



WORLD TRADE  
ORGANIZATION

## **A Handbook on the WTO TRIPS Agreement**

Edited by Antony Taubman, Hannu Wager  
and Jayashree Watal



CAMBRIDGE

CAMBRIDGE

more information - [www.cambridge.org/9781107023161](http://www.cambridge.org/9781107023161)



# A HANDBOOK ON THE WTO TRIPS AGREEMENT

This handbook describes the historical and legal background to the TRIPS Agreement, its role in the World Trade Organization (WTO) and its institutional framework, and reviews the following areas: general provisions and basic principles; copyright and related rights; trademarks; geographical indications; patents; industrial designs, layout-designs, undisclosed information and anti-competitive practices; enforcement of intellectual property rights; dispute settlement in the context of the TRIPS Agreement; TRIPS and public health; and current TRIPS issues. It contains a guide to TRIPS notifications by WTO Members and describes how to access and make use of the official documentation relating to the TRIPS Agreement and connected issues. Furthermore, it includes the legal texts of the TRIPS Agreement and the relevant provisions of the WIPO conventions referred to in it, as well as subsequent relevant WTO instruments.

ANTONY TAUBMAN is Director of the Intellectual Property Division of the WTO Secretariat.

HANNU WAGER is a senior officer in the Intellectual Property Division of the WTO Secretariat.

JAYASHREE WATAL is a senior officer in the Intellectual Property Division of the WTO Secretariat.



# A HANDBOOK ON THE WTO TRIPS AGREEMENT

Edited by  
ANTONY TAUBMAN, HANNU WAGER  
and  
JAYASHREE WATAL



**CAMBRIDGE**  
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS  
Cambridge, New York, Melbourne, Madrid, Cape Town,  
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press  
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

[www.cambridge.org](http://www.cambridge.org)  
Information on this title: [www.cambridge.org/9781107023161](http://www.cambridge.org/9781107023161)

© World Trade Organization 2012

This publication is in copyright. Subject to statutory exception and  
to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without  
the written permission of Cambridge University Press.

First published 2012

Printed in the United Kingdom at the University Press, Cambridge

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging-in-Publication Data*

A handbook on the WTO TRIPS Agreement /  
edited by Antony Taubman, Hannu Wager, and Jayashree Watal.  
p. cm.

ISBN 978-1-107-02316-1 (Hardback) – ISBN 978-1-107-62529-7 (Paperback)

1. Intellectual property (International law) 2. Agreement on Trade-Related Aspects of  
Intellectual Property Rights (1994) 3. Foreign trade regulation. I. Taubman, Antony.  
II. Wager, Hannu. III. Watal, Jayashree.

K1401.H365 2012

346.04'8–dc23

2011042620

ISBN 978-1-107-02316-1 Hardback  
ISBN 978-1-107-62529-7 Paperback  
ISBN WTO 978-1-107-66327-5 Paperback

Cambridge University Press has no responsibility for the persistence or  
accuracy of URLs for external or third-party internet websites referred to  
in this publication, and does not guarantee that any content on such  
websites is, or will remain, accurate or appropriate.

# CONTENTS

<i>List of figures</i>	xvi
<i>List of boxes</i>	xvii
<i>List of tables</i>	xviii
<i>Preface</i>	xix
<i>Acknowledgements</i>	xxii
<i>List of acronyms and abbreviations</i>	xxiii
<b>I Introduction to the TRIPS Agreement</b>	<b>1</b>
A Introduction	1
1 General	1
2 Historical and legal background to TRIPS	4
3 Place of TRIPS in the World Trade Organization	8
4 Overview of TRIPS provisions	10
(a) General provisions and basic principles	10
(b) Standards concerning the availability, scope and use of intellectual property rights	10
(c) Enforcement	12
(d) Certain other matters	12
B General provisions and basic principles of the TRIPS Agreement	12
1 Objectives and principles	12
2 Minimum standards agreement	13
3 Beneficiaries	14
(a) Industrial property	14
(b) Copyright	15
(c) Performers	15
(d) Producers of phonograms	15
(e) Broadcasting organizations	15
4 National treatment and most-favoured-nation treatment	16
5 Exhaustion	18
C Procedures for the acquisition and maintenance of intellectual property rights	20

D	Transitional arrangements and other matters	21
1	Transition periods	21
	(a) Developed countries and non-discrimination (all Members)	21
	(b) Developing countries and economies in transition	21
	(c) Least-developed countries	22
	(d) Acceding countries	23
2	Protection of existing subject matter	23
	(a) Application of the rules	23
	(b) Additional requirements in respect of pre-existing works and phonograms	24
3	Transfer of technology	24
4	Technical cooperation	25
5	Security exceptions	26
E	Institutional arrangements	26
1	Decision-making procedures	27
2	The work of the Council for TRIPS	30
	(a) Notifications	30
	(b) Review of national laws and regulations	32
	(c) Forum for consultations	32
	(d) Forum for further negotiation or review	33
	(e) Cooperation with the World Intellectual Property Organization	34
II	Copyright and related rights	36
A	Introduction	36
1	General	36
2	What are copyright and related rights?	36
3	What is the relationship of the TRIPS Agreement with the pre-existing provisions of the Berne and Rome Conventions?	37
B	TRIPS provisions on copyright	39
1	What is the subject matter to be protected?	39
	(a) 'Literary and artistic works'	39
	(i) <i>Computer programs</i>	39
	(ii) <i>Databases</i>	40
	(b) Derivative works	40
	(c) Certain other categories of works	41
	(d) Certain principles governing eligibility for copyright protection	41
	(i) <i>Idea/expression dichotomy</i>	41
	(ii) <i>Originality</i>	41



	(iii) Automatic protection	42
	(iv) Independence of protection	43
2	What are the rights to be conferred on authors?	43
	(a) General	43
	(b) Reproduction right	44
	(c) Rental right	44
	(d) Rights of public performance, broadcasting and communication to the public	44
	(e) Rights of translation and adaptation	45
	(f) Moral rights	46
3	What are the permissible limitations and exceptions?	46
4	Term of protection	48
C	TRIPS provisions on related rights	51
	1 Relevant rights under the TRIPS Agreement	52
	(a) Performers	52
	(b) Producers of phonograms	52
	(c) Broadcasting organizations	52
	2 Limitations and exceptions	53
	3 Term of protection	53
III	Trademarks	54
	A Introduction	54
	1 General	54
	2 What is the role of trademarks?	54
	3 What is the relationship of the TRIPS Agreement with the pre-existing provisions of the Paris Convention?	56
	B TRIPS provisions on trademarks	57
	1 What is the subject matter to be protected and what are the conditions for registration?	57
	(a) Subject matter of trademark protection	57
	(i) Distinctive signs	57
	(ii) Trade names	59
	(iii) Collective marks and certification marks	59
	(b) Conditions for registration as a trademark	60
	(i) Priority	60
	(ii) Publishing requirement	60
	(iii) Reasons which may not constitute grounds for refusal of trademark registrations	61
	(iv) Reasons which may constitute grounds for refusal of trademark registrations	63

