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Is the right to use trademarks mandated by the TRIPS Agreement?

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IS THE RIGHT TO USE TRADEMARKS MANDATED BY THE TRIPS AGREEMENT?

Carlos M. Correa



RESEARCH PAPERS

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SOUTH CENTRE

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I. INTRODUCTION

A growing number of countries are adopting legislation that restricts the use of trademarks on tobacco products, including the prohibition to use certain trademarks such as those of a figurative nature. The purpose of that legislation is to curb smoking and thereby protect the health of their citizens. Figurative trademarks may incentivize smoking; they are not intended, in fact, to neutrally distinguish the products of one firm from those of competitors but to increase the consumption of tobacco products.¹

Article 11.1(a) of the WHO Framework Convention on Tobacco Control (FCTC) requires contracting parties to ensure that “tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign...”.² Furthermore, article 13.4(c) of the FCTC more specifically mandates contracting parties to “restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public”. The Guidelines for the implementation of Article 13 of the FCTC note in this regard:

Promotional effects, both direct and indirect, may be brought about by the use of words, designs, images, sounds and colours, including brand names, trademarks, logos, names of tobacco manufacturers or importers, and colours or schemes of colours associated with tobacco products, manufacturers or importers, or by the use of a part or parts of words, designs, images and colours (para. 9).

A number of countries that, in implementing the FCTC, have introduced measures that in some way impede or limit the use of tobacco-related trademarks have been challenged in international fora. Thus, three companies controlled by Phillip Morris International submitted a complaint against Uruguay under the Uruguay-Switzerland Bilateral Investment Treaty (BIT).³ Philip Morris Asia (a company based in Hong Kong) similarly served a notice of claim on the Australian Government under the Hong-Kong-Australia BIT.⁴ Ukraine initiated proceedings under the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) against Australia.⁵ Other tobacco producing countries (Cuba, Honduras, Dominican Republic and Indonesia) also initiated WTO procedures to challenge the consistency with the WTO rules of the Australian legislation.⁶

¹ It has been noted in this regard that “[t]here is a solid evidentiary basis to show the link between use of descriptors and colour or imagery and false health beliefs about tobacco...”, Sarah Bennett, ‘Plain Packaging in Australia: Not Necessarily Compatible with TRIPS’, AIPJ Vol 22 (2011), p. 83.

² The FCTC – the only binding instrument adopted under article 19 of the Constitution of the World Health Organization (WHO) – currently has 180 Parties. See http://www.who.int/fctc/signatories_parties/en/.

³ *FTR Holdings S.A. (Suiza) y otros v. República Oriental del Uruguay*. See, e.g., Carlos Correa, ‘Hazards in Bilateral Investment Treaties (BITs): Investors’ rights v. public health’, *South Bulletin*, Issue 69 (21 November 2012), South Centre.

⁴ See, e.g., Henning Gross Ruse-Khan, *Litigating Intellectual Property Rights In Investor-State Arbitration: From Plain Packaging To Patent Revocation*, Max Planck Institute for Innovation and Competition Research Paper Series, 2014, available at: <http://ssrn.com/abstract=2463711>.

⁵ *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Australia – Tobacco Plain Packaging)*.

⁶ Dispute cases DS434 (brought by Ukraine), DS435 (Honduras), DS441 (Dominican Republic), DS458 (Cuba) and DS467 (Indonesia).

One of the main arguments articulated in these cases revolves around the nature of the rights that ought to be granted to the owner of a trademark under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Paris Convention for the Protection of Industrial Property (the Paris Convention).⁷ It is held, in particular, that tobacco legislation would violate the **right to use** a trademark which, in accordance with the claimants, could be derived from article 20 of the TRIPS Agreement, interpreted in the light of articles 2.1, 16.1, 16.3 and 20. A central piece in this argumentation is that, in order to give Article 20⁸ a proper meaning, some (positive) right to use a trademark must exist under the TRIPS Agreement, and that the concept of “special requirements” in that article includes measures that prevent the use of trademarks.

