

6: Objectives and Principles

Article 7 Objectives

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 Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
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.

1. Introduction: terminology, definition and scope

An article of a treaty establishes rights and obligations for the parties. A general principle of treaty interpretation is that terms are presumed not to be surplus. Words are in a treaty for a reason and should be given their ordinary meaning in its context.²⁷⁰ When the negotiators of the TRIPS Agreement

²⁷⁰ See, e.g., the decision of the WTO Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 20 May 1996, in which the AB said:

“Applying the basic principle of interpretation that the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty’s object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs.” *Id.*, at page 18.

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decided to include specific articles on “Objectives” and “Principles” in the agreement, they presumably did so with the goal of establishing rights and/or obligations.

Articles 7 and 8 have been invoked by Members to support rather different views of the purposes of TRIPS. The articles reflect the tensions inherent in the negotiations. Developing country Members have expressed considerable concern that only one side of the Agreement’s objectives are pursued by developed Members, these being the objectives relating to the protection of technology “assets”, while the stated objectives “that the protection and enforcement of intellectual property rights should contribute to the promotion” of transferring technology and actively promoting developmental interests are relegated to a secondary, and perhaps even illusory, status.

On 14 November 2001, WTO Members meeting in Doha adopted a Ministerial Declaration on the TRIPS Agreement and Public Health that bears directly on Articles 7 and 8. The implications of this Declaration for these provisions is described and analysed in Section 6.2.1, below.

2. History of the provision

2.1 Situation pre-TRIPS

Articles 7 and 8 of TRIPS establish the objectives and principles of this particular Agreement. Since TRIPS brought the regulation of intellectual property rights into the GATT, and now WTO, multilateral trading system for the first time,²⁷¹ there is no pre-TRIPS situation in respect to the objectives and principles of the Agreement. In other words, the objectives and principles of the TRIPS are unique to the Agreement.

The pre-TRIPS Agreement situation with respect to international governance of IPRs involved treaties administered by WIPO and other institutions. Even with respect to more detailed treaties like the Berne Convention, the pre-TRIPS international situation largely left discretion to regulate IPRs in the hands of each state, taking into account the domestic regulatory interests of the state. TRIPS represented a dramatic shift in that situation, taking away a great deal of internal regulatory discretion, and potentially shifting the pre-existing balance of internal interests. In light of this rather dramatic shift, the elaboration of objectives and principles in Articles 7 and 8 may well be viewed as a means to establish a balancing of interests at the multilateral level to substitute for the balancing traditionally undertaken at the national level.

Neither the Paris nor Berne Convention included provisions analogous to Articles 7 and 8. That is, there are no provisions that act to establish an overarching set of principles regarding the interpretation and implementation of the agreement.

²⁷¹ As noted elsewhere in this book, there were a few provisions in the GATT 1947 that concerned unfair competition, and Article XX(d) provided an exception for measures taken to protect IP. There was, however, no attempt in the agreement to establish substantive IPR standards.

2.2 Negotiating history

2.2.1 Early proposals²⁷²

2.2.1.1 The USA. The initial November 1987 United States “Proposal for Negotiations on Trade-Related Aspects of Intellectual Property Rights” included a section that addressed the objectives of the agreement:

“Objective. The objective of a GATT intellectual property agreement would be to reduce distortions of and impediments to legitimate trade in goods and services caused by deficient levels of protection and enforcement of intellectual property rights. In order to realize that objective all participants should agree to undertake the following:

- Create an effective economic deterrent to international trade in goods and services which infringe intellectual property rights through implementation of border measures;
- Recognize and implement standards and norms that provide adequate means of obtaining and maintaining intellectual property rights and provide a basis for effective enforcement of those rights;
- Ensure that such measure to protect intellectual property rights do not create barriers to legitimate trade;
- Extend international notification, consultation, surveillance and dispute settlement procedures to protection of intellectual property and enforcement of intellectual property rights;
- Encourage non-signatory governments to achieve, adopt and enforce the recognized standards for protection of intellectual property and join the agreement.”²⁷³

2.2.1.2 The EC. A proposal of Guidelines and Objectives submitted by the European Community to the TRIPS Negotiating Group in July 1988 also addressed the general purposes of an agreement, stating *inter alia*:

