

sions. All modern international trade negotiations are a result of compromise.<sup>130</sup> If the compromises are not voluntarily made but instead have been forced upon another country, the validity of the resulting treaty will be subject to provisions of Article 52 of the Vienna Convention and may lead to the treaty being declared void. Member States must be permitted to negotiate on bilateral and multilateral forums for further intellectual property protection. If TRIPS-plus provisions were to be declared outside the scope of future negotiations, there would be less motivation to enter into further trade agreements. Lastly, Member States are free to conclude treaties, including treaties that provide for additional intellectual property protection. If the obligations concerned to be too onerous, a Member State could refuse to adopt the treaty.

To conclude, the nature of the TRIPS Agreement is that of a treaty and the consequences thereof flow from the application of customary international law and codified principles contained in, *inter alia*, the Vienna Convention. The TRIPS Agreement is part of a single undertaking and is as such to be implemented as part of the obligations flowing from the WTO Agreement. The scope of the TRIPS Agreement is the subject matter of Part II of the Agreement and includes patents, copyright and related rights and undisclosed information. This scope must however be viewed in light of the title of the Agreement and of the preamble which limits the trade-related aspects of intellectual property rights. As development and technological objectives form the underlying basis for intellectual property rights they are also to be respected.

### *B. The object and purpose of the TRIPS Agreement*

The objectives and purposes of an agreement guide the interpretation of a treaty. The classification of the object and purpose of the TRIPS Agreement is, therefore, fundamental to determining how the TRIPS Agreement is understood and how it is to be implemented. Only when there is predictability in the TRIPS Agreement will a sense of security emerge for Member States implementing the Agreement. The DSU requires that in doing so the DSB must take customary international law into account.<sup>131</sup> A number of Panels and Appellate Body rulings have revealed that the Vienna Convention embodies a number of key interpretational tools of customary international law.<sup>132</sup> In terms of the Vienna Convention the interpretation of a treaty

130 *Straus* also notes that states concluding such agreements only do so if their ‘cost-benefit’ equation, on a macroeconomic level, favours the agreement. Cf. *Straus*, 6 J. Marshall Rev. Intell. Prop.L 1(2006) p. 11-12.

131 DSU Art 3.2.

132 The first Appellate Body decision to do so was the WTO *United States – Gasoline* case. Cf. WTO *United States – Gasoline* Report of the Appellate Body p. 17. See also *Abbott*, WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights in: *Abbott, Cottier and Gurry* (eds), *The International Intellectual Property System*:

must be made ‘in light of the object and purpose’.<sup>133</sup> The object and purpose in the TRIPS Agreement is found, *inter alia*, in the preamble and Articles 7 and 8.<sup>134</sup> Further, the preamble is also characterised by object-driven terminology; ‘desiring’, ‘recognising’ and ‘emphasising’ are words used to reflect the goal the negotiating parties had upon conclusion of the TRIPS Agreement. The identification of the intentions of the parties, as set out in the text of the Agreement, is particularly important in the TRIPS forum as the TRIPS Agreement exhibits ‘gulfs of interpretive difference regarding the meaning of many of its rules’.<sup>135</sup>

Articles 7 and 8 of the TRIPS Agreement are respectively identified as containing the ‘objectives’ and ‘principles’ of the Agreement. The use of this terminology would not have been lost on the negotiating parties. As it is presumed that the use of the words was not superfluous it must be concluded that it was the intention of the negotiating parties to cement their intentions in this manner.<sup>136</sup> Notwithstanding this, the ordinary meaning of the text does not fully confirm the titles given. Instead, Article 7 states the intended goal of the TRIPS agreement in respect to the promotion of innovation and the transfer of technology.<sup>137</sup> Article 8 on the other hand sets out the fixed policy or moral rule upon which Member States are to implement the TRIPS obligations. Within the auspices of the TRIPS Agreement its objectives and principles are further distinguished by the material content of the provisions themselves. They are analysed here in more detail.

