

Articles 7 and 8 as the basis for interpretation of the TRIPS Agreement

By **Thamara Romero***

Introduction

The implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)¹ at the national level can represent a challenge for policymakers in terms of designing intellectual property (IP) regimes consistent with the Agreement while maintaining the overall balance between the protection of private rights and the sovereign rights to pursue the legitimate socio-economic interests of the public in general. When such balance is found, intellectual property rights (IPRs) may work “to the mutual advantage of producers and users of technological knowledge”, an objective of the TRIPS Agreement (article 7).

The drafters of the TRIPS Agreement conceived arti-

cles 7 “Objectives” and article 8 “Principles” to guarantee the preservation of policy space at the national level.² These two articles are core elements in reaching the required balance between rewarding and promoting technological innovation through IP and addressing national needs, such as public health, food security and the development of national industrial and technological capabilities.

Articles 7 and 8 of the TRIPS Agreement serve as a guide for the correct formulation and recalibration of the IP system to be compatible with public policies. Those articles clearly indicate that it is the societal interest that must prevail in any IP system. According to article 7, the protection and enforcement of IP must promote “social and economic welfare”.

Abstract

Articles 7 and 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) play a central role in assuring the members of the World Trade Organization (WTO) the right to implement public health measures. The Doha Declaration on the TRIPS Agreement and Public Health is also an important element for the interpretation of any provision of the TRIPS Agreement that may have public health implications. The most recent and prominent example of the use of articles 7 and 8 for interpretation in WTO law can be found in the WTO Panel decision of 2018 on the *Australia – Tobacco Plain Packaging* dispute.

Les articles 7 et 8 de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce (ADPIC) jouent un rôle essentiel en reconnaissant aux Etats membres de l'Organisation mondiale du commerce (OMC) le droit de mettre en œuvre des mesures permettant de protéger la santé publique. La déclaration de Doha sur l'accord sur les ADPIC et la santé publique est également importante en ce qu'elle établit des règles concernant l'interprétation des dispositions de l'accord sur les ADPIC qui pourraient avoir des répercussions en matière de santé publique. La décision rendue en 2018 par le groupe spécial de l'OMC chargé du règlement du différend opposant plusieurs Etats et l'Australie au sujet de la loi adoptée par cette dernière imposant le conditionnement neutre des produits du tabac est l'exemple le plus récent et le plus marquant de la prise en compte des articles 7 et 8 de l'accord sur les ADPIC dans l'interprétation des dispositions de l'OMC.

*Los artículo 7 y 8 del Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio (ADPIC) desempeñan un papel central a la hora de garantizar a los Miembros de la Organización Mundial del Comercio (OMC) el derecho de adoptar las medidas necesarias para proteger la salud pública. La Declaración de Doha relativa al Acuerdo sobre los ADPIC y la Salud Pública también es un elemento importante para la interpretación de cualquier disposición del Acuerdo sobre los ADPIC que pudiera tener repercusiones en la salud pública. El ejemplo más reciente y destacado del uso de los artículo 7 y 8 para la interpretación de las normas de la OMC se encuentra en la decisión del grupo especial de solución de diferencias de la OMC de 2018 sobre el caso *Australia – Empaquetado genérico del tabaco*.*

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The recent decision by a WTO panel confirmed the important role of articles 7 and 8 in the overall interpretation and implementation of the TRIPS Agreement. The Panel appointed to rule on the case *Australia – Tobacco Plain Packaging*³ (hereinafter “the TPP Panel”) that produced its report in June 2018 applied articles 7 and 8 as a guide for interpreting some of the obligations contained in the TRIPS Agreement. The objective was, in particular, to determine whether the tobacco plain packaging (TPP) measures taken by Australia violated article 20 of the TRIPS Agreement. In its ruling the Panel 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 provisions of the TRIPS Agreement must be considered as a whole; they cannot be read or interpreted in isolation. The Panel also identified public health as a societal interest that justified the TPP measures, under article 7 and 8 of the TRIPS Agreement.⁴

This Policy Brief aims to illustrate the role that articles 7 and 8 of the TRIPS Agreement can play in assuring WTO member countries the right to implement public health measures.

