

# FAQ

Frequently  
Asked  
Questions

**Trade Related  
Aspects  
of  
Intellectual  
Property Rights  
(TRIPS)**



Centre for WTO Studies  
Indian Institute of Foreign Trade

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# Foreword



A crucial outcome of the Uruguay Round negotiation was coming into effect of a new international instrument on Intellectual Property Rights called the Agreement on Trade-Related Aspects of Intellectual Property Rights. The TRIPS Agreement, as it is more popularly known, addresses a wide range of Intellectual Property Rights which includes traditional subject matters like patents, copyrights, trademarks and industrial designs as well as new subjects like geographical indications and trade secrets. The subject of this Agreement is of great importance and is witnessing considerable new developments and challenges. At the multilateral level, negotiations are under way in WTO to refine and expand certain areas of TRIPS agreement whereas in several Free Trade Agreements, there is already a process underway to introduce new provisions, which can be more than what the TRIPS provides for, hence are said to be TRIPS-*plus*. This presents new challenges and opportunities for developing countries like India. As a growing economy, India has considerable stake in knowledge-based industries which can translate into protecting intellectual property in order to encourage research and innovation. At the same time, it needs to be vigilant that the bar of intellectual property protection is not raised so high as to adversely affect the vitality of some of its key manufacturing sectors like pharmaceuticals.

This volume of FAQs on TRIPS gives a bird's eye view of the various provisions of the complex subject matter of TRIPS with special emphasis on India in order to introduce the subject to lay readers in a simplified and easy to understand manner. I hope readers will find this publication useful.

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**K. T. Chacko**  
Director, IIFT

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*This set of FAQs on World Trade Organisation (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) issues has been prepared in two parts: firstly, the international context which deals with the genesis of the Agreement, its different components, relations with other international organizations and future developments. The second part in the national context discusses TRIPS issues in Indian scenario.*

## **PART A: International Context**

### **I. Introduction to TRIPS**

#### **Q1. What is TRIPS?**

**A1.** The Agreement on Trade related Aspects of Intellectual Property Rights of the WTO is commonly known as the TRIPS Agreement or simply TRIPS. TRIPS is one of the main agreements comprising the World Trade Organisation (WTO) Agreement. This Agreement was negotiated as part of the eighth round of multilateral trade negotiations in the period 1986-94 under General Agreement on Tariffs and Trade (GATT) commonly referred to as the Uruguay Round extending from 1986 to 1994. It appears as Annex 1 C of the Marrakesh Agreement which is the name for the main WTO Agreement. The Uruguay Round introduced intellectual property rights into the multilateral trading system for the first time through a set of comprehensive disciplines.

The TRIPS Agreement is part of the “single undertaking” resulting from the Uruguay Round negotiations. This implies that the TRIPS Agreement applies to all WTO members, mandatorily. It also means that the provisions

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of the agreement are subject to WTO dispute settlement mechanism which is contained in the Dispute Settlement Understanding (the “Understanding on Rules and Procedures Governing the Settlement of Disputes”). The TRIPS Agreement is one of the most important agreements of the WTO.

**Q2. Why was TRIPS included in WTO?**

**A2.** The precursor to the WTO was the General Agreement on Tariffs and Trade (GATT) which sought to address issues related to international trade in goods. The operation of the GATT over the years resulted in lowering of tariffs in general in international trade. As a result, increasingly, other domestic policies of nations came into focus of the trading nations. The developed countries, including the United States started facing increasing competition in manufactured exports from Newly Industrializing Countries (NICs) of Asia.

For intellectual property issues in general, the negotiators were required to “clarify GATT provisions and elaborate as appropriate new rules and disciplines” in order to reduce distortions and impediments to international trade. As technology became more important in goods and commodities, having higher proportion of invention and design (intellectual creativity) in their value, IPR became important in international trade. As a result, in the Uruguay Round negotiations, the intellectual property rights dominated the discussions.

**Q.3. What are Intellectual property rights (IPRs) and how do they grant protection to the owner of an IPR?**

**A3.** Intellectual property rights or IPRs are rights given to people over the creations of their minds. These rights are

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given by society through the State as an incentive to produce and disseminate ideas and expressions that will benefit society as a whole. Unlike Fundamental Rights of citizens which are guaranteed by the Constitution of a country, IPRs are statutory rights enacted by the law-making authority in a country.

