
PART 1: NATURE OF OBLIGATIONS, PRINCIPLES AND OBJECTIVES

1: Preamble

Members,

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;

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;
- (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
- (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
- (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and
- (e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;

Hereby agree as follows:

1. Introduction: terminology, definition and scope

The preamble of the TRIPS Agreement reflects the contentious nature of the negotiations and the differences in perspective among the negotiating WTO Members.

Government officials and judges may use the preamble of a treaty as a source of interpretative guidance in the process of implementation and dispute settlement. The statements contained in preambles are not intended to be *operative* provisions in the sense of creating specific rights or obligations. A preamble is designed to establish a definitive record of the intention or purpose of the parties in entering into the agreement.

Article 31 of the Vienna Convention on the Law of Treaties (VCLT)¹ provides that the preamble forms part of the treaty text and, as such, part of the terms and "context" of the treaty for purposes of interpretation.² In this sense, the preamble should be distinguished from the negotiating history of the treaty that is a "supplementary means of interpretation" that should be used when the express terms are ambiguous, or to confirm an interpretation (Article 32, VCLT).³

2. History of the provision

2.1 Situation pre-TRIPS

TRIPS is a "new instrument" on IPRs in international trade. It is the result of "new area" negotiations in the Uruguay Round.⁴ Its preamble reflects a particular

¹ The Convention was adopted on 22 May 1969 and entered into force on 27 January 1980. Text: United Nations, *Treaty Series*, vol. 1155, p.331.

² Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides in relevant part:
 "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:" [underlining added]

³ Article 32 of the VCLT provides:
 "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 terms "treaty" and "international agreement" are largely synonymous, and are used interchangeably in this chapter. In some national legal systems (such as that of the United States), the terms are sometimes used to distinguish the type of domestic ratification procedure that must be followed for approval.

⁴ The other principle "new area" of negotiations concerned trade in services, resulting in the General Agreement on Trade in Services, or GATS. While trade-related investment measures (or TRIMS) also covered a "new area", the resulting agreement in that area largely restated existing GATT 1947 rules.

2. History of the provision

3

balance of rights and obligations unique to the Agreement. In this sense, there is no “pre-TRIPS situation” for the preamble since the Agreement was designed to fill a perceived gap in the GATT 1947 legal system. The preamble reflects the views of the parties regarding the outcome of the negotiations and the object and purposes of the new instrument. Yet, the object and purposes of a new legal instrument do not arise in a historical vacuum. It is therefore useful to refer briefly to the factors that brought the new instrument about.

Prior to negotiation of TRIPS, IPRs were principally regulated at the international level by a number of treaties administered by the World Intellectual Property Organization (WIPO). These treaties included the Paris Convention on Industrial Property and the Berne Convention on Literary and Artistic Works. Starting in the late 1970s, developed countries expressed increasing concern that the treaty system administered by WIPO failed to adequately protect the interests of their technology-based and expressive industries. The major concerns were that WIPO treaties did not in some cases establish adequate substantive standards of IPR protection and that the WIPO system did not provide adequate mechanisms for enforcing obligations.

In the 1970s, the developing countries sought to establish new rules on a New International Economic Order (NIEO) that would include among its objectives mechanisms to facilitate the transfer of technology from developed to developing countries. Part of this initiative entailed securing greater access to technology protected by IPRs in the developed countries by limiting the scope of protection in developing countries and by closely regulating the exercise of rights.⁵ The objectives of the NIEO were perceived by the developed countries as conflicting with their own interests in strengthening protection of IPRs, first in WIPO and later in the GATT. Through the early 1980s developing countries were not persuaded that altering the WIPO system to strengthen IPR protection was necessary or appropriate.

In the lead-up to negotiations on a mandate for the Uruguay Round, developed country industry groups successfully created a coalition of governments that would pursue the objective of moving IPRs regulation from WIPO to the GATT. At the GATT, the dual objectives of establishing high standards of IPR protection and a strong multilateral enforcement mechanism would be pursued.

