

adequate intellectual property protection or the public policy objectives of the Member States, are all to be taken into account when implementing the TRIPS Agreement and its operative provisions.

The lack of a distinct direction in which the TRIPS Agreement is intended to operate creates the potential for diverging positions as to the role of the TRIPS Agreement and its intended intention. As the Appellate Body in the WTO *US – Shrimps* dispute acknowledged, treaties often have a ‘variety of different, and possibly conflicting, objects and purposes’. Taking a one-sided or overriding approach as to which single intention is to apply fails to represent the object and purpose of a treaty. It is thus in the hands of the interpreter to find a balance that implements the object and purpose of the treaty in light of the domestic concerns and needs of the country in question. To this extent, the role of the preamble should not be discounted.¹⁴⁶

II. An analysis of Article 7 TRIPS

‘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 7 was introduced in a proposal by a number of developing countries in the Uruguay Round of Negotiations in May 1990¹⁴⁷ and was seen as a means to incorporate a ‘developmental’ aim to the body of the TRIPS agreement, thus making it indirectly a part of the operational provisions of the Agreement.¹⁴⁸ The incorporation of these objectives into the body of the treaty, and not in the preamble, is seen as a step that has amplified the relevance of the status of the provisions.¹⁴⁹ The TRIPS Agreement is however neither a health nor development aid treaty, it is a treaty set to facilitate the protection and enforcement of intellectual property rights. This is the key objective of the TRIPS agreement and is the founding component of Article 7. The scope of Article 7 is however qualified. The qualification requires that the protection and enforcement of intellectual property rights ‘should’ increase, or at least facilitate the increase, of technological innovation *and* the transfer and dissemination of technology. The choice of the word ‘should’ in the context of rules and regula-

146 UNCTAD/ICTSD, Resource Book on TRIPS and Development (CUP New York 2005) p. 13.

147 GATT Communication from Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay (19.05.1990) MTN.GNG/NG11/W/71.

148 *de Carvalho*, The TRIPS Regime of Patent Rights (Kluwer The Hague 2002) p. 110.

149 *Gervais*, The TRIPS Agreement: Drafting History and Analysis (2nd edn Sweet and Maxwell London 2005) p. 116.

tions indicates a mandatory obligation.¹⁵⁰ In other words, TRIPS must facilitate the increase and dissemination of technology in and between the Member States. Failure to achieve this result would mean that the TRIPS Agreement would have failed to meet the objectives of the Member States.

Determining compliance with this provision occurs by assessing the manner and effect of the implementation of the minimum standards required by the TRIPS Agreement, i.e. Parts II to IV. Thus compliance is measured by the domestic implementation of the provision. This in turn means that each Member State is empowered and simultaneously required to give effect to the requirement that intellectual property rights, as required under the TRIPS Agreement, shall further technological innovation and transfer. Accordingly, compliance is to be determined domestically, i.e. on implementation. Hence one can also say that Member States are not only themselves required to implement this mandatory obligation but they are also required to abide by its requirements *inter partes*. Thus it would not be in 'good faith' for one Member State to call upon another to implement rules that are contrary to Article 7.

Notwithstanding being part of the operational portion of the TRIPS Agreement, Article 7 is not an operational provision in the traditional sense. A Member State could not be found in contravention of the TRIPS Agreement purely on the grounds of Article 7. Similarly a Member State cannot expect that the implementation of the TRIPS Agreement alone will automatically lead to economic growth and social improvement.¹⁵¹ Article 7 cannot be seen in isolation to the remainder of the TRIPS Agreement. Likewise, the implementation of the other operational provisions that provide for the transfer and dissemination of technology or promote technological innovation must be done in a manner that reiterates the aim of Article 7. Article 7 can thus be surmised as a non-operative general provision that does not, in itself, permit Member States to limit intellectual property rights.¹⁵² It is rather a provision that is relevant in determining if an intellectual property restriction is TRIPS-conform where the particular TRIPS provision is unclear.

Article 7 further requires that intellectual property rights be mutually advantageous to both the producers and the users of the technological knowledge.¹⁵³ Therefore the transposition of the TRIPS Agreement into national legislation must be done in a manner that benefits both the rights holder and the consumer. This requirement is further reinforced as Article 7 requires that the ensuing rights and obligations are balanced. To what extent an action is deemed to exceed the rights holder's entitlements is a matter for national determination. Notwithstanding this, Article 7 further states that the enforcement and protection of intellectual property rights should be conducive to social and economic welfare. Article 7 does not entitle a Member State

150 Webster's Third New International Dictionary.

151 *de Carvalho*, The TRIPS Regime of Patent Rights (Kluwer The Hague 2002) p. 112.

152 *de Carvalho*, The TRIPS Regime of Patent Rights (Kluwer The Hague 2002) p. 116.

153 *UNCTAD/ICTSD*, Resource Book on TRIPS and Development (CUP New York 2005) p. 126.

to renege on its TRIPS obligations where it discovers that its implementation of the TRIPS Agreement has failed to improve that country's social and economic wellbeing. It would thus be correct to state that Article 7 suggests that the TRIPS agreement can and should benefit every society in which it applies. Its success depends on the national implementation of the obligations by the Member States, not on the TRIPS agreement.

The standard used to adjudicate the domestic compliance with Article 7 differs amongst the Member States. Some Member States, in particular the US, take the view that the more extensive the protection and enforcement the more likely one is to attract persons and businesses that innovate and disseminate knowledge. Others feel that the adoption of TRIPS in its most limited form should be sufficient to lead to innovation and dissemination of knowledge.

One major consequence does however ensue from Article 7: intellectual property rights are not a means to an end. Instead they form part of a complex sum aimed to benefit society. Theoretically this provision establishes a barrier to one-sided demands to increase intellectual property protection without due consideration for its effects on other public policies. This 'justification' for limiting the extent of intellectual property rights is however a supple provision. It fails to permit Member States to take active steps to limit intellectual property rights and any limitations must be done in accordance with the scope of the applicable substantive provisions. The practical effect of Article 7 will be limited to its use as reinforcement for an action taken and permitted in other provisions. As the TRIPS Agreement is littered with interpretational nightmares, the ability to justify ones actions under Article 7 may prove sufficient to be label the measures TRIPS-compliant.

The measures regarded as being sufficiently valuable include public interest issues such as social and economic welfare, the transfer of technology and knowledge, the promotion of innovation and the protection thereof. As the relationship is dynamic, should situations require dire measures, Article 7 would not prevent such measures being taken. Such measures will be limited by the notions of reasonableness and proportionality.

III. An analysis of Article 8.1 TRIPS

'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.'

In implementing the TRIPS agreement, either through new legislation or the amendment of existing legislation, Article 8.1 empowers Member States with the