How the adjucatory bodies WTO could read TRIPs on a balanced way

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The purpose of achieving a proper balance in the field of Intellectual Property treaties and International practice pass necessarily by the treatment the pertinent adjucatory bodies are giving to the legal texts under their consideration. For all practical purposes, the most relevant bodies in this context are those established by WTO.

The issue shall be therefore analyzed here taking in consideration the evoluting nature of the specific case law of such bodies, in particular in connection with:

a) Nature of interpretation of international texts
b) Role of recitals and *leitmotiv* provisions
c) Effectiveness of principles versus dispositive norms
d) The Doha interpretation as a subsequent act under art. 31 of the Vienna Convention

Treaty interpretation

The basic instrument to conduct interpretation of treaty norms is, at this moment, art. 31 of the Vienna Convention on the Law of Treaties:

> Article 31 (General rule of interpretation)

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a)leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

The International Court of Justice displays especial reliance upon such interpretative principles:

> In doing so, it seeks in the first place to determine the usual and natural meaning of the words in their context, without, however, sticking too closely to the particular rules applicable under the procedural law of any legal system, and in that regard frequently refers to Article 31 of the Vienna Convention on the Law of Treaties. In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court emphasized that
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> "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation". [1]

Within the WTO's framework, art. 3..2 of the DSU Agreement [2] has chosen as guideline to interpretation the "customary rules of interpretation of public international law", which has been understood to mean those rules incorporated in the mentioned Vienna Treaty.

In interpreting its own treaty, however, the WTO´s Appelate Body displays a

[1] Text found at http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookchapter7.HTM, visited July 25, 2006.

[2] Article 3 General Provisions 2.The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

rather restrictive approach:

> "The Panel did not follow all of the steps of applying the 'customary rules of interpretation of public international law' as required by Article 3.2 of the DSU. As we have emphasized numerous times, these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. 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" [3].

As applied on the TRIPs ambiance, again it can be found a fleeting notion of the brocade *in claris non fit interpretatio* [4]:

> Thus, the correct approach was to focus first on the text of the provisions to be interpreted read in its context and to discern from this the intention of the parties to an agreement. It was only if this left a doubt that it was appropriate to seek enlightenment from the object and purpose of the agreement.

This last case has vigorously opposed the use of the object and purpose of TRIPs, as *stated* in its preamble, as reading tools to the document:

> - Canada claimed to be interpreting Article 30 of the TRIPS Agreement *in context* when it invoked the first recital to the Preamble and Articles 1.1 and 7 of the TRIPS Agreement. It was clear that the whole text of an agreement, including the preamble, formed part of the context of a provision of that agreement. However, the above provisions were not in reality being invoked by Canada as *context* to discern the ordinary meaning of the terms used in Article 30, but as expressions of *object and purpose*. The arguments drawn from these provisions by Canada all related to the supposed object and purpose of the TRIPS Agreement and not to contextual guidance as to the meaning of the terms of Article 30 thereof.
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> - The first recital of the Preamble of the TRIPS Agreement started with the word "Desiring" and was thus a clear expression of object and purpose. Article 1.1 set out, as its title indicated, the "nature and scope of obligations" which the TRIPS Agreement was *intended* to create and was therefore also an expression of object and purpose. Article 7 was entitled "Objectives" and set out objectives for the protection of intellectual property rights.
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> - The first recital of the Preamble to the TRIPS Agreement[5] expressed three purposes, namely: to reduce distortions and impediments to international trade, i.e. to secure a *more uniform* protection of intellectual property rights throughout the world; to promote effective and adequate protection of intellectual property rights, i.e. to *reinforce the protection* of these rights; and to ensure that measures and procedures to enforce intellectual property rights did not themselves become barriers to legitimate trade. Canada emphasized only the last of these purposes in order to argue that the protection of intellectual property rights should be *limited*. This was of course misleading. The third element of the first recital was not referring to the rights themselves at all. It was referring to the "measures and procedures" to enforce those rights regulated in Part III of the TRIPS Agreement. On the contrary, the TRIPS Agreement clearly provided in Article 1.1 that it was in general only laying down *minimum rights*, not *limited rights*.

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[3] *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), paragraphs 114-117.

[4] Doc. WT/DS114/R 17 March 2000, Case Canada – Patent Protection Of Pharmaceutical Products, Complaint by the European Communities and their member States, Report of the panel, p. 71

[5] "*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;"

Therefore, the then prevailing approach in the WTO's context (and elsewhere) was to give primary relevance to the textual construction of the segment illuminated by the factual attention, the so-called teleological interpretation being due only when the text under direct scrutiny is not clear as to the purposes of the parties. That approach, which is primary attentive to the direct rules at stake is not especially conducive to a principle-oriented reading.

It is, furthermore, not exactly conformative to mainstream treaty interpretation, which includes in the *ordinary meaning* the *principle of integration*[6], that is, the whole treaty shall be read, and not solely the provision, however clear it may shine in isolation, including, and perhaps, especially, the *stated* objects and purposes of the document. As to the relevancy of external sources, the segment under inspection should be read the whole body of relevant international law, both at the moment of the inception of the treaty and at the moment when the interpretation is done [7].

It would not seem improper, therefore, to classify the Canada case as an strong but inadequate ground upon which the built a TRIPs reading.

Even though the WTO´s restrictive approach in Canada, a very clear interpretation by recital trend can be discerned in regard to the Preamble to the Marrakech Treaty. For instance, the Appellate Body report in *Brazil - Desiccated Coconut* invoked the Preamble in the context of the integrated WTO system that replaced the old GATT 1947:

> "The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system. This can be seen from the preamble to the *WTO Agreement* which states, in pertinent part:
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> *Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations."[8]

The same occurred in other circumstances (leaving aside the cases concerning environmental issues):

> A) the Panel in India - Quantitative Restrictions [9]:
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> "At the outset, we recall that the Preamble to the WTO Agreement recognizes both (i) the desirability of expanding international trade in goods and services and (ii) the need for positive efforts designed to ensure that developing countries secure a share in international trade commensurate with the needs of their economic development. In implementing these goals, WTO rules promote trade liberalization, but recognize the need for specific exceptions from the general rules to address special concerns, including those of developing countries."
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> b) The Panel in *Brazil – Aircraft* [10]:

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[6] Ian Brownlie, Principles of Public International Law, Clarendon Press, Oxford, Fourth Ed., p. 629
[7] Brownlie, op. cit. loc. cit.
[8] Appellate Body Report on *Brazil - Desiccated Coconut*, p. 17
[9] Panel Report on India - Quantitative Restrictions, para. 7.2
[10] Panel Report on Brazil - Aircraft (Article 21.5 - Canada), para. 6.47, fn 49

> "The preamble to the *WTO Agreement* recognises
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> '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.'
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> This overarching concern of the *WTO Agreement* finds ample reflection in the *SCM Agreement*. Article 27 of that Agreement recognizes that 'subsidies may play an important role in economic development programmes of developing country Members' and provides substantial special and differential treatment for developing countries, including in respect of export subsidies."
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> c) In Singapore, the Ministerial Conference emphasized the importance of the Preamble in the Declaration adopted on 13 December 1996 [11]:
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> "For nearly 50 years Members have sought to fulfil, first in the GATT and now in the WTO, the objectives reflected in the preamble to the WTO Agreement of conducting our trade relations with a view to raising standards of living worldwide."

This concept provides for a supra-textual reading of the treaties, which is not extraneous to WTO case law altogether [12], both taking into account the treaty as a whole, including their teleological markings (like preambles) [13] and even other treaties [14].

Under the standards of ICJ of what should be *the context* (the framework of the entire legal system prevailing at the time of the interpretation), it would seem acceptable even some particular instances of soft law as a relevant rule of international law applicable in the relations between the parties. This is not a secondary instance of interpretation (as perhaps the rulings in the Shrimp and Canada cases might be felt to indicate) but should be consulted *together with the context* where a primary reading is to be effected.

The introductory and *leitmotiv* clauses

A major problem with the balancing concept as an interpretative medium is that some norms are felt as merely *hortatory* and not prescriptive. Thus expresses Professor Chon:

> A key impediment, however, is that the language referencing development in TRIPS is not mandatory, but rather hortatory and that the language is placed within parts of the treaty that are not in the main treaty body. This issue (rather than the substantive content of development) has preoccupied the few legal scholars who have addressed these terms [15].

A third option to the divide prescriptive/hortatory is traditionally the explanatory effect. The norm´s rather semiologic reason would be to shed light into

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[11] WT/MIN(96)/DEC, para. 2.

[12] See Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, (adopted May 20, 1996), "The General Agreement should not be read in 'clinical isolation' from public international law."

[13] Panel Report, *United States—Section 110(5)of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000) "that the text of the treaty must of course be read as a whole. One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part."

[14] Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, (adopted May 20, 1996)).

[15] Margaret Chon, Intellectual Property and the Development Divide, 27 Cardozo L. Rev. 2821 (April 2006) at 121.

the power and will of another norm. However, WTO case law distinguishes at least one possibility that simply explanatory clause turns into a *leading motive* of a segment (or the whole text at stake) on account of its perceived dynamic and recorrence. In one very interesting example [16], WTO case law goes further to recognize to those dynamic particles a more fundamental character, indeed constructing *principles* from what could be taken as explnatory intercurrences:

> Article 2.4 of the *AD Agreement* starts with a "Leitmotiv" placed at its very beginning: "A fair comparison shall be made between export price and normal value". The corresponding text resulting from the Tokyo Round was constructed differently[17]: what is now a separate first sentence of Article 2.4 of the *AD Agreement* was part of the present second sentence, worded in terms of an explanatory introduction to the more substantive rules which followed. By singling it out and placing it into a separate sentence the Uruguay Round has strengthened this "Leitmotiv", elevating it to a general principle governing all of Article 2.4 and its subparagraphs.[18]

Taking a clause as to be sounded again and again in such a way as to conduct the meaning of a segment of WTO treaty is held to be a *leitmotiv;* but once the taxonomy of the rules singles out the clause as a separate and distinguished formulation, we would have a *general principle*, to *govern* the ensemble of provisions to which it refers.

Constitutional Law construction has similarly developed the notion that there are other normative effects beyond the prescriptive/explanatory/hortatory options. Some norms endowed with effects upon other norms take a dynamic beyond the frontiers of the mere explanation of the "interpreted" norm (to say what the latter *is)* and carry weight upon the actual direction of the subjected norm (where the latter *go).* As explains the most celebrated Brazilian Constitutional Law author [19]:

> The qualitative distinction between rule and principle is one of the pillars of the modern Constitutional Law, indispensable for overcoming the legal positivism where the concept of Law was restricted to rules. The Constitution turns into an open system, comprising rules and principles, permeable to legal values beyond the positivism, where the ideas of justice and of accomplishment of the basic rights play a central role. The change of paradigm in this matter must render special tribute to the systematization of Ronald Dworkin [20]. Its elaboration concerning the different roles played by rules and principles gained universal course and now is the conventional knowledge in the field.
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> Rules are normative proposals formulated under form of *all or nothing*. If the factor foreseen occurs, the rule incides, in an automatic and direct way, producing its effects. (...) The command is objective and it does not give allow for more sophisticated elaborations concerning its incidence. A rule will only cease to incide on in the case where

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[16] United States – laws, regulations and methodology for calculating dumping margins ("zeroing"), Report of the Panel doc. WT/DS294/R, page 159

[17] [Footnote from quotation] "In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to Art. VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade…."

[18] [Footnote from quotation] Appellate Body Report, *EC – Bed Linen*, para 59.

[19] Luis Roberto Barroso, Interpretação e Aplicação da Constituição, Fundamentos de uma dogmática Constitucional Transformadora, Editora Saraiva,5th, ed., 2003, p. 232.

[20] [Note from the quotation] Ronald Dworkin, Taking rights seriously, 1997.

> the hypothesis of fact that it contemplates is invalid, there is another rule more specific, or is not in force. Its application is effected predominantly by means of subsumtion.
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> Principles contain, normally, a higher valorative load, an ethical bedding, a relevant policy decision, and indicate a certain direction to follow. It occurs that it may exist, in a pluralist sequence, other principles that shelter diverse decisions, values or fundaments, even opposed among themselves. The collision of principles, therefore, is not only possible, as it is part of the logic of the system, which has a dialectic nature. Therefore its incidence cannot be treated in terms of all or nothing, of validity or invalidity. A dimension of weight or importance must be recognized to the principles. Considering the elements of the concrete case, the interpreter will have to make based choices, when coping with inevitable antagonisms, as the ones that exist between the freedom of speech and the right of privacy, the free initiative and the state intervention, the right of property and its social function. The application of the principles is effected predominantly by means of balancing.