	(v) <i>Reasons which must constitute grounds for refusal or invalidation of trademark registration in Members</i>	63
2	What are the rights to be conferred on trademark owners?	66
	(a) General	66
	(b) Trademark rights	66
	(c) Rights with respect to well-known trademarks	69
	(d) Licensing and assignment of rights	71
	(e) Other requirements	71
3	What are the permissible exceptions to trademark rights?	72
	(a) Permissible exceptions	72
	(b) No compulsory licensing permitted	73
4	Term of protection	75
IV	Geographical indications	76
A	Introduction	76
	1 General	76
	2 Background	76
	3 What is the relationship with the pre-existing provisions of the Paris Convention?	77
B	TRIPS provisions on GIs	78
	1 What is the subject matter to be protected?	78
	(a) TRIPS definition of geographical indications	78
	(b) Elements of the Article 22.1 definition	78
	(i) <i>It is a sign</i>	79
	(ii) <i>Function of identification</i>	79
	(iii) <i>Subject matter of identification</i>	79
	(iv) <i>The geographical origin identified by the geographical indication</i>	80
	(v) <i>Quality, reputation, or other characteristics essentially due to the geographical origin</i>	80
	(c) Geographical indications, indications of source, rules of origin, appellations of origin and trademarks	80
	(i) <i>Geographical indications and indications of source</i>	83
	(ii) <i>Geographical indications and rules of origin</i>	83
	(iii) <i>Geographical indications and appellations of origin</i>	83
	(iv) <i>Geographical indications, trademarks and certification marks</i>	83
	(d) Right holders and eligible users	84
2	What are the conditions for getting protection?	84
3	Protection and rights conferred	85
	(a) For geographical indications for all goods (Article 22)	85

(i)	<i>Protection against use by others (Article 22.2)</i>	85
(ii)	<i>Protection against use as a trademark (Article 22.3)</i>	87
(iii)	<i>Factually true but misleading use (Article 22.4)</i>	87
(b)	<b>Additional protection for geographical indications for wines and spirits (Article 23)</b>	88
(i)	<i>Protection against use by others (Article 23.1)</i>	89
(ii)	<i>Protection against use as a trademark (Article 23.2)</i>	90
(iii)	<i>Homonymous geographical indications for wines (Article 23.3)</i>	90
(iv)	<i>Negotiation of a multilateral register of geographical indications for wines (Article 23.4)</i>	90
4	<b>Exceptions and international negotiations</b>	91
(a)	<b>Exceptions</b>	91
(i)	<i>Generic terms (Article 24.6)</i>	91
(ii)	<i>Prior trademark rights (Article 24.5)</i>	92
(iii)	<i>Prior use of the geographical indication (Article 24.4)</i>	92
(iv)	<i>Time limit to challenge trademarks under Article 22.3 and Article 23.2 (Article 24.7)</i>	93
(v)	<i>Use by a person of his name (Article 24.8)</i>	93
(vi)	<i>GIs not protected in their country of origin or which have fallen into disuse in their country (Article 24.9)</i>	93
(b)	<b>International negotiations, review and standstill</b>	94
(i)	<i>International negotiations (Article 24.1)</i>	94
(ii)	<i>Standstill (Article 24.3)</i>	94
V	<b>Patents</b>	95
A	<b>Introduction</b>	95
1	<b>What are patents?</b>	95
2	<b>What is the relationship with the pre-existing provisions of the Paris Convention?</b>	96
B	<b>TRIPS provisions on patents</b>	97
1	<b>What is the subject matter to be protected by patents?</b>	97
(a)	<b>In which areas must inventions be eligible for protection?</b>	97
(b)	<b>What conditions must inventions meet to be eligible for patent protection?</b>	98
(i)	<i>Novelty, inventive step and industrial applicability</i>	98
(ii)	<i>Disclosure</i>	100
(iii)	<i>What are the permissible exclusions from patentable subject matter?</i>	102
(iv)	<i>Review of Article 27.3(b)</i>	104
(v)	<i>Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore</i>	104

2	What are the rights to be conferred on patent owners?	105
(a)	What are the rights to be conferred on owners of product patents?	105
(b)	What are the rights to be conferred on owners of process patents?	105
(i)	<i>Rights of process patent owners</i>	105
(ii)	<i>Burden of proof</i>	106
(c)	Non-discrimination with respect to enjoyment of patent rights	107
(i)	<i>The place of invention</i>	107
(ii)	<i>The field of technology</i>	107
(iii)	<i>Whether products are imported or locally produced</i>	107
(d)	What other rights do patent owners have?	108
3	What are the permissible exceptions to patent rights?	108
(a)	Limited exceptions	108
(b)	Compulsory licences	109
4	What is the minimum period of protection to be accorded?	114
(a)	Term of protection	114
(b)	Revocation	115
VI	Industrial designs, layout-designs of integrated circuits, undisclosed information, anti-competitive practices	116
A	Introduction	116
B	Industrial designs	116
1	What is an industrial design?	117
2	What has to be eligible for protection as an industrial design?	117
(a)	General formalities for the protection of industrial designs	118
(i)	<i>Formalities</i>	118
(ii)	<i>Priority</i>	118
(b)	Provisions regarding formalities for industrial designs in the textile sector	118
3	What are the rights to be conferred on an owner of a protected industrial design?	119
4	What are the permissible exceptions to the rights conferred?	120
5	How long does the protection of an industrial design have to last?	120
C	Layout-designs (topographies) of integrated circuits	121
1	What is a layout-design (topography) of an integrated circuit?	121

2	What has to be eligible for protection as a layout-design of an integrated circuit?	122
3	What are the rights to be conferred on the owner of a protected layout-design?	123
4	What are the permissible limitations and exceptions to the rights conferred?	124
	(a) Reproduction for private or research purposes	124
	(b) Parallel creation	124
	(c) Innocent infringement	124
	(d) Exhaustion	125
	(e) Compulsory licensing	125
5	How long does the protection of a layout-design have to last?	125
D	Undisclosed information	126
1	Undisclosed information (trade secrets)	126
2	Undisclosed test and other data	128
E	Control of anti-competitive practices in contractual licences	129
1	Introduction	129
2	Overview of the relevant provisions of the TRIPS Agreement	131
<b>VII</b>	<b>Enforcement</b>	<b>135</b>
A	Introduction	135
1	Background	135
2	What is IPR enforcement?	136
3	Application of basic principles	137
4	What is the relationship of the TRIPS Agreement with pre-existing provisions in other conventions and treaties?	138
B	General obligations	138
C	Civil and administrative procedures and remedies	140
1	Fair and equitable procedures	140
2	Evidence	141
3	Remedies	141
	(a) Injunctions	141
	(b) Damages	142
	(c) Other remedies	142
4	Right of information	143
5	Indemnification of the defendant	143
D	Provisional measures	144
1	Why and what type of provisional measures?	144
2	Procedural requirements and safeguards against abuse	144
E	Border measures	146
1	Scope and coverage	146

