

## TRIPS AND INDIA: REGIONAL AGREEMENTS OVER TRIPS

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### Abstract

*TRIPS and India have had a long tryst with mixed responses from India where it knowingly/unknowingly has entered into Agreement without much deliberation on its potential harms. For this, few important provisions like Article 7 and Article 8 of TRIPS needs to be delineated, their goals and rules that guide the interpretation or implementation of the agreement have to be understood for benefit of India. This paper investigates whether developing countries, specifically India, fully recognize and leverage these flexibilities in context of Free Trade Agreements (FTA) with highlight on FTA between India and UAE as an example. The paper develops its understanding based on two primary assumptions that India can use the flexibilities given under TRIPS to implement FTA for its unique position and advantage and that the FTA signed by India have varying degree of success due to limitations by Agreements like TRIPS. The objective of this paper is to highlight how principles like Most Favoured Nation (MFN), National Treatment of TRIPS have been bypassed by developed countries and being forced upon developing countries to find better markets for industries of developed world. This paper also brings forth India's failure to use Article 4 of TRIPS despite its notable advantage for the country. Overall, this paper focuses on giving a road understanding of framework of TRIPS which can empower India to pursue its policy and trade goals in making FTAs, Comprehensive Economic Partnership agreement (CEPA) or Bilateral Trade Agreements (BTA), without hesitation and independently without being under adverse influence of International Agreements especially TRIPS by citing examples of countries like USA and EU which are doing the same.*

**Keywords:** Flexibilities, Sovereignty, Liberalization, Reciprocity, Trade Policy.

### 1. Introduction

The Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS) has evolved out of the trade negotiations under the Uruguay Rounds of GATT negotiations between 1986 to 1994 which led to formations of World Trade Organisation headquartered at Geneva Switzerland.

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The negotiations at these rounds were aimed at removing the lacunae of GATT 1948 which was signed to implement rules based trade around the world. The negotiations at Uruguay Rounds were held on various issues which led to agreements like Agreement on Agriculture (AoA), GATT etc. TRIPS was among them, addressing about protecting the Intellectual Property Rights of companies so that they can use them for establishing market without the fear of piracy. The factors which led to necessity of such an agreement are:

- i. **Advent of Technology Era:** With technology developing way faster than we can adopt it, there is a lot of research, efforts, funding which goes into it. Industries dependent on such intellectual input including pharmaceuticals, software, and entertainment, sought stronger protection for their innovations and creations. Hence with globalisation picking pace and markets crossing borders, it was essential to protect such intellectual inputs to promote commercial markets based on that.
- ii. **IPR Protection not Uniform:** There was a wide gap between the protection level offered to intellectual property in developed and developing countries. Also, there was disparity in the kinds of goods that get protection, for example, Europe wanted better protection for wines and spirits whereas it was not the case for other countries, hence uniformity was needed for trade to thrive.
- iii. **Trade Issues:** Increased frequency of disputes between trading countries over intellectual property rights has created a demand for standard rule and mechanism to address such specific issues.

Thus, all these factors led to the endorsement of intellectual property on Uruguay Round negotiations. The negotiations ended in April, 1994, with the signing of the Final Act of the Uruguay Round in that year, and established the World Trade Organization (WTO) and other agreements, one of which was the Agreement on TRIPS.

TRIPS represented a groundbreaking development in international trade, as it set out minimum standards for protection and enforcement of IPR, including patents, copyrights, trademarks, trade secrets, and more. It fortified a framework for addressing trade-related issues of intellectual property, aimed at promoting innovation, protecting

creators, inventors, and facilitating trade by harmonizing IP standards among WTO member countries.

