

38: Reservations

Article 72 Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

1. Introduction: terminology, definition and scope

Article 72 provides that a Member may not enter a reservation to all or part of the Agreement without the consent of the other Members. A reservation is a statement by which a party to a treaty undertakes to modify its obligations when it becomes party to the treaty (see VCLT, Articles 2(d), 19–23). The allowance of reservations to TRIPS may have created a situation in which different rules applied to different Members. This would not be so different from the situation in which Members enter exceptions in GATS Schedules of Commitments. This is not the approach followed by TRIPS.

2. History of the provision

2.1 Situation pre-TRIPS

The Vienna Convention on the Law of Treaties expressly addresses reservations to treaties and their effect (see Articles 19–23). There is an extensive legal literature on the nature and effect of reservations,¹⁹⁵ and there are decisions of international tribunals that address them. Generally, a reservation to a treaty may be entered by a state adhering to it provided that the treaty does not expressly exclude this, or if this would be inconsistent with the object and purpose of the treaty. If other state parties to the treaty do not object to the reservation, it will take effect. If a party objects to a reservation, it does not take effect with respect to that party. The result for the adhering (i.e., reserving) party's treaty obligations in that situation will vary depending on the circumstances (see Article 21.3 of the VCLT).

¹⁹⁵ See generally, *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (S. A. Riesenfeld & F. M. Abbott, eds. 1994: Martinus Nijhoff/Kluwer).

2. History of the provision

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2.2 Negotiating history

There is no analogue to Article 72 in negotiating texts prior to the Brussels Ministerial Text of December 1990. Up through the Montreal Mid-Term Ministerial in 1988, developing countries on the whole had not accepted that TRIPS would be binding on all Members, and the question of reservations was not especially relevant until the decision to accept the concept of the single undertaking was made.¹⁹⁶ Throughout the TRIPS negotiating process, issues concerning permissible exceptions to obligations, and later on the issue of transitional arrangements, were discussed extensively. These discussions considered differences in developmental circumstances among prospective Members to the agreement. The prospect of differentiated obligation on a Member-by-Member basis does not appear to have been considered in any detail, though this would have been one way to take into account different developmental circumstances.

2.2.1 The Brussels Draft

The Brussels Ministerial Text¹⁹⁷ included a predecessor to Article 72 that would have permitted reservations under limited conditions:

“Article 75: Reservations:

A PARTY may only enter reservations in respect of any of the provisions of this Agreement at the time of entry into force of this Agreement for that PARTY and with the consent of the other PARTIES.”

By referring to reservations in an affirmative way (that is, by indicating when Members may enter them), the Brussels Draft provision implied that Members at least contemplated the possibility of bargaining toward differentiated TRIPS commitments on a Member-by-Member basis. If the negotiating parties had bargained toward acceptable sets of reservations prior to the conclusion of TRIPS, the Agreement might ultimately have taken on a substantially different character than that ultimately achieved.¹⁹⁸ Article 75 of the Brussels Ministerial Text reflects the fact that the “single undertaking” concept embodied in the WTO Agreement was not settled as of late 1990.

2.2.2 The Dunkel Draft

The Dunkel Draft text of late 1991 amended the reservations clause of the Brussels Ministerial Text, substituting for it a “no reservations without consent” clause.¹⁹⁹

¹⁹⁶ On the TRIPS Agreement negotiating process, see Silvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for future negotiations*, at 285; J. Michael Finger, *The Uruguay Round North-South bargain: Will the WTO get over it?*, at 301; Frederick M. Abbott, *The TRIPS-legality of measures taken to address public health crises: Responding to USTR-State-industry positions that undermine the WTO*, at 311, and; T.N. Srinivasan, *The TRIPS Agreement*, at 343, each in *The Political Economy of International Trade: Essays in Honor of Robert E. Hudec* (eds. D. Kennedy and J. Southwick 2002)(Cambridge University Press).

¹⁹⁷ Document MTN.TNC/W/35/Rev. 1 of 3 December 1990.

¹⁹⁸ TRIPS takes account of differences in the level of development among Members principally, though not exclusively, through its transition provisions (Articles 65, 66 and 70, see Chapters 33, 36).

¹⁹⁹ Recall the final text of Article 72, which provides: “Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.”