This paper examines these arguments in the context of the policy space left to WTO members under the TRIPS Agreement to implement measures to protect public health.

II. INTERPRETING THE OBLIGATIONS UNDER THE TRIPS AGREEMENT

The TRIPS Agreement provides for set substantive and procedural minimum standards that need to be observed by the WTO members. In considering the scope of the obligations set out by the Agreement, three initial considerations are pertinent.

First, the provisions of the TRIPS Agreement must be interpreted – in line with the unambiguous jurisprudence developed under the GATT and WTO – in accordance with the interpretive rules of the Vienna Convention on the Law of Treaties (VCLT). These rules do not allow for an expansive interpretation of the provisions of the Agreement, including the trademark section, so as to read in it obligations that WTO members have not agreed upon. *A fortiori*, they do not allow to add, by way of interpretation, commitments not accepted by WTO members. The role of WTO panels and the Appellate Body is limited to the **clarification** of the obligations under the WTO agreements; they cannot create rules on issues that were left out of the Agreement, even if they considered that additional disciplines would have been necessary or convenient to address a particular situation subject to a dispute. As stated in *United States – Import Measures on Certain Products from the European Communities*:

it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of **the WTO Agreement**. Only WTO members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is “to preserve the rights and obligations of Members under the covered agreements,

⁷ Article 2.1 of the TRIPS Agreement mandates WTO members to ‘comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)’.

⁸ Article 20: ‘The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking’.

and to **clarify the existing provisions** of those agreements in accordance with customary rules of interpretation of public international law.”⁹

In *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (US)* the Appellate Body held:

... These rules must be respected and applied in interpreting the **TRIPS Agreement** or any other covered agreement. ... Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the **Vienna Convention**, and must not add to or diminish rights and obligations provided in the **WTO Agreement**.¹⁰

It is to be noted in this regard that the trademarks section of the TRIPS Agreement – like other sections of the Agreement – is far from establishing a full-fledged trademark law regime. It only sets out obligations in respect of certain aspects of the subject matter covered by the Agreement.¹¹ The TRIPS Agreement only requires members to comply with the obligations specifically set out therein; no member can be obligated to provide a protection broader than what is specifically mandated,¹² nor are they prepared to do so: ‘WTO members do not readily embrace the idea that they have agreed to confer rights that are not expressed as such’.¹³

Second, the alleged right to use a trademark is primarily inferred by their proponents from article 20 of the TRIPS Agreement. This provision cannot be read, however, in isolation from other provisions of the Agreement, including those setting forth the principles and objectives of the Agreement. WTO members have repeatedly expressed the relevance of Articles 7 and 8 of the TRIPS Agreement to interpret its provisions, particularly as they relate to public health policies.¹⁴ In reviewing the scope of Article 30 of the TRIPS Agreement the panel in *Canada – Protection of Pharmaceutical Products* stated that:

Both 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 (para. 7.26).¹⁵

In this sense, the Doha Declaration on the TRIPS Agreement and Public Health (‘the Doha Declaration’) recognized that:

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

⁹ WT/DS165/AB/R, para. 92, emphasis added.

¹⁰ WT/DS50/AB/R, para. 46.

¹¹ This is reflected in the title of the TRIPS Agreement itself: ‘Agreement on Trade-related Aspects of Intellectual Property Rights’ (emphasis added).

¹² See Article 1.1 of the TRIPS Agreement.

¹³ Mark Davison and Patrick Emerton, ‘Rights, Privileges, Legitimate Interests and Justifiability: Article 20 of TRIPS and Plain Packaging Tobacco’, *International Law Review*, vol. 29, No. 3, p. 547.

¹⁴ See, e.g. Canada’s arguments and various submissions by third parties in *Canada – Patent Protection of Pharmaceutical Products* (WT/DS114/R, 17 March 2000). See also the Communication from the European Communities and their Member States to the Council for Trade-Related Aspects of Intellectual Property Rights (IP/C/W/280, 12 June 2001).

