

# **Introduction to Trade-Related Intellectual Property Rights (TRIPS), TRIPS in the Doha Round and Issues for the Developing World**



**Specialized Course on Select WTO  
Issues : Agriculture, Services,  
TRIPs and RTAs**

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# Outline

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## Introduction to TRIPS

- IP and Trade: the link, objectives, definition, history
- Main features and basic principles of TRIPS
- Institutional arrangements
- The universe of IPRs in the TRIPS agreement

## TRIPS in Doha Agenda

- TRIPS Built-in-Agenda
- TRIPS in DDA
- Other provisions relating to developing countries
- Public policy implications

# Part I



## Introduction to TRIPS

# IP and Trade – the links

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- Technology is a key driver of competitiveness, which in turn is a key driver of international trade
- Technological development needs creative and inventive minds, and the need for incentivising them
- Globalisation and increased global trade and investment means greater need for protection of inventions and creations globally
- Linkage between Intellectual Property Rights (IPRs) and trade arises due to incidents of piracy, counterfeiting and other infringements of intellectual property rights
- As these incidents constitute a barrier to trade, hence the need to have minimum standards

# International law on IP and Trade - Objectives

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- To promote adequate protection of IPR in order to reduce distortions in and impediments to international trade
- To ensure that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade
- To reduce tensions by reaching strengthened commitment to resolve disputes on trade-related IP issues through multilateral procedures
- To establish a mutually supportive relationship between the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO)

# What is Intellectual Property (IP)?

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- IP as a legal concept refers to creations of the mind
- It could be embodied as a characteristic of an item or device or work or object (c.f. goodwill)
- IPR provides the owner an exclusive right, generally for a limited period, to stop others from making, using or selling that product without her permission
- IPRs laws are the legal means provided by the state to motivate inventors and creators
- IPR is an economic right
- IPR is a negative right – right to exclude others

# Brief International History of IPRs

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- International Exhibition of Inventions, Vienna 1873
- Paris Convention – 1883 pursuant to the International Congress on Industrial Property , 1878
- Berne Convention for the Protection of Literary and Artistic works, 1886
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961
- Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the WTO, 1995

# TRIPS Agreement - Main features

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- **Standards:** The agreement lays down minimum standards of protection
  - The subject matter to be protected
  - The rights to be conferred and permissible exceptions
  - The minimum period of protection
- **Enforcement**
  - Provisions for domestic procedure and remedies for the enforcement of the IPRs
  - Includes general principle applicable to IPR enforcement procedure apart from administrative, civil and criminal procedure available for enforcement of rights of the right holder
- **Dispute settlement:** The agreement provides for the settlement of disputes over IPR among the member states within the parameters of dispute settlement procedure



# TRIPS Agreement - Basic Principles

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Non-discrimination features prominently in TRIPS, similar to GATT and GATS, by following principles of:

- National Treatment (Article 3): Equal treatment for foreign and domestic individuals and companies
- Most Favoured Nation (Article 4): Equal treatment for nationals of all trading partners in the WTO
- Balanced Protection: (Article 7 and 8) IP protection should contribute to technical innovation and transfer of technology

# TRIPS Agreement - Acquisition and Maintenance

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- Member countries must set up and operate government offices for the acquisition and maintenance of IPRs
- Procedures for grant and registration of IPR must be reasonable
- Member country's law must provide for opposition, revocation, cancellation and judicial review
- Member country may adopt measures to protect public health and the public interest

# Institutional Arrangements under the WTO

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- Council for Trade Related Aspects of Intellectual Property Rights (TRIPS)
- Dispute Settlement Body (DSB)
- WTO-WIPO-WHO collaboration
- Current Negotiations in special sessions (SS)

# Types of IPRs in the TRIPS Universe: Copyright and Related Rights

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- Copyright grants exclusive rights to the creator of original scientific, artistic and literary works
- *'Original'* is key in defining a work that qualifies for copyright protection
- The term of protection – shall be no less than 50 years from date of authorised publication...
- limitations or exceptions: which do not conflict with exploitation of the work and not prejudicial to right holder

# Types of IPRs in the TRIPS Universe:

## Trademark

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- Trademark protects any word, name, logo or device used to **identify, distinguish** or indicate the source of goods or services
- The purpose is to safeguard the integrity of the product and to prevent product confusion and unfair competition
- The term of protection (initial registration and each renewal of registration) of a trademark shall be for a term of no less than 7 years

# Types of IPRs in the TRIPS Universe: Geographical Indication

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- GIs identify a good as originating in a region or locality, where a given **reputation** and quality or other characteristics of the good is essentially attributable to its geographical origin
- TRIPS prohibits the use of GIs that cause deception, and provides for injunctive relief, such as refusal of trademark registration, etc
- Unlimited term of protection
- Exceptions: countries are not obliged to bring a geographical indication under protection, where it has become a generic term for describing the product in question