Understanding Article 7, “Objectives”, and Article 8, “Principles”, of the TRIPS Agreement

Article 7, entitled “Objectives”, provides that:

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, entitled “Principles”, provides in its first paragraph that:

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

This reading of article 7 suggests that, to meet the objectives of the TRIPS Agreement, a series of elements must concur to fulfil the unique purpose of the contribution of IP to the society. It implies that the protection of IP alone does not produce welfare gains.⁵ Rather, it is the transfer and dissemination of technology, the shared gain for the producers and users of technological knowledge, within the context of a balance of rights and obligations, which are equally important and may be pursued in parallel by different means, such as through laws and regulations that prevent anti-competitive practices.

Article 7 of the TRIPS Agreement states that the pro-

tection and enforcement of IP rights should not be an end in itself but should serve to reward inventors and creators as they contribute to socio-economic welfare. In this way, the TRIPS Agreement should encourage innovation and the dissemination of technology for the benefit of society as a whole.⁶ As noted by the United Nations Conference on Trade and Development (UNCTAD), “[T]he TRIPS Agreement is based on the assumption that the implementation and enforcement of minimum levels of IPRs will encourage owners of IP to transfer technologies to others”.⁷

In addition, article 8 of the TRIPS Agreement sets basic principles that preserve the WTO Members’ discretion to adopt public policy measures necessary to protect societal interests.⁸ WTO members may, when implementing TRIPS rules, adopt measures necessary to protect public health and other public policy objectives, provided that such measures are consistent with the provisions of the TRIPS Agreement. This means that the TRIPS Agreement is not merely focused on the protection of the exclusive rights of the IP owners but also recognizes the freedom of States to attune their IP systems to their own needs and levels of development.

The Preamble of the TRIPS Agreement and that of the Doha Declaration on the TRIPS Agreement and Public Health (hereinafter “the Doha Declaration”) are equally important to the interpretation of the TRIPS Agreement. The WTO members agreed in the Doha Declaration that “the TRIPS Agreement does not and should not prevent members from taking measures to protect public health”.⁹ While members asserted their commitment to the TRIPS Agreement, they also recognized 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”.¹⁰ Hence, articles 7 and 8 hold importance for interpreting all provisions contained in the TRIPS Agreement as they relate to public health.

The most recent and prominent example of the use of articles 7 and 8 for interpreting the TRIPS Agreement can be found, as noted, in the *Australia – Tobacco Plain Packaging* dispute concerning the WTO consistency of Australia’s measures imposed on the packaging of cigarettes and other tobacco products to protect public health. The WTO Panel had, *inter alia*, to rule whether the measure referred to in the dispute fell under the justifiable measures that might encumber the use of trademarks. In this regard, the Panel stated: “We also consider that Article 7, entitled ‘Objectives’, and Article 8, entitled ‘Principles’, provide relevant context ... in the interpretation of the term ‘unjustifiably’ of Article 20 of the TRIPS Agreement”.¹¹

Article 20 of the TRIPS Agreement regulates domestic conditions for trademark use and makes their consistency with the Agreement dependant on, *inter alia*, meeting a justifiability requirement.

As will be discussed in the next section, articles 7 and 8 of the TRIPS Agreement provide a solid legal basis on

which to integrate public policy objectives into national legislation when implementing IP obligations, according to WTO law and its rules of interpretation. WTO law and jurisprudence support the important role of articles 7 and 8 of the TRIPS Agreement in the interpretation of its provisions – especially those which are ambiguous and open-ended.¹²

Defining the Interpretation Criteria

The interpretation of WTO law, as explained by the Appellate Body in the case *US – Shrimp*, must follow specific rules, especially in cases where the text of the WTO Agreement is unclear or inconclusive:

*Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.*¹³

Indeed, article 3(2) of the WTO Dispute Settlement Understanding (DSU) establishes as a general rule of interpretation that WTO law must be clarified in accordance with the “customary rules of interpretation of public international law”. This article also stipulates that the recommendations and rulings of the Dispute Settlement Body (DSB) cannot add to or diminish the rights and obligations provided in the covered agreements.

