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The Revitalisation of the Object and Purpose of the TRIPS Agreement

The *Plain Packaging* Reports and the Awakening of the TRIPS Flexibility Clauses

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1. Introduction

The COVID-19 pandemic has brought the role of intellectual property (IP) in the development of and access to new vaccines into the spotlight. In this context, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) has suddenly become the focus of attention.

Within this treaty, the limited role of Arts 7 and 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), specifying the objectives and principles of this international agreement, has regularly been deplored, in particular given the reluctance of the Dispute Settlement Body of the World Trade Organization (WTO) to apply these two norms when interpreting and implementing the protection granted by its substantive IP provisions.[1] The 2018 WTO Panel Report in the dispute *Australia—Plain Packaging*,[2] recently confirmed by the Appellate Body,[3] calls for a re-examination of this situation. Indeed, this impressive decision, not only due to its size (more than 800 pages) but also with regard to the outstanding pedagogical efforts exerted by the Panel, will probably

[1] See eg Christophe Geiger and Luc Desaunettes, 'Les articles 7 et 8, Belle au bois dormant de l'Accord sur les ADPIC' in Christophe Geiger (ed), *Le droit international de la propriété intellectuelle lié au commerce : l'accord sur les ADPIC, bilan et perspective* (LexisNexis 2017) 65–90. See also, for instance, the empirical analysis conducted by Henning Grosse Ruse-Kahn on the use of these two provisions and its conclusion that 'the interpretation of TRIPS in accordance with … Arts 7 and 8 TRIPS … is still to be realised in WTO jurisprudence': see Henning Grosse Ruse-Khan, 'The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO' (2011) 11–15 Max Planck Institute for Intellectual Property and Competition Law Research Paper 2, 16–27, 34; see also Peter K Yu, 'The Objectives and Principles of the TRIPS Agreement' (2009) 46(4) Houston Law Review 797 (hereafter Yu, 'The Objectives and Principles of the TRIPS'), exploring the potential of these two provisions as a 'guiding light' for interpretation, as 'sword and shield' against overprotection regimes, as a 'bridge' between TRIPS and other international norms, or even as a 'seed' for the development of new norms.

[2] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (28 June 2018) WT/DS435/R, WT/DS441/R, WT/DS458/R, and WT/DS467/R (Panel Report) (hereafter *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report*).

[3] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (9 June 2020) WT/DS435/AB/R and WT/DS441/AB/R (Reports of the Appellate Body) (hereafter *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Reports of the Appellate Body*).

Christophe Geiger and Luc Desaunettes-Barbero, *The Revitalisation of the Object and Purpose of the TRIPS Agreement* In: *Global Intellectual Property Protection and New Constitutionalism*. Edited by: Jonathan Griffiths and Tuomas Mylly, Oxford University Press. DOI: 10.1093/oso/9780198863168.003.0012

remain a milestone for the interpretation of the TRIPS Agreement, especially concerning the role assigned to Arts 7 and 8, leading to a possible awakening of what is sometimes referred to as the 'TRIPS flexibility clauses'.[4]

The tangible evolutions contained in these reports appear salutary with regard to the challenges faced by the TRIPS Agreement in its third decade. Indeed, the current return of protectionist temptations at national level has called multilateralism into question,[5] as demonstrated for example by decisions of the US administration regarding the imposition of tariff barriers on certain products,[6] the declared opposition to some trade and investment agreements, such as the already signed Trans-Pacific Partnership (TPP), from which the US announced its withdrawal immediately after President Trump took office,[7] or the US' continuous veto against the appointment of new Appellate Body members, with the result of the paralysis of this Body since 11 December 2019.[8] Besides this general context, the capacity of the TRIPS Agreement—which has generated a high degree of harmonisation of

[4] See Max Wallot, 'The Proportionality Principle in the TRIPS Agreement' in Hanns Ullrich, Reto M Hilty, Matthias Lamping, and Josef Drexl (eds), *TRIPS plus 20, From Trade Rules to Market Principles* (Springer 2016) 214 (hereafter Ullrich and others (eds), *TRIPS plus 20*, who reads Arts 7 and 8 TRIPS as expressing a principle of proportionality, according to which 'member states would benefit from an increased flexibility for designing national intellectual property laws'; Henning Grosse Ruse-Kahn, 'Proportionality and Balancing with the Objectives for Intellectual Property Protection' in Paul L C Torremans (ed), *Intellectual Property and Human Rights* (3rd edn, Kluwer Law International 2015) 194, seeing in the TRIPS objectives 'a normative input for a balancing exercise'; Yu, 'The Objectives and Principles of the TRIPS' (n 1) 1046, who concludes that these two norms could be a 'blessing in disguise' for the entire Agreement.

[5] On the Trump administration's view on multilateralism, see Office of the United States Trade Representative, '2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program' (2017) 1, which states: 'The American people grew frustrated with our prior trade … because they did not all see clear benefits from international trade agreements… As a general matter, we believe that these goals can be best accomplished by focusing on bilateral negotiations rather than multilateral negotiations—and by renegotiating and revising trade agreements when our goals are not being met.'

[6] See for instance Presidential Proclamation 9704 of 8 March 2018, Adjusting Imports of Aluminum into the United States, including the Annex, To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States (FR Vol 83, No 51, pp 11619–24, 15 March 2018) and Presidential Proclamation 9705 of 8 March 2018, Adjusting Imports of Steel into the United States, including the Annex, to Modify Chapter 99 of the Harmonized Tariff Schedule of the United States (FR Vol 83, No 51, pp 11625–30, 15 March 2018). Prior to them, the Trump administration announced the reconsideration of some free trade agreements and that it might even ignore WTO rulings going against US economic interests. Generally, Rachel Brewster, 'The Trump Administration and the Future of the WTO' (2018) Yale Journal of International Law Online, Duke Law School Public Law & Legal Theory Series No 2019-10, describing the Trump administration's trade policy as a shock that 'weakened the foundations of the multilateral trading system'.

[7] This plurilateral trade agreement also contains a chapter on IPRs and protection of investments, as well as an investor-state dispute settlement (ISDS) mechanism, see Peter K Yu, 'Investor-State Dispute Settlement and the Trans-Pacific Partnership' in Christophe Geiger, Craig A Nard, and Xavier Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar 2018) 463. On this trend to move from multilateralism to bilateralism, in particular with regard to trade and investment agreements, see eg Christophe Geiger, 'Bilateral Trade and Investment Agreements and the Harmonisation of Copyright Law at International Level: Lessons to be learned from the TTIP' in Tatiana E Synodinou (ed), *Pluralism or Universalism in International Copyright Law* (Kluwer Law International 2019) 279 and Christophe Geiger, 'Intellectual Property and Investment Law: An Introduction' in Christophe Geiger (ed), *Research Handbook on Intellectual Property and Investment Law* (Edward Elgar 2020) (hereafter Geiger (ed), *Research Handbook on Intellectual Property and Investment*).

[8] For an explanation of the grounds underlying Appellate Body members' appointment, see Po-Ching Lee, 'Appointment and Reappointment of the Appellate Body Members: Judiciary or Politics' in Chang-fa Lo, Junji Nakagawa, and Tsai-fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2020) 255–71. Regarding the reasons underlying this refusal, which are not only a mere refusal of supranationalism, see Bernard Hoekman and Petros C Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis' (2019) 56 RSCAS or Mitsuo Matsushita, 'Reforming the Appellate Body' in Chang-fa Lo, Junji Nakagawa, and Tsai-fang Chen (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2020) 43–52. To face this issue, 22 WTO Members (including the EU and China), have created an alternative appellate mechanism mirroring the Appellate Body. See the WTO, Notification of Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Art 25 of the DSU, 30.04.2020, JOB/DSB/1/Add.12

IP at the international level—to address current challenges is today questioned.[9] Indeed, the progressive transition towards a global knowledge economy has reinforced the necessity of guaranteeing the adaptability of those rights to economic, technological, and social realities in fast evolution. This adaptability is necessary to ensure that these rights initially tailored to foster innovation or creativity do not themselves become a source of deadlock regarding their purposes.[10] Furthermore, their harmonisation on the global scale as a result of the TRIPS Agreement has rapidly highlighted the possible conflicts between these rights and other ethical imperatives,[11] in particular in the context of health crises in developing and less developed countries.[12] In light of these concerns, it seems even more appropriate to come back to the *telos* of the Treaty in order to secure its evolving understanding and its flexibility. In this regard, as already mentioned, the Agreement contains two essential provisions that specifically refer to the objectives and principles that underlie its existence: Arts 7 and 8.

Thus, Art 7, dedicated to the *objectives*, states that:

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and

[9] See Section 5 of this chapter.

[10] For instance Francis Gurry, Graeme B Dinwoodie, Antony Taubman, Dan Burk, and Pedro Roffe in Christophe Geiger (ed), *The Intellectual Property System in a Time of Change: European and International Perspectives* (LexisNexis 2016).

[11] UNCHR (Sub-Commision) Res 7 (2000) E/CN.4/SUB.2/RES/2000/7 point 8, where the Commission requests 'the World Trade Organization, in general, and the Council on TRIPS during its ongoing review of the TRIPS Agreement, in particular, *to take fully into account the existing State obligations under international human rights instruments*' (emphasis added) (hereafter UNCHR (Sub-Commission) Res 7 (2000)). See also in this sense UNCHR (Sub-Commission) Res 21 (2001) UN Doc E/CN.4/SUB.2/RES/2001/21. On this issue see Hannu Wager and Jayashree Watal 'Human Rights and International Intellectual Property Law' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 149–71.

[12] For instance Graeme B Dinwoodie and Rochelle C Dreyfuss, *A Neofederalist Vision of TRIPS—The Resilience of the International Intellectual Property System* (Oxford University Press 2012) 201, concluding that the TRIPS Agreement 'failed to appreciate the benefits of allowing states to structure their innovation policies to reflect the nature of their local creative communities, to pursue their own social and political priorities, and to experiment with responses to new social or technological challenges'; Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: the TRIPS Agreement and Policy Options* (Zed Books 2000) 21, according to whom 'the adoption of the TRIPS Agreement represented a major victory for industrialized countries and for their most active industrial lobbies. It mirrors the standards of IPRs protection that are suitable for industrialized countries at their current level of development'; Paulin Edou Edou, *Les incidences de l'Accord ADPIC sur la protection de la propriété industrielle au sein de l'OAPI* (Phd Thesis Strasbourg III 2005) 440 ff, who stresses that an efficient protection of IPRs by the Member States of the African Intellectual Property Organization needs to take into account issues such as the protection of biodiversity, of traditional knowledge, and the right of local communities; Peter K Yu, 'The International Enclosure Movement' (2007) 82 Indiana Law Journal 827, according to whom: 'the international enclosure movement fences off areas that provide attractive policy options for less developed countries. By virtue of this enclosure, these countries are forced to adopt inappropriate IP systems, and they as a result have also lost their ability to respond to domestic crises within their borders'; see also William Cornish and Kathleen Liddell, 'The Origins and Structure of the TRIPS Agreement' in Ullrich and and others (eds), *TRIPS plus 20* (n 4) 22, highlighting the 'suspicions in the developing world' with regard to moves to strengthen international IP protection, 'increasingly impeded by differences of opinion among developed and developing countries as groups'; Jerome H Reichman, 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?' (2009) 46(4) Houston Law Review 1115; Ruth L Gana, 'Prospects for Developing Countries under the TRIPS Agreement' (1996) 29 Vanderbilt Journal of Transnational Law 735; Carolyn Deere-Birkbeck, 'Developing Countries in the Global IP System before TRIPS: The Political Context of the TRIPS Negotiations' in Carlos M Correa (ed), *Research Handbook on the Protection of Intellectual Property under WTO Rules* (Edward Elgar 2010) 42–45 (hereafter Correa (ed), *Research Handbook on the Protection of Intellectual Property*).

in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Art 8, outlining *principles*, is composed of the two following paragraphs:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of IP rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

At first glance, these two provisions seem different. Art 7 appears to describe the internal balance of the Agreement, whereas Art 8 gives the impression of enabling the Member States to adopt derogating measures in the public interest. However, we will see that, with regard both to their historical genesis and to their respective roles in the Agreement, the two Articles are closely linked and that it is thus necessary to analyse them together. In our opinion, these two provisions should play a fundamental role in the understanding and the enforcement of the Agreement but have, until the *Plain Packaging* reports, never found a proper or sufficient application by the WTO Dispute Settlement Body.

