

ORIGINAL ARTICLE

TRIPS Pluralism

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Abstract

The article explains that the interpretation of the TRIPS Agreement by WTO dispute-settlement panels and the Appellate Body has palpably shifted since the establishment of the WTO in 1995. Some of this shift is also arguably present in disputes concerning other WTO instruments. This progressive shift comes at a time when key debates about TRIPS waivers are taking place on the rue de Lausanne, namely a first for the COVID-19 pandemic and a second possible one for environmental protection measures related to climate change. According to the proposed pluralist analysis of TRIPS, it was less likely as of 2020 that the WTO dispute-settlement system would find unjustifiable inconsistencies between WTO commitments, on the one hand, and measures to protect public health or mitigate climate change, on the other hand. Whether future Appellate Body will follow that jurisprudence is an open question. Though the analysis contained in the article may make the COVID-related TRIPS waivers doctrinally unnecessary and allow Members to take measures now, its main aim is to inform the debates about the waivers and the future interpretation of the TRIPS Agreement, including the three-step test.

Keywords: TRIPS agreement; pluralism; public health; climate change; waiver

1. Introduction

Discussions about a waiver applicable to certain obligations contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) at the World Trade Organization (WTO) took what some may have seen as an unexpected turn.¹ Since 1995, key WTO Members, including the European Union and the United States, have remained staunch advocates for high intellectual property protection.² Accordingly, those Members, and others, first opposed the waiver sought by many Members to deal with the COVID-19 pandemic, and they were less than forthcoming in preliminary discussions about a waiver to allow Members to address climate change.³ In March 2021, however, the United States signaled a willingness to engage in the waiver discussions, putting pressure on the EU and pharmaceutical companies to be more accommodating of the demands made by developing nations and others.⁴

¹Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments – Results of the Uruguay Round, 33 ILM 1144 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April, 1994, 1869 UNTS 299, 33 ILM. 1197 (1994) (hereinafter TRIPS Agreement).

²The Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/W/2 (14 November 2001) is discussed below.

³World Trade Organization, ‘Members Discuss TRIPS Waiver, LDC Transition Period and Green Tech Role for Small Business’, Press Release, 11 March 2021, <https://bit.ly/3sihM2w>.

⁴Lalit K. Jha (2021) ‘TRIPS Waiver: Joe Biden Called Upon to Support India, South Africa at WTO’, *Mint*, 18 March 2021, <https://bit.ly/3uPePs5> (accessed 29 June 2021).

The principal reason to obtain a waiver relates to dispute settlement. A WTO Member seeking a waiver likely believes that it could be on the losing end of a dispute brought against it by another Member under the TRIPS Agreement if that member limited intellectual property protection to pursue public health, environmental, or other policy objectives. The waiver is unlikely to be *doctrinally* necessary on that count, even without discounting the risk that a Member would file a dispute against another Member using TRIPS flexibilities during a pandemic.⁵ Specifically, this is because the Appellate Body and panels following Appellate Body jurisprudence are more likely now than 20 years ago to apply an existing exception or use some other doctrinal vehicle to allow a Member to justify a measure sufficiently supported by a significant public policy objective. This shift is ‘pluralist’ in that it allows trade law to compete both with other norms of international law and with domestic norms in major policy areas.⁶

To argue that there is a trajectory towards pluralism in TRIPS jurisprudence, one must plot points on a historical timeline. This timeline begins with the establishment of the WTO in 1995 or just before. At that beginning point, one could observe two coexisting legal realms that mostly ignored one another. From World War II up until the early 1990s, those realms – international law and trade law (or economic law more generally) – had relatively few interconnections.⁷ As far as trade law is concerned, this was by design.⁸ Hence, until around 1990 trade law was, simply put, not part of the mainstream of international law.⁹

Viewed from the other realm, that of international law, international economic relations were perceived, in the words of Antonio Cassese, as ‘a hunting ground for a few specialists, who often jealously hold for themselves the key to this abstruse admixture of law and economics’.¹⁰ In other words, trade law and international law were different communities of practice, with little cross-pollination, if any. Professor Cassese penned this tale of separateness in 1986, the same year that the transformative Uruguay Round, which would lead to the establishment of the WTO, was launched. The Round would produce a package that added intellectual property to the WTO’s norm-set, that is, the TRIPS Agreement.¹¹

The dissimilarity of normative foundations of both realms explains part of the fragmentation of international law.¹² In a nutshell, trade law’s normative compass points towards trade liberalization, while international law aims to build a community of (sovereign) states.¹³ Though there

⁵There are valid *normative* reasons on the norm-making front to try to negotiate a waiver, including to spark a discussion on pharmaceutical innovation models and equitable access. The objective is to align WTO norm-making with non-trade policy objectives seen as equally important, or more so, than (compliance with) trade rules.

⁶One significant issue pertaining to the efficacy of the waiver that would require a separate analysis, including under investment law, is compelling access to know-how not disclosed in patent applications, if such knowhow were necessary to make the COVID-19 vaccines for example. Waiving article 39.2 does not mean that the information is ipso fact publicly available. See D. Gervais (2021) ‘The TRIPS Waiver Debate: Why, and Where to From Here’, *IPKat*, 20 May 2021, <https://ipkitten.blogspot.com/2021/05/guest-post-trips-waiver-debate-why-and-where.html> (accessed 29 June 2021).

⁷The separation took shape in the 1940s, after Bretton Woods. See J. Kurtz (2016) *The WTO and International Investment Law: Converging Systems*. Oxford, Oxford University Press.

⁸See G. Marceau (2001) ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties’, *Journal of World Trade* 35, 1130.

⁹D.M. McRae (1996) ‘The Contribution of International Trade Law to the Development of International Law’, *Recueil des Cours* 260, 111.

¹⁰A. Cassese (1986) *International Law in a Divided World*. New York, NY, Clarendon Press, 317.

¹¹Prior to the establishment of the WTO, the GATT only contained a rule on marks of origin (GATT art. IX:6). The Round also added trade the General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183; General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183, reprinted in 33 ILM. 1167 (1994) (hereinafter GATS).

¹²See International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission, 58th Session, 1 May–9 June, 3 July–11 August, UN Doc. A/CN.4/L.682 (13 April 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (11 August 2006) (finalized by Martti Koskeniemi).

¹³McRae, ‘The Contribution of International Trade Law’, at 111, *supra* note 9.

was always some common ground between the two realms, it was limited in scope. For example, both realms have been in agreement on the application of the treaty interpretation provisions of the Vienna Convention on the Law of Treaties (VCLT).¹⁴

In the last decade of the previous century – during which the WTO was established – the idea that trade law could help build the edifice of international law began to emerge.¹⁵ International law and trade law began eyeing each other with an increasing degree of interest.¹⁶ Professor McRae put his finger on an inquiry that resulted from this change: ‘How, and to what extent, are concepts of international law to be integrated within the legal regime of international trade law?’¹⁷ Trade law would progressively have to learn to navigate without its single normative trade liberalization lodestar, as its world was increasingly visited by non-trade, indeed non-economic concerns.

This progressive rapprochement, which emerged in plain view soon after the entry into force of the Marrakesh Agreement and the establishment of the WTO, is not altogether surprising.¹⁸ After all, the WTO Dispute-Settlement Understanding (DSU) itself contains a significant nudge in providing that WTO instruments are to be interpreted and applied ‘in accordance with the customary rules of interpretation of public international law’.¹⁹ In interpreting this provision barely a year after the establishment of the WTO, the Appellate Body cracked the door of the trade law realm open in stating that WTO Agreements were ‘not to be read in clinical isolation from public international law’.²⁰ At the very least, this meant that WTO law was not, or no longer, a closed system.²¹ As stated by the Appellate Body, this ‘non-clinical-isolation doctrine’ was reflected in later Appellate Body reports that relied – to a limited extent – on the case law of international tribunals, namely the International Court of Justice, the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights.²² This increased openness towards non-WTO norms of international law may reflect changes at the time in the composition of the Appellate Body.²³ There is also potentially influence from the Appellate Body Secretariat, which ‘tends to view the WTO as a bona fide international court’.²⁴

¹⁴Compare Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline (US–Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, at 17; and *Oil Platforms (Iran v. US)*, Preliminary Objection, 1996 ICJ 803, 812, both describing article 31 VCLT as customary international law. The Appellate Body has also applied the VCLT to TRIPS. See e.g., Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (India–Patents (US))*, WT/DS50/AB/R, adopted 16 January 1998, at para. 46.

¹⁵Key milestones during the 1990s include contestation after the Tuna/Dolphin GATT dispute in 1992 and the failed Seattle Ministerial Conference in 1999. See, D.J. Ross (1992) ‘Making GATT Dolphin-Safe: Trade and the Environment’, *Duke Journal of Comparative & International Law* 2, 345 and G. Horlick (2000), ‘Reactions to Seattle’, *Journal of International Economic Law* 3, 162, 167.

¹⁶This had definitely started to happen twenty years ago or so when Donald McRae labelled trade law the ‘new frontier’ of international law. D.M. McRae, ‘The WTO in International Law: Tradition Continued or a New Frontier?’, *Journal of International Economic Law* 2, 27, 28.

¹⁷*Ibid.*

¹⁸The Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154 entered into force on 1 January 1995.

¹⁹Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401 (hereinafter DSU), art. 3.

²⁰*US–Gasoline*, para. III:B.

²¹See G. Marceau (2006), ‘The WTO Is Not a Closed Box’, *American Society of International Law Proceedings* 100, 29.

²²*US–Gasoline*, note 36; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, adopted 1 November 1996, part D, note 19.

²³Specifically, appointing international law experts instead of former trade negotiators, for example Egyptian international law expert Georges Abi-Saab, who chaired the Appellate Body. He ‘formerly served as an appeals judge for the ICTY and an ad hoc judge for the ICJ’. D. Terris et al. (2008) ‘Toward A Community of International Judges’, *Loyola of Los Angeles International and Comparative Law Review* 30, 419, 440. See also G. Abi-Saab (2006) ‘The Appellate Body and Treaty Interpretation’, in G. Sacerdoti et al. (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System*. Oxford: Oxford University Press, 460–461.