According to Correa, the provisions of the TRIPS Agreement

*must be interpreted – in line with the unambiguous jurisprudence developed under the GATT and WTO – in accordance with the interpretive rules of the Vienna Convention on the Law of Treaties (VCLT). These rules do not allow for an expansive interpretation of the provisions of the Agreement, including the trademark section, so as to read in it obligations that WTO members have not agreed upon. A fortiori, they do not allow adding, by way of interpretation, commitments not accepted by WTO members. The role of WTO panels and the Appellate Body is limited to the clarification of the obligations under WTO agreements; they cannot create rules on issues that were left out of the Agreement, even if they considered that additional disciplines would have been necessary or convenient to address a particular situation subject to a dispute.*¹⁴

Article 31 of the VCLT establishes the general rule of interpretation thus:

*A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*¹⁵

WTO Members have repeatedly argued for the relevance of articles 7 and 8 of the TRIPS Agreement to interpret its provisions, particularly as they relate to public health policies. They did so, for instance, in their submissions and communications to the panels and the Council for Trade-Related Aspects of Intellectual Prop-

erty Rights.¹⁶ It is in the Doha Declaration, however, that the Members expressly recognized the role of articles 7 and 8. This Declaration is also an important element of the interpretation of any provision of the TRIPS Agreement that may have public health implications. The Doha Declaration states as follows:

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 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.

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.*¹⁷

An interpretation based on articles 7 and 8 of the TRIPS Agreement, therefore, is the primary (and horizontally applicable) instrument for addressing the relationship between IP and other societal concerns. These provisions establish the legitimacy of an integrative approach to the TRIPS Agreement’s interpretation that adequately addresses the relationship between IP protection and societal interests, such as in the area of public health.¹⁸

In summary, the individual provisions contained in the TRIPS Agreement cannot be read in isolation;¹⁹ they must be read in conjunction with other norms, especially articles 7 and 8.²⁰

WTO Dispute Settlement: Interpretation of Articles 7 and 8 of the TRIPS Agreement

The primary role of articles 7 and 8 of the TRIPS Agreement has been considered by various panels established under the WTO Dispute Settlement System. Those articles, however, have been mentioned as mere expressions of the inherent characteristics of the international intellectual property system. As has been well noted by academia, the legal value of articles 7 and 8 was underestimated.²¹ One of the most illustrative cases of failure to provide an adequate analysis of article 7 was the Panel ruling in *Canada – Patent Protection of Pharmaceutical Products*.²² In this ruling the Panel understood both article 7 and article 8 as simply illustrative of the balancing of goals that had already occurred during treaty negotiations, and thus essentially irrelevant for defining the scope of other provisions of the Agreement.²³

By contrast, the Appellate Body in *Canada – Term of Patent Protection*²⁴, while not providing an interpretation

of articles 7 and 8, acknowledged the function of these provisions in the interpretation of the TRIPS Agreement as follows:

[O]ur findings in this appeal do not in any way prejudge the applicability of Article 7 or Article 8 of the TRIPS Agreement in possible future cases with respect to measures to promote the policy objectives of the WTO Members that are set out in those Articles. Those Articles still await appropriate interpretation.²⁵

The Panel in the case *United States – Section 211 Omnibus Appropriations Act of 1998*²⁶ provided an important explanation of the function of article 7 and reinforced its importance as an interpretative tool. Furthermore, the Panel acknowledged article 7 as an effective source of legal obligations within the international intellectual property system.²⁷

*[A]rticle 7 of the TRIPS Agreement states that one of the objectives is that “[t]he protection and enforcement of intellectual property rights should contribute ... to a balance of rights and obligations”. We consider this expression to be a form of the good faith principle. The Appellate Body in *United States – Shrimps* stated that this principle “controls the exercise of rights by states. One application of this principle, the doctrine widely known as the doctrine of abuse de droit, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right “impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably”. An abusive exercise by a Member of its own treaty rights thus results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the Members so acting.²⁸*

Members, therefore, have the right to implement the provisions of the TRIPS Agreement in a manner consistent with the principle of the balance of rights and obligations enshrined in articles 7 and 8.

Landmark Panel Ruling on the Leading Role of Articles 7 and 8 for the Interpretation of the TRIPS Agreement

In the recent TPP case, articles 7 and 8 served to clarify the question of whether plain packaging was a justifiable measure that did not contravene article 20 of the TRIPS Agreement. In accordance with the applicable rules of interpretation mentioned above, the Panel had to determine the ordinary meaning of the term “unjustifiably” in article 20, in its context and in the light of the object and purpose of the provision and the Agreement.