In this chapter, we will therefore reflect upon the reasons why these provisions have been almost ignored so far and on the effects that an 'awakening' could have for the understanding of the TRIPS Agreement. To do so, we will first look back at their historical genesis. This will allow us to specify the meaning that signatory states wanted to give them as well as a better understanding of the tensions that were present during the negotiations of the Agreement (Section 2). We will then investigate the possible ways of interpreting Arts 7 and 8, before turning to the analysis of the decisions of the WTO's Dispute Settlement Body prior to the *Plain Packaging* reports (Section 3). The fourth part will be devoted to the renaissance of Arts 7 and 8 in the *Plain Packaging* reports in the aftermath of the Doha Declarations (Section 4). Lastly, the significance of these reports for the future interpretation of the agreement will be considered (Section 5).

2. The Historical Genesis of Arts 7 and 8: A Keystone for the Political Compromise between the Industrialised and Developing Countries on the TRIPS Agreement

The TRIPS Agreement has often been criticised as imposing the industrialised countries' approach in the field of IP onto developing countries.[13] Nevertheless, it is useful to remember that Arts 7 and 8 acted as concessions by the developed countries. The analysis of the historical context of the Agreement's negotiations is therefore illuminating regarding

[13] An overview of the literature is provided in the previous footnote.

both the meaning and the scope of the two provisions (2.1). Indeed, the two Articles played a determining role in the reaching of a diplomatic compromise (2.2).

2.1 The TRIPS Negotiations, an Opposition between the Approaches of the Industrialised and Developing Countries

Throughout the negotiations of the General Agreement on Tariffs and Trade (GATT), IP rights have been a point of strong contention between industrialised and developing countries. Even before the start of the negotiations regarding the substance of the TRIPS Agreement, a first debate took place over whether these rights should even be on the agenda of the negotiations. While the United States and Japan pushed for the opening of such negotiations, developing countries such as Brazil and Argentina were initially opposed.[14] The Ministerial Declaration of Punta del Este in 1986, which opened the Uruguayan Round of negotiations, finally specified that the negotiations should also cover this matter as a topic of negotiation concerning the trade in goods.[15] The Declaration, however, remains very cautious on the mandate given to the negotiators, as they had only to 'clarify GATT provisions and to elaborate as appropriate new rules and disciplines'.[16] Furthermore, the negotiations on those new rules and disciplines had to deal 'with international trade in counterfeit goods'. In the spirit of the liberalisation process that underlies the elaboration of the GATT, the Declaration of Punta del Este limited, in principle, the opening of a negotiation to the aspects of IP rights that constituted an impediment to international trade. This philosophy was reflected in the title of the Agreement, since it concerns only the aspects of IP rights related to trade. The given mandate did not allow in principle the opening of a general negotiation for an in-depth harmonisation of IP rights.[17]

However, the TRIPS Agreement greatly exceeded this framework. Ever since the beginning of the negotiations, industrialised countries pushed to obtain an extensive harmonisation of the IP rights to impose a high standard of protection.[18] From a political point of view, those states were worried about the decrease of their competitiveness especially in comparison to the developing countries,[19] and besides that, they were convinced that strong protection of these rights would be beneficial for their economic development.[20] At that

[14] See Catherine Field, 'Negotiating for the United States' and A V Ganesan, 'Negotiating for India' and Piragibe dos Santos Tarragô, 'Negotiating for Brazil' in Jayashree Watal and Antony Taubman (eds), *The Making of the TRIPS Agreement* (WTO 2015)respectively 130–31, 212–13, and 240–41 (hereafter Watal and Taubman (eds), *The Making of the TRIPS*).

[15] Ministerial Declaration on the Uruguay Round (20 September 1986) 7–8 (hereafter Ministerial Declaration on the Uruguay Round).

[16] Emphasis added.

[17] These negotiations should in principle take place within the WIPO, which the Declaration explicitly mentioned: see Ministerial Declaration on the Uruguay Round (n 15) 8.

[18] Catherine Field, in charge of the negotiations for the United States, noted in this regard that: 'achieving a strong agreement on IPR in the Uruguay Round negotiation was a top offensive objective of the United States', Catherine Field, 'Negotiating for the United States' in Jayashree Watal and Antony Taubman (eds), *The Making of the TRIPS* (n 14) 132.

[19] See Hanns Ullrich, 'The Political Foundations of TRIPS Revisited' in Ullrich and others (eds), *TRIPS plus 20* (n 4) 95–97.

[20] The idea that stronger IPRs would lead to more creation or innovation is often put forward by policymakers even if the literature criticises it, emphasising the need for IPRs to be balanced and proportionate to their

time, the potentially dysfunctional effects of those rights on the competitive process were not as clearly identified as they are today.[21] For this reason, the European Communities, followed by the United States, circulated two very detailed propositions in the negotiation group. These two texts included substantial developments regarding the existence, the scope, and the exercise of the different rights.[22]

In response, a group of fourteen developing countries submitted a counterproposal.[23] These states became aware that the architecture of the IP rights proposed by the industrialised countries might not necessarily suit their economic development.[24] Any IP system is indeed based on a compromise between, on the one hand, the incentive for innovation (or creation) that those rights might engender and, on the other hand, the creation of barriers to access and to the spread of the knowledge they generate.[25] Therefore, countries that are less developed, and thus less prone to being at the origin of innovations, may indeed have an interest in tipping the scale towards access and spreading of knowledge.[26]

Those considerations, frequently summarised by the expression 'one size does not fit all',[27] explain that the counterproposal of the developing countries aimed to ensure that any agreement would be flexible enough to guarantee the national sovereignty of each state to determine its policy in this domain. The substantive provisions are therefore fewer and less restrictive. Finally, two Articles, placed in the first chapter, had to regulate the exercise of that sovereignty. The first one fixed the 'objectives' that any IP policy must follow, while the second set up the 'principles' that had to prevail for the elaboration of these legislations. The two provisions of this counterproposal laid the groundwork for Arts 7 and 8 of the future TRIPS Agreement.

objectives. See for instance Reto M Hilty, 'Ways out of the Trap of Article 1(1) TRIPS' in Ullrich and others (eds), *TRIPS plus 20* (n 4) 194.

[21] William Cornish and Kathleen Liddell, 'The Origins and Structure of the TRIPS Agreement' in Ullrich and others (eds), *TRIPS plus 20* (n 4) 20.

[22] Draft agreement on trade-related aspects of IPR (29 March 1990) MTN.GNG/NG11/W/68; Draft agreement on trade-related aspects of IPR (11 May 1990) MTN.GNG/NG11/W/70. The similarity between the two proposals is often explained by the preparatory work made ahead of the negotiations by a consortium of industrial lobbies from these states: Peter Drahos and John Braithwaite, *Information Feudalism—Who Owns the Knowledge Economy?* (The New Press 2002) 121 ff; Charles Clift, 'Why IPR Issues Were Brought to GATT: A Historical Perspective on the Origins of TRIPS' in Correa (ed), *Research Handbook on the Protection of Intellectual Property* (n 12) 17.

[23] Communication from Argentina, Brazil, Chile, China, Colombia, Cuba and others, Egypt, India, Nigeria, Peru, Tanzania, and Uruguay (14 May 1990) MTN.GNG/NG11/W/71.

[24] William Cornish and Kathleen Liddell, 'The Origins and Structure of the TRIPS Agreement' in Ullrich and and others (eds), *TRIPS plus 20* (n 4) 20.

[25] See Christophe Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP law' in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) 153; Susy Frankel (ed), *The Object and Purpose of Intellectual Property* (Edward Elgar 2019).

[26] See Christophe Geiger, 'Exploring the Flexibilities of the TRIPS Agreement Provisions on Limitations and Exceptions' in Annette Kur and Vytautas Mizaras (eds), *The Structure of Intellectual Property Law—Can One Size Fit All?* (Edward Elgar 2011) 287 (hereafter Kur and Mizaras, *The Structure of Intellectual Property Law*); Christophe Geiger, 'Copyright and Free Access to Information, For a Fair Balance of Interests in a Globalised World' (2006) 28(7) European Intellectual Property Review 366 (hereafter Geiger, 'Copyright and Free Access to Information').

[27] See Kur and Mizaras, *The Structure of Intellectual Property Law* (n 26).

2.2 Arts 7 and 8 of the Agreement, Fragile Keystone of an Unprecedented Compromise

To ease the discussions, the President of the Negotiating Group created a working document—the Chairman's report[28]—proposing a 'compilation of the options' and 'intend[ing] to provide a profile of the current state of work in the Negotiating Group'.[29] This composite document noted the existence of two approaches that differed 'not only in substance but also in structure'.[30] The report contained both a general part, including an Art 7, summarising the principles and objectives proposed by the developing countries, and a special part summarising the substantive provisions designed by the industrialised ones. This document was never supposed to be a conciliating text between the two proposals but had, as its only purpose, the clarification of the progress of the negotiations and their sticking points.

Nevertheless, the negotiations crystallised around the structure of the Chairman's report. First, the industrialised countries managed to impose their approach aiming at a strong degree of harmonisation. The negotiations of the TRIPS Agreement indeed took place in the more general context of the GATT negotiations. The negotiations took place following the Declaration of Punta del Este under the principle of globality: even if they were made inside different negotiating groups, they were considered as a whole.[31] Henceforth the developing countries partly abandoned their claims in this area in exchange for concessions in other areas more significant for their economy at that time, in particular in the agricultural and textile domains.[32]

In return, the developing countries succeeded in having the principles and objectives stemming from their counterproposal enshrined in two provisions placed at the first Part of the Agreement entitled 'General provisions and basic principles'.[33] Art 7 is hence dedicated to the objectives which policies in the field of IP must aim for: namely, the promotion of economic, social, and technological development and also the guarantee of a balance between the rights and the obligations of the holder of these rights. Art 8, entitled 'principles', is divided into two paragraphs allowing the Member States to adopt measures necessary to protect certain interests or to avoid the abuse of IP rights.

This compromise was made at the expense of overall consistency of the Agreement. Given their respective aims—guaranteeing the implementation of freedom for the Parties or, on the contrary, assuring a strict harmonisation—the two approaches were in principle mutually exclusive. It was indeed contradictory to give general and flexible guidelines for the establishment of national regulations in the field of IP if the Agreement already solved the regulatory trade-offs within explicit provisions. To prevent this inconsistency from

[28] Status of Work in the Negotiating Group, Chairman's Report to the GNG (23 July 1990) MTN.GNG/NG11/W/76.