(a) Mandatory coverage of pirated copyright goods and counterfeit trademark goods	146
(b) Optional coverage	147
2 Procedural requirements and safeguards against abuse	148
(a) Application, including evidence and description of goods	148
(b) Notice of suspension	149
(c) Duration of suspension	149
(d) Posting of security/payment of compensation	149
3 Right of inspection and information	150
4 Remedies	150
5 Special rules for <i>ex officio</i> action	151
F Criminal procedures	151
1 Scope and coverage	151
2 Remedies	151
(a) Measures and intellectual property rights at issue	152
(b) Summary of key Panel findings	152
G Cooperation and contact points	153
1 Cooperation between Members	153
2 Contact points	154
<b>VIII Dispute prevention and settlement</b>	<b>155</b>
A Introduction	155
B Dispute prevention and the review of national implementing legislation	156
C Dispute settlement	157
1 General	157
2 Non-violation and situation complaints	159
D Description of the dispute settlement procedures	161
1 Consultations between the parties	161
2 Panel examination	163
3 Appellate review	163
4 Adoption of the Panel/Appellate report(s) and implementation	164
E Experience in the area of TRIPS	166
1 A guide to resources	176
<b>IX TRIPS and public health</b>	<b>179</b>
A Introduction	179
B Doha Declaration on the TRIPS Agreement and Public Health	180
1 Concerns that triggered the discussions	180

2	Scope	180
3	General statements	181
4	Clarification of flexibilities	181
5	Transfer of technology	182
6	Follow-up	183
C	Paragraph 6 System	184
1	The issue	184
2	The solution: establishment of the Paragraph 6 System	184
3	Description of the System	186
(a)	Scope and coverage	186
(b)	Eligible importing Members	187
(c)	Exporting Members	187
(d)	Notifications	187
(e)	Safeguards against diversion	188
(f)	Avoidance of double remuneration	189
(g)	The special case of regional trade agreements	190
4	Chairman's statement	190
5	Domestic implementing legislation	191
6	Use of the Paragraph 6 System	193
7	Review of the Paragraph 6 System's functioning	193
D	Access to medicines: the broader picture	194
X	Current TRIPS issues	196
A	Introduction	196
1	Current issues	196
2	The mandates for work on TRIPS issues	198
B	Current issues	200
1	Geographical indications	200
(a)	Background	200
(b)	The multilateral register for wines and spirits	202
(c)	Extending the 'higher level of protection' beyond wines and spirits	204
2	The 'triplets': biotechnology, traditional knowledge, biodiversity	205
(a)	Article 27.3(b) review	205
(b)	Traditional knowledge and folklore	206
(c)	Relationship between the TRIPS Agreement and the Convention on Biological Diversity	207
3	Non-violation complaints	210

4	Least-developed countries and TRIPS	210
5	The TRIPS Agreement and transfer of technology	212
6	Electronic commerce	213
C	The TRIPS Agreement in other multilateral policy processes	214
1	The TRIPS Agreement and public health beyond the World Trade Organization	214
2	TRIPS and human rights	216
3	TRIPS and development issues	217
4	Intellectual property and competition policy	218
5	TRIPS and environmental agreements	218
	Appendix 1 Guide to TRIPS notifications	220
A	General	220
B	Relevant notification procedures	222
1	Notification of laws and regulations under Article 63.2	222
(a)	Procedures for the notification of laws and regulations	222
(b)	Availability of the information received	225
2	Notifications of contact points under Article 69	226
3	Notification requirements for Members availing themselves of certain possibilities under the TRIPS Agreement	227
(a)	Articles 1.3 and 3.1	227
(b)	Article 4(d)	228
(c)	Article 6ter of the Paris Convention	228
(d)	Other notification requirements under the Berne Convention and the Rome Convention incorporated by reference into the TRIPS Agreement	229
4	Notification requirements for Members making use of the additional flexibilities relating to TRIPS and public health	232
5	Notification requirements for developed country Members agreed by the TRIPS Council in the context of Articles 66.2 and 67	234
(a)	Reports under Article 66.2	234
(b)	Contact points for technical cooperation and reports under Article 67	235
(i)	Contact points for technical cooperation on TRIPS	235
(ii)	Reports under Article 67	235
6	Certain other information flows	236
(a)	Records of reviews of national implementing legislation	236
(b)	Responses provided in the context of the review of the provisions of the Section on geographical indications under Article 24.2	237



- (c) Responses provided in the context of the review of the provisions of Article 27.3(b) 237

## Appendix 2 Guide to TRIPS documents 239

- A General 239
- B TRIPS notifications 241
- C Reviews of national legislation 241
- D Dispute settlement 243
- E Reports and decisions 243
- F Minutes 243
- G Working documents 244
- H Documents of the Council for TRIPS in special session 245

## Annexes 246

- 1 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) 1994 247
- 2 Provisions of the Paris Convention for the Protection of Industrial Property (1967) referred to in the TRIPS Agreement 289
- 3 Provisions of the Berne Convention for the Protection of Literary and Artistic Works (1971) referred to in the TRIPS Agreement 308
- 4 Provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) (1961) referred to in the TRIPS Agreement 337
- 5 Provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits (1989) ('Washington Treaty') referred to in the TRIPS Agreement 343
- 6 Declaration on the TRIPS Agreement and Public Health (2001) 350
- 7 Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (2003) 352
- 8 Decision on Amendment of the TRIPS Agreement (2005) 359
- 9 Decision on Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products (2002) 367
- 10 Decision on Extension of the Transition Period under Article 66.1 for Least-Developed Country Members (2005) 368

## *Index* 371

## FIGURES

I.1	WTO organizational structure	9
II.1	Three-step test	48
VIII.1	WTO dispute settlement timeline	162
VIII.2	Accessing dispute settlement documents	177
A1.1	Members' transparency toolkit	221

## BOXES

II.1	<i>US – Copyright Act</i> (DS160)	49
III.1	<i>US – Section 211 Omnibus Appropriations Act</i> (DS176)	64
III.2	Community trademarks	70
III.3	<i>EC – Trademarks and Geographical Indications</i> (DS174, DS290)	73
IV.1	Some examples of GIs and logos or symbols	81
V.1	<i>Canada – Pharmaceutical Patents</i> (DS114)	110
VII.1	<i>China – Intellectual Property Rights</i> (DS362)	152
VIII.1	Paragraph 1 of Article XXIII of GATT 1994 on the three grounds for complaints	160
IX.1	TRIPS flexibilities as recognized by the Doha Declaration	183
IX.2	The Paragraph 6 System in a nutshell	192

## TABLES

VIII.1	Dispute settlement cases in the area of TRIPS (as of January 2012)	167
A2.1	WTO document series for the circulation of intellectual property notifications	242

## PREFACE

At the heart of the World Trade Organization (WTO), as an international organization, is a set of rules that regulate trade between nations: a body of agreements which have been negotiated and signed by governments of the majority of the world's trading nations, with the aim of promoting transparency, predictability and non-discrimination in trading relations. These agreements, covering trade in goods, trade in services and trade-related aspects of intellectual property rights, help to define and inform the multiple roles of the WTO, in administering the trade agreements, providing a forum for trade negotiations, handling trade disputes, monitoring national trade policies, providing technical assistance and capacity building for developing countries, and cooperating with other international organizations. Understanding these agreements and their practical, policy and legal contexts therefore provides significant insights into the WTO as an institution, its activities and international role, its partnerships with other organizations, and the way in which WTO Member governments identify and pursue their national interests through this intergovernmental forum.

