

Right to Health

The 'Rule of Reason' and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS

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In August 2001 the first public meeting of the American Society of International Law Project on Human Rights and International Trade ('Project') was held at the World Trade Institute in Berne, Switzerland. One session of that meeting was devoted to the relationship between human rights and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement'). As part of the follow-up to that meeting, the team leading the Project decided it would be useful to consider several 'case studies' that would seek more specifically to identify and analyse situations in which human rights and trade rules interact with each other. This study looks at the manner in which human rights may affect the application of competition rules and principles in the context of the TRIPS Agreement.

The analysis begins by observing that rights to life and health are well-recognized in human rights law, and that the right to health has been confirmed by the WTO Ministerial Conference in the Doha Declaration on the TRIPS Agreement and Public Health. It proceeds to demonstrate that the TRIPS Agreement rules governing competition provide substantial flexibility in terms of national policy, rule development, and application, and that this flexibility is sufficient to take into account human rights interests. The analysis turns to WTO Appellate Body jurisprudence for support for the proposition that Members are permitted to take into account non-trade interests in interpreting and applying TRIPS Agreement rules.

I. THE RIGHT TO HEALTH AND WTO LAW

A. Rights to life and health

The rights to life and health are established by treaty and customary international law. The human right to life prohibits governments from acting to deprive individuals of their right to exist.¹ While failure by a government to take adequate steps to address a threat to life (for example, in the circumstances of a disease outbreak) may constitute a deprivation of the right to life, commentary on the relationship between human rights and the TRIPS Agreement has focused attention on the right to health because this right is understood to impose a positive obligation on governments.²

The paper prepared for the first Project meeting analyses the complex relationship between human rights and WTO rules.³ It notes that some human rights are *jus cogens* norms that have a special character in international law, allowing for no derogation. In no case may a WTO rule, including a TRIPS Agreement rule, be allowed to conflict with a *jus cogens* human rights norm. On the other hand, treaties such as the WTO and TRIPS agreements may be inconsistent with other treaties or customary international law, including human rights treaties and norms. A conflict would need to be resolved by customary rules of treaty interpretation, including use of the principle of consistent interpretation.

B. 'Core' rights

In addition to norms of *jus cogens* and general treaty and customary rules, human rights law introduces the concept of 'core' rights. The concept of core rights is introduced because a number of human rights are subject to 'progressive realization'. Because governments are constrained in the availability of resources, it is not possible for each government promptly to provide adequate education, housing, and health care for all the people. Nonetheless, governments are obligated to take steps consistent with their means to realize these rights progressively.

Despite resource constraints, each human right begets an irreducible 'core' obligation that governments are obligated to fulfil. For example, in the case of housing, there is a core obligation not to evict residents without notice and an opportunity to make a challenge. The concept of 'core' human rights, which

¹ There is, of course, dispute regarding the content of the right to life, *inter alia*, concerning whether the death penalty can lawfully be imposed in criminal proceedings.

² See eg Report of the High Commissioner, The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session, Item 4 of the provisional agenda, E/CN.4/Sub.2/2001/13 (27 June 2001).

³ F M Abbott, TRIPS and Human Rights: Preliminary Reflections, in International Trade and Human Rights, Foundations and Conceptual Issues (World Trade Forum, vol 5, F M Abbott/C Breining-Kaufmann/T Cottier eds 2005).

might be thought of as the 'core of the right', raises the question whether there is an additional step in the hierarchy of international legal rules—including at the WTO—between absolute *jus cogens* obligations and general treaty and custom. If a TRIPS Agreement rule might ordinarily be inconsistent with a human rights rule established by treaty, might a 'core' human right have a special status that precludes such interference?

Neither the earlier paper nor this case study suggests a general answer to the question of what implications the concept of 'core' human rights may have for interpretation of the TRIPS Agreement. They suggest, however, that the relationship between WTO law and human rights law may be more nuanced than drawing a bright line between the treatment of *jus cogens* and general international law norms.

C. The content of the right to health

A human right to health is identified in a number of human rights instruments. Article 25 of the Universal Declaration of Human Rights refers to health, well-being, and medical care as the objectives of an adequate standard of living. Article 12(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

The preamble to the Constitution of the World Health Organization states, *inter alia*:⁴

The States Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The WHO Constitution is of particular importance because of virtually universal state membership of the organization.⁵

Article XI of the American Declaration on the Rights and Duties of Man provides: 'Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.'⁶

⁴ Available at <http://www.who.int>.

⁵ As of 2 September 2003, there were 192 states party to the WHO Constitution. *Ibid*.

⁶ See also Art 26 of the American Convention on Human Rights providing for the progressive implementation of rights implicit in the Charter of the Organization of American States, including Art 34 providing for the establishment of conditions for a 'healthful' life.

A number of other international agreements recognise a 'right to health'.⁷

The Committee on Economic, Social, and Cultural Rights has provided a detailed interpretation of the right to health established under Article 12, ICECSR in its General Comment No 14 (2000) on 'The right to the highest attainable standard of health'. The Committee elaborates on 'core' obligations:

Core obligations

43. In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development, the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

⁷ General Comment No 14 (2000) to the ICESCR, following reference to the Universal Declaration and the ICECSR, states:

2. Additionally, the right to health is recognized, *inter alia*, in article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1(f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (Art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights, as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

44. The Committee also confirms that the following are obligations of comparable priority:

- (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- (b) To provide immunization against the major infectious diseases occurring in the community;
- (c) To take measures to prevent, treat and control epidemic and endemic diseases;
- (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- (e) To provide appropriate training for health personnel, including education on health and human rights.

In addition to the core obligations, the Committee interprets the right to health to incorporate an obligation on states, *inter alia*, to foster medical research.⁸ The obligation to pursue research is emphasized by the Report of the High Commissioner on Human Rights and the TRIPS Agreement.⁹

D. The TRIPS Agreement

A number of provisions of the TRIPS Agreement directly affect public health interests.¹⁰ Although a 'right to health' is not explicitly acknowledged in the agreement, the right of WTO Members to adopt measures necessary to protect public health is affirmed (conditioned on consistency with the agreement). The Doha Declaration on the TRIPS Agreement and Public Health was adopted in part to clarify that the right to health plays an essential role in interpretation of the agreement.

E. The Doha Declaration

The negotiating history and a more complete analysis of the Doha Declaration appear elsewhere.¹¹ It is important to emphasize here that the Doha Declaration is implicitly a human rights instrument, as well as a trade instrument. At paragraph 4, it states:

We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

The Members of the WTO have agreed by consensus that the TRIPS Agreement 'does not and should not' prevent them from taking measures to

⁸ *ibid* para 37. ⁹ Report of the High Commissioner (n 2) paras 37–41.

¹⁰ These are identified non-exhaustively in TRIPS and Human Rights (n 3).

¹¹ F M Abbott, The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO, 5 *Journal of International Economic Law* (2002) 469 (emphasis added).