[29] ibid 1.

[30] ibid. The text explicitly identifies from which of the two approaches each provision originated.

[31] Ministerial Declaration on the Uruguay Round (n 15) 2–3: 'The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking.'

[32] See William Cornish and Kathleen Liddell, 'The Origins and Structure of the TRIPS Agreement' in Ullrich and others (eds), *TRIPS plus* 20 (n 4) 26–27; Antonio G Trombetta, 'Negotiating for Argentina' in Watal and Taubman (eds), *The Making of the TRIPS* (n 14) 263–65; see also for India A V Ganesan, 'Negotiating for India' in Watal and Taubman (eds), *The Making of the TRIPS* (n 14) 215–18.

[33] Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (2nd edn, Oxford University Press 2020) 91.

having a destabilising effect on the whole Treaty, the normative power of Arts 7 and 8 was reduced. Thus, as of the so-called Brussels Final Act,[34] the modal verb 'should' was selected to describe the objectives of the Agreement in Art 7, expressing more an aspiration than an obligation. Likewise, the two paragraphs of Art 8 were subjected to a 'conformity clause' expressed by the wording 'provided that such measures are consistent with the provisions of this Agreement'.[35] As will be more specifically explained in the next section, this conformity clause makes the scope of Art 8 uncertain: how can provisions meant to open the possibility of derogating measures be conditioned on their compliance with a text from which they are supposed to derogate?

From a diplomatic point of view, the negotiations ended in success: the TRIPS Agreement emerged despite the divergences between industrialised and developing countries. Arts 7 and 8 played an essential role in the obtaining of an agreement between those two groups acting as a guarantee granted by the first to the approach of the second. From a legal point of view, this compromise was obtained at the expense of the consistency of the Agreement and of clarity regarding the normative power of these provisions.

3. The Uncertainty Regarding Legal Status and the Long Lethargy of Arts 7 and 8

As we have seen, the meaning and the scope of Arts 7 and 8 were deliberately left unclear by the negotiators. This uncertainty consequently allowed a wide scope of potential interpretations for these two provisions, ranging from the total absence of any normative power to the understanding of these two Articles as general exceptions to the rest of the Agreement (3.1). This strong uncertainty regarding the meaning to give to these provisions explains the reluctance of the Dispute Settlement Body in charge of the interpretation of the Agreement to rely upon them (3.2).

3.1 The Wide Spectrum of Possible Interpretations Regarding the Normative Power of Arts 7 and 8

The lack of clarity of Arts 7 and 8 allows for three interpretations regarding their normativity: that they are deprived of any normative power (3.1.1), that they are, on the contrary, general exceptions to the rest of the Agreement (3.1.2), or finally, that they are of interpretative value (3.1.3).

3.1.1 The minimal option: the absence of any normative power

As a first hypothesis, it might be considered that these two Articles are devoid of any normative power.

[34] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (26 November 1990) MTN.TNC/W/35.

[35] On the successive evolution of these two Articles, see Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press 2016) 441–42 (Art 8 TRIPS), 455–57 (Art 7 TRIPS) (hereafter Grosse Ruse-Khan, *The Protection of Intellectual Property*).

Following this hypothesis, the use of 'should' and the generality of the objectives of Art 7 only confer a descriptive value to these provisions. The same reasoning also applies to Art 8, even if the latter is drafted in a more precise way and seems to enable the Member States to take certain measures. It is nevertheless surrounded by the two conformity clauses previously mentioned. These two clauses, added at the end of the negotiations, have the effect, according to this interpretation, of emptying the two paragraphs of any normative potential. Following this understanding, these Articles describe the freedom of the Member States regarding the taking of action in the field of innovation or creation, but only outside of the scope of application of the Agreement and thus outside the framework of the regulation of IP *stricto sensu*.[36]

As we have seen, such an interpretation does not, however, seem in line with the historical and systematic analysis of these provisions. Indeed, the Member States chose to turn these provisions into full Articles, part of the Agreement, and even offered them a prominent position by placing them in its first part dedicated to the 'General provisions and basic principles'. If the Member States had wished to give as little power as possible to those principles, the preamble of the Agreement would, without a doubt, have been the preferred location.[37]

3.1.2 The maximal option: exceptions of direct applicability

A maximalist reading of Arts 7 and 8, on the contrary, would consider them as exceptions of direct applicability to the whole of the Agreement.[38] A Member State could then justify derogating from the TRIPS Agreement by arguing that their application in a precise case would not assure a 'balance of rights and obligations' in accordance with Art 7, or that such a derogation was necessary 'to protect public health' as set out in Art 8. Such general clauses of exceptions are indeed provided for in the other WTO agreements, for example in GATT's Art XX and in Art XXI of the GATS. Some prominent authors argue for an aligned interpretation.[39]

Despite this parallel, it seems uncertain if such an interesting but rather bold interpretation is compatible with the letter of the two Articles and the structure of the Agreement. Art 7 seems rather to describe the intrinsic objectives and functions of the Agreement. No formula in Art 7 enables the states explicitly to deviate from the Agreement. The Art is

[36] This reasoning seems to have been followed by the WTO Panel in the following decision: *European Communities: Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (15 March 2005) WT/DS174/R (Panel Report), para 7.210 (hereafter *European Communities: Protection of Trademarks and Geographical Indications—Panel Report*): 'These principles reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.'

[37] See Oliver Brand in Jan Busche, Peter-Tobias Stoll, and Andreas Wiebe (eds), *TRIPS—Internationales und europäisches Recht des geistigen Eigentums* (Carl Heymanns Verlag 2013) 190–91, s 6 (hereafter Busche and others (eds), *TRIPS—Internationales und europäisches Recht).* Even in this case, these provisions would not have lost any normative power: Art 31.2 of the Vienna Convention on the Law of Treaties indeed provides that: 'the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . .'.

[38] Considering such a reading, see Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (2nd edn, Oxford University Press 2020) 99 f; Oliver Brand in Busche and others (eds), *TRIPS—Internationales und europäisches Recht* (n 37) 191, s 8.

[39] ibid.

entitled 'objectives' and not 'General exceptions' as is the case with Arts XX GATT and XXI GATS. Likewise, the choice of the modal verb does not seem to authorise derogation from provisions of the Agreement written in the imperative.[40] Finally, with regard to its generality, allowing the Member States to establish exceptions to the Agreement on the basis of Art 7 could have a destabilising effect on the trade-offs embodied within it.[41]

Given its wording, Art 8 seems more qualified to play the role of a general exception, as it enables the Member States explicitly to take certain measures. However, the two paragraphs of this Article are accompanied by conformity clauses conditioning any measure on its compatibility with the provision of the Agreement. This restriction seems then to temper the derogative potential of these provisions.[42] To rectify this, Carlos M Correa suggests that the conformity in question should be considered only in regard to the objectives of Art 7 and the clauses of the preamble.[43] However, the wording of the two clauses could be problematic for such a reading, as they stipulate the need for compatibility with 'the provisions of this Agreement'.[44] This formulation, not aiming at the Agreement in general, but making explicit reference to its 'provisions', could be considered as limiting the possibility to resort to such a systematic approach.

3.1.3 The intermediate option: the Agreement's transversal interpretative clauses

Arts 7 and 8 hold, given their history and place in the Agreement, indisputably, a certain normative power. However, it may be too much of a stretch to consider them as exceptions of direct applicability. Several scholars have thus proposed an intermediate option: to recognise them as having an interpretative role as transversal clauses of the Agreement.[45]

Indeed, this intermediate interpretation guarantees the effectiveness of these provisions. Art 7 serves as a guideline to decide between several possible alternative interpretations of other provisions of the Agreement. Likewise, the conformity clauses of Art 8 do not constitute an impediment as long as the function of this Article consists in interpreting other derogative norms expressly provided by the Treaty.[46] In the same way, once it is clear that these two Articles have only an interpretative role, the risk of a substantial modification of the balance striven for within the Agreement becomes less significant.

[40] For a discussion of the use of the modal verb and its impact on the normative power of Art 7, see Alison Slade, 'The "Objectives" and "Principles" of the WTO TRIPS Agreement: A Detailed Anatomy' (2016) 50(3) Osgoode Legal Studies Research Paper 948–98, 960–62 (hereafter Slade, 'The "Objectives" and "Principles" of the WTO TRIPS').

[41] The EC supported the argument in the decision: *Canada: Patent Protection of Pharmaceutical Products* (17 March 2000) WT/DS114/R para 7.25 (Panel Report) (hereafter *Canada: Patent Protection of Pharmaceutical Products—Panel Report*).

[42] Daniel Gervais, *The TRIPS Agreement—Drafting History and Analysis* (4th edn, Sweet & Maxwell 2012) 237–48 (hereafter Gervais, *The TRIPS Agreement*).

[43] Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (2nd edn, Oxford University Press 2020) 100. For another interpretation recognising this provision the sense of a general exception, see Max Wallot, 'The Proportionality Principle in the TRIPS Agreement' in Ullrich and others, *TRIPS plus 20* (n 4) 228–30.

[44] cf Gervais, *The TRIPS Agreement* (n 42) 237–38.

[45] cf Gervais, *The TRIPS Agreement* (n 42) 229–30, 237–38; Oliver Brand in Busche and others (eds), *TRIPS—Internationales und europäisches Recht* (n 37) 190–91, s 6; Grosse Ruse-Khan, *The Protection of Intellectual Property* (n 35) 453 (Art 8 TRIPS), 462–69 (Art 7 TRIPS).

[46] Namely, Arts 13, 17, 24, 30, 31, and 40. Slade, 'The "Objectives" and "Principles" of the WTO TRIPS' (n 40) 987–90.

3.2 The Reluctance of the Previous Reports of the Dispute Settlement Body and the Lethargy of Arts 7 and 8

The uncertainty about the meaning to be given to these provisions explains the reluctance—before the *Plain Packaging* reports—of the WTO Dispute Settlement Body to make use of them when dealing with the interpretation of the states' obligations under the TRIPS Agreement. Regardless of the choice made regarding the interpretation of the normative power of Arts 7 and 8, any decision on the issue will have a fundamental impact on the implementation of the entire Agreement. The implications of this choice likely explain the reluctance of the Dispute Panels and the Appellate Body to apply these provisions. Indeed, the Dispute Settlement Body, as its name suggests, is not organised in the form of a jurisdiction: it is a half-jurisdictional, half-political body whose purpose is to bring a solution to disputes between the Member States.[47] Thus, the Panels, put in place ad hoc, have the mission to apply the Agreement but also to help the Members 'to develop a mutually satisfactory solution'.[48] It is then not surprising that the reports adopted in the framework of this mechanism are of extreme cautiousness and tend to avoid the adoption of stances of a fundamental nature for the understanding of the Agreement. Before the *Plain Packaging* reports, the Dispute Settlement Body had three opportunities to decide on the meaning of these two Articles but, in each instance, it chose to avoid taking a decisive position, therefore leaving Arts 7 and 8 in a lethargic state.

3.2.1 The report *Canada—Patent Protection of Pharmaceutical Products*: the strategy of avoidance

The report *Canada—Patent Protection of Pharmaceutical Products* is particularly revealing of this reluctance.[49] This decision was concerned with planned exceptions in Canadian law regarding pharmaceutical patents.[50] Following a complaint from the European Communities, the Panel was asked to decide on the legality of the exceptions in the light of Art 30 of the TRIPS Agreement, which states that the Member States can provide exceptions with regard to patents 'provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'.