“... the Community suggests that the negotiations on substantive standards be conducted with the following guidelines in mind:

- they should address trade-related substantive standards in respect of issues where the growing importance of intellectual property rights for international trade requires a basic degree of convergence as regards the principles and the basic features of protection;
- GATT negotiations on trade related aspects of substantive standards of intellectual property rights should not attempt to elaborate rules which would substitute

²⁷² The proposals from the United States and European Community, as well as the statement by the Indian delegate that follow, also are reproduced in Chapter 1 regarding the preamble to the TRIPS Agreement. However, these elements of the negotiating history bear directly on the development of Articles 7 and 8, as well as the Preamble, and are repeated here for the convenience of the reader.

²⁷³ Suggestion by the United States for Achieving the Negotiating Objective, United States Proposal for Negotiations on Trade-Related Aspects of Intellectual Property Rights, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/14, 20 Oct. 1987, Nov. 3, 1987.

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for existing specific conventions on intellectual property matters; contracting parties, could, however, when this was deemed necessary, elaborate further principles in order to reduce trade distortions or impediments. The exercise should largely be limited to an identification of an agreement on the principles of protection which should be respected by all parties; the negotiations should not aim at the harmonization of national laws;

– the GATT negotiations should be without prejudices to initiatives that may be taken in WIPO or elsewhere. . . .”²⁷⁴

2.2.1.3 India. In July 1989, India submitted a detailed paper that elaborated a developing country perspective on the objective of the negotiations. It concluded:

“It would . . . not be appropriate to establish within the framework of the General Agreement on Tariffs and Trade any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights.”²⁷⁵

At a meeting of the TRIPS Negotiating Group in July 1989, the objectives and principles of the agreement were discussed. As reported by the Secretariat, India was among those countries that made a fairly detailed intervention:

“5. In his statement introducing the Indian paper, the representative of India first referred to recent action by the United States under its trade law and recalled the serious reservations of his delegation about the relevance and utility of the TRIPS negotiations as long as measures of bilateral coercion and threat continued. Subject to this reservation, his delegation submitted the paper circulated as document NG11/W/37, setting out the views of India on this agenda item. At the outset, he emphasised three points. First, India was of the view that it was only the restrictive and anti-competitive practices of the owners of the IPRs that could be considered to be trade-related because they alone distorted or impeded international trade. Although India did not regard the other aspects of IPRs dealt with in the paper to be trade-related, it had examined these other aspects in the paper for two reasons: they had been raised in the various submissions made to the Negotiating Group by some other participants; and, more importantly, they had to be seen in the wider developmental and technological context to which they properly belonged. India was of the view that by merely placing the label “trade-related” on them, such issues could not be brought within the ambit of international trade. Secondly, paragraphs 4(b) and 5 of the TNC decision of April 1989 were inextricably inter-linked. The discussions on paragraph 4(b) should unambiguously be governed by the socio-economic, developmental, technological and public interest needs of developing countries. Any principle or standard relating to IPRs should be carefully tested against these needs of developing countries, and it would not be appropriate

²⁷⁴ Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/26, July 1988, at II. The EC proposal stated that it was not intended to indicate a preference for a “code” approach. *Id.*, at note 1.

²⁷⁵ Communication from India, Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights, MTN.GNG/NG11/W/37, 10 July 1989.

for the discussions to focus merely on the protection of the monopoly rights of the owners of intellectual property. Thirdly, he emphasised that any discussion on the intellectual property system should keep in perspective that the essence of the system was its monopolistic and restrictive character. This had special implications for developing countries, because more than 99 per cent of the world's stock of patents was owned by the nationals of the industrialised countries. Recognising the extraordinary rights granted by the system and their implications, international conventions on this subject incorporated, as a central philosophy, the freedom of member States to attune their intellectual property protection system to their own needs and conditions. This freedom of host countries should be recognised as a fundamental principle and should guide all of the discussions in the Negotiating Group. . . . Substantive standards on intellectual property were really related to socio-economic, industrial and technological development, especially in the case of developing countries. It was for this reason that GATT had so far played only a peripheral role in this area and the international community had established other specialised agencies to deal with substantive issues of IPRs. The Group should therefore focus on the restrictive and anti-competitive practices of the owners of IPRs and evolve standards and principles for their elimination so that international trade was not distorted or impeded by such practices."²⁷⁶

The Indian position was debated extensively, with a substantial number of developing delegations lending their support.