## I. An analysis of the preamble

The preamble of the TRIPS Agreement provides more than a mere overview of the intentions of the negotiating parties. It sets out, in addition to Articles 7 and 8, the objectives of the TRIPS Agreement.<sup>138</sup> As such, the preamble is not an operative provision creating rights and obligations.

A preamble in a treaty is considered to form part of the context of the treaty for the purposes of interpretation.<sup>139</sup> This means that within the context of the TRIPS Agreement the preamble is applied together with the ordinary meaning of an opera-

Comments and Materials (Kluwer The Hague 1999) Part I p. 517, *Ortino*, 9 JIEL 1 (2006) p. 119.

133 Vienna Convention Art 31(1).

134 *WTO Canada – Pharmaceuticals* p. 154.

135 *Abbott*, WTO Dispute Settlement and the Agreement on Trade-Related Aspects of Intellectual Property Rights in: *Abbott, Cottier and Gurry* (eds), *The International Intellectual Property System: Comments and Materials* (Kluwer The Hague 1999) Part I p. 719.

136 *UNCTAD/ICTSD*, *Resource Book on TRIPS and Development* (CUP New York 2005) p. 118.

137 *de Carvalho*, *The TRIPS Regime of Patent Rights* (Kluwer The Hague 2002) p. 109.

138 *WTO United States – Section 211* (Appellate Body ruling) p. 89.

139 Vienna Convention Art 31(2).

tive TRIPS provision to determine the intention of the parties to the Agreement.<sup>140</sup> The preamble, as with the other provisions incorporating the objectives and purposes of the TRIPS Agreement, will only be applied when express operative provisions are ambiguous or in order to confirm an interpretation.<sup>141</sup> As many of the TRIPS provisions are flexible in nature and permit significant room for interpretation, the role of the preamble is potentially significant.

The preamble contains numerous references to the intention of the parties. The use of the word 'desiring' in the first paragraph of the preamble is an indication that the contents hereof form the core of the negotiating parties' intention.<sup>142</sup> This is confirmed by the contents thereof. The paragraph creates three pillars upon which the TRIPS Agreement is based. With the first pillar the Member States indicated their intention to use the TRIPS Agreement to reduce distortions and impediments to international trade. This intention is mirrored in the WTO and GATT Agreements and is a concept that is central to the WTO as an institution. The second pillar focuses this general concept on the field of intellectual property rights and, in doing so, forms the principal column upon which the TRIPS Agreement is based. It calls for promotion of effective and adequate protection for intellectual property rights. This is achieved through the operative provisions of the TRIPS Agreement which introduce a minimum level of intellectual property rights protection and thus, reaffirms the intention of the negotiating parties. In light of the first two pillars one would have to conclude that the intention was to introduce effective and adequate provisions that would protect intellectual property that would not distort or impede international trade. As intellectual property rights are potentially able to be applied in a manner that creates trade distortions, the negotiating parties indicated, in the third pillar, their intention that the regulation of intellectual property rights should further be regulated in such a manner that the intellectual property rights themselves do not form barriers to international trade.

The first paragraph is indeed curious as it on the one hand seeks to eliminate trade restrictions and on the other protect intellectual property rights, which are in themselves trade restrictions. The preamble ignores the theoretical debate as to the value of intellectual property rights in a free market. The fact that in reducing impediments to trade one must take 'into account' the protection of intellectual property rights indicates however that the reduction of distortions and impediments are the principal goal of the TRIPS Agreement and, indirectly, the WTO as a whole. This goal, in theory, conflicts with intellectual property rights which seek to create limited free and unencumbered trade. A patent holder is able to impede international trade by preventing the importation of the invention from countries where the product is not

140 *Anheuser-Busch Inc. v. Budejovický Budvar národní podnik* C-245/02 [2004] ECR I-10989.