## 2. Negotiations at TRIPS

The negotiations at TRIPS within the ambit of WTO have had varying viewpoints with respect to spectrum of issues related to IPR and its impact on developed and developing countries.<sup>1</sup> Few of the issues are: ease of access to knowledge and technology; socioeconomic impact of strong intellectual property rights; subject matter of protection; waiver rights; compulsory licenses; transition period etc. Detailed below is a brief description of the negotiations from the perspectives of both groups:

### 2.1. Negotiations by Developed Countries

The countries with good percentage of their GDP going for Research and Development for innovative technologies like USA, European Union members, and Japan have always wanted strong IP measures in countries where they see potential markets for their products as according to them it is essential to incentivize research and payback the cost involved in coming up with such a technology.

The countries have always pushed for stringent action in cases of violation of IPR and heavy penalty on violation of such laws. Also, they seek extended minimum period of protection with nearly no possibility of licensing even in cases of emergencies. Another major area of contention is the pharmaceuticals industry which have often face dilemma between two virtues - whether to give protection to patent or give leeway for health issues of public at large.

### 2.2. Negotiations by Developing Countries

In case of countries which are still in phase of developing their economies have always been apprehensive about strong IP regime as it poses a potential threat to their economy by fixation of prices at a price much higher than their affordability. Principles like MFN treatment, minimum standards for all countries including neighbours have been a hindrance to free trade across borders. The famous case of *Nexaver*<sup>2</sup> in India of compulsory licensing and treatment of other serious diseases like HIV, cancer which have

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<sup>1</sup> Peter K. Yu, "Are Developing Countries Playing a Better TRIPS Game?", 16 *UCLA Journal of International Law and Foreign Affairs* 314 (2011).

<sup>2</sup> *Bayer Corporation v. Union of India* [(2014) 245 Bom. LR 551].

mortal effects on lives of people have been away from people due to patents on medicines which increases the cost, thereby becoming unaffordable for the mass at large.

They have always taken a stand that the developed countries must be obligated to transfer technology under the TRIPS to less privileged countries who were denied support or protection during the industrialisation taking place in such developed countries. The developing countries have advocated for balancing the IP protection regime with socio economic development goals; therefore, they have sought provisions like differentiated treatment, transition period recognising their unique position and constraints.

Even after enforcement of the TRIPS agreement there have been negotiations between developed and developing countries on similar issues. For example, the Doha Declaration on TRIPS and Public Health in 2001 has protected the rights of developing countries in situations where they need medicines and lighten grip on IP regime to meet emergency health needs of their population.

Thus the TRIPS Agreement has been the battleground of trade negotiations between two blocks of the world with the aim to balance the IP regime with that of socio-economic development of the world, hence there have been push to health issues, special safeguard mechanism, compulsory licenses, waiver of IP rights in emergencies.

### 3. Interpretation of Article 4 of TRIPS

Article 4<sup>3</sup> of the Agreement on TRIPS emphasised situations when there might be two contradictory international agreements with one being TRIPS. It lays down the principles of how exceptions will come into play when there is conflict between two international agreements. It is worth mentioning that TRIPS is just like any other multilateral agreement which cannot supercede others in order.

The explanation to the exceptions given under Article 4<sup>4</sup> of TRIPS is as follows:

#### i. Consistency with other Agreements

Article 4(1)<sup>5</sup> says that member countries of WTO can have agreements with other member countries or countries that provide a greater protection to IP rights than what is provided in TRIPS. In other words, countries can have TRIPS+ agreements but

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<sup>3</sup> Trade-Related Aspects of Intellectual Property, 1995, art. 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

cannot go TRIPS- in any agreement through bilateral or regional treaties. This provision recognizes the sovereign right of countries to establish stronger protection if they desire.

#### **ii. Exceptions for International Agreements**

Article 4(2) clarifies that if a country is a member to an existing international contract that is in conflict with TRIPS, there may be no need to comply with certain provisions of TRIPS that conflict with the other agreement. This allows countries to honor their obligations under other international agreements, particularly in cases where those agreements were in force before TRIPS or where they deal with specific issues in a more nuanced manner.