²⁴K. Pelc and J. Pauwelyn (2019) ‘The WTO’s Trade Dispute Appeal System May End on December 10: Here’s What You Need to Know’, *Washington Post*, 5 December 2019.

While this shift, however subtle, affected trade law, it applied somewhat differently to TRIPS because that Agreement is not typical trade law. Indeed, TRIPS incorporated by reference most provisions of two extant intellectual property conventions (that belonged to the realm of international law, not trade law).²⁵ This erected a different type of bridge between the two realms. Then TRIPS is also different in that it aims not to liberalize trade but to protect intellectual property. Hence, there is what this Article refers to as a ‘TRIPS difference’, justifying its different consideration from the (rest of) trade law.

The Article proceeds as follows. In Section 2, it defines the term used to label the last point in the timeline, namely ‘pluralism’, and explains what a pluralist approach to the application and interpretation of the TRIPS Agreement might entail. In Section 3, the Article draws a first timeline by reviewing reports of panels and the Appellate Body in non-TRIPS disputes at the WTO that support, or not, the idea that there is a trajectory towards a pluralist approach. This is relevant because despite the TRIPS difference it is the same jurisdictions that decide TRIPS cases. Section 4 paints the TRIPS timeline and reviews the changes in the interpretation of the TRIPS Agreement in various disputes since 1995. Section 5 looks in greater detail at the 2020 dispute-settlement reports in a case concerning Australian tobacco plain packaging legislation, which have paved the way to a pluralist approach. The Article then examines what a pluralist repositioning may mean for the future of TRIPS.

To be clear, the Article’s objective is not to identify the normative valence of a pluralist approach – a debate that should be had elsewhere – but rather to query whether a pluralist approach is in fact emerging, and what that might mean going forward. Identifying the existence of a trajectory towards pluralism in TRIPS interpretation both broadens the range of tools available to litigants in their written submissions and oral arguments before panels and the Appellate Body, and provides a useful additional lens to parse Appellate Body reasoning.²⁶

2. Pluralism

The term ‘pluralism’ as it is used in international law probably owes its origins to an editorial by Josef L. Kunz published in 1955.²⁷ In more recent scholarship, pluralism was described differently, namely as seeking:

[T]o discern a model of order that relies less on unity and more on the heterarchical interaction of the various layers of law. Legally, the relationship of the parts of the overall order in pluralism remains open – governed by the potentially competing rules of the various sub-orders, each with its own ultimate point of reference and supremacy claim, the relationships between them are left to be determined ultimately through political, not rule-based processes.²⁸

Pluralism can be defined in a number of ways.²⁹ That said, all versions of pluralism rest on two overarching premises. The first is recognition that different legal orders do not just co-exist but

²⁵That is most of the provisions of the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, both of which are administered by the World Intellectual Property Organization (WIPO). Paris Act Relating to the Berne Convention for the Protection of Literary and Artistic Works, 24 July 1971, 1161 UNTS 18388; and Paris Convention for the Protection of Industrial Property, March. 20, 1883, 21 UNTS 1583, 828 UNTS 305, as revised at Stockholm on 14 July 1967.

²⁶Namely how WTO Members interpret Appellate Body reports and use that understanding to predict future outcomes. See M. Zang (2020) *Judicial Engagement of International Economic Courts and Tribunals*. Cheltenham: Edward Elgar.

²⁷J.L. Kunz (1955) ‘Pluralism of Legal and Value Systems and International Law’, *The American Journal of International Law* 49, 370–376 (emphasis in original). For a critique of that early definition, see S. Pahuja (2011) *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. Cambridge: Cambridge University Press, ch. 4.

²⁸N. Krisch (2010) *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford: Oxford University Press, at 23.

²⁹It is often used from a comparative perspective when there are ‘plural’ implementations of an international norm. See L. Bently and T. Aplin (2019) ‘Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism’, in S. Frankel (ed.), *Is Intellectual Property Pluralism Functional?* Cheltenham: Edward Elgar, at 96.

occasionally clash. The second is an assertion that such clashes can produce positive outcomes through hybridization by allowing non-hierarchical contestations of the norms of one order by another. They can thus become more responsive to normative concerns reflected differently in the ethos of each order.³⁰ Pluralism is to international law what entropy is to science, for an increase in entropy means both an increase in the energy but also simultaneously in the randomness of a system.³¹ This explains why pluralism can ‘unleash centrifugal forces’ that, at the extreme, can threaten the very existence of a legal order.³² Put differently, by bringing both a renewed energy and more variability to legal analysis – and especially the interpretation of international intellectual property norms enforced through the trade regime – the adoption of a pluralist approach brings increased flexibility but it can also cause uncertainty (as to the outcome of a dispute, for example), which, in turn, can cause systemic instability and be a source of incoherence.³³

A pluralism of authority among an array of norms, norm generators and decision-makers results in a horizontality of norms from different parts of the legal order – interacting norms perceived as parts of a flower instead of an onion, to use Ana Nordberg’s metaphor.³⁴ It translates into decentered law generation to take account of ‘differences both in substantive values and in attitudes about law [that] arise from fundamentally different histories, philosophies, and worldviews’.³⁵

Pluralism’s focuses clashes among both *norms and institutions*. When norms from different parts of the international legal order interpenetrate the jurisdictions tasked with their interpretation, a form of ‘jurisdictional hybridity’ can occur, whether for good or ill.³⁶ Such hybridity can be used as a positive counterweight to ‘jurisdictional isolationism’, a condition that was said to afflict the Appellate Body a decade ago or so.³⁷

Pluralism is not limited to the domain of international law, though its role there has gained prominence in the last 15 years or so.³⁸ An international norm can also clash with a norm of municipal law. For example, in his account of the interaction between WTO and EU norms in respect of hormones added to beef destined for human consumption (as instantiated in *EC-Hormones*³⁹) or other applications of the precautionary principle, Krisch sheds light on a key feature of pluralism, the ‘contest of constituencies’.⁴⁰ In that case, the WTO dispute-settlement system provided a mechanism of judicial review of EU administrative action, thus serving an international constituency, while ‘the European mechanism that determines the status of WTO law in European Union law ties global regulatory action back to the European, national constituency’.⁴¹

³⁰See P. Schiff Berman (2007) ‘Global Legal Pluralism’, *Southern California Law Review* 80, 1155, 1192

³¹G.W.F. Drake, ‘Entropy’ in *Encyclopedia Britannica*, www.britannica.com/science/entropy-physics, 2 June 2021, accessed 20 August 2021.

³²W.A. Galston (2002) *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*. Cambridge: Cambridge University Press, at 65.

³³See A. Nordberg (2019) ‘Legal Method and Interpretation in International IP Law: Pluralism or Systemic Coherence’, in S. Frankel (ed.), *Is Intellectual Property Pluralism Functional?* Cheltenham: Edward Edgar, at 109–111.

³⁴*Ibid.* at 109. Dr Nordberg distinguishes a narrow and a broader application of pluralism to legal reasoning.

³⁵P. Schiff Berman (2012) *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*. Cambridge: Cambridge University Press, at 136.

³⁶*Ibid.*, at 23.

³⁷See C. Henckels (2008) ‘Overcoming Jurisdictional Isolationism at the WTO–FTA Nexus: A Potential Approach for the WTO’, *European Journal of International Law* 19, 571, 598.

³⁸See generally Berman, *Global Legal Pluralism*, *supra* note 35.

³⁹Appellate Body Report, *EC–Measures Concerning Meat and Meat Products (EC–Hormones)*, WT/DS26/AB/R & WT/DS48/AB/R, adopted 13 February 1998.

⁴⁰N. Krisch (2006) ‘The Pluralism of Global Administrative Law’, *European Journal of International Law* 17(1), 247, 259. (For a discussion, see R. Quick and A. Bluethner (1999) ‘Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case’, *Journal of International Economic Law* 2, 603; and D. Roberts (1998) ‘Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations’, *Journal of International Economic Law* 1, 377.

⁴¹Krisch, ‘The Pluralism of Global Administrative Law’, *supra* note 40.

Based on the above analysis, as it is used in this Article ‘pluralism’ can be defined as a way of interpreting international obligations (trade and non-trade) that posits a horizontal relationship between two norm-sets, resulting in increased flexibility to blend trade and non-trade (indeed, non-economic) interests.⁴² Pluralism is thus best seen as an *approach or construct*, which can be used from two different perspectives.⁴³ From *within* an institutional actor, making or interpreting a body of rules, it means a horizontality of norms external to that actor and norms within the actor’s own institution, whether perceived as a mode of accommodation, or as operating at a more fundamental level, especially in norm-making endeavors. From *outside* the institutional actor, a pluralist analytical perspective considers that, while each actor/regime may struggle for primacy, none succeeds. Such an outcome can be seen as pluralist whether or not it was actually *intended* by any particular actor/regime partaking in a norm competition.

3. Pluralism in WTO (non-TRIPS) Practice and Jurisprudence

The aim of this section is to place key dispute-settlement reports and other WTO materials in non-TRIPS related matters on a timeline to provide a contextual backdrop for the analysis of a possible injection of pluralism in the application and interpretation of the TRIPS Agreement.

3.1 Context

As we begin, it is important to note that the WTO Appellate Body has not expressly described the interface between trade law and international law as horizontal.⁴⁴ Indeed, in certain disputes where the interface with external norms was directly raised by parties, panels and the Appellate Body sidestepped the issue.⁴⁵ The notion of giving WTO Members greater *marge de manœuvre* to reflect non-trade interests in their public policy initiatives has clearly been present in the Appellate Body’s mind, however, and increasingly so.⁴⁶

3.2 Cases Supporting a Pluralist Approach

Leaving TRIPS-related disputes aside for now, the cases that arguably support a pluralist approach allowing WTO members to rely on competing, external (that is, non-WTO) norms to justify derogations from their trade commitments to give way to nontrade concerns, include: *US–Shrimp*, *EC–Asbestos*, *US–Cotton Yarn*, *US–Gambling*, *EC–Biotech*, *Brazil–Retreaded Tyres*, and *EC–Seals*.⁴⁷

First on the timeline, in *US–Shrimp* (1998) the Appellate Body used both the Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD) to decide whether the term ‘exhaustible natural resource’ in the GATT general exception (article XX) included living natural resources.⁴⁸ It found in the affirmative based in part on Article 56 of

⁴²This results in clashes between norms and jurisdictions, and may sometimes lead to ‘justified indecision’ in analyzing an outcome, a term suggested to the Author by Professor Ingo Venzke.