This dwornkian perspective is not restricted to Constitutional Law, but is applicable to every circumstance where principles and rules coexist in a legal context. Principles are (as the German jurist Robert Alexy proposes [21]) an *optimization mandate* to be carried up to the most ample fashion, "admitting, however, more or less intense application in accordance with the existing legal possibilities, without this compromises its validity" [22].

Within a treaty, principles can be induced (as in the antidumping case mentioned above) or much more easily read from the preambulatory and principle-specific clauses. The first case is illustrated by the long series of principle-reading case law concerning the WTO´s 1994 treaty general recitals, as mentioned above, and especially applicable to the TRIPs agreement [23].

This is specially the case of TRIPs art. 8, labeled "Principles" to dispel any doubts as to its nature. But art. 7, joined by some crucial preambulatory text[24] also thrusts into the ensuing rules a command to *serve a purpose*. Authors like Andrès Moncayo [25] have dismissed the simply hortatory effect such principle-

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21 Teoría de los derechos fundamentales, 1997, P. 81 s.

22 Barroso, op. Cit. p. 325.

23 Daniel J. Gervais, Intellectual Property, Trade & Development: The State of Play, 74 FORDHAM L. REV. 505, 508-09 (2005), supra note 31, at 80. "The preamble to the TRIPS Agreement is an essential part of it. Under "GATT" law, preambles are on occasion relied upon to a considerable extent by panels when the wording of a provision is not clear or where it is susceptible to divergent interpretations. . . The preamble, together with footnotes, should be considered as an integral part of the agreement, a condensed expression of its underlying principles".

24 The first recital, " *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" indicates two potentially opposing interests to be balanced: IP vs. Trade. Third and fourth recitals draw an opposition between *private* interests to be given due regard ("*Recognizing* that intellectual property rights are private rights") and public interests to be similarly endorsed ("*Recognizing* the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives"). The following recital is a clear and strong expression of a *substantive equality* mandate towards the least developed countries.

25 Andrés Moncayo von Hase, La protección de las invenciones en América Latin durante los años 2001-2002. Incidencia del ADPIC en las legislaciones latinoamericanas, found at http://www.ml.ua.es/webprom/Jornadas/documentos/Moncayo-Invenciones.pdf, visited on 26/2/06. "Sus artículos 7 y 8 ponen de relieve los objetivos y principios básicos que inspiran al Acuerdo y que han de

specific clauses of TRIPs, emphasizing the active interpretation and the balancing approach resulting from the dworkian perspective.

Another important aspect of the dworkian-alexyan approach is that principles are not applied in abstract but in a specific case, in regard to which the choices are to be implemented, upon the chosen value-grounds. In a series of very distinct norms, the WTO case law assumes a much closer principle-fact approach. That happens in some antidumping cases, where the adjudication took the facts and in some instances the equities of a particular case and the consequences of choosing one outcome over another is part of the process of adjudication[26]. This setting presumes a case-by-case tactic coupled to a balancing scrutiny, which exceeds a mere positivist interpretation [27].

The fact that in the Canada pharmaceutical issue the adjudicating body decided to misread such commands as though they were irrelevant to the specific case under its review[28] would render the precedent not only an unbalanced, ultra positivist ruling but probably a rogue example of bad law. If a member-state decided to follow *à outrance* the developmental lead to ignore the private interest portion of the balance the same, however opposite, result would be also qualifiable as unacceptable reading of the law, as no party can chose what portion of the law should be followed, and what discarded.

Rules versus principle norms

Treaties – like any body of law – are free to adopt a rule-exclusive wording. The fact that the WTO treaty as a whole rejected the fragmentary and positivist approach (as indicated in the case law on the WTO´s general preamble) indicate that a rule-only reading is simply extraneous to the WTO law.

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guiar su interpretación. En ellos se pone énfasis en la necesidad de lograr un equilibrio entre la protección de los derechos de propiedad intelectual y la necesidad de difundir y transferir tecnología y la posibilidad de adopción por parte de los Estados parte de medidas destinadas a proteger el medio ambiente y la salud pública y prevenir el abuso de los derechos de propiedad intelectual por sus titulares". For a more specific analysis of such reading by the same author, as applied to the Canadá pharmaceuticals decision as see www.eclac.cl/.../capacidadescomerciales/CD%20Seminario%2011%20nov%2005/DOCUMENTOS/AMoncayo%20OMPI-CEPAL.pdf

26 James Gathii, Fairness as Fidelity to Making the WTO Fully Responsive to All its Members, document SSRN-id594485.pdf, found at www.ssrn.com.br

27 Gathii, op. Cit., over footnote 24: "WTO Appellate Body (AB) in the initial Shrimp-Turtle case (Shrimp-Turtle I) held, in interpreting the meaning of Article 3.1 of the SPS Agreement, that where there is a choice in construing a treaty provision, the principle of in dubio mitius-"the less onerous meaning to the party which assumes the obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties"is to be preferred. The AB therefore concluded: "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligation".

28 More precisely, the case decided to read just one of the interests to be balanced: the purpose of TRIPs as to IP rights was held to be "*reinforce the protection* of these rights".

Positivist versus vectorial approaches represent in themselves a tension between the ideas of Justice and legal previsibility. The principle norm approach also assumes some sort of active adjudication, which is not just applying the hypothesis to the fact in point, but also weighing the interests (when there is a balancing command) to inhale the specific issue with an adequate supply of equity. This requires an articulate and strong dispute settlement mechanism, which was one of the major improvements of WTO over the previous trade system.

Principle norms command *vectorial* reading. The ambiance drawn in the preambulatory plus art. 7 and 8 norms indicate that they are recognizably *opposing* interests to be given due respect and the possible conciliation[29]. One-sidedness in a vectorial system means wiping out of the competing interest, which is violation of the system.

Effective vectorial law also assumes that all competing interests are to be given some degree of subjective fungibility (any party may be liable to the same rigors of the law, particularly figured in the Rawlsian dilemma of the community approaching a new planet). When some portion of the parties are probably immune from that fungibility - as TRIPs assumes that the least developed countries for the time being are – a rule of *substantive equality* is a requirement of Justice or (in a rather utilitarian perspective) of long term efficiency [30].

The question whether a vectorial approach in international trade law is safe or wise is a very serious one; developing and developed country interests are not fully fungible, at least on a synchronic perspective [31], and the diachronic view is not the province of adjudicatory bodies.