Conventionally, many forms of IPRs are recognised. They are traditionally classified into two main categories:

- **Copyright and related rights:** i.e., rights granted to authors of literary and artistic works, and the rights of performers, producers of phonograms and broadcasting organizations. The main purpose of protection of copyright and related rights is to encourage and reward creative work. The distinguishing feature of this category of rights is that they protect only the tangible expression of an idea and not the idea itself. Further, these rights generally come into existence the moment a work is created and need not be registered with any central authority.
- **Industrial property:** This category includes: (1) the protection of distinctive signs such as trademarks and geographical indications, and (2) industrial property protected primarily to stimulate innovation, design and the creation of technology which are protected through laws on protection of inventions (patents), industrial designs and trade secrets.

IPRs grant protection to the owner as they give the creator an exclusive right over the use of his/her intellectual creations generally for a limited period of time. However, in the case of certain categories of IPRs,

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the rights e.g. trade secrets and geographical indications can exist indefinitely so long as the right holder takes steps to protect his right. In the case of certain other time limited IPRs, it is possible to renew the rights periodically either for an indefinitely long period as in the case of trademarks or for a pre-specified maximum limit as in the case of industrial designs.

**Q4. Which IPRs are covered under TRIPS?**

**A4.** The IPRs covered by the TRIPS Agreement 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
- Layout-designs (topographies) of integrated circuits
- Undisclosed information, including trade secrets and test data

**II. Link between TRIPS, WTO and WIPO**

**Q5. What is the link between TRIPS, WTO and WIPO?**

**A6.** Intellectual Property Rights (IPRs) at a multilateral level have their genesis in the Paris Convention for the Protection of Industrial Property in 1883 which protected industrial property i.e. Patents and trademarks and the

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Berne Convention for the Protection of Literary and Artistic Works in 1886 for copyrights and related rights. World Intellectual Property Organization (WIPO) which began its work in 1967 taking over from the Bureau for the Protection of Intellectual Property that had been working since 1893, is the international agency under the United Nations that administers the work of these conventions. The WIPO administers many other international conventions on IPRs also.

While the IPR Conventions and treaties create the international standards in protection of IPRs which are to be followed by the member countries, substantive trade related disciplines on IPRs under these international conventions have been adopted by reference into the WTO through the TRIPS Agreement. This means that the Agreement provides rules for trade and investment in ideas and creativity by incorporating standards laid down in certain exact provisions of the major IPR conventions. The WTO provides that “intellectual property” should be protected when trade is involved. Thus, through the TRIPS, the WTO makes it mandatory for all its member countries to follow basic minimum standards of IPR provided for under TRIPS and bring about a degree of harmonization of domestic laws in this field.

### **III. Doha Declaration on Public Health**

- Q6. What is the importance of the Doha Declaration on Public Health, why was this necessary?**
- A6.** The framework of stringent intellectual property rights established by the TRIPS Agreement enables pharmaceutical manufacturers to charge prices above



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marginal cost of production. This affects the ability of governments to monitor and protect public health because of their obligations to protect IPRs of the manufacturers. This means that Governments may find their capacity to ensure affordable access to medications restricted.

In 2001, in response to concerns of developing countries regarding limited or no access to medicines at affordable prices, the WTO members agreed to issue the Doha Declaration to clarify the TRIPS Agreement in the context of Public Health. The declaration states that the TRIPS Agreement would not prevent members from taking steps to protect public health and makes clear that each member has the right to create certain exceptions to its IPR laws to enable it to grant compulsory licenses for manufacture of essential goods such as life-saving drugs even if the consent of the holder of the IPR is not forthcoming. Each member would be required to determine the grounds on which such compulsory licenses can be granted and shall have the right to determine what constitutes a national emergency. Based on a decision taken by the WTO in 2003, Member states may also grant a compulsory license for limited export and import of medicines where the receiving country lacks manufacturing capacity.