The GATT was founded with the goal of liberalizing world trade.⁶ It was not concerned with intellectual property as such. One of the major issues confronting GATT negotiators prior to launching the Uruguay Round was whether IPRs should be considered sufficiently “trade-related” to be brought within the subject matter covered by the institution. Since WIPO existed as a specialized agency of the United Nations with the role of defining and administering international IPRs

⁵ Such efforts were exemplified by the technology regulations put in place by the Andean Community in the early 1970s through Decision 24 of the Andean Group. See, Frederick M. Abbott, *Bargaining Power and Strategy in the Foreign Investment Process: A Current Andean Code Analysis*, 3 SYRACUSE J. OF INT'L L. & COMM. 319 (1975); Susan Sell, *Power of Ideas: North South Politics of Intellectual Property and Antitrust* (1998), State University of New York Press; and S.J. Patel. P. Roffe, A. Yusuf, *International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct*. 2001, Kluwer Law International, The Hague.

⁶ See the preamble to the GATT 1947.

standards, it was not clear whether or why the GATT should take on an overlapping mandate.

The subject of TRIPS was included in the Uruguay Round mandate without prejudgment regarding the substance or form of any resulting agreement. In fact, there was expectation at the outset of the negotiations that only a Tokyo Round type “code” among the developed countries and a select few developing countries might be achieved in a first round of negotiations on this subject matter.⁷

From the outset of the Uruguay Round negotiations in 1986, and until early 1989, developing countries were opposed to incorporating substantive standards of IPR protection in the GATT (although there was sympathy for affording basic protection against trademark counterfeiting and copyright piracy).⁸ However, the resistance of developing countries was overcome through a combination of concessions offered by developed countries in other areas (principally agriculture and textiles), and by threats of trade sanctions and, implicitly at least, dismantling of the GATT.⁹

Although the major developed country actors – the United States, European Community, Japan and Switzerland – took somewhat different approaches to TRIPS during the Uruguay Round, the coalition essentially remained firm on broad strategic objectives throughout the negotiations.

2.2 Negotiating history

2.2.1 Early proposals

2.2.1.1 The USA. The initial November 1987 United States “Proposal for Negotiations on Trade-Related Aspects of Intellectual Property Rights” included a section that addressed the objectives of the agreement:

“Objective. The objective of a GATT intellectual property agreement would be to reduce distortions of and impediments to legitimate trade in goods and services caused by deficient levels of protection and enforcement of intellectual property rights. In order to realize that objective all participants should agree to undertake the following:

- Create an effective economic deterrent to international trade in goods and services which infringe intellectual property rights through implementation of border measures;

⁷ See the 1987 U.S. proposal quoted in the next Section that, in its final clause, assumes the adoption of a code among a limited group of GATT contracting parties.

⁸ See, Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. OF TRANSNAT'L L. 689 (1989), J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 New York University Journal of International Law and Politics 11 (1996) and UNCTAD, *The TRIPS Agreement and Developing Countries* (1996), United Nations Publication, Sales No. E.96.II.D.10.

⁹ See UNCTAD-ICTSD Policy Discussion Paper, *Intellectual Property Rights: Implications for Development* (2003), Geneva [hereinafter UNCTAD-ICTSD Policy Discussion Paper].

2. History of the provision

5

- Recognize and implement standards and norms that provide adequate means of obtaining and maintaining intellectual property rights and provide a basis for effective enforcement of those rights;
- Ensure that such measures to protect intellectual property rights do not create barriers to legitimate trade;
- Extend international notification, consultation, surveillance and dispute settlement procedures to protection of intellectual property and enforcement of intellectual property rights;
- Encourage non-signatory governments to achieve, adopt and enforce the recognized standards for protection of intellectual property and join the agreement.”¹⁰

2.2.1.2 The EC. A proposal of Guidelines and Objectives submitted by the European Community to the TRIPS Negotiating Group in July 1988 also addressed the general purposes of an agreement, stating *inter alia*:

“... the Community suggests that the negotiations on substantive standards be conducted with the following guidelines in mind:

- they should address trade-related substantive standards in respect of issues where the growing importance of intellectual property rights for international trade requires a basic degree of convergence as regards the principles and the basic features of protection;
- GATT negotiations on trade related aspects of substantive standards of intellectual property rights should not attempt to elaborate rules which would substitute for existing specific conventions on intellectual property matters; contracting parties, could, however, when this was deemed necessary, elaborate further principles in order to reduce trade distortions or impediments. The exercise should largely be limited to an identification of an agreement on the principles of protection which should be respected by all parties; the negotiations should not aim at the harmonization of national laws;
- the GATT negotiations should be without prejudices to initiatives that may be taken in WIPO or elsewhere... ”¹¹

The EC proposal stated that it was not intended to indicate a preference for a “code” approach.¹²

¹⁰ Suggestion by the United States for Achieving the Negotiating Objective, United States Proposal for Negotiations on Trade-Related Aspects of Intellectual Property Rights, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/14, 20 Oct. 1987, Nov. 3, 1987.

¹¹ Guidelines and Objectives Proposed by the European Community for the Negotiations on Trade Related Aspects of Substantive Standards of Intellectual Property Rights, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/26, July 1988, at II.

¹² *Id.*, at note 1.

2.2.1.3 India. In July 1989, India submitted a detailed paper that elaborated a developing country perspective on the negotiations. It concluded:

“It would... not be appropriate to establish within the framework of the General Agreement on Tariffs and Trade any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights.”¹³

At a meeting of the TRIPS Negotiating Group in July 1989, the objectives and principles of the agreement were discussed. As reported by the Secretariat, India was among those countries that made a fairly detailed intervention:

“5. In his statement introducing the Indian paper, the representative of India first referred to recent action by the United States under its trade law and recalled the serious reservations of his delegation about the relevance and utility of the TRIPS negotiations as long as measures of bilateral coercion and threat continued. Subject to this reservation, his delegation submitted the paper circulated as document NG11/W/37, setting out the views of India on this agenda item. At the outset, he emphasised three points. First, India was of the view that it was only the restrictive and anti-competitive practices of the owners of the IPRs that could be considered to be trade-related because they alone distorted or impeded international trade. Although India did not regard the other aspects of IPRs dealt with in the paper to be trade-related, it had examined these other aspects in the paper for two reasons: they had been raised in the various submissions made to the Negotiating Group by some other participants; and, more importantly, they had to be seen in the wider developmental and technological context to which they properly belonged. India was of the view that by merely placing the label “trade-related” on them, such issues could not be brought within the ambit of international trade. Secondly, paragraphs 4(b) and 5 of the TNC decision of April 1989 were inextricably inter-linked. The discussions on paragraph 4(b) should unambiguously be governed by the socio-economic, developmental, technological and public interest needs of developing countries. Any principle or standard relating to IPRs should be carefully tested against these needs of developing countries, and it would not be appropriate for the discussions to focus merely on the protection of the monopoly rights of the owners of intellectual property. Thirdly, he emphasised that any discussion on the intellectual property system should keep in perspective that the essence of the system was its monopolistic and restrictive character. This had special implications for developing countries, because more than 99 per cent of the world’s stock of patents was owned by the nationals of the industrialised countries. Recognising the extraordinary rights granted by the system and their implications, international conventions on this subject incorporated, as a central philosophy, the freedom of member States to attune their intellectual property protection system to their own needs and conditions. This freedom of host countries should be recognised as a fundamental principle and should guide all of the discussions in the Negotiating Group. ... Substantive standards on intellectual property were really related to socio-economic, industrial and technological development, especially

¹³ Communication from India, Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights, MTN.GNG/NG11/W/37, 10 July 1989.

2. History of the provision

7

in the case of developing countries. It was for this reason that GATT had so far played only a peripheral role in this area and the international community had established other specialised agencies to deal with substantive issues of IPRs. The Group should therefore focus on the restrictive and anti-competitive practices of the owners of IPRs and evolve standards and principles for their elimination so that international trade was not distorted or impeded by such practices.”¹⁴

The Indian position was debated extensively, with a substantial number of developing delegations lending their support.