Those are real problems. But fact is that – from a *positivist* standpoint – the WTO Agreements include vectorial norms, and *pacta sunt servanda*.

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29 It must be considered that vectorial analysis is not simply reading TRIPs, nor the WTO context in itself. As the much quoted case says, the General Agreement cannot be read in clinical isolation. Authors have emphasized, for instance, that the Human Rights international norms shall be taken in consideration, specially the Right to Development as substract upon which the TRIPs preambulatory and principle-specific clauses shall be integrated.

30 James Gathii, Fairness...: "Egalitarian liberals invoke a Rawlsian framework according to which benefits and burdens in the trading regime ought to be distributed in accordance initially with an equality principle that would treat all members of the WTO similarly and without distinction. However, egalitarian liberals emphasize the importance of John Rawls's difference principle, according to which, in the distribution of benefits and burdens, concern for the most vulnerable members of the trading regime should be taken into account. One thread that runs through this approach is that fairness is regarded as a condition of moral equality and, for some of its advocates, a precondition for economic justice".Gathii quotes John Rawls, A Theory of Justice, 4, 14-15 (1971).

31 As notes Professor Chon in Development Divide, at p. 169: "As Carlos Correa has stated, "When the [knowledge] products are essential for life-as with food and pharmaceuticals-allocative efficiency becomes an important objective on both economic and equity grounds."In other words, equality tilts the balance towards static efficiency and away from dynamic efficiency arguments, at least for resource-poor areas of the world. A failure to understand that will lead to policy impasses."

Doha and the *evolutive interpretation* principle

Another element that should dismiss the authority of the Canada case as the relevant law to interpret TRIPs is the *authentic* reading of the preamble of TRIPs, as well as the art. 7 and 8, by the Doha Ministerial issue, to which we will return below.

It may illustrate our point here a somewhat extended lesson from ICJ:

> 11. As a general rule of interpretation, Article 31, paragraph 3 *(b)*, of the 1969 Vienna Convention on the Law of Treaties provides that account shall be taken, together with the context, of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".
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> 12. The International Law Commission has acknowledged that "[t]he probative value of subsequent practice is well recognized", because it shows how the intention of the parties has been put into effect. Moreover, the interpretation of treaties by reference to subsequent practice is well established in the jurisprudence of international tribunals and, more especially, of the World Court (*Yearbook of the International Law Commission*, 1964, Vol. II, p. 59).
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> 13. Thus the Permanent Court of International Justice, in its Opinion on the Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, stated:
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> "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty." (*1922, P.C.I.J. Series B, No. 2,* p. 39.)
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> 14. Similarly, this Court, in the *Corfu Channel* case found that:
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> "The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation." (*I.C.J. Reports 1949*, p. 25.)
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> 15. Later pronouncements of this Court have confirmed the importance of subsequent practice for the interpretation of a Treaty, as is indicated in paragraph 50 of the Judgment.
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> 16. Subsequent practice can be relevant either as a means of establishing the parties' agreement to the Treaty's interpretation or in order to shed light on their original intentions. It is possible that the conduct of the parties may have been at variance with the provisions of the Treaty, showing disregard for the natural and ordinary meaning of its terms. In such cases, "there may be a blurring of the line between the *interpretation* and the *amendment* of a treaty by subsequent practice", even though these two processes are legally quite distinct. In the opinion of the International Law Commission this was exactly what happened in the *Temple of Preah Vihear* case, where the line of action taken by the parties was not reconcilable with the natural and ordinary meaning of the terms of the Treaty. The Commission therefore concluded that the effect of subsequent practice on that occasion was to amend the Treaty (*Yearbook of the International Law Commission*, 1964, Vol. II, p. 60).
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> 17. The practice of an individual State may have special cogency when it relates to the performance of an obligation which particularly concerns that State, as was stated by the Court in its Opinion on the *International Status of South West Africa* (*I.C.J. Reports 1950*, pp. 135-136). However, subsequent practice as a means of interpretation of bilateral treaties requires the agreement of both parties. Such agreement may be expressed through their joint or parallel positive activity, but it may also be ascertained from the activity of only one of the parties, where there is assent or lack of objection by the other party. As is remarked by the International Law Commission, it is sufficient that the other party accepts that practice (*United Nations Conference on the Law of*

Treaties - First and Second Sessions: Documents of the Conference (1968-1969), p. 42, para. 15). [32]

The issue here is to employ a constructive device under what the Brazilian International Law jurist Maristela Basso calls the Principle of Evolutive Interpretation, resulting from the combination of art. 7 and 8 plus 71.1 of TRIPs, which led to the Doha improvements and in particular the recent enactment of Par. 6 into non-soft norm [33].

The Doha Declaration states that work in the TRIPS Council on these reviews or any other implementation issue should also look at the relationship between the TRIPS Agreement and the UN Convention on Biodiversity; the protection of traditional knowledge and folklore; and other relevant new developments that member governments raise in the review of the TRIPS Agreement. It adds that the TRIPS Councils work on these topics is to be guided by the TRIPS Agreements objectives (Article 7) and principles (Article 8), and must take development fully into account.

This Declaration amounts to an *authentic* interpretation of the TRIPs agreement that in every practical way turns the formal authority of the Canada Generics case in regard to the role of preambulatory and principle-specific clauses into smithereens.

The vectorial role of TRIPs Art. 7 and 8

Crucial for the developing countries was also the perceived role of the vectorial provisions of art. 7 and 8 of TRIPs. As it would be developed below, those provisions may have also an important role in limiting the scope of post-TRIPS FTAs.

The aspects to be taken into account, to this author's perspective, are the legitimacy of negotiation, if divertive from the balanced approach that TRIPs can be a model; the eventual contestability of over the balance FTAs provisions as compared to TRIPs model; and the eventual bias that unbalanced FTAs may cause towards future multilateral negotiations. A second set of issues is the effects that unbalanced FTAs may have in the internal law of the major negotiating agents (USA and EU), especially through the MFN clauses of the WTO ambiance; and the intrinsic inequality of the agreements where the major party has in fact lesser Intellectual Property obligations than the other party.

Art. 7 and 8 are, beyond any doubt, an *interpretative* tool of the meaning of the TRIPs agreement[34], and were thus used in the WTO case law especially in connection with the exceptions provided for its Art. 30 [35].