#### **iii. Exceptions for Developing Countries**

Article 4(3)<sup>6</sup> provides a specific exception for developing countries. It states that developing country that are not parties to certain agreements, will be given additional time to comply with certain TRIPS provisions. This recognises that developing countries may need more time and flexibility to adjust their legal systems and practices to accept the standards set out in TRIPS.

#### **iv. Transitional Arrangements**

Article 4(4)<sup>7</sup> allows countries that were not providing certain standards of intellectual property safeguards before implementation of TRIPS (typically countries with weaker IP systems) to put transitional arrangements in place to gradually phase in TRIPS-compliant measures. This is another recognition of the need for flexibility, particularly for countries that face significant challenges in meeting TRIPS requirements immediately.

Overall, Article 4 of TRIPS is designed to carve a balance among harmonizing international intellectual property standards and recognizing diversity of legal systems and international agreements that exist among WTO member countries. It makes provisions for exceptions and flexibilities for the agreements which were entered between parties before coming of TRIPS (which has been discussed in the paper below, how

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<sup>6</sup> *Supra* note 3.

<sup>7</sup> *Id.*, art. 4(4).

developed countries have used) to be TRIPS compliant or not. Such agreements can co-exist if they foster innovation and safeguarding of intellectual Property Rights.

#### **4. South Asian Preferential Trade Agreement**

The South Asian Preferential Trade Agreement (SAPTA) is a consensus-based agreement signed in 1993 between the SAARC member countries. It is a regional intergovernmental organization consisting of eight South Asian countries - India, Bangladesh, Bhutan, Afghanistan, Sri Lanka, Maldives, Nepal and Pakistan. The main goal of SAPTA was to increase economic cooperation and trade liberalization among these member nations.

##### **4.1. Features and Objectives of SAPTA 1993**

The features and objectives of this Agreement are as follows:

###### **i. Preferential Trade**

SAPTA was supposed to reduce or eliminate tariffs on specific traded goods between SAARC member countries. Under this agreement, countries agreed to provide preferential treatment to products of each other by reducing customs duties, thus making these products more competitive within the regional market.

###### **ii. Trade Liberalization**

The agreement sought to gradually liberalize trade in the region by creating a framework for reducing trade barriers. This was seen as a step towards the establishment of a South Asian Free Trade Area (SAFTA).

###### **iii. Product Coverage**

SAPTA included practically all categories of goods-from agricultural, industrial and other goods. Tariff concessions have been negotiated on a varying range of items among the members for the purpose of expanding trade opportunities for one another.

###### **iv. Tariff Reduction Schedules**

The member countries of the regional integration were required to submit to the body their own tariff reduction schedules and how these would progressively reduce or eliminate tariffs that applied to intra-regional trade. These schedules were subject to negotiations and agreed upon by consensus.

#### v. Trade Facilitation

SAPTA included provisions for ease of trade measures, like the simplification of customs process, harmonization of trade regulations, also for the establishment of mechanisms to resolve trade-related disputes.

SAPTA was a landmark agreement that set the stage for many efforts towards promoting economic cooperation and integration in South Asia. However, it faced challenges in terms of implementation, including issues related to political tensions between some member countries, sanitary barriers, and the slow progress for trade liberalization in member states.

In 2006, SAARC member countries took a step further by implementing SAFTA, which built upon the principles and objectives of SAPTA and aimed to create a more unified regional trade bloc with deeper economic integration. SAFTA includes provisions for the reduction or zero customs duties, the target to formulate a dispute settlement mechanism, and ways to improve economic cooperation and growth within the region.

#### 4.2. Using Exception of Article 4 in the SAPTA

Exception 1 to Article 4<sup>8</sup> TRIPS talk about situation when the countries have some trade agreement before the date of TRIPS enforcement, Article 4 says that countries which have such agreement can go either TRIPS plus or TRIPS minus under such agreement provided that it intimates WTO regarding the same.

