

## TRIPS : A MORE DETAILED OVERVIEW OF THE TRIPS AGREEMENT

# Overview: the TRIPS Agreement

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

The three main features of the Agreement are:

- ❑ **Standards.** In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.
- ❑ **Enforcement.** The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR 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, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

## CONTENTS:

- > **General provisions**
- > **Standards of protection**
- > Copyright
- > Related rights
- > Trademarks
- > Geographical indications
- > Industrial designs
- > Patents
- > Integrated circuits
- > Undisclosed information
- > Anti-competitive licences
- > **Enforcement**  
([intel2b\\_e.htm#enforcement](#))
- > General obligations  
([intel2b\\_e.htm#generalobligs](#)).
- > Procedures and remedies  
([intel2b\\_e.htm#civiland](#))
- > Provisional measures  
([intel2b\\_e.htm#provisional](#))
- > Border measures  
([intel2b\\_e.htm#specialrequi](#))

❑ **Dispute settlement.** The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

In addition the Agreement provides for certain basic principles, such as national and most-favoured-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. The obligations under the Agreement will apply equally to all Member countries, but developing countries will have a longer period to phase them in. Special transition arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals.

The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

## Certain general provisions

As in the main pre-existing intellectual property conventions, the basic obligation on each Member country is to accord the treatment in regard to the protection of intellectual property provided for under the Agreement to the persons of other Members. Article 1.3 defines who these persons are. These persons are referred to as "nationals" but include persons, natural or legal, who have a close attachment to other Members without necessarily being nationals. 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 main pre-existing intellectual property conventions of WIPO, applied of course with respect to all WTO Members whether or not they are party to those conventions. These conventions are the Paris Convention, the Berne Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty).

Articles 3, 4 and 5 include the fundamental rules on national and most-favoured-nation treatment of foreign nationals, which are common to all categories of intellectual property 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 intellectual property rights as well as those matters affecting the use of intellectual property rights 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 most-favoured-nation treatment clause forbids discrimination between the nationals of other Members. In respect of the national treatment obligation, the exceptions allowed under the pre-existing intellectual property conventions of WIPO are also allowed under TRIPS. Where these exceptions allow material reciprocity, a consequential exception to MFN treatment is also permitted (e.g. comparison of terms for copyright protection in excess of the minimum term required by the TRIPS Agreement as provided under Article 7(8) of the Berne Convention as incorporated into the TRIPS Agreement). Certain other limited exceptions to the MFN obligation are also provided for.

The general goals of the TRIPS Agreement are contained in the Preamble of the Agreement, which reproduces the basic Uruguay Round negotiating objectives established in the TRIPS area by the 1986 Punta del Este Declaration and the 1988/89 Mid-Term Review. These objectives include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures

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> [Criminal procedures](#)  
(intel2b\_e.htm#criminal)

> [Other provisions](#)  
(intel2c\_e.htm#otherprovisi  
ons)

> [Acquiring and main-  
taining rights](#)  
(intel2c\_e.htm#aquisition)

> [Transitional arrange-  
ments](#)  
(intel2c\_e.htm#transitional)

> [Protecting existing  
matter](#)  
(intel2c\_e.htm#protectiono  
fexisting)

and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. These objectives should be read in conjunction with Article 7, entitled "Objectives", according to which the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. 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 intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.

## **Substantive standards of protection**

### **Copyright**

During the Uruguay Round negotiations, it was recognized that the Berne Convention already, for the most part, provided adequate basic standards of copyright protection. Thus it was agreed that the point of departure should be the existing level of protection under the latest Act, the Paris Act of 1971, of that Convention. The point of departure is expressed in Article 9.1 under which Members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention, i.e. Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of that Convention, i.e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation), or of the rights derived therefrom. The provisions of the Berne Convention referred to deal with questions such as subject-matter to be protected, minimum term of protection, and rights to be conferred and permissible limitations to those rights. The Appendix allows developing countries, under certain conditions, to make some limitations to the right of translation and the right of reproduction.

In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement clarifies and adds certain specific points.

Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. It confirms further, that the form in which a program is, whether in source or object code, does not affect the protection. The obligation to protect computer programs as literary works means e.g. that only those limitations that are applicable to literary works may be applied to computer programs. It also confirms that the general term of protection of 50 years applies to computer programs. Possible shorter terms applicable to photographic works and works of applied art may not be applied.

Article 10.2 clarifies that databases and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright. Databases are eligible for copyright protection provided that they by reason of the selection or arrangement of their contents constitute intellectual creations. The provision also confirms that databases have to be protected regardless of which form they are

in, whether machine readable or other form. Furthermore, the provision clarifies that such protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11 provides that authors shall have in respect of at least computer programs and, in certain circumstances, of cinematographic works the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: a Member is excepted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, the obligation does not apply to rentals where the program itself is not the essential object of the rental.