Article 20 states that:

*The use of a trademark in the course of trade shall not be **unjustifiably encumbered** by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with,*

but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.²⁹

It is important to notice that article 20 is one case where the meaning imparted by the text itself is equivocal and inconclusive. It was essential for the Panel to provide a reading of the text in compliance with the interpretative rules set forth by the Vienna Convention on the Law of the Treaties, notably to seek guidance in accordance with the object and the purpose of the treaty. With respect to the definition of the term “unjustifiably”, the Panel held that:

In Article 20, the term “unjustifiably” qualifies the verb “encumbered”. The above definitions suggest that the term “unjustifiably”, as used in Article 20, connotes a situation where the use of a trademark is encumbered by special requirements in a manner that lacks a justification or reason that is sufficient to support the resulting encumbrance.³⁰

This in turn implies that there may be circumstances in which good reasons exist that sufficiently support the application of encumbrances on the use of a trademark in a reasonable manner. Article 20 does not expressly identify the types of reasons that may form the basis for the “justifiability” of an encumbrance. We find useful general guidance in this respect in the context provided by other provisions of the TRIPS Agreement.³¹

The Panel then searched for useful general guidance to define whether the encumbrance of the trademark was justified in the context provided by articles 7 and 8, together with the preamble of the TRIPS Agreement:³²

*Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement, which are to be borne in mind when specific provisions of the Agreement are being interpreted in their context and in light of the object and purpose of the Agreement. As the Panel in *Canada – Pharmaceutical Patents* observed in interpreting the terms of Article 30 of the TRIPS Agreement, “[b]oth 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”.³³*

According to the Panel, article 7 “reflects the intention of establishing and maintaining a balance between the societal objectives mentioned therein”.³⁴ The Panel also acknowledged that:

Article 8.1 “... makes clear that the provisions of the TRIPS Agreement are not intended to prevent the adoption, by Members, of laws and regulations pursuing certain legitimate objectives, specially measures “necessary to protect public health and nutrition” and “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 the Agreement...³⁵

As Correa pointed out, the purpose of the TRIPS Agreement is to protect intellectual property rights and at the same time the policy space retained by WTO Members to implement public policies.³⁶ Indeed, the Panel followed the same line of interpretation by asserting that the princi-

ples reflected in article 8 “express the intention of drafters of the TRIPS Agreement to preserve the ability for WTO Members to pursue certain legitimate societal interests”.³⁷ The Panel stated that:

Article 8 offers, in our view, useful contextual guidance for the interpretation of the term “unjustifiably” in Article 20. Specifically, the principles reflected in Article 8.1 express the intention of the drafters of the TRIPS Agreement to preserve the ability for WTO Members to pursue certain legitimate societal interests, at the same time as it confirms their recognition that certain measures adopted by WTO Members for such purposes may have an impact on IP rights, and requires that such measures be “consistent with the provisions of the TRIPS Agreement”...³⁸

Particularly notable is the recognition by the Panel that article 8.1 sheds light on the types of recognized societal interests that provide a basis for the justification of measures under article 20 and “unquestionably identify public health as such a recognised societal interest”.³⁹ The Panel held in this regard that:

The specific objectives expressly identified in Article 8.1 do not, in our view, necessarily exhaust the scope of what may constitute a valid basis of the “justifiability” of encumbrances on the use of trademarks under Article 20. However, their identification in Article 8.1 may shed light on the types of recognized “societal interests” that may provide a basis for the justification of measures under the specific terms of Article 20, and unquestionably identify public health as such a recognized societal interest...⁴⁰

Academics had previously asserted that a possible interpretation of a justifiable encumbrance was provided by article 8, as the Panel confirmed. According to the experts, if tobacco plain packaging is a measure employed to protect human health, then it is justifiable and therefore consistent with the TRIPS Agreement.⁴¹ Article 8.1 assures Members the possibility to pursue legitimate public policy objectives.⁴²

It is important to note that Article 8 of TRIPS Agreement should not be read as creating exceptions to the obligations under the Agreement, but rather establishing a principle to be used in interpreting the substantive provisions of TRIPS Agreement. The Panel also made reference to the Doha Declaration in interpreting Article 20:

We note in this respect that the Doha Declaration, adopted by Ministers on 14 November 2001, provides that, “[i]n 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”. (Doha Declaration, para 5)⁴³

The Doha Declaration clarifies the flexibilities that allow WTO Members to protect public health under the TRIPS Agreement. Its key role was acknowledged by the Panel as follows:

