

## INTELLECTUAL PROPERTY: BRIEFING

# Current issues in intellectual property

Ideas and knowledge are an increasingly important part of trade. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value. Films, music recordings, books, computer software, on-line services, clothing, food, plants, biotechnology products and many others are bought and sold because of the information, creativity and identity they contain – not usually because of the plastic, metal, cloth, paper or other material used to make them.

The WTO's **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**, negotiated in the 1986–94 Uruguay Round ([https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm)), introduced intellectual property rules into the multilateral trading system for the first time. It's one of the three main areas of work in the WTO, alongside trade in goods and services. The **TRIPS Council**'s job is to monitor how countries are applying the TRIPS Agreement ([https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPS](https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPS)) and to discuss issues that arise from that.

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## Follow TRIPS

- ❑ Full coverage: [www.wto.org/trips](http://www.wto.org/trips) ([https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm)). See a [basic introduction](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) ([https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)) or [all explanations, from basic to technical, and the legal stuff](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm#WhatAre) ([https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm#WhatAre](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm#WhatAre)).
- ❑ Follow specific TRIPS issues ([www.wto.org/trips#issues](http://www.wto.org/trips#issues) ([https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm#issues](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm#issues))): TRIPS and public health; geographical indications; protection for plants and animals, traditional knowledge and biodiversity; non-violation complaints; technology transfer, least developed countries
- ❑ Follow [latest developments and what they mean](https://www.wto.org/english/news_e/archive_e/trips_arc_e.htm) ([https://www.wto.org/english/news\\_e/archive\\_e/trips\\_arc\\_e.htm](https://www.wto.org/english/news_e/archive_e/trips_arc_e.htm)). Or go to [full, technical coverage of the TRIPS Council](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm#TRIPSwork) ([https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm#TRIPSwork](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm#TRIPSwork)).
- ❑ [Transparency toolkit](https://www.wto.org/english/tratop_e/trips_e/trips_toolkit_e.htm) ([https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_toolkit\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_toolkit_e.htm)) for experts
- ❑ [Technical assistance](https://www.wto.org/english/tratop_e/trips_e/intel9_e.htm) ([https://www.wto.org/english/tratop\\_e/trips\\_e/intel9\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel9_e.htm)).

THIS EXPLANATION is designed to help the public understand developments in the WTO. While every effort has been made to ensure the contents are accurate, it does not prejudice member governments' positions.

## Principles

A balance. The balance is described in different ways. It's a balance between private rights (incentives to create) and public interest (ability to use or access the creations). It's also a balance between the short and long term.

- ❑ **Long-term:** society benefits from creations and inventions, including when the period of protection expires and they enter the public domain
- ❑ **Short-term:** intellectual property protection is mostly limited in time (there are some exceptions). Generally, private rights are protected in the short-term as an incentive to create and invent. Where intellectual property protection has social costs, governments can meet their objectives for social welfare and development by adapting the protection through various exceptions and flexibilities, for example to tackle public health problems

Technology transfer. Intellectual property protection should contribute to technical innovation and the transfer of technology. Producers and users should benefit. So should economies and societies at large.

Equal treatment.

- ❑ **national treatment** — treating one's own nationals and foreigners equally, with limited exceptions
- ❑ **most-favoured-nation treatment** — equal treatment for nationals of all trading partners in the WTO, with limited exceptions

Different legal systems .... The TRIPS Agreement respects countries' own legal systems, which can vary considerably. Each can decide how to protect intellectual property and implement the agreement's provisions so long as they meet the TRIPS Agreement's minimum standards (see [paragraph 1 of Article 1](https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm) ([https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm))).

... same minimum standards. Countries have to meet minimum standards set by the TRIPS Agreement, such as the minimum number of years of protection. Each country is also free set its own standards at a higher level than the agreement requires, sometimes called

"TRIPS-plus", so long as this is consistent with the agreement. (See [paragraph 1 of Article 1 \(https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm\)](https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm)).

Some current issues

Briefly, these are some of the issues currently or recently discussed in the TRIPS Council. Some are regularly on the agenda; others are raised from time to time. More details at [www.wto.org/trips#issues](https://www.wto.org/trips#issues) ([https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm#issues](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm#issues)).

## TRIPS and public health

[www.wto.org/tripshealth](http://www.wto.org/tripshealth)  
([https://www.wto.org/english/tratop\\_e/trips\\_e/pharmpatent\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm)) and [fact sheet \(https://www.wto.org/english/tratop\\_e/trips\\_e/factsheet\\_pharm00\\_e.htm\)](https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm00_e.htm).