This clause has been used by USA and European nations as they already knew beforehand that a body like WTO is going to come into existence and later, they will be bound by the rule of MFN and National Treatment in which they would have to treat every nation the same. Also, the minimum standards proposed by TRIPS would harm their regional trade agreements. A notable example of the same is - A Bilateral Trade Agreement such as the North American Free Trade Agreement (NAFTA) signed in 1992 and operational at the time of the WTO's establishment, is not subject to the MFN requirements outlined in TRIPS agreement. Certainly, the notification from the United States regarding NAFTA clarifies that Article 1709(7) within NAFTA is not bound by

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<sup>8</sup> *Id.* at 5.

the MFN obligations outlined in the TRIPS agreement. Nonetheless, a debatable point regarding NAFTA concerns whether it qualifies as an agreement primarily focused on intellectual property protection. NAFTA is, in fact, a regional accord aimed at enhancing trade and investment, though it does include provisions related to intellectual property rights. NAFTA is not primarily related to IPR protection, which is the prerequisite for obtaining MFN exemption as stipulated in Article 4(d) of the TRIPS agreement.<sup>9</sup>

A point worth emphasis is that in the Uruguay Round negotiations, the European Community (EC) sought an exception to the MFN rule for bilateral and regional treaties. The European Community's proposal in 1990 suggested that countries entering into customs union and free trade area agreements under Article XXIV of GATT<sup>10</sup> can enforce IPR measures among themselves without having to extend these measures to other nations. The United States put forth a similar suggestion, stating that any benefits, advantages, privileges, or immunities exceeding the TRIPS agreement's requirements and offered within an international agreement would be exempted from the MFN rule, provided that such an agreement is accessible for any contracting party to TRIPS.<sup>11</sup>

*Upon analysis it is clearly evident that the developed countries have exploited the exception to their own benefit and hence a question arises as to what is stopping from using the trade related articles of SAPTA to by-pass the rigidities of TRIPS and establish an IP mechanism with respect to trade, beneficial for neighbouring countries in South Asia?*

Article 8 of TRIPS Agreement, which concerns supplementary actions, stipulates that Contracting States commit to contemplate, beyond the measures detailed in Article 7 of TRIPS, for implementation of trade friendly terms and other steps that can back and enhance SAFTA for the shared advantage of all involved. Article 8<sup>12</sup> of SAPTA talks about additional measures which can be adopted for mutual benefit of the Contracting parties it states that:

These measures may encompass, among other things:

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<sup>9</sup> Prabhash Ranjan, "Bilateralism, MFN and TRIPS: Exploring Possibilities of Alternative Interpretation," 13(4) *International Trade Law and Regulation* 69 (2007).

<sup>10</sup> General Agreement on Tariffs and Trade, 1948, art. 24.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> South Asian Preferential Trade Agreement, 1993, art. 8.

- a) harmonization of standards, reciprocal recognition of tests and accreditation of testing laboratories of Contracting States and certification of products;
- b) simplification and harmonization of customs clearance procedure;
- c) harmonization of national customs classification based on HS coding system.

Clauses a, b, c and j of the Article can be used to implement favourable measures for trade related to IP protection. This will help build a system like European Union which will help in improving trade relations and develop a *sui generis* system for whole of South Asia.

#### **4.3. Article 10 of SAPTA - Special Treatment for the Least Developed Contracting States**

It provides that Contracting States should engage in negotiations for long-term contracts aimed at helping the Least Developed Contracting Countries to target sustainable export levels for their products. Special consideration should be given to exports from Least Developed Countries when applying safeguard measures. The Least Developed Contracting States should have greater flexibility in imposing and maintaining quantitative or other restrictions, on a provisional and non-discriminatory basis, under critical circumstances concerning imports from other Contracting States.

Further this article can be employed in harmony with Article 7<sup>13</sup> and 8 of TRIPS for going beyond TRIPS and serving our national interest without being in violation of WTO norms.