⁴³When defining pluralism this way, it is not clear whether and if so, to what extent, a particular actor or regime can be pluralist. See G. Shaffer (2012) ‘International Law and Global Public Goods in A Legal Pluralist World’, *European Journal of International Law* 23, 669, 671.

⁴⁴See *ibid*. Indeed, its approach has been described as opaque, shifty, and fact-specific.

⁴⁵Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels (EC–Commercial Vessels)*, WT/DS301/R, adopted 20 June 2005, at para. 4.190. For example, in *EC–Commercial Vessels*, Korea rejected the application sought by the EC of the International Law Commission’s draft articles on State Responsibility. Korea’s argument was anchored in Article 3.2 of the DSU. See *ibid*, at para. 4.257.

⁴⁶Krisch, ‘The Pluralism of Global Administrative Law’, *supra* note 40, at 260.

⁴⁷Sections 4 and 5 specifically with TRIPS disputes. The reference to each dispute is contained in the notes accompanying the discussion of each one, below.

⁴⁸Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, at para. 130. This case is also the one that opened the door to amicus briefs by non-governmental organizations (NGOs) in Appellate Body proceedings. See paras. 90–91. For a discussion, see A.E. Appleton

UNCLOS, which refers to ‘natural resources, whether living or non-living’.⁴⁹ The report also referred to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (the ‘CITES’), to determine that sea turtles were an endangered species.⁵⁰ Interestingly, the Appellate Body mentioned ‘the recent *acknowledgement by the international community* of the importance of concerted bilateral or multilateral action to protect living natural resources’.⁵¹ In the same report, the Appellate Body noted that it could rely on ‘interpretative guidance, as appropriate, from the general principles of international law’, including the principle of good faith, which the Appellate Body – described as a “pervasive” general principle of good faith that underlies all treaties’ noting that the chapeau of Article XX is ‘but one expression of the principle of good faith’ – and the doctrine of *abus de droit*.⁵²

US-Shrimp admits both a view that an interpenetration of subject-specific, non-WTO norms into the WTO legal order is possible, and a broader view that the application of non-subject specific principles of (international) law is possible. Put differently, the report built a bridge between WTO and non-WTO norms in a way that can, but does not necessarily, support a pluralist approach by using the general exception as a source of norm clashes. Clearly, however, the report marked a sea change from earlier GATT panel reports that squarely denied similar regulatory flexibility to the United States on a similar set of facts.⁵³

In *EC-Asbestos*,⁵⁴ the Appellate Body interpreted the expression ‘necessary to protect human ... life or health’ in the same general exception (art. XX GATT) to decide whether the European Communities’ ban on asbestos was justified.⁵⁵ This ‘landmark ruling’ changed the interpretation of the term ‘necessary’ as the Appellate Body found that less trade restrictive measures render a measure unnecessary only if such alternative measures are ‘sufficiently effective’.⁵⁶ Previously, the demonstration by a complainant that a less-trade-restrictive alternative was available, even if not as effective in achieving the respondent’s public policy objective, was sufficient for a finding that the measures was incompatible with the respondent’s trade commitments.⁵⁷ Though the Appellate Body interpreted the term ‘necessary’ in a way that might make a lexicographer cringe, it left the EC with the room it needed to justify a ban based on an *internal* public health assessment. The panel considered the ban as supported by an emerging ‘consensual norm’ about the harms associated with the use of the product.⁵⁸ Importantly for our purposes, in words

(1999) ‘Turtle: Untangling the Nets’, *Journal of International Economic Law* 2, 477, 485–489. The United States lost this case under the chapeau of art. XIV, not the substantive exception (public morals). The test under the general exception has two parts. The panel must first determine whether the measure can be justified under one of the substantive exceptions contained in the paragraphs (of art. XX of the GATT or XIV of the GATS) and then see whether the application of the measure meets the requirement of the chapeau, namely that such measure does not ‘constitute a misuse of abuse of the exception’ or a form of arbitrary and unjustifiable discrimination. P. van den Bossche and W. Zdouc (2017) *The Law and Policy of the World Trade Organization*. Cambridge: Cambridge University Press, at 593–594.

⁴⁹United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3; Convention on Biological Diversity, 5 June 1992, 31 ILM 818.

⁵⁰Convention on International Trade in Endangered Species of Wild Flora and Fauna, 3 March 1973, 993 UNTS 243, 12 ILM 1085; *US-Shrimp*, at para. 25.

⁵¹*US-Shrimp*, at para. 131.

⁵²Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US-Cotton Yarn)*, WT/DS192/AB/R, adopted 5 November 2001, at para. 81; and *US-Shrimp*, para. 158.

⁵³GATT Panel Report, *United States Restrictions on Imports of Tuna* (1991) 30 ILM 1594; Panel Report, *United States Restrictions on Imports of Tuna* (1994) 33 ILM 839.

⁵⁴Appellate Body Report, *EC-Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001.

⁵⁵*Ibid.*, at para. 156 (emphasis added). Technically, one could say this was dicta because the case was resolved by deciding that the products were not ‘like’.

⁵⁶J.H. Paltrowitz (2001), ‘A “Greening” of the World Trade Organization? A Case Comment on the Asbestos Report’, *Brooklyn Journal of International Law* 26, 1789, 1792.

⁵⁷See *ibid.*

⁵⁸See *ibid.*, at 1830.

that would find an echo in the *Declaration on the TRIPS Agreement and Public Health* issued by Ministers at Doha later the same year, the Appellate Body found that ‘it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation’.⁵⁹

A few months later in *US–Cotton Yarn*, the Appellate Body explicitly referred to the International Law Commission’s draft Articles on Responsibility of States, and noted that its findings were ‘supported further by the rules of *general international law* on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered’.⁶⁰

In another report issued between *EC–Asbestos* and *US–Cotton Yarn*, the Appellate Body referred to the principle of good faith as ‘organic’, and implied that WTO law formed an integral part of public international law, noting that ‘the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention apply to any treaty, in any field of public international law, and *not just* to the WTO agreements’.⁶¹

In *US–Gambling* (2005) the Appellate Body examined the application of the general exception contained in art XIV GATS.⁶² The US alleged that the measures restricting access to foreign online gambling platforms were ‘necessary to protect public morals or to maintain public order’.⁶³ As in *EC–Asbestos*, the Appellate Body found the measure ‘necessary’ even in the absence of a consideration of less restrictive measures, noting that a *prima facie* case that a measure was necessary could be made ‘by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be “weighed and balanced” in a given case’.⁶⁴

The portions of the GATT and GATS general exceptions referred to in WTO law as the ‘necessity test’⁶⁵ were thus used to justify recourse to non-WTO norms to impinge on trade liberalization commitments.⁶⁶ This remains true despite the availability of less trade-restrictive measures.⁶⁷

As explained by the Appellate Body, the process of assessing necessity ‘begins with an assessment of the “relative importance” of the interests or values furthered by the challenged measure’.⁶⁸ *The*

⁵⁹Appellate Body Report, *EC–Asbestos*, at para. 168. Compare with paragraphs 4 and 5(c) of the Declaration on the TRIPS Agreement and Public Health, *supra* note 2, which provide first, that ‘the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health’, and further that each ‘Member has the right to determine what constitutes a national emergency’.

⁶⁰*US–Cotton Yarn*, at para. 120. See R. Diamond (2008) ‘Privatization and the Definition of Subsidy: A Critical Study of Appellate Body Textualism’, *Journal of International Economic Law* 11, 649, 662.

⁶¹Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, at para. 60 (emphasis modified from original text).

⁶²GATS. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US–Gambling)*, WT/DS285/AB/R, adopted 20 April 2005 (emphasis added). See also J. Bacchus (2005) ‘Appellators: The Quest for the Meaning of And/Or’, *World Trade Review* 4, 499, 508.

As in *US–Shrimp*, the United States lost this case on the chapeau, not the substantive exception. Ultimately, the US prevailed in the article 21.5 proceeding. The United States lost this and *US–Shrimp* case under the chapeau, not the specific substantive exception invoked.

⁶³*US–Gambling*, at para. 293.

⁶⁴*Ibid.*, at para. 310.

⁶⁵See WTO, Note by the Secretariat, ‘Necessity Tests’ in the WTO, document S/DPDR/W/27, 2 December 2003, at 8–9. See also S. Yakovleva (2020) ‘Personal Data Transfers in International Trade and EU Law: A Tale of Two “Necessities”’, *Journal of World Investment and Trade* 21, 881.

⁶⁶See Panel Report, *EC–Asbestos* (as modified by the Appellate Body), at para. 3.125. For example, in *EC–Asbestos*, the panel considered several Conventions and a guide published by the International Labor Organization (ILO) (this was not discussed in detail by the Appellate Body).

⁶⁷Many WTO members believed that the existence of a reasonable, less trade-restrictive alternative would defeat a necessity defence, but it does not always work that way. See Jeol P. Trachtman (2017) ‘WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe’, *Harvard International Law Journal* 58, 273, 294

⁶⁸*US–Gambling*, at para. 306; and Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea–Beef)*, WT/DS161/AB/R and WT/DS169/AB/R, adopted 10 January 2001, at para. 164; Appellate Body Report,

more important the interest, the heavier it weighs in the assessment.⁶⁹ As a result, ‘necessity’ can be situated on a spectrum that goes from ‘indispensable’, at one end, to merely a need to show that the measure is ‘making a contribution to’ the underlying policy objective, at the other end.⁷⁰ The point on the spectrum that applies to a challenged measure depends, in each case, on the importance of the non-trade public interest at stake, which, in turn, depends on the existence of relevant non-trade norms.