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[32] ICJ, Botswana/Namibia - Judgment of 13 December 1999, Dissenting opinion of Judge Parra-Aranguren,

[33] See South Centre Analytical Note of March 2004, doc. SC/TADP/AN/IP/1

[34] Andrés Moncayo von Hase, La protección .....

On a distinct analysis, Professor Margaret Chon [36] also expresses the view that TRIPs Art. 7 and 8 incorporates an affirmation of the equal protection values present in most or all vectorial laws; our analysis of the non-discrimination rule of WTO body of law addresses this consideration.

Art 7 balancing device

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.

According to the UNCTAD Resource Book on TRIPs [37],

> "IPRs have been designed to benefit society by providing incentives to introduce new inventions and creations. Article 7 makes it clear that IPRS are not an end in themselves. It sets out the objectives that member countries should be able to reach through the protection and enforcement of such tights. 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.

Article 7 should therefore be read as a dynamic *interpretative* tool before everything [38], in a way conducive to the technology transfer; but it stresses especially the *balanced* nature [39] of the overall agreement [40].

It should be noticed that Art. 7 does not limits itself to technological IPRs, as the final clause (The protection and enforcement of intellectual property rights should contribute (…) to *a balance of rights and obligations*) encompasses a

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[35] See the Canadá decision as analyzed by Andrés Moncayo, in www.eclac.cl/.../capacidadescomerciales/ CD%20Seminario%2011%20nov%2005/DOCUMENTOS/AMoncayo%20OMPI-CEPAL.pdf

[36] Presentation to the to the Workshop on IP, FTAs, and Sustainable Development, American University Washington College of Law, 27 - 28 February 2006.

[37] UNCTAD-ICTSID Resource Book on TRIPs and Development, Cambridge, 2005.

[38] Id. Eadem, "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".

[39] Certain authors emphasize, however, that this balancing would prevent and exclude the vectorial rebalance at the moment of the internment of the norms of TRIPs. He has, there, however, an underlying certainty of a dualism, with prevalence of the international norm.

[40] Id. Ead. "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".

much broader extent.

The idea of balancing is obviously a vectorial device. The necessary balancing to the constitutionality of the IPRs as it is developed in the Constitutional discourse in many relevant countries appears in TRIPs, preventing the exclusive protection of the interests of the IPRs owners.

Art. 8 teleology device

Concluding the general principles (art. 8), the Agreement foresees that each country can legislate, within the scope of TRIPs, to protect the public health and nutrition and to promote the public interest in sectors of vital importance for its economic and technological development:

> 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 [41].

The conformation to the Agreement

Important consideration, however, is how the article concludes: provided that these measures are compatible with the provisions of the Agreement. Similar provision can be found at the 1947 GATT art XX (b) [42]. However, whereas GATT 1947 allows for such measures as nonviolative provided that they are *not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade*, Article 8.1, provides that necessary measures must be "consistent with" the Agreement.

The UNCTAD Resource book notes:

> 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 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 sug-

[41] Incidentally, the provision is, by allowing the national law to *promote the public interest in sectors of vital importance to their socio-economic and technological development,* almost a *littera ad litteram* reproduction of the wording of art. 5. XXIX of the Brazilian Constitution of 1988.

[42] Article XX - General Exceptions - Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

> gests 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.

Art. 8 read in conformity with WTO law

Our contention is that Art. 8 must be read as a non-discrimination rule by the application of Art. XX of GATT 1947 [43]. The issue of non-discrimination turns therefore to be relevant, if we were to interpret TRIPs art. 8 in harmony with the whole body of the WTO normative system.

The GATT, in its basic body, contains two rules relative central offices to the discrimination: of Article I, relative to the Most favored nation (MFN), and of Art. III, that it regulates the call "national treatment". John Jackson Says:

> ""The national treatment, like the MFN obligation, is a rule of 'nondiscrimination'. In the case of MFN, however, the obligation prohibits discrimination between goods from different exporting countries. The national treatment clause, on the other hand, attempts to impose the principle of nondiscrimination as between goods which are domestically produced, and goods which are imported. It is, needless to say, a central feature of international trade rules and policy." [44]

Thus, the basic principles of non-discrimination are that no member of the WTO can treat other members differently, nor to establish inequality between

[43] See our article O Princípio de Não-Discriminação em Propriedade Intelectual, found at http://denisbarbosa.addr.com/discriminatio.doc, included in our Usucapião de Patentes e outros Temas de Propriedade Intelectual, Lumen Juris, 2006.

[44] Op. cit., p. 483.

national and foreign. On other side, reasons exist that justify the discrimination.

The first hypothesis where this can occur is the foreseen one in Art. XXI, relative to the national security, which are of an unconditional effect [45]. A thing quite similar occurs with the general norms of public order of art. XX, as indicated.

Among such norms they are the measures necessary to assure the application of the laws and regulations that are not incompatible with the provisions of TRIPs, such as, for example, the defense to the public health through limitations to the patents of remedies against the AIDS, or the protection of the patents, trademarks and rights of authorship and reproduction, and the measures proper to hinder passing off [46].

The exception, in this hypothesis, is not unconditional, as in the case of the national security. It is necessary that if it demonstrates that the pertinent measures do not constitute arbitrary or unjustified discrimination, between the countries where the same conditions exist. Or either, that all the foreign countries are treated without discrimination or, having such thing, that the same one is justified. It is necessary also that the measure in question is not a disguised restriction to the international trade. Or either, that the measure, still that has for effect the restriction to the commerce, if does not come back specifically to such end.