2.2.2 The Anell Draft

The preamble draft texts (as well as drafts regarding objectives and principles) appeared in the Annex to the 23 July 1990 Anell Report to the General Negotiating Group (GNG) on the status of work in the TRIPS Negotiating Group.¹⁵ The source of each Annex proposal is indicated by numerical reference to the country source document:

“This Annex reproduces tel quel Parts I, VI, VII and VIII of the composite draft text which was circulated informally by the Chairman of the Negotiating Group on 12 June 1990. The text was prepared on the basis of the draft legal texts submitted by the European Communities (NG11/W/68), the United States (NG11/W/70), Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay, and subsequently also sponsored by Pakistan and Zimbabwe (NG11/W/71), Switzerland (NG11/W/73), Japan (NG11/W/74) and Australia (NG11/W/75).”

Because features of the preamble originated from drafts on objectives and principles, the draft texts on objectives and principles are also reproduced here:

“PART I: PREAMBULAR PROVISIONS; OBJECTIVES

1. Preamble (71); Objectives (73)

1.1 Recalling the Ministerial Declaration of Punta del Este of 20 September 1986; (73)

1.2 Desiring to strengthen the role of GATT and its basic principles and to bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines; (73)

1.3 Recognizing that the lack of protection, or insufficient or excessive protection, of intellectual property rights causes nullification and impairment of advantages and benefits of the General Agreement on Tariffs and Trade and distortions detrimental to international trade, and that such nullification and impairment may be caused both by substantive and procedural deficiencies, including ineffective enforcement of existing laws, as well as by unjustifiable discrimination of foreign persons, legal entities, goods and services; (73)

¹⁴ Note by the Secretariat, Meeting of Negotiating Group of 12–14 July 1989, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/14, 12 September 1989.

¹⁵ For an explanation of the Anell Draft, see the explanatory note on the methodology at the beginning of this volume.

1.4 Recognizing that adequate protection of intellectual property rights is an essential condition to foster international investment and transfer of technology; (73)

1.5 Recognizing the importance of protection of intellectual property rights for promoting innovation and creativity; (71)

1.6 Recognizing that adequate protection of intellectual property rights both internally and at the border is necessary to deter and persecute piracy and counterfeiting; (73)

1.7 Taking into account development, technological and public interest objectives of developing countries; (71)

1.8 Recognizing also the special needs of the least developed countries in respect of maximum flexibility in the application of this Agreement in order to enable them to create a sound and viable technological base; (71)

1.9 Recognizing the need for appropriate transitional arrangements for developing countries and least developed countries with a view to achieve successfully strengthened protection and enforcement of intellectual property rights; (73)

1.10 Recognizing the need to prevent disputes by providing adequate means of transparency of national laws, regulations and requirements regarding protection and enforcement of intellectual property rights; (73)

1.11 Recognizing the need to settle disputes on matters related to the protection of intellectual property rights on the basis of effective multilateral mechanisms and procedures, and to refrain from applying unilateral measures inconsistent with such procedures to PARTIES to this PART of the General Agreement; (73)

1.12 Recognizing the efforts to harmonize and promote intellectual property laws by international organizations specialized in the field of intellectual property law and that this PART of the General Agreement aims at further encouragement of such efforts; (73)

2. Objective of the Agreement (74)

2A The PARTIES agree to provide effective and adequate protection of intellectual property rights in order to ensure the reduction of distortions and impediments to [international (68)][legitimate (70)] trade. The protection of intellectual property rights shall not itself create barriers to legitimate trade. (68, 70)

2B The objective of the present Agreement is to establish adequate standards for the protection of, and effective and appropriate means for the enforcement of intellectual property rights; thereby eliminating distortions and impediments to international trade related to intellectual property rights and foster its sound development. (74)

2C With respect to standards and principles concerning the availability, scope and use of intellectual property rights, PARTIES agree on the following objectives:

(i) To give full recognition to the needs for economic, social and technological development of all countries and the sovereign right of all States, when enacting national legislation, to ensure a proper balance between these needs and the rights granted to IPR holders and thus to determine the scope and level of protection of such rights, particularly in sectors of special public concern, such as health, nutrition, agriculture and national security. (71)

(ii) To set forth the principal rights and obligations of IP owners, taking into account the important inter-relationships between the scope of such rights and obligations and the promotion of social welfare and economic development. (71)