In *Brazil–Retreaded Tyres* (2007), Brazil tried to justify a ban on the importation of retreaded tires under GATT art. XX.⁷¹ The ban was meant to reduce ‘exposure to risks arising from the accumulation of waste tyres’.⁷² According to the Appellate Body, the ban ‘illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns’, adding the analysis should take ‘into account the importance of the interests or the values underlying the objective pursued by it’.⁷³

The last dispute in this section is *EC–Seals* (2014). Canada and Norway contested the EU seal regime, which banned the placing of most seal products on the EU market.⁷⁴ The Appellate Body upheld the Panel’s finding that the EU regime was ‘necessary to protect public morals’.⁷⁵ In doing so, the Appellate Body ‘gave expression to an important degree to the ethos of global pluralism ... accepting that the EU ban on seal products could be justified not only in terms of moral concern for the suffering of seals, but also as expressing disapprobation of complicity with the infliction of such suffering by consumers who purchase the products’.⁷⁶ This suggests a broad deference to ‘protecting the environment, as well as animal and human health, through approaches that are sound under utilitarian policymaking, and are shaped by noninstrumental ethical and religious conceptions of what is right’.⁷⁷ In other words, the report showed that the ‘WTO is not closed to the rest of the world, and [that] priority can be given to non-trade concerns’.⁷⁸

The above cases support a pluralist approach. From within the WTO, they demonstrate an openness to let external norms, consensus, decisions, and values compete with WTO norms and the underlying trade liberalization ethos. From outside (analytically) the WTO, the cases show that the external norm can ultimately win the norm competition

3.3 Cases Not Supporting a Pluralist Approach

Other dispute-settlement reports blew a much colder wind on proponents of a pluralist approach. The first example is *EC–Biotech Products* (2006).⁷⁹ Argentina, Canada, and the United States

Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil–Retreaded Tyres), WT/DS332/AB/R, adopted 17 December 2007, at para. 143.

⁶⁹*US–Gambling*, at para. 307. Another factor considered by the Appellate Body is the degree of international ‘support’ for a measure even if not enshrined in the text of a treaty. See Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R, adopted 9 May 2016 (as modified by the Appellate Body), at paras. 7.671 and 7.715. Though the panel report was appealed (WT/DS453/AB/R, adopted 9 May 2016), the points made in these two paragraphs remain valid.

⁷⁰*Korea–Beef*, at paras. 160–161. See also WTO, Note by the Secretariat, ‘Necessity Tests’ in the WTO, supra note 65, at 8–9.

⁷¹*Brazil–Retreaded Tyres*, at para. 3.

⁷²*Ibid.*, at paras. 154 and 170.

⁷³*Ibid.*, at para. 210 (emphasis added). Ultimately, Brazil lost the case because it treated MERCOSUR and other countries differently, which the Appellate Body considered as a form of arbitrary or unjustifiable discrimination under the Art. XX chapeau. See *ibid.*, at para. 233 and supra note 48.

⁷⁴With a few limited exceptions. See Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R adopted 18 June 2014.

⁷⁵*Ibid.*, paras. 5.198–5.202.

⁷⁶R. Howse and K. Nicolaidis (2016) ‘Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large’, *Law and Contemporary Problems* 79(2), 259, 280.

⁷⁷*Ibid.*

⁷⁸Marceau, ‘The WTO Is Not a Closed Box’, supra note 21, at 30. Though the EC lost the case on other grounds, it won on the necessity test, and the analysis underlying that decision is what matters for our purposes.

⁷⁹Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, and WT/DS293/R, adopted 21 November 2006.

opposed the EC's restrictions on the importation and sale of genetically modified foods.⁸⁰ The case drew a lot of attention.⁸¹ The panel focused in highly technical trade terms on the EU measures' inconsistencies with the SPS and TBT Agreements.⁸² Interestingly, the SPS Agreement expressly opens a door to the application of non-WTO standards in two ways: first, by referring in its preambular provisions to 'international standards, guidelines and recommendations developed by the *relevant international organizations*', and, second, by stating that members must 'base their sanitary and phytosanitary measures on *international standards, guidelines or recommendations, where they exist*'.⁸³ Moreover, the WTO refers to the basic aim of the SPS Agreement as maintaining 'the sovereign right of any government to provide the level of health protection it deems appropriate'.⁸⁴ In this dispute, however, the reference to extrinsic norms and 'relevant organizations' was used more as a mere outsourcing of the 'science' to organizations better equipped to provide those inputs, leaving the WTO as arbiter to decide whether (a) the EU measures were 'based on' relevant international norms'; and (b) were not a disguised form of protectionism. WTO norms were situated in a hierarchical position towards other polities.

Though the two disputes deal with different WTO commitments, the panel report in *EC-Biotech Products* can be compared to the Appellate Body report in *EC-Hormones* (1998), which defined the phrase 'based on an international standard' not as 'conforming' to such a standard but only as incorporating some elements of the standard.⁸⁵ In that report, the Appellate Body examined the factors on which WTO members must base their sanitary or phytosanitary measures, namely on an assessment of the 'risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations', a process for which the Agreement provides a list of factors.⁸⁶ The Appellate Body found the list of factors non-exclusive and in doing so it opened 'the door to the inclusion of such factors as *cultural preferences and societal values* in the risk assessment for SPS measures'.⁸⁷

The same year as *EC-Biotech Products*, in *Mexico-Soft Drinks* (2006) the Appellate Body found Mexico's attempt to rely on the Permanent Court of International Justice's judgement in *Factory at Chorzów* to argue that the United States had prevented Mexico from having recourse to the NAFTA dispute settlement 'misplaced', adding that it saw 'no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes'.⁸⁸

In *Peru-Agricultural Products* (2015) the Appellate Body refused to apply the Free Trade Agreement (FTA) between Peru and Guatemala to allow Peru not to comply with its WTO

⁸⁰See *ibid.*

⁸¹M. Hakimi (2020) 'The Integrative Effects of Global Legal Pluralism', in P.S. Berman (ed.), *The Oxford Handbook of Global Legal Pluralism*. Oxford: Oxford University Press, at para. 20.3.3.

⁸²Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, Preamble, Marrakesh Agreement Establishing the World Trade Organization Annex 1A, in Results of the Uruguay Round of Multilateral Trade Negotiations 1 (1994) at 69 (hereinafter SPS Agreement); and Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (hereinafter TBT Agreement).

⁸³SPS Agreement, preamble and art. 3.1 (emphasis added).

⁸⁴WTO Secretariat, Understanding the SPS Agreement, www.wto.org/english/tratop_e/sps_e/spsund_e.htm (accessed 10 March 2021).

⁸⁵*EC-Hormones*, at para. 163.

⁸⁶*EC-Hormones* deals with article 3 (harmonization). The factors to be considered are: 'available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment'. SPS Agreement, *supra* note 81, art. 5.2.

⁸⁷R. Neugebauer (2000) 'Fine-Tuning WTO Jurisprudence and the SPS Agreement: Lessons from the Beef Hormone Case', *Law and Policy in International Business* 31, 1255, 1266. See also D.E. McNeil (1998) 'The First Case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban', *Virginia Journal of International Law* 39, 89, 107-122. For a critique, see Quick and Bluthner, 'Has the Appellate Body Erred?', *supra* note 40.

⁸⁸Appellate Body Report, *Mexico - Tax Measures on Soft Drinks, and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, at paras. 55-56.

commitments to Guatemala.⁸⁹ Peru based part of its argument on the VCLT, stating that the FTA constituted a relevant rule of international law applicable under Article 31(3)(c) and a ‘subsequent agreement between the parties’ under Article 31(3)(a).⁹⁰ The Appellate Body refused to follow Peru down that path.⁹¹

The cases just reviewed maintain a fairly clear hierarchy of norms. A clash between WTO and non-WTO norms may be acknowledged but ultimately it was decided on a non-horizontal basis and, hence, do not support a pluralist approach.

3.4 Other Relevant Aspects of WTO Practice

In 2007 – after *EC–Asbestos* and *US–Gambling* – WTO Director-General Pascal Lamy opined that WTO norms ‘do not supersede or trump international norms. In fact, the GATT, and now the WTO, recognizes explicitly that trade is not the only policy consideration that Members can favour’.⁹² This statement can be read either as opening the door to a pluralist approach, or merely as mirroring the fact that WTO dispute settlement uses specific mechanisms (such as GATT Article XX and VCLT Article 31(3)(c)) to interface only in specified ways with non-WTO norms. One finds support for the claim that he may have meant the former in a speech given a few months earlier. There, Lamy arguably went a step further down the horizontality/norm competition path by recognizing not just that ‘international norms’ (by which one assumes he meant nontrade international law) are not superseded by trade law, but by positing something like equal force between the two realms, indeed recognizing the potential superiority of non-trade concerns in appropriate cases, hence showing international law as \geq trade law. In his words:

[T]he WTO does take into account other norms of international law; and absent protectionism, a trade restriction based on legitimate non-WTO considerations will trump WTO norms. Moreover, I believe that in leaving Members with the necessary policy space to favour non-WTO concerns, the WTO also recognizes the specialization, expertise and importance of other international organizations.⁹³

Then in 2009, in words that echo the Appellate Body’s non-clinical isolation doctrine, he opined that the ‘international intellectual property system cannot operate in isolation from broader public policy questions such as how to meet human needs as basic health, food and a clean environment’.⁹⁴

⁸⁹Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru–Agricultural Products)*, WT/DS457/AB/R, adopted 31 July 2015, at para. 5.85. The FTA (Tratado de libre comercio entre la República del Perú y la República de Guatemala (6 December 2011)), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2620/download> (accessed 2 April 2021).

⁹⁰*Peru–Agricultural Products*, at para. 5.98. Reaching this conclusion had previously been proposed by J.T. Gathii (2002) ‘The Legal Status of the Doha Declaration on Trips and Public Health Under the Vienna Convention on the Law of Treaties’, *Harvard Journal of Law and Technology* 15, 291, 300.