[47] WTO, *A Handbook on the WTO Dispute Settlement System,* (2nd edn, Cambridge University Press 2017) 12: '[T]he primary objective of the system is not to make rulings or to develop jurisprudence. Rather, the priority is to settle disputes, preferably through a mutually agreed solution …'. Also, Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (4th edn, Cambridge University Press 2017) 185–209; Ernst-Ulrich Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health law?: WTO Dispute Settlement Panel Upholds Australia's Plain Packaging Regulations of Tobacco Products' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2018* (Oxford University Press 2019) 4–9 [(hereafter Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law?'), distinguishing between a 'legal 'inside' legitimacy', which appears to be nowadays challenged, and an 'outside' legitimacy', which is not scientifically assessed but appears to be low; Daniel Gervais, 'Does the WTO Appellate Body "Make" IP Law?' in Christophe Geiger, Craig A Nard, and Xavier Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar 2018) 500–04.

[48] Art 11 of the Understanding on rules and procedures governing the settlement of disputes.

[49] *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41).

[50] The exceptions allowed competitors of the patent's holder to use the patented invention without authorisation during the term of the patent, to obtain government marketing approval. and to manufacture and stockpile patented goods during a specific period before the patent expired.

The conditions of application of this provision were disputed, and the argumentation developed by the Member States destined this decision to be fundamental regarding the interpretation of Arts 7 and 8. Indeed, Canada asserted that:

> Article 7 … declares that one of the key goals of the TRIPS Agreement was balance between the intellectual property rights created by the Agreement and other important socio-economic policies of WTO Member governments. Article 8 elaborates the socio-economic policies in question, with particular attention to health and nutritional policies.[51]

As a consequence, it concluded:

> With respect to patent rights, … these purposes call for a liberal interpretation of the three conditions stated in Article 30 of the Agreement, so that governments would have the necessary flexibility to adjust patent rights to maintain the desired balance with other important national policies.[52]

Contrary to this, the European Communities argued that Arts 7 and 8 described 'the balancing of goals that had already taken place in negotiating the final texts of the TRIPS Agreement' and that they could not be used to 'renegotiate' those arbitrations, and this especially given the conformity clause of Art 8.1.

Compared to the arguments of the parties, the response of the Panel turns out to be disappointing. It states tersely that 'both the goals and the limitations stated in Arts. 7 and 8.1 must obviously be borne in mind when [assessing the relevant conditions] as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes'.[53] Arts 7 and 8 are therefore considered as part of the general context of the Agreement, without any particular role to be conferred on them.[54] Moreover, the rest of the decision contains no further developments concerning the two provisions.[55] In the light of the arguments developed by the parties, which invited the Panel to take a clearer stand on the scope of these Articles, the vacuity of the response can only be explained by the refusal of the Panel to decide this sensitive question.[56]

3.2.2 The report *United States—Section 211 Omnibus Appropriations Act of 1998*:[57] the diversion towards 'good faith'

The next year, another Panel called upon to decide the legal value of these provisions interpreted Art 7 as an 'expression of good faith' prohibiting the states from 'abusive exercise' of their rights provided by the Treaty.[58] Nevertheless, as Henning Grosse Ruse-Khan points out, the subject of Art 7 was never the regulation of interstate relations: even if this Article mentions the necessity of ensuring 'a balance of rights and obligations', it concerns

[51] *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41) para 7.24.
[52] ibid para 7.24.
[53] ibid para 7.26.
[54] Critical: Grosse Ruse-Khan, *The Protection of Intellectual Property* (n 35) s 13.68 and f.
[55] Focke Höhne in Busche and others (eds), *TRIPS—Internationales und europäisches Recht* (n 37) 184–85, s 10.
[56] cf Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (2nd edn, Oxford University Press 2020) 86.
[57] *United States*: *Section 211 Omnibus Appropriations Act of 1998* (6 August 2001) WT/DS176/R (Panel Report).
[58] ibid para 8.57.

the owners of IP rights and not the Member States.[59] This reading, in reality, allowed the Panel to avoid having to take sides.

3.2.3 The report *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*:[60] the negative approach

In the decision *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, the Panel finally decided the legal nature of Art 8.1 of the Agreement. The report has not lost the cautiousness of its predecessors.[61] Indeed, instead of taking a stance on the reading that should be given to Art 8, the Panel chooses only to refute an interpretation that would make it an equivalent to the general exception clauses of the GATT and GATS Agreements. Arguing on the particular nature of the TRIPS Agreement, which 'does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts',[62] the Panel concludes that the latter does not need, for this reason, any general exception. Also, Art 8 'inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement'.[63] The approach proposing a maximum normative power, then, seems to be rejected, without any further clarification being given on the legal value that should be conferred on the provisions at issue.

In the end, these reports bring relatively little explanation of the scope of Arts 7 and 8 of the Agreement. Acknowledging this reality, the Appellate Body in the decision *Canada—Patent Term* concludes laconically, in an *obiter dictum*, that its findings:

> do not in any way prejudge the applicability of Article 7 or Article 8 of the *TRIPS Agreement* in possible future cases with respect to measures to promote the policy objectives of the WTO Members that are set out in those Articles. Those Articles still await appropriate interpretation.[64]

4. From the Doha Impetus to the *Australia—Plain Packaging* Reports: The Awakening of Arts 7 and 8

Given the relevance of political legitimacy to the question of the normative power of Arts 7 and 8, it is not surprising that the first impulse needed for the activation of these two provisions came not from the Dispute Settlement Body, but directly from the states themselves in the frame of the Doha Declarations (4.1). This first impetus from the Members of the TRIPS

[59] Grosse Ruse-Khan, *The Protection of Intellectual Property* (n 35) 460, s 13.62. However, the Appellate Body did not endorse the argumentation of the Panel: *United States: Section 211 Omnibus Appropriation Act of 1998* (2 January 2002) WT/DS176/AB/R (Report of the Appellate Body).

[60] *European Communities: Protection of Trademarks and Geographical Indications—Panel Report* (n 36).

[61] Even if this decision comes four years after the Doha Declaration, to which further consideration will be devoted in the following paragraph.

[62] *European Communities: Protection of Trademarks and Geographical Indications—Panel Report* (n 36) para 7.210.

[63] ibid.

[64] *Canada: Term of Patent Protection* (19 September 2000) WT/DS170/AB/R (Report of the Appellate Body).

Agreement directly leads to a shift of paradigm in the *Australia—Plain Packaging* reports, where Arts 7 and 8 find full application for the first time (4.2).

4.1 The Revitalisation of Arts 7 and 8 through the Political Impetus of the Doha Declarations

4.1.1 The motivation and the content of the Doha Declaration

Even if the TRIPS Agreement was and remains the most advanced international agreement on IP rights, for its drafters it was clear from the beginning that it would need to be re-evaluated in the future to take account of issues that could not be addressed or were not foreseeable during the negotiations.[65] They therefore provided for a review mechanism laid down in Art 71(1) TRIPS, whereby:

> The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

It soon arose from the Council's evaluation work[66] that the implementation of the TRIPS Agreement raised issues in particular regarding its relationship with other international agreements (including, for instance, the Convention on Biological Diversity[67]). Besides that, the question of access to medicines in developing countries was beginning to raise great concerns because of the HIV pandemic at the turn of the century.[68]

Aware of these concerns, the Member States agreed on two Declarations during the WTO's fourth Ministerial Conference, both of which invited a more systematic application of Arts 7 and 8 of the Agreement as a potential solution for these two issues. Thus, in the Declaration on the TRIPS Agreement and Public Health,[69] the Member States reaffirm first their right 'to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose',[70] before specifying that:

[65] Gervais, *The TRIPS Agreement* (n 42) 724.

[66] For a 'year by year' description of the Council work, see Gervais, *The TRIPS Agreement* (n 42) 32–49.

[67] Convention on Biological Diversity (opened for signature 5 June 1992 and entered into force on 29 December 1993) 760 UNTS 69 (hereafter CBD).

[68] See generally Frederick M Abbott, 'The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO' (2002) 5 Journal of International Economic Law 469; Haochen Sun, 'The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health' (2004) 15(1) European Journal of International Law 123; Benjamin Coriat, Fabienne Orsi, and Cristina d'Almeida, 'TRIPS and the International Public Health Controversies: Issues and Challenges' (2006) 15(6) Industrial and Corporate Change 1033; Stine Jessen Haakonsson and Lisa Ann Richey, 'TRIPs and Public Health: The Doha Declaration and Africa' (2007) 25 Development Policy Review 71; Andrew Law, *Patents and Public Health* (Nomos 2009) in particular chs 4 and 6; Valbona Muzaka, *The Politics of Intellectual Property Rights and Access to Medicines* (Palgrave Macmillan 2011) in particular 38–108.

[69] Carlos M Correa, 'Économie des brevets, l'accord sur les ADPIC et la santé publique' and Benjamin Coriat, Fabienne Orsi and Cristina d'Almeida, 'L'accord ADPIC et ses implications en matière de santé publique pour les pays du Sud : bilan et perspectives pour l'après 2005' in Bernard Remiche and Jorge Kors (eds), *L'accord ADPIC, dix ans après* (Larcier 2007) 161, 219.

[70] Declaration on the TRIPS Agreement and Public Health (adopted 14 November 2001) WT/MIN(01)/DEC/2 para 4 (hereafter Doha Declaration).

> … these flexibilities include: [a] in applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.[71]

Furthermore, and this time regarding the work programme of the Council on the issue of the potential existence of conflicts between the TRIPS and other international agreements, the Ministerial Declaration of the same day instructs the Council for TRIPS:

> … to examine … the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.[72]

4.1.2 The legal and policy impact of the declarations on the revitalisation of Arts 7 and 8 TRIPS

The impact of these two statements on the normative status of Arts 7 and 8 was the subject of debate: for some authors, they strengthened the role of these two provisions, whereas others refute this analysis, arguing that these Declarations did not alter the balance of the Agreement.[73] It seems unclear if the Doha Declaration really modified the legal status of the two provisions, since the Member States only ask for a transversal use of these clauses as interpretation tools of the Agreement:[74] as previously explained, such an application of these norms was already possible under the 'intermediate interpretation option'.[75]

Even if they did not change their legal status, the two Declarations nevertheless play a decisive role in revitalising Arts 7 and 8. Indeed, the Member States stressed their desire to see these two provisions play a central role in the interpretation of the Agreement; a role that the WTO Panel had previously failed to concede them. The importance for the future interpretation of the Agreement of these declarations was explicitly acknowledged by the Panel and the Appellate Body in the *Plain Packaging* reports.[76] Here the Panel indeed recognises that the Declaration on Public Health presents the characteristic of a 'subsequent agreement' of the Member States in the sense of Art 31(3)(a) of the Vienna Convention regarding the interpretation of the entire Agreement:

> The terms and contents of the decision adopting the Doha Declaration express, in our view, an agreement between Members on the approach to be followed in interpreting the provisions of the TRIPS Agreement. This agreement, rather than reflecting a particular

[71] Doha Declaration (n 70) para 5a.
[72] Ministerial Declaration (14 November 2001) WT/MIN(01)/DEC/1 para 19.
[73] For a presentation of the arguments of both sides, see Yu, 'The Objectives and Principles of the TRIPS' (n 1) 979, 997–1000.
[74] Gervais, *The TRIPS Agreement* (n 42) 234; Focke Höhne in Busche and others (eds), *TRIPS—Internationales und europäisches Recht* (n 37) 186, s 14.
[75] See Section 3.1.
[76] To be precise, the Panel only bases its reasoning on the Doha Declaration.