2. History of the provision

9

(iii) To facilitate the diffusion of technological knowledge and to enhance international transfer of technology, and thus contribute to a more active participation of all countries in world production and trade. (71)

(iv) To encourage technological innovation and promote inventiveness in all countries. (71)

(v) To enable participants to take all appropriate measures to prevent the abuses which might result from the exercise of IPRs and to ensure intergovernmental co-operation in this regard. (71)¹⁶

The Anell text included in its main body (i.e., not in the Annex) a “B” provision with respect to “Principles” that is mainly reflected in Articles 7 and 8 of TRIPS. It is, however, relevant to the preamble:

“8. Principles

8B.1 PARTIES recognize that intellectual property rights are granted not only in acknowledgement of the contributions of inventors and creators, but also to assist in the diffusion of technological knowledge and its dissemination to those who could benefit from it in a manner conducive to social and economic welfare and agree that this balance of rights and obligations inherent in all systems of intellectual property rights should be observed.

8B.2 In formulating or amending their national laws and regulations on IPRs, PARTIES have the right to adopt appropriate measures to protect public morality, national security, public health and nutrition, or to promote public interest in sectors of vital importance to their socio-economic and technological development.

8B.3 PARTIES agree that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and enhance the international transfer of technology to the mutual advantage of producers and users of technological knowledge.

8B.4 Each PARTY will take the measures it deems appropriate with a view to preventing the abuse of intellectual property rights or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. PARTIES undertake to consult each other and to co-operate in this regard.”¹⁷

The difference in perspectives among developed and developing countries is evident in the Annex to the Anell text. Much of the ultimately concluded TRIPS Agreement preamble can be found in proposals from Japan and Switzerland from the developed country side. A more modest influence is seen from proposals by the group of developing countries. The first paragraph of the TRIPS preamble principally emerges from proposals of the United States, European Community and Japan (*see* paragraphs 2A and 2B of “Objective of the Agreement”, above). The structure and terms of the preamble reflect the generally successful

¹⁶ Chairman’s Report to the GNG, Status of Work in the Negotiating Group, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/76, 23 July 1990.

¹⁷ *Id.*

effort of developed countries to incorporate protection of IPRs in the WTO legal system.

2.2.3 The Brussels and Dunkel Drafts

The draft text of the TRIPS Agreement transmitted to the Brussels Ministerial Conference on Chairman Anell's initiative in December 1990 substantially reorganized the July 1990 proposals into the form of a preamble, and Articles 7 ("Objectives") and 8 ("Principles").¹⁸ The Brussels Draft text on the preamble was essentially the same as the final TRIPS text, with no significant changes made in the Dunkel Draft.¹⁹

3. Possible interpretations

As noted earlier, the preamble of TRIPS may be used as a source for interpretation of the operative provisions of the agreement.²⁰ Since the preamble is not directed to establishing specific rights or obligations, it is difficult to predict the circumstances in which its provisions may be relied upon. Many or most TRIPS Agreement articles leave some room for interpretation, and in this sense the preamble may be relevant in many interpretative contexts. Some general observations may nevertheless be useful.

The first clause of the preamble indicates that the main objective of the Agreement is "to reduce distortions and impediments to international trade". This objective is to be accomplished "taking into account" the need to protect and enforce IPRs. The protection of IPRs is not an end in itself, but rather the means to an end. This is a critical point, because interest groups often lose sight of the basic mission of the WTO which, as stated in the preamble of the WTO Agreement, is to promote trade and economic development, not to protect the interests of particular private IPR-holding interest groups.

The first clause of the preamble also recognizes that measures to enforce IPRs may become obstacles to trade. Border measures, for example, might be implemented in ways that allow IPRs holders to inhibit legitimate trade opportunities of producers.

Subparagraph (b) of the second clause refers to the need to provide "adequate" IPR standards. The intention of the drafters was not to create the system of IPR protection that would be considered "optimum" by particular right holders groups, but one that is adequate to protect the basic integrity of the trading system. The development and implementation of IPR laws involves balancing the interests of the public in access to information and technology, and the interests of those creating new works and inventions in securing return on their investments. It is often possible to expand the protection of private right holders and increase

¹⁸ Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, MTN.TNC/W/35/Rev. 1, 3 Dec. 1990.