⁹¹*Peru–Agricultural Products*, at para. 5.101. In doing so, it was relying on similar statements in e.g. Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, report of the Appellate Body, WT/DS316/AB/R, adopted 1 June 2011, at para. 846. In that case, as support for its finding, the Appellate Body cited M.E. Villiger (2009) *Commentary on the 1969 Vienna Convention on the Law of Treaties*. New York, NY. Brill. One could also mention in this context article 30 VCLT, which deals with successive treaties concerning the same subject matter.

⁹²P. Lamy (2007) ‘The Place of the WTO and its Law in the International Legal Order’, *European Journal of International Law* 17(5), 969, 978.

⁹³Quoted in Marceau, ‘The WTO Is Not a Closed Box’, supra note 21, at 3.

⁹⁴P. Lamy, Speech at the WIPO Conference on Intellectual Property and Public Policy Issues, Geneva, 14 July 2009, www.wipo.int/meetings/en/2009/ip_gc_ge/presentations/lamy.html (accessed 24 February 2021). As to the treaties incorporated into the TRIPS Agreement, see note 25.

Lamy's views are consistent with Pauwelyn's, who argued that the 'WTO treaty, [must be construed and applied] in the context of *other norms of international law*' and that WTO norms may 'prevail over the WTO Treaty' and 'offer a valid legal defence against claims of WTO breach'.⁹⁵ WTO Legal Affairs Counselor Gabrielle Marceau wrote along similar lines that an 'evolving' (*évolutive*) interpretative approach to embrace societal values was appropriate.⁹⁶

That said, one should make appropriate distinctions between recognizing the scope of WTO members' broad policy flexibility to balance their trade commitments against other, non-trade-related policy concerns, and members' flexibility in implementing widely supported non-trade norms with a reduced focus on trade norm compliance. The idea underlying the latter is letting non-WTO norms permeate the interpretation and application of WTO commitments, especially those that have broad support among WTO Members. Examples include, as the next Part explains, the WHO *Framework Convention on Tobacco Control* (FCTC) and Guidelines, the CBD and the *United Nations Framework Convention on Climate Change*, all of which have a very substantial number of parties.⁹⁷

4. Pluralism in TRIPS Practice and Jurisprudence

4.1 The TRIPS Difference

Unlike the GATT and GATS, TRIPS is not meant to liberalize trade. That difference – indeed something one could even call a conflict – between TRIPS and other WTO instruments is encapsulated in what the GATT said about intellectual property *before* TRIPS, namely that intellectual property is but an acceptable barrier to free trade.⁹⁸ This TRIPS difference is reflected in the TRIPS Preamble, which states that 'measures and procedures to enforce intellectual property rights [should] not themselves become barriers to legitimate trade'.⁹⁹ Indeed, the name of the Agreement itself points to the difference: it is *trade-related*.

Senior trade economists commented early on that intellectual property did not fit in a normative framework dedicated to the liberalization of trade in goods and services.¹⁰⁰ This was not lost on panels and the Appellate Body, many members of both being often picked from a list of seasoned *trade negotiators*.¹⁰¹ The report in the very first TRIPS dispute-settlement case to go to a panel noted that 'the TRIPS Agreement, the entire text of which was newly negotiated in the Uruguay Round... occupies a relatively self-contained, sui generis status in the WTO Agreement'.¹⁰²

The Appellate Body expressly espoused the TRIPS difference in *Australia–Tobacco Plain Packaging*:

[T]he TRIPS Agreement, as an agreement addressing intellectual property rights, is principally concerned with the creation and protection of exclusive private rights. By definition,

⁹⁵J. Pauwelyn (2003) *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*. Cambridge: Cambridge University Press, at 485 and 491.

⁹⁶G. Marceau (2018) 'L'interprétation Évolutive par le Juge OMC: Sophisme ou Nécessité?' 122(1), 23.

⁹⁷On the FCTC, see Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (*Australia–Tobacco Plain Packaging*), WT/DS435/AB/R and WT/DS441/AB/R, adopted 29 June 2020, para. 6.707; and section 5.1, below.

⁹⁸GATT Contracting Parties were allowed under the general exception of GATT Article XX(d) to regulate IP and thus, for example, to disallow the importation of goods infringing an intellectual property right, which, subject to the chapeau's test, allows Parties to adopt measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including ... the protection of patents, trade marks and copyrights, and the prevention of deceptive practices'.

⁹⁹TRIPS Agreement, *supra* note 1, Preamble.

¹⁰⁰See e.g., J. Bhagwati (2004) *In Defense of Globalization*. Oxford, Oxford University Press, at 182–185.

¹⁰¹Though not always, and this has gone back and forth. See *supra* note 23.

¹⁰²*India–Patent (US)*, at para. 7.19.

these exclusive rights act to restrict commercial activity and require an active intervention of government to enforce these restrictions'.¹⁰³

Trade agreements tend to limit regulatory autonomy by making certain types of regulation incompatible with trade rules or by imposing a range of acceptable regulation. TRIPS is different in that, as the Appellate Body noted, it requires 'active intervention of government to enforce these restrictions'.¹⁰⁴ 'By contrast', it said, other covered agreements are focused on the *liberalization of international trade*, effected through the progressive reduction, through mutual agreement, of barriers to trade.¹⁰⁵ This TRIPS difference will matter in the following pages as we try to determine the effect of a pluralist approach on the future application and interpretation of the TRIPS Agreement.

4.2 Early TRIPS Cases

The TRIPS Agreement incorporates most of the substantive provisions of two major, non-trade-related instruments administered by the World Intellectual Property Organization (WIPO).¹⁰⁶ There is a common denominator, however, between trade and IP, and it follows from the choice made during the Uruguay Round of trade law to enforce intellectual property. That common denominator is the focus (particularly in dispute-settlement reports) on economic impact, which, when applied to IP, is the 'sextant that can ensure that it avoids the Charybdis of rent-seeking and the Scylla of free-riding'.¹⁰⁷ In the case of copyright, for example, TRIPS' focus is explicitly limited to economic rights, and excludes authors' moral rights.¹⁰⁸ As a result, early dispute-settlement panels have tended to consider exceptions and limitations mostly in terms of their economic impact.¹⁰⁹

This economic approach is visible in two cases involving the so-called 'three-step test'.¹¹⁰ Unlike GATT and GATS, the TRIPS Agreement does not contain a general exception. Instead, it applies a 'three-step test' to any exception to copyright, design or patent rights in municipal law.¹¹¹ The three-step test has not yet been interpreted by the Appellate Body. It was applied, however, by two panels, both in the year 2000. First, in *Canada – Pharmaceutical Patents* the panel declared a Canadian exception allowing generic drug manufacturers to stockpile a patented drug six months prior to the expiration of the patent to avoid lag time between that expiration and the competition from the lower-cost generic on the market incompatible with Canada's TRIPS commitments.¹¹² In its defense of the measure, Canada invoked the public health nature of the measure and anchored that argument in art. 8.1 of TRIPS, which provides in part that

¹⁰³*Australia–Tobacco Plain Packaging*, at para. 6.577 and footnote 1502.

¹⁰⁴*Ibid.*

¹⁰⁵*Ibid.* footnote 1670 [emphasis added].

¹⁰⁶See note 25. Both texts were last revised in 1967, although an Appendix was added to the Stockholm text of the Berne Convention in 1971 (in Paris).

¹⁰⁷D. Gervais (2015) 'Human Rights and the Philosophical Foundations of Intellectual Property', in Ch. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*. Cheltenham: Edward Elgar, at 93.

¹⁰⁸Moral rights contained in art. 6*bis* of the Berne Convention (see note 25) include the right to be recognized as the author of a copyrighted work and to object to its 'mutilation'. TRIPS art. 9.1 provides in part that 'Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.'

¹⁰⁹See *ibid.* at para. 3.196 and following.

¹¹⁰See C. Geiger et al. (2014), 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law', *American University International Law Review* 29, 581, 591.

¹¹¹See *ibid.* at 586. There are three different three-step tests in the TRIPS Agreement. The first, in art. 13, applies to copyright rights and is mirrored on art. 9(2) of the Berne Convention (see *supra* note 25). The other two apply to designs and patents, respectively. TRIPS Agreement, *supra* note 1, arts 13, 26.2, and 30.

¹¹²Panel Report, *Canada – Patent Protection of Pharmaceutical Products (Canada–Pharmaceutical Patents)*, WT/DS114/R, adopted 7 April 2000.

'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health'.¹¹³ The panel did not mention public health even once in its findings and made short shrift of Canada's argument, merely noting that the 'goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind'.¹¹⁴ Instead, it found, that the three steps necessary to justify an exception should be applied cumulatively and interpreted the term 'limited' in the first step by gauging 'the extent to which the patent owner's rights to exclude "making" and "using" the patented product have been curtailed', thus ostensibly staying fully within the normative view that TRIPS was meant to protect IP owners.¹¹⁵

A few months later in *US – Section 110(5) Copyright Act*, the panel had to decide whether an exception in US copyright law allowing bars, hotels, restaurants, and supermarkets to play music without payment to the copyright holder was allowable under the three-step test.¹¹⁶ The panel answered in the negative, finding fault with the US exception on all three steps of the test.¹¹⁷ It did, however, open the door ever so slightly to broader considerations. For example, it interpreted the term 'special' in the first step to mean that an exception 'should be clearly defined and should be narrow in its scope and reach', but then added that 'a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned'.¹¹⁸ Far from engaging in a contestation of norms, however, the panel merely accepted that 'undiscernible' normative claims might generate a sufficient degree of 'specialness'. On the second step of the test, namely that the impugned exception not 'interfere with normal exploitation' of the copyrighted work, the panel took a resolutely economic turn and found that an exception failed that step if it entered 'into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains'.¹¹⁹ Then, in what may seem tautological, the panel interpreted the 'unreasonable' prong in the third step to mean that an exception was incompatible with TRIPS 'if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner'.¹²⁰

There is a rather striking aspect to both above panel reports. Recall that the TRIPS Agreement incorporated by reference most of the substantive provisions of two pre-existing, non-trade international instruments.¹²¹ In its consideration of the test contained in art. 13 of TRIPS, both panels noted that it was based on art 9(2) of the Berne Convention.¹²² In pages that would not be jarring in an ICJ judgment, the panels went over the *travaux* of the Berne Convention and decided that those *travaux* had been incorporated by reference into TRIPS when the Berne Convention was incorporated by reference into TRIPS.¹²³ The path followed to perform this integrative analysis was tortuous, however, especially in *US – Section 110(5) Copyright Act*. The panel first noted a statement by the Rapporteur at the last revision conference of the Berne Convention (Stockholm, 1967) and found that it amounted to an 'agreement within the meaning of

¹¹³TRIPS Agreement, supra note 1, art. 8.1.