2.2.2 The Anell Draft

The main body of the Anell text (as opposed to its Annex)²⁷⁷ included a draft with respect to "Principles", which is a "B" text (i.e. developing country-supported).

"8. Principles

8B.1 PARTIES recognize that intellectual property rights are granted not only in acknowledgement of the contributions of inventors and creators, but also to assist in the diffusion of technological knowledge and its dissemination to those who could benefit from it in a manner conducive to social and economic welfare and agree that this balance of rights and obligations inherent in all systems of intellectual property rights should be observed.

8B.2 In formulating or amending their national laws and regulations on IPRs, PARTIES have the right to adopt appropriate measures to protect public morality, national security, public health and nutrition, or to promote public interest in sectors of vital importance to their socio-economic and technological development.

8B.3 PARTIES agree that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and enhance the international transfer of technology to the mutual advantage of producers and users of technological knowledge.

²⁷⁶ Note by the Secretariat, Meeting of Negotiating Group of 12–14 July 1989, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/14, 12 September 1989.

²⁷⁷ For an explanation of the Anell Draft, see the explanatory note on the methodology at the beginning of this volume.

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8B.4 Each PARTY will take the measures it deems appropriate with a view to preventing the abuse of intellectual property rights or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. PARTIES undertake to consult each other and to co-operate in this regard.²⁷⁸

Most of the elements of Articles 7 and 8 can be identified in Article 8B, above, although some elements of Articles 7 and 8 can also be found in the Annex.²⁷⁹ It is significant that the developing country proposal for objectives and principles

²⁷⁸ Chairman's Report to the GNG, Status of Work in the Negotiating Group, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/76, 23 July 1990.

²⁷⁹ The Annex (see also Chapter 1) provided:

"This Annex reproduces tel quel Parts I, VI, VII and VIII of the composite draft text which was circulated informally by the Chairman of the Negotiating Group on 12 June 1990. The text was prepared on the basis of the draft legal texts submitted by the European Communities (NG11/W/68), the United States (NG11/W/70), Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, and subsequently also sponsored by Pakistan and Zimbabwe (NG11/W/71), Switzerland (NG11/W/73), Japan (NG11/W/74) and Australia (NG11/W/75).

"PART I: PREAMBULAR PROVISIONS; OBJECTIVES

1. Preamble (71); Objectives (73)

1.1 Recalling the Ministerial Declaration of Punta del Este of 20 September 1986; (73)

1.2 Desiring to strengthen the role of GATT and its basic principles and to bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines; (73)

1.3 Recognizing that the lack of protection, or insufficient or excessive protection, of intellectual property rights causes nullification and impairment of advantages and benefits of the General Agreement on Tariffs and Trade and distortions detrimental to international trade, and that such nullification and impairment may be caused both by substantive and procedural deficiencies, including ineffective enforcement of existing laws, as well as by unjustifiable discrimination of foreign persons, legal entities, goods and services; (73)

1.4 Recognizing that adequate protection of intellectual property rights is an essential condition to foster international investment and transfer of technology; (73)

1.5 Recognizing the importance of protection of intellectual property rights for promoting innovation and creativity; (71)

1.6 Recognizing that adequate protection of intellectual property rights both internally and at the border is necessary to deter and persecute piracy and counterfeiting; (73)

1.7 Taking into account development, technological and public interest objectives of developing countries; (71)

1.8 Recognizing also the special needs of the least developed countries in respect of maximum flexibility in the application of this Agreement in order to enable them to create a sound and viable technological base; (71)

1.9 Recognizing the need for appropriate transitional arrangements for developing countries and least developed countries with a view to achieve successfully strengthened protection and enforcement of intellectual property rights; (73)

1.10 Recognizing the need to prevent disputes by providing adequate means of transparency of national laws, regulations and requirements regarding protection and enforcement of intellectual property rights; (73)