¹⁹ Trade Negotiations Committee, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNG/W/FA, 20 Dec. 1991 (generally referred to as the "Dunkel Draft").

²⁰ See Section 1 above and references to the VCLT therein.

3. Possible interpretations

11

their investment returns, but this expansion of rights may have an adverse impact on the welfare of a wider public. The objective of IPR laws is not to provide the maximum possible return to right holders, but to strike the proper balance of private and public interests. In the trade context, the objective (as stated in the first paragraph of the preamble) is to avoid distortion of the system. WTO Members may argue that TRIPS substantive standards and enforcement measures become trade-related issues only when they are operating inadequately at an aggregate level materially affecting trade flows in a negative way.

Subparagraph (c) recognizes that enforcement measures may take into account differences in national legal systems. This recognizes an important element of flexibility in enforcement.

The fourth clause of the preamble refers to intellectual property rights as “private rights.” The reference to IPRs as “private rights” in the preamble was not intended to exclude the possibility of government or public ownership of IPRs.²¹ Most likely, the reference to IPRs as private rights was inserted in the preamble because of the unique characteristic of TRIPS in regulating national laws governing privately held interests (e.g., patents), in specifying remedies that are to be provided under national law for protecting such interests, and in clarifying that governments would not be responsible for policing IPR infringements on behalf of private right holders.

The fifth clause of the preamble recognizes “the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives.” Developing country delegations had strongly promoted the importance of recognizing the public policy objectives of IPRs during the TRIPS negotiations, and that such policy objectives called for moderating the demands of right holders. Public policy objectives are further dealt with in Articles 7 and 8.

The sixth clause emphasizes the need for “maximum flexibility” in favour of least developed countries. This is addressed more specifically in Article 66,²² but it is important that it is stated in the preamble in terms of “maximum” flexibility, as the term “maximum” does not appear in Article 66.

The eighth clause of the preamble emphasizes the importance of dealing with TRIPS issues through multilateral procedures. This was included in the preamble to address frequently articulated concerns of the developing countries about use of bilateral threats and enforcement measures to address alleged deficiencies in IPR protection.

The ninth clause recognizes the intention to pursue mutually supportive relationships with WIPO and other “relevant” international organizations. To a certain

²¹ Public ownership of IPRs was and is a fairly common practice. According to a senior member of the WTO Secretariat who participated in the TRIPS negotiations, the reference to “private rights” was included at the insistence of the Hong Kong delegation, which wanted clarification that the enforcement of IPRs is the responsibility of private rights holders, and not of governments. See Frederick M. Abbott, *Technology and State Enterprise in the WTO*, in 1 *World Trade Forum: State Trading in the Twenty-First Century* 121 (Thomas Cottier and Petros Mavroidis eds. 1998). Assuming that this accurately reflects the genesis of the relevant language, other delegations may have attached different significance to the “private rights” language.

²² See Chapter 33.

extent, the emphasis on WIPO downplays the significant role that other multilateral organizations play in the field of IPR protection, such as the United Nations Conference on Trade and Development (UNCTAD). As such, the lack of specific reference to other international organizations may reflect a general lack of attention among trade negotiators to the wider effects that TRIPS would have on international public policy.

4. WTO jurisprudence

4.1 Shrimp-Turtles

The potential importance of the preamble to TRIPS is demonstrated by reference to the decision of the WTO Appellate Body in the Shrimp-Turtles case.²³ In that case, reference in the WTO Agreement to the objective of “sustainable development” fundamentally influenced the approach of the AB to interpretation of the GATT 1994. This is not to suggest that particular terms of the preamble to TRIPS will necessarily play a role of comparable importance to that of “sustainable development” in the WTO Agreement, but rather to illustrate that the preamble *might* play an important role in the interpretative process.