> interpretation of a specific provision of the TRIPS Agreement, confirms the manner in which 'each provision' of the Agreement must be interpreted, and thus 'bears specifically' on the interpretation of each provision of the TRIPS Agreement.[77]

The Doha Declarations thus entirely solve the potential legitimacy issue which could have presented an obstacle to the full application of Arts 7 and 8 by the Dispute Settlement Body.

4.2 The Reports in *Australia—Plain Packaging*: A New Paradigm for Arts 7 and 8

Following the logic of its argumentation regarding the meaning of the Doha Declaration, the reports of both the Panel and the Appellate body in the case *Australia—Plain Packaging* propose for the first time an application of Arts 7 and 8 as crucial interpretative tools for the Agreement (4.2.2). To better understand the role played by the two provisions, the legal question at stake needs first to be presented (4.2.1).

4.2.1 The matter at issue: the interpretation of the term 'unjustifiably' in Art 20 TRIPS

The dispute at stake was relatively simple: in 2010, Australia introduced the Tobacco Plain Packaging Regulations (TPP), which prohibited logos and branding on tobacco packaging: only the brand name was to be printed in small standardised fonts.[78] The purpose of this Regulation was smoking prevention through the reduction of the attractiveness of tobacco products. This Regulation was denounced by Cuba, Honduras, the Dominican Republic, and Indonesia as contrary to the TRIPS provisions regarding trade marks, especially Art 20, which provide that: 'the use of a trademark in the course of trade shall not be *unjustifiably*[79] encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings'.[80]

[77] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report* (n 2) para 7.2410. The Panel's interpretation concerning the interpretative value of the Doha Declaration was then confirmed by the Appellate Body, see *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Report of the Appellate Body* (n 3) para 6.657: 'We agree with the Panel that paragraph 5(a) of the Doha Declaration reflects "the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted" '.

[78] See Australian Government, Tobacco Plain Packaging Regulations 2011 made under the Tobacco Plain Packaging Act 2011, Select Legislative Instrument 2011 No 263, as amended (8 August 2013). See especially Division 2.3. The decision provides a description of the requirement: *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report* (n 2) paras 2.1.2.3 and 2.1.2.4.

[79] Emphasis added.

[80] For a presentation of the case, see Susy Frankel and Daniel Gervais, 'Plain Packaging and the Interpretation of the TRIPS Agreement' (2013) 46(5) Vanderbilt Journal of Transnational Law 1149; see also Enrico Bonadio and Althaf Marsoof, 'Logo? No logo? The WTO Dispute on Plain Packaging of Tobacco, and beyond' in Geiger (ed), *Research Handbook on Intellectual Property and Investment* (n 7); Lucas G Kelly, 'Smoke'em If You Got'em: Discussing the WTO Dispute Settlement Panel's Decision to Uphold Plain Packaging in Australia and its Impact on the Future' (2017) 35 UCLA Pacific Basin Law Journal 179; Alice Maxwell, 'Plainly Justifiable? The World Trade Organization's Ruling on the Validity of Australia's Plain Packaging under Article 20 of the Trips Agreement' (2019) 14 Asian Journal of WTO & International Health Law and Policy 115 (hereafter Maxwell, 'Plainly Justifiable? The World Trade Organization's Ruling'); Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law?' (n 47) 9–24; Tibor Gögh, 'WTO Panel, Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging

The critical question was hence to determine how 'unjustifiably' was to be interpreted in the framework of Art 20 TRIPS. The parties developed at least two different lines of interpretation.[81] The first, mainly supported by the Dominican Republic, read the expression 'unjustifiably' as providing an 'exception or qualification to prohibition on encumbrances on the use of a trade mark'.[82] The complainants hence argued that the purpose of Art 20 was to 'safeguard "to the greatest extent possible" the ability of a trademark to fulfil its basic function of distinguishing goods and services'[83] and that therefore the term 'unjustifiably' was to be interpreted in 'the light of the role and importance of "the use of trademark", as the interest protected by the provision'.[84] It concluded that the reasons advanced to limit the use of the trademark were to be considered as exceptions to the principle set down in this Article and that they were to be carefully calibrated to impose the least prejudice possible to the protected interest of 'the use of a trademark'.[85]

On the other side, Australia advanced a much more permissive meaning of the term 'unjustifiably'. For the defendant, 'the use of a trademark in the course of trade is "unjustifiably" encumbered by special requirements only if there is no "rational connection" between the imposition of the special requirements and a legitimate public policy objective'.[86] Hence, Australia accepted the necessity of a nexus between the encumbrance and the legitimate policy objective pursued. It nevertheless estimated that this nexus should be considered as satisfied as soon as it is demonstrated that the encumbrance is 'capable of contributing to its legitimate objective'.[87] Therefore, according to Australia, no further balancing test between the legitimate public policy objective and the interest of the trade mark owner was necessary.[88]

Requirements Applicable to Tobacco Products and Packaging, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 28 June 2018' (2019) 46(2) Legal Issues of Economic Integration 182; Genevieve Wilkinson, 'Tobacco Plain Packaging, Human Rights and the Object and Purpose of International Trade Mark Protection' in Susy Frankel (ed), *The Object and Purpose of Intellectual Property* (Edward Elgar 2019) 193–215 (hereafter Wilkinson, 'Tobacco Plain Packaging'); Nathalie Devillier and Ted Gleason, 'Consistent and Recurring Use of External Legal! Norms: Examining Normative Integration of the FCTC post-Australia—Tobacco Plain Packaging' (2019) 53(4) Journal of World Trade 533; Lukasz Gruszczynski and Margherita Melillo, 'The FCTC and its Role in WTO Law: Some Remarks on the WTO Plain Packaging Report' (2018) 9(3) European Journal of Risk Regulation 564; Tania Voon, 'Third Strike: The WTO Panel Reports Upholding Australia's Tobacco Plain Packaging Scheme' (2018) 1 Journal of World Investment & Trade 146–84; Wolf R Meier-Ewert, 'The WTO Disputes Regarding Tobacco Plain Packaging—Selected TRIPS Findings from the Panel Stage' in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and International Dispute Resolution* (Kluwer Law International 2019) 211–44 (hereafter Meier-Ewert, 'The WTO Disputes Regarding Tobacco Plain Packaging').

[81] We will hereafter concentrate on these two main opposing arguments. However, it should be noted that it is possible to distinguish more nuanced lines of argumentation supported by certain countries.

[82] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report* (n 2) para 7.3.5.5.1.1 and para 7.2307.

[83] ibid para 7.2313.

[84] ibid para 7.2314.

[85] ibid para 7.2313. This line of argument was then adopted by Honduras during the appeal procedure: see *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Reports of the Appellate Body* (n 3) paras 6.3.2.3, 6.644, 6.648, 6.650, 6.652, and 6.656.

[86] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report* (n 2) paras 7.3.5.5.1.1 and 7.2329.

[87] ibid para 7.2331.

[88] ibid para 7.2333. Australia maintained the same line of argumentation during the Appeal, see *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Reports of the Appellate Body* (n 3) para 6.3.2.3. Para 6.638: Australia considers that 'the Panel interpreted and applied the term "unjustifiably in a manner that places this term much closer to a standard of "necessity" than Australia believes is warranted under a proper interpretation'.

4.2.2 An analysis based on Arts 7 and 8 TRIPS

Based on Arts 7 and 8 TRIPS, the Panel answers the question by proposing a middle way in interpreting the term 'unjustifiably'. For the Panel, even if the mere establishment of a rational connection with the public policy is indeed not considered to be sufficient, the pursuit of public policy should be considered as of equal rank with the legitimate interest of the trade mark owners in protection, imposing, therefore, a case-by-case balancing assessment.[89]

The reasoning followed by the Panel is more interesting than the solution itself. After a short analysis of the 'ordinary meaning' of this word, the Panel indeed comes to the conclusion first that 'they may be circumstances in which good reasons exist that sufficiently support the application of encumbrances'[90] but, second, that Art 20 nevertheless does not 'expressly identify the types of reasons' that could justify the encumbrance.[91] To interpret the latter, the Panel turns therefore to Arts 7 and 8 to provide the 'relevant context'.[92] After having reproduced the two provisions, the Panel, confronted with their interpretation, does not shirk its task:

> 7.2402. Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement, *which are to be borne in mind when specific provisions of the Agreement are being interpreted in their context and in light of the object and purpose of the Agreement.*[93] As the panel in Canada—Pharmaceutical Patents observed in interpreting the terms of Article 30 of the TRIPS Agreement, '[b]oth the goals and the limitations stated in Articles 7 and 8.1 must obviously be borne in mind when doing so as well as those of other provisions of the TRIPS Agreement which indicate its object and purposes'.
>
> 7.2403. Article 7 reflects the intention of establishing and maintaining a balance between the societal objectives mentioned therein. Article 8.1, for its part, makes clear that the provisions of the TRIPS Agreement are not intended to prevent the adoption, by Members, of laws and regulations pursuing certain legitimate objectives, specifically, measures 'necessary to protect public health and nutrition' and 'promote the public interest in sectors of vital importance to their socio-economic and technological development', provided that such measures are consistent with the provisions of the Agreement.
>
> 7.2404. Article 8 offers, in our view, useful contextual guidance for the interpretation of the term 'unjustifiably' in Article 20. Specifically, the principles reflected in Article 8.1

[89] See also Maxwell, 'Plainly Justifiable? The World Trade Organization's Ruling' (n 80) 129–30, noting that the Panel test 'requires a more holistic approach to the question of justifications that involves a weighing and balancing of … factors'; Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law?' (n 47) 19, according to whom 'the use of the term "unjustifiably" rather referred to a requirement that a justification or reason should exist that sufficiently supports the encumbrance resulting from the action or the measure at issue'; Wilkinson, 'Tobacco Plain Packaging' (n 80) 206–16; Meier-Ewert, 'The WTO Disputes Regarding Tobacco Plain Packaging' (n 80) 226–27, according to whom this assessment 'meant taking account of the legitimate interest of the trade mark owners in using its trademark in the course of trade … and how that is affected by the encumbrances to be justified'. The Panel interpretation is in line with the proposal made by Max Wallot to read Arts 7 and 8 as supporting a proportionality principle having an interpretation function: Max Wallot, 'The Proportionality Principle in the TRIPS Agreement' in Ullrich and others, *TRIPS plus 20* (n 4) 226–28.

[90] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report* (n 2) para 7.3.5.5.1.3, paras 7.2394–7.2396.

[91] ibid para 7.2397.

[92] ibid para 7.2399. It should also be noted that the Panel mentions the TRIPS preamble as a potential source to determine the relevant context (para 7.2398).

[93] Emphasis added.