#### **4.4. Interpretation of Article 7 TRIPS**

Article 7<sup>14</sup> TRIPS is a pivotal provision which underpins the global network for the protection of intellectual property. TRIPS, plays a crucial role in harmonizing IP standards across member countries. Article 7, in particular, serves as a cornerstone by setting out the goals and principles that guide the Agreement.

Article 7 recognizes that innovation must encourage and facilitate the transfer of technology. The protection of IP is thought to be aimed at encouraging inventors and creators to pursue investment in research and development, which will probably result

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<sup>13</sup> *Supra* note 3, art. 7.

<sup>14</sup> *Ibid.*

soon in dissemination of new technologies and knowledge. But it also emphasizes that such protection should not withhold from farmers' technology transfer to countries of the developing world.

The main goal of Article 7 can be briefly explained as follows:

**i. Social and Economic Wellbeing**

An important concern of Article 7 is the recognition of IPRs as important with regard to social and economic welfare of member countries. In other words, IP protection should not only justify the interests of right holders but must also be considering benefits to the society as a whole. Striking a good balance between the interest of private parties and that of the public good remains a challenge for TRIPS.

**ii. Trade and Sustainable Development**

It is a positive aspect of Article 7 that it points out the relationship between IP protection and international trade. It aims to prevent IPRs from being misused for an unjust restraint of trade. Along with this, it recognizes that protection of IP may also enhance trade and economic growth. Particularly, it relates to international trade in goods and services.

**iii. Guaranteeing the availability of medicines and protection of public health**

Probably the most controversial issue in TRIPS relates to the fight between IP protection and reach in essential medicines. Article 7 is inclusive in the sense that it seeks to provide some equilibrium, ensuring that IP rights will not interfere with the need to consider different ways of making affordable medicines available, especially to those developing countries that still face the challenge of health crisis.

**iv. Flexibilities for Member Countries**

Article 7 specifies that the members have different levels of development and different policy objectives. Within this context, it promotes flexibility in the way the TRIPS provisions are implemented by allowing adaptation of IP laws in accordance with the particular needs and circumstances of each country.

In consequence, Article 7 has occupied the place of a debate and negotiation among WTO Members. Their argument has been that the TRIPS document must be

interpreted and implemented in such a way that its provisions are made supportive of development goals and priorities. This has led to several mechanisms being introduced, such as compulsory licensing, patent renewal annually.

Indeed, Article 7 of the TRIPS Agreement has a very important role in the global IP scenario. It establishes the broad goals and principles guiding those common to the implementation of the Agreement, highlighting the importance of balancing rights holders, society, and economic growth. The delicate equilibrium remains an ongoing challenge to policymakers and stakeholders around the world.

#### **4.5. Interpretation of Article 8 of TRIPS**

Article 8 of TRIPS Agreement is a significant provision which deals with principles that govern the protection of IPRs, focusing on balancing promotion of innovation along with protection of wider interests of society. It aims to take a harmonious approach and to set minimum standards of IP principles among member states to ameliorate trade and innovation among members. Article 8 is key provision in realizing the above goals.

Article 8 of TRIPS, titled “Principles” gives few key principles that ensures effective enforcement of the Agreement:

- i. It focusses on need to create a balance between rights of IPR holder and society at large. It ensures that IPR protection must protect the innovation and act in furtherance of technology beneficial to society and at the same time it does not obstruct the path of legitimate trade and uphold social and economic goals of society.
- ii. It highlights the importance of robust mechanism to stop infringement of IPR regime which includes among others rules against anti-competitive practices and acts which harm public interest.
- iii. It also provides for member nations to make sure that the level of protection of intellectual property in every member state must be effective and meet the international standards.
- iv. Article 8 provides that the protection of IPRs should not be used as a weapon to set trade barriers or to create unnecessary trade restrictions or distortions.

- v. It gives principle for developed countries that the protection of IP should not derail the process of transfer of technology to developing countries.
- vi. Though Article 8 explicitly does not mention public health, the Agreement acknowledges that IP protection should not unduly hinder access to essential medicines and other community health needs.