141 *WTO United States – Shrimps* p. 42.

142 The last paragraph in the preamble also commences with the word desiring. The paragraph does not however incorporate the intention of the negotiating parties to the TRIPS Agreement as a whole, but rather it refers to the intention to create a cooperative relationship with the WIPO.

subject to patent protection. The debate as to the necessity for intellectual property rights in a society is not referred to in the TRIPS preamble. Instead it proceeds from the point where intellectual property rights are accepted as a necessary tool for the advancement of society. It must therefore be concluded that the negotiating parties were in agreement that, as a whole and as indicated in the operative TRIPS provisions, intellectual property rights are not deemed to be an impediment to trade. This acceptance of intellectual property as being an exception to the general notion of free trade was accepted as far back as 1947 where the GATT parties agreed that measures taken for the protection of patents, trade marks and copyrights were a valid general exception to the free trade.<sup>143</sup> It must also be concluded that as intellectual property rights are a means for reducing trade impediments and distortions, the protection of intellectual property rights is not an end in itself, but rather a means to an end.

The preamble proceeds from the first paragraph by listing the measures needed to realise the negotiating parties' intentions. The introduction of new rules providing for the application of basic GATT principles, such as national treatment, and a comprehensive spectrum of rules setting intellectual property standards and ensuring their protection and enforcement. The negotiating parties identified further principles that they deemed important for the introduction of intellectual property protection: the status of intellectual property rights as private rights, the role of public policy objectives in the intellectual property system and the additional freedoms permitted to LDCs in the implementation of the TRIPS Agreement. The role of each of these factors in determining the parties' intention is uncertain. The reason for this is that the principles identified in the preamble lead, in certain circumstances, to diverging results. An example of this is paragraph 5 in the preamble recognising the underlying policy objectives of a domestic intellectual property system. The underlying public policy objectives may, for some Member States, mean strong intellectual property rights and for others mean weak intellectual property rights. It can be argued that as Member States have differing needs, the TRIPS Agreement can be interpreted in a way that determines 'adequate' protection in relation to the public-policy needs a country exhibits. Therefore it would be possible for a Member State with a low domestic concentration of technological ability to embark on a policy of encouraging domestic industries by determining 'adequate' protection restrictively.<sup>144</sup> The preamble does not require Member States to interpret adequate in a way that would mean maximum protection.<sup>145</sup> The wide scope of principles included in the preamble reflects the varying interests of the Member States and would imply that the balancing of interests, whether they be the reduction of trade impediments,

143 GATT Art XX(d).

144 The WTO Appellate Body relied heavily on the development objective found in the WTO Agreement preamble. This is, to a certain degree, mirrored in the TRIPS preamble and may carry similar weight in the interpretation of the TRIPS Agreement. See WTO *United States – Shrimps* p. 48.

145 Reaffirmed in Art 1.1 of the TRIPS Agreement.

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

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

## II. An analysis of Article 7 TRIPS

### ‘Objectives

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

Article 7 was introduced in a proposal by a number of developing countries in the Uruguay Round of Negotiations in May 1990<sup>147</sup> and was seen as a means to incorporate a ‘developmental’ aim to the body of the TRIPS agreement, thus making it indirectly a part of the operational provisions of the Agreement.<sup>148</sup> The incorporation of these objectives into the body of the treaty, and not in the preamble, is seen as a step that has amplified the relevance of the status of the provisions.<sup>149</sup> The TRIPS Agreement is however neither a health nor development aid treaty, it is a treaty set to facilitate the protection and enforcement of intellectual property rights. This is the key objective of the TRIPS agreement and is the founding component of Article 7. The scope of Article 7 is however qualified. The qualification requires that the protection and enforcement of intellectual property rights ‘should’ increase, or at least facilitate the increase, of technological innovation *and* the transfer and dissemination of technology. The choice of the word ‘should’ in the context of rules and regula-

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

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

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

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