While the statement was made in the specific context of a

re-affirmation by Members of the flexibilities provided in the TRIPS Agreement in relation to measures taken for the protection of public health, we note that paragraph 5 of the Doha Declaration is formulated in general terms, inviting the interpreter of the TRIPS Agreement to read “each provision of the TRIPS Agreement” in the light of the object and purpose of the Agreement, as expressed in particular in its objectives and principles. As described above, Articles 7 and 8 have central relevance in establishing the objectives and principles that, according to the Doha declaration, express the object and purpose of the TRIPS Agreement relevant to its interpretation...⁴⁴

Paragraph 5 of the Doha Declaration legitimizes the adoption of measures WTO Members deem appropriate to address public health concerns under the TRIPS Agreement.⁴⁵ It confirms that the TRIPS Agreement leaves Members some discretion to implement its provisions under domestic law.⁴⁶ Importantly, the Panel in the Australia TPP case addressed the legal status of the Doha Declaration. It states:

This paragraph of the Doha Declaration may, in our view, be considered to constitute a “subsequent agreement” of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention. As the Appellate Body has clarified: Based on the text of Article 31(3)(a) of the Vienna Convention, we consider that a decision adopted by Members may qualify as a “subsequent agreement between the parties” regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between Members on the interpretation or application of a provision of WTO law...⁴⁷

The terms and contents of the decision adopting the Doha Declaration express, in our view, an agreement between Members on the approach to be followed in interpreting the provisions of the TRIPS Agreement. This Agreement, rather than reflecting a particular interpretation of a specific provision of the TRIPS Agreement, confirms the manner in which “each provision” of the Agreement must be interpreted, and this “bears specifically”⁴⁸ on the interpretation of each provision of the TRIPS Agreement...⁴⁹

The guidance provided by the Doha Declaration is consistent, as the Declaration itself suggests, with the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted, and confirms in our view that Articles 7 and 8 of the TRIPS Agreement provide important context for the interpretation of Article 20...⁵⁰

Conclusion

Articles 7 and 8 of the TRIPS Agreement provide an important interpretative guide to exercising the WTO Members’ rights to implement public health measures.

The recent ruling by the TPP Panel serves to reassure WTO Members of their rights, as recognized by article 7 of the TRIPS Agreement, to establish and maintain a balance between IP and the societal objectives mentioned therein.

The TPP Panel concluded that taking the ordinary meaning of the text as a starting point, the object and purpose of a treaty is decisive for interpreting article 20's phrase "unjustifiable encumbrance". Articles 7 and 8 of the TRIPS Agreement are critical to understanding whether a measure is justifiable because they clarify the types of reasons that may be invoked by WTO members to support encumbrances on the use of trademarks.

Moreover, the Panel made it clear that, in accordance with article 8.1, the provisions of the TRIPS Agreement are not intended to prevent the adoption by Members of laws and regulations pursuing legitimate objectives, specifically measures necessary to protect public health.

Endnotes:

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement), 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments: Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (hereinafter Marrakesh Agreement).

² Carlos Correa, "Is the right to use trademarks mandated by the TRIPS Agreement?", South Centre Research Paper 72, Geneva, 2016, p. 5.

³ World Trade Organization. Panel report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, documents WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R (28 June 2018).

⁴ *Idem*, para. 7.2403.

⁵ Thaddeus Manu, "Interpretation of TRIPS provisions in a manner consistent with human rights instruments: a policy option for the exploration of South-South judicial cooperation", *Oxford University Commonwealth Law Journal*, Oxford, (2017).

⁶ See, e.g., UNCTAD, *Reference Guide to IPRs and Pharmaceutical Production in Developing Countries*, UNCTAD/DIAE/PCB/2009/19, Geneva, (2011). Available from <https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=437>.

⁷ *Idem*, p. 29.

⁸ See, e.g., UNCTAD, *The TRIPS Agreement and Developing Countries*, UNCTAD/ITE/1, 54, Geneva, (1996). Available from https://unctad.org/en/docs/ite1_en.pdf.

⁹ See para. 4 of the Doha Declaration, available from www.wto.org/english/thewto_e/minist_e/min01_e/mindec1_trips_e.htm.

¹⁰ *Ibid.*

¹¹ Panel report, *Australia – Tobacco Plain Packaging*, para. 7.2399.