While Article 8 has been liberal enough to secure interests of developing countries in practice it has always been a matter of debate for true implementation of spirit of Article 8. Developing Countries have always argued that principles in Article 8 should be enforced in ways that promote growth and development among the third world countries. This has led to discussions of flexibilities and safeguards under the TRIPS IPR regime.

#### **4.6. TRIPS and India-UAE Comprehensive Economic Partnership Agreement<sup>15</sup>**

The India-UAE CEPA deals with intellectual property in Chapter 11 of the Agreement. Article 11.2 and 11.3 of the CEPA finds resonance with Article 7 and 8 of TRIPS.

##### *4.6.1. Article 11.2 of India-UAE Agreement*

The objective of Article 11.2 is: “*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.*”

Thus, the statement details the multifaceted goals of IPR protection, emphasizing that it shall not only stimulate innovation but also make sure that the benefits of technology are evenly distributed, leading to mutual advantages, societal well-being, and a harmonious balance between the rights of creators and their duties towards society.

##### *4.6.2. Article 11.3 of India-UAE Agreement*

The principles laid down under Article 11.3 are:

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<sup>15</sup> Comprehensive Economic Partnership Agreement, India-UAE, 2020.

- i. *“A Party may, in formulating or amending its 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 Chapter.”*
- ii. *“The Parties recognise that appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adverse effect the international transfer of technology.”*

The explanation to above articles provides that a Party possesses the freedom, when establishing or adjusting its legal framework, to introduce necessary measures aimed at protecting health of public, nutrition, and promoting the public welfare in areas important to their socio-economic and technical progress, while sticking to the principles specified in this Article.

The second statement emphasizes on Parties to acknowledge the potential for intellectual property to be abused by rights holders or for certain practices to be employed in a way which may restrict trade or harm the sharing and transferring technology for trade. To address these issues, the Parties agree that it may be necessary to implement measures. However, these measures must align with the guidelines outlined in the Chapter, meaning they should be consistent with the provisions and principles of the relevant agreements or regulations.

In essence, this paragraph highlights the need for a balanced approach where intellectual property is protected but not to the extent that they hinder fair competition, trade, or the exchange of technology on the global stage. It underscores the importance of implementing measures that strike a harmonious balance between promoting innovation through intellectual property protection and ensuring that these protections do not lead to actions that distort trade or hinder free flow of technical knowledge across borders. These articles are exact replica of the TRIPS agreement but they fail to utilise the same for bilateral benefit and just end up as being used in TRIPS.

#### 4.6.3. Article 11.4 of India-UAE Agreement

Article 11.4 provides that having regard to the underlying public policy objectives of national systems, the Parties recognise the need to:

- i. promote innovation and creativity;
- ii. facilitate the diffusion of information, knowledge, technology, culture and the arts; and
- iii. foster competition.

Article 11.4 in particular goes beyond the principles of TRIPS and intend to meet the cases where departure from the minimum standards may be required. This read in consonance with Article 7 and 8 can be used to serve better national interests in pharma, traditional knowledge, trade secrets, patents. Article 7 and Article 8 have the potential of enabling an efficient adaptable enforcement of TRIPS Agreement. They can be used as

- i. A beacon for understanding and executing.
- ii. A defence against assertive requests for heightened intellectual property safeguarding.
- iii. A weapon to contest clauses that excessively safeguard intellectual property rights or permit their misuse.
- iv. A beacon for changing and giving new intellectual property norms.