When, in 1994, at the end of the Uruguay Round of trade negotiations, governments settled on the cluster of agreements that created and defined the WTO, the Agreement on Trade-Related Aspects of Intellectual Property Rights, or the TRIPS Agreement, was part of the package. The TRIPS Agreement was not negotiated as a stand-alone treaty, and did not enter into legal force on its own, but is one of the multilateral trade agreements (MTAs) that are integral to the overarching Marrakesh Agreement Establishing the World Trade Organization. This status means that when the TRIPS Agreement entered into force in 1995, it was as part of a composite set of trade agreements that are together binding on countries that choose to join the WTO as Members. The WTO Agreement also made disputes between Members about trade and intellectual property subject to the same dispute settlement mechanism as is used for a wide range of trade issues. But the TRIPS

Agreement also incorporated significant elements of the established multilateral intellectual property agreements administered by the UN specialized agency for intellectual property, the World Intellectual Property Organization (WIPO). Hence the TRIPS Agreement has a dual character – an important element of international trade law, it also draws heavily on, and builds upon, the established heritage of international intellectual property (IP) law.

The TRIPS Agreement has also come to the fore in a wide range of international policy discussions – ranging over public health, biodiversity, the environment, and human rights, and other debates concerning policy settings for innovation, knowledge-based economic growth and technology diffusion. The need for a practical knowledge of TRIPS, its provisions and its institutional context therefore extends beyond the traditional circle of trade negotiators and IP lawyers, and this *Handbook* has been prepared to serve the needs of this wider community of legislators, diplomats, policy-makers, other government officials, representatives of civil society and industry, practitioners, journalists, students and other interested parties in the general public.

This publication is the latest in a series of WTO *Handbooks*, aimed at providing a non-technical overview of key elements of the WTO system. As a *Handbook* on the TRIPS Agreement, it provides a general account of the Agreement itself, and describes its objectives, principles and other provisions. The TRIPS Agreement has not been a static document since its entry into force in 1995, and the *Handbook* reflects the evolving context of TRIPS, in particular:

- While the *Handbook* is not a legal textbook, and it does not explore questions of legal interpretation, it does describe some of the experience in analysing and interpreting the TRIPS Agreement in the context of dispute settlement.
- The *Handbook* provides an overview of the institutional framework within the WTO that administers the TRIPS Agreement, in particular the TRIPS Council.
- And the *Handbook* gives an update of some of the key developments, such as the Doha Declaration on the TRIPS Agreement and Public Health and the ensuing amendment to TRIPS, and ongoing negotiations and policy discussions within the WTO.

The *Handbook* is up to date at the time of writing, but readers should be aware that some of the processes it describes are dynamic, and several

passages have been highlighted as areas where further developments may potentially have occurred since mid-2011.

For reasons of space and brevity, the *Handbook* concentrates on the text of the TRIPS Agreement and on TRIPS-related developments within the WTO itself and does not describe in detail the important discussions and debates in other international policy processes and organizations that have dealt with TRIPS; a very brief description is provided to assist the reader to understand this broader context of TRIPS, but this is not intended to give authoritative guidance, which can instead be obtained from the organizations concerned.

Prospective readers should not pick up this *Handbook* expecting close legal analysis of TRIPS provisions, nor authoritative statements about the implications or impact of the TRIPS Agreement, nor extensive descriptions of the complex policy debates that surround the TRIPS Agreement. There is a vast academic, policy and legal literature concerning the TRIPS Agreement, its interpretation, and these related issues; this *Handbook* does not venture into this territory that has been widely explored and mapped by many expert authors. Instead, this *Handbook* seeks to give the reader an accessible, non-technical overview of the Agreement, and describes how to access and make use of some of the key official documentation that relates to the TRIPS Agreement and related issues. The initiative to publish this *Handbook* responds to the practical feedback received from countless active participants in technical cooperation, and readers are encouraged to provide further feedback to the address [ipd@wto.org](mailto:ipd@wto.org) for possible use should there be a future decision to produce a revised and updated edition.

*Antony Taubman*  
Director

Intellectual Property Division, WTO Secretariat

## ACKNOWLEDGEMENTS

Preparation of the *Handbook* was undertaken by the WTO Intellectual Property Division, drawing on years of practical feedback from technical assistance and training programmes prepared and delivered by the Division, in particular the material prepared for the TRIPS module of WTO eTraining in 2007. The former director of the Division, Mr Adrian Otten, substantively reviewed and enhanced earlier versions of this material. The *Handbook* is a collective production by the Division, but the following individuals contributed particularly to certain chapters:

Chapter I: Hannu Wager and Jayashree Watal

Chapter II: Hannu Wager

Chapter III: Wolf Meier-Ewert

Chapter IV: Thu-Lang Tran Wasescha

Chapter V: Jayashree Watal

Chapter VI: Wolf Meier-Ewert, Xiaoping Wu, Robert Anderson and  
Pierre Arhel

Chapter VII: Roger Kampf

Chapter VIII: Hannu Wager

Chapter IX: Roger Kampf

Chapter X: Antony Taubman

Appendices 1–2: Hannu Wager

The joint editors Antony Taubman, Hannu Wager and Jayashree Watal express thanks to all contributing authors and to those involved in the production process, particularly Karla Brepsant and Karyn Russell.

<p><b>DISCLAIMER</b> This publication provides a general, non-technical introduction to the TRIPS Agreement, and to the related work of the World Trade Organization, to assist in promoting general understanding and awareness, including for training courses and educational activities. It should not be viewed as advancing any form of legal interpretation or any policy position, and no views or analysis in this publication should be attributed to the World Trade Organization, its Secretariat or its Members.</p>
---



## ACRONYMS AND ABBREVIATIONS

AOC	appellation d'origine contrôlée
AOP	appellation d'origine protégée
BATF	Bureau of Alcohol, Tobacco and Firearms
CBD	Convention on Biological Diversity
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CMO	collective management organization
CTM	Community trademark
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FDI	foreign direct investment
FTA	free trade area
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GI	geographical indication
GSPOA	Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property
ICESCR	International Covenant on Economic, Social and Cultural Rights
INAO	Institut National d'Origine et de la Qualité
IP	intellectual property
IPIC	Intellectual Property in Respect of Integrated Circuits
IPR	intellectual property right
LDC	least-developed country
MFN	most-favoured-nation
MTA	multilateral trade agreements
MTO	Multilateral Trade Organization
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
R&D	research and development
RTA	regional trade agreement
TK	traditional knowledge
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development

UNDESA	United Nations Department of Economic and Social Affairs
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Social and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UPOV	International Union for the Protection of New Plant Varieties
WCT	WIPO Copyright Treaty
WGTC	Working Group on the Interaction between Trade and Competition Policy
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

## Introduction to the TRIPS Agreement

### A Introduction

#### *1 General*

This chapter provides an overview of the TRIPS Agreement. It first explains the historical and legal background of the Agreement and its place in the World Trade Organization (WTO). It then turns to the general provisions and basic principles, as well as other provisions and institutional arrangements, that apply to all the categories of intellectual property rights (IPRs) covered by TRIPS. [Chapters II to VII](#) then discuss each of these categories in more detail.