In the Shrimp-Turtles case, the AB rejected a narrow interpretation of Article XX of the GATT 1947 adopted by the panel, which had placed a strong emphasis on protecting against threats to “the multilateral trading system”. The AB said:

“An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the *Marrakesh Agreement Establishing the World Trade Organization*²⁴ (the “WTO Agreement”) acknowledges that the rules of trade should be ‘in accordance with the objective of sustainable development’, and should seek to ‘protect and preserve the environment’.” (at para. 12)

It added:

“Furthermore, the Panel failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the *WTO Agreement*. Thus, while the first clause of the preamble to the *WTO Agreement* calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the *WTO Agreement* should allow for ‘optimal use of the world’s resources in accordance with the objective of sustainable development’, and should seek ‘to protect and preserve the environment’. The Panel in effect took a one-sided view of the object and purpose of the *WTO Agreement* when it fashioned a new test not found in the text of the Agreement.” (at para. 17)

The AB also observed that:

“While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994,

²³ *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, AB-1998-4 WT/DS58/AB/R, 12 Oct. 1998.

²⁴ Done at Marrakesh, 15 April 1994.

5. Relationship with other international instruments

13

fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* – which informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges ‘the objective of *sustainable development*’.” (at para. 129)

“From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather ‘by definition, evolutionary’.” [at para. 130 footnotes omitted, italics in the original]

It would not be an exaggeration to say that the preamble of the WTO Agreement not only played a key role in determining the result of the *Shrimp-Turtles* case, in which the AB provided a much more nuanced approach to evaluating claims of trade discrimination than the panel; but, moreover, it provided the foundation for what may be the single most important development in the interpretative approach of the AB since the inception of the WTO – that is, the notion of “evolutionary” interpretation.²⁵

As noted earlier, because there is a wide variety of dispute that may arise under TRIPS, it is not practicable to predict the circumstances in which the preamble may be employed as an interpretative source. What the *Shrimp-Turtles* case makes evident is that the potential role of the preamble should not be discounted.

5. Relationship with other international instruments

5.1 WTO Agreements

The preamble of TRIPS should be read in conjunction with the preamble of the WTO Agreement that sets out the objectives of the organization. These objectives are to reduce barriers and discrimination in trade in order to promote economic development and improve standards of living, with attention to sustainable development, and with special attention to the needs of developing countries. The TRIPS Agreement was added to the GATT – now WTO – framework to assure that adequate protection of IPRs promoted world trade in goods and services; and that the under- and over-protection of IPRs did not undermine the economic strategy and ultimate objectives of the organization. The protection of IPRs is part of the means to an end – to be “taken into account” within a larger strategy to promote economic growth. The core objective of the WTO is to improve worldwide standards of living.

5.2 Other international instruments

The preamble of TRIPS in its last paragraph (see quotation in Section 1, above) makes specific reference to establishing a mutually supportive relationship between the WTO and WIPO and other relevant international organizations. Although discussing how to establish such a relationship was not given much consideration during the Uruguay Round, developing Members may rely on this provision in the context of urging greater cooperation with UNCTAD, the World Health

²⁵ For more details on the interpretation of the TRIPS Agreement, including the concept of “evolutionary interpretation”, see Annex II to Chapter 32.

Organization (WHO) and other institutions that pursue broad developmental interests.

6. New developments

6.1 National laws

6.2 International instruments

6.2.1 The Doha Declaration on the TRIPS Agreement and Public Health

The Declaration on the TRIPS Agreement and Public Health adopted by Ministers at Doha on 14 November 2001 includes important statements regarding the objectives of TRIPS.²⁶ The Doha Declaration includes recitals or preambular provisions (paragraphs 1–3) that precede and provide context for its operative provisions (paragraphs 4–7).²⁷ The role of the Doha Declaration in the interpretation of TRIPS is discussed in Chapter 6 (Objectives and principles).

6.3 Regional and bilateral contexts

6.4 Proposals for review

7. Comments, including economic and social implications

The preamble of TRIPS refers to the general purposes and objectives of the Agreement. This raises the questions whether the agreement as a whole is in the interests of developing Members of the WTO, and whether parts of the agreement may reflect an inappropriate balance from a developing country standpoint.