# Types of IPRs in the TRIPS Universe: Industrial Design

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- Protects the **artistic aspect** (namely, texture, pattern, shape) of an object instead of the technical features
- The term of protection: amount to at least 10 years – ‘*amount to*’ allows the term to be divided into two periods (for example two periods of five years)
- The third party is prohibited from making, selling or importing articles bearing a design which is a copy of the protected design, when such acts are undertaken for commercial purposes
- Exception: where such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design

# Types of IPRs in the TRIPS Universe:

## Patents

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- ❑ Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to **novelty, inventiveness and industrial applicability**
- ❑ Use without authorisation from right holder permitted: Compulsory Licensing
- ❑ The term of protection: 20 years from the date of filing



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- ❑ The agreement allows countries to **exclude inventions from patentability** on following grounds:
  - Inventions necessary ‘to protect *ordre public* or morality; including to protect human, animal or plant life or health or to avoid serious prejudice to the environment...’
  - Diagnostic, therapeutic and surgical methods for the treatment of humans or animals
  - Plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes

# Types of IPRs in the TRIPS Universe: Layout Designs of Integrated Circuits

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- It refers to layout designs (topographies) of the integrated circuits; the stencils used to etch or encode an electrical circuit on a semiconductor chip
- Protection conferred to “original” layout-design/topographies
- Exclusive rights include the right of reproduction and the right of importation, sale and other distribution for commercial purposes
- The term of protection: ten years form the date of first commercial exploitation

# Types of IPRs in the TRIPS Universe:

## Undisclosed Information (trade secrets)

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- Undisclosed information protection applies to information that is secret, that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret
- Trade secrets consist of formulae, patterns, process or compilation of information. (for example the formula for a sports drink)
- In most countries, they are not subject to registration but are protected through laws against unfair competition
- Unlimited term of protection

# Exhaustion of IPRs under TRIPS Agreement

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Two main competing theories:

- **Universal or international exhaustion theory:** An IPR holder's right are exhausted on the first sale of the protected product anywhere in the world
- **Domestic or territorial exhaustion theory:** The right holder's IP are not exhausted until after the first sale of the product in the territory in which he holds the rights

*The resolution of exhaustion issues is left to national laws and there are no international or customary law norms in this area*

# Part II



TRIPS in Doha Round

# TRIPS Built-in-Agenda

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- Article 23.4: Negotiations shall be undertaken concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system
- Article 27.3 (b): Members shall review the exclusion from patentability of plants, animals and micro-organisms
- Article 64.3: Members shall review the scope and modality of application of non-violation complaints to intellectual property rights

# TRIPS in DDA

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- GI Registry: for wines and spirits as per built in agenda under Article 23.4 – two views
    - Trademarks can cover such registration requirement
    - A multilateral register is mandated under the Agreement
- Negotiations in special session stalled

# TRIPS in DDA

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- Extension: of the higher level of protection available to wines and spirits to other products
- Developing countries main demandeurs as they have less interest in wines and spirits and more in food and artisanal products
- Negotiations under the chairpersonship of DG, WTO as there is disagreement on whether negotiations are mandated on the issue in DDA



# TRIPS in DDA

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- ❑ Disclosure: For TRIPS-CBD compatibility relating to sustainable exploitation of biological resources, members must disclose the source of origin of any biological material used in the application for patent [Art 27.3 (b)]
- ❑ Members must also protect traditional knowledge from patenting
- ❑ Negotiations under the chairpersonship of DG, WTO as there is disagreement on whether negotiations are mandated on the issue in DDA

# Other provisions relating to developing countries

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- Transitional arrangements for LDCs
- Developed countries to provide
  - (I) Incentives for transfer of technology to Least Developed Countries (LDCs)
  - (II) Technical assistance and financial support to developing countries in preparing laws and regulations on protection and enforcements of IPRs

# Public Policy Implications

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- Benefits and costs of higher IP standards for developing countries
- Protection of traditional knowledge and culture
- Health
- Food

# Impact of TRIPS on Trade

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## **Domestic Market**

Free riding/Imitation made difficult

Easy for foreigners to obtain/enforce protection

Standards of protection vary as novelty, inventiveness and industrial applicability not defined in TRIPS

## **International Market**

Exporters need to be aware of IP content of exports

Exporters need to be aware of competitors' IP

Reverse Engineered products susceptible to legal action<sup>28</sup>

# Conclusion

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- Highly innovative agreement and remains the most comprehensive international agreement on intellectual property till date
- Most contentious of WTO agreements
- Overall it has worked well, however, it needs to continue to implement wide ranging provisions specially when it touches on significant public policy questions
- Developing countries in need of technology leapfrogging must use flexibilities available in TRIPS to ensure inclusive development path

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Thank You