However, in order to understand the TRIPS Agreement it is important to first review the background to the intellectual property (IP) system: what the main forms of IPRs are, why these ‘rights’ are recognized, and how they are protected. These questions have been at the core of IP policy discussions since the adoption of the earliest IP laws, and continue to spark active debate. This chapter attempts neither to summarize various relevant legal and economic theories, nor to survey the range of views presented in the debate, but merely highlights some of the general concepts and approaches.

IPRs can be characterized as rights given to persons over the creations of their minds. They usually take the form of a limited ‘exclusive right’ granted under national law to a creator over the use of the creation for a certain period of time. Such a right allows the creator to exclude others from using the creation in certain ways without the creator’s authorization. The right holder can then extract economic value from the IPRs by using them directly or by authorizing others to do so.

IPRs are territorial rights, which means that they are valid only in the jurisdiction where they have been registered or otherwise acquired.

IPRs are customarily clustered into two categories: copyright and industrial property.

Copyright can usefully be divided into two main areas:

1. Copyright (or 'authors' rights' in some systems) refers to the rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculptures, computer programs and films). Authors, or those who derive the right from authors (such as publishers), have the right to determine how their works are used for a minimum period of time after the death of the author.
2. Copyright in a wider sense also includes related rights (sometimes called 'neighbouring rights'), especially the rights of performers (e.g. actors, singers and musicians) over their performances, producers over phonograms (sound recordings), and broadcasting organizations over broadcasts. These rights are also limited in time.

Industrial property can be divided into two fields:

1. The first is the protection of distinctive signs, in particular trademarks (which distinguish the goods or services of one undertaking from those of other undertakings) and geographical indications (GIs, which identify a good as originating in a place where a given characteristic of the good is essentially attributable to its geographical origin). Trademark protection may last indefinitely, provided the sign in question continues to be distinctive; use of the trademark is also often a requirement. A GI can also be protected indefinitely, provided it continues to identify the geographical origin.
2. Other types of industrial property are protected primarily to recognize and stimulate technological innovation and industrial design, and to provide the legal framework for the creation of new technologies and products. In this category fall inventions (protected by patents; although, in a number of countries, innovations that could embody lesser technical progress than patentable inventions may be protected by utility models), industrial designs and trade secrets. The protection is usually given for a finite term (now typically twenty years in the case of patents), although trade secrets can be protected as long as they remain secret. Industrial property also includes legal means to suppress acts of unfair competition.

The intellectual property (IP) system is a tool of public policy: generally, it is intended to promote economic, social and cultural progress by stimulating creative work and technological innovation. More specifically, the main social purpose of protection of copyright and related rights is to encourage and reward creative work. It gives an opportunity

for authors and artists to earn their living from creative work. Other than serving as an incentive to authors, copyright essentially provides an economic foundation for cultural industries and the market for cultural products once the rights are licensed or assigned to publishers and producers. Similarly, patents and certain other industrial property rights are designed to provide protection for innovations resulting from investment in research and development (R&D), thus giving the incentive and means to finance applied R&D.

These standard policy objectives are supported by the economic theory that suggests that works and information resulting from creative work and innovation have characteristics of public goods in the sense that they are ‘non-excludable’ and ‘non-rivalrous’ in consumption – in other words, once created, absent specific measures, none can be excluded from ‘consuming’ them. In addition, one’s use of a work or an invention does not deprive another of its use and it can be freely used by anyone (unless there are specific legal constraints), unlike physical property such as land that can be fenced off. Therefore, in the absence of IP protection, it is difficult for creators to extract economic value from or ‘appropriate’ the financial returns from their work, or indeed to influence how they are utilized. Thus, from the society’s perspective, there is a risk of ‘market failure’, that is, underinvestment in socially beneficial creative and innovative work. The IP system also allows market-driven decentralized decision-making, where products are created and technology developed in response to demand. The IP system offers a range of options, but does not preclude the need for other forms of financing mechanisms, in particular in areas where the market alone may not provide adequate incentives (for example, contemporary concert music or cures for neglected diseases).

Another objective of IP protection is the transfer and dissemination of technology. A well-functioning IP regime should, other things being equal, facilitate the direct and indirect transfer of technology, by means such as foreign direct investment (FDI), trade and licensing. The legal titles provided by the IP system are used to define and structure the distinct rights and responsibilities in technology partnerships, such as research cooperation or technology sharing or transfer arrangements. One of the purposes of the patent system is to disseminate technological information by requiring inventors to disclose new technology in their patent applications rather than attempt to keep it secret, so that new technology can become part of the common pool of knowledge of mankind and be freely used once patents expire. Improved information

technology tools that facilitate, for example, the availability of patent information on the Internet means that this ‘teaching’ function of the patent system is becoming increasingly more effective and accessible in practice compared to earlier days.

Trademarks, GIs and other distinctive signs are protected so as to inform consumers and prevent consumer deception. In addition, these forms of IP help to ensure fair competition among producers. They provide an incentive for companies to invest in their reputation through the provision of quality products and services. An equally important objective is to enable consumers to make informed choices between various goods and services.

Reflecting their role as tools of public policy, IPRs are not absolute and unlimited, but are generally subject to a number of limitations and exceptions that aim to balance the legitimate interests of right holders and users. These limitations and exceptions, together with the carefully defined scope of protectable subject matter and a limited term of protection, are intended to maintain an appropriate balance between competing public policy interests so that the system as a whole can be effective in meeting its stated objectives.

## *2 Historical and legal background to TRIPS*

The World Trade Organization (WTO) is the legal and institutional foundation for the administration and development of trade relations among its 153 Members, at the multilateral level. It aims to provide fair and stable conditions for the conduct of international trade with a view to encouraging trade and investment that raises living standards worldwide. It is the successor to the former General Agreement on Tariffs and Trade (GATT 1947), a multilateral trade agreement that was concluded in that year. Further trade liberalization was pursued under the auspices of the GATT through ‘trade rounds’ aiming at further tariff cuts and strengthened rules. The Uruguay Round was the eighth round of trade negotiations and by far the most comprehensive. These negotiations were launched in 1986 and completed in 1994.

The main results from the Uruguay Round included a further major reduction of customs tariffs worldwide, and the liberalization of, and development of better rules governing trade in textiles and agriculture – two areas previously largely excluded from the GATT. The trading system was also extended into new areas of trade relations not previously dealt with, notably trade in services and IP. This reflected the growing

economic importance of these two areas and their increased share of international trade. Furthermore, the results included the development of a reinforced and integrated dispute settlement system, which is applicable to any agreements covered by the WTO. The Uruguay Round also resulted in the creation of a new organization – the WTO – to administer the agreements. The Marrakesh Agreement Establishing the World Trade Organization ('the WTO Agreement') entered into force on 1 January 1995. The 'GATT' now refers to an updated agreement on trade in goods, dubbed 'GATT 1994' to distinguish it from the earlier GATT, which is only one of a number of agreements annexed to the WTO Agreement.