¹⁵ WT/DS114/R, 17 March 2000.

purpose of the Agreement as expressed, in particular, in its objectives and principles (para. 5 (a)).

Third, the Doha Declaration, while adopted with a main focus on access to medicines, applies to any measure relating to public health. According to its para. 4:

[w]e agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

Tobacco-related legislation that may restrict the use of trademarks clearly falls under the category of a “measure to protect public health”. Although a “declaration” has no specific legal status in the framework of WTO law and it is not strictly an authoritative interpretation in terms of Article IX.2 of the Marrakesh Agreement Establishing the WTO; the content and mode of approval of the Doha Declaration indicates that it has the same effects and interpretation. The Declaration can also be regarded as a “subsequent agreement” between the parties under Article 31.3 (a) of the VCLT.¹⁶ As a minimum, the Doha Declaration will be an essential part of the context for the interpretation of any provision of the TRIPS Agreement that may have implications in the area of public health.¹⁷ In fact, the WTO jurisprudence has already made it clear that it is undisputed that WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation, and that the protection of public health is “vital and important in the highest degree” and that “few interests are more vital.”¹⁸

It is also worth mentioning that in interpreting the scope of WTO obligations in relation to living resources, the Appellate Body has explicitly taken into consideration international conventions and declarations, including the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (‘CITES’).¹⁹ The FCTC should

¹⁶ In *US – Clove Cigarettes*, the Appellate Body considered whether the Doha Ministerial Decision on Implementation-Related Issues and Concerns constituted an authoritative interpretation under Article IX:2 of the WTO Agreement. It concluded that this was not the case for procedural reasons, but that the declaration could still constitute a subsequent agreement within the terms of Article 31(3)(a) of the VCLT (Appellate Body Report, *United States – Measures Affecting The Production And Sale Of Clove Cigarettes*, WT/DS406/AB/R, 4 April 2012, paras. 251-255).

¹⁷ According to the European Commission, ‘in the case of disputes (e.g. in the context of WTO dispute settlement procedures) Members can avail themselves of the comfort provided by this Declaration. Panellists are likely to take account of the provisions of the TRIPS Agreement themselves as well as of this complementary Declaration, which, although it was not meant to affect Members’ rights and obligations, expresses the Members’ views and intentions. Hence, the Declaration is part of the context of the TRIPS Agreement, which, according to the rules of treaty interpretation, has to be taken into account when interpreting the Agreement.’ European Commission, *WTO Ministerial Declaration on the TRIPS Agreement and Public Health*. Brussels, European Commission, 19 November 2001, p. 2.

¹⁸ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R (March 12, 2001), paras. 168 and 172.

¹⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras. 130-132. The Appellate body recalled in this case, based on an opinion of the International Court of Justice, that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation” (Namibia Advisory Opinion (1971) I.C.J. Rep., p. 31) (WT/DS58/AB/R, footnote 109).

similarly be taken into account in dealing with controversies relating to trade in tobacco products.

III. THE CONTEXT OF ARTICLE 20

Proponents of the argument that the TRIPS Agreement mandates WTO members to recognize a right to use a trademark cannot provide the reference to a provision in the Agreement (or the Paris Convention) that specifically alludes to such right. Such a provision does not exist. Obviously, an excessively literal interpretation of a treaty provision is not what is required under rules of the VCLT, since it mandates to take the object and purpose of the treaty and the context of a particular provision into account. But neither the object and purpose of the TRIPS Agreement, nor the context of article 20 confirms the existence of a right to use a trademark.

The **object** of the TRIPS Agreement is to establish **certain** minimum binding standards, and not to articulate a comprehensive regime of intellectual property rights. As noted, the Agreement only covers certain matters and leaves others to the discretion of WTO members, as part of their policy space to regulate on intellectual property issues. The **purpose** of the Agreement is to protect intellectual property rights and **at the same time** the policy space retained by WTO members to implement public policies, as clearly stated in the above mentioned articles 7 and 8.

