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1 ARTICLE 8

1.1 Text of Article 8

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.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

1.2 General

1. The Panel in *Australia – Tobacco Plain Packaging*, in considering the types of reasons that may sufficiently support the application of special requirements not to be considered to "unjustifiably" encumber the use of a trademark in the course of trade within the meaning of Article 20, noted that:

"Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement, which are to be borne in mind when specific provisions of the Agreement are being interpreted in their context and in light of the object and purpose of the Agreement."¹

2. As regards Article 8 specifically, the same Panel observed that:

"Article 8.1 ... makes clear that the provisions of the TRIPS Agreement are not intended to prevent the adoption, by Members, of laws and regulations pursuing certain legitimate objectives, specifically, measures 'necessary to protect public health and nutrition' and '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 the Agreement.

Article 8 offers, in our view, useful contextual guidance for the interpretation of the term 'unjustifiably' in Article 20. Specifically, the principles reflected in Article 8.1 express the intention of drafters of the TRIPS Agreement to preserve the ability for WTO Members to pursue certain legitimate societal interests, at the same time as it confirms their recognition that certain measures adopted by WTO Members for such

¹ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2402.

purposes may have an impact on IP rights, and requires that such measures be 'consistent with the provisions of the [TRIPS] Agreement'."²

3. The same Panel took the view that paragraph 5 of the Doha Declaration on the TRIPS Agreement and Public Health may be considered to constitute a "subsequent agreement" of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention. The Panel noted that:

"The guidance provided by the Doha Declaration is consistent, as the Declaration itself suggests, with the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted, and confirms in our view that Articles 7 and 8 of the TRIPS Agreement provide important context for the interpretation of Article 20."³

1.3 Article 8.1

4. In *EC – Trademarks and Geographical Indications*, in the course of explaining why the TRIPS Agreement did not contain a general exceptions provision, the Panel referred to the principles of the Agreement set out in Article 8.1:

"These principles reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement."⁴

1.4 Relationship with other provisions of the TRIPS Agreement

1.4.1 Article 20

5. The Panel in *Australia – Tobacco Plain Packaging*, in considering the types of reasons that may sufficiently support the application of special requirements not to be considered to "unjustifiably" encumber the use of a trademark in the course of trade within the meaning of Article 20, noted that:

"The specific objectives expressly identified in Article 8.1 do not, in our view, necessarily exhaust the scope of what may constitute a valid basis for the 'justifiability' of encumbrances on the use of trademarks under Article 20. However, their identification in Article 8.1 may shed light on the types of recognized 'societal interests' that may provide a basis for the justification of measures under the specific terms of Article 20, and unquestionably identify public health as such a recognized societal interest."⁵

1.4.2 Article 30

6. The Panel in *Canada – Pharmaceutical Patents* considered both the systemic importance of Article 30 within the TRIPS Agreement and the extent to which other provisions of the Agreement can impart meaning to Article 30:

"In the Panel's view, Article 30's very existence amounts to a recognition that the definition of patent rights contained in Article 28 would need certain adjustments. On the other hand, the three limiting conditions attached to Article 30 testify strongly that the negotiators of the Agreement did not intend Article 30 to bring about what would be equivalent to a renegotiation of the basic balance of the Agreement.

² Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.2403 – 7.2404.

³ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2411.

⁴ Panel Reports, *EC – Trademarks and Geographical Indications (US)*, para. 7.210; *EC – Trademarks and Geographical Indications (Australia)*, para. 7.246.

⁵ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.2406. See also paras. 1 to 3 above.

Obviously, the exact scope of Article 30's authority will depend on the specific meaning given to its limiting conditions. The words of those conditions must be examined with particular care on this point. Both the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes."⁶

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⁶ Panel Report, *Canada – Pharmaceutical Patents*, para. 7.26.