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How to reconcile human rights, trade law, intellectual property, investment and health law?

WTO dispute settlement panel upholds Australia's plain packaging regulations of tobacco products

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HOW TO RECONCILE HUMAN RIGHTS, TRADE LAW, INTELLECTUAL PROPERTY, INVESTMENT AND HEALTH LAW?

WTO DISPUTE SETTLEMENT PANEL UPHOLDS AUSTRALIA'S PLAIN PACKAGING REGULATIONS OF TOBACCO PRODUCTS

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Abstract

This comment on the legal findings of the four WTO panel reports of June 2018 on Australia's tobacco plain packaging (TPP) measures begins with a discussion of the 'systemic interpretation' challenges (I) and 'legitimacy challenges' of WTO panel interpretations of trade rules that affect also related disputes over intellectual property rights, health rights, investment regulations and human rights (II). Section III summarizes the main Panel findings that the TPP measures are apt to, and do make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products; the claimants have not demonstrated that the TPP measures are 'more trade-restrictive than necessary to fulfil a legitimate objective' in violation of Article 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT). Section IV summarizes the Panel findings that the complainants did not demonstrate that the TPP measures were inconsistent with the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS). Section V concludes.

Keywords

health protection; human rights; intellectual property rights; tobacco control; trade law.

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Introduction*

The WTO complaints initiated in 2012 by Ukraine, Honduras, and the Dominican Republic, and in 2014 by Cuba and Indonesia, challenged the consistency with the law of the World Trade Organization (WTO) of Australia's tobacco plain packaging (TPP) measures. The measures operate as an integral part of Australia's other tobacco control policies, which were not challenged in these proceedings. The TPP measures at issue were:

- the Tobacco Plain Packaging Act 2011 (TPP Act);
- the Tobacco Plain Packaging Regulations 2011 as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (TPP Regulations); and
- the Trade Marks Amendment Act 2011 (TMA Act).

A previous legal challenge by tobacco industries in the national courts of Australia that the TPP Act had amounted to an acquisition of property on less than just terms in contravention of section 51(xxxi) of the Australian Constitution had been rejected by the High Court of Australia in its judgment of 15 August 2012.[1] An investor-state arbitration proceeding, initiated in 2012 by Philip Morris Asia challenging the consistency of the TPP regulations with Australia's obligations under an investment treaty between Hong Kong and Australia, was rejected on procedural grounds in an arbitration award of December 2015.[2] Following Ukraine's request to suspend its WTO complaint, the four WTO panel reports on the complaints by Cuba, the Dominican Republic, Honduras and Indonesia were circulated in all three official WTO languages in June 2018.[3] Two panel reports were adopted by the DSB on 27 August 2018; Honduras and the Dominican Republic appealed some of the legal findings concerning their respective panel reports. Even though the panel reports refrain from referring to human rights, which had not been invoked by the complainants or the defendant, the panel findings confirm that the customary rules on treaty interpretation enable, and require, specialized trade and investment tribunals to decide trade and investment disputes 'in conformity with the principles of justice in international law', as explicitly recalled in the customary rules of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties (cf. the Preamble and Arts 31-32 VCLT) and illustrated by the Panel's careful interpretation of WTO market access and TRIPS commitments in conformity with sovereign rights of WTO members to protect public health.

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[1] Cf JT International SA v Commonwealth; British American Tobacco Australasia Ltd v Commonwealth HCA 2012, 43 (5 October 2012). For an overview of tobacco litigation in national, European and investment courts see E.U.Petersmann, Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law (Oxford : Hart 2017), 241ff, 256ff.

[2] The tribunal's award was published on the website of the Permanent Court of Arbitration only in May 2016.

[3] WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R of 28 June 2018 on Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging. These four panel reports are cited below as 'Australia-TPP'. The initial complaint by Ukraine (DS434) was subsequently suspended under Article 12.12 of the WTO Dispute Settlement Understanding (DSU). All facts (e.g. regarding Australia's TPP measures and the claims by the parties to this WTO dispute) and legal instruments mentioned in the following (e.g. WTO and World Health Organization agreements) are quoted from, and documented in more detail in these panel reports.

I. Legal fragmentation vs interpretative 'systemic integration'

International human rights law (HRL), intellectual property law, international health law, the 1994 WTO Agreement and modern international investment law continue being developed through different international agreements in different *international fora* like the United Nations (UN), the World Intellectual Property Organization (WIPO), the World Health Organization (WHO), WTO governance and judicial institutions, and in networks of more than 3.200 bilateral, regional and worldwide treaties on the protection of foreign investments and third-party adjudication of related investment disputes. The fragmented treaty systems are based on diverse (e.g. deontological vs utilitarian) rationalities, different memberships of states and non-state actors (like the European Union and sub-state customs territories as WTO members), and diverse interactions with (e.g. 'monist' or 'dualist') national legal systems and constitutional rights of citizens. Yet, there are also numerous 'regulatory overlaps' in the complex, dynamically evolving interrelationships between these five fields of international law. For instance:

- According to Article 27 of the Universal Declaration of Human Rights (UDHR 1948), 'everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'. This individual right to benefit from culture or science is complemented, in the second paragraph, by universal recognition of the human right of 'everyone … to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author', thereby requiring legislators to protect creators through intellectual property rights promoting remuneration for their work.
- Article 25 UDHR provides that 'everyone has the right to a standard of living adequate for the health of himself and his family.' Article 12 of the UN Covenant on Economic, Social and Cultural Rights (ICESR 1966) sets forth a state's obligations to respect, protect and fulfill the right to the enjoyment of the highest attainable standard of physical and mental health. In General Comment No 14 (2000), the UN Committee on Economic, Social and Cultural Rights included in the normative content of this 'right to the highest available standard of health' also the 'availability' of 'functioning public health and health-care facilities, goods and services, as well as programmes … in sufficient quantity within the State party'.[4] The right to health protection is universally recognized in the WHO Constitution (1945) and in the WHO Framework Convention on Tobacco Control (FCTC) of May 2003.[5] In contrast to this explicit foundation of health law, author rights and investor rights on *human rights* and private property rights, WTO law generally focuses on *rights of states* (e.g. to protect public health) rather than on *rights of citizens*.[6]
- UN HRL recognizes the 'inalienable' and 'indivisible nature' of civil, political, economic, social and cultural human rights, including an entitlement of 'everybody … to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 UDHR). Yet, even thought the right to own private property is recognized in Article 17 UDHR and in a few other worldwide and regional human rights conventions, other economic rights of existential importance for providing human beings with scarce goods and services – like the 'freedom to choose a profession and right to engage in work' protected in Article 15 of the European Union Charter of Fundamental Rights (EUCFR), or the 'freedom to conduct a business (Article 16 EUCFR) – are not protected in UN human right conventions. UN HRL aims at protecting legal 'status equality' of human beings and 'sufficiency' of their access

[4] UN Doc. E/C.12/2000/4 of 11 August 2011, para. 12(a).

[5] UN Treaty Series Vol. 2302, p. 166.

[6] The TRIPS Agreement differs from other WTO Agreements in that its Article 1.3 determines as beneficiaries of IP protection 'nationals', which include persons, natural or legal, who have a close attachment to a WTO Member. The 4th recital of its Preamble recognizes IP rights as 'private rights'.

to existential goods and services without aiming at 'material equality'[7] or securing adequate production of goods and services satisfying the demand by peoples, which depends on economic law and institutions (like markets supplying consumers with goods and services). Trade, investment and intellectual property law promote such production of goods and services, and acknowledge sovereign rights of states to protect human rights; yet, with a few exceptions like the Lisbon Treaty establishing the EU (1999) incorporating the EUCFR as integral part of European constitutional law, most international economic law (IEL) treaties do not incorporate, or refer to, HRL.

- The customary rules of treaty interpretation require interpreting treaties in conformity with their text, context, object and purpose and 'in conformity with the principles of justice and international law', including also 'human rights and fundamental freedoms for all' (as recalled in the Preamble of the VCLT). Yet, interpretation of international rules tends to be strongly influenced by the 'institutional context', as recognized in Article 38 of the Statute of the International Court of Justice but neglected in the VCLT.[8] For instance, interpretations advocated by citizens, peoples and their democratic and judicial institutions are more inclined to interpret treaties in conformity with 'principles of justice' and human rights than intergovernmental WTO institutions controlled by diplomats interested in limiting their democratic and judicial accountability vis-à-vis citizens and their human rights. WTO adjudicating bodies do apply customary rules of treaty interpretation (including also the related principles of 'effective interpretation', 'harmonious systemic interpretation', '*in dubio mitius*', '*lex specialis*', 'evolutionary interpretation') and judicial interpretation methods (like 'cross-referencing' confirming the meaning of one provision by references to related treaty provisions, references to legal interpretations of other tribunals). Yet, as selection of WTO judges is controlled by diplomats and access to WTO dispute settlement panels and to the Appellate Body (AB) is limited to WTO members, private parties cannot invoke human rights in WTO dispute settlement practices (except in the rare cases of admission of *amicus curiae* briefs from non-governmental organizations); hence, 'systemic interpretation' in WTO dispute settlement practices tends to be 'biased' in favor of state actors, and WTO adjudicating bodies hardly ever invoke, or refer to human rights in their panel, appellate and arbitration reports.

Diplomats justify this state-centered, power-oriented abstention from references to HRL in worldwide IEL treaties by the economic principle of 'separation of policy instruments' (Nobel Prize economist J.Tinbergen): as most economic diplomats and trade, monetary or investment lawyers have no expertise in HRL, the numerous disagreements among governments on human rights should not impede 'efficient negotiations' of specialized IEL agreements. Yet, the customary international 'rules of recognition' recognize that the sources and general principles of international law must be construed 'in conformity with the principles of justice' as requiring not only recognition by states, but also 'by civilized nations' and citizens (e.g. as 'democratic principals' of governance agents), as determined, *inter alia*, also in 'judicial decisions and the teachings of the most qualified publicists of the various nations'[9]. If, as in UN and WTO institutions, access and voice are limited to state

[7] Cf. the criticism by S.Moyn, Not Enough. Human Rights in an Unequal World (Cambridge : Harvard University Press 2018).

[8] For instance, Article 38 :1(d) of the Statute requires the ICJ to apply 'judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.' The codification of the customary rules of treaty interpretations in Articles 31-33 of the VCLT avoids acknowledging, for example, the fact that 'judicial interpretations' influenced by the dispute settlement mandate of international courts may differ from 'political interpretations' by complainants (e.g. advocating 'dynamic interpretations' of indeterminate treaty rules in support of their complaints) and defendants (e.g. denying state consent to 'deductive' or 'dynamic interpretations' of international rules).

[9] Cf. Article 38.1 of the ICJ Statute, the Preamble of the VCLT, and Petersmann (n 1), at 128 ff (emphasizing that legal systems consist not only of rules, principles and institutions, but of human interactions based on rights of citizens and 'principal-agent relationships' which, in the 21st century, must be legally interpreted in conformity with the human rights

representatives, the legal *opinio juris sive necessitatis* expressed by diplomats (notably from authoritarian UN member states) often fails being representative of citizens, peoples and their inalienable human rights.

This absence of explicit references to HRL is also characteristic for the four WTO panel reports on the complaints by Cuba, the Dominican Republic, Honduras and Indonesia challenging certain measures applied by Australia concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging.[10] Even though Article 31.3 VCLT provides that any subsequent agreement or practice between the parties or any relevant rule of international law may be considered along with the context for the purpose of interpretation, human rights are nowhere mentioned in the more than 870 pages of the Panel findings, notwithstanding the Panel's confirmation that Australia's TPP measures were justified health protection measures in conformity with the WTO Agreements on TBT and TRIPS.[11] Whereas European courts examine governmental duties to protect intellectual property (e.g. pursuant to Article 17 EUCFR, Article 1 Protocol 1 to the European Convention on Human Rights) with due regard to other human rights[12], the absence of similar, explicit 'balancing' of competing human rights and property rights in specialized international trade and investment courts often provokes civil society concerns that specialized WTO or investment judges may unduly neglect 'principles of justice' and 'human rights and fundamental freedoms' by one-sidedly prioritizing economic interests of states and of powerful corporations avoiding references to human rights in specialized economic tribunals. The four Panel reports on *Australia-TPP* demonstrate that WTO dispute settlement panels may have good reasons to avoid references to HRL (e.g. if neither the complainants nor defendant referred to human rights); the judicial balancing of economic rights (e.g. market access rights and intellectual property rights protected by WTO law) and public health protection can remain consistent with HRL even if the judges focus on *governmental rights to protect public health* rather than on corresponding *human rights*.

II. Legitimacy problems of WTO adjudication

One of the most important developments in international law over the past decades continues to be the multiplication of international courts and of other (quasi)adjudicatory bodies based on worldwide, regional or bilateral treaties, especially if international courts interact with domestic courts aimed at multilevel protection of transnational rule of law for the benefit of citizens as inside the European common market. Yet, the 'legitimacy' of specialized trade, investment and intellectual property courts and arbitration tribunals – e.g. in the sense of justification of their legal and judicial authority and protection of their independence and personal integrity vis-à-vis rent-seeking interests groups – remains contested in democratic and civil societies, just as the 'politicization' of judicial appointments in national courts (e.g. politically motivated 'packing' of the US Supreme Court in the 1930s and more recently) is increasingly contested.

Respect for the separation between democratic, executive and judicial powers?

The increasing failures of UN/WTO governance institutions to protect transnational public goods demanded by citizens (like human rights, rule of law, sustainable development) reflect increasing

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obligations and related 'principles of justice' accepted by all UN member states and the corresponding constitutional rights of citizens).

[10] See note 3.

[11] Uruguay, in its 3rd party submission, noted that - in the area of human rights law - States commit themselves to serve as the primary guarantors of the rights to life and health; see para 7.2391 (note 3).

[12] Cf. C.Geiger (ed), Research Handbook on Human Rights and Intellectual Property (Cheltenham : Elgar, 2016), for instance chapters 4, 5 and 7.

disregard by governments for the limited mandates granted by citizens and democratic institutions to government executives as legal constraints on intergovernmental power politics.[13] Legitimacy challenges of courts depend on their diverse judicial mandates, subject matters, specific goals, design choices, legal sources, processes, audiences, institutional contexts and results.[14] *Normative legitimacy* is concerned with the 'right to rule' (e.g. to issue judgments, decisions or opinions) according to agreed standards; it explains why those addressed by an authority should comply with its mandates also in the absence of perceived self-interest or brute coercion. *Sociological legitimacy* derives from empirical analyses of perceptions or beliefs that an institution has a right to rule. Both the *internal legitimacy* (e.g. the perceptions of regime insiders like WTO diplomats) and *external legitimacy* (e.g. beliefs of outside constituencies like EU citizens, traders, producers, investors and consumers affected by trade and investment adjudication) may be based on *specific support* (e.g. of individual judgments) or *diffuse support* (e.g. individual's favorable dispositions toward a court generally and willingness to tolerate unpalatable decisions). The overall *legitimacy capital* may increase or decline over time depending on source-, process- and result-oriented factors. For instance, due to the US blockage of the nomination of WTO AB judges since 2017, the AB has been reduced to only three members (from China, India and the USA) since October 2018, in clear violation of the collective duties of WTO members to maintain the AB as defined in Article 17 of the WTO Dispute Settlement Understanding (DSU, e.g. as being 'composed of seven persons', with vacancies being 'filled as they arise', and being 'representative of membership in the WTO'). Due to the universal recognition of human rights, *source-based legitimacy* may also require democratic consent of affected citizens and other non-state stakeholders (like the EU as a WTO member). *Process-based legitimacy* raises questions concerning, *inter alia*, the relevant parties and their procedural rights. *Result-oriented legitimacy* concerns how well international courts perform their functions (e.g. to settle disputes, protect rule of law, clarify indeterminate rules and principles) and enable the disputing parties to solve their problems (e.g. through rule-compliance).

Standards for assessing the legitimacy of courts

Justice (e.g. in the sense of justifiable law-enforcement and treaty-interpretation), democracy (e.g. in the sense of pronouncing judgments in the name of 'We the people', promoting transparency, participation and democratic accountability), and effectiveness (e.g. in the sense of realizing the judicial goals) are often used as standards for assessing the normative legitimacy of courts. If law is defined not only in terms of rules, principles and institutions, but also as relationships between citizens (e.g. as 'constituent powers' and 'democratic principals' of governments with limited, delegated powers), then sociological legitimacy - for example, depending on how courts are embedded within polities, and how their judgments respond to prevailing public interest conceptions of compliance constituencies – may influence the normative 'compliance pull' of a court's decision and of social beliefs in justice. Calls for 'democratization' of international courts may, however, be better understood as suggestions for 'constitutionalizing' multilevel legal regulation and governance so as to make international courts justifiable for all affected persons (e.g. by transparency, accountability, participation and related principles of 'cosmopolitan constitutionalism' prioritizing protection of general 'public interests' and human rights over particular trading and investor interests):[15] 'Judges

[13] Cf. Petersmann (n 1) and idem, The 2018 American and Chinese Trade Wars Risk Undermining the World Trading System and Constitutional Democracies, in: EUI Working Paper Law 2018/17 (describing the increasing disregard of US and EU trade policies for 'democratic constitutionalism' and for the constitutional restraints prescribed in domestic constitutional systems, thereby undermining the democratic input legitimacy and output legitimacy of power-oriented trade protectionism).

[14] The following legitimacy criteria are explained in: N.Grosman/H.Grant Cohen/A.Follesdal/ G.Ulfstein (eds), Legitimacy and International Courts (Cambridge: CUP, 2018).

[15] Cf. A.Follesdal, Constitutionalization, Not Democratization. How to Assess the Legitimacy of Courts, in : Grosman et alii (n 14), at 323: 'Undemocratic ICs (= international courts) may thus be a valuable part of a legitimate GBS (= global basic

should be the servants of the law and justice, and their legitimacy arises from their effectiveness in fulfilling this function'[16], especially if 'democratic principles' (e.g. as prescribed in Articles 9-12 of the Lisbon Treaty on European Union) are integral parts of the applicable law. Legitimacy and effectiveness usually operate in a mutually reinforcing manner (e.g. states are more likely to implement judicial decisions if they perceive courts as legitimate); yet, they may also be mutually undermining, for instance if confidential investor-state arbitration adversely affects civil societies in unjustifiable ways.[17]

Different courts have different normative goals (e.g. prospective justice in WTO adjudication vs restorative justice through investment law remedies; legal bindingness of judicial rulings vs non-binding advisory opinions by some regional trade courts), design choices (e.g. regime-embedded or regime-independent tribunals), audiences (e.g. regime insiders, non-state actors), institutional environments (e.g. competing or overlapping jurisdictions) and modes of interacting with other courts (e.g. preliminary rulings or advisory opinions at the request of national courts). Hence, 'justified authority/legitimacy' of courts, their *legitimacy capital*, and their contribution to *social capital* (e.g. based on trust increasing the market value of economic rights) depend on the particular contexts of international courts (ICs); for instance, the more the legitimacy of the WTO dispute and appellate review system is being undermined by US power politics and by illegal 'tariff wars' (e.g. between China and the USA since 2018), the more the economic value and predictability of WTO rules and dispute settlement procedures decrease (e.g. the economic value of WTO market access rights, of non-discrimination and rule of law principles violated by discriminatory 'tariff wars' among China and the USA). Violations of WTO rules and dispute settlement procedures may require differentiating between *legitimacy of origin* of international courts, the *personal legitimacy* of judges, operational *legitimacy of judicial exercise*, *output legitimacy* of judgments and jurisprudence, the perception of their *sociological legitimacy* by compliance constituencies, and social reactions by governments, diplomatic communities or civil society (e.g. against perceived 'judicial biases' or 'judicial overreach'). For example, the illegal reduction of the number of WTO AB judges from seven to now only three may not devalue the *legitimacy of origin* of the AB (e.g. in terms of consent by states and their national parliaments) or the *personal legitimacy* of the remaining three judges; yet, the legal effectiveness and social legitimacy of the AB (e.g. in terms of the representativeness of the remaining three judges for all 164 WTO members, their decreasing personal capacity in dealing with appellate proceedings within the prescribed time-limits, civil society criticism of US power politics) are clearly weakened.

Legal 'inside legitimacy' of WTO dispute settlement reports

The WTO Agreement, and the more than 400 additional trade agreements notified to the WTO since its entry into force in 1995 or concluded before, have set up more (quasi)judicial dispute settlement mechanisms than in any other area of international law.[18] In most cases, the jurisdiction of the

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structure) if that structure as a whole is sufficiently controlled by democratic mechanisms to be legitimate, i.e. it is justifiable toward all affected parties as equals'.

[16] Cf. M.N.S.Sellers, Democracy, Justice and the Legitimacy of International Courts, in : Grosman et alii (n 14), at 338ff.

[17] Cf. Y.Shany, Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions, in : Grosman et alii (n 14), at 354ff.

[18] For comparative studies of 11 international and domestic trade courts - i.e. the WTO adjudicating bodies; the EU Court of Justice (CJEU); the EFTA Court; the US Court of International Trade; the Federal Court of Canada; the MERCOSUR courts; the Andean Court of Justice; the Economic Court of the Commonwealth of Independent States; the Common Market for Eastern and Southern Africa Court of Justice; the West African Economic and Monetary Union Court of Justice; and the ASEAN Trade Dispute Settlement Mechanism – see: R.Howse/H.Ruiz-Fabri/G.Ulfstein/M.Q.Zang (eds), The Legitimacy of International Trade Courts and Tribunals (Cambridge: CUP, 2018). Each of these case studies addresses the following seven research questions: (1) selection and composition of the adjudicators; (2) procedural rules; (3) fact-finding; (4) interpretative approaches; (5) forum shopping; (6) implementation and interaction with national

international courts goes beyond trade; for instance, by protecting sovereign rights to protect non-economic public goods like public morals, public order, public health, national security and 'sustainable development', their jurisprudence often affects not only economic actors, but also government policies (e.g. their transparency, non-discriminatory nature, efficiency, rule of law) and citizens benefitting from, or adversely affected by such policies (like the millions of citizens dying every year from consumption of toxic tobacco products). The normative and sociological, legitimate authority of trade, investment and intellectual property courts needs to be assessed beyond the consent of the sovereign states to their delegation of judicial powers; it must analyze, *inter alia*, how these delegated powers were exercised, subject to which procedures, legal interpretation and fact-finding methods, their respective outcomes (e.g. in terms of judgments of quasi-judicial dispute settlement mechanisms), their social perception by insiders (e.g. the internal legitimacy as perceived by diplomats in economic organizations) and by citizens affected by the jurisprudence more generally (e.g. due to its impact on domestic legal systems and policies). In view of the accusations against international trade and investment courts that they maintain distributive injustice, it is not clear whether other institutions (like the International Court of Justice recognized as optional jurisdiction in some WIPO conventions) would be better situated than trade courts, given the state-orientated nature of the international trading system and the judicial powers to interpret the non-trade exemption clauses broadly (e.g. as it is done in WTO jurisprudence) and to use evolutionary interpretation, case law, and systemic interpretation (e.g. taking into account the human rights obligations and related 'constitutional restraints' of states) in judicial interpretations of trade rules: 'formal treaty reforms may not be what global distributive justice requires, but rather changes in interpretive practices of the WTO system'.[19] For instance, the assault by the US Trump administration on the WTO legal and dispute settlement system is part of a more general US disdain of legal accountability in multilateral international courts like the International Criminal Court (ICC) or the International Tribunal for the Law of the Sea (ITLOS), whose jurisdiction the US continues to reject. The legal principle of 'sovereign equality of states' makes 'legal fragmentation' inevitable: different states and governments have different priorities as to which trade, investment, intellectual property, health and human rights treaties each of the 193 UN member states is willing to ratify, subject to which judicial remedies, and how it implements treaty obligations inside diverse national legal and political systems (e.g. in common law countries like Australia leaving negotiation of international agreements to the executive – and domestic implementation to the legislative – branch of government).

Until recently, WTO diplomats tended to assess the *inside legitimacy* of WTO panel, AB and arbitration reports mainly from procedural perspectives of WTO dispute settlement such as selection of judges, participation in WTO dispute settlement procedures, their internal and external transparency and duration, fact-findings, legal standards of review, interpretative approaches, interpretation techniques (like cross-references to AB jurisprudence), distortions of 'judicial administration of justice' (e.g. through 'forum shopping' and 'rules shopping'), legal remedies, adoption of dispute settlement reports by the WTO Dispute Settlement Body (DSB), implementation of dispute settlement findings, and cooperation with national courts.[20] It is only more recently that the US Trump administration seems to reject the AB jurisprudence more generally in view of its criticism of specific

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courts; and (7) tribunal-specific legitimacy concerns resulting, e.g., from the embeddedness of each court into a particular legal and political regime. Due to the focus on (quasi)judicial models with automatic rights of referral of a dispute to permanent courts or to quasi-judicial procedures with an appeals body functioning similar to a court, the purely ad hoc NAFTA dispute settlement mechanisms are not explored in this book (cf. p.10).

[19] Cf. A.Follesdal, Toward a More Just WTO: Which Justice, Whose Interpretation? in : Howse et alii (n 18), 479, at 499. Follesdal also recommends that, by making 'judicial comity' among courts conditional on respect for human and constitutional rights of citizens (e.g. following the successful precedent of the 'solange jurisprudence' of constitutional and regional courts in Europe), civil society pressures may further help in bringing the 'global basic structure' underlying international and domestic legal systems more into conformity with the human and constitutional rights of citizens.

[20] On these various assessment criteria see : R.Malacrida/G.Marceau, The WTO Adjudicating Bodies, in : Howse et alii (n 18), 20-69.

AB dispute settlement findings (e.g. regarding judicial limitations of US trade remedy measures), of AB interpretations of judicial powers under the DSU (notably Article 17), as well as in view of US opposition to the 'judicialization' of the WTO dispute settlement system and the increasing ineffectiveness of the consensus-based 'negotiation function' and political rule-making function of the WTO. Even though some WTO Members (like the USA) have not ratified the FCTC in view of the strong influence of tobacco lobbies on domestic policy-making, the adoption by the DSB – at its meeting of 27 August 2018 – of two of the four panel reports (concerning the complaints by Cuba and Indonesia) suggests that WTO members accepted these reports as legitimate and convincing dispute settlements. Honduras' appeal of the Panel's findings on 19 July 2018 is limited to the findings on TBT Article 2.2 and TRIPS Articles 20 and 16.1; in addition, Honduras claims that the Panel failed to conduct an 'objective examination' of the evidence on TPP measures' contribution to the objective of reducing the use of tobacco products in violation of its obligations under Article 11 DSU. Furthermore, Honduras claims that the Panel erred in law in its analysis by finding that paragraph 5 of the Doha Declaration on the TRIPS Agreement and Public Health constitutes a subsequent agreement under Article 31.3(a) of the VCLT. On 23 August 2018, the Dominican Republic appealed the Panel's findings concerning TBT Article 2:2 and TRIPS Article 20; the Dominican Republic further incorporated the claims of appeal by Honduras. The Panel's findings on Articles 6*quinquies* and Article 10*bis* of the Paris Convention for the Protection of Industrial Property, on TRIPS Articles 15.4, 16.3, 22.2(b) and 24.3, and GATT Article IX:4 were not appealed. Legal assessments of the four panel reports on *Australia-TPP* and of their confirmation of sovereign rights to protect public health have to take into account also the exceptional circumstances of these tobacco disputes, such as

- the exceptional length of the four panel reports (more than 870 pages of panel findings plus several hundred pages of Annexes);
- the third party interventions by 39 WTO members (without counting the 28 member states represented by the EU) in the panel proceedings;
- the more than 40 *amicus curiae* submissions;
- the joint communications to the Panel by the WHO and FCTC Secretariats providing information on the FCTC;
- the additional factual information provided by the WIPO Secretariat on provisions of WIPO conventions incorporated into the TRIPS Agreement;
- the suspension, at the request of Ukraine in May 2015, of its complaint; and
- the long duration of the panel proceeding - since the requests by Ukraine, Honduras and the Dominican Republic for establishing the panel in 2012 - up to the circulation of all final reports in the three official WTO languages in June 2018.

Challenges to the 'outside legitimacy' of WTO adjudication

Empirical assessments of the *outside legitimacy* of these panel reports (e.g. as evaluated by civil societies) are too early at this point of time.[21] The questions of 'legitimate for whom?' and 'legitimate in terms of which principles of justice?' remain crucial: As most WTO judges are chosen by WTO diplomats on the ground of their practical experiences as trade diplomats (e.g. the chairman of the Panel A.Erwin as a former trade minister) and politicians (e.g. the second panel member Ms Billie Miller as an expert in health policies) rather than legal experts (Prof. F.Dessemontet as third panelist as an intellectual property expert), the absence of professional legal judges and the risk of potential

[21] For an 'initial review' by the WHO FCTC and the McCabe Centre for Law and Cancer see: http://untobaccocontrol.org/kh/legal-challenges/initial-overview-wto-panel-decision-australia-plain-packaging/ (describing the Panel finding as a 'resounding victory' for Australia following Australia's previous victories in the constitutional challenge of its TPP legislation in Australia's courts and in the investment law challenge in investor-state arbitration).

'trade biases' are criticized by civil society members. The 2018 American and Chinese 'tariff wars' in violation of WTO law (e.g. GATT Articles I and II) and of the DSU (e.g. Article 21)[22], like the collective violation by all WTO members of their legal duty to maintain the AB as legally prescribed in Article 17 DSU (i.e. as being 'composed of seven persons', with vacancies being 'filled as they arise'), reveal power-oriented conceptions of WTO dispute settlement procedures by two of the major WTO trading countries. The *de facto* reduction of the number of serving WTO AB members to three (as of October 2018) - and the more than 10 pending AB proceedings in October 2018 - entail that the AB may never be able to complete AB reports on the appeals from the Dominican Republic and Honduras; without such appellate reports, also the two panel reports on the complaints by these two WTO members risk never being adopted (cf. Article 16:4 DSU). Even though the GATT/WTO trading system has helped billions of people to overcome poverty, the return to power politics among WTO members in manifest violation of WTO law suggests that civil society will rightly remain critical of WTO rules and WTO adjudication, for instance because neither WTO law nor domestic laws ensure respect for transnational rule of law and for the limited, democratic mandates given to WTO diplomats for implementing WTO rules. The 2018 American and Chinese 'tariff wars' confirm that, as emphasized long since by Nobel Prize economists (like F.A.Hayek, D.Kahneman, P.Romer)[23], global economic governance risks being based on a 'pretense of knowledge' guided by intuitive 'fast thinking' rather than by more reasonable 'slow thinking' respecting the rule of law and limited mandates given by parliaments to government executives. Protectionist disregard by government executives (e.g. in the USA) for their WTO legal obligations favors powerful industry actors (like US steel lobbies) prioritizing interest group politics over respect for GATT/WTO law as approved by national parliaments.[24] If citizens and democratic institutions allow governments to abuse their policy discretion (e.g. their 'lending privilege', 'resource privilege' and 'regulatory privilege') for enriching the ruling elites through abusive transactions with foreigners[25], also related trade, investment and dispute settlement rules risk being abused, as illustrated by the illegal US blockage of the appointment of WTO AB judges, or by the tobacco industries' systemic legal and judicial challenges of TPP measures adopted in WTO member states so as to delay the entry into force of related public health regulations.

III. Consistency of Australia's tobacco plain packaging laws and policies with the WTO Agreement on Technical Barriers to Trade

Australia's TPP Act and the TMA Act were passed by the Parliament in November 2011; the TPP regulations were adopted in December 2011. Tobacco products manufactured or packaged in Australia for domestic consumption were required to comply with the TPP measures as from 1 October 2012.

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[22] Cf. E.U.Petersmann, The 2018 American and Chinese Trade Wars Risk Undermining the World Trading System and Constitutional Democracies, in: EUI Working Paper Law 2018/17.

[23] See, e.g., F.A.Hayek, Knowledge, Evolution and Society (London: Adam Smith Institute, 1983; D.Kahneman, Thinking, Fast and Slow (London: Penguin, 2012); P.Romer, The Origins of Endogenous Growth, in: Journal of Economic Perspectives 8 (1994) 3-22.

[24] US steel companies and their powerful lobbies remain the main users of US trade remedy laws. Already prior and during the Uruguay Round of GATT negotiations, they successfully lobbied the US government to negotiate 'voluntary export restraints', veto the adoption of GATT panel reports limiting abuses of antidumping laws, and politically interfere in GATT dispute settlement practices (e.g. by forcing GATT Director-General A.Dunkel to assign jurisdiction inside the GATT Secretariat for servicing GATT dispute settlement procedures involving trade remedy laws to a newly created 'Rules Division' staffed with US experts specialized in the administration of US antidumping laws). President Trump's 'aggressive unilateralism' is carried out by the same lawyers (like USTR R.Lighthizer) who worked for the US steel industries during the 1980s advocating similar, protectionist trade policies and power-oriented dispute settlement methods.

[25] E.g. by discriminatory import tariffs redistributing domestic income for the benefit of protected industries, or by abusing foreign loans and concession contracts with foreign investors for enriching ruling elites.

As of 1 December 2012, all tobacco products sold, offered for sale, or otherwise supplied in Australia were required to comply with the TPP measures, which regulate various elements affecting the appearance of the retail packaging of tobacco products and tobacco products themselves[26]; they operate in conjunction with other legislative requirements not challenged in these disputes (like graphic health warnings). As of 1 December 2012, textual and graphic warnings must cover 75% of the front surface and 90% of the back surface of cigarette packs and cartons. The TPP measures regulate the appearance of trademarks on tobacco retail packaging and products in various ways:

- in respect of retail packaging of tobacco products, they permit the use of word marks that denote the brand, business or company name, or the name of the product variant, provided that they appear in the form prescribed by the TPP Regulations; they prohibit the use of stylized word marks, composite marks and figurative marks;
- in respect of tobacco products, the TPP measures prohibit the use of all trademarks on cigarettes;
- in respect of cigar bands, they permit the use of trademarks denoting the brand, business or company name, or the name of the product variant, as well as the country of origin, so long as they appear in the form prescribed by the TPP Regulations.

Australia submitted, *inter alia*, that tobacco use is the world's leading cause of preventable morbidity and mortality; it is classified as a global epidemic under the FCTC. Tobacco use is responsible for the deaths of nearly 6,000,000 people annually, including 600,000 non-smokers exposed to second-hand smoke. Nicotine causes addiction, critical in maintaining smoking. Tobacco is a unique, highly addictive, and deadly product, and the only legal consumer product that kills half of its long-term users when used exactly as intended by the manufacturer. The burden of death and diseases from non-communicable diseases is most heavily concentrated in the world's poorest countries. In Australia, the annual mortality ranged from 15,000 to 20,000 people; and two in three Australian smokers will die prematurely from smoking-related diseases. Section 3 of Australia's TPP Act, entitled 'Objects of this Act', provides:

> (1) The objects of [the TPP] Act are:
>
> (a) to *improve public health* by:
>
> (i) discouraging people from taking up smoking, or using tobacco products; and
>
> (ii) encouraging people to give up smoking, and to stop using tobacco products; and
>
> (iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and
>
> (iv) reducing people's exposure to smoke from tobacco products; and
>
> (b) to *give effect to certain obligations* that Australia has as a party to the Convention on Tobacco Control.
>
> (2) It is the intention of the Parliament *to contribute to achieving the objects* in subsection (1) by regulating the retail packaging and appearance of tobacco products in order to:
>
> (a) *reduce the appeal* of tobacco products to consumers; and
>
> (b) *increase the effectiveness* of health warnings on the retail packaging of tobacco products; and
>
> (c) *reduce the ability* of the retail packaging of tobacco products *to mislead* consumers about the harmful effects of smoking or using tobacco products.'

[26] Inter alia, all outer surfaces of retail packaging are required to be in a matt finish in a drab dark brown colour, and imagery must be removed.

One object of the TPP Act is to give effect to certain obligations that Australia has as a party to the FCTC, which was adopted in 2003 and entered into force in 2005.[27] The FCTC's objective, as set out in its Article 3, is to 'protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke'. Article 5 on 'General Obligations' provides that '(e)ach Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the Protocols to which it is a party. The FCTC Conference of Parties adopted in 2008, by consensus, two separate Guidelines: one for the implementation of Article 11 and another for the implementation of Article 13. The Article 11 FCTC Guidelines, entitled '*Packaging and labelling of tobacco products*', provide:

> Parties should consider adopting measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging)…

The recommendation under the Article 13 FCTC Guidelines, entitled '*Tobacco advertising, promotion and sponsorship*, provides:

> Packaging and product design are important elements of advertising and promotion. Parties should consider adopting plain packaging requirements to eliminate the effects of advertising or promotion on packaging.

The Panel first considered the evidence concerning the combined operation of both the trademark and format requirements in the context of the Art 2.2 TBT claim. The relevant text of Article 2.2 of the TBT Agreement provides:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

The panel findings in a nutshell

The complaints focused on the claim that the TPP measures were 'unnecessary obstacles to international trade' in violation of Article 2.2 of the TBT Agreement and 'unjustifiably encumbered' the use of trademarks in violation of Article 20 TRIPS Agreement. The complainants also claimed that TPP restrictions on the use of figurative elements of trademarks, geographical indications and marks of origin were contrary to various other TRIPS provisions[28] and to GATT Article IX.4. The Panel found that the complainants had not demonstrated that the TPP measures were inconsistent with these provisions. The complainants did not dispute the harmful consequences of tobacco consumption; they also acknowledged the importance of effective tobacco control measures to reduce the public health burden resulting from tobacco use. Their key argument was that the TPP measures were not capable of contributing to their public health objective. The Panel recalled that, in accordance with the applicable rules on burden of proof, the burden of establishing that the TPP measures are inconsistent with Article 2.2 rests on the complainants. The complainants used essentially the same evidence to argue

[27] The FCTC (see n 5) has 181 parties, of which 150 are also WTO Members. Australia and Honduras have ratified the FCTC; Cuba has signed, and the Dominican Republic and Indonesia are not signatories.

[28] Namely TRIPS Articles 15.4, 16.1, 16.3, 22.2(b) and 24.3, and Articles 6quinquies, 10bis(1), 10bis(3)(1) and 10bis(3)(3) of the Paris Agreement. Some of these claims are briefly discussed in section IV below.

that the TPP measures were 'unnecessary' in terms of Article 2.2 TBT and 'unjustifiable' in terms of Article 20 TRIPS. The Panel analysed this evidence first in the context of its examination of Article 2.2 TBT, and then referred back to this analysis in the context of its later examination of Article 20 TRIPS.

Having examined extensive evidence provided by the parties, the Panel concluded that the TPP measures, as applied in combination with other tobacco-control measures maintained by Australia, *are capable* of contributing, and *do in fact contribute*, to their objective of improving public health by reducing the use of, and exposure to, tobacco products. Having considered the 'trade-restrictiveness' of the TPP measures and their degree of 'encumbrance' of the use of trademarks, the underlying health concerns, and the contribution of the TPP measures to their health objectives, the Panel found that the complainants had not demonstrated that the TPP measures were inconsistent with WTO law.

Approach and key-findings of the WTO panel regarding Article 2.2 TBT Agreement

The Panel noted that Article 2.2 applies to measures that are 'technical regulations' within the meaning of the TBT Agreement. Thus, the first step in the Panel's analysis was to determine whether the TPP measures constitute a technical regulation. It noted Australia's argument in this regard that the TBT Agreement addresses technical regulations and not the exploitation of intellectual property. The Panel considered Australia's argument that the TBT Agreement does not, on its face, appear to be concerned with the exploitation of intellectual property. The Panel examined whether this constituted an impediment to the application of the TBT Agreement to the 'trademark requirements' of the TPP measures because the latter would fall within the purview of the TRIPS Agreement. The Panel found that

- it is well established that the WTO Agreement is a 'Single Undertaking' such that WTO obligations are generally cumulative and Members must comply with all of them simultaneously. Pointing to Article II.2 of the WTO Agreement and Appellate Body precedent, the Panel found it clear that the fact that the covered agreements may overlap in scope does not imply that the scope of application of each agreement should be diminished or otherwise modified. Rather, in principle, the TBT and TRIPS Agreements may apply concurrently and cumulatively to different aspects of the same measures; the Panel must assume that Article 2.2 TBT and Article 20 TRIPS apply 'cumulatively and harmoniously';[29]
- the TTP measures constitute a 'technical regulation' laying down characteristics for the appearance and packaging of tobacco products, including requirements relating to the manner in which trademarks may be displayed on tobacco products and packaging, and mandate compliance with those characteristics;[30]
- the TPP measures pursue a 'legitimate objective' within the meaning of Article 2.2 TBT, i.e. to improve public health by reducing the use of, and exposure to, tobacco products, as confirmed also by the references to certain FCTC obligations;[31]
- Australia had not demonstrated that the Articles 11 and 13 FCTC Guidelines constitute a 'relevant international standard' that can be 'rebuttably presumed not to create an unnecessary obstacle to international trade' in the sense of Article 2.5 TBT.[32]

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[29] WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (n 3), paras. 7.88-106.

[30] Idem (n 3), paras. 7.117ff; 7.157-159; 7.171-183. Annex 1.1 of the TBT Agreement defines a 'technical regulation' as a: 'Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method'.

[31] Idem, paras. 7.213-253.

[32] Idem, paras. 7.398ff.

As the burden of establishing that the TPP measures were inconsistent with Article 2.2 TBT rested with the complainants, the Panel proceeded in its assessment of whether the TPP measures were 'more trade restrictive than necessary to fulfill a legitimate objective' to the 'relational analysis' of (1) the degree to which measures contribute to a legitimate objective; (2) their trade-restrictiveness; and (3) the nature and gravity of the risks that non-fulfilment of the objective would create. This 'relational analysis' was followed by a 'comparative analysis' of the proposal by some complainants of alternative measures that allegedly were reasonably available to Australia and would make an equivalent contribution to the health policy objective while being less trade restrictive. In addressing the three factors forming part of the 'relational analysis', the Panel found that

- the TPP measures are apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to, tobacco products;[33] this Panel finding was based on a detailed consideration of the evidence on the design, structure and operation of the TPP measures, of their actual application, and on the Panel's overall assessment based on the entirety of the relevant evidence taken together;
- the TPP measures are trade-restrictive, insofar as, by reducing the use of tobacco products, they reduce the volume of imported tobacco products on the Australian market, and thereby have a 'limiting effect' on trade;[34]
- the nature of the risks non-fulfilment of the objective would create is that public health would not be improved as the use of, and exposure to, tobacco products would not be reduced, and the public health consequences of not fulfilling this objective are particularly grave, as recognized also in the FCTC: 'few interests are more "vital" and "important" than protecting human beings from health risks'; and it is undisputed that 'there is no safe level of tobacco use or safe level of tobacco exposure to second hand or environmental tobacco use';[35]
- the complainants did not demonstrate that the four proposed alternative measures, individually or cumulatively, would be a less trade-restrictive alternative measure, reasonably available to Australia, that would make an equivalent contribution to its objective (e.g. to reduce the appeal of tobacco products and the ability of tobacco packaging to mislead consumers, without affecting the effectiveness of graphic health warnings).[36]

In its overall conclusions regarding Article 2.2 TBT, the Panel recalled its findings that

- the objective of the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products.
- the TPP measures are apt to, and do, make a meaningful contribution to this objective;
- the TPP measures are trade-restrictive, to the extent that they result in a reduction in the total volume of imports; and
- the nature of the risks that would arise from the non-fulfilment of Australia's objective is that public health would not be improved, as the use of, or exposure to, tobacco products, would not be reduced, and the consequences of such use, and exposure, are particularly grave.

None of the alternatives proposed by the complainants would contribute to the objective to an equivalent degree, taking into account the risks non-fulfilment of the objective would create and the actual contribution made by the challenged measures. These conclusions were made within the context of the comprehensive strategy designed and implemented by Australia to address tobacco control. They justified the Panel's legal finding that the complainants had not demonstrated that the

[33] Idem, paras. 7.1024ff.

[34] Idem, paras. 7.1160ff, 7.1255.

[35] Idem, paras. 7.1310-1323.

[36] Idem, paras. 7.1717-1732.

TPP measures were more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of TBT Art 2.2.

IV. Consistency of Australia's tobacco plain packaging laws and policies with the WTO Agreement on Trade-Related Intellectual Property Rights

After having found no violation of Article 2.2 TBT, the Panel examined the claims relating to the protection of trademarks, namely protectable subject matter (Paris Convention Article 6*quinquies*, TRIPS Article 15.4), rights conferred (TRIPS Article 16.1 and 16.3) and other requirements (TRIPS Article 20). In its examination of the claims under Article 20 TRIPS, it referred back to the relevant parts of its analysis of the evidence under Article 2.2 TBT. It then examined the claims relating to unfair competition (paras 1, 3(1) and 3(3) of Article 10*bis* of the Paris Convention) and of geographical indications (TRIPS Articles 22:2(b) and 24:3). Finally, it examined and rejected the claim under GATT Art IX.4. This section is limited to a brief summary of the Panel findings relating to the TRIPS Agreement.

Article 6quinquies of the Paris Convention - protection of trademarks 'as is'?

TRIPS Agreement Article 2.1 requires that Members comply with Articles 1-12 and 19 of the 1967 Paris Convention for the Protection of Industrial Property. In turn, Paris Convention Article 6*quinquies* A(1) states:

> Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article...

Honduras and Cuba claimed that the TPP measures are inconsistent with TRIPS Agreement Article 2.1 in conjunction with Paris Convention Article 6*quinquies* A(1) because 'a trademark duly registered in the country of origin outside Australia is not protected "as is", i.e. in its original format.'[37] Honduras asserted that the 'protection' obligation necessarily involved ensuring that trademark owners can use their trademarks. Australia responded that the term 'protected' refers to the protection that may or may not flow as a result of a trademark being registered in its original form. The Panel agreed that the text of Article 6*quinquies* A(1) suggests that the term 'protected' refers to the protection that flows from the registration of a sign as a trademark in that jurisdiction where the registration is obtained pursuant to the requirements of Article 6*quinquies* A(1). It noted that the term 'protected', in itself, does not provide any guidance as to what the protection flowing from the registration under the domestic law should consist of. The Panel did not find any support in the language for a substantive minimum standard of rights that WTO Members would be obliged to make available to the owner of a trademark that has been registered pursuant to the requirements of Article 6*quinquies* A(1); this interpretation was supported by the immediate context of other paragraphs in Article 6*quinquies*, as well as the object and purpose of Paris Convention Articles 6 and 6*quinquies* A(1), which is to provide, and thus secure, two ways of obtaining registration of a trademark in a country of the Paris Union. The Panel concluded that Honduras and Cuba had not demonstrated that, as a result of the TPP measures,

- Australia does not accept for filing and protect 'as is' every trademark duly registered in the country of origin under Article 6*quinquies*;
- Australia would not provide a duly registered trademark the protection that flows from the registration under its domestic law;[38] and
- that the TPP measures were inconsistent with Australia's obligations under TRIPS Agreement Article 2.1 in conjunction with Paris Convention Article 6*quinquies*.[39]

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[37] Idem, paras. 7.1734-1736.

[38] Idem, paras. 7.1763-1774.

Article 15.4 TRIPS Agreement - nature of goods as obstacle to registration of trademarks?

According to Article 15.4 of the TRIPS Agreement, '(t)he nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.' All complainants claimed that the TPP measures violate Article 15.4 because they constitute an obstacle to the registration of trademarks based on the nature of the goods to which they would be applied. Based on the parties' arguments, the Panel understood the question before it to be whether the TPP measures amount to an obstacle to the registration of a trademark based on the nature of the goods or services to which the trademark is to be applied, within the meaning of Article 15.4, in that they (a) prevent registration of signs, which are not inherently distinctive and have not yet acquired distinctiveness through use, but which are capable of acquiring distinctiveness through use; or (b) prevent new non-inherently distinctive non-word signs from acquiring distinctiveness through use and thereby becoming eligible for registration in relation to tobacco products; and (c) reduce the protection flowing from registration for tobacco-related trademarks because of the nature of the product.[40]

The Panel began its analysis by interpreting Article 15.4. It noted that the term 'trademark' in Article 15.4 refers to signs or combinations of signs that meet the distinctiveness requirement set out in Article 15.1, first sentence, which Members are therefore under an obligation to consider as capable of constituting trademarks. It recalled the general rule that Members may determine the general conditions for filing and registration of trademarks subject to certain provisions, including Article 15 TRIPS. The Panel considered the phrase 'obstacle to the registration of the trademark' to refer to 'an impediment or hindrance to the registration of a sign, or combination of signs, that is otherwise capable of constituting a trademark, and thus eligible for registration, within the meaning of Article 15.1.' On this basis, the Panel concluded that the obligation in Article 15.4 'should be understood to mean that signs or combinations of signs that are otherwise eligible for registration as a trademark may not be denied such registration on the basis of the 'nature of the goods or services' to which the trademark is applied.[41]

The Panel then applied its interpretation to the TPP measures, recalling the complainants' claims that they (1) 'prevent registration of signs' which are not inherently distinctive and have not yet acquired distinctiveness through use, but which are 'capable of acquiring distinctiveness through use'; (2) prevent new non-inherently distinctive non-word signs from acquiring distinctiveness through use and thereby becoming eligible for registration in relation to tobacco products; and (3) reduce the protection flowing from registration for tobacco-related trademarks because of the nature of the product. As to the first claim, the Panel recalled its interpretation of Article 15.1, specifically that the definition contained in the first sentence refers to 'signs that, at that particular moment, are capable of distinguishing goods and services'; the Panel concluded that the obligation for Members in Article 15.1, first sentence 'does not require Member to make eligible for registration as trademarks signs that are not inherently distinctive and that have not yet acquired distinctiveness through use.' As a consequence, the term 'trademark' as used in Article 15.4 does not encompass signs that do not meet the 'distinctiveness' requirement in Article 15: 'the TPP measures, in operating to prevent the registration of certain non-inherently distinctive signs that have not yet acquired distinctiveness through use on tobacco products, do not violate the obligation in Article 15.4';[42] it is 'not within the object and purpose of Article 15.4 to regulate the use of signs that do not already have the capability of distinguishing goods or services in the sense of Article 15.1.'[43] The overall conclusion of the Panel

(Contd.)

[39] Idem, para. 7.1775.

[40] Idem, para. 7.1819.

[41] Idem, paras. 7.1821-1857.

[42] Idem, paras. 7.1859-1874.

[43] Therefore, 'interpreting Article 15.4 as obliging Members to permit use of non-distinctive signs to allow them to acquire distinctiveness irrespective of the products or services to which they are to be applied is not compatible with the language of Article 15.4, nor with its object and purpose, as read in the context of Article 15.1' (paras. 7.1875-1897).

regarding Article 15.4 was that the complainants had not demonstrated that the TPP measures were inconsistent with Article 15.4 of the TRIPS Agreement.[44]

Article 16.1 of the TRIPS Agreement - rights to prevent unauthorized use

According to Article 16.1, '(t)he owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion.' The complainants claimed that the TPP measures violate this provision because the prohibition on the use of certain tobacco-related trademarks reduces the distinctiveness of these trademarks, thus reducing the ability to demonstrate 'a likelihood of confusion' with other marks, and impacting the ability of the right owner to exercise its right to prevent unauthorized use: 'a trademark owner's ability to demonstrate confusion in the market, and thus infringement, correlates with the degree of distinctiveness, or strength of the trademark which … is intrinsically linked to the trademark owner's ability to use it'; 'the TPP measures' prohibition of certain uses of certain tobacco-related trademarks results in a reduction in the trademarks' distinctiveness, eroding the trademark owners' ability to prevent third parties from using similar or identical marks on similar goods in a manner that creates a "likelihood of confusion."'[45]

The Panel first considered the 'scope' of Article 16.1. The Panel agreed with the parties that Article 16.1 does not establish a trademark owner's right to use its registered trademark; it only provides for a registered trademark owner's right to prevent certain activities by unauthorized third parties under the conditions set out in the first sentence of Article 16.1. The Panel considered that 'to show that the TPP measures violate Australia's obligation under Article 16.1, the complainants would have to demonstrate that, under Australia's domestic law, the trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision.'[46] The Panel understood the complainants' argument to rest on an assumption that 'trademark infringement with respect to tobacco-related trademarks affected by the TPP measures will occur less frequently and with respect to fewer signs than before, and that this constitutes a reduction of the trademark owner's right …, because it reduces the range of similar signs that the trademark owner can prevent unauthorized third parties from using in the course of trade.'[47] The Panel was 'not persuaded that causing the instances in which a "likelihood of confusion" may arise to be reduced constitutes a violation of the trademark owner's right to prevent such infringements by third parties, as mandated by the text of Article 16.1, first sentence.'[48] The Panel found no indication in the text of Article 16.1, first sentence, of an obligation on Members to maintain distinctiveness of registered trademarks, or to refrain from regulatory conduct that might negatively affect the distinctiveness of such trademarks through use. Hence, the Panel did not agree that Australia is evading its obligation under Article 16.1, or that, as claimed by Cuba, Article 16.1 obliges Members to provide a minimum opportunity to use trademarks: 'the possibility of a reduced occurrence of a "likelihood of confusion" in the market does not, in itself, constitute a violation of Article 16.1, because Members' compliance with the obligation to provide the right to prevent trademark infringements under Article 16.1 is independent of whether such infringements actually occur in the market.'[49] The Panel concluded that, to demonstrate a violation of Article 16.1,

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[44] Idem, para. 7.1913.

[45] Idem, paras. 7.1915-1916, 7.1966.

[46] Idem, paras. 7.1970-1980.

[47] Idem, paras. 7.1993-1994.

[48] Idem, paras. 7.1996-2001.

[49] Idem, para. 7.2031 (Article 16.1 "does not require Members to refrain from regulatory measures that may affect the ability to maintain distinctiveness of individual trademarks or to provide a 'minimum opportunity' to use a trademark to protect such distinctiveness."

'the complainants would have to demonstrate that, under Australian national law, the trademark owner does not have the right to prevent third-party activities that meet the conditions set out in that provision'; the complainants did not demonstrate that the TPP measures are inconsistent with TRIPS Agreement Article 16.1.[50]

Article 16.3 of the TRIPS Agreement - well-known trademark status

Article 16.3 of the TRIPS Agreement provides that Article 6*bis* of the Paris Convention applies, *mutatis mutandis*, to 'goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.' Paris Convention Article 6*bis* states, in relevant part:

> (1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

Cuba and Indonesia claimed that the TPP measures violate Article 16.3 'because they prevent existing well-known tobacco trademarks from maintaining their well-known trademark status and because they prevent other registered tobacco trademarks from attaining well-known trademark status through use.' Australia responded that 'it is not obligated under Article 16.3 to grant a right to a trademark owner to use its trademark so that it may maintain or acquire well-known status.'[51] The Panel agreed with the parties that Article 16.3 'does not establish a positive right to use a well-known trademark, and only provides for an undertaking by Members to refuse or cancel a registration, and to prohibit the use, of a trademark conflicting with a registered well-known trademark that is used on non-similar goods and services where (a) use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark, and (b) the interests of the owner of the registered trademark are likely to be damaged by such use.'[52]

In considering whether the TPP measures are inconsistent with Article 16.3, the Panel recalled that, similar to Article 16.1, Members comply with the obligation under Article 16.3 by providing in their national legislation for the possibility of refusing or cancelling the registration, and of prohibiting the use, of a trademark where these conditions are fulfilled. It considered that, contrary to the complainants' argument, nothing in the text of Articles 16.3 or 6*bis* suggest an obligation by Members to permit or maintain the occurrence of the factual circumstances described in these provisions; 'the possibility of a reduced knowledge of previously well-known trademarks in the market does not, in itself, constitute a violation of Article 16.3, because Members' compliance with the obligation … is independent of whether well-known trademarks actually exist in the market.'[53] The Panel concluded that 'even assuming that the operation of the TPP measures results in situations in which certain registered trademarks may be less likely to acquire well-known trademark status, this would not

[50] Idem, paras. 7.2041-2051.

[51] Idem, paras. 7.2052-2055.

[52] Idem, paras. 7.2093-2099.

[53] Idem, paras. 7.2101-2123.

constitute a violation by Australia of Article 16.3'; Cuba and Indonesia had not demonstrated that the TPP measures were inconsistent with Article 16.3.[54]

Article 20 TRIPS Agreement - unjustifiable encumbrance on the use of a trademark?

Article 20 of the TRIPS Agreement states:

> The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings…

The complainants claimed that the TPP measures are inconsistent with Article 20 because they impose 'special requirements,' which 'encumber' the 'use' of trademarks 'in the course of trade'; furthermore, such use is encumbered 'unjustifiably.' The Panel recalled that - in line with the general principles of burden of proof - the parties agreed that it is for the complainants to make a prima facie case that the TPP measures amount to special requirements that encumber the use of trademarks in the course of trade within the meaning of Article 20. However, the parties disagreed as to which party bears the burden of proof in respect of whether such use is encumbered 'unjustifiably.' As the first sentence of Article 20 establishes a single obligation, rather than an obligation and an exception thereto, the Panel concluded that it was 'for the complainants to present a prima facie case that the TPP measures amount to special requirements and that the use of a trademark in the course of trade is unjustifiably encumbered by these requirements.'[55] In its examination of whether the TPP measures involve 'special requirements' that 'encumber' the 'use of a trademark' 'in the course of trade' within the meaning of Article 20, and whether they do so 'unjustifiably', the Panel considered that 'special requirements' could also include a prohibition on using a trademark; the meaning of 'encumber' could, likewise, include a prohibition on the use of trademarks to the extent that it would restrict such use 'in the course of trade.' The Panel found that the TPP measures, to the extent they restrict the use of word marks to certain forms and prohibit the use of stylized word marks, composite marks, and figurative marks in the specified situations, amount to 'special requirements' that 'encumber' the use of a trademark.[56]

In its examination of whether the special requirements in the TPP measures encumber the 'use of a trademark in the course of trade', the Panel found that the phrase 'in the course of trade' covers the process relating to commercial activities; it did 'not find support in the language of Article 20 or its context for the assertion that "in the course of trade" culminates or terminates at the point of sale'.[57] As it is for the right holder to decide how to exploit or make use of its exclusive rights to extract economic value from those rights in the marketplace, the Panel found that the relevant 'use' for the purposes of Article 20 is not limited to the use of a trademark for the specific purpose of distinguishing the goods and services of one undertaking from those of other undertakings.[58] The Panel concluded that 'the trademark requirements of the TPP measures amount to special requirements that encumber "the use of a trademark in the course of trade"'.[59] The Panel then considered whether the TPP measures 'unjustifiably' encumber the use of trademarks in the course of trade. The Panel found that the term 'unjustifiably', as used in Article 20, connotes a situation where the use of a trademark is encumbered by special requirements in a manner that lacks a justification or reason that is sufficient to support the resulting encumbrance. Given that Article 20 does not expressly identify the

[54] Idem, paras. 7.2125-2130.

[55] Idem, paras. 7.2154-2169.

[56] Idem, paras. 7.2241-2245.

[57] Idem, paras. 7.2260-2264.

[58] Idem, paras. 7.2279-2286.

[59] Idem, paras. 7.2287-2292.

types of reasons that may form the basis for the 'justifiability' of an encumbrance, the Panel found 'useful general guidance … in the context provided by other provisions of the TRIPS Agreement', notably Articles 7 and 8, together with the preamble of the TRIPS Agreement, which set out general goals and principles underlying the TRIPS Agreement: 'Article 7 reflects the intention of establishing and maintaining a balance between the societal objectives mentioned therein', while '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.' According to the Panel, 'Article 8 offers … useful contextual guidance for the interpretation of the term "unjustifiably" in that 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'; the 'specific objectives expressly identified in Article 8.1 do not … necessarily exhaust the scope of what may constitute a valid basis for the "justifiability" of encumbrances on the use of trademarks under Article 20.' Regarding the identification in Article 8.1 of public health as such a recognized societal interest, the Panel noted that 'the Doha Declaration, adopted by Ministers on 14 November 2001, provides that, "(i)n applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles."' According to the Panel, this paragraph of the Doha Declaration 'may … be considered to constitute a "subsequent agreement" of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention', which confirms that Articles 7 and 8 TRIPS provide important context for the interpretation of Article 20.[60]

The Panel did not consider that the term 'unjustifiably' in Article 20 should be assumed to be synonymous with 'unnecessarily', as used in Article 41.2 of the TRIPS Agreement. The use of the term 'unjustifiably' rather referred to a requirement that a justification or reason should exist that sufficiently supports the encumbrance resulting from the action or measure at issue. The Panel understood that 'Article 20 reflects the balance intended by the drafters of the TRIPS Agreement between the existence of a legitimate interest of trademark owners in using their trademarks in the marketplace, and the right of WTO Members to adopt measures for the protection of certain societal interests that may adversely affect such use.'[61] A determination of whether the use of a trademark in the course of trade is being 'unjustifiably' encumbered by special requirements should involve a consideration of the following factors:

- the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function;
- the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and
- whether these reasons provide sufficient support for the resulting encumbrance.[62]

In applying this standard, the Panel recalled its findings discussed above that the TPP measures fall within the scope of Article 20 'to the extent that they prohibit the use of certain trademarks on tobacco retail packaging and products'; the TPP measures, including the prohibitions they impose on the use of stylized words marks, composite marks, and figurative marks, amount to 'special requirements' within the meaning of Article 20, and 'encumber' the use of a trademark in the course of trade. While a prohibition on use of a trademark by nature involves a high degree of encumbrance on such use, the

[60] Idem, paras. 7.2393-2409.

[61] Idem, paras. 7.2410-2429.

[62] Idem, para. 7.2430.

Panel saw no basis for assuming that a particular threshold or degree of encumbrance would be inherently 'unjustifiable' under this provision. Rather, it considered that 'this must in all cases be assessed in light of the circumstances in accordance with the standard of review that (it) … identified above.' Similarly, while recognizing that a prohibition on the use of a trademark involves a very high degree of encumbrance, the Panel did not consider that this renders it 'by nature incapable of justification under Article 20.' It therefore concluded that 'special requirements that involve a high degree of encumbrance, such as those in the TPP measures that prohibit the use of stylized word marks, composite marks, and figurative marks, are not per se unjustifiable'; this must be assessed in the light of the circumstances in accordance with the same standard of review that it had identified.[63]

The Panel then examined whether Article 20 requires the 'unjustifiability' of any 'special requirements' imposed on the use of trademarks to be assessed, in all cases, in relation to each individual trademark and its specific features and whether, as a result, the encumbrances imposed by the TPP measures are per se 'unjustifiable' in that they do not involve such an individual assessment but rather apply to all trademarks on tobacco products without distinction. The Panel did not find support in the text or context of Article 20 for the complainants' assertion that special requirements that encumber the use of trademarks could only be 'justifiable' on the basis of an assessment of individual trademarks and their specific features. The Panel found that 'Article 20 does not require the unjustifiability of special requirements under Article 20 to be in all cases assessed by a Member in respect of individual trademarks and their specific features'; the 'extent to which an assessment of the unjustifiability of specific encumbrances will require an assessment on the basis of individual trademarks and their specific features will depend on the circumstances of the case'.[64] The Panel noted Australia's explanation that the removal of stylized fonts, logos, emblems and other branding imagery from trademarks on tobacco packaging and products is intended to prevent the use of such imagery to communicate specific messages to targeted demographic groups or to convey any positive associations. The Panel considered that this approach is not, per se, unjustifiable. The Panel concluded that 'the complainants have not demonstrated that the trademark requirements of the TPP measures are per se inconsistent with Australia's obligations under Article 20 on the grounds that they do not provide for individual assessment of trademarks and their specific features.[65]

The Panel agreed with the complainants that the TPP measures' prohibitions of the use on tobacco retail packaging and products of figurative trademarks, as well as of the figurative and stylized elements of composite and word marks are far-reaching, noting that the TPP measures thus prevent any non-word components of the relevant trademarks, such as fonts, size, colours and placement of the trademark on the product, as well as all other distinctive visual content, from contributing to distinguishing the products in the marketplace. According to Australia, taking the permissive and prohibitive aspects of the measures together, the TPP measures had not affected tobacco companies' ability to use trademarks to distinguish their products in the course of trade. In response, the Panel recalled prior precedent recognizing the importance of the use of trademarks so that they can serve to distinguish products in the marketplace. The Panel found that - by disallowing the use of design features of trademarks - the TPP measures prevent a trademark owner from extracting economic value from any design features of its trademark through its use in the course of trade; the TPP measures' prohibitions of the use of figurative trademarks on tobacco retail packaging and products, as well as of the figurative and stylized elements of composite and word marks, were, therefore, far-reaching in terms of the trademark owner's expected possibilities to extract economic value from the use of such features. On the other hand, the Panel considered that the practical implications of the prohibitions are partly mitigated by the fact that the TPP measures allow tobacco manufacturers to use word trademarks, including brand and variant names, to distinguish their products from each other. The

[63] Idem, paras. 7.2439-2442.

[64] Idem, paras. 7.2492-2506.

[65] Idem, paras. 7.2507-2508.

Panel then recalled the evidence that it examined above under TBT Agreement Article 2.2 on the impact of the reduced differentiation on prices and downward substitution.[66] The Panel then addressed the reasons for which the special requirements under the TPP measures are applied, including any societal interests they are intended to safeguard, so as to enable the Panel to consider whether these reasons provide sufficient support for the resulting encumbrances on the use of trademarks in the course of trade. The Panel recalled its finding above in the context of its analysis of the claims under TBT Agreement Article 2.2 that the objective pursued by Australia through the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products. The Panel noted the parties' agreement about 'the importance of public health as a policy concern', as well as 'the importance of effective tobacco control measures to reduce the public health burden resulting from tobacco use.'[67]

In order to consider whether these reasons 'provide sufficient support for the resulting encumbrances', the Panel explained that it would 'need to assess the public health concerns that underlie the TPP trademark requirements against their implications on the use of trademarks in the course of trade, taking into account the nature and extent of the encumbrances at issue.' The Panel weighed and balanced the different interests at issue to reach a conclusion as to whether the TPP measures 'unjustifiably' encumbered the use of trademarks in the course of trade. It noted that it was undisputed that the grounds on which the special requirements were applied addressed an exceptionally grave domestic and global health problem involving a high level of preventable morbidity and mortality. The fact that these special requirements - as part of the overall TPP measures and in combination with other tobacco-control measures maintained by Australia - are capable of contributing, and do in fact contribute, to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, suggested that the reasons for which these special requirements are applied provide sufficient support for the application of the resulting encumbrances on the use of trademarks. The Panel did not exclude that the availability of an alternative measure could, in the circumstances of a particular case, call into question the reasons a respondent would have given for the adoption of a measure challenged under Article 20. Recalling many of its earlier findings made above under TBT Agreement Article 2.2, the Panel concluded that - for purposes of Article 20 of the TRIPS Agreement - the complainants had not shown that any of the proposed alternative measures alone or in combination would be manifestly better in contributing towards Australia's public health objective, operating in a manner comparable to the TPP measures as an integral part of Australia's comprehensive tobacco control policies and at the level desired by Australia; the Panel was 'not persuaded that the complainants have demonstrated that Australia has acted beyond the bounds of the latitude available to it under Article 20 to choose an appropriate policy intervention to address its public health concerns in relation to tobacco products, in imposing certain special requirements under the TPP measures that encumber the use of trademarks in the course of trade.' It also observed that 'Australia, while having been the first country to implement tobacco plain packaging, has pursued its relevant domestic public health objective in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including the Article 11 and Article 13 FCTC Guidelines'. The Panel concluded that the complainants had not demonstrated that the trademark-related requirements of the TPP measures unjustifiably encumber the use of trademarks in the course of trade within the meaning of TRIPS Agreement Article 20.[68]

[66] Idem, paras. 7.2559-2573.

[67] Idem, paras. 7.2575-2587.

[68] Idem, paras. 7.2590-2605.

Article 10bis of the Paris Convention - protection against unfair competition

Paris Convention Article 10*bis*, which is incorporated into the TRIPS Agreement through Article 2.1, reads as follows:

> (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
>
> (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
>
> (3) The following in particular shall be prohibited:
>
> 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
>
> 2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
>
> 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.

The complainants claimed that both the requirements within the TPP measures that affect the use of trademarks, geographical indications and other categories of intellectual property on tobacco retail packaging and products ('trademark requirements') and the requirements that concern other physical features of tobacco retail packaging and products ('format requirements') were inconsistent with Article 10*bis*, as incorporated into the TRIPS Agreement under Article 2.1. The Panel confirmed that – as Article 10*bis* makes no distinction between acts of unfair competition that would relate to trademarks or other specific categories of intellectual property and other acts of unfair competition, and Article 2.1 of the TRIPS Agreement requires Members to comply with Article 10*bis* – the term 'in respect of' in Article 2.1 does not have the effect of conditioning the scope of the incorporation of the obligations under Article 10*bis* to cover only those acts of unfair competition that relate to the specific subject matters addressed in Parts II, III or IV of the TRIPS Agreement. WTO Members are required not only to prohibit the three specific types of acts identified in paragraph 3 of Article 10*bis*, but also to provide effective protection against all acts falling more generally within the scope of its paragraph 2.[69] The Panel understood the definition of 'an act of unfair competition' in paragraph 2 as referring to something that is done by a market actor to compete against other actors in the market in a manner that is contrary to what would usually or customarily be regarded as truthful, fair and free from deceit *within a certain market*. Hence, the Panel concluded that 'the TPP measures in themselves do not constitute an act of competition within the meaning of Article 10*bis*(2), and therefore also do not constitute an act of unfair competition against which a Member is bound to assure effective protection under Article 10*bis*(1), including by prohibiting all acts of unfair competition of such a nature as to create confusion within the meaning of Article 10*bis*(3)(1) or by prohibiting indications or allegations, the use of which in the course of trade is liable to mislead the public within the meaning of Article 10*bis*(3)(3).'[70] The Panel was also not persuaded that Cuba and Indonesia had demonstrated that compliance by market actors with the TPP measures would constitute an act of unfair competition of such a nature as to create confusion in the minds of consumers within the meaning of paragraph 3(1), or that the use, under the circumstances of the TPP measures, of a brand, business or company name and variant name in a standard format on retail packaging would not allow consumers to distinguish the commercial source or the products themselves and thus create confusion about the establishment of competitors or the goods at issue and their associated qualities. As protection against unfair

[69] Idem, paras. 7.2662-2680.

[70] Idem, paras. 7.2693-2699.

competition serves to protect competitors as well as consumers, together with the public interest, all these factors had to be taken into account in determining 'honesty' in business dealings, as reflected in the balancing of diverse societal objectives in Article 7 of the TRIPS Agreement. All competitors on the Australian market had to comply with the same requirements. The Panel was not persuaded that a consumer would mistakenly assume that all competing products have identical characteristics or source because their external appearance was very similar due to the well-publicized, regulatory intervention. Cuba and Indonesia had not demonstrated that the TPP measures compel market actors to engage in acts of unfair competition of such a nature as to create confusion within the meaning of paragraph 3(1).[71]

Turning to Article 10*bis*(3)(3), the Panel was also not persuaded that the absence of brand imagery would mislead consumers by way of giving incorrect information or false impressions, or by creating any particular incorrect expectations in the minds of consumers about the nature, manufacturing process or characteristics of the product, be they similar to or different from the characteristics of other corresponding products on the market. As the complainants did not identify specific allegations or statements required by the TPP measures that would mislead the consumer, the Panel concluded that the complainants did not demonstrate that the TPP measures compel market actors to engage in acts amounting to misleading indications or allegations within the meaning of Article 10*bis*(3)(3).[72] Finally, the Panel was also not persuaded that an act to sell products in compliance with the regulatory requirements under the TPP measures constitutes an 'act of competition' that is 'contrary to honest practices in industrial and commercial matters'. Keeping in mind the possibilities permitted by the TPP measures to differentiate the tobacco products in the market with the use of brand, company and variant names, the Panel did not consider that the obligation in Article 10*bis*(1) 'can be construed as requiring Australia to permit competing tobacco producers to use branding to signal such additional qualities.' The Panel concluded that Honduras, the Dominican Republic and Cuba had not demonstrated that the TPP measures require market actors to engage in acts of unfair competition against which Australia is bound to assure effective protection pursuant to paragraph 1 of Article 10*bis*.[73]

TRIPS Agreement Articles 22.2(b) and 24.3 - protection of geographical indications

TRIPS Agreement Article 22 on 'Protection of geographical indications' provides in paragraph 2 that '(i)n respect of geographical indications, Members shall provide the legal means for interested parties to prevent: … (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).' The Panel recalled its previous findings that

- while a Member is required to prohibit the types of acts of unfair competition enumerated in paragraph 3 of Article 10*bis*, the scope of practices in industrial and commercial practices against which a Member is bound to assure effective protection needs to be considered in the context of the legal system and conceptions of what constitutes an act contrary to what would usually or customarily be regarded as truthful, fair and free from deceit, within the domestic market at issue;[74]
- the TPP measures in themselves do not constitute an 'act of unfair competition,' as referred to in Article 22.2(b). The Panel agreed with the parties that Article 22.2(b) obliges Members to provide, in respect of geographical indications, the legal means for interested parties to prevent uses by third parties that constitute acts of unfair competition.[75]

[71] Idem, paras. 7.2700-2724.

[72] Idem, paras. 7.2749-2765.

[73] Idem, paras. 7.2787-2795.

[74] Idem, paras. 7.2843-2849.

[75] Idem, paras. 7.2857-2861.

The Panel noted that the complainants had not identified any specific indications or allegations required by the TPP measures in respect of geographical indications that would be liable to mislead the public within the meaning of Article 10*bis*(3)(3). It also recalled that the TPP measures permit the use of a term constituting a geographical indication to the extent it is part of the brand, business or company name, provided that the geographical indication appears in the form prescribed by the TPP regulations. The Panel was not persuaded that the complainants had demonstrated that the public would be liable to be misled about product characteristics within the meaning of Article 10*bis*(3)(3) in respect of geographical indications as a result of the requirement to present tobacco products for retail sale in a standardized form under the TPP measures. As a consequence, it was also not persuaded that actions undertaken by market actors in order to comply with the regulatory requirements of the TPP measures constitute acts of unfair competition amounting to indications or allegations the use of which is liable to mislead the public within the meaning of Article 10*bis*(3)(3) in respect of geographical indications. The Panel, therefore, found that the complainants had not demonstrated that the TPP measures compel market actors to engage in acts of unfair competition that would amount to misleading indications or allegations within the meaning of paragraph 3(3) of Article 10*bis* of the Paris Convention (1967) in respect of geographical indications. The complainants had not demonstrated that the TPP measures were inconsistent with Article 22.2(b) of the TRIPS Agreement.[76]

According to Article 24.3, '(i)n implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.' Honduras and the Dominican Republic argued that the TPP measures were inconsistent with this provision because they diminish the protection afforded to geographical indications that existed in Australia immediately prior to 1 January 1995. Cuba argued that they diminish the level of protection Australia accorded to the 'Habanos' geographical indication by eliminating the ability of Cuban exporters to affix that geographical indication on exports of large handmade cigars as of 1 December 2012. The Panel did not exclude the applicability of Article 24.3 to the TPP measures solely because those measures were not adopted for the purpose of implementing the obligation under Article 22.2. In respect of the object and purpose of this provision, the Panel agreed with Australia that the purpose of Article 24.3, as a standstill provision, was to ensure that, in giving effect to its obligations under Section 3 to provide protection for geographical indications, a Member does not undermine pre-existing property rights in specific geographical indications that were protected in a Member prior to the entry into force of the TRIPS Agreement.[77] In light of the evidence before it, the Panel concluded that the complainants had not demonstrated that the protection that geographical indications enjoyed under the Australian law immediately before 1 January 1995 has been diminished as a result of the TPP measures. The complainants had not demonstrated that the TPP measures were inconsistent with Australia's obligations under Article 24.3 of the TRIPS Agreement.[78]

V. Conclusion: 'Constitutional functions' of WTO adjudication and US power politics

The adoption of two of the panel reports (concerning the complaints by Cuba and Indonesia) by the DSB at its meeting of 27 August 2018, and the appeals by Honduras and the Dominican Republic from the two other panel reports, come at a time when the WTO legal and dispute settlement system remains under an existential attack by the US Trump administration.[79] Since 2017, in response to the illegal blockage of the nomination of AB vacancies by the USA, all 164 WTO Members continue violating their collective legal obligation to maintain the WTO AB as defined in Article 17 DSU (i.e. being 'composed of seven persons', with vacancies being 'filled as they arise'). With only three AB

[76] Idem, paras. 7.2862-2872.

[77] Idem, paras. 7.2927-2936.

[78] Idem, paras. 7.2937-2959.

[79] Cf. Petersmann, The 2018 American and Chinese Trade Wars (note 13).

judges left (as of October 2018), the AB may continue functioning until December 2019, when the terms of two other AB members will end. Cessation of the AB's review of WTO panel reports risks undermining the systemic, legal coherence of the WTO legal and dispute settlement system, for instance in case of mutually incoherent outcomes of the pending WTO panel proceedings examining claims by some WTO Members (including also the US) that mere invocation of national 'security concerns' justifies all violations of WTO rules without any WTO jurisdiction to legally review such allegedly 'self-judging', national security justifications of otherwise illegal import restrictions.[80] As there are currently (October 2018) 11 appeals pending in the WTO AB, it remains unlikely that the appeals by the Dominican Republic and Honduras against some of the panel findings in *Australia-TPP* can be decided by the remaining 3 AB judges before the end of 2019. Without such appellate reports, these two panel reports may never be adopted in view of Article 16.4 DSU.[81] Yet, according to the AB jurisprudence, the legal interpretations embodied in the two panel reports adopted on 27 August 2018 have already become 'part and parcel of the *acquis* of the WTO dispute settlement system'.[82]

Evaluating the Australia-TPP Panel report from a 'constitutional justice' perspective

Section II explained why the WTO mandate of settling WTO disputes by clarifying 'the existing provisions of (WTO) agreements in accordance with customary rules of interpretation of public international law' through impartial and independent panel, AB and arbitration procedures aimed at 'providing security and predictability to the multilateral trading system' involves not only problems of *cognition* (like discovering the common intentions of the treaty parties as expressed in the treaty text, its context, object and purpose); it also amounts to a *judicial mandate* to interpret WTO law and settle WTO disputes independently and impartially 'in conformity with the principles of justice and international law', including also 'human rights and fundamental freedoms for all', as recalled in the Preamble and Article 31 of the VCLT.[83] Arguably, WTO judges have a mandate not only for settlement of disputes among WTO members, but also for 'providing security and predictability to the multilateral trading system' (Article 3:2 DSU) for the benefit of third WTO members (e.g. as third-party interveners in WTO dispute settlement proceedings) as well as of non-governmental economic actors and citizens basing their trade transactions on WTO rules.[84] As, according to WHO statistics, tobacco trade and consumption are responsible for up to seven million deaths annually, the *Australia-TPP* panel reports are among the most important WTO dispute settlement reports continuing the long-standing WTO jurisprudence confirming the regulatory autonomy ('sovereignty') of each WTO Member to protect public health and to give priority to non-economic public goods (like public morals, public order, national security) over WTO market access commitments (e.g. vis-à-vis tobacco exporting WTO Members). The Panel wisely admitted the participation of around 40 WTO members

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[80] For legal criticism of such claims undermining the multilateral, systemic nature of WTO law and WTO dispute settlement see the special issue on 'Revisiting 'Exceptions' Under International Trade Law' in: Asian Journal of WTO Law and Health Law and Policies (AJWH) 13.2 (2018), 275-462. On the AB jurisprudence (based on Article 3 DSU and the hierarchical nature of the WTO dispute settlement system) that – even if WTO law does not know formal rules on legal precedents (stare decisis) – WTO panels cannot 'disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports' unless they can identify 'cogent reasons' (2008 AB Report WT/DS344/AB/R on US-Stainless Steel, para. 160), see: P. van den Bossche/W. Zdouc (eds), The Law and Policy of the WTO (4th ed. CUP 2017), at 224 f.

[81] Article 16.4 DSU provides, inter alia: 'If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.'

[82] Cf. the 2008 AB Report WT/DS344/AB/R on US-Stainless Steel, para. 161, and van den Bossche/Zdouc (note 80), at 224 f.

[83] On judges as guardians of agreed 'constitutional justice principles' limiting interest-driven 'political interpretations' see: E.U.Petersmann, Human Rights, Constitutional Justice and International Economic Adjudication: Legal Methodology Problems, in: EUI Working Paper Law 2018/18; M.Scheinin/ H.Krunke/M.Aksenova (eds), Judges as Guardians of Constitutionalism and Human Rights (Cheltenham: Elgar, 2016).

[84] The question of whether WTO rules protect also 'reasonable expectations' of non-governmental actors (like holders of intellectual property rights protected by the TRIPS Agreement) remains controversial in WTO law and jurisprudence.

as third parties and *amicus curiae* submissions from UN health agencies and numerous non-governmental industrial, health advocacy and other civil society groups. The Panel also convincingly emphasized the importance of considering Australia's TPP measures as part of a much wider, universally coordinated tobacco control scheme including, e.g., mandatory health warning requirements, tobacco advertisement restrictions, taxation measures, sale restrictions, full or partial consumption bans, anti-smoking campaigns on social media, and measures to curb illicit tobacco trade.

As most WTO Members are members also of the WHO and of its FCTC, the adoption of two of the panel reports by the DSB is expected to induce many other WTO Members to adopt similar legislation on plain packaging of tobacco products. As indicated in *section I* above, the panel findings have successfully avoided the risks of 'legal fragmentation' (e.g. between WTO, WIPO, WHO, FCTC rules and human rights conventions) through mutually coherent 'systemic interpretations' of these separate treaty systems and institutional practices in conformity with the customary rules of treaty interpretation. The Panel's recognition of the 2001 Doha Declaration on Public Health and the TRIPS Agreement as a 'subsequent agreement' of WTO Members within the meaning of Article 31(3)(a) VCLT, the Panel's references to the legal obligations of most WTO Members under the FCTC, and the Panel's rejection of all legal challenges of Australia's health protection measures implementing the FCTC confirm that compliance with the customary rules of treaty interpretation enables WTO adjudicators to protect the 'constitutional functions' of GATT/WTO rules to assist member states to increase their respective national economic welfare and enhance transnational rule of law without unduly limiting sovereign rights to protect non-economic public goods.[85] The Panel confirmed previous WTO jurisprudence that – even though the TBT and TRIPS Agreements lack 'general exception clauses' similar to GATT Article XX – the necessary 'weighing', 'balancing' and legal reconciliation of trade commitments and health protection obligations[86] must remain consistent with the basic principles underlying GATT Article XX as recognized in the Preamble of the TBT Agreement as well as in Articles 7 and 8 of the TRIPS Agreement. Similarly, in its examination of the specific relationship between the terms of Article 20 of the TRIPS Agreement and those of Article 2.2 of the TBT Agreement, the Panel convincingly found that these two obligations are not in substantive contradiction or 'mutually exclusive'; they can be concurrently complied with at the same time by balancing their three common dimensions: (i) the objective of reducing and avoiding trade barriers; (ii) the possibility of adopting measures for legitimate public policy purposes, including public health; and (iii) compliance with applicable requirements under the relevant provisions of each agreement. As neither the defendant nor the complainants raised human rights arguments, the Panel had good reasons to avoid the legal controversies among human rights lawyers over how to interpret the 'indivisibility' of human rights in the judicial balancing of health rights and private property rights, or over the relevance of human rights in interpreting the competition law dimensions of intellectual property rights and other economic rights. The 'balancing criteria' elaborated and applied by the Panel by interpreting the TBT Agreement, various TRIPS provisions and Australia's TPP measures were precise and, arguably, politically more acceptable for WTO member states than the different 'balancing' which a UN human rights body might have used for justifying the legal priority of health rights over conflicting trading and intellectual property rights.

The legal and democratic 'disconnect' between intergovernmental UN/WTO politics and rights of domestic citizens entails that trade law and governance need to be justified vis-à-vis citizens not only in terms of 'state consent' in order to become socially accepted and voluntarily complied with. The

[85] Cf. E.U.Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Policy in the United States, the European Community and Switzerland (Fribourg: Fribourg University Press/Boulder Publishers, 1991)

[86] E.g. concerning the importance of the health policy objective pursued, the contribution of the measure to that policy, the trade-restrictiveness of the measures, their impact on the use of trademark rights, and the comparison with any alternative measures.

'principles of justice' justifying WTO law vis-à-vis citizens remain, however, contested among and inside the 164 WTO members.[87] As mentioned in *section II*, judicial third-party adjudication is a much older 'principle of justice' and method of justifying rule of law than democratic governance.[88] The worldwide, compulsory WTO jurisdiction for the peaceful settlement of WTO disputes through judicial clarification of the often indeterminate WTO treaty provisions has rightly been celebrated by all WTO Members as a historically unique success ('crown jewel of the WTO') in the progressive 'civilization' and 'constitutionalization' of world trade law, even if WTO law deliberately avoids describing the AB as a 'court of justice' or AB members as 'justices'. The empirical fact that the WTO legal and judicial system has promoted much higher levels of international 'rule of law' and of judicial settlement of international disputes in worldwide economic cooperation than most other treaties empirically confirms the 'constitutional importance' of WTO law for protecting also equal rights of non-governmental economic actors, related 'principles of justice' and public goods inside and beyond national frontiers. Yet, the US assault on the WTO AB system raises the question of whether WTO member will prove capable of protecting the compulsory WTO dispute settlement system at least among those, more than 160 WTO members which continue acknowledging their reasonable self-interests in maintaining transnational rule of law in international trade.

Will US power politics destroy the WTO legal and AB system?

In the Doha Round negotiations, the resistance by many WTO members against business-driven US demands for additional market access commitments for services trade and for stronger intellectual property protection has prompted increasing pursuit of these US trade policy objectives outside the Doha Round negotiations, for instance through the launch of negotiations since 2012 on a Trade in Services Agreement (TISA) and through FTA commitments to 'TRIPS plus' protection. Similarly, the business-driven US resistance against ratification of UN environmental, public health and labor rights treaties (like the 2003 FCTC, the 2015 Paris Agreement on Climate Change Prevention, ILO conventions) and against multilateral economic courts limiting the scope for US power politics (like the investment court proposed by the EU) has prompted other WTO members to pursue these treaty objectives outside WTO institutions. The US Trump administration's decision to unilaterally block the filling of AB vacancies and terminate, thereby, the future AB jurisdiction over US trade measures as of 2020[89] is inconsistent with the US legal obligations under WTO law (e.g. Articles 3.10 and 17 DSU); it also increases the risks of future conflicts between WTO law and UN law if future WTO dispute settlement decisions become more politicized and elude multilateral legal scrutiny by the AB and by the DSB.[90] The US criticism of certain legal interpretations by the AB[91] has offered *no*

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[87] For a discussion of principles of 'justice as fairness', 'constitutional justice', 'distributive justice', 'corrective justice', 'commutative justice' and equity underlying modern international economic law see: E.U.Petersmann, International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods (Oxford: Hart, 2012), chapters II-IV.

[88] On ancient roots of third-party adjudication in the Bible and in Aeschylus' Oresteia see D.D.Raphael, Concepts of Justice (OUP 2001), Part I.

[89] As of December 2019, there will be only one single AB judge (from China) left, and the USA is likely to claim that the AB no longer has a mandate to operate (e.g. by using 'Rule 15' of the AB Working Procedures).

[90] For instance, if the WTO AB system would be replaced by ad hoc arbitration pursuant to Article 25 DSU as suggested by some WTO lawyers (e.g. J.Bacchus, Saving the WTO's Appeals Process, Cato Institute October 12, 2018), WTO panel and arbitration reports would no longer be adopted by the DSB and elude multilateral, legal scrutiny by all WTO members.

[91] Notably regarding WTO trade remedy rules (e.g. on anti-dumping calculations, safeguards and subsidy rules) and the AB powers under the DSU relating to the 90 day deadline for appeals (Article 17:5 DSU), 'Rule 15' of the AB Working Procedures (authorization of AB members to complete pending AB proceedings beyond the termination of their

evidence that the AB has exceeded its interpretative and judicial powers under the DSU; the US criticism is based on political grounds (e.g. its occasional denial of the quasi-judicial mandate of the AB) without challenging the consistency of the judicial AB 'clarifications' with the customary rules of treaty interpretation and with 'judicial administration of justice'. As all these judicial interpretations and dispute settlement reports by the AB have been consistently adopted by WTO members (including the US) in DSB and DSU legal practices since 1996, other WTO members have strong self-interests in protecting the WTO legal and judicial system against power-oriented amendments of WTO rules as proposed by the US. The true purpose of the illegal US strategy of unilaterally blocking AB nominations is to terminate the AB capacity of exercising its jurisdiction, and to enhance the US bargaining power for renegotiating WTO and DSU rules.[92]

This US power politics in disregard of WTO rules and WTO dispute settlement procedures poses a much bigger, 'existential challenge' to the multilateral trading system than the political need for strengthening WTO disciplines for China's state-capitalism[93] as well as for the 'graduation' of less-developed WTO members' (e.g. including 10 of the G20 countries). Both the American and Chinese WTO challenges illustrate the constitutional problem of 'legal perspectivism', *i.e.* deductive, judicial arguments about treaty interpretation as 'judicial concretization' of indeterminate treaty provisions through 'judicial administration of justice' risk being challenged by voluntarist, political apologies of governments denying state consent in particular international contexts.[94] While adversely affected WTO members cannot prevent the 'American assault on the rule of law in world trade'[95], they can – and should – protect the proper functioning of the AB system in the trade relations among the other WTO members through

- WTO majority decisions pursuant to Articles IX.1 WTO Agreement for the filling of the vacant AB positions;
- 'authoritative interpretations' pursuant to Article IX:2 WTO Agreement confirming – or politically challenging - the judicial reasoning underlying WTO dispute settlement jurisprudence;

(Contd.)

mandate), the AB duty to address all issues of law raised in panel reports (Article 17.12 DSU), AB review of facts (Article 17.6 DSU), and precedential value of AB legal findings except for cogent reasons (Article 3.2 DSU); see the US President's 2018 Trade Policy Agenda of March 2018: https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf at pp. 22-28.

[92] Cf. E.U.Petersmann, The Crown Jewel of the WTO has been stolen by US Trade Diplomats – and they have no Intention of Giving it Back, in: D.Prevost et alii (eds), Restoring Trust in Trade – Liber Amicorum for Peter Van den Bossche (Oxford: Hart 2018), 105-118.

[93] E.g. WTO legal disciplines for limiting Chinese market distortions through state-owned enterprises, subsidies and other government interventions into corporate governance, intellectual property rights (e.g. compulsory technology transfers), taxation, competition and industrial policies.

[94] Cf. M.Koskenniemi, From Apology to Utopia. The Structure of International Legal Argument (CUP 2005). Yet, Koskenniemi's claim – 'that law is incapable of providing convincing justifications to the solution of normative problems' (p. 69) – prioritizes 'legal deconstruction' over the 'constructive task' of legal systems and 'republican responsibilities' of citizens and governments to protect human rights and related PGs demanded by citizens. Judicial clarification of agreed rules promoting 'public reason' and 'constitutional mind-sets' contributes to 'civilizing', 'socializing' and 'embedding' legal systems by strengthening democratic support (e.g. through promotion of human rights, inclusive legal reasoning, third-party adjudication, judicial clarification of indeterminate legal terms promoting the overall coherence, justice, efficiency and social acceptance of legal systems). The separation of legislative, executive and judicial powers in WTO law rests on 'constitutional principles of justice' aimed at protecting citizens against welfare-reducing abuses of discretionary trade policy powers to tax domestic citizens and redistribute their domestic income for the benefit of protectionist interest groups.

[95] See J.Bacchus, Might Unmakes Right. The American Assault on the Rule of Law in World Trade, Centre for International Governance Innovation CIGI Papers No. 173 (May 2018).

- using '(e)xpeditious arbitration within the WTO as an alternative means of dispute settlement' (Article 25 DSU), for instance based on bilateral or plurilateral agreements to resort to 'arbitration appeals' as a substitute for appellate review under Article 17 DSU;[96] and through
- identifying those judicial 'rule clarifications' which WTO members may wish to reverse through WTO amendments or authoritative interpretations.

Recent claims by the US Trump administration – e.g. that the US no longer perceives the WTO AB as a judicial institution, that the adoption of WTO dispute settlement reports should entail no 'precedential value' for applying their legal reasoning equally to other WTO members in future WTO disputes, and that the 'WTO bargain' has become distorted (e.g. by the failures of the Doha Development Round, Chinese state practices circumventing WTO rules, WTO jurisprudence limiting abuses of trade remedy rules) – reflect 'political bargaining positions' rather than coherent challenges of past judicial interpretations of WTO rules in WTO dispute settlement practices since 1996 as justified by the customary rules of treaty interpretation and by the quasi-judicial mandates of WTO panelists, AB members and arbitrators. Until WTO members reach agreement on replacing the existing WTO law by politically agreed WTO amendments or by a new 'WTO 2.0 agreement', the DSU requires WTO members to assess and adopt WTO dispute settlement reports – including future AB reports on the appeals from the two panel reports on *Australia-TPP* – 'in accordance with the customary rules of interpretation of public international law' and the judicial WTO mandate of 'providing security and predictability to the multilateral trading system' (Article 3.2 DSU). If citizens, democratic institutions and WTO members are no longer willing to defend the global public good of the rules-based WTO legal and dispute settlement system, intergovernmental power politics – like the American and Chinese tariff wars of 2018 - risk destroying multilevel governance of transnational public goods far beyond world trade to the detriment of citizens all over the world.

[96] Cf. Bacchus (note 90); S.Andersen et alii, Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals, CTEI Working Papers (2017).