¹² See, e.g., Henning Grosse Ruse-Khan, "The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO", Max Planck Institute for Intellectual Property and Competition Law Research Paper Series No. 11-15, Cambridge University Press, (2012).

¹³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted 6 November 1998), para. 114.

¹⁴ Carlos Correa, "Is the right to use trademarks mandated by the TRIPS Agreement?", South Centre Research Paper 72, Geneva, (November 2016), p.2.

¹⁵ Emphasis added.

¹⁶ See, e.g., Canada's arguments in *Canada – Patent Protection of Pharmaceutical Products*, (WT/DS114/R, 17 March 2000). See also Carlos Correa, "Is the Right to Use Trademarks Mandated by the TRIPS Agreement?", South Centre Research Paper 72, Geneva, (November 2016), p. 3.

¹⁷ Emphasis added.

¹⁸ Henning Grosse Ruse-Khan, "The (non) use of treaty object and purpose in intellectual property disputes in the WTO", Max Planck Institute for Intellectual Property and Competition Law Research Paper Series No. 11-15. Cambridge University Press, (2012).

¹⁹ Carlos Correa, "Is the right to use trademarks mandated by the TRIPS Agreement?", South Centre Research Paper 72, Geneva, (November 2016), p. 3.

²⁰ *Idem*, p. 3. See also Canada's arguments and various submissions by third parties in *Canada – Patent Protection of Pharmaceutical Products* (WT/DS114/R, 17 March 2000). See also the Communication from the European Communities and their Member States to the Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/W/280, (12 June 2001).

²¹ For instance, see Alison Slade, "Good faith and the TRIPS Agreement: Putting flesh on the bones of the TRIPS 'objectives'", Cambridge University Press, Vol. 63, Issue 2 (April 2014), p.4; see also Henning Grosse Ruse-Khan, "The (non) use of treaty object and purpose in intellectual property disputes in the WTO", Max Planck Institute for Intellectual Property and Competition Law Research Paper Series No. 11-15. Cambridge University Press, (2012).

²² *Canada – Patent Protection of Pharmaceutical Products*, DS114 (23 October 2000).

²³ *Ibid.*

²⁴ Appellate Body Report, *Canada - Term of Patent Protection*, DS170 (18 September 2000).

²⁵ *Idem*, paras. 7.23-7.92. As pointed out by Henning Grosse Ruse-Khan, "the approach of the Panel is subject to criticism: while acknowledging Canada's arguments on the role of Article 7 and 8 to balance IP protection with other societal interest, the Panel apparently viewed the non-discrimination requirement as limiting that role of Articles 7 and 8", and "Here, the Panel again failed to consider Article 7 and 8 as interpretative tools to shape the appropriate understanding of the term "discrimination"". See Henning Grosse Ruse-Khan, "The (non) use of treaty object and purpose in intellectual property disputes in the WTO", Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 11-15, Cambridge University Press, (2012), p. 32.

²⁶ *United States – Section 211 Omnibus Appropriations Act of 1998*, DS176 (2002).

²⁷ Alison Slade, "Good faith and the TRIPS Agreement: Putting flesh on the bones of the TRIPS objectives", Cambridge University Press, Vol. 63, Issue 2 (April 2014), p. 5.

²⁸ United States – Section 211 Omnibus Appropriations Act of 1998, para. 8.57.

²⁹ Emphasis added.

³⁰ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2395.

³¹ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2396.

³² *Idem*, para. 7.2397.

³³ *Idem*, para. 7.2402. The TPP Panel quoted the Panel Report, *Canada – Pharmaceutical Patents*, para 7.26.

³⁴ *Idem*, para. 7.2403.

³⁵ *Idem*, para. 7.2403.

³⁶ Carlos Correa, “Is the right to use trademarks mandated by the TRIPS Agreement?”, South Centre Research Paper 72, Geneva, (November 2016), p. 5.

³⁷ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2404.

³⁸ *Idem*, para. 7.2404.

³⁹ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2406. The same conclusion was reached by the Appellate Body in the case *United States – Certain Country of Origin Labelling (COOL) Requirements*, DS384, in its para. 370 and in the case *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, DS381, para. 313.