> express the intention of drafters of the TRIPS Agreement to preserve the ability for WTO Members to pursue certain legitimate societal interests, at the same time as it confirms their recognition that certain measures adopted by WTO Members for such purposes may have an impact on IP rights, and requires that such measures be 'consistent with the provisions of the [TRIPS] Agreement'.
>
> 7.2405. Read against this broader context, we understand the requirement under Article 20 that the use of trademarks in the course of trade not be 'unjustifiably' encumbered as reflecting a recognition that there may be legitimate reasons for which a Member may encumber such use. The term 'unjustifiably' defines, in the specific context of encumbrances in respect of the use of trademarks, the applicable standard for the permissibility of such encumbrances.

In the first of these four paragraphs reproduced, the Panel hence finally rules on the question of the normative role of these two provisions: following the invitation of the Doha Declarations, the Panel explicitly recognises the function of Arts 7 and 8 as transversal interpretative clauses of the Agreement.[94] In the second paragraph, the Panel then specifies the general meaning of each of the two provisions. Even if the developments are succinct, their presence is already an innovation that is to be commended.

In the last two quoted paragraphs,[95] the Panel deduces the implications of these provisions regarding the meaning of 'unjustifiably' in Art 20 TRIPS. There, the first paragraph of Art 8 plays a decisive role in defining the reasoning followed by the Panel: as a reminder, this provision indeed recognises the possibility for the states to pursue certain legitimate social interests, even if the latter impact IP rights, but subject to the previously explained 'conformity clause'. Because of this 'conformity clause', the Panel rejects Australia's view that the mere existence of a rational connection between the encumbrance and a legitimate public policy objective is to be regarded as sufficient.[96] For the Panel, the reasons advanced need to be consistent with TRIPS, which requires verifying on a case-by-case basis whether the encumbrance is 'weighed and balanced', with respect to the legitimate interest of the trade mark owner.[97] Still, on the basis of Arts 7 and 8, the Panel also refutes the line of interpretation proposed by the Dominican Republic, according to which the public policy reasons advanced need only be considered as 'exceptions'. Against the context of the two provisions, the Panel indeed considers the public policy objectives not as exceptions but as 'reasons' which, even though they need to be balanced with the interest of the trade mark owner, are at least at the theoretical stage considered to be of equal rank. The Panel thus concludes that 'Article 20 reflects the balance intended by the drafters of the TRIPS Agreement between the existence of a legitimate interest of trademark owners in using their trademarks in the marketplace, and the right of WTO Members to adopt measures for the protection of certain societal interests that may adversely affect such use'.[98]

[94] See also Maxwell, 'Plainly Justifiable? The World Trade Organization's Ruling' (n 80) 125–27, according to which the Panel relies on a 'contextual approach'.

[95] See also the following paragraphs (paras 7.2405–7.2406).

[96] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report* (n 2) paras 7.3.5.5.1.3, 7.2422.

[97] ibid para 7.2431.

[98] ibid para 7.2430.

Thus, Arts 7 and 8 have a decisive function in interpreting the '*unjustifiably* encumbered' condition of Art 20,[99] imposing a case-by-case assessment of the conformity of the balance reached between the interests involved. For the record, in the case at stake, the Panel found that Australia did not act 'beyond the bounds of the latitude available under Article 20',[100] even if the measures in question were 'far-reaching in terms of the trademark owner's expected possibilities to extract economic value from the use of such features'.[101] It further considered that 'as regards the TRIPS Agreement … Article 8.1. sheds light on the types of societal interests that may provide a basis for the justification of measures under the specific terms of Article 20, and expressly recognizes public health as such a societal interest',[102] and that none of the conceivable alternative measures 'would be apt to make a contribution to Australia's objective equivalent to that of the trademark plain packaging measures'.[103]

The Panel reasoning was then entirely upheld on Appeal. The Appellate Body admittedly considers less intensely the normative value of Arts 7 and 8 and merely recalls, in this regard, the findings made by the Panel.[104] However, it fully endorses the outcome of the reasoning relative to the normative value of Arts 7 and 8 as providing 'important context for the interpretation' of the Agreement,[105] and it implements it in the context of Art 20. There, the Appellate Body confirms the possibility that special requirements encumbering the use of a trademark will, on the basis of a case-by-case balancing assessment, be justifiable as serving public policy objectives and contributing to the object and purpose of the Agreement.[106]

5. The Future Implications of the Decision: The Potential of Arts 7 and 8 for the Flexibility of the TRIPS Agreement

The reactivation of Arts 7 and 8 TRIPS could play a decisive role in relation to the new challenges faced by the TRIPS Agreement more than twenty years after its enactment. From an internal point of view, these rights are confronted with new economic, technological, and social realities that require a re-evaluation of their balance. From an external perspective, we have also witnessed, over the last two decades, an awareness of the potential conflict between respect for IP rights and other ethical imperatives. Faced with these challenges, the TRIPS Agreement seems ill-adapted, and the failure of the Doha Round has proven that it is difficult for the Member States to reach a substantial agreement again in this domain today. If the absence of response to these issues is likely to signal the fading of the Treaty with time, the 'awakening' of Arts 7 and 8 TRIPS could offer a solution to many endogenous

[99] Pushing for such an interpretation, see Susy Frankel and Daniel Gervais, 'Plain Packaging and the Interpretation of the TRIPS Agreement' (2013) 46(5) Vanderbilt Journal of Transnational Law 1202. See also Andrew D Mitchell, 'Australia's Move to the Plain Packaging of Cigarettes and its WTO Compatibility' (2010) 5(2) Asian Journal of WTO and International Health Law and Policy 413.

[100] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Panel Report* (n 2) para 7.3.5.5.3.4, para 7.2604.

[101] ibid para 7.3.5.5.3.2, para 7.2569.

[102] ibid para 7.3.5.5.3.3, para 7.2588.

[103] ibid para 7.3.5.5.3.4, para 7.2600.

[104] *Australia: Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements—Reports of the Appellate Body* (n 3) para 6.3.2, para 6.625.

[105] ibid para 6.658.

[106] ibid see in particular para 6.649, where, based on Art 8, the Appellate Body confirms that the special requirement might also be imposed 'in pursuit of public health objectives' and hence 'do not have to relate to the trade mark itself'.

problems (5.1), but also to the exogenous ones (5.2), by allowing greater adaptability of the Agreement in the face of these new issues.

5.1 The Influence of Arts 7 and 8 as Transversal Interpretation Clauses on IP Rights' Internal Limitations

5.1.1 The evolution of the economic context and the necessity to secure the adaptability of IP rights

As a form of economic regulation, IP is, inter alia, intended to bring legal correctives to the market when it cannot, on its own, ensure an optimal position.[107] However, the economy is neither monolithic nor static, and it has known profound transformations since the negotiation of the TRIPS Agreement.

For example, the number of patent registrations[108] has exploded since the signing of the Agreement and has been accompanied by the development of extraordinary sophistication in some technologies (there may, for example, be 250,000 active patents inside a smartphone),[109] to which is added an increasing need for interoperability between rival products, requiring the establishment of technologic norms. These three factors are favourable to opportunistic behaviours: a patent can now be used not to recoup the necessary investments to develop the technology it protects, but for strategic purposes like the exclusion of rivals or the inhibition of new business models.[110] The appearance of 'non-practising entities' or the patents war declared from 2011 in the high-tech sector are concrete manifestations of these potential dysfunctional effects.

Copyright has, for its part, been confronted with the emergence of information and communication technologies[111] which have been described as disruptive because their introduction has led to a modification of consumers' behaviour and, consequently, to a transformation of markets.[112] Regarding music, the CD has replaced the audio cassette, before being overtaken by downloading, which itself is close to being entirely marginalised by streaming. The 'Majors', whose economic model was organised around the production of discs, have used IP rights they own to slow down the emergence of dematerialised distribution methods. The use made in that context of copyright has been, from a societal point of view, doubly dysfunctional: it has not only delayed the appearance of business models enabling a massive propagation of protected contents but, furthermore, has

[107] For a general presentation of the economic justifications of IP, generally see William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003); Joseph E Stiglitz, 'Economic Foundations of Intellectual Property Rights' (2007) 57 Duke Law Journal 1693.

[108] For a presentation of the different studies in this domain and the challenges that this increase represents: Hanns Ullrich, 'The Political Foundations of TRIPS Revisited' in Ullrich and others, *TRIPS plus 20* (n 4) 111–12.

[109] Daniel O'Connor, 'One in Six Active US Patents Pertain to the Smartphone' (*Disruptive Competition Project*, 17 October 2012) <http://www.project-disco.org/intellectual-property/one-in-six-active-u-s-patents-pertain-to-the-smartphone> accessed 28 December 2020.

[110] On the transformations of the functions of patents, see Reto M Hilty and Christophe Geiger, 'Patenting Software? A Judicial and Socio-Economic Analysis' (2005) 36(6) International Review of Intellectual Property and Competition Law 615.

[111] In that sense, see Christophe Geiger, 'Flexibilising Copyright—Remedies to the Privatisation of Information by Copyright Law' (2008) 39(2) International Review of Intellectual Property and Competition Law 178.

[112] See Joseph L Bower and Clayton M Christensen, 'Disruptive Technologies: Catching the Wave' (1995) 73(1) Harvard Business Review 45–48.

slowed the development of a legal offer and has therefore favoured the emergence of mass infringement.[113]

These examples of economic evolution illustrate the fact that IP rights, if they are to continue performing their corrective task, cannot stay static without becoming themselves a source of market failure.[114]

5.1.2 The interpretation of limitations and exceptions under the Agreement—offering more flexibility via Arts 7 and 8 TRIPS

Facing this constant need to adapt, the TRIPS Agreement seems to be at a stand-off. The new reading of Arts 7 and 8 as transversal interpretation clauses could, however, offer a solution by instilling the Treaty with the necessary dose of flexibility. Admittedly, these two Articles can play this role only when other provisions of the Agreement are open to interpretation, as was the case regarding the interpretation of the term 'unjustifiably' in Art 20 TRIPS. In this regard, the provisions defining the prerogatives attached to each of the IP rights offer room for leeway (albeit sometimes limited).[115] Nevertheless, the extent of the scope of protection of an IP right is defined both positively regarding the prerogatives conferred and negatively in the light of its limits. In this regard, the wording of the provisions concerning the 'limitations and exceptions' of each of these rights—namely, Arts 13, 17, 26.2, and 30—are relatively vague, offering a fruitful field for interpretation. These four Articles, which possess a very similar structure,[116] ensure that the states may provide 'limited exceptions to the exclusive rights … provided that such exceptions do not unreasonably conflict with a normal exploitation [of this right] and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties'.[117]

[113] Christophe Geiger, 'Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach' in Paul L C Torremans (ed), *Research Handbook on the Cross-Border Enforcement of Intellectual Property* (Edward Elgar 2014) 704.

[114] Reto M Hilty, 'Ways out of the Trap of Article 1 (1) TRIPS' in Ullrich and others, *TRIPS plus 20* (n 4) 194. For copyright, see Geiger, 'Copyright and Free Access to Information' (n 26); Christophe Geiger, 'Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests' in Rebecca Giblin and Kimberlee G Weatherall (eds), *What if We Could Reimagine Copyright?* (Acton, Australian National University (ANU) Press 2016) 73.

[115] As some authors emphasise, many notions or terms within these provisions are susceptible to interpretation, allowing for a greater flexibility in the Agreement's application. See Grosse Ruse-Khan, *The Protection of Intellectual Property* (n 35) 468, note 143.