**Q7. What are the challenges of the Doha Declaration?**

**A7.** Even though the Doha Declaration on TRIPS Agreement and Public Health [hereinafter Doha Declaration] and the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health [hereinafter 2003 Decision] recognize the "gravity" of public health problems and reflect concerns regarding

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implications of the TRIPS Agreement, these documents left a number of technical and legal problems unresolved. For example, since the term 'epidemics' in the Doha Declaration has been left undefined, and even though the Doha Declaration acknowledges each Members' right to determine what constitutes a national emergency or a circumstance of extreme emergency, governments may still face challenges from pharmaceutical manufacturers on whether they can issue compulsory licenses over certain medications. This means that medications for chronic diseases such as HIV/AIDS, tuberculosis, malaria and other epidemics may be interpreted as a restriction on this right since the existence of a chronic disease may not qualify as a "national emergency". There are also concerns that the administrative burden associated with the procedural arrangements required by the Declaration for notifying the WTO of the mechanism to provide drugs and medicines to countries not having local manufacturing capacity under the 2003 Decision will be costly and cumbersome particularly for developing countries.

#### **IV. TRIPS plus provisions in FTAs**

**Q8. What are TRIPS *plus* provisions?**

**A8.** IPRs are territorial rights and can be acquired in the territory of the country having an IPR law. That is, IPR acquired in one country cannot be enforced in another country. The TRIPS Agreement lays down only certain minimum standards of protection and enforcement of IPRs by its Members through enactment of such national laws and regulations. The TRIPS Agreement, however, allows Members to have higher levels of protection than the minimum standards laid down in it, thus leaving the

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flexibility to Members to have 'TRIPS *plus*' laws and regulations. The developed countries are moving toward higher, enhanced standards of IPR protection to evolve TRIPS-plus regime. These higher standards are now making an appearance in various free trade agreements (FTA) that these countries are negotiating and entering into with their trading partners. Since these provisions go beyond minimum standards established under TRIPS, they may take away the flexibilities (for example the ability to issue compulsory licenses for medicines required in public health emergencies) that exist in the TRIPS Agreement. These negotiate rules and commitments in bilateral, sub regional and regional agreements that go beyond the multilateral level in WTO.

**Q9. Why TRIPS *plus* provisions are important in FTAs and what are the consequences of this inclusion?**

**A9.** By entering into FTAs with the developed countries, developing countries see some advantages in tariff reductions on agricultural, clothing and other products. In return, developed countries seek better market access and investment opportunities for products and services of their interest. In addition, developed countries also seek to raise the minimum levels of protection for IPRs as they have a comparative advantage in technology products and services. At the same time, developing countries find it difficult to put forward the issues of their concern through the FTA negotiations including the harmonisation of TRIPS and CBD, access to medicines, and protection against the bio-piracy of their biological genetic resources, farmers' rights and associated traditional knowledge, ability of their farmers to continue their subsistence and livelihood related

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farming practices and getting the same level of protection for their geographical indications as for wines and spirits of developed countries. As a consequence, FTAs create an imbalanced set of rights and obligations in favour of developed countries by ratcheting up the levels of IPR protection.

While it can be argued that there is no bar on developing countries in walking away from unequal agreements, it can also be argued that owing to unequal negotiating strengths, many bilateral agreements do turn out to be unequal. If the immediate need to benefit from reduced tariffs, etc. is high then a developing country can be guided into making concessions in areas of longer term impact such as IPRs.

## **V. Further negotiations under TRIPS**

### **Q10. What are the future issues under consideration relating to TRIPS?**

**A10.** Some of the issues that are under debate relating to TRIPS are:

- The effectiveness of the 2003 “waiver” in the 2001 Doha Declaration on TRIPS and Public Health. The waiver in Doha Declaration removes a requirement that generics produced under compulsory license should be mainly for the domestic market. This would hinder their export to countries that cannot make the medicines. The TRIPS Agreement has been amended in 2005 to include these provisions in it, but the amendment has not come into force as most Members have not ratified it so far. In addition, the mechanism established in the 2003 waiver for providing affordable medicines to poor countries

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does not seem to have worked as only one case of its use exists (where Rwanda obtained medicines from Canada), and that too has not been very successful. WTO members are reviewing this provision.

- The TRIPS Agreement has a built in review of the provisions relating to patenting of life forms. The current provision obliges members not to exclude from their patent regime microorganisms and non-biological and microbiological processes. It also obliges Members to protect plant varieties either through patents or through a *sui generis* system (of its own kind) or a combination thereof. This review has not been concluded even though it started in 1999.
- Protection of the innovations of indigenous and local farming communities and the continuation of the traditional farming practices including the right to save, exchange seeds, and sell their harvest
- Protection of the rights of indigenous communities and prevent any private monopolistic intellectual property claims over their traditional knowledge.
- Grant of the same level of protection of geographical indications in other products as is granted to wines and spirits.