Various provisions of the trademarks section of the TRIPS Agreement (and of the Paris Convention) are certainly relevant, in accordance with Article 31 of the VCLT, as elements of the context for clarifying the meaning of the provisions in the TRIPS Agreement, including Article 20. But contextual provisions cannot create by themselves an obligation not spelt out in the Agreement which would erode the policy space that the WTO members retained when adopting that Agreement.

Article 15.4 of the TRIPS Agreement provides that WTO members may not refuse the registration of a trademark because of the nature of the goods or services the mark is applied to. This means that a trademark registration may not be refused merely because the mark identifies, for instance, tobacco products or other products which may be deemed hazardous or whose distribution could be regarded as immoral. The only obligation established by this provision is, however, to register a trademark, not to permit its use. No right to use a trademark can be inferred from this provision.

Article 16.1 and article 16.3 may be deemed part of the context for interpreting article 20 of the TRIPS Agreement. Article 16.1, however, only requires Members to provide for an “exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs...”. This is clearly a **negative** right. There is no reasonable way in which this provision could be read as obligating Members to guarantee a positive right to use a trademark.

Similarly, Article 16.3 of the TRIPS Agreement confirms and expands the protection conferred by the Paris Convention against the **use by third parties** of well-known trademarks. This is, again, a negative right. The method of interpretation codified by the

VCLT does not provide any legal basis to derive a positive right to use a well-known trademark from a right to exclude.

Notably, the arbitration award in the referred to investment case by Philip Morris against Uruguay rejected the concept of a right to use against the State. The tribunal held that

...Ownership of a trademark does, in certain circumstances, grant a right to use it. It is a right of use that exists *vis-à-vis* other persons, an exclusive right, but a relative one. It is not an absolute right to use that can be asserted against the State *qua* regulator (para. 267).

The Tribunal concludes that under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but **only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power** (para. 271).²⁰

A right to use a trademark cannot be derived either from Article 6*bis* or other provisions of the Paris Convention. In particular, the obligation to refuse or to cancel the registration, and to prohibit the use, *ex officio* or at the request of an interested party, of a 'well-known' trademark (Article 6*bis* (1) of the Paris Convention) cannot be equated to a right to use such trademark.

Further, Article 17 of the TRIPS Agreement does not provide a legal basis for a right to use a trademark. It only refers to uses of a trademark **by third parties** and not by the trademark owner himself. The measures that limit the use of tobacco-related trademarks affect their use by **the trademark owner**. The exceptions to the exclusive rights that a Member may provide for in order to allow conduct by third parties that could otherwise be banned by the owner of a registered trademark cannot be read as limiting the sovereign rights preserved under the TRIPS Agreement to regulate the use of trademarks, including by restricting their use.

Article 19.1 of the TRIPS Agreement is also part of the context for understanding article 20 of the TRIPS Agreement. It allows WTO members to require the use of a trademark to maintain a registration and stipulates some conditions that apply to the ability to cancel the registration of a trademark in case of non-use. Under Article 19.1, the trademark owner may invoke "valid reasons based on the existence of obstacles to such use" to preserve a trademark:

Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on **or other government requirements** for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.²¹

²⁰ PHILIP MORRIS BRANDS SÀRL, PHILIP MORRIS PRODUCTS S.A. and ABAL HERMANOS S.A. (THE CLAIMANTS) and ORIENTAL REPUBLIC OF URUGUAY (THE RESPONDENT), ICSID Case No. ARB/10/7, available at <http://www.italaw.com/cases/460> (emphasis added).

²¹ Emphasis added.