Though seemingly admitting for the possibility of reservations, the negative drafting of the Dunkel Draft and final TRIPS Agreement reservations text appeared to signal an important distinction between TRIPS and the GATT and GATS. Although neither the GATT nor GATS specifically provides for reservations, commitments on tariff bindings and services market access are made on a Member-by-Member basis, and these commitments are made in the context of individualized reciprocal negotiations. In practical effect, this is similar to the allowance of reservations. The WTO Agreement does not permit reservations to its own terms, and provides that “Reservations in respect of any of the provisions of the Multilateral Trade Agreements [including TRIPS] may only be made to the extent provided for in those Agreements” (Article XVI: 5, WTO Agreement).

3. Possible interpretations

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Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

There is limited practical scope for interpretative disagreement as to the meaning of Article 72 precluding the entry of reservations absent the consent of the other Members. Under the VCLT and customary international law, reservations may only be entered upon adherence to a treaty.²⁰⁰ No Member attempted to enter a reservation to TRIPS when the WTO Agreement was initially concluded. This leaves little possibility that an issue with respect to Article 72 might surface in connection with original WTO membership. An interpretive issue theoretically might arise upon accession of a new Member to the WTO.²⁰¹ However, as a practical matter this is unlikely because a new Member accedes to the WTO (and TRIPS Agreement) on the basis of an accession agreement (a Protocol of Accession), and this agreement is concluded by consensus (absent exceptional circumstances). If there were a consensus among Members as to a waiver or modification of a TRIPS Agreement obligation in an accession agreement, this would be the

²⁰⁰ Article 19, VCLT. Technically, a reservation may be formulated “when signing, ratifying, accepting, approving or acceding to a treaty”, *id.*

²⁰¹ A question might arise whether the consent of the other Members to a reservation must take place by some affirmative act, or might be tacit or passive (i.e., by lack of formal objection to a reservation). Article 72 does not specify the form by which acceptance of other Members must take place, and there is room to argue that the lack of an objection by any of the other Members to a reservation could constitute its acceptance. Article 20(1) of the VCLT provides that if a treaty allows for a particular reservation, no acceptance is required by other parties. Otherwise, acceptance is required. In general (unless the treaty provides otherwise) acceptance will be presumed if the party does not object within 12 months following notification (Article 20(5), VCLT). Article 20(5) of the VCLT makes clear that a reservation must be “notified” to other Members for it to be subject to tacit or passive acceptance, and Article 23(1) indicates that a reservation must be in written form. Since it must be “notified” as a reservation in written form, it is unlikely that a reservation made by an acceding Member could be inadvertently accepted by other Members by failing to object to it.

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substantive equivalent of a reservation with the consent of the other Members. It seems doubtful that such a waiver or modification would be legally framed as a “reservation” but, if it was, the consent of the other Members would be present and an interpretive issue would not arise.²⁰² It is difficult to foresee the context in which an acceding Member might propose to modify the terms of TRIPS by entering a reservation outside its Protocol of Accession.

4. WTO jurisprudence

There have been no WTO disputes on Article 72.

5. Relationship with other international instruments

5.1 WTO Agreements

The WTO Agreement provides at Article XVI:5:

“5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.”

Article 72, pursuant to Article XVI:5 of the WTO Agreement, governs the extent to which reservations may be entered in respect of TRIPS.

5.2 Other international instruments

The Vienna Convention on the Law of Treaties prescribes rules regarding reservations at Articles 19–23.

6. New developments

6.1 Proposals for review

No proposals have been made to review Article 72.

7. Comments, including economic and social implications

TRIPS does not permit reservations absent the consent of the Members. The same rules generally apply to all Members. Transitional mechanisms are intended to ease potential economic and social dislocations. TRIPS negotiators might have

²⁰² The question might be asked whether consent of the “other Members” means “all” of the other Members, or might mean only “some” or “a few” of the other Members. If negotiators had intended that a limited number of Members might among themselves agree on a reservation, this might better have been made explicit. There might have been reference to a reservation accepted by “another Member”. The consequences of such an individuated arrangement (e.g., from an MFN standpoint) might have been addressed. Absent some persuasive evidence that negotiators intended a fairly dramatic break with the general application of the TRIPS Agreement, there is little reason to suggest that less than all Members might accept a reservation as among themselves.

taken another approach and allowed each Member to negotiate its own intellectual property commitments based on its particular situation. If negotiators had followed this alternative approach, they probably would not have employed the legal formula of allowing reservations. More likely they would have adopted schedules of commitments along the lines of the GATS. Article 72 is significant largely for confirming the single undertaking approach adopted in TRIPS.