According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. Paragraphs 2 through 4 of that Article specifically allow shorter terms in certain cases. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13 requires Members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. This is a horizontal provision that applies to all limitations and exceptions permitted under the provisions of the Berne Convention and the Appendix thereto as incorporated into the TRIPS Agreement. The application of these limitations is permitted also under the TRIPS Agreement, but the provision makes it clear that they must be applied in a manner that does not prejudice the legitimate interests of the right holder.

### **Related rights**

The provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. According to Article 14.1, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance.

In accordance with Article 14.2, Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called grand-fathering clause, according to which a Member, which on 15 April 1994, i.e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

Broadcasting organizations shall have, in accordance with Article 14.3, the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.

The term of protection is at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organizations (Article 14.5).

Article 14.6 provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

## **Trademarks**

The basic rule contained in Article 15 is that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, must be eligible for registration as a trademark, provided that it is visually perceptible. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, must be eligible for registration as trademarks.

Where signs are not inherently capable of distinguishing the relevant goods or services, Member countries are allowed to require, as an additional condition for eligibility for registration as a trademark, that distinctiveness has been acquired through use. Members are free to determine whether to allow the registration of signs that are not visually perceptible (e.g. sound or smell marks).

Members may make registrability depend on use. However, actual use of a trademark shall not be permitted as a condition for filing an application for registration, and at least three years must have passed after that filing date before failure to realize an intent to use is allowed as the ground for refusing the application (Article 14.3).

The Agreement requires service marks to be protected in the same way as marks distinguishing goods (see e.g. Articles 15.1, 16.2 and 62.3).

The owner of a registered trademark must be granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion must be presumed (Article 16.1).

The TRIPS Agreement contains certain provisions on well-known marks, which supplement the protection required by Article 6*bis* of the Paris Convention, as incorporated by reference into the TRIPS Agreement, which obliges Members to refuse or to cancel the registration, and to prohibit the use of a mark conflicting with a mark which is well known. First, the provisions of that Article must be applied also to services. Second, it is required that knowledge in the relevant sector of the public acquired not only as a result of the use of the mark but also by other means, including as a result of its promotion, be taken into account. Furthermore, the protection of registered well-known marks must extend to goods or services which are not similar to those in respect of which the trademark has been registered, provided that its use

would indicate a connection between those goods or services and the owner of the registered trademark, and the interests of the owner are likely to be damaged by such use (Articles 16.2 and 3).

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties (Article 17).

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely (Article 18).

Cancellation of a mark on the grounds of non-use cannot take place before three years of uninterrupted non-use has elapsed unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark, such as import restrictions or other government restrictions, shall be recognized as valid reasons of non-use. Use of a trademark by another person, when subject to the control of its owner, must be recognized as use of the trademark for the purpose of maintaining the registration (Article 19).

It is further required that use of the trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services (Article 20).

### **Geographical indications**

Geographical indications are defined, for the purposes of the Agreement, as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (Article 22.1). Thus, this definition specifies that the quality, reputation or other characteristics of a good can each be a sufficient basis for eligibility as a geographical indication, where they are essentially attributable to the geographical origin of the good.

In respect of all geographical indications, interested parties must have legal means to prevent use of indications which mislead the public as to the geographical origin of the good, and use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (Article 22.2).

The registration of a trademark which uses a geographical indication in a way that misleads the public as to the true place of origin must be refused or invalidated *ex officio* if the legislation so permits or at the request of an interested party (Article 22.3).

Article 23 provides that interested parties must have the legal means to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication. This applies even where the public is not being misled, there is no unfair competition and the true origin of the good is indicated or the geographical indication is accompanied by expressions such as "kind", "type", "style", "imitation" or the like. Similar protection must be given to geographical indications identifying spirits when used on spirits. Protection against registration of a trademark must be provided accordingly.

Article 24 contains a number of exceptions to the protection of geographical indications. These exceptions are of particular relevance in respect of the additional protection for geographical indications for wines and spirits. For example, Members are not obliged to bring a geographical indication under protection, where it has become a generic term for describing the product in question (paragraph 6). Measures to implement these provisions shall not prejudice prior trademark rights that have been acquired in good faith (paragraph 5). Under certain

circumstances, continued use of a geographical indication for wines or spirits may be allowed on a scale and nature as before (paragraph 4). Members availing themselves of the use of these exceptions must be willing to enter into negotiations about their continued application to individual geographical indications (paragraph 1). The exceptions cannot be used to diminish the protection of geographical indications that existed prior to the entry into force of the TRIPS Agreement (paragraph 3). The TRIPS Council shall keep under review the application of the provisions on the protection of geographical indications (paragraph 2).

## **Industrial designs**

Article 25.1 of the TRIPS Agreement obliges Members to provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

Article 25.2 contains a special provision aimed at taking into account the short life cycle and sheer number of new designs in the textile sector: requirements for securing protection of such designs, in particular in regard to any cost, examination or publication, must not unreasonably impair the opportunity to seek and obtain such protection. Members are free to meet this obligation through industrial design law or through copyright law.