1.11 Recognizing the need to settle disputes on matters related to the protection of intellectual property rights on the basis of effective multilateral mechanisms and procedures, and to refrain from applying unilateral measures inconsistent with such procedures to PARTIES to this PART of the General Agreement; (73)

1.12 Recognizing the efforts to harmonize and promote intellectual property laws by international organizations specialized in the field of intellectual property law and that this PART of the General Agreement aims at further encouragement of such efforts; (73)

became operative provisions of TRIPS (i.e., Articles 7 and 8), while the largely developed country proposals set out in the Annex were reflected in the more general statement of intent (i.e., the Preamble). Because articles of a treaty are intended to establish rights and obligations, Articles 7 and 8 should carry greater weight in the process of implementation and interpretation.

2.2.3 The Brussels Draft

The draft text of the TRIPS Agreement transmitted to the Brussels Ministerial Conference on the Chairman Anell's initiative in December 1990 reorganized the July 1990 proposal on "Principles" into Articles 7 ("Objectives") and 8 ("Principles").²⁸⁰ The Brussels Draft retained significant portions of the developing country proposals, but in doing so added language that limited the range of public policy options. This was accomplished through the use of a "do not derogate" formula in Articles 8.1 and 8.2.

On Article 7, the Brussels Draft provided:

"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."

2. Objective of the Agreement (74)

2A The PARTIES agree to provide effective and adequate protection of intellectual property rights in order to ensure the reduction of distortions and impediments to [international (68)] [legitimate (70)] trade. The protection of intellectual property rights shall not itself create barriers to legitimate trade. (68, 70)

2B The objective of the present Agreement is to establish adequate standards for the protection of, and effective and appropriate means for the enforcement of intellectual property rights; thereby eliminating distortions and impediments to international trade related to intellectual property rights and foster its sound development. (74)

2C With respect to standards and principles concerning the availability, scope and use of intellectual property rights, PARTIES agree on the following objectives:

(i) To give full recognition to the needs for economic, social and technological development of all countries and the sovereign right of all States, when enacting national legislation, to ensure a proper balance between these needs and the rights granted to IPR holders and thus to determine the scope and level of protection of such rights, particularly in sectors of special public concern, such as health, nutrition, agriculture and national security. (71)

(ii) To set forth the principal rights and obligations of IP owners, taking into account the important inter-relationships between the scope of such rights and obligations and the promotion of social welfare and economic development. (71)

(iii) To facilitate the diffusion of technological knowledge and to enhance international transfer of technology, and thus contribute to a more active participation of all countries in world production and trade. (71)

(iv) To encourage technological innovation and promote inventiveness in all countries. (71)

(v) To enable participants to take all appropriate measures to prevent the abuses which might result from the exercise of IPRs and to ensure intergovernmental co-operation in this regard. (71)"

Chairman's Report to the GNG, Status of Work in the Negotiating Group, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/76, 23 July 1990.

²⁸⁰ Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, MTN.TNC/W/35/Rev. 1, 3 Dec. 1990.

3. Possible interpretations

With respect to Article 8.1, the Brussels Draft provided:

“1. Provided that PARTIES do not derogate from the obligations arising under this Agreement, they may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.”

With respect to Article 8.2, the Brussels Draft provided:²⁸¹

“2. Appropriate measures, provided that they do not derogate from the obligations arising under 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.”

2.2.4 The Dunkel Draft

With respect to Article 7, there was no change from the Brussels to the Dunkel Draft and the final TRIPS text.

With respect to Article 8.1, there was only one change to the Brussels Draft made in the Dunkel Draft text, and that was adopted in the final TRIPS Agreement. The Dunkel Draft of late 1991 and final TRIPS Agreement texts move the first clause of the Brussels Draft Article 8.1 (as quoted above) to the end of the paragraph, and use the legal formula, “provided that such measures are consistent with the provisions of this Agreement.” The difference between an undertaking not to derogate, on the one hand, and to act consistently, on the other, is difficult to discern. Regarding Article 8.2, the “do not derogate” formula of the Brussels Draft was also modified in the Dunkel Draft text to a “consistent with” formula.