¹¹⁴*Canada-Pharmaceutical Patents*, at para. 7.26.

¹¹⁵*Ibid.* at para. 7.34. 'Making' and 'using' are used in quotations marks because they are two of the primary rights of patent owners, as provided in art. 28.1(a) of TRIPS.

¹¹⁶Panel Report, *United States – Section 110(5) of the US Copyright Act (US-Section 110(5) Copyright Act)*, WT/DS160/R, adopted 27 July 2000.

¹¹⁷See *ibid.*

¹¹⁸*Ibid.* at para. 6.112.

¹¹⁹*Ibid.* at para. 6.183.

¹²⁰*Ibid.* at para. 6.229.

¹²¹See note 25.

¹²²See *ibid.*

¹²³*Canada – Pharmaceutical Patents*, at paras. 7.71 and 7.72; *US – Section 110(5) Copyright Act*, supra note 116, at paras. 6.72 and following

Article 31(2)(a) of the Vienna Convention between all the parties'.¹²⁴ It then found that the 'agreement' reflected in the *travaux* formed part of the VCLT 'context'.¹²⁵ The last step in the panel's analysis was to note that there was 'no indication in the wording' of the TRIPS Agreement that the 'incorporation[of the Berne Convention] should have covered only the text of Articles 1–21 of the Berne Convention ... , but not the entire Berne *acquis* relating to these articles', because otherwise TRIPS 'would have explicitly so provided'.¹²⁶ This led to a conclusion logically derived from the above, namely that 'the incorporation of ... the Berne Convention ... into the Agreement includes the entire *acquis* of [its incorporated] provisions'.¹²⁷ In the end, however, though the analytical path trodden by the panel created a formal horizontality between external norms incorporated into TRIPS and the TRIPS Agreement, the panel's analysis cannot be described as pluralist as the term was defined above.

Though it has not had a chance to opine on the three-step test, in 1997 the Appellate Body interpreted the freedom to implement contained in TRIPS art 1.1.¹²⁸ Like the three-step test, facially this provision could support a pluralist reading – indeed its very text point to possible 'plural' implementations of TRIPS obligations.¹²⁹ Yet, despite a pronouncement that WTO members were 'free to determine how best to meet their obligations under the TRIPS Agreement within the context of their own legal systems', the Appellate Body refused to consider that India was complying with its obligation to provide a temporary mechanism to protect pharmaceutical patents (India had no such protection when it became a WTO member) because the Indian mechanism had been established through administrative means rather than a formal statute or regulation.¹³⁰ This provision, like the three-step test(s), has yet to deliver a genuinely pluralist outcome.

4.3 The HIV/AIDS Inflection Point

The HIV/AIDS pandemic of the late 1990s/early 2000s marked an inflection point in the TRIPS timeline. When the HIV pandemic hit, South Africa had begun to reform its drug pricing policy using, *inter alia*, compulsory licensing to reduce prices.¹³¹ Facing this major public health crisis, the South African government took measures to obtain antiretroviral medicines at a cost it could afford, including a competition law complaint against many major actors in the multinational pharmaceutical industry.¹³² This quickly got Washington's attention, and the United States Trade Representative designated South Africa a priority country under section 301 of US trade law because 'South Africa has become a test case for those who oppose the US government's long-standing commitment to improve the terms of protection for all forms of American intellectual property, including pharmaceutical patents'.¹³³

Several critiques began to emerge, suggesting that the TRIPS Agreement was reducing public welfare not just in South Africa but more generally in all developing countries.¹³⁴ The WHO 'began questioning the relationship between the new international trade regime and its own

¹²⁴US – Section 110(5) Copyright Act, *supra* note 116, at para. 6.53.

¹²⁵*Ibid.* at para. 6.60.

¹²⁶*Ibid.* at para. 6.62.

¹²⁷*Ibid.* at para. 6.63.

¹²⁸Which allows Members 'to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.

¹²⁹See US – Section 110(5) Copyright Act, *supra* note 116, at para. 6.53.

¹³⁰*India–Patents (US)*, at para. 59.

¹³¹See H. Klug (2012) 'Access to Medicines and the Transformation of the South African State: Exploring the Interactions of Legal and Policy Changes in Health, Intellectual Property, Trade, and Competition Law in the Context of South Africa's, *Law and Social Inquiry* 37, 297, 307–308.

¹³²See *ibid.* at 310–311.

¹³³*Ibid.* at 314.

¹³⁴See F.M. Scherer (2004) 'Global Welfare in Pharmaceutical Patenting', *World Economy* 27, 1127, 1141

mandate to promote world health'.¹³⁵ This new discourse led in short order to a recommendation that TRIPS should be resisted.¹³⁶ The WTO, which was trying to launch a new round of multi-lateral negotiations after the failed Ministerial in Seattle in 1999, was feeling this normative tsunami blowing against its walls.¹³⁷ Ministers were finally able to agree to launch the Doha Round (or Development Agenda) in 2001 thanks to the adoption of the Declaration on the TRIPS Agreement and Public Health, paragraph 6, which required members to 'find an expeditious solution' to the problem of WTO members with 'insufficient or no manufacturing capacities in the pharmaceutical sector'.¹³⁸ The so-called 'paragraph 6' system, allowing compulsory licensing of pharmaceuticals for export to countries with insufficient or no manufacturing capacities, would be adopted approximately two years later, leading to the first – and so far only – amendment to the TRIPS Agreement: the addition of article 31*bis*.¹³⁹

When compared to other WTO agreements, by 2001 TRIPS had become a different normative battlefield. The TRIPS difference played a key role in shaping the battle, as the HIV/AIDS pandemics would confirm. This battle initially waged between public health and intellectual property has since been extended to measures to mitigate climate change.¹⁴⁰ The COVID-19 pandemic put the TRIPS difference in even starker contrast.

The WTO's response to the COVID pandemic has been to try to firm up supply chain commitments and trade liberalization to eliminate or reduce 'nationalistic' export restrictions and similar measures.¹⁴¹ Hence, in the area of trade in *goods*, the WTO aims to adopt and if necessary *enforce stronger rules* to ensure the resilience of supply chains.¹⁴² Contrast this with intellectual property, an area in which the policy response to COVID-19 under discussion at the WTO is to permit countries who have not or cannot invent technologies (including vaccines) to respond to the crisis to use technology developed by others, either under a compulsory license or an exception under a temporary waiver, that is, a *loosening of the rules* enshrined in TRIPS. Lessons from the COVID-19 pandemic are likely to fuel continued demands for reductions in intellectual property obligations undertaken by countries that typically import the equipment and pharmaceutical products necessary to deal with such public health emergencies. In those contexts, the 'TRIPS difference' will lead to a push for weakening of TRIPS rules by the same WTO members that are pushing for a strengthening of trade liberalization rules, in particular bans on export restrictions.

¹³⁵Klug, 'Access to Medicines and the Transformation of the South African State', supra note 131, at 317.

¹³⁶See D. Gervais (2009) 'Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation', *Fordham Law Review* 77, 2353, 2357–2360.

¹³⁷See J.L. Kenworthy (2000) 'US Trade Policy and the World Trade Organization: The Unraveling of the Seattle Conference and the Future of the WTO', *Georgetown Journal of Law and Public Policy* 5, 103; and A.M. Curti (2001) 'The WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight Against AIDS' *American Journal of Law & Medicine* 27, 469, 485.

¹³⁸Declaration on the TRIPS Agreement and Public Health, supra note 2, at para. 6.

¹³⁹See D. Gervais (2021) *The TRIPS Agreement: Drafting History and Analysis*, 5th edn. London: Sweet & Maxwell, at paras. 2.80 and following.

¹⁴⁰See Cambridge IP, 'The Acceleration of Climate Change and Mitigation Technologies: Intellectual Property Trends in the Renewable Energy Landscape', Global Challenges Brief (2014), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gc_1.pdf (accessed 29 June 2021).

¹⁴¹That is, precisely what Director-General Okonjo-Iweala promoted literally from her very first day in office. See WTO (2021), 'DG Okonjo-Iweala: WTO Can Deliver Results If Members "Accept We Can Do Things Differently"', WTO Press Release (2 March 2021). The WTO secretariat also noted that, with respect to goods required to fight the pandemic, 'the WTO has several tools in place to help governments as well as the general public follow the COVID-19-related measures being imposed and notified by members to the WTO', including barriers to trade. WTO, *Frequently Asked Questions: The WTO and COVID-19*, www.wto.org/english/tratop_e/covid19_e/faqcovid19_e.htm (accessed 29 June 2021). The TRIPS waiver was also mentioned in DG Okonjo-Iweala's speech, *ibid*.

¹⁴²Free markets tend to prioritize efficiency over resiliency. That said, this is not just a governmental objective. Private companies that suffered from the lack of resilience in supply chains are also looking to strengthen supply. See K. Aliche, R. Gupta, and V. Trautwein (2020) 'Resetting Supply Chains for the Next Normal', McKinsey & Company (21 July 2020), <https://mck.co/2OHOCvI> (accessed 21 June 2021).

A final note before we close this Section – between 2001 and 2015, the few TRIPS cases that led to a panel or Appellate Body report did not discuss, at least not head-on, clashes between a public policy goal and intellectual property protection. Then came tobacco.

