosure is considered as one of the basic principles of patent law. It is in exchange for the cost of monopoly granted to the inventor or patentee. An applicant for a patent shall disclose the inventing in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the state of art.¹ The State may also require the applicant to indicate the best mode of carrying out the invention known to the inventor at the date of filing or where priority is claimed, at the priority date of the application.¹ The purpose of this best mode is to prevent the right holder from hiding the invention from the public. It also prevents excessively broad claims. For instance, the applicant sometimes seeks protection to methods on products that have not been described in the application. The national laws can demand

information on the source or place of origin of the biological material deposited. According to the Indian Patent Act, the disclosure of source and geographical origin is mandatory. Further, the biological materials mentioned in the specification are available to the public immediately after the publication of the application.¹

Rights of a Patentee (Articles 28 and 30)

Under the TRIPS Agreement, a product patentee can exclude third parties from the act of making, using, offering for sale, selling or importing for those purposes.¹ The same is applicable for process patent.¹ The Agreement also grants certain exception to the exclusive rights granted on three conditions, these are :¹

- ❖ They must be limited
- ❖ They should not be in conflict with the normal exploitation of the patent.
- ❖ Exceptions should not unreasonably prejudice the legitimate interest of the patent owner.

Based upon these conditions a few examples of these exceptions provided by various countries are, use of the invention for research, use of the invention for teaching practices, experimentation on the invention to test or improve on it, preparation of medicine, bonafide use of the invention by third party that had used it before the date of application of patent, parallel import¹ and experiments made for the purpose of seeking regulatory approval for marketing of a product after the expiration date (Bolar exception).¹



Compulsory License (Article 31)

It is a part of public policy that tries to balance the monopoly rights of the patentee with the competition and consumer rights. Compulsory License is one of the main mechanisms used for this purpose. A compulsory license can be defined as authorization given by a national authority to a person without or against the consent of the title holder, for exploitation of a subject matter protected by a patent or other intellectual property rights.¹ A compulsory license operates only at the request of the person. TRIPS does not use the term, 'Compulsory License' but it uses other use without the authorization of the right holder. A compulsory license is non-exclusive and non-transferable.¹ Grounds for granting compulsory license are.

- Emergency and extreme urgency – Article 31(b)
- Anti-competitive practices – Article 31 (j)
- Public non-compulsory use – Article 31 (b)
- Dependent patents – Article 31 (k)
- Refusal to deal – Article 31 (b)

However, TRIPS like earlier cases allows states to have some space to safeguard their interest interest.

Enforcement (Article 41 and 64)

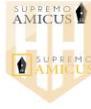
Apart from the above mentioned provisions enforcement of intellectual property rights was a major issue for discussion. Pre-existing Intellectual Property laws contained few provisions in this area. A notable feature of the agreement is the detailed provision for the enforcement

procedure. Article 41 sets the general obligation on enforcement. Articles 42-50 spell out the civil and administrative procedures and remedies. Article 61 requires the institution of criminal remedies in case of willful trade mark counterfeiting and copyright piracy on a commercial scale. Articles 51-60 provides an important remedy in form of border measures. The Agreement does not provide any special court for Intellectual Property cases.

However, the states are obliged to give powers to the courts to issue injunctions both permanent and interlocutory. Judicial authorities should be given power to issue damages as remedial measure. A Border measure obligates the state on request of the right holder, with competent authorities, administrative or judicial, for suspension by the customs authorities of the release into free circulation of such goods.¹

Dispute Settlement (Article 64)

According to Article 64 the resolution is governed by Article XXII and XXIII of the GATT Agreement of 1994 and understanding on Rules and Procedures governing the settlement of Disputes. These envisage a time bound and binding dispute settlement mechanism. However, there is an exemption to this rule—sub paragraphs of Article XXIII I(b) and I(c) of GATT 1994 i.e. non violation complaints does not apply to the TRIPS Agreement for a period of 5 years from the date of entry into force of the WTO Agreement. During this 5 years period TRIPS council is to reach a consensus on the course of action with regard to the non-violation complaints.



Conclusion

Intellectual property system provides a boost to the national wealth and contributes considerably to its sustainable development. Hence, there is a great economic value attached with promoting the use of the intellectual property system and ensuring its effective protection. Protection of Intellectual Property is conducive to increased investment in the economies that provide for such protections. It is also a notion to enhance its international trade. In general the economic value of Intellectual Property Rights depends on its competitive capability and scope for its enhancement and protection. Thus an intellectual property system helps in expanding a country's economic and trade programs. The TRIPS Agreement laid down basic minimum criteria for patentability irrespective of technological and economic development of participating countries. The Agreement made drastic changes in the international patent regime. It prescribed a universal minimum protection for patent including the scope of patentability, rights of the patentee, duration of protection, compulsory licensing, burden of proof and set up an enforcement mechanism.