No conflict. The [2001 Doha Declaration on TRIPS and Public Health \(https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm\)](https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) was a political statement affirming that intellectual property protection and public health objectives do not contradict each other: "We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health."

It gave governments the confidence to use the flexibilities available in the TRIPS Agreement. For example: **compulsory licensing** and **parallel imports** (see jargon buster).

Rule-change needed: the "paragraph 6 system". One issue needed a change in the rules. The declaration's paragraph 6 dealt with TRIPS Article 31(f), which limited the amount nations could export under a compulsory licence to countries needing the medicines. A "[waiver agreed in 2003 \(https://www.wto.org/english/news\\_e/pres03\\_e/pr350\\_e.htm\)](https://www.wto.org/english/news_e/pres03_e/pr350_e.htm)", and a [pending amendment agreed in 2005 \(https://www.wto.org/english/news\\_e/pres05\\_e/pr426\\_e.htm\)](https://www.wto.org/english/news_e/pres05_e/pr426_e.htm), allow generic medicines to be made under compulsory licences exclusively for export to countries that cannot produce the medicines themselves. This "Par.6 system" is routinely reviewed in the TRIPS Council.

WHO-WIPO-WTO cooperation. An important result of the 2001 declaration has been [closer work between the World Health Organization, World Intellectual Property Organization and WTO \(https://www.wto.org/english/tratop\\_e/trips\\_e/who\\_wipo\\_wto\\_e.htm\)](https://www.wto.org/english/tratop_e/trips_e/who_wipo_wto_e.htm). This has focused both on access to medicines and on incentives for research and development so that new medical technologies become available. It has underscored the fact that intellectual property is only part of the picture. Ensuring poorer patients are able to access medicines and other health products,, involves proper ("rational") use of the products, affordable prices, properly designed health systems, suitable financing, and carefully selecting strategies for procuring the products.

## TRIPS, biodiversity, traditional knowledge, plants and life forms

See [www.wto.org/tripsbio](https://www.wto.org/tripsbio) ([https://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm)) and [explanation \(https://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_background\\_e.htm\)](https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm).

In the TRIPS Council, these topics are usually discussed under three merged agenda items — a "triplet" of related issues. They come under the [Doha Development Agenda \(https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm\)](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm) although members disagree on whether they are negotiations. These issues are also discussed in separate consultations chaired by the Director-General or a deputy.

- ❑ Animals and plants. TRIPS Art.27.3(b) deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties. It has been under review in the TRIPS Council for several years. The Doha Declaration ([https://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#trips](https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#trips)) added:
- ❑ TRIPS and CBD — the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity
- ❑ Traditional knowledge — the protection of traditional knowledge and folklore

The TRIPS Council's review of the three is guided by the TRIPS Agreement's objectives (Article 7 which says the objective is innovation and technology transfer for social and economic benefits) and principles (Article 8, which refers to health and other social and economic objectives, and to abuse of rights). ([https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm)), and must take development fully into account.

Members agree on the objectives:

- ❑ the need to avoid **inappropriate patenting**, such as patenting a claimed invention that is not new or does not involve an "inventive step"
- ❑ the need to avoid what is sometimes loosely called "**biopiracy**". This is the unauthorized use of genetic resources or traditional knowledge (as laid down in the international treaty on biodiversity), ie, without the permission of the countries or communities considered to be the rightful owners — complex concepts that are still being debated

They disagree about how to achieve this. One proposal would amend the TRIPS Agreement so that patent applicants are required to disclose the origin of genetic resources and any traditional knowledge used in the inventions. This "disclosure" would avoid inappropriate patenting and provide evidence that the patent applicants received "prior informed consent" (a term used in the UN Convention on Biological Diversity), and evidence of "fair and equitable" benefit sharing. Others envisage some other forms of disclosure.

Some advocate other ways of achieving these objectives without amending the TRIPS Agreement and without "disclosure". These include contracts with whoever is considered to be the rightful owner, and databases that patent examiners can use to avoid bad patenting.

Some countries oppose patenting all life forms outright, meaning patenting would not be possible at all and disclosure would not be relevant.

## Geographical indications

See [www.wto.org/gi](http://www.wto.org/gi) ([https://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/gi_e.htm)) and explanation ([https://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_background\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm)).

Geographical indications are place names (in some countries also words associated with a place) used to identify the origin and quality, reputation or other characteristics of products (for example, "Champagne", "Tequila" or "Roquefort").

The TRIPS Agreement handles this in three articles.

