

Trade-Related Intellectual Property Rights (TRIPS)

The WTO's TRIPS Agreement is an attempt to narrow the gaps in the way intellectual property rights (IPRs) are protected by Members and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the intellectual property of other WTO Members. The agreement covers five broad issues:

- How basic principles of the trading system and other international intellectual property agreements should be applied – based on national treatment and most favoured nation (MFN) Treatment;
- How to give adequate protection to intellectual property rights;
- How countries should enforce those rights adequately in their own territories;
- How to settle disputes on intellectual property between members of the WTO; and
- Special transitional arrangements during the period when the TRIPS Agreement is coming into force.

The second part of the TRIPS agreement looks at different kinds of intellectual property rights and how to protect them. The purpose is to ensure that adequate standards of protection exist in all member countries. Here the starting point is the obligations of the main international agreements of the World Intellectual Property Organization (WIPO), these being the *Paris Convention for the Protection of Industrial Property* and the *Berne Convention for the Protection of Literary and Artistic Works* (dealing with copyright). Some areas are not covered by these conventions and in some instances WTO Members are of the opinion that standards of protection outlined in these agreements are not adequate so the TRIPS agreement adds new and/or higher standards.

Implementation in Developing Country and LDC Members

The obligations under TRIPS apply equally to all WTO Members but developing countries were allowed extra time to implement the applicable changes to their national laws, in two tiers of transition according to their level of development, with the extra time expiring at the end of 2005.

Article 66.1 states that if a duly motivated request is handed in, the transition period shall be extended by the TRIPS Council. In October 2005, the LDC group formally presented their joint request to the Council for TRIPS. The request was prepared on the basis of LDC Members' common special needs and requirements; economic, financial and administrative constraints; and need for flexibility to create a viable technological base. The joint request ensured that LDCs were not subject to individual scrutiny and differentiated transition periods.

The request was successful and the transition period for LDCs was extended by 7½ years to July 2013.¹ In order to allow targeted technical assistance and financial cooperation to take place, LDCs are asked to provide the TRIPS Council with comprehensive information, preferably before 1 January 2008, as to their individual needs for assistance in implementing their TRIPS obligations. However, few LDCs have taken steps to identify their needs so the LDCs may be in danger of not doing enough to meet the compliance deadline of 2013.

One initiative that has been launched with DFID financing (and implemented by ICTSD and Saana Consulting) is the undertaking, upon request, of needs assessment diagnostic studies in LDCs, aimed at identifying their needs for financial and technical co-operation in the context of the implementation of the TRIPS Agreement. The specific objectives of the needs assessments are to review the current status of the IPR and innovation reform process in LDCs and to provide direct assistance for the next stage of detailed planning and implementation of the required legal and administrative reforms, together with a tailored programme of capacity building and awareness raising for key stakeholders from government, the private sector and civil society. One LDC that has taken advantage of this initiative is Uganda, although only the first stage has been implemented.

¹ This is the date that LDCs have to apply the provisions of the TRIPS Agreement. Another important date is the extension of the application of pharmaceutical patents by LDCs to 2016.

TRIPS and Public Health

The Doha Ministerial Declaration ensured that the TRIPS Agreement is to be interpreted in a way that supports public health and that each Member has the right to use the flexibilities that are built into the TRIPS Agreement, including compulsory licensing and parallel importing.

As part of the Doha Declaration, Ministers also instructed the TRIPS Council to decide on how to ensure that countries unable to produce pharmaceuticals domestically can obtain supplies of copies of patented drugs from other countries (importing under compulsory licensing - paragraph 6).

Article 31(f) of the TRIPS Agreement says products made under compulsory licensing must be “predominantly for the supply of the domestic market”. This was considered to limit the amount of drugs that could be exported to countries in need of these drugs. This issue was resolved when, in August 2003, WTO Members agreed on legal changes to make it easier for countries to import cheaper generics made under compulsory licensing if they are unable to manufacture the medicines themselves. When Members agreed on the decision, the General Council chairperson also read out a statement setting out Members’ shared understandings on how the decision would be interpreted and implemented. The decision contains three waivers:

- Exporting countries’ obligations under Article 31(f) are waived so any Member country can export generic pharmaceutical products made under compulsory licences to meet the needs of importing countries.
- Importing countries’ obligations on remuneration to the patent holder under compulsory licensing are waived to avoid double payment. Remuneration is only required on the export side.
- Exporting constraints are waived for developing and least-developed countries so that they can export within a regional trade agreement, when at least half of the members were categorised as least-developed countries at the time of the decision.

A number of conditions apply to pharmaceutical products imported under the system that aim to ensure that beneficiary countries can import the generics without undermining patent systems, including measures to prevent the medicines from being diverted to other markets.

Governments using the system are required to keep all other members informed and the WTO has a dedicate page on their website giving notifications by WTO Members of their intention to use the system established by the Decision as an importer and of their intention to effect specific imports under the system and a page giving notifications by WTO Members of the grant of compulsory licences for export.

The 30th August 2003 waiver was an interim agreement and this was made into a permanent decision with a General Council decision on 6th December 2005 which was to come into force when two thirds of members accept the waiver. The deadline the WTO Members gave themselves to get two-thirds acceptance was 1st December 2007. However, by December only 14 WTO members had accepted the waiver (with 100 acceptances needed for the decision to come into force) so the General Council has reset the deadline for acceptance to 31st December 2009.

Geographical Indications (GIs)

Geographical Indications are place names used to identify products with specific characteristics that come from these places. All products are covered by Article 22 of the TRIPS Agreement, which defines a standard level of protection. This says geographical indications have to be protected in order to avoid misleading the public and to prevent unfair competition. Article 23 provides a higher or enhanced level of protection for geographical indications for wines and spirits: subject to a number of exceptions, they have to be protected even if misuse would not cause the public to be misled. Article 24 provides for exceptions to geographical indications do not have to be protected or the protection can be limited, such as when a name has become the

common (or “generic”), as is the case for “cheddar” that refers to a particular type of cheese not necessarily made in Cheddar, and when a term has already been registered as a trademark.

Two issues are debated in the TRIPS Council under the Doha mandate: creating a multilateral register for wines and spirits; and extending the higher (Article 23) level of protection beyond wines and spirits.

Multilateral Register for Wines and Spirits

The Doha Declaration’s deadline for completing the negotiations was the Fifth Ministerial Conference in Cancun in 2003. Since this was not achieved, the negotiations are now taking place within the overall timetable for the round.

Three sets of proposals have been submitted: One by the EC (TN/IP/W/11) which proposes an amendment to the TRIPS Agreement by adding an annex to Article 23.4; a “joint proposal” (TN/IP/W/10) from Argentina, Australia, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Japan, Mexico, New Zealand, Chinese Taipei and the US proposing no amendment but a voluntary system where notified geographical indications would be registered in a database; and one by Hong Kong, China (TN/IP/W/8) that proposes a compromise position. There is no sign of a consensus being reached in the near future.

Extending the “higher level of protection” beyond wines and spirits

Some members want to negotiate extending this higher level of protection to other products while other Members oppose this. Included in this debate is whether the Doha Declaration provides a mandate for these negotiations. Again, there is no sign of compromise being made.

No LDC takes an active part in the debate on Geographical Indications.