[116] These Articles are twins; even if they differ on some details, there is no historical reason to suggest that the Member States wanted to give them different meanings (*Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41) para 7.29). On the differences: only Art 17, on the exceptions to trade marks, adopts a structure in two steps. Other discrepancies can also be observed between the formulation of Art 13, concerning copyright, and the three other Articles, concerning the limits of industrial property. Thus, while the first condition of the test in copyright stipulates that the exceptions should be limited to 'special cases', the Articles in the area of industrial property provide only for the exception to be 'limited'. In the same way, if the second condition for copyright only forbids limitations that would 'conflict with a normal exploitation of the work', the provisions on industrial property rights add the precision that the exceptions must 'unreasonably' conflict with this exploitation. Finally, regarding the third condition, only the Articles in the domain of industrial property mention the taking into account not only of the legitimate interests of the right-holder but also those of third parties. These criteria regarding the legitimacy of limitations and exceptions in TRIPS are often referred to as the 'three-step test', even if certain provisions only contain a 'two-step test'. See eg Martin R F Senftleben, 'Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law' (2006) 37 International Review of Intellectual Property and Competition Law 407; Christophe Geiger, Daniel Gervais, and Martin R F Senftleben, 'The Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) American University International Law Review 581.

[117] See Art 3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (opened for signature 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (hereafter TRIPS Agreement or TRIPS).

Until now, the Panel's decisions, refraining from recourse to Arts 7 and 8, propose a very restrictive interpretation of these limitations (5.1.2.1). This might change with the awakening of Arts 7 and 8 TRIPS as transversal interpretation clauses. Indeed, both the articulation of the conditions and the definition of terms such as 'limited exceptions', 'normal exploitation', 'unreasonably prejudice', or 'legitimate interests' offer fertile ground for interpretation and could allow for a more flexible application of the Agreement (5.1.2.2).[118]

5.1.2.1 The restrictive interpretation of the limitations and exceptions in the Panel's reports

The Articles concerning limitations and exceptions to IP rights have been subject to three decisions of the DSB: the decisions *Canada—Pharmaceutical Patents*,[119] *United States—Section 110(5) Copyright Act*,[120] and *CE—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*.[121] A particularly restrictive interpretation of the provisions has emerged from these decisions.

First, the Panel concluded that these Articles include three conditions that 'are cumulative, each being a separate and independent requirement that must be satisfied'.[122] This way any restriction must (1) be limited (industrial property) or provided for by explicit regulation (copyright), (2) not unreasonably conflict with a normal exploitation of the right, and (3) not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.[123]

Furthermore, the decisions then propose a particularly strict definition of each condition. Thus, the first one, consisting of the limited character of the exception, has been interpreted as having to be 'be clearly defined' and 'limited in its field of application or exceptional in its scope'.[124] The terms used seem rather restrictive and lead some authors to even doubt the conformity of the fair use exception in US copyright law with the three-step test,[125] even though the exception existed before the negotiations of the Agreement, on which the United States had a significant influence. Indeed, this exception authorises certain uses of copyright-protected works considered to be fair not because they fall within

[118] Christophe Geiger, 'Exploring the Flexibilities of the TRIPS Agreement's Provisions on Limitations and Exceptions' in Kur and Mizaras, *The Structure of Intellectual Property Law* (n 26) 300–03; see also Christophe Geiger, 'Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions' (2009) 40(6) International Review of Intellectual Property and Competition Law 627 (hereafter Geiger, 'Implementing an International Instrument').

[119] *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41).

[120] *United States: Section 110(5) of the US Copyright Act—Panel Report* (15 June 2000) WT/DS160/R (Panel Report) (hereafter *United States: Section 110(5) of the US Copyright Act—Panel Report*).

[121] *European Communities: Protection of Trademarks and Geographical Indications—Panel Report* (n 36).

[122] *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41) para 7.20; Comp *United States: Section 110(5) of the US Copyright Act—Panel Report* (n 120) para 6.97.

[123] For a transversal analysis, see Martin R F Senftleben, 'Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law' (2006) 37 International Review of Intellectual Property and Competition Law 407.

[124] *United States: Section 110(5) of the US Copyright Act—Panel Report* (n 120) paras 6.108 and 6.109; similar wording can be observed in two other reports. Regarding patents: *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41) para 7.30. With trade marks: *European Communities: Protection of Trademarks and Geographical Indications—Panel Report* (n 36) para 7.650.

[125] Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (2003) SCCR/9/7 World Intellectual Property Organization, Standing Committee on Copyright and Related Rights 67–69; against such an analysis for historical reasons: Christophe Geiger, 'Exploring the Flexibilities of the TRIPS Agreement's Provisions on Limitations and Exceptions' in Kur and Mizaras, *The Structure of Intellectual Property Law* (n 26) 295–96.

a strictly defined limitation, but by reference to a body of criteria that judges apply to individual cases.[126]

The interpretation given to the second condition, ensuring that an exception to this IP right does not unreasonably conflict with a normal exploitation, is similarly restrictive. The Panels hence estimated that this normal exploitation consists in the ability 'to exclude all forms of competition that could detract significantly from the economic returns anticipated from [this right's] grant of market exclusivity'[127] and point out that these benefits can also stem from future forms of exploitation 'which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance'.[128] While this term could have been understood as taking public interest considerations into account, the adopted definition of 'normal use' seems to be primarily centred on the right-holder. Furthermore, the extension of the definition to future exploitations is utterly questionable. As explained, IP rights are tools of market regulation. Evolutions of the economy should lead to a re-evaluation of the latter and not to an ever-growing extension of their field of application.[129]

Finally, the last condition should allow a genuine assessment of proportionality between the interests of the IP owner and those of third parties.[130] However, with the exception of the Panel decision regarding trademark law, these decisions take no stand on the justifications underpinning the established exceptions.[131] By imposing a reading of the three conditions as cumulative, and an interpretation having as its starting point the IP right owner's interests, the Panel potentially marginalises the role of this proportionality test. Indeed, in most cases, the latter will not find any application because one of the first two conditions will not be fulfilled.[132] Alternatively, it will apply, but only in cases in which the Panels will be able to deny the very existence of the right owner's interests, thus avoiding any debate on the existing justifications for the restriction of the IP right.[133] This particularly strict interpretation negates the scope of these provisions and makes the TRIPS Agreement even more calcified.

5.1.2.2 For a new reading of the limitations and exceptions provisions through the prism of Arts 7 and 8 after the Australia—Plain Packaging *reports*

The reading proposed by the Panels until now seems inconsistent with the understanding of Arts 7 and 8 as transversal interpretation clauses.[134] Art 8 indeed provides the possibility

[126] US Code, Copyright Act 1976, 17 USC § 107—Limitations on exclusive rights: Fair use.

[127] *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41) para 7.55.

[128] *United States: Section 110(5) of the US Copyright Act—Panel Report* (n 120) para 6.180.

[129] cf Christophe Geiger, 'Exploring the Flexibilities of the TRIPS Agreement's Provisions on Limitations and Exceptions' in Kur and Mizaras, *The Structure of Intellectual Property Law* (n 26) 296–98.

[130] Christophe Geiger, 'The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society' (2007) Copyright Bulletin 1.

[131] Annette Kur, 'Limitations and Exceptions Under the Three-Step Test—How Much Room to Walk the Middle Ground?' in Annette Kur and Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar 2011) 236–37 (hereafter Kur and Levin, *Intellectual Property Rights in a Fair World Trade System*).

[132] *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41). In this decision, the Panel found that the stockpiling of patent goods does not fulfil the first condition of the test and therefore stops its examination at this level.

[133] *Canada: Patent Protection of Pharmaceutical Products—Panel Report* (n 41) paras 7.60–7.84.

[134] Christophe Geiger, Daniel Gervais, and Martin R F Senftleben, 'Understanding the "Three-Step Test"' in Daniel Gervais (ed), *Research Handbook on International Intellectual Property Law* (Edward Elgar 2015) 167.

for the Member States 'to promote the public interest in sectors of vital importance to their socio-economic and technological development' as well as to take necessary measures to prevent IP rights from allowing 'practices which unreasonably restrain trade'. In the same way, Art 7 explicitly stipulates that IP rights must contribute 'to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge'.[135] In the light of these provisions, the restrictive reading of the different limitations and exceptions to IP rights suggested by the Panels hardly seems justifiable, especially in comparison with the interpretation proposed of the word 'unjustifiably' in the *Plain Packaging* reports. Hence, the choice to interpret the limitations and exceptions as having to be 'exceptional in … scope' or to resort to the IP right owner's interest as a unique prism to define the '*normal* exploitation' of this right or, last but not least, the marginalisation of the proportionality test, cannot be considered to conform to Arts 7 and 8.

Accepting the role of Arts 7 and 8 as transversal interpretation clauses of the Agreement forces one to consider that within the conditions of application of these exceptions, the proportionality test must play a fundamental role. As such, the exceptions are written in a single sentence that does not compel the distinction of three cumulative conditions which have to be verified 'step by step'. A comprehensible overall assessment of these provisions is thus fully justified.[136] Such a global approach to the conditions restores the central role of the proportionality test, preventing each condition from becoming a veto.[137] In the same vein, a change in the order of the conditions has been suggested, beginning precisely with the proportionality test and then using the first two conditions as safeguards.[138] Moreover, the concept of '*normal* exploitation' must be interpreted in compliance with the requirement of Art 7 as considering not only the right-holder's interest but also those of third parties. It then appears possible to redirect this definition towards the object of IP rights, namely the correction of a market failure to obtain a social optimum. Thus, in the presence of adequate compensation, the normal exploitation criteria should be considered fulfilled.[139]

The acceptance of such an interpretation offers a broader scope to the limitations and exceptions. This reading would make it possible to provide the necessary flexibility to national legislators to adapt the IP rights to new economic contexts without leading to a substantial

[135] Emphasis added.

[136] Christophe Geiger, Jonathan Griffiths, and Reto M Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39(6) International Review of Intellectual Property and Competition Law 707, s 1 (hereafter Geiger and others, 'Declaration on a Balanced Interpretation of the "Three-Step Test" ').

[137] Christophe Geiger, Jonathan Griffiths, and Reto M. Hilty, 'Towards a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 489 European Intellectual Property Review, stating that under the interpretation of the WTO Panel 490, 'the second step of the 'test' becomes a form of 'show-stopper', precluding law-makers from taking into account any interests other than the private economic interests of right-holders'. Emphasising the role of the third step as a proportionality test, see also Martin RF. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004) 226; Séverine Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique* (Larcier 2005) 221; Daniel Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) 9(1) Marquette Intellectual Property Law Review 18–19, stating 'that the inclusion of a reasonableness/justifiability criterion is a key that allows legislators to establish a balance between on the one hand, the rights of authors and copyright holders, and the needs and interests of users, on the other hand'; Christophe Geiger, 'The Three-Step Test, A Threat to a Balanced Copyright Law?' (2006) 37(6) International Review of Intellectual Property and Competition Law 683, 696.

[138] Christophe Geiger, 'Exploring the Flexibilities of the TRIPS Agreement's Provisions on Limitations and Exceptions' in Kur and Mizaras, *The Structure of Intellectual Property Law* (n 26) 300–01.

[139] Geiger and others, 'Declaration on a Balanced Interpretation of the "Three-Step Test" ' (n 136) s 4.

alteration of the text of the TRIPS Agreement. The role of Arts 7 and 8, interpreted as transversal clauses of interpretation, does not, however, stop here. These provisions also allow for a better integration of the consideration of ethical imperatives and external norms relative to human rights in the interpretation of the TRIPS Agreement.

