The Principle of Integration in WTO/TRIPS Jurisprudence
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IDLO, Rome – 15-17 June 2011
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The Principle of Integration as Core of the Sustainable Development Concept

• “States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population” (HE Conference, Stockholm Declaration, 1972)

• “Peace, development and environmental protection are interdependent and indivisible” (Earth Summit, Rio Declaration, 1992)

• “We, the representatives of the peoples of the world, (...) assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection — at the local, national, regional and global levels” (WSSD, Johannesburg Declaration, 2002)
The Principle of Integration as Core of the Sustainable Development Concept

“The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives” (ILA Declaration, 2002):

• Integration principle as “essential to the achievement of sustainable development”

• “All levels of governance (...) and all sectors of society should implement the integration principle” (para.7.2)

→ The other six ILA principles address specific economic, environmental and social aspects and balance those…

→ Hence they are expressions of the overarching integration principle
IP Linkages with Social, Environmental and Economic Concerns

The (international) protection of IP coincides with societal concerns like:

- **public health** (patent protection for pharmaceutical products and access to medicines);
- **climate change** (IP as incentive for R&D in new, innovative ‘green’ technologies or as barrier for transfer and dissemination of green technology?);
- **free trade** (IP protection as securing trade in protected goods or as barrier to international trade & transit?);
- **access to knowledge** (copyright protection affecting access to educational materials and plain facts/information?)
- **food security** (plant variety rights vs. farmer’s informal seed exchange systems)

→ A significant potential for operating the integration principle!
WTO/TRIPS Provisions on Integration

Marrakesh Agreement Establishing the World Trade Organization

The Parties to this Agreement,
Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development
(Preamble, para.1)
WTO/TRIPS Provisions on Integration

The Role of the Sustainable Development Objective for Treaty Interpretation

“We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994.”

WTO/TRIPS Provisions on Integration

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

Article 7 - Objectives
The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 - Principles
1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
WTO/TRIPS Provisions on Integration

Doha Declaration on the TRIPS Agreement and Public Health

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

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

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.
IP Related Jurisprudence in the WTO

Main Legal Argument:
→ In case of TRIPS, integration of other societal concerns functions primarily via treaty interpretation, based on Art.31 VCLT, and with an important role for TRIPS’ object and purpose, as embodied in Art.7, 8 TRIPS!
→ Against this background, Panels have a legal obligation to interpret TRIPS in light of Art.7, 8 TRIPS.

Hypothesis:
→ Panels give insufficient, if any, role to the integration provisions of Art.7, 8 TRIPS in interpreting TRIPS.
IP Related Jurisprudence in the WTO

TRIPS Cases in WTO Dispute Settlement:
• As of 1 June 2011, 424 complaints have been filed under the DSU
• Of those, 29 cases concern (inter alia) the TRIPS Agreement
• Of which 12 led to DSB decisions: 9 Panel-, 3 Appellate Body Reports

Methodology for Analysing the Use of Integration Principle:
→ All 12 IP related decisions (including main arguments of the parties) are scanned (full-text search) for passages addressing the following issues:
  • Art.7 and/or 8 TRIPS (objectives and principles)
  • WTO preamble (especially sustainable development objective)
→ To contrast this result with reliance on other factors affecting treaty interpretation, further searches look for:
  • Role of ‘object and purpose’ for treaty interpretation in general
  • Other elements of treaty interpretation (ordinary meaning, context)
IP Related Jurisprudence in the WTO

Main (Preliminary) Findings:

→ Use of Art.7, 8 TRIPS as treaty objective in comparison to other objectives relied upon in the interpretation exercise:

1. Application of Art.7, 8 TRIPS: → 3 instances
   a. Canada – Patents, para.7.92 (but overridden by Art.27 TRIPS);
   b. US – Havanna Club, para.8.57 (understood as good faith principle);
   c. EC – GIs, para.7.245-46 (reflecting principle of negative rights)

2. Mere acknowledgement of Art.7, 8 TRIPS as object & purpose (but without use/application): → 3 instances (Canada – Patents; US – Havanna Club; Canada – Patent Term)

3. Application / use of other objectives:
   a. of TRIPS (effective IP protection; non-discrimination, minimum standards): → 7 instances
   b. of individual provisions of TRIPS: → 3 instances

4. Mere acknowledgements of treaty object & purpose: 6 instances
IP Related Jurisprudence in the WTO

Main (Preliminary) **Findings:**

⇒ **Example** for applying Art.7, 8 TRIPS – the *Canada – Patents* case

- At issue is the consistency of a ‘bolar’ exception in Canada’s patent law which allows generic producers to use a patented drug in order to apply for regulatory approval
- The EC argued that **Art.30 TRIPS** is infringed – it provides:
  
  “*Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.*”

⇒ While acknowledging the general role of Art.7, 8:1 for the interpretation of Art.30, the Panel **did not actually apply Art.7, 8:1 to define the ambiguous terms of Art.30**

⇒ As to the interpretation of another obligation (**Art.27:1**), the Panel views the latter **overriding the goals of Art.7 TRIPS**...
(Preliminary) Conclusions

• Strong legal arguments support an important role of Art.7, 8:1 TRIPS in the interpretation of TRIPS provisions – especially those which are ambiguous and open-textured.

• In the Doha Declaration, all WTO Members emphasized this role as a crucial element for balancing IP and access to medicines – i.e. integrating economic and social concerns.

• WTO IP jurisprudence so far have given an insufficient role to the integration provisions of Art.7, 8 TRIPS in interpreting TRIPS.

• To improve this, WTO Members should consistently raise Art.7, 8 arguments in their claims & rebuttals.
Thank you for your attention!

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