- ❑ Standard: Article 22 ([https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04b\\_e.htm#3](https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm#3)) defines geographical indications and sets a **standard level of protection**. All have to be protected in order to avoid misleading the public and to prevent unfair competition
- ❑ Higher: Article 23 ([https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04b\\_e.htm#3](https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm#3)) applies only to **protection for wines and spirits** and says that subject to a number of exceptions their names have to be protected against incorrect use even where this would not mislead the public

- ❑ Exceptions: [Article 24 \(https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04b\\_e.htm#3\)](https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm#3). For example, a term does not have to be protected in a country if it has become generic or has already been protected as a trademark in that country

Two issues are debated in the TRIPS Council under the Doha mandate: negotiations to create a multilateral geographical indications register for wines and spirits; and discussions on extending the higher (Article 23) level of protection beyond wines and spirits.

## 'Non-violation' complaints

See [coverage \(https://www.wto.org/english/tratop\\_e/trips\\_e/nonviolation\\_e.htm\)](https://www.wto.org/english/tratop_e/trips_e/nonviolation_e.htm) and [explanation \(https://www.wto.org/english/tratop\\_e/trips\\_e/nonviolation\\_background\\_e.htm\)](https://www.wto.org/english/tratop_e/trips_e/nonviolation_background_e.htm).

WTO agreements allow countries to bring cases against each other if one feels that another government's action or a specific situation has deprived it of an expected benefit, even if no agreement has been violated.

But opinions differ among WTO members on whether non-violation cases are feasible in intellectual property. The TRIPS Agreement contains a temporary restraint (a "moratorium", [Article 64.2 \(https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_07\\_e.htm\)](https://www.wto.org/english/docs_e/legal_e/27-trips_07_e.htm)) on bringing non-violation complaints. This has been extended several times, more recently from one Ministerial Conference to the next.

## Technology transfer

Developing and least developed countries, in particular, see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights. The TRIPS Agreement includes a number of provisions on this. For example, it says one of the purposes of protecting intellectual property is to promote innovation and technology transfer, and it requires developed countries' governments to provide incentives for their companies and institutions to transfer technology to least-developed countries ([Article 66.2 \(https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_08\\_e.htm\)](https://www.wto.org/english/docs_e/legal_e/27-trips_08_e.htm)). More [here \(https://www.wto.org/english/tratop\\_e/trips\\_e/techtransfer\\_e.htm\)](https://www.wto.org/english/tratop_e/trips_e/techtransfer_e.htm).

## Least developed countries' priority needs

As least developed countries use their transition period to prepare to implement the WTO's intellectual property provisions, they have been asked to identify their needs in order to receive support. An overview of the process of identifying and responding to least developed countries' needs, with links to working materials, updates and tools for coordinating this on-going work can be found [here \(https://www.wto.org/english/tratop\\_e/trips\\_e/ldc\\_e.htm\)](https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm).

## Enforcement

Intellectual property rights have to be enforceable. Or, more precisely, the [TRIPS Agreement says \(https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm\)](https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm) governments have to provide **effective procedures for enforcement**. The question of discussing enforcement routinely in the TRIPS Council has sometimes been controversial.

Some developed countries considered counterfeiting and piracy to be a serious problem and wanted to discuss it; developing countries resisted, fearing that this would target them and be used to argue for new standards more stringent than those in TRIPS.

Recently (around 2011) the discussion has focused on an Anti-Counterfeiting Trade Agreement (ACTA) negotiated by a group of countries (text in document [IP/C/W/563](#)). The ACTA countries said the opposition to undertaking work on enforcement in the WTO was one reason why they negotiated the agreement outside the WTO.

A number of developing countries said they were concerned about the possibility that access to medicines could be impeded, that pressure would increase on countries to protect intellectual property to a higher standard than required in the WTO (the ACTA countries said they would not), and about the implications for the WTO system of discussing an agreement negotiated outside the WTO. (See [TRIPS news](#) ([https://www.wto.org/english/news\\_e/archive\\_e/trips\\_arc\\_e.htm](https://www.wto.org/english/news_e/archive_e/trips_arc_e.htm)).

## WHAT EXACTLY?

The areas of intellectual property covered by the TRIPS Agreement:

- Copyright and related rights
- Trademarks, including service marks
- Geographical indications
- Industrial designs
- Patents
- Layout-designs (topographies) of integrated circuits
- Undisclosed information, including trade secrets

These are explained [here](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) ([https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)).

## JARGON BUSTER

- CBD
- compulsory licensing
- GIs
- modality, modalities
- Paragraph 6 system
- Special Sessions
- TRIPS

> More jargon: glossary ([https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm))