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. Since 1995, key WTO Members, including the European Union and the United States, have remained staunch advocates for high intellectual property protection. 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. 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.

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

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. As far as trade law is concerned, this was by design. Hence, until around 1990 trade law was, simply put, not part of the mainstream of international law.

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’. 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.

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

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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.html (accessed 29 June 2021).


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).


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.'\(^{24}\)

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16 This 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.


20 US–Gasoline, para. III.B.


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). 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


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-Hormones39) 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

34Ibid. at 109. Dr Nordberg distinguishes a narrow and a broader application of pluralism to legal reasoning.
36Ibid., at 23.
38See generally Berman, Global Legal Pluralism, supra note 35.
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.\footnote{This 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.} Pluralism is thus best seen as an \textit{approach or construct}, which can be used from two different perspectives.\footnote{When 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.} From \textit{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 \textit{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 \textit{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.\footnote{See ibid. Indeed, its approach has been described as opaque, shifty, and fact-specific.} Indeed, in certain disputes where the interface with external norms was directly raised by parties, panels and the Appellate Body sidestepped the issue.\footnote{Panel Report, \textit{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 \textit{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.} The notion of giving WTO Members greater \textit{marge de manoeuvre} to reflect non-trade interests in their public policy initiatives has clearly been present in the Appellate Body’s mind, however, and increasingly so.\footnote{Krisch, ‘The Pluralism of Global Administrative Law’, supra note 40, at 260.}

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: \textit{US–Shrimp, EC–Asbestos, US–Cotton Yarn, US–Gambling, EC–Biotech, Brazil–Retreaded Tyres, and EC–Seals.}\footnote{Sections 4 and 5 specifically with TRIPS disputes. The reference to each dispute is contained in the notes accompanying the discussion of each one, below.}

First on the timeline, in \textit{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.\footnote{Appellate Body Report, \textit{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 nongovernmental organizations (NGOs) in Appellate Body proceedings. See paras. 90–91. For a discussion, see A.E. Appleton} It found in the affirmative based in part on Article 56 of
UNCLOS, which refers to ‘natural resources, whether living or non-living’. 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. 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’. 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.

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.

In EC–Asbestos, 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. 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’. 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. 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. Importantly for our purposes, in words

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(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.


55Ibid., 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’.


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

59 Appellate 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’.  


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.


66 See 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).

67 Many 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 Jee P. Trachtman (2017) ‘WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe’, Harvard International Law Journal 58, 273, 294

more important the interest, the heavier it weighs in the assessment. 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. 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. The ban was meant to reduce ‘exposure to risks arising from the accumulation of waste tyres’. 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’.

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. The Appellate Body upheld the Panel’s finding that the EU regime was ‘necessary to protect public morals’. 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 disapproval of complicity with the infliction of such suffering by consumers who purchase the products’. 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’. 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’.

The above cases support a pluralist approach. From within the WTO, they demonstrate an openness to let external norms, consensuses, 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). Argentina, Canada, and the United States

69US–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.

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

71Ibid., at para. 3.

72Ibid., at paras. 154 and 170.

73Ibid., 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.


75Ibid., paras. 5.198–5.202.


77Ibid.

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.

opposed the EC’s restrictions on the importation and sale of genetically modified foods. The case drew a lot of attention. The panel focused in highly technical trade terms on the EU measures’ inconsistencies with the SPS and TBT Agreements. 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’. 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’. 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. 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. 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’.

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’.

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

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80See ibid.
83SPS Agreement, supra note 82, art. 3.1 (emphasis added).
84SPS Agreement, preamble and art. 3.1 (emphasis added).
86EC–Hormones, at para. 163.
87EC–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.
commitments to Guatemala.\textsuperscript{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).\textsuperscript{90} The Appellate Body refused to follow Peru down that path.\textsuperscript{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.

\subsection*{3.4 Other Relevant Aspects of WTO Practice}

In 2007 – after \textit{EC–Asbestos} and \textit{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’.\textsuperscript{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:

\begin{quote}
[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.\textsuperscript{93}
\end{quote}

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’.\textsuperscript{94}


\textsuperscript{91}Peru–Agricultural Products, at para. 5.101. In doing so, it was relying on similar statements in e.g. Appellate Body Report, \textit{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) \textit{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.