There is wide acceptance among international economists and other policy specialists concerned with the role of IPRs in the economic development process that our collective understanding of this role is substantially incomplete. This incompleteness derives from the nature of IP itself and from the measurement problems associated with it.²⁸

As a basic proposition, and leaving aside for the moment issues relating to the situation of IPRs in various developmental contexts, to empirically determine the role IPRs play in the economic development process, we would need to

²⁶ See WT/MIN(01)/DEC/W/2 of 14 November 2001.

²⁷ The Doha Declaration in paras. 1–3 provides:

“1. We recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.

2. We stress the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.

3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.”

²⁸ This section is based on Frederick M. Abbott, *The Enduring Enigma of TRIPS: A Challenge for the World Economic System*, 1 *Journal of International Economic Law* 497 (1998) (Oxford Univ. Press). See also the Report of the Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, London, 2002, in particular Chapter 1 [hereinafter IPR Commission]; see also the UNCTAD-ICTSD Policy Discussion Paper, in particular Part I.

7. Comments, including economic and social implications

15

measure the cause and effect relationship between creating knowledge and creative works on the one hand, and restricting their diffusion and use for a certain duration on the other. Though economists and other policy specialists have endeavoured to create mechanisms for such measurement, this task has so far proven impracticable.

For any nation or region, IPRs are only one factor that will determine the course of development. Other factors include natural resource endowment, labour force characteristics, availability of capital, the size of markets and conditions of competition, and the form of government management/intervention in society. The difficulties inherent in disaggregating IPRs from other determinants of economic development have so far precluded meaningful measurement of the role of IPRs in the economic development process.

Though policy specialists may not be able to make precise measurements about the role of IPRs in economic development, there is an emerging consensus that the impact of IPRs is likely to be quite case sensitive. There are sound reasons to conclude, for example, that the role of patents in the process of development of an automotive sector is quite different to the role of patents in the development of a pharmaceutical sector. Similarly, there are sound reasons to conclude that the role of IPRs will be different in the economies of industrialized, developing and least-developed countries (LDCs), and that even among these broad categories of economic development there will be variations depending on a number of factors such as market size, local capacity for innovation, and so forth.²⁹

Among international IPR specialists there is certainly a range of views as to the value of introducing higher levels of IPR protection in newly industrializing, developing and least-developed countries. Some are strong advocates of introducing such systems on the grounds that they are preconditions of long-term economic growth, and are necessary complements to other facets of commercial law. It has been suggested that sound governance structures are central to improving economic welfare in developing countries, and that the introduction and improvement of IPRs-related legal rules and institutions may have a positive general impact on governance within these countries.

Other specialists are rather sceptical of introducing IPR systems on the grounds that rent transfer effects are likely to predominate, or that time and energy are better spent in areas (such as water and sanitation infrastructure) more likely to yield tangible benefits. There are those who would advocate a nuanced approach that would take into account the industry-specific and country-specific factors elaborated above.

Despite this range of perspectives, these specialists might nevertheless agree that (a) there are substantial gaps in our understanding based on the inherent nature of IP and difficulties in measuring its effects; (b) that the role of IPRs in economic development is likely to be industry and country case sensitive; and (c) that international IPR policy-makers are seeking to strike a balance between interests in

²⁹ See Lall, *Indicators of the Relative Importance of Intellectual Property Rights to Developing Countries*, UNCTAD-ICTSD, Geneva, 2003; also available at <<http://www.iprsonline.org/index.htm>>.

knowledge creation and knowledge diffusion under conditions in which drawing welfare-maximizing boundaries is difficult.

Regarding TRIPS balance, some points seem clear. There are cases in which private interests in IPRs must be subordinated to more compelling public interests. For example, developing countries are facing increasing social, political and financial difficulties as a consequence of epidemic disease. Although research-based pharmaceutical enterprises in the developed countries may require high rates of return on investment in order to finance research into new treatments, the developing and least developed WTO Members cannot be expected to bear the burden of paying for this research.

Whether and to what extent there are other circumstances in which IPRs must give way to more compelling public interests can be taken up as these questions present themselves. The TRIPS Agreement can only survive as an instrument of international public policy if it is able to appropriately balance potentially competing interests.