5. Tobacco Plain Packaging

5.1 Overview of the Dispute

As explained above, the ‘relative self-contained’ nature of TRIPS and its ‘difference’ in principle open the door for a normative separation of TRIPS from other WTO instruments, thus possibly allowing for greater flexibility in interpreting the text of the Agreement than other WTO texts. That is arguably what the Appellate Body did in 2020 when, in *Australia–Tobacco Plain Packaging*, it did not consider that the term ‘unjustifiably’ in TRIPS Article 20 had to be read the same way as a similar term in the chapeau to Article XX GATT (and XIV GATS), that is, the two general exceptions. As the Article will now explain, if *Australia–Tobacco Plain Packaging* is followed in future panel and Appellate Body reports, it may well be viewed as marking a watershed moment in the use of a pluralist approach in the interpretation of the TRIPS Agreement.

The complainants (Cuba, Dominican Republic, Honduras, and Indonesia) complained, *inter alia*, that Australia had violated its obligations under TRIPS, article 20, which prohibits *unjustifiable* encumbrances on the use of a trademark in the course of trade 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’.¹⁴³ The impugned Australian legislation (a) bans the use of logos and colors on cigarette packs (other than imposing a color rather vividly described as ‘vomit green’); (b) imposes strict obligations to display large health warnings and graphic images of diseased patients on the packs; and (c) allows only black block letters in small print to identify the brand.¹⁴⁴ The panel, like the Appellate Body, had no difficulty in finding that the Australian measure created a severe encumbrance by special requirement on the use of tobacco trademarks in the course of trade.¹⁴⁵ The case turned, therefore, on whether the encumbrance was unjustifiable.

The panel and Appellate Body allowed a broad scope for justification under external norms and put the burden to show unjustifiability on the Complainants, thus making the case virtually impossible to win for them. The external norms in question relied on by Australia are contained in the WHO Framework Convention on Tobacco Control (FCTC) and specifically on Guidelines to the FCTC that suggest that parties ‘consider adopting measures to restrict or prohibit the use of logos, colors, brand images or promotional information on packaging other than brand names and product names displayed in a standard color and font style (plain packaging)’.¹⁴⁶

The use of the FCTC guidelines is a striking aspect of the panel report, as the FCTC and guidelines are mentioned *over 1,000 times* in the report.¹⁴⁷ It is particularly noteworthy that the

¹⁴³TRIPS Agreement, *supra* note 1, art. 20.

¹⁴⁴Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R, at 90–93. The reports in DS458 and DS467 were adopted 27 August 2018 as Cuba and Indonesia did not appeal the report. Other complainants did. See *supra* note 97. As a result, the reports in DS435 and DS441 were adopted and 29 June 2020 as modified by the Appellate Body. On the expression ‘vomit green’, see M. Johnston, ‘Warnings Squeeze Out Brands’, *Daily Telegraph*, 4 December 2012, <https://bit.ly/3h0zHsf> (accessed 29 June 2021).

¹⁴⁵See Gervais, *The TRIPS Agreement*, *supra*, note 138, at paras. 3.295 and following. See also S. Frankel and D. Gervais (2013) ‘Plain Packaging and the Interpretation of the TRIPS Agreement’, *Vanderbilt Journal of Transnational Law* 46, 1149.

¹⁴⁶World Health Organization, Framework Convention on Tobacco Control, Guidelines for Implementation of Article 11, para. 46.

¹⁴⁷A word search of the report performed by the author returned a count of 1,062 but that includes the table of contents, list of abbreviations etc.

complainants are *not* party to the FCTC.¹⁴⁸ The purported justification for the Australian measure was a multilateral instrument with broad acceptance (181 parties as of August 2021) but one that could thus not be applied to the complainants on a contractarian basis. This was a matter of accepting a clash with an otherwise widely accepted public health norm to defeat a WTO commitment.

In the end, the Appellate Body found that the encumbrance would be unjustified only if the *complainant* could ‘prove that the encumbrance by special requirement is *incapable of being reasonably explained*’, which for a complainant is assuredly ‘a heavy burden to discharge’.¹⁴⁹ The absence of a justification is a necessary element of the claim and not a defense. Unfortunately, however, the Appellate Body, while mostly agreeing with the panel’s findings, punted on the role and relevance of the FCTC, even though that question had been put quite squarely before it by the appellants.¹⁵⁰ The Appellate Body merely noted that the panel had only ‘referred to Articles 11 and 13 of the FCTC Guidelines as additional *factual* support to its previous conclusion that the complainants failed to establish that Australia acted inconsistently with Article 20 of the TRIPS Agreement’.¹⁵¹

5.1.1 Analysis

The door of pluralism, opened wide by the panel in *Australia–Tobacco Plain Packaging*, was left ajar by the Appellate Body. There is little doubt that environmental and public health norms reflected in instruments adopted outside the WTO by a large contingent of WTO members – whether or not parties to a WTO dispute have adhered to such an instrument – may now validly be brought to the attention of a panel and/or the Appellate Body, even if only under the rubric of ‘factual’ support in a TRIPS dispute. For example, another global framework convention with a high degree of multilateral purchase, the United Nations Framework Convention on Climate Change (UNFCCC) – 197 parties as of August 2021 – might be invoked to limit the role of patents in climate change mitigation.¹⁵² These norm clashes will be more frequent and, from a pluralist perspective, may inform the horizontal interpretation of WTO norms adumbrated by Pascal Lamy’s comment that ‘a trade restriction based on legitimate non-WTO considerations will trump WTO norms’.¹⁵³

The composition of the Appellate Body panel demonstrates that one need not have served on a non-WTO international court or tribunal to allow external norms to clash with a WTO commitment.¹⁵⁴ The presiding member in *Australia–Tobacco Plain Packaging*, Shree B. C. Servansing, is a former Permanent Representative (Mauritius) to the WTO. The other two members were Ujal Singh Bhatia, also a former Permanent Representative (India) to the WTO, and Thomas R. Graham, the former head of the international trade practice at a large international law firm and Deputy General Counsel in the Office of the US Trade Representative.¹⁵⁵

¹⁴⁸See UN Treaty Collection: WHO Framework Convention on Tobacco Control, <https://bit.ly/3ry6UOv> (accessed 29 June 2021). Cuba signed but has not ratified it.

¹⁴⁹Gervais, *The TRIPS Agreement*, supra note 138, at para. 3.303.

¹⁵⁰Honduras, for example, claimed ‘that the Panel gave undue legal weight to the FCTC and its Guidelines’. *Australia–Tobacco Plain Packaging*, supra at para., 6.700.

¹⁵¹*Ibid.* at para. 6.707 (emphasis added).

¹⁵²United Nations, UNFCCC Process Parties, 7 August 2018, <https://unfccc.int/process/parties-non-party-stakeholders/parties-convention-and-observer-states>. As with the FCTC Guidelines, the norms concerned could extend to decisions made by the FCCC Conferences of the Parties and also potentially to policy recommendations made by the Subsidiary Body of Implementation or other FCCC subsidiary bodies. See United Nations, FCCC- Process and meetings Bodies Subsidiary Bodies, undated, <https://unfccc.int/process/bodies/subsidiary-bodies/sbi> (accessed 21 2021).

¹⁵³Lamy (2007), see above note 92.

¹⁵⁴See above note 23.

¹⁵⁵See World Trade Organization, Appellate Body Members, undated, www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm. Mr Graham also served as the first chairman of the American Society of International Law’s Committee on International Economic Law. For Mr Servansing, see Biography – Shree Baboo Chekitan Servansing (Mauritius), undated,

The road towards a pluralist approach traveled over the past 30 years can be measured by comparing the Australian reports with the 1990 *Thailand–Cigarettes* GATT panel report.¹⁵⁶ That panel held that a Thai measure banning the importation of tobacco products was not ‘necessary’ to protect their citizens’ health under the ‘least-trade-restrictive-alternative’ test.¹⁵⁷ A key reason for the adoption of the measure was the presence of harmful ‘chemical and other additives contained in United States cigarettes’.¹⁵⁸ A GATT Contracting Party, the panel said, could only ‘impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were *unavoidable*’. It suggested that Thailand should ban harmful ingredients instead.¹⁵⁹ Moreover, while the WHO FCTC guidelines took centerstage in *Australia–Tobacco Plain Packaging*, in *Thailand–Cigarettes*, the panel did not accord much weight to Thailand’s reliance on a report prepared by experts from the WHO that concluded that ‘once a market was opened, the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which undermined public health and governments were left with no effective tool to carry out public health policies’.¹⁶⁰ Indeed, the WHO itself submitted a brief in the dispute in support of Thailand’s position.¹⁶¹ All to no avail. Hence, while Australia was granted almost complete leeway to regulate tobacco, in 1990 Thailand was not given the same opportunity.¹⁶²

5.2. Looking ahead

As noted above, the Appellate Body acknowledged the existence of one or more degree(s) of separation between TRIPS and the rest of the WTO instruments. Hence, a likely future scenario based on the trajectory of cases reviewed in this Article is a pluralist one in which non-WTO norms, domestic or international, are routinely used as support for a domestic policy measure. Within a pluralist analytical framework, a lack of method to deal with such clashes may be unavoidable, as the clash of norms is entropic in nature. That said, if horizontality itself becomes normative, perhaps a more systemic form of ‘constitutional pluralism’ will emerge, one in which ‘each polity, in an exercise of public autonomy through its institutions, [can] define the terms on which it interacts with others’.¹⁶³

Naturally, one can read the accommodations made by WTO panels and the Appellate Body as a mere application of WTO rules allowing a specific interface with non-WTO norms of international law. The analysis contained in this Article leaves the distinct impression, however, that something more is afoot, along the lines suggested in the quotes from former

www.wto.org/english/tratop_e/dispu_e/popup_servansing_e.htm. That said, while the Appellate Body tiptoed into pluralism the panel dove right in. Perhaps this was due in part to the fact that one its members was a (Swiss) law professor, Francois Dessemontet, well-known senior scholar in international law, who wrote on various topics from the Vienna Convention to UNIDROIT principles. See ‘Francois Dessemontet – Biography’, undated, <http://dessemontet.ch/biography.php> (all links accessed 29 June 2021)

¹⁵⁶GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT B.I.S.D. DS10/R37S/200, adopted November 1990.

