

# Competition policy, the TRIPS Agreement and New Technologies

Wolf Meier-Ewert  
Counsellor

Intellectual Property, Government Procurement  
and Competition Division  
WTO Secretariat

# Relevance of competition policy to specific elements of the WTO Agreements

## TRIPS, Articles 8, 31 and 40:

- Members permitted to take measures to deal with anti-competitive licensing practices, other abuses

## GATS, Article VIII:

- issues concerning conduct involving monopoly and exclusive service suppliers

## GATS, Article IX:

- consultations regarding anti-competitive business practices that restrain competition and thereby restrict trade in services

## GATS Telecoms Annex and Basic Telecom Negotiations, Reference Paper on Regulatory Principles

- Clear references to competition policy principles

## GPA:

- competition rules an essential counterpart
- main aim to increase supplier competition

## TRIMS, Article 9:

- issue of whether to implement complementary provisions on investment and competition policy in the course of a review of the Agreement

Implication: competition policy is present in the WTO framework, though in a piecemeal fashion.

# THE TRIPS AGREEMENT

# General considerations



Important  
multilateral  
framework for IP  
and CP issues

Helps to frame  
domestic law  
and policy

Fosters  
convergence  
among  
jurisdictions

Ensures  
transparency

Provides access  
to TA

Overall, TRIPS  
CP-related  
provisions are  
rather permissive

## ***Article 8***

### *Principles*

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

# Article 8.2

Is not only about  
competition related  
abuses

More than just a  
permissive norm:  
Expression of the idea  
that WTO Members  
might ***need*** to take  
measures

Measures to be  
***appropriate*** and  
consistent with TRIPS

## **Article 31**

### *Other Use Without Authorization of the Right Holder*

 *Does not prescribe specific grounds for allowing such use*

(b) such use may only be permitted if, prior to such use, **the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time**. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

## **Article 31**

### *Other Use Without Authorization of the Right Holder*



(f) any such use shall be **authorized predominantly for the supply of the domestic market** of the Member authorizing such use;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted **to remedy a practice determined after judicial or administrative process to be anticompetitive**. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

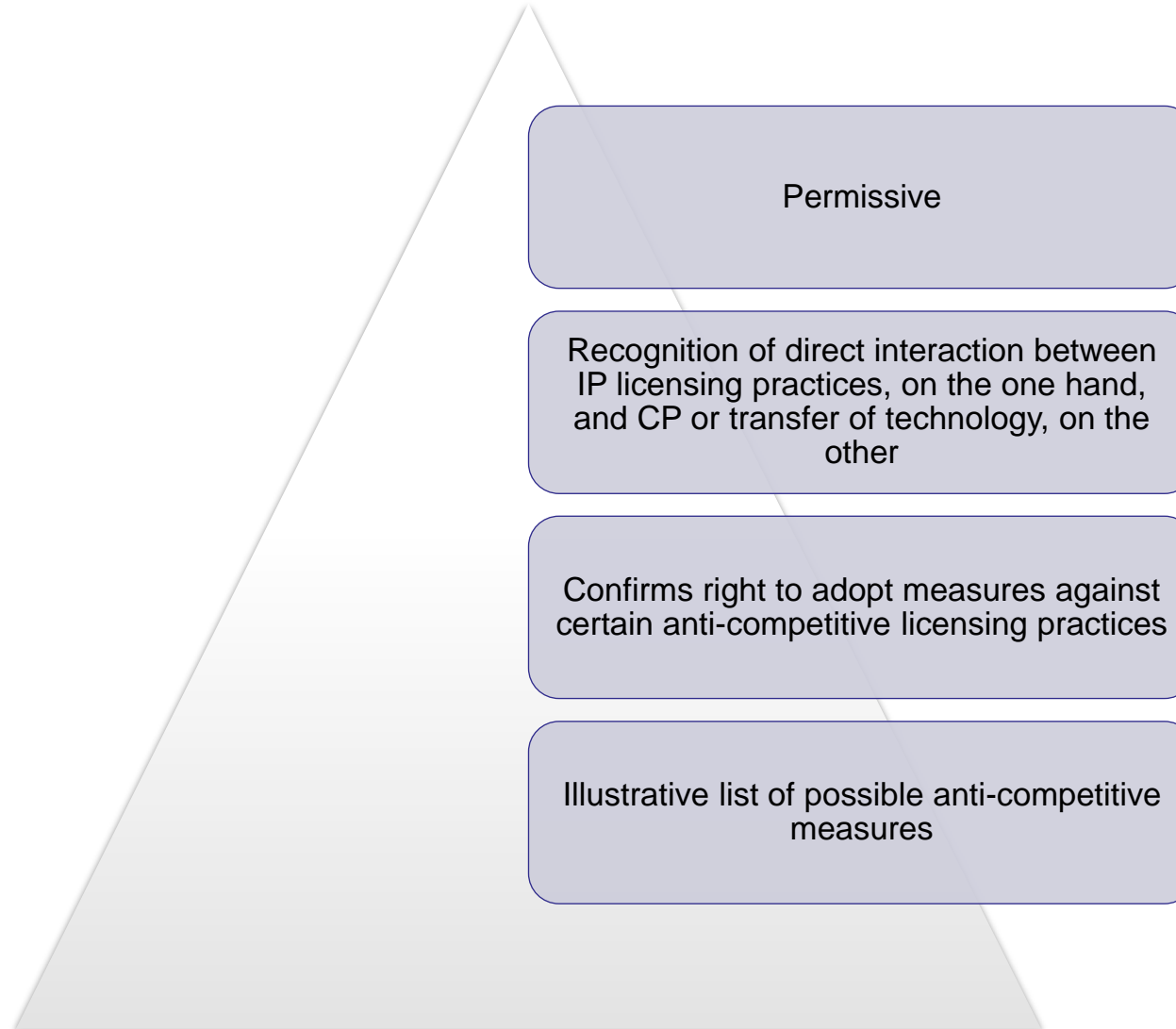


Control of Anti-Competitive Practices in Contractual Licences  
**Article 40**



1. Members agree 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.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, **consistently with the other provisions of this Agreement**, appropriate measures to prevent or control such practices, **which may include for example [1] exclusive grantback conditions, [2] conditions preventing challenges to validity and [3] coercive package licensing**, in the light of the relevant laws and regulations of that Member.

# Article 40



# What is not stated in Article 40?

The set of other practices (beyond those explicitly referred to in Article 40.2) which may constitute actionable abuses under Members' competition laws

The standards under which such practices should be reviewed (e.g. per se or "rule of reason"). Article 40.2 refers to "appropriate measures".

The appropriate remedies to be employed (beyond the general requirement of consistency with other provisions of the TRIPS Agreement and compulsory licensing as a remedy (Article 31(k)))

# TRIPS flexibilities and new technologies



Innovation Dimension

Access Dimension

More on CP and IP issues in this newly published book, edited by the WTO and WIPO.

Launch event with several author presentations (watch for free!):  
[Booklaunch Webinar – Competition Policy and Intellectual Property in Today's Global Economy - YouTube](#)

## Competition Policy and Intellectual Property in Today's Global Economy

Edited by Robert D. Anderson,  
Nuno Pires de Carvalho and Antony Taubman