GATT 1947 included several provisions that made reference to IPRs. For instance, GATT 1947 confirmed that Contracting Parties could have rules on IPRs provided that they were consistent with principles of non-discrimination. Article III:4 requires treatment for imported products that is no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements; this includes IP laws. More specifically, Article XX(d) allows a general exception to the application of GATT obligations with respect to compliance with laws and regulations that are not inconsistent with GATT provisions, including those that deal with patents, trademarks and copyrights and the prevention of deceptive practices. Additionally, Article IX:6 contains a positive obligation on Contracting Parties to cooperate with each other to prevent the use of trade names in a manner that would misrepresent the true origin of a product, or that would be to the detriment of distinctive regional or geographical names of products protected in other parties' territories by national legislation.

In the Tokyo Round of multilateral trade negotiations (1973 to 1979), the one immediately preceding the Uruguay Round, there was a proposal to negotiate rules on trade in counterfeit goods resulting in a draft Agreement on Measures to Discourage the Importation of Counterfeit Goods. However, negotiators did not reach agreement and this subject was not included in the results of the Tokyo Round when it concluded in 1979. Instead, in 1982, pursuant to a work programme agreed by trade ministers,<sup>1</sup> a revised version of a draft agreement on trade in counterfeit goods

<sup>1</sup> 'The CONTRACTING PARTIES instruct the Council to examine the question of counterfeit goods with a view to determining the appropriateness of joint action in the GATT framework on the trade aspects of commercial counterfeiting and, if such joint action is found to be appropriate, the modalities for such action, having full regard to the competence of other international organizations. For the purposes of such examination, the

was submitted. This draft was referred to a group of experts in 1984, which submitted its report a year later. The group met six times in 1985. It produced a report on Trade in Counterfeit Goods that recommended that joint action was probably needed, but could not decide on the appropriate forum. It left it to the GATT Council to make a decision.

During the early 1980s, negotiators worked on a mandate for negotiations for a new Round, including on aspects of IP. Trade ministers met at Punta del Este, Uruguay, in September 1986, and adopted a decision on future trade negotiations, which included the following mandate under the title ‘Trade-related aspects of intellectual property rights, including trade in counterfeit goods’:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

A negotiating group on ‘trade-related aspects of intellectual property rights’, or TRIPS, was formed to pursue this mandate. From 1986 to April 1989, the group mainly discussed whether there was a mandate to negotiate rules on IPRs in general, or only on their trade-related aspects. For the developing countries, such ‘trade-related aspects’ only included trade in counterfeit goods or anti-competitive practices in relation to IPRs. However, in the mid-term review of the overall Uruguay Round negotiations, undertaken in April 1989, a decision was adopted that gave the negotiating group on TRIPS a full mandate.<sup>2</sup> This decision is the basis for the current structure of the TRIPS Agreement.

CONTRACTING PARTIES request the Director-General to hold consultations with the Director-General of WIPO in order to clarify the legal and institutional aspects involved.’

<sup>2</sup> The following is an extract from the mandate: ‘3. Ministers agree that the outcome of the negotiations is not prejudged and that these negotiations are without prejudice to the views of participants concerning the institutional aspects of the international implementation of the results of the negotiations in this area, which is to be decided pursuant to the final paragraph of the Punta del Este Declaration.’



Between the spring of 1989 and the spring of 1990, several detailed proposals were submitted by all the major players: EC, United States, Switzerland, Japan and a group of fourteen developing countries (Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Pakistan, Peru, Tanzania, Uruguay and Zimbabwe). A composite text, based on these submissions, was prepared by the Chairman of the Negotiating Group in June 1990. From then until the end of the Brussels ministerial meeting in December 1990, detailed negotiations were conducted on every aspect of this text. There were six Chairman's drafts of the agreement between July and November 1990. A revised TRIPS text was then sent to the Brussels Ministerial Conference (MTN.TNC/W/35/Rev.1). There was commonly agreed language for large parts of the agreement, but differences continued on the forum for lodging the agreement and on dispute settlement, as well as on some twenty-five other outstanding issues, mainly relating to some provisions on patents and undisclosed information, copyright, GIs and transition periods. Work continued at Brussels until a sudden breakdown of negotiations in the overall Round due to the failure to reach an understanding on agriculture.

Progress was made on the patent provisions, particularly in autumn 1991 – including on the scope and timing of rights, exceptions from patentability, compulsory licensing/government use, exhaustion of rights, term of protection, protection of test data, transition periods,

4. Ministers agree that negotiations on this subject shall continue in the Uruguay Round and shall encompass the following issues:

- (a) the applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions;
- (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
- (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
- (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments, including the applicability of GATT procedures;
- (e) transitional arrangements aiming at the fullest participation in the results of the negotiations.

5. Ministers agree that in the negotiations consideration will be given to concerns raised by participants related to the underlying public policy objectives of their national systems for the protection of intellectual property, including developmental and technological objectives.

6. In respect of 4(d) above, Ministers emphasise the importance of reducing tensions in this area by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures.'

and the protection of existing subject matter. The question of forum was resolved with the decision to encapsulate the results of the negotiations within a Single Undertaking, which would also establish a new organization, the Multilateral Trade Organization (MTO)/WTO. A Draft Final Act (MTN.TNC/W/FA) was released by the then Director-General of GATT, Arthur Dunkel, on 20 December 1991, and came to be known as the Dunkel Text. Only two changes were made to TRIPS provisions between the 1991 Draft Final Act and the 1993 Final Act: first, introducing the text on the moratorium on so-called ‘non-violation complaints’ in dispute settlement cases (Article 64.2–3); and, second, to limit the scope of compulsory licensing of semi-conductor technology (Article 31(c)).

### 3 *Place of TRIPS in the World Trade Organization*

The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (‘WTO Agreement’) of 15 April 1994, which entered into force on 1 January 1995. The TRIPS Agreement is an integral part of the WTO Agreement, and is binding on each Member of the WTO from the date the WTO Agreement becomes effective for that country. However, the TRIPS Agreement gave original WTO Members transition periods, which differed according to their stages of development, to bring themselves into compliance with its rules (see section D1 of this chapter for transition periods). The Agreement is administered by the Council for TRIPS, which reports to the WTO General Council. The place of the TRIPS Council in the WTO can be seen from [Figure I.1](#).