No significant changes to the Dunkel Draft texts were made in the TRIPS Agreement.

3. Possible interpretations

3.1 Article 7 (Objectives)

Article 7 of TRIPS provides:

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.

IPRs have been designed to benefit society by providing incentives to introduce new inventions and creations.²⁸² Article 7 makes it clear that IPRs are not an end

²⁸¹ For the negotiating history of Article 8.2, TRIPS Agreement, see also Part 3 (IPRs and Competition), Section 2.2.

²⁸² Correa, Carlos, *Formulating Effective Pro-development National Intellectual Property Policies*, Trading in Knowledge. Bellmann, C., Dutfield, G. and Meléndez-Ortiz, R., London, 2003, Earthscan: 9, 209.

in themselves. It sets out the objectives that member countries should be able to reach through the protection and enforcement of such rights. The wording of Article 7 (“The protection . . . should contribute . . .”) suggests that such a protection does not automatically lead to the effects described therein. In introducing IPR protection, countries should frame the applicable rules so as to promote technological innovation and the transfer and dissemination of technology “in a manner conducive to social and economic welfare”.²⁸³ IPRs are unlikely to promote innovation in countries with low scientific and technological capabilities, or where capital to finance innovative activities is lacking. The concept of “mutual advantage of producers and users of technological knowledge” is of particular importance in this context, since developing countries are largely *users* of technologies produced abroad.²⁸⁴

Article 7 provides guidance for the interpreter of the Agreement, emphasizing that it is designed to strike a balance among desirable objectives. It provides support for efforts to encourage technology transfer, with reference also to Articles 66 and 67. In litigation concerning intellectual property rights, courts commonly seek the underlying objectives of the national legislator, asking the purpose behind establishing a particular right. Article 7 makes clear that TRIPS negotiators did not mean to abandon a balanced perspective on the role of intellectual property in society. TRIPS is not intended only to protect the interests of right holders. It is intended to strike a balance that more widely promotes social and economic welfare.

3.2 Article 8 (Principles)

Article 8.1 provides:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

Article 8.1 establishes a basis for the adoption of internal measures in language similar to that used in Article XX(b) of the GATT 1994. However, Article XX(b) of the GATT 1994 is used to justify internal measures which are necessary yet otherwise inconsistent with the GATT 1994. Article 8.1, by way of contrast, provides that necessary measures must be “consistent with” the Agreement.

Since language of a treaty is presumed not to be surplus, it would appear that Article 8.1 is to be read as a statement of TRIPS interpretative principle: it advises that Members were expected to have the discretion to adopt internal measures they consider necessary to protect public health and nutrition, and to promote the

²⁸³ “Transfer” generally refers to the *transmission* of technology in a bilateral context (e.g. a licensing agreement), while “dissemination” rather alludes to the *diffusion* of innovation. IPRs normally reduce the diffusion of innovations as the title-holder charges prices above marginal costs in order to take advantage from the exclusive rights he enjoys.

²⁸⁴ Interestingly, although TRIPS covers trademarks and copyrights, it only refers in Article 7 to “technological” knowledge.

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public interest in sectors of vital importance to their socio-economic and technological development. The constraint is that the measures they adopt should not violate the terms of the agreement. This suggests that measures adopted by Members to address public health, nutrition and matters of vital socio-economic importance should be presumed to be consistent with TRIPS, and that any Member seeking to challenge the exercise of discretion should bear the burden of proving inconsistency. Discretion to adopt measures is built into the agreement. Challengers should bear the burden of establishing that discretion has been abused.

The reference to “promot[ing] the public interest in sectors of vital importance to their socio-economic and technological development” places substantial discretion in the hands of WTO Members regarding the kinds and subject matter of measures that may be adopted in the context of Article 8.1. Sectors of vital importance may vary from country to country and region to region, and the provision is not limited to implementation by developing countries. So long as sectors and measures are identified in good faith, the sovereign discretion of the Member adopting such measures should be accepted.

This statement of principle in Article 8.1 should prove important in limiting the potential range of non-violation nullification or impairment causes of action that might be pursued under TRIPS.²⁸⁵ Article 8.1 indicates that Members were reasonably expected to adopt such TRIPS-consistent measures. In this regard, developed Members may not succeed with claims that their expectations as to the balance of concessions have been frustrated.