¹⁵⁷Ibid. at para. 74.

¹⁵⁸Ibid. at para. 14(i).

¹⁵⁹Ibid. at para. 77.

¹⁶⁰Ibid. at para. 27.

¹⁶¹Ibid. at paras. 50–62.

¹⁶²See above notes 156–160 and accompanying text.

¹⁶³Krisch, *Beyond Constitutionalism*, at 103. The link between constitutionalism – another way of considering the interface between trade law and international law, cannot be explored here. See Ernst-Ulrich Petersmann (2005) ‘Human Rights and International Trade Law: Defining and Connecting the Two Fields’, in T. Cottier, J. Pauwelyn, and E. Bürgi (eds.), *Human Rights and International Trade*. Oxford: Oxford University Press, at 29–30; and D.Z. Cass (2001) ‘The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’, *European Journal of International Law* 12(1), 39, 40.

Director-General, Lamy.¹⁶⁴ That ‘something more’ is an express willingness to engage in norm competition and consider external norms and decisions made by other institutional actors as trumping trade law.

This pluralist shift affects norm-making, such as the TRIPS waiver(s) under discussion as of this writing.¹⁶⁵ The same concerns will naturally also affect disputes and specifically the interpretation of the Agreement, operationalizing the approach using different doctrinal vectors than in GATT and GATS owing to the TRIPS difference.¹⁶⁶ In both GATT and GATS disputes, the general exception has been the main vector used to effectuate a pluralist analysis. In TRIPS, pluralism may both bear on the interpretation of the three-step test and lead to a less formalistic approach to the interpretation of, and a broad reduction in the level of obligations contained in, the Agreement when compliance with such commitments affects public welfare negatively and requires policy countermeasures. We find a clear illustration of this approach in *Australia–Tobacco Plain Packaging*, which functionally read Article 20 out of the Agreement short of an encumbrance resulting from a demonstrably capricious or arbitrary measure.¹⁶⁷

In what may be a sign of the perceived increase in Member’s flexibilities brought about by the pluralist turn of events and interpretation in dispute-settlement reports, the EU took the position in April 2021 that the TRIPS Agreement *already contains* all the necessary margin required by Members to deal with ongoing public policy crises.¹⁶⁸ This follows in the wake of work by scholars who suggested, in some cases already more than a decade ago, ways in which TRIPS flexibilities could be expanded.¹⁶⁹ A pluralist approach would likely make this type of outcome easier to achieve. Considered from within the institutional actor (WTO), a pluralist approach to TRIPS is contingent on the willingness (and underlying analytical posture) of panel and Appellate Body members to consider non-WTO norms, whether embodied in widely subscribed-to multilateral instruments or reflecting otherwise credible and significant public interest objectives, as ‘equal or better’ in contesting the application of commitments contained in the TRIPS Agreement.¹⁷⁰

This analysis should not lead one too rapidly to the conclusion that a clash with norms generated outside the WTO will necessarily result in Members being able to use or even impose such norms in WTO dispute-settlement proceedings in all cases. Reliance by the Appellate Body on extrinsic norms has thus far been uneven.¹⁷¹ Then one must consider the strength of the push for reform of the Appellate Body by the European Union and United States, which seems to pull in the opposite direction. For example, a 2021 reform proposal tabled by the EU notes ‘valid concerns about certain adjudicative approaches of the Appellate Body’ and suggests that

¹⁶⁴Naturally, a speech by the Director-General has no legal effect within the WTO regime. It would seem a bit naïve to think, however, that panel and Appellate Body members are not aware of signals coming from the ‘top’. The more recent signaling from the newly appointed (2021) Director General on flexibilities to deal with the COVID-19 pandemic could be mentioned here.

¹⁶⁵See note 3.

¹⁶⁶Other WTO instruments have their own vectors, as noted above for example in respect of the SPS Agreement. See above note 82 and note 83.

¹⁶⁷See above note 149 and accompanying text.

¹⁶⁸See S. Lustig Vijay (2021) ‘Growing Consensus Emerging at WTO – Strengthen Supply Chain and Tech Transfer to Expand Vaccine Access’, *Health Policy Watch* (15 April 2021) <https://healthpolicy-watch.news/85056-2/> (accessed 29 June 2021).

¹⁶⁹See, e.g., J. T. Gathii (2006) ‘How Necessity May Preclude State Responsibility for Compulsory Licensing under the TRIPS Agreement’, *North Carolina Journal of International Law & Commercial Regulation* 31, 943, 969.

¹⁷⁰A push for a pluralist approach may be supported by the view that trade rules are a form of neo-colonialism meant to restrict the policy space of former colonies. See, I. Venzke, ‘International Law and the Spectre of Inequality’, Inaugural Chair Lecture, University of Amsterdam, 8 (Amsterdam: deLex, 2019), quoting B. Semmel (1970) *The Rise of Free Trade Imperialism: Classical Political Economy, the Empire of Free Trade and Imperialism*. Cambridge: Cambridge University Press, at 8, <https://dare.uva.nl/search?identifier=a4b88a14-4772-4974-8123-346689262258> (accessed 29 April 2021).

¹⁷¹See above notes 20–24 and accompanying text. On the link with art. 31(3)(b) VCLT, see S. Frankel (2005) ‘WTO Application of the “Customary Rules of Interpretation of Public International Law” to Intellectual Property’, *Virginia Journal of International Law* 365, 401–402.

the future ‘role of the Appellate Body should be strictly limited to addressing legal issues raised on appeal to the extent this is necessary to resolve a dispute’.¹⁷² A United States Trade Representative report published under the Trump Administration excoriated the Appellate Body for its interpretive approach in a number of dispute-settlement reports.¹⁷³ Yet, the openness of the pre-2021 Appellate Body to take a pluralist path is unmistakably there, especially following *Australia–Tobacco Plain Packaging*. Hence, though the suggestion that a non-WTO international norm should be used as a blueprint for the interpretation of, or to effectuate a reduction in the scope of stated obligations under, the TRIPS Agreement must still be considered with caution, the required degree of caution is certainly lower now than it was 20, or even just 10 years ago.¹⁷⁴

Future Appellate Body guidance on reconciling the influence of external norms in the interpretation of TRIPS and the principle that ‘unbargained-for’ concessions are not part of the WTO norm-set could dramatically change the picture.¹⁷⁵ Going forward, pluralism is likely to take the form of a somewhat unstructured interaction between norm-sets, at least for a certain period of time, until the point at which (if it is ever reached) pluralism’s centrifugal effects cause irreversible systemic change.

Finally, one should note that as the composition of the post-2020 Appellate Body is likely to be entirely different from its former self, it is difficult to predict the exact precedential weight that a future Appellate Body will give to what does seem like emerging pluralism in both TRIPS and non-TRIPS cases, and what role it will allow non-WTO instruments to play on this vast, horizontal stage of international law.¹⁷⁶ Overall, however, it seems that the tendency to interface by interpretation trade and trade-enforceable norms with broader policy concerns, especially in the public health field supported by the text of the Doha Declaration – formally described as ‘subsequent agreement’ under the VCLT¹⁷⁷ – is a path already well-marked should the future Appellate Body members wish to follow it.

6. Conclusion

This Article explored the idea that a pluralist approach is emerging in the interpretation of the TRIPS Agreement against a backdrop of reports by panels and the Appellate Body in both TRIPS and non-TRIPS disputes. The marriage of convenience of intellectual property and trade formalized by the TRIPS Agreement, which opened the door to a trade-based interpretation of intellectual property norms, is now a *ménage à trois*, as trade, intellectual property, and

¹⁷²An Open, Sustainable and Assertive Trade Policy, Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review, COM(2021) 66 final (18 February 2021), at 5, <https://bit.ly/3ln5MLw> (accessed 29 June 2021).

¹⁷³United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), quoting letters from several members of Congress to the USTR complaining about the Appellate Body’s interpretation of WTO Agreements. This includes, for example, a 2004 letter from Rep. Charles B. Rangel (D-New York), Sen. Max Baucus (D-Montana), Rep. Amo Houghton (R-New York), Sen. Larry E. Craig (R-Idaho), Rep. Sander M. Levin (D-Michigan), and Sen. John D. Rockefeller (D-West Virginia) stating that ‘the problem of WTO overreaching and WTO panelists and Appellate Body members substituting their personal views for the express terms of negotiated agreements ... extends to a number of other areas such as introducing substantive elements of public international law’ (emphasis added) *ibid.*, at A-11, <https://bit.ly/3lmhF4k> (accessed 29 June 2021).

¹⁷⁴See *ibid.*; and T. Eres (2004) ‘The Limits of GATT Article XX: A Back Door for Human Rights?’, *Georgetown Journal of International Law* 35, 597, 624–625.

The way in which the Appellate Body dealt with the FCTC and its guidelines – and the way it did not – in *Australia–Tobacco Plain Packaging* can also be read as a deliberate attempt not to comment on the issue, at least not directly. See R. Howse (2016) ‘The World Trade Organization 20 Years On: Global Governance by Judiciary’, *European Journal of International Law* 27, 45. See also I. Van Damme (2010) ‘Treaty Interpretation by the WTO Appellate Body’, *European Journal of International Law* 21, 605, 606.

¹⁷⁵See Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions’, *supra* note 8.

¹⁷⁶See R. Howse (2021) ‘Appointment with Destiny: Selecting WTO Judges in the Future’, *Global Policy*, 28 April 2021, <https://doi.org/10.1111/1758-5899.12933> (accessed 29 June 2021).

¹⁷⁷Panel Report, *Australia–Tobacco Plain Packaging*, para. 7.2378.

non-trade norms cohabit. In sum, with trade norms subject to a pluralist interpretive approach, panels and the Appellate Body are creating ‘linkage[s] to a broader array of norms’.¹⁷⁸ Whether and how those cases will be followed by future Appellate Body members is assuredly an interesting question.

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¹⁷⁸G.B. Dinwoodie and R.C. Dreyfuss (2012) *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime*. Oxford: Oxford University Press, at 160.