The Ministerial Conference is the highest decision-making body in the WTO. Its sessions are to take place at least once every two years, during which sessions all matters under the WTO Agreements may be addressed. The General Council constitutes the second tier in the WTO structure. It comprises representatives from all Member countries, usually Ambassadors/Permanent Representatives based in Geneva. It meets some five times in a year. It may adopt decisions on behalf of the Ministerial Conference when the Conference is not in session. The General Council has authority over the Trade Negotiations Committee, which is currently charged with the negotiations mandated by the Doha Development Agenda. The General Council also meets as the Trade Policy Review Body, with its own Chairperson, to carry out trade policy reviews as mandated by the Trade Policy Review Mechanism (Annex 3 of the WTO Agreement), and the Dispute Settlement Body (DSB), with its own

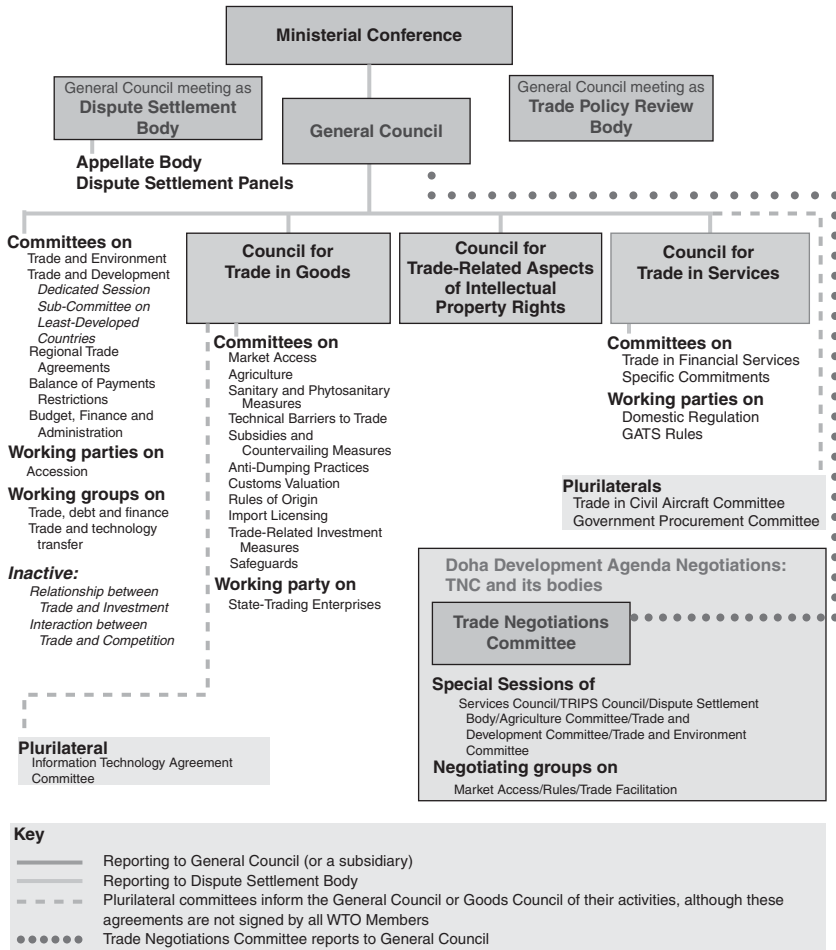


Figure I.1 WTO organizational structure

Chairperson to administer the rules in the Understanding on Rules and Procedures Governing the Settlement of Disputes.

The Council for TRIPS is one of the three sectoral (i.e. subject area) Councils operating under the General Council, the other two being the Council for Trade in Goods and the Council for Trade in Services. It is the body, open to all Members of the WTO, responsible for the administration of the TRIPS Agreement and in particular for monitoring the operation of the Agreement. The Council meets in Geneva formally three to four times a year as well as informally as necessary.

The WTO Agreement serves as an umbrella agreement for the TRIPS Agreement and the other trade agreements annexed to it. It includes provisions on the structure and operation of the WTO. Section E of this chapter explores some of these institutional aspects, namely the cross-cutting decision-making and amendment procedures in the WTO Agreement, and discusses the work of the Council for TRIPS.

#### 4 Overview of TRIPS provisions

The TRIPS Agreement is a comprehensive multilateral agreement on IP. It deals with each of the main categories of IPRs, establishes standards of protection as well as rules on administration and enforcement of IPRs, and provides for the application of the WTO dispute settlement mechanism to resolve disputes between Members concerning compliance with its standards. The following is a brief introduction to the various parts of the Agreement.

##### (a) General provisions and basic principles

Part I of the TRIPS Agreement sets out general provisions and basic principles of the Agreement, such as national treatment and most-favoured-nation (MFN) treatment, and exhaustion of IPRs. These general provisions and basic principles are discussed in section B of this chapter.

##### (b) Standards concerning the availability, scope and use of intellectual property rights

Part II of the Agreement sets out the minimum standards of IP protection to be provided by each Member in the following fields:

- (1) copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations);
- (2) trademarks, including service marks;
- (3) GIs;
- (4) industrial designs;
- (5) patents, including the protection of new varieties of plants;
- (6) the layout-designs of integrated circuits; and
- (7) undisclosed information, including trade secrets and test data.

Part II also contains provisions on the control of anti-competitive practices in contractual licences. These areas of IP and control of anti-competitive practices will be discussed in [Chapters II to VI](#) of this *Handbook*.

In respect of each of these fields of IP, the main elements of protection are defined:

- the subject matter eligible for protection;
- the scope of rights to be conferred;
- permissible exceptions to those rights; and,
- where applicable, the minimum duration of protection.

The TRIPS Agreement sets these standards firstly by requiring compliance with the substantive obligations of the main conventions of the World Intellectual Property Organization (WIPO), the Paris Convention and the Berne Convention in their most recent versions. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these two conventions are incorporated by reference and thus become obligations between WTO Members under the TRIPS Agreement, separately from the obligations they mostly have to one another directly under those conventions. The relevant provisions are to be found in Articles 2.1 and 9.1, which relate, respectively, to the Paris Convention and to the Berne Convention.

The TRIPS Agreement then adds a substantial number of additional obligations on matters where the pre-existing conventions were silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a ‘Berne-plus’ and ‘Paris-plus’ agreement. As explained later in [Chapter II](#), the TRIPS provisions on related rights contain certain references to the Rome Convention. The Section on the protection of layout-designs of integrated circuits, explained in [Chapter VI](#), incorporates most of the substantive provisions of the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty). Article 2.2 of the TRIPS Agreement contains a safeguard clause, according to which the provisions of the Agreement cannot be understood to derogate from the existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention or the IPIC Treaty.<sup>3</sup>

<sup>3</sup> Unless otherwise indicated, in this *Handbook*, ‘Paris Convention’ refers to the Paris Convention for the Protection of Industrial Property (the Stockholm Act of 14 July 1967); ‘Berne Convention’ refers to the Berne Convention for the Protection of Literary and Artistic Works (the Paris Act of 24 July 1971); ‘Rome Convention’ refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961; and the ‘IPIC Treaty’ to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989.

### (c) Enforcement

Part III of the TRIPS Agreement deals with domestic procedures and remedies for the enforcement of IPRs. The Agreement lays down certain general principles applicable to IP enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures. These provisions specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights and also provide for safeguards against the abuse of such procedures and remedies as barriers to legitimate trade. These provisions are discussed in [Chapter VII](#).

### (d) Certain other matters

Part IV of the Agreement contains general rules on procedures related to the acquisition and maintenance of IPRs, particularly concerning how applications for IP protection are administered and the kind of appeals or reviews that should be available. These rules are explained below in section C of this chapter.