Article 8.2 provides:

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.

This Article to a large extent reflects the view advanced by the Indian delegation, among others, during the Uruguay Round negotiations that a main objective of TRIPS should be to provide mechanisms to restrain competitive abuses brought about by reliance on IPR protection.

Like Article 8.1, Article 8.2 includes the requirement that measures taken should be “consistent with” TRIPS. It is complementary to Article 40 that addresses anticompetitive licensing practices or conditions that restrain trade.²⁸⁶ Article 31, regarding compulsory licensing of patents, also deals specifically with the application of measures to remedy anticompetitive practices.²⁸⁷

²⁸⁵ Note that the moratorium concerning the applicability of non-violation complaints under TRIPS has been extended to the Sixth Ministerial Conference in December 2005. See Chapter 32, providing interpretation favourable to a continuing exclusion of such complaints in the TRIPS context. The same Chapter analyzes in detail the implications of non-violation complaints in the TRIPS context.

²⁸⁶ For a detailed analysis of both Article 8.2 and Article 40, see Chapter 29.

²⁸⁷ For details, see Chapter 25.

TRIPS does not place significant limitations on the authority of WTO Members to take steps to control anticompetitive practices.²⁸⁸

4. WTO jurisprudence

The Preamble and Articles 7 and 8 were given modest attention by the parties (including third countries) and panel in the *Canada – Generics* dispute.²⁸⁹ The panel said:

“(b) Object and Purpose

7.23 Canada called attention to a number of other provisions of the TRIPS Agreement as relevant to the purpose and objective of Article 30. Primary attention [footnote] was given to Articles 7 and 8.1. . . .

In the view of Canada, . . . Article 7 above declares that one of the key goals of the TRIPS Agreement was a balance between the intellectual property rights created by the Agreement and other important socio-economic policies of WTO Member governments. Article 8 elaborates the socio-economic policies in question, with particular attention to health and nutritional policies. With respect to patent rights, Canada argued, these purposes call for a liberal interpretation of the three conditions stated in Article 30 of the Agreement, so that governments would have the necessary flexibility to adjust patent rights to maintain the desired balance with other important national policies.

The EC did not dispute the stated goal of achieving a balance within the intellectual property rights system between important national policies. But, in the view of the EC, Articles 7 and 8 are statements that describe the balancing of goals that had already taken place in negotiating the final texts of the TRIPS Agreement. According to the EC, to view Article 30 as an authorization for governments to ‘renegotiate’ the overall balance of the Agreement would involve a double counting of such socio-economic policies. In particular, the EC pointed to the last phrase of Article 8.1 requiring that government measures to protect important socio-economic policies be consistent with the obligations of the TRIPS Agreement. The EC also referred to the provisions of first consideration of the Preamble and Article 1.1 as demonstrating that the basic purpose of the TRIPS Agreement was to lay down minimum requirements for the protection and enforcement of intellectual property rights.

In the Panel’s view, Article 30’s very existence amounts to a recognition that the definition of patent rights contained in Article 28 would need certain adjustments. On the other hand, the three limiting conditions attached to Article 30 testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement. Obviously, the exact scope of Article 30’s authority will depend on the specific meaning given to its limiting conditions. The words of those conditions

²⁸⁸ See Frederick M. Abbott, *Are the Competition Rules in the WTO TRIPS Agreement Adequate?*, 7 J Int’l Econ. L No. 3, 2004, at 687–703.

²⁸⁹ *Canada – Patent Protection of Pharmaceutical Products*, Report of the Panel, WT/DS114/R, March 17, 2000 (hereinafter “Canada-Generics”).

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must be examined with particular care on this point. Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes.”

[Footnote]: Attention was also called to the text of the first recital in the Preamble to the TRIPS Agreement and to part of the text of Article 1.1. The Preamble text in question reads:

‘Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, *and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.*’ (emphasis added by Canada)

Part of the Article 1.1 text referred to reads:

‘Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal systems and practice.’