Article 26.1 requires Members to grant the owner of a protected industrial design the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

Article 26.2 allows Members to provide limited exceptions to the protection of industrial designs, provided that 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, taking account of the legitimate interests of third parties.

The duration of protection available shall amount to at least 10 years (Article 26.3). The wording "amount to" allows the term to be divided into, for example, two periods of five years.

## **Patents**

The TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology without discrimination, subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced (Article 27.1).

There are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to *ordre public* or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of *ordre public* or morality (Article 27.2).

The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)).

The third is that Members may exclude 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. However, any country excluding plant varieties from patent protection must provide an effective *sui generis* system of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement (Article 27.3(b)).

The exclusive rights that must be conferred by a product patent are the ones of making, using, offering for sale, selling, and importing for these purposes. Process patent protection must give rights not only over use of the process but also over products obtained directly by the process. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts (Article 28).

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties (Article 30).

The term of protection available shall not end before the expiration of a period of 20 years counted from the filing date (Article 33).

Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application (Article 29.1).

If the subject-matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process, where certain conditions indicating a likelihood that the protected process was used are met (Article 34).

Compulsory licensing and government use without the authorization of the right holder are allowed, but are made subject to conditions aimed at protecting the legitimate interests of the right holder. The conditions are mainly contained in Article 31. These include the obligation, as a general rule, to grant such licences only if an unsuccessful attempt has been made to acquire a voluntary licence on reasonable terms and conditions within a reasonable period of time; the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the licence; and a requirement that decisions be subject to judicial or other independent review by a distinct higher authority. Certain of these conditions are relaxed where compulsory licences are employed to remedy practices that have been established as anticompetitive by a legal process. These conditions should be read together with the related provisions of Article 27.1, which require that patent rights shall be enjoyable without discrimination as to the field of technology, and whether products are imported or locally produced.

### **Layout-designs of integrated circuits**

Article 35 of the TRIPS Agreement requires Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the IPIC Treaty (the Treaty on Intellectual Property in Respect of Integrated Circuits), negotiated under the auspices of WIPO in 1989. These provisions deal with, *inter alia*, the definitions of "integrated circuit" and "layout-design (topography)", requirements for protection, exclusive rights, and limitations, as well as exploitation, registration and disclosure. An "integrated circuit" means a product, in its final form



or an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and/or on a piece of material and which is intended to perform an electronic function. A "layout-design (topography)" is defined as the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture. The obligation to protect layout-designs applies to such layout-designs that are original in the sense that they are the result of their creators' own intellectual effort and are not commonplace among creators of layout-designs and manufacturers of integrated circuits at the time of their creation. The exclusive rights include the right of reproduction and the right of importation, sale and other distribution for commercial purposes. Certain limitations to these rights are provided for.

In addition to requiring Member countries to protect the layout-designs of integrated circuits in accordance with the provisions of the IPIC Treaty, the TRIPS Agreement clarifies and/or builds on four points. These points relate to the term of protection (ten years instead of eight, Article 38), the applicability of the protection to articles containing infringing integrated circuits (last sub clause of Article 36) and the treatment of innocent infringers (Article 37.1). The conditions in Article 31 of the TRIPS Agreement apply *mutatis mutandis* to compulsory or non-voluntary licensing of a layout-design or to its use by or for the government without the authorization of the right holder, instead of the provisions of the IPIC Treaty on compulsory licensing (Article 37.2).

### **Protection of undisclosed information**

The TRIPS Agreement requires undisclosed information -- trade secrets or know-how -- to benefit from protection. According to Article 39.2, the protection must apply 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. The Agreement does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in a manner contrary to honest commercial practices. "Manner contrary to honest commercial practices" includes breach of contract, breach of confidence and inducement to breach, as well as the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

The Agreement also contains provisions on undisclosed test data and other data whose submission is required by governments as a condition of approving the marketing of pharmaceutical or agricultural chemical products which use new chemical entities. In such a situation the Member government concerned must protect the data against unfair commercial use. In addition, Members must protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

### **Control of anti-competitive practices in contractual licences**

Article 40 of the TRIPS Agreement recognizes that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology (paragraph 1). Member countries may adopt, consistently with the other provisions of the Agreement, appropriate measures to prevent or control practices in the licensing of intellectual property rights which are abusive and anti-competitive (paragraph 2). The Agreement provides for a mechanism whereby a country seeking to take action against such practices involving the companies of

another Member country can enter into consultations with that other Member and exchange publicly available non-confidential information of relevance to the matter in question and of other information available to that Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member (paragraph 3). Similarly, a country whose companies are subject to such action in another Member can enter into consultations with that Member (paragraph 4).