To certain degree, Article 7 sets the groundwork for potential future exemptions and constraints, which could be employed to reestablish equilibrium within the global intellectual property framework. This goal holds particular significance for underdeveloped nations, primarily reliant on technologies originating from foreign sources. As these nations typically have larger numbers of consumers than producers, the broad interpretation of “users” in Article 7 will be highly advantageous for them. This interpretation includes both end consumers and those who produce goods and services utilizing technological knowledge.<sup>16</sup>

Article 8.1 is important for developing states as it has provisions for exceptions which enhance the greater good in areas important to both socio-economic progress and

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<sup>16</sup> Peter K. Yu, “The Objectives and Principles of the TRIPS Agreement”, 46 *Houston Law Review* 1007 (2009).

the exchange of technology. Moreover, the point noteworthy in Article 8.1 is ambiguous definition of crucial measures intended to “promote the welfare of the public in areas vital to their social as well as economic and technological advancement.” The TRIPS Agreement doesn't provide for a precise definition for these domains. In reality, what constitutes “crucial sectors” can vary from one country to another, and the Article is not restricted solely to enforcement by developing countries.

Whether compliance with TRIPS requirements is in question depends on a comprehensive understanding of the TRIPS Agreement. When Article 7 and Article 8 are taken together, a meticulous interpretation of Article 7 could assist in addressing any potential inconsistencies with the TRIPS Agreement. Equally crucial is the inept utilization of the Preamble, that can be argued to represent a succinct embodiment of the fundamental principles within the TRIPS Agreement. Professor Correa underscored the importance of evaluating adherence to the TRIPS Agreement by accounting for Article 7 and Preamble together. This entails examining a balance between rights and duties along with wider aspects of social and economic welfare.<sup>17</sup>

#### **4.7. Analysing implementation of Article 7 and 8 from perspective of developing countries**

During the Doha negotiations,<sup>18</sup> particular attention was given to Articles 7 and 8. In Paragraph 19 of the Ministerial Declaration,<sup>19</sup> it was outrightly stated that actions of the TRIPS Council must be inspired by goals or fundamental principles outlined in Articles 7 and 8 of TRIPS Agreement, with due consideration of development aspects. However, legal impact of this Agreement continues to be uncertain, it might prompt a panel to conduct a more thorough examination of how the provisions must be understood within the broader domain of the Agreement, particularly regarding the requirement for balance.

Article 7 and Article 8 can play a critical tool in accurately understanding the scope of various obligations and exemptions within the TRIPS Agreement This

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<sup>17</sup> Abdulqawi A. Yusuf, “TRIPS: Background, Principles and General Provisions” in Carlos M. Correa & Abdulqawi A. Yusuf (eds.), *Intellectual Property and International Trade: The TRIPS Agreement* 3-22 (2nd edn., 2008).

<sup>18</sup> WTO, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, 41 ILM 755 (2002).

<sup>19</sup> WTO, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1, 41 ILM 746 (2002), para. 19.

encompasses terms like “third party” and “legitimate interests” given under Article 30, “unfair commercial utilization” in Article 39.3, and “misuse” provided in Article 40 and Article 50.3, along with various other provisions within TRIPS.

Certainly, Jayashree Watal characterized these unclear terms and expressions as “positive ambiguities.”<sup>20</sup> These ambiguities are seen as positive because they can be purposefully interpreted and utilized to offer developing nations more flexibility in fulfilling their responsibilities under the TRIPS document. Consequently, the beneficial vagueness serves as a safeguard for developing nations in front of the ongoing spread of IP regime.

Article 7 and Article 8 hold significance as WTO panel and Appellate Body frequently have a temptation of incorporating their personal policy perspectives of intellectual property rights. An instance of this is seen in how these panels have, at times, adopted perspectives that primarily concentrate on the economic interests of rights holders when determining what constitutes the standard exploitation of intellectual property.<sup>21</sup>

In re-balancing of the intellectual property system, it is essential to interpret the TRIPS document with a developmental vision, prioritizing the targets and principles outlined in Articles 7 and 8 of the TRIPS Agreement and the flexibilities carved out explicitly acknowledged within those provisions.

