



SYMPOSIUM ON THE TRIPS AGREEMENT FOR TRIPS COUNCIL MEMBERS AND OBSERVERS

Legal Impact of TRIPS: Implications for Global IP Policy Debates

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Outline

The early days after TRIPS entered into force

What really changed when TRIPS entered into force

The winds from Doha and the likes and dislikes of TRIPS Flexibilities

Deeper integration agreements as tools to boost trade globally and their IP provisions - The likes and dislikes of TRIPS Plus

The way forward

The early days after TRIPS entered into force

- WIPO/WTO Agreement (1995)
- Developing countries' concerns and TRIPS implementation
- Changes in the IP law of developed countries

- The response to commitments for implementation was not enthusiastic, to some extent, justified by the perception of some Members that TRIPS' higher standards of protection would be a **net negative in terms of welfare cost** Daniel Gervais, '(Re)implementing the TRIPS Agreement on Trade-Related Aspects of Intellectual Property to Foster Innovation', *Journal of World Intellectual Property* (2009), Vol 12, no 5, pp 349
- Some developing countries had TRIPS-compatible legislation in place well in advance of the 2000 deadline (Chile, Mexico and South Korea among others)
- In the case of LDCs, the situation varies markedly: while some that have the right to use the transition period have not yet adopted implementing legislation, there are others that passed implementing legislation in advance of the initial 2006 transition period (for example, 14 of the 17 country members of OAPI, which are bound by the revised Bangui Agreement (2002))
- In June 2013, [WTO members agreed](#) to extend until July 1, 2021 the deadline for LDCs to protect IP under TRIPS, with a further

- The minimum standards: A few examples on industrial property matters
- The MFN clause on IP
- A single treaty on *almost* all IP categories with across the board rules on enforcement
- The introduction of WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, applicable to TRIPS

The Minimum Standard Concept: A few examples of industrial property matters

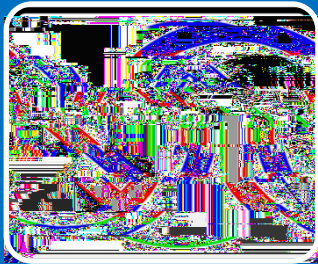
- **Trademarks.** Rights Conferred ([Art. 16.1](#)); Well-known Trademarks ([Art. 16.2 and 3](#)); Term of Protection ([Art. 18](#))
- **Industrial Designs.** Requirements for Protection ([Art. 25.1](#)); Protection ([Art. 26](#))
- **Patents.** Patentable Subject Matter ([Art. 27](#)); Rights Conferred ([Art. 28](#)); Term of Protection ([Art. 33](#)); Process Patents: Burden of Proof ([Art. 34](#))
- **Enforcement.** Availability of civil and administrative procedures and remedies—fair and equitable—([Art. 42](#)); Criminal Procedures ([Art. 61](#))

The winds from Doha and the likes and dislikes of TRIPS Flexibilities

- The concept of “flexibility”
- TRIPS Agreement Implementation: [Art. 27](#) and some of its flexibilities

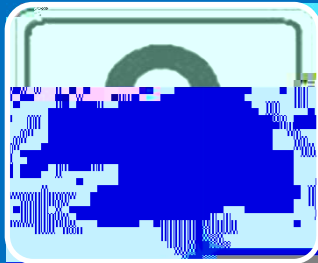


TRIPS Agreement Implementation: Art. 27 and some of its flexibilities



Explicit obligation to give protection

- Inventions - whether products or processes - in all fields of technology
- Micro-organisms



Explicit permission to exclude from patent protection

- Plants and animals
- Diagnostic, therapeutic and surgical methods



Implicit permission not to give protection

- Discoveries
- Substances existing in nature
- Incremental innovation

Regional Trade Agreements (EPAs/FTAs and Interim Agreements)

- Regional trade agreements (RTAs) – whether free trade agreements (FTAs) or customs unions (CUs) – are a way to promote liberalization
- Trade agreements are in principle regional, but FTAs are increasingly cross-regional
- In order to pursue liberalization, countries play simultaneously at three levels: bilateral, regional and multilateral, producing a special synergy among the different process, the so-called “competitive liberalization”

- GATT [Article XXIV](#), GATS [Article V](#) and the [Enabling Clause](#)

Interaction between WTO law and RTAs: TRIPS Plus provisions

- RTA provisions aim to add, clarify, interpret or to narrow a TRIPS flexibility; or they go beyond the minimum standard protection under TRIPS
- Development of new matters not covered by the TRIPS Agreement (i.e., utility models and TK)
- Duplication of TRIPS provisions
- Obligation to “apply” or “accede” to WIPO-administered treaties (i.e., [PLT](#), [Budapest](#) and [PCT](#)) or to respect international commitments in force ([Doha Declaration on Public Health](#))

TRIPS Agreement Implementation: Art. 27 and more extensive protection

Explicit obligation to protect	Explicit permission to excluded	Implicit permission not give protection
<ul style="list-style-type: none"> • Inventions, whether products or processes, in all fields of technology (to renounce to a transition period) • Micro-organisms (comprehensive definition) 	<ul style="list-style-type: none"> • Plant and animals (not to exclude or only exclude plants varieties and animal races) • Diagnostic, therapeutic and surgical methods (not to exclude or limit the concepts to allow protection under certain circumstances) 	<ul style="list-style-type: none"> • Substances existing in nature (allow protection when isolated and purified) • First and Second medical use (allow protection via modifying requirement of novelty/type of claims)

The way forward:

- After TRIPS Multilateral Agreements and the MFN (PLT) and current negotiations (SCP);
- The revisions to agreements incorporated by reference into TRIPS (Paris, Berne, Washington); and
- TRIPS negotiations