When it analyzed the relationship between Article 27.1 and Article 30 of the TRIPS Agreement, the panel employed Articles 7 and 8.1 in its analysis, stating:

“7.92 . . . Beyond that, it is not true that Article 27 requires all Article 30 exceptions to be applied to all products. Article 27 prohibits only discrimination as to the place of invention, the field of technology, and whether products are imported or produced locally. Article 27 does not prohibit bona fide exceptions to deal with problems that may exist only in certain product areas. Moreover, to the extent the prohibition of discrimination does limit the ability to target certain products in dealing with certain of the important national policies referred to in Articles 7 and 8.1, that fact may well constitute a deliberate limitation rather than a frustration of purpose. It is quite plausible, as the EC argued, that the TRIPS Agreement would want to require governments to apply exceptions in a non-discriminatory manner, in order to ensure that governments do not succumb to domestic pressures to limit exceptions to areas where right holders tend to be foreign producers.” [emphasis added]

The panel suggests that Articles 7 and 8.1, and the policies reflected in those articles, are bounded by the principle of non-discrimination in Article 27.1 with respect to patents. Presumably the panel is invoking the specific non-discrimination requirement of Article 27.1 as a control on the more general policies stated in Articles 7 and 8.1, and also invoking the consistency requirement of Article 8.1. It is not clear how far this idea of giving precedence to specific obligations over more general policies should be extended.²⁹⁰

²⁹⁰ It is also important to recall that the panel in the same paragraph says that *bona fide* exceptions may apply to certain product areas (i.e. fields of technology), thus establishing the critical distinction between bad faith “discrimination” on one hand, and good faith “differentiation” on the other.

5. Relationship with other international instruments

5.1 WTO Agreements

The objectives and principles of TRIPS must be considered in relation to the objectives of the WTO Agreement, which is reflected in its preamble. In addition to promoting general economic growth compatible with sustainable development, the preamble of the WTO Agreement:

“Recogniz[es] further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,”

In fact, most of the WTO agreements include provisions regarding special and differential treatment for developing countries. Since Articles 7 and 8 refer to development objectives, it may be useful in the context of dispute settlement to cross-reference developmental objectives and principles of the appropriate agreements.

5.2 Other international instruments

The objectives and principles set forth in Articles 7 and 8 are supported by a myriad of other international instruments that promote economic development, transfer of technology, social welfare (including nutritional and health needs), and so forth. Human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, support a number of the same objectives and principles as Articles 7 and 8. The various agreements of the International Labour Organization, and the charter of the World Health Organization, support the development-oriented objectives and principles of TRIPS. In the implementation of TRIPS and in any dispute settlement proceedings it will be useful to establish the supportive links between the objectives and principles stated in Articles 7 and 8, and the objectives and principles of other international instruments. The Appellate Body, as noted in Chapter 1 (Section 4 on the “Shrimp-Turtles” case), has moved firmly away from the notion of the WTO as a “self-contained” legal regime, and the establishment of support in other international instruments may help persuade the AB to recognize and give effect to developmental priorities.

6. New developments

6.1 National laws

6.2 International instruments

6.2.1 The Doha Declaration on the TRIPS Agreement and Public Health

The Declaration on the TRIPS Agreement and Public Health adopted by Ministers at Doha on 14 November 2001 includes important statements regarding the objectives and principles of TRIPS.²⁹¹

²⁹¹ See WT/MIN(01)/DEC/W/2 of 14 November 2001.

6. New developments

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Operative paragraph 4 of the Doha Declaration can be understood as directed to elaborating on the meaning of Article 8.1. It provides:

“4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.”

The first important point regarding this paragraph is that it is stated in the form of an agreement (i.e., “we agree”). Since this statement was adopted by consensus of the Ministers, and since the operative language is in the form of an agreement, this may be interpreted as a “decision” of the Members under Article IX.1 of the WTO Agreement. Although paragraph 4 is not an “interpretation” in the formal sense since it was not based on a recommendation of the TRIPS Council pursuant to Article IX:2 of the WTO Agreement, a decision that states a meaning of the Agreement should be considered as a very close approximation of an interpretation and, from a functional standpoint, may be indistinguishable.