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[45] See as to this aspect of the continuance of GATT 1947 exceptions our article A Proteção da Segurança Nacional no GATT (1993) , in our book Licitações, Subsídios e Patentes, Lumen Juris, 1997 (Direito do Desenvolvimento Industrial, vol. 2), republished in the Brazilian Defense Legal Review of Oct. 2005, found at http://denisbarbosa.addr.com/60.doc

[46] The case law prior to WTO had alredy accepted that Art. XX (b) of GATT applied to IPRs According to the GATT Law and Practice, 1994, in the 1983 Panel Report on "United States - Imports of Certain Automotive Spring Assemblies", "the Panel noted that, as far as it had been able to ascertain, this was the first time a specific case of patent infringement involving Article XX(d) had been brought before the CONTRACTING PARTIES".. "The Panel noted that the GATT recognized, by the very existence of Article XX(d), the need to provide that certain measures taken by a contracting party to secure compliance with its national laves or regulations which otherwise would not be in conformity with the GATT obligations of that contracting party would, through the application of this provision under the conditions stipulated therein, be in conformity with the GATT provided that the national laws or regulations concerned were not inconsistent with the General Agreement. In this connection the Panel noted in particular that the protection of patents was one of the few areas of national laws and regulations expressly mentioned in Article XX(d). "' In the Panel Report on "United States - Section 337 of the Tariff Act of 1930", "The Panel noted that in the dispute before it the `laws or regulations' with which Section 337 secures compliance are the substantive patent laves of the United States and that the conformity of these laves with the General Agreement is not being challenged"." In relation to the criterion of "necessary" in terms of Article XX(d), "The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent lave or its desired level of enforcement of that lave, provided that such lave and such level of enforcement are the same for imported and domestically-produced. products. However, it does mean that if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with ~ GATT provisions, it would be required to do so".

The case law after WTO has affirmed the continuance of Art. XX and XXI exceptions:

> (…) a member State may treat imported products less favorably, and even ban such products, if it is pursuing one of the legitimate goals set forth in the Article XX exceptions, and such unfavorable treatment does not amount to an "unjustifiable" or "arbitrary" discrimination, or a "disguised restriction on trade. [47]:

However, under current WTO case law, also the measures implementing national interest should be subject to a standard of minimum impact on the overall purposes of WTO law:

> The WTO could, for example, conclude that the defendant State should raise additional taxes to provide its population with treatment without suspending patent rights. While this argument would be hard to make with respect to a State with very limited resources, it would have some strength with respect to a country such as Brazil, which was a defendant in the proceedings filed in the WTO by the United States relating to the suspension of patent rights for AIDS drugs. The defendant State may also seek cooperation with the foreign drug companies to lower the price of drugs [48].

TRIPs Art. 8 read as a non discrimination rule

There is no doubt that there is a normative context common with the basic body of the GATT-1947 and the new TRIPs Agreement. The basic 1994 text so states:

> 1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
>
> (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

The TRIPs text also is identified clearly as part of the normative system of the OMC.

> *Recognizing*, to this end, the need for new rules and disciplines concerning:
>
> (a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;

Moreover, the Agreement enters in vigor after that to the validity of the Treated one instituting the OMC (TRIPS 65, 1) and is used as essential element of the system of solutions of controversies of Articles XXII and XXIII of the General Agreement (TRIPS 64).

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[47] Ari Afilalo, Sheila Foster The World Trade Organization's Anti-Discrimination Jurisprudence: Free Trade, National Sovereignty, And Environmental Health In The Balance, 15 Geo. Int'l Envtl. L. Rev. 633, Summer, 2003. O autor agradece a Prof. Sheila Foster, da Fordham University Law School, pelo seu auxílio neste contexto.

[48] Op. Cit.

WTO Case law and the non discrimination role of TRIPs art. 7 and 8

The Resource Book notes, referring to the *Canada – Generics* case [49] :

> When it analyzed the relationship between Article 27.1 and Article 30 of he TRIPS Agreement, the panel employed Articles 7 and 8.1 in its analysis:
>
> "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. t. It is not clear how far this idea of giving precedence to specific obligations over more general policies should be extended'

Therefore, however misguided in this context [50], the role of non-discrimination principle of WTO law seems inevitable consideration wherever dealing with TRIPs art. 7 and 8.

The purposes leading to TRIPs art. 7 and 8

Achieving a standard of balancing of interests was clearly a stated target of the developing countries engaged in the negotiation of TRIPs [51].

> Written submissions of a more general nature presenting views on questions of standards and principles concerning the scope, availability and use of trade-related intellectual property rights have also been circulated by Thailand, Mexico and Brazil. The Thai statement (MTN.GNG/NG11/W/27) inter alia emphasises that the two fundamental goals pursued by governments when granting intellectual property protection are the stimulation or encouragement of intellectual property creation and the accord of proper and legitimate protection of the public interest; **the former must not put an undue burden on or adversely affect the latter.** The statement by Mexico (MTN.GNG/NG11/W/28) inter alia says that the negotiating objective regarding the improvement of intellectual property rights should not become a barrier to access by developing countries to technologies produced in developed countries. Any results obtained in the Group would therefore necessarily have to include more flexible elements for the use of such technology by developing countries, since countries with different levels of development cannot respond in the same way to each of the trade and intellectual property aspects. Mexico also advocates examination of Articles IX, XX and XXIII of the General Agreement and says that the provisions of the General Agreement should not be used to modify legal regimes governing intellectual property rights, but

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[49] Canada - Patent Protection of Pharmaceutical Products, Report of the Panel. **WT/DSI14/k.** March 17, **2000**

[50] This author has extensively analyzed the problem of the so-called non dicrimination status of TRIPs art. 27.3 in O Princípio de Não-Discriminação em Propriedade Intelectual, op. cit. Here, again, non-discrimination should be read under the lights of general WTO law, and not only within the sole context of TRIPs.

[51] TRIPs negotiating document MTN.GNG/NG11/W/32/Rev.1, 29 September 1989

should aim, in the best of cases, at recommendations to reduce distortions in international trade and barriers to that trade which may derive from the application and protection of intellectual property rights.

Particularly relevant in this context was the Brazilian position:

The Brazilian paper (MTN.GNG/NG11/W/30) says that the originality of the Group's work lies in the need to keep in view both the trade-related and developmental aspects of intellectual property rights, distinguishing it from more legal discussion being held in other fora. It advocates priority attention in the Group to:

i) The extent to which rigid and excessive protection of intellectual property rights impedes access to the latest technological developments, restricting therefore the participation of developing countries in international trade. In this context, it emphasises the importance of specific exclusions from the protection of intellectual property rights.

ii) The extent to which abusive use of intellectual property rights gives rise to restrictions and distortions in international trade. Practices which have this effect should be subject to adequate multilateral discipline. (….)

iii) The risks that a rigid system of protection of intellectual property rights implies for international trade. Attentive consideration should be given to cases where the protection and enforcement of intellectual property rights become a barrier or harassment to legitimate trade, including where it is used as an excuse to implement protectionist and discriminatory measures.