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

Lamy's views are consistent with Pauwelyn's, who argued that the 'WTO treaty, [must be con-
strued 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 encap-
sulated 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 norma-
tive 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 sea-
soned 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 prin-
cipally concerned with the creation and protection of exclusive private rights. By definition,
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].
106 See 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).
108 Moral rights contained in art. 6bis 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 6bis of that Convention or of the rights derived therefrom.’
109 See ibid. at para. 3.196 and following.
111 See 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.
‘Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health’. 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’. 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.

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. The panel answered in the negative, finding fault with the US exception on all three steps of the test. 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’. 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’. 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’.

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. 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. 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. 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

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113 TRIPS Agreement, supra note 1, art. 8.1.
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.
117 See ibid.
118 Ibid. at para. 6.112.
119 Ibid. at para. 6.183.
120 Ibid. at para. 6.229.
121 See note 25.
122 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.\textsuperscript{124} It then found that the ‘agreement’ reflected in the travaux formed part of the VCLT ‘context’.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, \textit{inter alia}, compulsory licensing to reduce prices.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{134} The WHO ‘began questioning the relationship between the new international trade regime and its own

\begin{footnotes}
\item[124]US – Section 110(5) Copyright Act, supra note 116, at para. 6.53.
\item[125]Ibid. at para. 6.60.
\item[126]Ibid. at para. 6.62.
\item[127]Ibid. at para. 6.63.
\item[128]Which allows Members ‘to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice’.
\item[129]See US – Section 110(5) Copyright Act, supra note 116, at para. 6.53.
\item[130]\textit{India–Patents (US)}, at para. 59.
\item[132]See ibid at 310–311.
\item[133]Ibid at 314.
\end{footnotes}
mandate to promote world health.\textsuperscript{135} This new discourse led in short order to a recommendation that TRIPS should be resisted.\textsuperscript{136} The WTO, which was trying to launch a new round of multilateral negotiations after the failed Ministerial in Seattle in 1999, was feeling this normative tsunami blowing against its walls.\textsuperscript{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’.\textsuperscript{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 31bis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{138}Declaration on the TRIPS Agreement and Public Health, supra note 2, at para. 6.
\textsuperscript{139}See D. Gervais (2021) The TRIPS Agreement: Drafting History and Analysis, 5th edn. London: Sweet & Maxwell, at paras. 2.80 and following.
\textsuperscript{141}That 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/covd19_e/faqcovid19_e.htm (accessed 29 June 2021). The TRIPS waiver was also mentioned in DG Okonjo-Iweala’s speech, ibid.
\textsuperscript{142}Free 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. Alicke, 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’. 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. 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. 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, brand images or promotional information on packaging other than brand names and product names displayed in a standard color and font style (plain packaging)’.

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. It is particularly noteworthy that the

143TRIPS Agreement, supra note 1, art. 20.
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. 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’. 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, punt on the role and relevance of the FCTC, even though that question had been put quite squarely before it by the appellants. 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’.

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. 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’.

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. 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.

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149 Gervais, The TRIPS Agreement, supra note 138, at para. 3.303.
150 Honduras, 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).
153 Lamy (2007), see above note 92.
154 See above note 23.
155 See 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. 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. A key reason for the adoption of the measure was the presence of harmful ‘chemical and other additives contained in United States cigarettes’. 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. 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’. Indeed, the WHO itself submitted a brief in the dispute in support of Thailand’s position. All to no avail. Hence, while Australia was granted almost complete leeway to regulate tobacco, in 1990 Thailand was not given the same opportunity.

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’.

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

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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)

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.
Director-General, Lamy. 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. 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. 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.

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. 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. 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. 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. 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

164 Naturally, 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.

165 See note 3.

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

167 See above note 149 and accompanying text.


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’. 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. 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


173 United 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).


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


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’. Whether and how those cases will be followed by future Appellate Body members is assuredly an interesting question.

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