It is being noted by commentators that the articles till now are generally used for pharma related disputes only but it is pointed out that they can be used in other sectors as well like a *sui generis* system for plant variety or non-IP values of local communities. Both of the Articles can be employed to reinforce other effective clauses that encourage societal and economic well-being and maintain the equilibrium within the IP system. For instance, Articles 66 and 67 of the TRIPS Agreement necessitate developed nations to offer technological assistance to the least-developed countries. While there were concerns among less-developed countries regarding the discretionary language used in Article 66, Paragraph 11.2 of the Doha Ministerial Decision given in 2001, that addresses moot questions and worries related to implementation, reaffirmed the obligatory nature of this

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<sup>20</sup> *Supra* note 16 at 1023.

<sup>21</sup> *Ibid*

provision. Building upon the principles established in Articles 7 and 8, it is expected that Articles 66 and 67 will gain increased strength and efficiency.

Articles 7 and 8 can serve both as a means of challenging and as a means of defence in non-violation complaints. Although less-developed nations have expressed concerns about potentially being subject to such complaints once the moratorium ends, they can also utilize these complaints to challenge measures in developed countries that disturb the balance of the TRIPS system.

Article 7 and Article 8 can be used for the creation of equity-oriented standards, within the global intellectual property framework.<sup>22</sup> They can provide the necessary terminology and guidance in shaping these fresh standards. Additionally, they serve as a reminder to those creating treaties about the essence, extent, and goals of intellectual property norms.

Article 7 and Article 8 are simultaneously valuable in shaping external standards. While few of these standards might align with or be in consistence with prevailing internal norms, few others might be referred to as “counter regime norms,” as defined by Laurence Helfer, which encompass binding treatise regulations and flexible soft law fundamentals aimed at modifying the existing legal framework. Once established, these prevailing rules can establish upper limits for intellectual property protection. Moreover, they might become ingrained within the intellectual property regime in a “revisionist norms.” As intellectual property protection increasingly influences various sectors like agriculture, healthcare, climate, human resource, traditional knowledge, freedom of expression, democracy, and legal principles, significance of equity oriented and progressive standards will keep growing.<sup>23</sup>

## 5. Conclusion

Finally, it can be understood from above discussion that the flexibility or the negotiations that developing countries were successful in embedding in the TRIPS should be used more vehemently in justifying their actions which they can take to serve their interests. As the negotiations at TRIPS were mostly leaning towards interests of developed economies and developing countries were made to sign it in the want of

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<sup>22</sup> James Thuo Gathii, “The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties”, 15(2) *Harvard Journal of Law & Technology* 304 (2002).

<sup>23</sup> *Supra* note 16 at 1044.

technologies or due to economic difficulties like India did, but they as mentioned can use the exceptions. But the problem arises in using Exception 1 of Article 4 is, since most of the Trade agreements done by the developing countries (like India) are after 1995 except few like mentioned above. Hence it is suggested that they should be used and TRIPS must be interpreted in a way to serve the requirement of developing countries.

Moreover, as discussed above, Article 7 and 8 can be used as a shield as well as a tool for various policy measures that are reflected in the India-UAE CEPA; however, when it comes to their practical implementation and utilization, the agreement falls short in achieving its intended objectives. It is suggested that the country must use the Articles without any hesitation as we see that the developed countries interpret and use provisions of TRIPS for their benefit. There has been no case where such provision is used for setting new norms which contrary to the established practices but it will be interesting to see the response of panel when developing countries interpret it for justifying their actions of socioeconomic development and transfer of technology. It was found during the research that Countries can go beyond TRIPS both forward and backward of TRIPS if they interpret objectives for their best interest. India to some extent has used the objective in its CEPA with UAE but it has to be used more practically rather than just mentioning in the agreement.

Globally, these articles have set the groundwork for creation of renewed global norms, inside and outside the TRIPS framework. Though many of the safeguarding proposals put forth by developing nations were not incorporated into the TRIPS Agreement, the adoption of similar language for Article 7 and Article 8 marks a noteworthy advancement. In fact, it could be seen as a concealed advantage. Whether these two provisions can genuinely yield benefits shall depend on the ability of TRIPS member countries to utilize them efficiently, to their benefit, and in the best ways possible.