Article 19.1 only applies when a Member requires use as a condition to maintain registration of a trademark.²² There is, however, no obligation to establish this requirement. In addition, the fact that the trademark owner has an **obligation** (imposed by national law, not by the TRIPS Agreement) to use the trademark for the purpose of conserving its registration is not equivalent to having a **right** to use it. Moreover, Article 19.1 specifically requires WTO members to recognize as valid reasons for non-use “circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark”. This provision in fact confirms that WTO members have retained their regulatory powers to restrict the use of trademarks. Article 19.2, in turn, just mentions “use” (by another person). It alludes to a factual element, not to a right to use. The only right recognized is to maintain registration.

If WTO members could not impose “requirements” that create an “obstacle” to the use of trademarks, article 19.1 would be meaningless. Such a reading would be incompatible with the accepted principle of treaty interpretation of “l’effet utile”. The proper (and logical) reading of the TRIPS Agreement is that WTO members preserve the regulatory authority to impede the use of trademarks; the only obligation they have is to take into account the obstacles they may create as a justification for non-use by a trademark owner if use were required to maintain registration.

In summary, an obligation to provide a positive right to use a trademark cannot be derived from the provisions in the trademarks’ section of the TRIPS Agreement that may be invoked as part of the context for the interpretation of article 20. On the contrary, article 19.1 leads to the opposite conclusion.

IV. AN IMPLICIT RIGHT?

In the absence of a provision in the TRIPS Agreement mandating WTO members to confer the right to use a trademark, the proponents of that theory have been forced to argue that such a right is *implicit* in the Agreement. Some authors contend that Article 20 presupposes or otherwise creates a right to use a trademark. A. Kur has held that “a total ban against the use of tobacco trademarks on other products ... would contradict, not the letter, but the *spirit* of international conventions”.²³ D. Gervais has also argued that ‘the *spirit* of TRIPS is to allow the use of marks’.²⁴

These are weak arguments indeed. They seem to assume that there is something like an “international trademark law” from which certain binding rules can be derived and imposed on the members of the WTO. The Paris Convention and the TRIPS Agreement,

²² See, e.g., T. Voon and A. Mitchell, ‘Implications of WTO Law for Plain Packaging of Tobacco Products’ in T. Voon, A. D. Mitchell, J. Liberman and G. Ayres, *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar Publishing Limited, 2012), p. 8.

²³ Annette Kur, ‘The right to use one’s own trade mark: a self-evident issue or a new concept in German, European and international trade mark law?’ (1996) 18(4) *European Intellectual Property Review* 198, 203, (emphasis added).

²⁴ Gervais D, ‘Analysis of the Compatibility of certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention’ (2010), available at <http://www.smoke-free.ca/trade-and-tobacco/Resources/Gervais.pdf>, para. 30.

however, only contain a **limited** number of mandatory standards that need to be observed by national trademark regimes. Only those standards specifically provided for in those treaties are binding. An interpretation based on the ‘spirit’ of a treaty is unviable under the principles of treaty interpretation codified by the VCLT.

An important clarification is necessary at this stage of the analysis. While the rights conferred under article 16.1 of the TRIPS Agreement may be exercised **against infringing third parties**, the alleged right to use a trademark would be exercised **against a State**, in this case to limit its regulatory authority to pursue legitimate public health objectives. It is not reasonably conceivable that a right that would constrain the sovereignty of the WTO members in such a way was deemed to be created implicitly or that it could be derived from merely contextual provisions.

The need to take the actual text of a covered treaty into account under WTO was stressed in several cases. For instance, in *EC – Hormones*:

... The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used.²⁵

Similarly, in *India – Patents (US)*,

... The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the **Vienna Convention**. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.²⁶

Significantly, the exclusive rights recognized in the TRIPS Agreement are established through **explicit** provisions in respect of some of the categories of intellectual property protected under the Agreement.²⁷ No WTO member is obliged to grant exclusive rights in certain areas (e.g. trade secrets) in the absence of explicit provisions to that effect. The reason for this is that exclusive rights represent such a drastic derogation of the principle of free circulation of ideas and knowledge that they cannot be simply considered to be implicit in the text. The same applies, *a fortiori*, to the case of a right to use which could be exercised against a sovereign State to limit its regulatory autonomy, and not just against private third parties to prevent infringing commercial conduct. In this sense, the Advocate General of the European Court of Justice held, in a case relating to the validity of the European Tobacco Products Directive, that:

the essential substance of a trademark right does not consist in an entitlement as against the authorities to use a trademark unimpeded by provisions or public law. On the contrary, a trademark right is essentially a right enforceable against other individuals if they infringe the use made by the holder.²⁸

²⁵ WT/DS26/AB/R, WT/DS48/AB/R, para. 181.