⁴⁰ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2406. The TPP Panel also makes reference to the Appellate Body Report, *US – Cool*, para. 370; and Appellate Body Report *US – Tuna II (Mexico)*, para. 313 (discussing legitimate objectives in the context of Article 2.2 of the TBT Agreement).

⁴¹ Correa noted in this regard that “conditions imposed with an aim to warn the public about the effects of the use of a product (e.g. tobacco) or restricting the use of trademarks” would be “justifiable for public health reasons” under Article 20 of the TRIPS Agreement; see Carlos Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*, Oxford University Press (2007), p. 200. Hestermeyer affirmed: “The Agreement clearly does not intend to solely further the interests of the inventor, but also imposes limits on those interests for reasons of social and economic welfare”; see Holger Hestermeyer, *Human Rights and the WTO, The Case of Patents and Access to Medicines*, Oxford (2007), p. 51. In accordance with Voon and Mitchell, “it seems incontrovertible that a public health objective could justify an encumbrance under TRIPS Article 20”; see Tania Voon and Andrew D. Mitchell, “Implications of WTO law for plain packaging of tobacco products”, *Public Health and Plain Packaging of Cigarettes: Legal Issues*, Mitchell, Voon and Liberman, eds. (Edward Elgar, 2012), p. 123. Davison assured that if plain packaging legislation were necessary for public health within the meaning of Article 8 of the TRIPS Agreement, it would not contravene international obligations under either the TRIPS Agreement or the Paris Convention in relation to the protection of trademarks. If plain packaging legislation is not necessary for public health within the meaning of Article 8 of the TRIPS Agreement, it may contravene Article 20 of TRIPS but no other provision of TRIPS or the Paris Convention; see Mark Davison, “The legitimacy of plain packaging under international intellectual property law: Why there is no right to use a trademark under either the Paris Convention or the TRIPS Agreement (21 February 2012), *Public Health and Plain Packaging of Cigarettes: Legal Issues*, Mitchell, Voon and Liberman, eds. (Edward Elgar, 2012), p. 82; WHO, *Confronting the Tobacco*

Epidemic in a New Era of Trade and Investment Liberalization, Geneva, (2012), p. 38.

⁴² *European Communities: Trademarks and Geographical Indications* (para. 7.246); see also Peter K. Yu, “The objectives and principles of the TRIPS Agreement”, *Houston Law Review*, vol. 46, No. 979 (2009). Available from <https://scholarship.law.tamu.edu/facscholar/457>.

⁴³ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2407.

⁴⁴ *Idem*, para. 7.2408.

⁴⁵ UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, Cambridge University Press (2005), p. 131.

⁴⁶ Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines*, Oxford University Press (2007), p. 49; see also Tania Voon and Andrew Mitchell, “Implications of WTO law for plain packaging of tobacco products”, in *Public Health and Plain Packaging of Cigarettes: Legal Issues*, edited by Tania Voon, Andrew D. Mitchell, Jonathan Liberman, Glyn Ayres, Edward Elgar, Northampton, (2011), p. 118.

⁴⁷ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2409. The TPP Panel also quoted the following decisions: Appellate Body Report, *US – Clove Cigarettes*, para. 262 (emphasis original). See also Panel Reports, *US – Corrosion Resistant Steel Sunset Review*, para. 7.27 fn 39 (noting that “Ministers recognized the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures” in the Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures (Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement), and applying similar interpretative analysis to address analogous issues under the Anti-dumping Agreement); *US – Softwood Lumber VI*, para. 7.18 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement); *US – Countervailing Duty Investigation on DRAMS*, para. 7.351 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement); *US – Countervailing Measures on Certain EC Products* (Article 21.5 – EC), para. 7.81 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement); *US – Oil Country Tubular Goods Sunset Reviews* (Article 21.5 – Argentina), para. 7.58 fn 45 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement); and *Japan – DRAMs (Korea)*, para. 7.354 (referring to the Declaration on Dispute Settlement Pursuant to Article VI of the GATT 1994 or Part V of the SCM Agreement).

⁴⁸ This term was used by the Appellate Body in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, DS381, para. 372 (referring to Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, para. 265, in turn quoting Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, DS27 (EC – Bananas III (Article 21.5 – Ecuador II)/ EC – Bananas III (Article 21.5 – US), para. 390).

⁴⁹ Panel report, *Australia - Tobacco Plain Packaging*, para. 7.2410.

⁵⁰ *Idem*, para. 7.2411.

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