The treatment of art. 7 and 8 by Case law

The notion of the balancing role of art. 7 and 8 has not, apparently, received to the moment full support in the WTO case law

In the first few years after the adoption of TRIPs, the WTOs Dispute Settlement Body (DSB) considered two complaints regarding domestic standards of patent protection that were alleged to violate international trade law obligations. Their resolution has proved illuminating. Both decisions proceed from the assumption that TRIPs is primarily concerned with protecting intellectual property even though the Agreement plainly recognises the objective of protecting and enforcing exclusive rights in IP for the purpose of contributing 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.

In *India Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the DSBs Appellate Body had to consider whether India had complied with its obligations under TRIPs in respect of a means for the filing of patent applications for pharmaceutical and agricultural chemical products. It was common cause that India's obligations to

provide minimum standards of patent protection would become effective only ten years after the adoption of TRIPs (i.e., in 2005).

India unsuccessfully defended the original complaint lodged by the US (and largely supported by the European Union) before a DSB panel. It was largely unsuccessful in its attempt to overturn the panel decision on appeal. The Appellate Body decision tempered some of the more disagreeable aspects of the panel's findings. But its reasoning views the main object and purpose of TRIPs as the need to promote effective and adequate protection of intellectual property rights. In its view, TRIPs is simply about the protection of IP.

The principle of balance suffered a similar fate in *Canada Patent Protection of Pharmaceutical Products*. In that case, a DSB panel had to deal with three issues. First, does TRIPs permit the production and stockpiling of pharmaceutical products prior to patent expiry? Second, does the agreement allow for generic manufacturers to start and complete the drug regulatory process prior to patent expiry? Third, can pharmaceutical products be treated differently from inventions in other fields of technology?

Importantly, not one of the provisions of Canadian patent law under attack would have allowed for the introduction of generic competition during the life of a pharmaceutical patent. Collectively, they merely sought to eliminate delays in bringing generic medicines to market upon patent expiry. In other words, the provisions would have allowed for generic competition immediately upon patent expiry, because drugs would have already been registered and produced in advance.

In its decision, the WTO panel declared the stockpiling provision to be in violation of TRIPs. It upheld the early registration of pharmaceutical products. And it sidestepped

the differential treatment question. On the surface, the outcome appeared almost acceptable. The direct consequences for Canada were fairly minimal. This was because the loss of the right to stockpile meant little more than that generic drugs produced in Canada reached the market about three weeks later.

Yet the position was critically different for countries with weaker generic manufacturing capacity. And it would be shortsighted to view the decision solely from the point of view of its impact on Canada. The panel's interpretation of the general exceptions clause (whose existence signifies the need for a mechanism to resolve legitimate, competing policy interests) provides cause for general concern. Seemingly heedless of the principle of balance that lies at the core of patent protection, the panel considered the TRIPs provision Canada invoked to justify its statute solely in the light of how much the rights holder might lose, not in how much society might gain, from a given exception. It never asked what scope the exception might require to achieve the social purposes at issue [52].

[52] Edwin Cameron (Supreme Court of Appeal, Bloemfontein, South Africa), Patents And Public Health: Principle, Politics And Paradox, Inaugural British Academy Law Lecture held at the University of Edinburgh, Tuesday 19 October 2004

However, it must be noticed the very important note of the Appellate Body in the Canada case:

> 101. Also, we note that our 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 [53].

The normative environment set by art. 7 and 8

But a somewhat more vigorous hand is felt in the normative exercises, both as an inspiration and grounds for the Group of 77's proposals and actual Doha implementation.

In the Brazilian/Argentinean proposal for a Development Agenda the balancing approach is also central [54]

> "Intellectual property enforcement should also be approached in the context of broader societal interests and development related concerns, in accordance with Article 7 of TRIPS"

And:

> A consideration of the development dimension of intellectual property must be quickly brought to bear on discussions in the SCP. If discussions on the SPLT are to proceed, these should be based on the draft treaty as a whole, including all of the amendments that have been tabled by developing countries. Moreover, Members should strive for an outcome that unequivocally acknowledges and seeks to preserve public interest flexibilities and the policy space of Member States. Provisions on objectives and principles, reflecting the content of Articles 7 and 8 of the TRIPS Agreement, should be included in the SPLT and other treaties under discussion in WIPO [55].

The same inspiration permeates the position of non-governmental actors of the FTAs negotiating environment:

> FTAA should create mechanisms devoted to the promotion of effective technological transfer for the developing countries (TRIPs Article 7) through the elimination of existing constrains, as well as to drive public and private actions for improvement of R&D capacities in such countries, with 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 [56].
>
> Hemispherical financial institutions, as Inter-American Development Bank, should create special financing lines to promote technical invention and technological transfer among countries into FTAA. Such financial lines should materialize in FTAA the compromise assumed by developed countries through TRIPs Article 7. The local counterpart could be considered public or private source available in member countries of FTAA.

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[53] Doc. WT/DS170/AB/R 18 September 2000

[54] Doc. WO/GA/31/11 of Aug. 27, 2004

[55] This sensibility is very active in Brazil, as can be perceived in the statement by Pedro de Paranaguá Moniz, on behalf of the Centre for Technology and Society - CTS,of Fundação Getúlio Vargas (FGV) School of Law, Rio de Janeiro, Brazil, yo the WIPO Provisional Committee on a Development Agenda - PCDA, 1st Session 20-24 February 2006 "In order to implement the development dimension within WIPO, as agreed by consensus, and in order to prevent the undesired costs above-mentioned, we recommend that the language of articles 7 and 8 of the TRIPs Agreement be present in every current and future WIPO Treaty".

[56] The Brazilian Fine Chemicals And Biotechnology Business Association (ABIFINA) proposal for FTAA:

A rule of reason approach to competitive rules

Other relevant effect of art. 7 and 8 of TRIPs occurs in their joint interpretation with art. 40 of TRIPs, as notes J.H. Reichmann [57]:

> (…) article 40 of the TRIPs Agreement reiterates the legitimacy of controlling anticompetitive practices in contractual licenses affecting intellectual property rights generally.[58] However, article 40 (1) acknowledges the lack of consensus in the area [59] by conceding that states agree only "that some licensing practices or pertaining to intellectual property rights... restrain competition" and "may have adverse effects on trade and may impede the transfer and dissemination of technology. " [60] (…) Evidently, this provision attempts to address the kinds of abuse sounding in antitrust principles that developed counties normally recognize, [61] *without necessarily impeding the developing counties from proceeding on other grounds* either under the formulation of article 8 or under broader principles inherent in the objectives set out in article 7 and in the public interest exception set out in article 8(1). [62] "

As Professor Reichman notes, as a more general measure, TRIPs also provides for the adequate balance between competition and Intellectual Property interests [63]. This TRIPs experience is, so this author believes, a very important precedent for the negotiation of competition themes within WTO[64]. For, as it is remarked in the legal literature, Intellectual property rights are essential, but not sufficient, conditions for competition. Both the excessiveness of scope and misuse need to be balanced by way of the regulation of competition. Even considering that some balance is inherent to TRIPS art. 8, it could be certainly helped by the establishment of some further discipline on private party conduct and competition in the WTO[65].