5.3 The External Limits: Taking into Account Ethical Imperatives through International Human Rights

In the same way, the new reading of Arts 7 and 8 TRIPS as transversal clauses could also offer a gateway to ethical imperatives in the interpretation of the TRIPS norms.[140]

As already mentioned, the filing of legal actions in the early 2000s by a number of pharmaceutical companies to defeat public policies led by the South African Government in the battle against HIV highlighted the conflicts that existed between IP and respect for ethical imperatives,[141] and eventually led to the Doha Declaration on the TRIPS Agreement and Public Health.[142] The potential conflicts are not, however, limited to the domain of health: access to food, information, knowledge, scientific progress, or to culture or even freedom of speech, are only a few other examples.[143] While it is true that IP rights can propose substantial solutions to these issues,[144] they also have the potential, when they are not correctly balanced, to constitute a legal barrier to access. The current rejection of these rights by many citizens might be regarded as a consequence of this process.[145] A potential reconciliation will then be possible if legal tools exist to solve this tension.[146]

[140] Also Wilkinson, 'Tobacco Plain Packaging' (n 80) 209: 'In future disputes, societal interests could be interpreted to directly overlap with the protection of human rights that can be linked to the object and purpose of TRIPS such as the right to health'; Yu, 'The Objectives and Principles of the TRIPS' (n 1) 1037.

[141] For a presentation of the case, see the literature cited in (n 68).

[142] Doha Declaration (n 70). Generally, see Duncan Matthews, 'Right to Health and Patents' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 496.

[143] On these issues, see Marianne Levin, 'The Pendulum Keeps Swinging—Present Discussions on and around the TRIPS Agreement'in Kur and Levin, *Intellectual Property Rights in a Fair World Trade System* (n 131) 25–45; Frantzeska Papadopoulou, 'TRIPS and Human Rights' in Kur and Levin, *Intellectual Property Rights in a Fair World Trade System* (n 131) 283–86; Hannu Wager and Jayashree Watal, 'Human Rights and International Intellectual Property Law' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 160–71 (hereafter Geiger, *Research Handbook on Human Rights and Intellectual Property*); Christophe Geiger (ed), *Intellectual Property and Access to Science and Culture: Convergence or Conflict?* (Collection CEIPI/ICTSD on Global Perspectives and Challenges for the Intellectual Property System 2016); Klaus D Beiter, 'Establishing Conformity Between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights' in Ullrich and others, *TRIPS plus 20* (n 4) 449–63; Laurence R Helfer, 'Human Rights and Intellectual Property: Mapping an Evolving and Contested Relationship' in Rochelle C Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (Oxford University Press 2018) 117–43; Christophe Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property—An Update' in Paul L C Torremans (ed.), *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2020).

[144] Recalling this role of IPR, see Hannu Wager and Jayashree Watal, 'Human Rights and International Intellectual Property Law' in Geiger, *Research Handbook on Human Rights and Intellectual Property* (n 143) 149–56; also Xavier Seuba, 'Mainstreaming the TRIPS and Human Rights Interactions' in Correa (ed), *Research Handbook on the Protection of Intellectual Property* (n 12) 193–94.

[145] Daniel Gervais points out that these problems could even be exacerbated in the context of investor-state dispute settlement: Daniel Gervais, 'Investor-State Dispute-Settlement: Human Rights and Regulatory Lessons from Lilly v. Canada' (2008) 8(3) UC Irvine Law Review 459; from the same author: 'ISDS & IP: Lessons from *Lilly v. Canada*' in Geiger (ed), *Research Handbook on Intellectual Property and Investment* (n 7); also Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law?' (n 47) 26.

[146] Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Toward a New Social Contract for the Protection of Intangibles' in Geiger, *Research Handbook on Human Rights and Intellectual Property* (n 143) 662–64. See in the context of the Covid-19 crisis: Christophe Geiger, 'Marque, brevet,

Given these stakes, the TRIPS Agreement contains no explicit mention of respect for fundamental rights.[147] The Vienna Convention provides, under Art 31.3 c), that the context that must serve to interpret a treaty includes 'any relevant rules of international law applicable in the relations between the parties'. As all WTO Member States are also members of the UN, the Universal Declaration of Human Rights (UDHR) is part of this context.[148] However, reducing the protection of fundamental rights to a contextual element might not be sufficient to resolve the tensions previously mentioned[149] and Arts 7 and 8 of the Agreement could thus serve as an intermediary to fundamental rights application in the context of the TRIPS Agreement.[150]

Indeed, Art 7 explicitly provides that IP should be protected 'in a manner conducive to social … welfare, and to a balance of rights and obligations'. Likewise, Art 8.1 provides the possibility for the Member States to take necessary measures 'to promote the public interest in sectors of vital importance to their socio-economic … development'. The two provisions, therefore, refer to societal issues, whose essence relies on respect for fundamental rights.[151]

This consideration of fundamental rights through Arts 7 and 8 obeys the same constraints as in the context of endogenous limits. These two provisions cannot offer these rights more

et santé publique, Quand l'OMC prend (finalement) au sérieux les objectifs et principes de l'accord sur les Adpic' (2020) 77 Propriétés intellectuelles 130–131 and the collective text drafted by several academics (including Christophe Geiger, one of the authors of this chapter), 'Pour une politique du brevet au service de la santé publique' (2021) 11 Semaine du droit, édition générale 284–285.

[147] For this reason, it has been suggested that an explicit reference to the UDHR should be included in the TRIPS Agreement, 'so that the Declaration could serve as a guideline for its interpretation. This could prevent a systematic interpretation in favour of right owners. Furthermore, it would guarantee that economic reasoning is carried out with ethical considerations. Such a reference could be added via a Declaration or an Agreed statement without substantial changes to the Agreement and might draw more easily a consensus on an international level because of the high moral acceptance of the UDHR then a revision of TRIPS', Christophe Geiger, ' "Constitutionalizing" Intellectual Property Law?, The Influence of Fundamental Rights on Intellectual Property in Europe' (2006) 37(6) International Review of Intellectual Property and Competition Law 371, 389; see also Klaus D Beiter, 'Establishing Conformity between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights' in Ullrich and others, *TRIPS plus 20* (n 4) 478–79; Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5(1) Minnesota Intellectual Property Review 47, 61. According to this author, allowing greater opportunities for airing a human rights perspective on IP issues will strengthen the legitimacy of the WTO and promote the integration of an increasingly dense thicket of legal rules governing the same broad subject matter. See also Robert D Anderson and Hannu Wager, 'Human Rights, Development, and the WTO' (2006) 9(3) Journal of International Economic Law 707 ff, underlining the complementarities of international trade law with human rights concerns. See further Hannu Wager and Jayashree Watal, 'Human Rights and International Intellectual Property Law' in Geiger, *Research Handbook on Human Rights and Intellectual Property* (n 143) 149.

[148] It has been suggested that the primacy of international human rights acts over trade liberalisation rules already require these rules to be interpreted in the light of the UDHR (see eg the article of Gabrielle Marceau, Counsellor for the Legal Affairs Division of the WTO Secretariat, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) European Journal of International Law 753 ff; see also UNCHR (Sub-Commission) Res 7 (2000) (n 11).

[149] Christophe Geiger, 'Exploring the Flexibilities of the TRIPS Agreement's Provisions on Limitations and Exceptions' in Kur and Mizaras, *The Structure of Intellectual Property Law* (n 26) 291.

[150] Also Petersmann, 'How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law' (n 47) 26: 'The Panel confirmed … that—even though the TBT and TRIPS Agreements lack 'general exception clauses' similar to GATT Article XX—the necessary "weighing", "balancing" and legal reconciliation of trade commitments and health protection obligations must remain consistent with the basic principles underlying GATT Article XX as recognized in the Preamble of the TBT Agreement as well as in Articles 7 and 8 of the TRIPS Agreement'; see also Wilkinson, 'Tobacco Plain Packaging' (n 80) 182.

[151] The UN Commission explicitly targets this possible link to human rights in the framework of the UN: The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights (27 June 2001) E/CN.4/Sub.2/2001/13 8 ss 16–17; Frantzeska Papadopoulou, 'TRIPS and Human Rights' in Kur and Levin, *Intellectual Property Rights in a Fair World Trade System* (n 131) 273–74.

than the normative power they possess. A derogation from the norms of the Agreement on the sole basis of a provision of the UDHR combined with one of these two Articles is not likely to be accepted.[152] However, understood as horizontal interpretation clauses, Arts 7 and 8 will allow fundamental rights to be taken into account each time a provision of the Agreement opens the possibility of a balancing of interests.[153] The reports *Australia—Plain Packaging*, and the interpretation of the condition 'unjustifiably encumbered' contained in Art 20 TRIPS, could become a pilot case in this regard. Generally, the provisions of the Agreement laying down exceptions and limitations could again play a key role, since the consideration of external ethical imperatives through Arts 7 and 8 is conceivable for the interpretation of the terms of these provisions, as for instance, in the definition of 'normal exploitation' of these rights or, even more, at the level of the proportionality test.[154]

If a consistent interpretation is possible, Arts 7 and 8 are therefore likely to offer a way of solving conflicts between the TRIPS Agreement and the need to respect other ethical or human rights imperatives.[155] Although they will not provide a miracle solution, these two provisions applied in the light of the *Plain Packaging* reports seem to be in a position to offer privileged access to fundamental rights reasoning in the context of the Agreement.

6. Conclusion

As we have seen, a closer look at Arts 7 and 8 TRIPS reveals a paradox. The two Articles were enshrined in the Agreement as a political concession from the industrialised countries to the developing ones. A concern that these provisions might harm the consistency of the Treaty through the introduction of unduly broad policy spaces and overly flexible wording probably led to their relative obscurity and, in particular, to the plunging of these two provisions into a deep twenty years' sleep by the Panels. This lethargy seems to have come to an end thanks to the *Australia—Plain Packaging* reports of the WTO Dispute Settlement Body. Given the constant need to adapt the TRIPS Agreement to new economic, technological, and social realities, and the improbability that Member States will be able to agree to revise this international agreement in the context of the current crisis of multilateralism, the awakening of the two Articles as transversal interpretation clauses could prove to be salutary by enabling improved flexibility for the whole of the Treaty, and thus securing its future, and acceptability in the decades to come.

[152] Also Frantzeska Papadopoulou, 'TRIPS and Human Rights' in Kur and Levin, *Intellectual Property Rights in a Fair World Trade System* (n 131) 294–6; for an analysis of the interaction between fundamental rights and the TRIPS Agreement in case of conflict, see Xavier Seuba, 'Mainstreaming the TRIPS and Human Rights Interactions' in Correa (ed), *Research Handbook on the Protection of Intellectual Property* (n 12) 209–14; Klaus D Beiter, 'Establishing Conformity Between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights' in Ullrich and others, *TRIPS plus 20* (n 4) 486 ff.

[153] Wilkinson, 'Tobacco Plain Packaging' (n 80) 210, according to whom 'this interpretative approach could be relevant to other "open-textured" terms in TRIPS'.

[154] See Geiger, 'Implementing an International Instrument' (n 118) 627.

[155] As highlighted by Wilkinson, 'Tobacco Plain Packaging' (n 80) 182, the reference to the object and purpose of the Agreement could promote a more harmonious coexistence between international IP provisions and international human rights instruments.