The International Law Relation Between TRIPS and Subsequent TRIPS-plus Free Trade Agreements Towards Safeguarding TRIPS Flexibilities?

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28 January 2011
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Outline

- **Introduction**: Calls and Commitments to Safeguard TRIPS Flexibilities

- The **wider Int. Law Context** for Analysing the TRIPS – FTA Relationship

- Do **TRIPS Flexibilities Prevail over TRIPS-plus FTA Obligations**?
  - The **General Int. Law** Perspective
  - The Approach of **TRIPS**
  - The View from **FTAs**

- **Conclusions**
Calls and Commitments to Safeguard TRIPS Flexibilities

- States must “take into account in bilateral trade agreements the flexibilities contained in the Agreement on Trade-related Aspects of Intellectual Property Rights and recognized by the Declaration on the TRIPS Agreement and Public Health” (WHO, 57th GA)

- “European IPR policy towards developing countries should not go beyond TRIPs Agreement obligations, but that it should instead encourage the use of TRIPs flexibilities.” (EU Parliament, Res. of 22 May 2007)

- “The United States will work to ensure that the provisions of our bilateral and regional trade agreements (...) do not impede the taking of measures necessary to protect public health.” (USTR, Special 301 Report 2010)
The Analytical Context

- As int. treaties, TRIPS and TRIPS-plus FTAs are ‘born into’ & interact with existing int. law (IL) which governs their relationship

- In IL, no a priori hierarchy of norms exists

- Priority in application however can derive from ‘conflict norms’ in the earlier treaty, later treaty or in general IL (e.g. Art.30, 41 VCLT)

- General presumption of continuity and against conflict: Later (treaty) rule presumed to abide by earlier one – unless sufficient evidence for state intention otherwise: “(…) when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations” (ILC, 2006)
The Analytical Context

Structure and ‘Toolbox’ for Analysing Norm Relations & Norm Conflicts

- Relationships of Interpretation
  - IL as a legal system – principle of harmonisation
  - Systemic integration – Art.31 (3) c) VCLT

- Relationships of Conflict
  - Any explicit conflict norms in either of the two bodies of law / treaties involved?
  - If not (or if not conclusive), resort to general principles of conflict resolution
    - Lex specialis, ‘self-contained regimes’
    - Lex posterior (Art.30, 41 VCLT)
    - Lex superior (ius cogens, Art.103 UN Charter)
TRIPS Flexibilities vs. TRIPS-plus FTA obligations

TRIPS ‘Conflict Norm’ regarding TRIPS-plus

Under **principle of minimum standards**, subsequent *(inter-se)* treaties may in general add new layers of protection

**Art.1:1 TRIPS**: “Members *may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.*”

Can curtailing TRIPS flexibilities amount to *contra-vening*’ the respective TRIPS norms?

→ A decision of a WTO Member not to implement an **optional** TRIPS flexibility is also a way of exercising the “right to use” *(Doha Decl.)* this flexibility…

→ hence arguably no contravention of TRIPS flexibilities…
TRIPS Flexibilities vs. TRIPS-plus FTA obligations

‘Conflict Clauses’ in TRIPS-plus FTAs

- In the relation between the FTA parties, FTA conflict clauses are *lex specialis* to the general rule in Art.1:1 TRIPS

→ Do they operate to safeguard TRIPS flexibilities?

- Types of conflict clauses in FTAs:
  - Affirming WTO/TRIPS (Rights and) Obligations
  - References to the Doha Declaration
  - References to (Specific) TRIPS Flexibilities
TRIPS Flexibilities vs. TRIPS-plus FTA obligations

Affirming WTO/TRIPS (Rights and) Obligations

- “Nothing in this Agreement shall derogate from any international obligation of a Party with respect to any other Party under existing agreements to which both Parties are party, including the TRIPS Agreement.” (Art.1:1 ACTA)

- “The parties affirm their rights and obligations with respect to each other under the TRIPS Agreement” (Art.15.1:7 US–CAFTA DR)

- “In the event of any inconsistency between this Agreement and the WTO Agreement, the WTO Agreement shall prevail to the extent of the inconsistency” (Art. 12 Japan-Indonesia FTA)
TRIPS Flexibilities vs. TRIPS-plus FTA obligations

References to the Doha Declaration

- “Recognizing the principles set out in the Doha Declaration on the TRIPS Agreement and Public Health” (ACTA Preamble)

- “[I]n interpreting and implementing the rights and obligations under this Title, the Parties shall ensure consistency with [the Doha] Declaration.” (Art.190:2 EU – Colombia, Peru FTA)

- “The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health (...) Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party’s right to protect public health and, in particular, to promote access to medicines for all” (Art.16.13:2 US – Peru TPA)
TRIPS Flexibilities vs. TRIPS-plus FTA obligations

References to (Specific) TRIPS Flexibilities

- “With due regard to the provisions of this Title, each Party may, in formulating or amending its laws and regulations, make use of the exceptions and flexibilities permitted by the multilateral intellectual property agreements” (Art.190:1 EU – Peru & Colombia FTA)

- “Each Party in its laws and regulations shall provide for protection of undisclosed information in accordance with and subject to the flexibilities in the TRIPS agreement.” (Art.15 Draft EU – India FTA)

- “The objectives and principles set forth in Part I of the TRIPS Agreement, in particular in Articles 7 and 8, shall apply, mutatis mutandis, to this Agreement.” (Art.2:3 ACTA)

- “Nothing in this Chapter shall be construed to prevent a Party from excluding inventions from patentability as set out in Articles 27.2 and 27.3 TRIPS” … (Art.16.9:2 US Peru TPA)
Conclusions

Can TRIPS Flexibilities Prevail over TRIPS-plus?

- As the default rule, the **minimum standard principle** allows TRIPS-plus FTAs to erode TRIPS policy space.

- Certain clauses in FTAs however can **safeguard TRIPS flexibilities** – particularly promising are:
  
  - Doha-references demanding an interpretation and implementation of FTA provisions that does not undermine the flexibilities listed in the Doha Declaration;

  - clauses where certain TRIPS-plus obligations are made ‘subject to’ / ‘shall not be construed to prevent’ the right to use TRIPS flexibilities.

- Wherever TRIPS-plus rules are **ambiguous**, the must be understood in light of TRIPS flexibilities.

→ The answer depends on **ability and willingness of FTA partners for creative FTA implementation!**
Thank you for your attention!

Any comments and questions to

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