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## **PART B: Indian Context**

### **I. Indian obligations under TRIPS**

**Q.1 What is the impact of TRIPS on relevant Indian legislation?**

A1. To meet international obligations under the TRIPS, various existing domestic IPR laws have been amended from time to time.

For example, in the area of patents, the Indian Patent Act 1970 was amended in order to make it conform to TRIPS. The first amendment to the Patent Act 1970 was effected through the Patents (Amendment) Act, 1999 that was brought into force retrospectively from 1st January, 1995. The amended Act provided for filing of applications for product patents in the areas of drugs, pharmaceuticals and agro chemicals even though such patents were not allowed. However, provision was made that such applications were to be examined only after 31-12-2004. This was necessitated in view of the transitional arrangements allowed under the TRIPS Agreement. Under the transitional arrangements, a grace period was allowed to developing country members to make their laws TRIPS-compatible provided they met certain conditions. One such condition was that to avail of 10 year grace period (till 1<sup>st</sup> January 2005) under TRIPS, a 'mail-box' of applications would have to be created in which all product-patent application would be placed for subsequent examination on merits from January 2005. In the intervening period, the applicants were to be allowed Exclusive Marketing Rights (EMR) to sell or distribute

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these products in India, subject to fulfilment of certain conditions.

The second amendment to the 1970 Act was made through the Patents (Amendment) Act, 2002. This Act came into force on 20 May 2003 with the introduction of new Patent Rules, 2003 by replacing the earlier Patents Rules, 1972. With these amendments, India met all its obligations relating to patent protection that it was required to meet by the year 2000 under the TRIPS Agreement. It also brought the Patents Act in conformity with the requirements of the Patent Cooperation Treaty of WIPO as modified until 2001. The third amendment to the Patents Act 1970 was introduced through the Patents (Amendment) Ordinance, 2004 with effect from 1st January, 2005. This Ordinance was later replaced by the Patents (Amendment) Act 2005 (Act 15 of 2005) on 4th April, 2005 which was brought into force from 1-1-2005. This amendment obliged India to grant product patents to drugs and medicines and food and chemical products. This final amendment brought India in full compliance with its TRIPS obligations.

Similarly, in the case of trademarks, the governing law in India now is Trade Marks Act, 1999 brought into force with effect from September 15, 2003 to bring it in compliance with TRIPS by repealing the Trade and Merchandise Marks Act, 1958.

The Copyright Act, 1957 today is compliant with most international conventions and treaties in the field of copyrights. India is a member of the Berne Convention of 1886 (as modified at Paris in 1971), the Universal Copyright Convention of 1951 and TRIPS. Though India is not a member of the Rome Convention of 1961, the Copyright Act, 1957 is fully compliant with the

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provisions of this Convention. Two new treaties, collectively termed as Internet Treaties, were negotiated in 1996 under the auspices of the World Intellectual Property Organization (WIPO). These treaties are the 'WIPO Copyrights Treaty (WCT)' and the 'WIPO Performances and Phonograms Treaty (WPPT)'. These treaties were negotiated essentially to provide for protection of the rights of copyright holders, performers and producers of phonograms in the Internet and digital era. India is not a member of these treaties. However, the current set of amendments placed by the Government before the Parliament seeks to bring the law in conformity with these treaties as well.

**Q.2 What are the criteria for grant of a patent?**

**A2.** Patents provide property rights to inventions. An 'invention' may be defined as a novel idea which permits in practice the solution of a specific problem in a field of technology. Patents are available for any invention, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Thus, the TRIPS Agreement stipulates that countries shall grant patents for inventions in all fields of technology and for both:

- Products, and
- Processes, including those used in manufacturing products.

**Q.3 Is there any special or unique provision on Patents in the Indian law?**

**A3.** The Patent Act has a set of exceptions stated in Section 3 by which certain things cannot be protected by the law.



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One very unique provision is embodied in Section 3, clause (d). This provision prevents patenting of minor improvements in chemical and pharmaceutical entities unless the invention results in the enhancement of known efficacy of that substance. This prevents patenting of mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus. This provision is a safeguard for public health purposes and sets a higher threshold which has been interpreted as therapeutic efficacy for the grant of a patent on pharmaceuticals.

