

Presentation on Articles 7 and 8 of TRIPS as well as Article 66 of TRIPS

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Let me begin by highlighting two key articles that have been referred to several speakers before me and that serve as the cornerstone of the TRIPS Agreement:

Article 7 which outlines the objectives of TRIPS, and **Article 8** which sets forth its guiding principles.

Both articles play a crucial role in the interpretation and implementation of the TRIPS Agreement.

The introduction of TRIPS transformed the global IP system.

Before TRIPS, international governance of IP was mainly through WIPO-administered treaties such as the Paris and Berne Conventions which allowed states regulatory discretion.

Neither of these Conventions have provisions like Articles 7 and 8 that set out overarching principles for the interpretation and implementation of the agreement.

TRIPS marked a major shift by globally harmonizing IP standards and thus limiting national discretion in balancing competing interests.

These articles are unique to TRIPS and can be viewed as a means to establish a balance of interests at the multilateral level, which would otherwise have been done at the national level.

These articles also reflect the North-South tensions inherent in the negotiations.

As resisting the inclusion of new substantive standards for the protection and enforcement of intellectual property rights in GATT proved futile, developing countries insisted that protection and enforcement of IP have to be considered in the context of socio-economic, developmental, technological and public interest needs of countries.

In March 1990, the European Communities submitted their draft text which was followed by the US. In response 14 developing countries submitted their own texts.

According to some analyst the proposed provisions were influenced by the Draft International Code of Conduct on the Transfer of Technology, negotiated under UNCTAD but never adopted.

Eventually, proposals of developing countries became the basis for Articles 7 and 8 of TRIPS, while proposals of developed countries on objectives and principles were largely reflected in the preamble.

As substantive provisions of the Treaty, Articles 7 and 8 should rightfully hold greater significance in its implementation and interpretation.

Article 7 delineates the objectives of the TRIPS Agreement: *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.*

From a policy development perspective, Article 7 holds significant importance.

Use of "should" in Article 7 is a reminder that IP protection and enforcement does not automatically lead to innovation, knowledge dissemination, or technology transfer.

Countries should design IP systems not as ends in themselves but should consider how the system contributes to technology development, taking into consideration not just the interests of the producers of the technological knowledge but also users of such knowledge as well as societal interests.

Article 8(1) lays out the public interest principle in the TRIPS Agreement. It allows WTO Members to adopt measures to protect public health, nutrition, and socio-economic development provided that such measures are consistent with the provisions of this Agreement.

Article 8.1 presumes measures adopted are aligned with TRIPS unless proven otherwise.

Article 8.2 of TRIPS reflects the view, notably supported by India during the Uruguay Round that TRIPS should provide mechanisms to restrain restrictive and anti-competitive practices arising from IP protection, as these practises impede international trade.

It complements other provisions of TRIPS such as Article 40 on anti-competitive licensing and Article 31 on compulsory licensing of patents which can also be used to remedy anticompetitive practices.

Article 8 provision also contains two major constraints, added by developed countries in the last stages of negotiations, the first is the necessity requirement, which is somewhat similar to the one found in Article XX of the GATT and the second is that the measures are 'consistent with the provisions of [the TRIPS] Agreement.

Articles 7 and 8 of TRIPS serve multiple purposes.

Most important is the role in the interpretation and implementation of the TRIPS Agreement. Article 31(1) of the Vienna Convention stipulates that '[a] treaty shall be interpreted in good

faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose’.

WTO Panel in the Australia Tobacco Plain Packaging case considered that articles 7 and 8 were to be borne in mind when specific provisions of the Agreement were interpreted, in their context and in light of the object and purpose of the Agreement.

The panel also points out that the principles reflected in Article 8.1 express the intention of the drafters of TRIPS to preserve the ability of WTO Members to pursue certain legitimate societal interests.

Articles 7 and 8 are even more important in light of the many ambiguities built into the TRIPS Agreement.

Since the Articles reflect the bargain struck during the negotiation process of balancing public and private interests these provisions provide guidance to policymakers, WTO panels on how the TRIPS Agreement is to be interpreted.

Articles 7 and 8 have acquired some influence at a policy level within the WTO. For instance, Paragraph 19 of the 2001 Doha Ministerial Declaration stated explicitly that the work of the TRIPS Council ‘shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension’.

They are also reflected in para 5 (a) of the Doha Declaration on TRIPS and Public Health

Outside the WTO as well, Articles 7 and 8 has helped to lay the foundation for a more balanced approach to international IP regulation that supports both social and economic development.

For instance, these articles are reflected in **Recommendation 45** of the WIPO Development Agenda which then ensures that IP enforcement is approached from a balanced and development-oriented perspective..

A final point - we heard that negotiation process on TRIPS was unbalanced from the perspective of developing countries, and essentially the essence of the IP system is based on monopoly and thus open to abuse by the IP holders. In this context Articles 7 and 8 serve as a reminder of the need for a balanced approach and the right of members to take measures to address their development needs.

Article 66 of the TRIPS Agreement which is relevant to least developed countries

Before work began on the legal text of TRIPS, Bangladesh, on behalf of the group of LDCs, had made clear in its submission that any agreement resulting from the negotiations shall not prevent LDCs from adopting measures and policies which would assist their economic development and shall provide for access to and ensure effective transfer of technologies.

Laid the basis for LDC transition period.

Since TRIPS was a new legal regime, substantial adjustments had to be made at the national level for developing countries and LDCs so transition periods became very important for those countries.

Proposals in the earlier drafting text differ from the final version of Article 66.1 which deals with transition period for LDCs. For instance, some earlier proposals did not provide for unconditional extension of the transition period which now is available for LDCs under Article 66.1 and has been used to extend the transition period for LDCs until July 2034.

With respect LDCs demand on technology transfer, Article 66.2 was agreed which places an obligation on developed country Members to provide incentives to their enterprises and institutions for the purpose of promoting and encouraging technology transfer to LDCs with the aim of creating a sound and viable technological base.

For LDCs, the Article 66.2 commitment is a necessary “part of the bargain” of the TRIPS Agreement for LDC

Today concerns remain that Article 66.2 commitment on technology transfer has not been delivered.