Part V of the Agreement deals with dispute prevention and settlement. The Agreement makes disputes between Members about the respect of obligations contained in it, whether in the field of substantive standards or in the field of enforcement, subject to the WTO's dispute settlement procedures. Dispute prevention and settlement are discussed in [Chapter VIII](#).

Part VI of the Agreement contains provisions on transition periods, transfer of technology and technical cooperation. Part VII deals with institutional arrangements and certain cross-cutting matters such as the protection of existing subject matter. These two Parts are covered below in section D of this chapter.

## **B General provisions and basic principles of the TRIPS Agreement**

### *1 Objectives and principles*

The general goals of the TRIPS Agreement are set out in its Preamble, and include reducing distortions and impediments to international trade, promoting effective and adequate protection of IPRs, and ensuring that

measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. The Preamble is largely drawn from the Uruguay Round mandates given to the negotiators of the TRIPS Agreement in the 1986 Punta del Este Declaration (reproduced on p. 6) and in the April 1988 mid-term review decision (relevant extract in footnote 2).

The general goals contained in the Preamble of the Agreement should be read in conjunction with Article 7, entitled 'Objectives'. Article 7 reflects the search for a balanced approach to IP protection in the societal interest, taking into account the interests of both producers and users. IP protection is expected to contribute not only to the promotion of technological innovation, but also to the transfer and dissemination of technology in a way that benefits both its producers and users and that respects a balance of rights and obligations, with the overall goal of promoting social and economic welfare.

Article 8, entitled 'Principles', recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of IPRs, provided that such measures are consistent with the provisions of the TRIPS Agreement.

The Preamble and Articles 7 and 8 express the general goals, objectives and principles of the Agreement. As recognized by WTO dispute settlement panels, they are to be borne in mind when the substantive rules of the Agreement are being examined. The 2001 Doha Declaration on the TRIPS Agreement and Public Health provides (in paragraph 5(a)) that '[i]n applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles'.

## 2 *Minimum standards agreement*

As discussed above, the TRIPS Agreement sets out minimum standards of protection to be provided by each Member. Article 1.1 makes it clear that Members may, but are not obliged to, implement in their law more extensive protection than required by the Agreement, provided that such protection does not contravene its provisions. For example, Members may provide for longer terms of protection than that mandated by the TRIPS Agreement but they are not required to do so; however, they cannot do this in a way that conflicts with TRIPS

provisions. For instance, in light of the principle of non-discrimination, longer protection could not be made available only to nationals of one country.

Article 1.1 further clarifies that Members are free to determine the appropriate method of implementing the provisions of the TRIPS Agreement within their own legal system and practice.

Given the long history of international cooperation on IP matters, the national laws in this area are often fairly similar. However, to establish how the law applies in any concrete practical situation, the applicable national law will have to be consulted.

### 3 *Beneficiaries*

As in the main pre-existing IP conventions, the basic obligation on each Member is to accord the treatment in regard to the protection of IP provided for under the Agreement to right holders and users of other Members. Article 1.3 defines who these persons are. They are referred to as 'nationals' but include persons, natural or legal, who have a close attachment to a Member without necessarily having the nationality of that Member. The criteria for determining which persons must thus benefit from the treatment provided for under the Agreement are those laid down for this purpose in the pre-existing IP conventions of WIPO referred to in the Agreement, applied of course with respect to all WTO Members whether or not they are party to those conventions. The following clarifies who the beneficiaries are for industrial property rights and for copyright and related rights, as the rules differ slightly between these categories.

#### (a) *Industrial property*

Pursuant to Articles 2 and 3 of the Paris Convention, protection is granted in the case of industrial property to natural or legal persons who:

- are nationals of a Member;
- are domiciled in a Member; or
- have real and effective industrial or commercial establishments in a Member.

Pursuant to Article 5 of the IPIC Treaty, similar criteria for determining eligible beneficiaries are applied in relation to layout-designs of integrated circuits.



### (b) Copyright

Pursuant to Articles 3 and 4 of the Berne Convention, protection is granted to authors of literary or artistic works who:

- are nationals of a Member;
- have their habitual residence in a Member;
- have their works first (or simultaneously) published in a Member;
- are authors of cinematographic works the maker of which has his headquarters or habitual residence in a Member; or
- are authors of works of architecture erected in a Member or of other artistic works incorporated in a building or other structure located in a Member.

### (c) Performers

Pursuant to Article 4 of the Rome Convention, protection is granted to performers whose:

- performance takes place in another Member;
- performance is incorporated in a phonogram as defined below; or
- performance is covered by a broadcast as defined below.

### (d) Producers of phonograms

Pursuant to Article 5 of the Rome Convention, protection is granted to producers of phonograms:

- if the producer is a national of another Member;
- if the first fixation of sound (i.e. recording) was made in another Member; or
- if the phonogram was first published in another Member.

In accordance with the provisions of Article 5(3) of the Rome Convention as incorporated into the TRIPS Agreement, a Member may declare that it does not apply either the criterion of fixation or that of publication. The criterion of nationality, however, may not be excluded.

### (e) Broadcasting organizations

Pursuant to Article 6 of the Rome Convention, protection is granted to broadcasting organizations:

- whose headquarters are situated in another Member; or
- when the broadcast was transmitted from a transmitter in another Member.

In accordance with the provisions of Article 6(2) of the Rome Convention as incorporated into the TRIPS Agreement, a Member may declare that it will protect broadcasts only if both relevant conditions are met, i.e. that the headquarters of the broadcasting organization are situated in another Member and the broadcast was transmitted from a transmitter situated in the same Member.

#### *4 National treatment and most-favoured-nation treatment*

A key principle in the WTO is that of non-discrimination. It applies to trade in goods, trade in services and IPRs. It has two components: national treatment, and most-favoured-nation (MFN) treatment. As regards IPRs, the fundamental rules on national and MFN treatment of foreign nationals can be found in Articles 3 to 5 of the TRIPS Agreement. These rules are common to all categories of IP covered by the Agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of IPRs as well as those matters affecting the use of IPRs specifically addressed in the Agreement. While the national treatment clause forbids discrimination between a Member's own nationals and the nationals of other Members, the MFN treatment clause forbids discrimination between the nationals of other Members.

Article 3 of the TRIPS Agreement on national treatment requires each Member to accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of IP. With respect to the national treatment obligation, the exceptions allowed under the four pre-existing WIPO treaties (Paris, Berne, Rome and IPIC) are also allowed under TRIPS.

An important exception to national treatment is the so-called 'comparison of terms' for copyright protection allowed under Article 7(8) of the Berne Convention as incorporated into the TRIPS Agreement. If a Member provides a term of protection in excess of the minimum term required by the TRIPS Agreement, it does not need to protect a work for a duration that exceeds the term fixed in the country of origin of that work. In other words, the additional term can be made available to foreigners on the basis of 'material reciprocity'. For example, if Member A provides its own nationals with a copyright term of seventy years, instead of fifty years as required by Article 12 of the TRIPS Agreement, while Member B provides for fifty years, Member A need not protect works from Member B for more than fifty years.