**Q.4 How is a patent granted? Which office deals with patents?**

**A4.** A patent is granted by a national patent office or by a regional office that does the work for a number of countries, such as the European Patent Office and the African Regional Industrial Property Organization. Under such regional systems, an applicant requests protection for the invention in one or more countries, and each country decides as to whether to offer patent protection within its borders. The WIPO-administered Patent Cooperation Treaty (PCT) provides for the filing of a single international patent application which has the same effect as national applications filed in the designated countries.

In India, the Controller General of Patents, Designs and Trademarks is responsible for the administration of the Patents Act, 1970 through the Patent Offices located at Kolkata, Mumbai, Delhi and Chennai.

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## **II. Trademark**

**Q5. What is a trademark, how is trademark important and what is the period of protection provided by a trademark?**

**A5.** A trademark is a sign or mark that is used to distinguish the goods or services of one enterprise from those of another enterprise. It can be any distinctive word, letter, numeral, drawing, picture, shape, colour, sound, smell, logotypes, or any combination of these that may be used for distinguishing goods and services, of any given business. A trademark is used extensively by an enterprise to reach customers by enabling customers to identify and locate the product. A trademark is issued by a national office and is granted for a period of 10 years and may be renewed indefinitely.

**Q6. What is the criteria for grant of a trademark?**

**A6.** The criteria for the grant of a trademark are:

- The selected mark should be capable of being represented graphically (that is in the paper form).
- It should be capable of distinguishing the goods or services of one undertaking from those of others.
- It should be used or proposed to be used in relation to goods or services for the purpose of indicating a connection in the course of trade between the goods or services and some person that has the right to use the mark.

**Q7. Under what conditions is a trademark granted in India?**

**A7.** Under the Indian Trademarks Act, 1999, the following conditions have been included for the grant of a

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trademark:

- Definition of trademark has been enlarged to include shape of goods, packaging and combination of colors which can be adopted as a trade mark.
- Registration of Service Marks allowed in addition to Trademarks for goods.
- Single Registration of trademark; no separate application necessary for each category/class of goods or services, a single application would do; however filing fee will be charged separately for each class of goods/services.
- Enhanced punishment for the offences relating to trademark on par with the Copyright Act, 1957 to prevent the sale of spurious goods.
- Term of registration of trademark is ten years, subject to renewal thereafter.
- Registration of Collective Marks owned by associations allowed.
- Some offences relating to trademark made cognizable.
- Extension of application of convention countries in India

**Q8. How to choose a trademark?**

**A8.** To choose a trademark it is advisable to:

- Undertake a comprehensive search that includes both market study as well as a study of data base of the country one chooses to trade in.
- Avoid marks which are:

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- descriptive
  - have reference to character and quality of goods
  - may serve in a trade to designate the intended purpose
  - which can only be considered for registration on acquiring a distinctive character as a result of the use
  - is a well known mark by virtue of extensive publicity
  - is of such a nature as to deceive the public or cause confusion
  - likely to hurt the religious susceptibilities of any class or citizens
  - containing scandalous or obscene matter
  - Marks prohibited under law; e.g Emblems and Names (Prevention of improper use) Act, 1950 or direction of the Central Government listing the non registrable marks.

### **III. Design**

**Q9. What is a design?**

**A9.** Design is another intellectual property right and refers to external features of shape, configuration, pattern, ornamentation or composition of lines or colours applied to any article, whether in two or three dimensional (or both) forms. Design does not include any mode or principle of construction or anything which is mere mechanical device. It also does not include any trade mark or any artistic work.

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**Q10. How is design defined in India?**

**A10.** The IPR of Design is covered by the Designs Act, 2000. This means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 43 of 1958.

**Q11. What are the important aspects in Indian Design Act 2000?**

**A11.** The important aspects in Indian Design Act 2000 are:

- identification of non-registerable designs
- introducing a classification system (Locarno classification)
- elimination of secrecy period of two years for a registered design
- provision of public inspection after notification
- introduction of rights of registered proprietor of design
- initial term of protection is 10 years followed by another 5 years on request
- provision of restoration of lapsed design.