The statement that TRIPS “does not . . . prevent Members . . . from taking measures to protect public health” might be interpreted as a broad mandate to developing and least developed Members to take whatever steps they consider appropriate to addressing public health concerns. An aggressive interpretation would be that developing Members are free, for example, to override patent protection as the situation demands, without constraint by TRIPS. However, the broad mandate is qualified by the second clause of this paragraph that reaffirms the right of Members to use the existing flexibility in TRIPS “for this purpose”. It can be argued that the opening statement merely affirms that TRIPS allows Members to address public health concerns within the framework of the rules established by the Agreement. This is reinforced by the opening phrase of paragraph 5 (see below).

The second sentence of paragraph 4 indicates that TRIPS “can and should be interpreted and implemented . . . to promote access to medicines for all”. This would imply that the Agreement should not be used to maintain prices that are unaffordable to the poor. This again would imply that patent protection may be limited in order to provide lower priced access to medicines, but is qualified by the second sentence of paragraph 4 (and paragraph 5).

In the second sentence of paragraph 4, Members reiterate their commitment to TRIPS, and in the third sentence Members indicate that the Agreement contains certain flexibilities. This suggests that the existing language of TRIPS is not intended to be overridden or superseded by the Declaration, despite the strong first sentence of paragraph 4.

The first part of paragraph 5 of the Declaration provides:

“5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:

(a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.”

Paragraph 5(a) states an interpretative principle that has already been enunciated by the panel in the Canada-Generics case, and that would already be understood by operation of Article 31 of the Vienna Convention on the Law of Treaties. By particularizing reference to objectives and principles, the Declaration appears indirectly to reference Articles 7 and 8 and this may have the effect of elevating those provisions above the preamble of TRIPS for interpretative purposes.²⁹²

6.3 Regional and bilateral contexts

6.4 Proposals for review

The Doha Declaration on the TRIPS Agreement and Public Health (see above) followed meetings of the Council for TRIPS that included substantial discussion of the objectives and principles of TRIPS. It is understood that those initial meetings are part of a continuing process of examining the impact of TRIPS on public health.²⁹³

A number of developing countries have indicated that the implementation of Article 7 should be examined in the Council for TRIPS in the context of determining whether TRIPS is fulfilling the objective of contributing to the dissemination and transfer of technology.²⁹⁴

7. Comments, including economic and social implications

Article 7 recognizes that IPRs are intended to achieve a balance among social welfare interests, including interests in the transfer of technology, and the interests of producers.

TRIPS does not contain a general safeguard measure comparable to Article XX of the GATT 1994 or Article XIV of the GATS. For those other Multilateral Trade Agreements (MTAs), the necessity to protect human life or health may take priority over the generally applicable rules of the agreement, subject only to general principles of non-discrimination. Yet when it comes to intellectual property, the “exceptions” are circumscribed with various procedural or compensatory encumbrances, making their use more difficult. Article 8.1 contains language similar to

²⁹² The TRIPS Agreement preamble might be understood to place a somewhat greater weight on the interests of intellectual property rights holders than on public interests.

²⁹³ A number of developing countries have suggested that Article 8.1 of the TRIPS Agreement might be made consistent with Article XX(b) of the GATT 1994 that permits exceptional measures that are otherwise inconsistent with the agreement. Although it is not clear whether the Council for TRIPS will consider this issue since it was at least partially addressed in the Doha Declaration, it is a potential agenda item.

²⁹⁴ While reference to reaffirming commitments under Article 66.2 was made in the Doha Declaration, this reference relates to encouraging actions by enterprises and institutions in favour of least developed Members. For more details on Article 66.2, see Chapter 34.

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that of GATT Articles XX and GATS Article XIV, yet it demands consistency rather than tolerating inconsistency. What accounts for this difference in approach? Proponents of high levels of IPR protection argue this is necessary to protect against abuse of exceptions, and that IPRs such as patents represent a special case. Article XX of GATT has been invoked to prevent fleets of fishing vessels from operating in ways injurious to dolphins and sea turtles. Yet there is no comparable provision in TRIPS that allows Members to generally suspend IPR protection to allow the manufacture and distribution of vitally needed medicines to save human lives. This distinction poses a fundamental question regarding the nature of the WTO. One that is unlikely to go away soon.