Carlos Correa [66] also stresses that effect of the balancing provisions to art. 40.2 of TRIPs:

> La Sección 8 del Acuerdo TRIPs contiene una serie de normas destinadas a controlar las "prácticas anticompetitivas" en licencias voluntarias. Estas normas pueden considerarse

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[57] The International Lawyer, Summer 1995, Volume 29, Number 2

[58] [Original footnote] See TRIPS Agreement, supra note 4, art. 40 and title do Part II, Section 8 ("Control of Anti-Competitive Practices in Contractual License")

[59] [Original footnote] See supra notes 63-73 and accompanying text; Matsushita, supra note 197, at 92-93; Spencer Weber Waller & Noel J. Byrne, Changing View of Intellectual property and Competition Law in the European Community and the United States of America, 20 Brook J. Int'l L. 1 (1993); see also Reichman, Competition Law, Intellectual Property Rights and Trade, supra note 3, at 87-94 ("Pressures on the Doctrine of Misuse").

[60] [Original footnote] See TRIPS Agreement, supra note 4, art. 40 (I).

[61] [Original footnote] See supra notes 64, 72-73 and accompanying text.

[62] [Original footnote] See TRIPS Agreement, supra note 4 arts. 7, 8(1); supra text accompanying notes 65-71 77-80;

[63] See our article The World Competition Agency as a necessary International Institution (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=436685)

[64] Not all writers would agree. Swaine remarks (op. cit) "First, however unsophisticated many countries were with respect to intellectual property, and however ideologically divisive those issues may potentially be, TRIPS profited considerably from the drafters' ability to incorporate norms and members from the World Intellectual Property Organization (WIPO). See Leebron, supra note 118, at 19-20. Antitrust has no such precedent. Second, an indispensable issue for cross-issue trades – the trust of the parties – may have been partly exhausted in the aftermath of TRIPS, as developing countries came to recognize the potential costs of recognizing intellectual property rights and to doubt the market access commitments by the developed countries. This is reflected in the emphasis on implementation issues at Doha.

[65] Cottier and Maitinger, The TRIPs Agreement without a Competition Agreement?, found at www.feem.it/NR/rdonlyres/364E97CC-2C8D-42E2-BE36-D87542C3A67C/ 299/6599.pdf , visited 17/8/2003

[66] [Nota do Original] Acuerdo TRIPs, op. Cit.

> como una aplicación concreta del principio general establecido en el artículo 8.2 del mismo Acuerdo, según el cual "podrá ser necesario aplicar medidas apropiadas, siempre que sean compatibles con lo dispuesto en el presente Acuerdo, para prevenir el abuso de los derechos de propiedad intelectual por sus titulares o el recurso a prácticas que limiten de manera injustificable el comercio o redunden en detrimento de la transferencia internacional de tecnología"[67].

The vectorial promise

Balancing of contrasting interests is a crucial issue in IP law:

> The efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions. (...) From their inception, **the federal patent laws have embodied a careful balance** between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy. Bonito Boats, Inc. V. Thunder Craft Boats, Inc., 489 U.S. 141 (1989).

This balancing was held in Bonito Boats as a constritictive limitation to the state power to go beyond the Federal standard. Balancing, whenever achieved, is a positive legal border no to be violated by well meant however misguided exercises in strengthening IP protection.

This author thinks that TRIPs, even though being a minimum standards treaty, also imposes a balancing of interest standard, indicating which interests are relevant. A FTA provision that unreasonably exceeds the levels provided by TRIPs would thrive in one-sidedness. It might be held therefore, following the reasoning of Bonito Boats, as violative of TRIPs.

It neither is nor advanced the idea that TRIPs would prevent protection beyond its minimum level:

> The basic observation is very straightforward: TRIPS does not prohibit WTO Members to conclude among themselves treaties containing obligations that go beyond the standards of TRIPS. Although there is no clear provision specifically dealing with the relationship with other agreements, several TRIPS provisions indicate TRIPS conformity of TRIPS-plus standards in agreements among individual WTO members [68]

But this may happen in some instances. TRIPs also includes *maximum* protection levels and exceeding them may result in violation of such agreement [69]. Our understanding, however, is that even in areas not covered by those ceiling standards, unbalancing of interests in a unreasonable manner is violative of

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[67] [Nota do Original] Outra aplicación importante de este principio es el artículo 31k), antes citado, referente a las licencias obligatorias para corregir prácticas anticompetitivas.

[68] Josef Drexl, op. cit.

[69] Id., ead. "Nevertheless, existing TRIPS standards may conflict with TRIPS-plus standards in bilateral agreements in cases in which the former do not only define minimum, but also maximum standards. Although it seems, according to Art. 1.1 TRIPS, that such maximum standards are inherently foreign to the concept of the TRIPS, the Agreement nevertheless prohibits "more intensive protection" in its provisions on enforcement of Part III to the extent that it fixes general procedural provisions to the benefit of any party to an IP litigation. In some instances, the Agreement even explicitly provides for procedural rights of the defendant, like with regard to the level of legal certainty as a requirement for provisional measures (Art. 50.3 TRIPS) and the rights of the alleged infringer to be informed and to be heard within a reasonable time after provisional measures have been adopted inaudita altera parte (Art. 50.4 TRIPS). Most strikingly Art. 48 TRIPS provides for a right to indemnification of the defendant in case of an abuse of enforcement procedures."

TRIPs [70].

[70] A relevant aspect of raising such issue in a context of FTAs is the standing to argue such violation; unbalance is a subjective or objective standard? The TRIPs minimum standards were construed as generally applicable, as under the "universal minimum standards" entry level of the old era of International Law. Many States, after having negotiated FTAs, would probably maintain at a public level that the negotiations were fair and balanced considering their specific *subjective* context, even if under a *objective* consideration of art. 7 and 8 they would be possibly lacking.