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**Q12. Why is design registration important for business?**

**A12.** Design registration is important for business for the following reasons:

- To protect any new/ original shape, configuration, surface pattern, combination of lines or colours and prevent the imitation of the innovator's design and prevent the commercial exploitation of the innovator's design by the third party without the proprietor's consent
- To obtain bonafide reward by commercial exploitation of the design by the creator as well as by assignment of the same to other parties
- To enable consumer to identify products

**Q13. How does design registration confer intellectual property protection?**

**A13.** The benefits of design registration as IP are that the registration of a design confers upon the registered proprietor the exclusive right to apply a design to the article in the class in which the design has been registered. A registered proprietor of the design is entitled to protection of his intellectual property. He can sue for infringement, if his right is infringed by any person. He can license or sell his design as legal property for a consideration or royalty.

**IV. Copyright**

**Q14. What is copyright? How is copyright protected in India?**

**A14.** Copyright is a right given by law to the creators of literary, dramatic, musical and artistic works and the

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producers of cinematographic films and sound recordings on their creations and productions. It is one of the intellectual property rights designed to encourage creativity. Copyrights are intended to safeguard, protect and reward the rights of creators of artistic works in their respective creations. Writers, artists, designers, dramatists, musicians, architects, producers of sound recordings, cinematographers, computer software developers etc. are empowered through copyright. TRIPS provides that the rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by copyright, for a minimum period of life of the author plus 50 years after his/her death.

The interesting aspect of copyright protection is that it need not be registered with any authority to be protected under law. Secondly, it protects only the tangible expression of an idea and not an idea itself. This has led to many a litigation to settle the idea-expression dichotomy.

The Indian Copyright Act, 1957 protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized uses. Unlike the case with patents, copyright protects the expressions and not the ideas. There is no copyright protection for ideas, procedures, methods of operation or mathematical concepts as such. In India, the duration of copyright for authors is life of the author plus 60 years after his/her death and for cinematograph films and sound recordings 60 years from the year of production. After the death of the owner, the rights pass on to his/her legal heirs.

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**Q15. Do we need to register a copyright?**

**A15.** No. Acquisition of copyright is automatic and it does not require any formality of registration. Copyright comes into existence as soon as a work is created. The office in charge of copyright registration is Copyright Office, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi 110001.

**Q16. If copyright registration is not necessary for the law to protect copyright in works then why do India and many other countries have a process of registration?**

**A16.** Registration of a work with the copyright registry in the country provides evidence of the existence of a work on a given date. Secondly, the process of registration also creates a prima facie evidence about the facts about the work stated in the application for registration. These are of help in settling legal disputes regarding ownership and infringement, even though they are not direct evidence of ownership by themselves.

## **V. Geographical Indications**

**Q17. What are Geographical Indications?**

**A17.** Geographical Indications of goods are indications which identify a good as originating in the territory of a country or a region or locality in that territory. Typically, such a name conveys an assurance of quality and distinctiveness which is essentially attributable to the fact of its origin in that defined geographical locality, region or country. They are covered under Articles 22 to 24 of the TRIPS Agreement. In contrast to other IPRs, a Geographical Indication is owned by members of a community who produce the good in question.



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India enacted the Geographical Indications of Goods (Registration & Protection) Act, 1999 which has come into force with effect from 15th September 2003. The Act is administered by the Controller General of Patents, Designs and Trade Marks who is the Registrar of Geographical Indications. The Geographical Indications Registry is located at Chennai. A geographical indication is registered for a period of 10 years in the Geographical Indications Registry but is renewable from time to time.

**Q18. How is Geographical Indications distinct from appellation of origin?**

**A18.** A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin. Geographical indications may be not only place names but also other names and indicators used to refer to a product.

On the other hand, an appellation of origin is a special kind of geographical indication, used on products that have a specific quality that is exclusively or essentially due to the geographical environment in which the products are produced. Agricultural products typically have qualities that derive from their place of production and are influenced by specific local factors, such as climate and soil.

Thus, the concept of appellations of origin is subsumed in that of geographical indication.

