

The Doctrine of Patent Misuse: Origins, Antitrust and the TRIPS Agreement

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Received: 8th November 2023; revised: 7th February 2024

Patent misuse refers to the acts of patent owners when they attempt to extend a patent's exclusivity beyond its physical or temporal scope. Common examples of patent misuse include tying or patent term extension. The patent misuse has its roots in the doctrine of equity and was judicially created doctrine in the United States. Over the past century the concept has evolved considerably and has hanged over the heads of patent owners. However, an antitrust-like analysis is replacing the historical *per se* illegality of patent misuse acts gradually. The pressure over the concept is slowly taking its toll with increasing calls for its abolition. This paper discusses the history and origins of patent misuse, its interface with competition law and treatment under various articles of the TRIPS Agreement.

Keywords: Patent Misuse, Equity, Patents, Antitrust, TRIPS

The Doctrine of Patent Misuse originated in the United States. A judicially created doctrine, patent misuse has evolved considerably over the past century and has haunted patent owners consistently. However, the historical *per se* illegality of actions deemed to be misuse of the right to exclude, based on *patent-equal-market-power* presumption, is now being gradually replaced with antitrust-like analysis. In the backdrop of this development, many commentators question the existence of the doctrine, some even demanding its abolition.¹

Patent Misuse may be defined as any act of the patent owner that extends exclusivity beyond the 'physical and temporal scope'² of the granted patent. Physical scope of the patent is determined by its claims³ (aided by the description and drawings), whereas the temporal scope is normally the statutory period of patent term. A patent owner who, relying on the patent right, tries to exert control beyond such claims or protection period is deemed to be engaging in patent misuse.

Common examples of extension of physical or temporal scope of patent would be tying arrangement and extension of patent term. Patent misuse, is normally considered *per se* illegal (historically, the courts did not engage in the analysis of actual market conditions).⁴ However, the 1988 patent misuse amendments⁵ in the United States and the 2006 *Illinois Tool Works* decision of the U.S. Supreme

Court now require the employment of the rule of reason analysis at least on the antitrust aspect of a case.⁶

The patent misuse doctrine is usually relied upon as a defense by an alleged infringer or a licensee in a suit brought by a patentee. It is a *shield*, therefore, and not a *sword*.⁷ Accordingly, an accused infringer may not be able to rely on it as a 'basis for affirmative claims for monetary or injunctive relief,'⁸ but only afford her an opportunity to assert a defense to avoid legal sanctions.

If the court finds that a patentee has engaged in patent misuse, the patent is held unenforceable to the extent of the misuse. For example, in case of patent term extension through a license,⁹ the court may hold the license clause void whereas, the patent itself remains enforceable against third parties and other licensees. Unlike an antitrust sanction, the patentee is allowed to 'purge' or correct the misuse, upon which the patent becomes fully enforceable once again. The unenforceability is not 'against the world'¹⁰ and not forever. The patentee can correct the misuse, inform the interested parties and reassert the right granted under the patent.

Patent Misuse Doctrine

Roots in the Doctrine of Equity

The Patent Misuse Doctrine has its roots in the doctrine of equity in common law.¹¹ The United States Judicial System was divided into courts of law

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and courts of equity before 1938. Courts of law were authorized to award damages whereas the courts of equity had the exclusive authority to grant injunctive relief and accounting for profits.¹² Therefore, for seeking different reliefs, a claimant had to go to two separate courts. The courts of equity were generally seen to be not as rigid in the application of law as compared to courts of law.¹³

As injunctive relief is of vital importance in enforcing the right to exclude granted by a patent,¹⁴ the role of courts of equity was of paramount importance in cases of patent infringement.¹⁵ Another reason for the importance of the role of courts of equity in patent infringement cases was that these courts had the exclusive jurisdiction to award accounting of profits of the infringer to the claimant.

Concept of ‘Unclean Hands’

Part of the law of equity is the concept of ‘unclean hands.’ A defensive doctrine, ‘unclean hands’ allows an alleged infringer to raise an equitable defense that the claimant ‘had committed an injustice or impropriety related to the subject matter of the action.’¹⁶ In 1933, the United States Supreme Court in *Keystone Driller v General Excavator*¹⁷, citing Story’s Equity Jurisprudence, 14th ed., § 98, stated ‘that [...] a complainant [...] must come into court with clean hands.’¹⁸ The Court further held that:

*“[W]henever a party... who seeks to obtain some remedy [from a court of equity] has violated conscience or good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.”*¹⁹

At another instance, the U.S. Supreme Court held patent misuse to be ‘an extension of the doctrine of unclean hands to the patent field.’²⁰

Motion Picture and Morton Salt

The concept of patent misuse emerged in *Motion Picture*, though the court did not label it as such. This was a case of tying sales of patented film projectors and patented film making techniques through a license. The U.S. Supreme Court held that, ‘the scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification.’²¹ The court then stated, making observation on the notice, attached with Motion Picture’s patented machines, restricting their usage only to its films,

*“[s]ucha restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular character of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it.”*²²

The Court heavily relied on public interest instead of analyzing the effects of tying on competition in the market. However, it was only in *Morton Salt*²³ that the U.S. Supreme Court ‘expressly labeled the defense “misuse” and created the present blanket unenforceability remedy.’²⁴ *Morton Salt* was another tying case where the Court relied upon the public policy reasoning based on the *Motion Picture* rationale. Invoking the doctrine of ‘unclean hands,’²⁴ the Court held, that ‘[i]t is a principle of general application that... courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest.’²⁵ The Court so holding created the ‘misuse’ defense in patent infringement cases, which required only a finding of violation of ‘public policy of the United States evinced by the Constitution and the patent law’²⁶ without any analysis of the actual market conditions.²⁷

Limiting the Patent Misuse Doctrine

In the ensuing forty years, both Congress²⁸ and the U.S. Supreme Court limited the doctrine at regular intervals. The attrition started with the dissent of Justice O’Conner in *Jefferson Parish*, which questioned the presumption that patents equal market power in the context of antitrust analysis.²⁹ Four years after *Jefferson Parish*, the Congress amended the Patent Act to limit the patent misuse doctrine. The new Section 271(d)(5), addressing the issue of tying, required showing of ‘market power in the relevant market for the [tying product].’³⁰ Finally in *Illinois Tool*, the Supreme Court emphasizing on the requirement of Section 271(d)(5), held that illegality of a tying arrangement ‘must be supported by proof of market power in the relevant market...’³¹ This severely circumscribed the scope of patent misuse doctrine as compared to its original reach.

Patent Misuse and Antitrust

As evident from the change in statute in 1988 and the recent approach of the U. S. Supreme Court, progress with respect to patent misuse has been made

in the direction of antitrust-like analysis.³² Dratler observes a 'growing trend among the lower courts to shape misuse doctrine to the contours of antitrust law.'³³ The resulting similarity between patent misuse and antitrust analyses and the careful balancing of the antitrust law through the rule of reason approach is convincing growing number of commentators on the redundancy of the misuse doctrine.³⁴

However, the patent misuse doctrine still differs from antitrust in various respects, some of which are as follows. First, as mentioned earlier, misuse is a shield and not a sword and cannot be used affirmatively, unlike an offensive antitrust claim. Second, misuse can be purged after which the patentee can assert his complete rights to exclude everyone, without his permission, to use his invention.³⁵ Third, for finding misuse, there is no requirement of presence of condemnable offense under the antitrust laws.³⁶ Fourth, in patent misuse case, neither the government nor those whose actions have not been challenged have any standing in the court.³⁷ It may be argued that due to these differences the defendants in patent infringement cases in the U. S. may continue to rely upon patent misuse defense, unless it is completely eliminated.³⁸

Patent Misuse and TRIPS

Various provisions of the TRIPS Agreement allow countries to adopt measures to check the abuse of IPRs. Historically, the main tool to do so was considered to be compulsory licenses. The patent misuse doctrine signifies another option that countries may employ to check excesses of the IPR holders. Moreover, the social, political and economic realities of developing countries may make adoption of patent misuse doctrine a practicable choice. Several enticements may work in this regard. For starters, the universal problem of access to medicine³⁹ and the perpetual attempts for patent ever-greening by branded drug manufacturers can be a potential trigger. Similarly, generic pharmaceutical industry in developing countries would also have a crucial interest in the recognition of such a defense. Even though patent misuse is a shield, it may potentially be a sword as well, not in the hands of the alleged infringer, but over the heads of patentees.

Article 8(2)

The misuse doctrine appears to be in line with the proportionality and consistency requirements of Article 8(2). With respect to the requirement of proportionality, the unenforceability of the patent in

case of a patent misuse is not uncorrectable. 'Purging' is an important part of the doctrine and ensures that the unenforceability is proportional to patentee's conduct.⁴⁰ The unenforceability is also not 'against the world.'⁴¹ The idea is to match the measure with the misuse.⁴² Consistency with Article 30 and 31 will be discussed below.

Article 30: The Three-Step Test⁴³

The Patent Misuse Doctrine may also meet the three-step test of Article 30. The patent is decreed unenforceable in the first place because the patentee attempts to exploit the patent *abnormally* by extending the physical and temporal scope of the patent. The misuse doctrine does not restrict patentee's exploitation of the patent beyond the misuse.⁴⁴ Therefore, there may be no *unreasonable* conflict with the normal exploitation of the patent.

The unenforceability in patent misuse cases is for a limited period of time,³⁵ in contrast to the doctrine of 'inequitable conduct,'⁴⁵ which 'cannot be purged after the fact.'⁴⁶ At the same time the scope of the sanction is also limited to the misuse itself.⁴⁷ The patent becomes *fully* enforceable as soon as the misuse is purged.³⁵

Thirdly, the unenforceability sanction does not 'unreasonably prejudice the *legitimate* interests of the patent owner.' As mentioned above, the unenforceability is to the extent of the misuse and is a sanction against illegal extension of scope of patent exclusivity. Under the current misuse doctrine, the patent owner has no *legitimate* interest in extending the exclusivity beyond what is allowed by the law.³ The proportionality of unenforceability sanction is reflective of the legitimate interests of third parties. Moreover, the basis of the misuse doctrine is public interest and policy.²³ Thus, it can be argued that the patent misuse doctrine 'take[s] into account the legitimate interests of third parties,'⁴⁸ both as an enabling as well as a limiting factor in the final analysis.

Article 31

Article 31 relates to the direct *authorization* by the government for use of the subject matter of a patent by someone other than the patentee.⁴⁹ The use is subject to meeting the requirements set out in the sub-provisions of the article. Moreover, the use of the subject matter of a patent is separate and distinct from that allowed under Article 30.

The patent misuse defense does not directly translate into an authorization of use of the subject

matter of a patent. However, it can be inferred from the unenforceability sanction that the alleged infringer may continue using the subject-matter. As only that party, which has suffered harm from patentee's misuse conduct can raise a patent misuse defense,⁵⁰ in most cases the unenforceability sanction would be considered an indirect authorization to the infringer to continue with the exploitation of the subject matter of the patent without the authorization of the patentee until the misuse is purged. Therefore, the patent misuse doctrine may be subject to the requirements of Article 31. The indirect authorization in cases of patent misuse is on individual merits of the case.⁵¹ The authorization may not require prior negotiations between the contending parties in all cases. Even cases like national emergency, circumstances of extreme urgency and public non-commercial use are not always the reasons for unenforceability sanction in a patent misuse defense.⁵² Therefore the patent misuse sanction and resulting indirect authorization may not meet the requirements of Article 31(b). The sanction is limited in scope and duration of the misuse till it is purged.⁵³ The sanction also meets the requirement of non-exclusivity and non-assignability.⁵⁴ The indirect authorization may not restrict the alleged infringer's production to supply to the domestic market.⁵⁵ The unenforceability sanction is effective till the misuse is not purged⁵⁵ and also the sanction is also subject to review on appeal.⁵⁶ The authorized use under the misuse doctrine may not entitle the patentee any remuneration, as the unenforceability is a sanction on the improper extension of exclusivity by the patentee.⁵⁷

The most interesting case for patent misuse doctrine is in Article 31(k) which allows 'member [states] not [...] to apply the conditions set forth in subparagraphs in (b) and (f) where such use is permitted to remedy a practice determined after judicial [...] process to be anti-competitive.' As discussed earlier, most of the misuse cases are also liable for sanction under antitrust law and there is progressive convergence between the two doctrines. Therefore, subparagraphs (b) and (f) which appear to be in conflict with the misuse doctrine might not apply where the misuse is also an antitrust violation.

It may therefore be argued that the patent misuse doctrine and the unenforceability sanction may also meet the requirements set out in different subparagraphs of Article 31 where the misuse is also adjudged to be an antitrust violation. Thus the patent misuse doctrine, at least in the refined form as being

envisaged by the U.S. Congress and the Supreme Court meets the requirements of the TRIPS provisions discussed above.

Article 40

Article 40(1) specifies that WTO members can specify in their legislation licensing practices that 'may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.'⁵⁸ A narrow reading of the phrase 'adverse effect on competition in the relevant market' would imply that only those licensing conditions that have anti-competitive effects would trigger the sanctions. All those licensing conditions that may violate public policy, other than antitrust, of a WTO Member does not fall under this article. This is also in line with the argument that antitrust laws are not for the protection of a competitor but competition itself. A broader interpretation would put all IPR abuses through licensing arrangements within the ambit of this article. A licensee is, nevertheless, adversely affected by the abuse and the licensing terms may affect his performance in the marketplace. The patent misuse defense can be raised if the defendant can make a case of 'unclean hands' (as required under the doctrine). The U.S. Supreme Court decisions may have founded the misuse doctrine on public policy; however, the same practices were also found to be infringing antitrust laws. Therefore, it may be argued that Article 40(1) would not bar adoption of patent misuse defense.

Conclusion

The Doctrine of Patent Misuse serves as an important check on the abuse of patents by the right holders. It works effectively to achieve the normative goals of the patent system and to ensure that a balance between users, innovators and follow-on innovators is maintained. The Doctrine of Patent Misuse is in line with the provisions of the TRIPS Agreement as discussed above. Developing countries and respective courts of law will be well-advised to incorporate this doctrine in their laws and decisions respectively.

References

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- 2 *Windsurfing International, Inc v AMF, Incorporated*, 782 F.2d 995, 1001 (Fed. Cir. 1986) (The Doctrine of Patent Misuse [...] requires that the alleged infringer show that the

- patentee has impermissibly broadened the “physical or temporal scope” [...]).
- 3 *Motion Picture Patents Co. v Universal Film Co.*, 243 U.S. 502, 510 (1917).
 - 4 The historical analysis in *Illinois Tool Works Inc. v Independent Ink, Inc.*, 547 U.S. 28, 38 (2006). However, the Federal Circuit has always employed a two-step anti-competitive effects test whenever not explicitly prohibited by Supreme Court precedent.
 - 5 Section 201, Public Law 100-703, 100th Congress, 19 November 1988.
 - 6 *Illinois Tool Works*, 28 (holding that ‘a patent does not necessarily confer market power upon the patentee,’ and ‘in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product;’ 35 U. S. C. §271(d)(5)).
 - 7 Jay Dratler Jr, A Brief Primer on Antitrust Law and Misuse Doctrine, *Licensing of Intellectual Property* (Law Journal Press New York Vol. 1) 1994 citing *Senza-Gel Corp. V Seiffhart*, 803 F.2d 661, 668 (Fed. Cir. 1986).
 - 8 However, ‘[m]isuse may be used in an offensive litigation tactic, as a counterclaim or claim for declaratory judgement of invalidity...’ Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-77.
 - 9 For a discussion of patent term extension through licenses, Herbert H. *et al.*, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*, 2009, 3.24-3.27.
 - 10 *Qualcomm Inc. v Broadcom Corp*, 548 F.3d 1004 1024 (Fed. Cir. 2008); Dratler (1994) 3 (observing that ‘[t]he scope of the unenforceability remedy of waiver must always be limited to the circumstances of the present case.’).
 - 11 For a brief discussion of courts of equity and law in the U.S., ‘Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-72.
 - 12 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-72, 73, ‘Prior to 1938, the United States maintained separate courts to dispense different remedies, even for the same wrong. Courts authorized to award damages were known as courts of law, and those authorized to award injunctive relief and an accounting of profits were known as courts of equity.
 - 13 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-73, The doctrines of equity were generally designed to be flexible and adaptable to doing justice as each individual judge saw fit.
 - 14 Injunctive relief is an equitable remedy historically granted through courts of equity.
 - 15 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-74 (observing that patent owner had to go to courts of equity to obtain injunctive relief).
 - 16 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-75.
 - 17 *Keystone Driller Co. v General Excavator Co.*, 290 U.S. 240 (1933).
 - 18 *Keystone Driller Co. v General Excavator Co.*, 290 U.S. 244.
 - 19 *Keystone Driller Co. v General Excavator Co.*, 290 U.S. 245.
 - 20 *United States Gypsum Co. v National Gypsum Co.*, 352 U.S. 457, 465 (1957).
 - 21 *Motion Picture Patents Co. v Universal Film Co.*, 243 U.S.510.
 - 22 *Motion Picture Patents Co. v Universal Film Co.*, 243 U.S.518.
 - 23 *Morton Salt Co v G S Suppiger Co*, 314 U.S. 488 (1942).
 - 24 Vincent C, Living with patents: Insight from patent misuse, *Marquette Intellectual Property Law Review*, 15(1) (2011) 12.
 - 25 *Morton Salt Co v G S Suppiger Co*, 314 U.S.492.
 - 26 *Morton Salt Co v G S Suppiger Co.*, 314 U.S.488.
 - 27 The Court declined to examine the case on the basis of the Clayton Act. 314 U.S. 488, 494 (1942).
 - 28 Major reform came in 1952 with the codification of federal patent law, which acknowledged the existence of the misuse doctrine. ‘However,’ Chiappetta writes, ‘rather than expressly adopting and incorporating the Court’s patent policy-based “extension of the rights” test... Congress instead added provisions limiting the doctrine’s application. Sections 271(b) and (c) defining inducement and contributory patent infringement were intended to override the doctrine’s threatened elimination of secondary infringement liability. Section 271(d) spelled out specific behaviors not triggering misuse. Responding to the Court’s evolving *per se* “tying equals misuse” jurisprudence the section explicitly confirmed a patent owner’s right to derive revenue from the sale or use of components which constituted less than the whole, but a material part of the invention.’ These amendments came in the wake of U. S. Supreme Court decision in *Mercoird Corporation v Minneapolis-Honeywell Regulator Co.* 320 U. S. 680 (1944). *Illinois Tool Works Inc. et al.v Independent Ink, Inc.*, 547 U. S.41.
 - 29 *Illinois Tool Works Inc. et al.v Independent Ink, Inc.*, 547 U. S. 28, 37 – 38 (2006) citing dissent of O’Connor J. in *Jefferson Parish Hospital District No.2 v Hyde*, 466 U. S. 2 (1984).
 - 30 35 U. S. C. § 271(d)(5): ‘(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: ... (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.’
 - 31 *Illinois Tool Works*, 547 U. S. 28, 43 (2006).
 - 32 Dratler singles out ‘the field of patent licensing’ to exemplify the shift in approach of the courts and Congress to achieve the ‘desirable goal’ of coherency between misuse doctrine and antitrust law.
 - 33 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-72.
 - 34 Chiappetta states, that ‘[t]he time has arrived to dispense with patent misuse. In the prevailing market efficiency paradigm the doctrine’s limitations on exploitation of patent rights are not merely superfluous but affirmatively harmful. Misuse’s vague and poorly calibrated “exceeding the scope of the patent” inquiry and its blanket one-size-fits-all unenforceability remedy have been rendered obsolete by more nuanced responses to potential patent power and related overreaching under other laws. Antitrust law more appropriately finds the proper balance between maximizing patent incentives while minimizing undue interference with market operation and innovation.’

- 35 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-78.
- 36 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-77.
- 37 Vincent C, Living with patents: Insight from patent misuse, *Marquette Intellectual Property Law Review*, 15 (1) (2011) 13.
- 38 Vincent C, Living with patents: Insight from patent misuse, *Marquette Intellectual Property Law Review*, 15 (1) (2011) 41 (arguing for the complete abolition of the patent misuse doctrine).
- 39 Not necessarily essential medicines.
- 40 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-78, Once a patent holder has abandoned its improper practices and the consequences of the patent misuse have dissipated, the holder may again enforce the patent.
- 41 *Qualcomm Inc. v Broadcom Corp*, 548 F.3d 1004, 1026.
- 42 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 5-79, The scope of enforceability of waiver cannot be automatic but must be “fashioned to give a fair, just and equitable response reflective of the offending conduct”.
- 43 Article 30 TRIPS (Exceptions to Rights Conferred): ‘Members may provide *limited* exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not *unreasonably* conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the *legitimate interests of third parties*’.
- 44 Jay Dratler, Jr., *Licensing of Intellectual Property*, 2005, 3, Even before purging, the patent holder may still be able to enforce the patent against devices or methods beyond the scope of the misuse.
- 45 For a discussion of the concept of ‘inequitable conduct,’ Christian E M, Controlling the “Plague”: Reforming the Doctrine of Inequitable Conduct, *Berkeley Technology Law Journal*, 24 (2010) 1329, 1333.
- 46 American Bar Association, *Intellectual Property Misuse: Licensing and Litigation*, 2000, 68-9.
- 47 ‘A patent will not become “unenforceable against the world” because there is no connection between the breach and “products beyond the misuse itself [...]” The scope of the unenforceability remedy of waiver must always be limited to the circumstances of the present case.’ Jay Dratler, Jr., *Licensing of Intellectual Property*, 1994,3.
- 48 Article 30 TRIPS.
- 49 The language of Article 31 TRIPS assumes that a WTO member has discretionary power to authorize use other than that allowed in Article 30 TRIPS: ‘*Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder...*’.
- 50 Vincent C, Living with patents: Insight from patent misuse, *Marquette Intellectual Property Law Review*, 15 (1) (2011) 13.
- 51 Article 31(a) TRIPS.
- 52 Article 31(b) TRIPS, For example, the Supreme Court found in *Morton Salt* that the patentee violated the ‘*public policy of the United States evinced by the Constitution and the patent law.*’ However, the subsequent unenforceability was not in the context of ‘national emergency, circumstances of extreme urgency or public non-commercial use.’
- 53 Article 31(c) TRIPS.
- 54 Article 31(d) & (e) TRIPS.
- 55 Article 31(f) TRIPS.
- 56 Article 31(g) & (i) TRIPS.
- 57 Article 31(h) & (j) TRIPS.
- 58 Article 40(1) TRIPS.