## **VI. Plant Variety Protection**

**Q19. What is a plant variety protection? How is plant variety protection important? How is it defined in Indian law**

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**and what is the period of protection provided by plant variety protection?**

**A19.** India is one of the countries in the world to have passed *sui generis* legislation (the Latin term *sui generis* means 'of its own kind') granting rights to both breeders and farmers under the Protection of Plant Varieties and Farmers Rights Act, 2001. The law attempts to incorporate the interests of various stakeholders, including private sector breeders, public sector institutions, non-governmental organizations and farmers, within the property rights framework. Where a country excludes plant and animal inventions and plant varieties from patentability, it is expected to protect them under an effective *sui generis* system as mandated by TRIPS.

It is generally considered that this provision aims at encouraging countries to use the *sui generis* system provided by the UPOV (Convention on the Protection of New Varieties of Plants). India's Act allows four types of varieties to be registered reflecting the interests of actors: new variety (criteria of new, distinctiveness, uniformity and stability), extant variety (distinctiveness, uniformity, stability), essentially derived variety (essentially derived from such initial variety when it is predominantly derived from such initial variety, is clearly distinguishable from such initial variety; and conforms to such initial variety in the expression of the essential characteristics) and farmers variety (has been traditionally cultivated and evolved by the farmers in their fields or is a wild relative or land race of a variety about which the farmers possess the common knowledge).

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**Q19. Which Indian office deals with plant variety protection?**

**A19.** In India the Plant Varieties and Farmer's Rights Protection Authority is established under Plant Varieties and Farmers Rights Act, 2001 to promote the development of new varieties of plants and to protect the rights of the farmers and breeders. A National Register of Plant Varieties maintains the addresses of breeders and plant varieties. The maximum protection for trees and vines is 18 years and for extant variety it is 15 years. Farmer's rights are protected when their material is used as donors of genes in varieties registrable under the Act. The farmers are entitled to recognition and reward from the National Gene Fund. The farmer may claim compensation from a breeder if a variety does not meet the expected performance.

## **VII. Trade Secrets**

**Q20. What is a trade secret? How is it protected?**

**A20.** A trade secret is an IPR that is with the holder indefinitely or rather as long as he can keep his secret as a trade secret. To enable an enterprise to keep something as a trade secret, the holder must ensure secrecy agreements with the employees in the business. These can be built into the service contract agreements.

For information to be treated as a trade secret, it is necessary that there should be commercial value associated with the information, that this commercial value would be lost, damaging the commercial interests of the holder of the trade secret and that the holder had taken reasonable care to protect the secret so that its loss would be possible only through an illegal access.

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**Q21. What does the TRIPS Agreement say about trade secrets or undisclosed information?**

**A21.** Undisclosed information, or trade secrets have been provided protection by the TRIPS agreement for the first time in public international law. This explicitly requires undisclosed information- trade secrets or know-how – to benefit from protection. The protection is applied to information that is secret, has commercial value because it is secret, and has been subject to reasonable steps to keep it secret. The Agreement does not demand that undisclosed information should be treated as a form of property, but it does stipulate 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.

### **VIII. New negotiations and areas**

**Q22. What are the challenges in negotiations on various IPRs under TRIPS for India?**

**A22.** On almost all the IPRs discussed, negotiations are afoot in various international fora. There is current debate on patenting of life forms, whether access to medicines through Doha declaration has been achieved, etc. Other issues of concern are biodiversity and its link with *sui generis* systems of plant protection and technology transfer. There is also debate on whether to extend enhanced protection for geographical indications beyond wines and spirits. Internet access and sharing of electronic files has questioned some of the established rules in copyright. On all these issues India needs to examine world trends and proactively develop informed policy interventions.

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**Q23. What are the challenges in enforcement of IPRs ?**

**A23.** Enforcement of IPRs has always been a challenge. In the case of industrial property, the onus is on the holder of the IPR to check for infringement. In case of copyright and related rights, there are numerous associations e.g. Business Software Alliance and other Alliance of State Broadcasters Associations (NASBA), International Intellectual Property Alliance (IIPA) that promote the cause of copyright holders. Currently there is enhanced interest as some countries are negotiating an Anti-counterfeit Trade Agreement (ACTA) for enforcement of copyright and trademark protection. This is seen by many developing countries as having the potential to bring stringent enforcement of IPR and negotiating TRIPS plus provisions.

**Table: Subject matter and main fields of application of IPRs**

Subject matter	Type of IPRs	Main fields
New, non-obvious, inventions	Patents	Chemicals, pharmaceutical products, plastics, engines, turbines, electronics, control and scientific equipments, mechanical instruments.
Signs or symbols to identify goods and services	Trademarks	All industries/business enterprises
Original works of authorship; artistic performances, cinematograph films, broadcasting and phonograms production	Copyright and related rights	Publishing, Printing, entertainment (audio, video motion pictures) software, broadcasting
Original layout designs	Integrated circuits	Microelectronics industry
New, stable, homogeneous, distinguishable varieties	Plant Breeder's rights	Agriculture and food industry
Secret business information	Trade secrets	All industries

Subject matter	Type of IPRs	Main fields
Ornamental designs	Industrial designs	Clothing, automobiles, electronics, consumer products, etc.
Geographical origin of goods and services	Geographical indications	Wines, spirits, cheese, other food products and products bearing name of a place e.g. Darjeeling tea, handicrafts, handlooms.

### **Useful Web Links**

- [www.commerce.nic.in](http://www.commerce.nic.in)
- [www.wto.org](http://www.wto.org)
- [www.unctad.org](http://www.unctad.org)
- [www.worldbank.org](http://www.worldbank.org)
- [www.wipo.int](http://www.wipo.int)
- [www.fao.org](http://www.fao.org)
- [www.unescap.org](http://www.unescap.org)
- [www.artnetontrade.org](http://www.artnetontrade.org)
- [www.ictsd.org](http://www.ictsd.org)



## Other Publications of the Centre for WTO Studies

- FAQ on WTO Negotiations in Agriculture
- FAQ on WTO Negotiations in Non Agriculture Market Access (NAMA)
- FAQ on WTO Negotiations in Services
- FAQ on Geographical Indications
- FAQ on WTO Agreement on Subsidies and Countervailing Measures
- FAQ on WTO Agreement on Safeguards
- FAQ on WTO Compatibility of Border Trade Measures for Environmental Protection
- FAQ on Transfer of Technology in Environmentally Sound Technologies
- Review of Trade Policies of India's Major Trading Partners
- *Discussion Paper 1: India's Duty Free Tariff Preference Scheme: Case Study for Select LDCs*
- *Discussion Paper 2: Cotton Production, Exports and Price: A Comparative Analysis of India and USA*
- *Discussion Paper 3: Study on Identification of Select Textile and Wool and Woollen Products Having Export Potential to Chile, Colombia and Peru*
- *Discussion Paper 4: Trade Facilitation in WTO and Beyond*
- *Discussion Paper 5: Agriculture under WTO Regime: Cross Country Analysis of Select Issues*
- *Discussion Paper 6: WTO Negotiations on Market Access on Environmental Goods: Identification of Existing NTMs on Proposed Items*
- *Discussion Paper 7: Implications of Fishery Sector Subsidies: A Review of Issues in Light of WTO Negotiations*
- Bimonthly newsmagazine titled 'India, WTO and Trade Issues'

All the above publications are available on the website of the Centre for WTO Studies, <http://wtocentre.iift.ac.in>

## About the WTO Centre

The Centre for WTO Studies has been functioning since November 2002 at the Indian Institute of Foreign Trade. The major objective of the Centre is to provide research and analytical support to the Department of Commerce on identified issues relating to the World Trade Organisation.

The Centre has recently undergone considerable strengthening. It has now a wider mandate and is tasked to carryout research activities, bring out newsletters on WTO related subjects, organise outreach and capacity building programmes through seminars, workshops, subject-specific meetings etc. and to be a repository of important WTO documents in its Trade Resource Centre. A Steering Committee has been constituted to guide the work of the Centre.

The Centre is currently engaged in research activities on following WTO related subjects:

- Agriculture
- Intellectual Property Rights
- Agreement on Sanitary and Phytosanitary Measures
- Agreement on Technical Barriers to Trade
- Trade Facilitation
- Technology Transfer
- Issues relating to Environment and Trade
- Subsidies including Fishery Subsidies

More information about the WTO Centre and its activities can be accessed on its website: <http://wtocentre.iift.ac.in>



### Centre for WTO Studies

Indian Institute of Foreign Trade  
IIFT Bhawan, B-21, Qutab Institutional Area, New Delhi-110016  
Tel: 011-26564409  
E-mail: [editor\\_wtocentre@iift.ac.in](mailto:editor_wtocentre@iift.ac.in)