²⁶ WT/DS50/AB/R, para. 45.

²⁷ See in particular Articles 16, 26 and 28 of the TRIPS Agreement.

²⁸ Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, decision of 10 December 2002, para. 266.

While a right to use a trademark would curtail the policy space retained by WTO members to pursue public policy objectives, the exclusive rights guaranteed under article 16.1 of the TRIPS Agreement only limit private commercial acts that may affect the interests of the trademark owner. It is hard to think that the drafters of the TRIPS Agreement agreed to create a right to use a trademark—non-existent under the Paris Convention—that is enforceable against the State without even mentioning it, but were careful to include explicit language to establish exclusive rights enforceable against private parties.

Moreover, if by hypothesis, there were any ambiguity in respect of whether the right to use a trademark is required under the TRIPS Agreement, the issue should be addressed under the international law principle of *in dubio mitius*. In case of ambiguity, a treaty provision must be understood in a way that imposes the minimum of obligations on the parties to the treaty. Any ambiguity must be resolved in the manner that is less onerous for the State parties and which allows them to retain their regulatory power.²⁹ This means that, in deference to the sovereignty of States, an obligation cannot be assumed if it interferes with the regulatory powers of the State. It cannot be just assumed that WTO members in adopting the TRIPS Agreement surrendered their regulatory powers and consecrated the supremacy of trademark owners' rights over governments' legitimate right to regulate the use of intellectual property.

V. THE FUNCTIONS OF TRADEMARKS

One of the considerations to invoke the existence of a right to use a trademark under the TRIPS Agreement is that the core function of a trademark, – to distinguish the products or services of one undertaking from those of other undertakings – cannot be fulfilled if the trademark is not used.

A large number of registered trademarks are never used. When used, they may serve different functions that are beneficial to producers and consumers, while in some cases they may also negatively affect the public interest (such as when they serve to promote consumption of dangerous goods). However, a (positive) right to use a trademark allegedly conferred **under the TRIPS Agreement** cannot be derived from a conceptual construction about what functions trademarks perform. Any such right could only be derived from the provisions of the Agreement itself. In addition, the primary function of distinguishing the goods and services of one undertaking from those of competitors is achieved through the grant and enforcement of the negative right to exclude unauthorized uses. A positive right to use would mean nothing if the right holder would be unable to prevent third parties' unauthorized uses of its trademark.

²⁹ See, e.g., Appellate Body Report, European Community – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R (April 16, 1998), which in referring to the principle of *in dubio mitius*, noted that “[w]e cannot ‘lightly assume’ that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations” (para. 165). The International Court of Justice, in *Frontier Between Turkey and Iraq, Advisory Opinion*, noted that “If the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted” (1925 P.C.I.J. 25 (ser. B) No. 12, at 25..

Moreover, the only requirement under article 15 of the TRIPS Agreement is to allow for the registration of certain signs capable of distinguishing between the goods and services of different undertakings. There is nothing in the TRIPS Agreement, however, requiring Members to take measures, such as the recognition of a positive right to use, to preserve the distinctive character of a trademark. Distinctiveness is a **condition** to obtain protection; there is no right to distinctiveness. Moreover, the non-use of a trademark may not lead to a loss of distinctiveness, as a sign may continue to “be capable” of distinguishing the goods or services of an undertaking.

The extent to which a trademark is distinctive is a function of the characteristics of the protected sign and of the trademarks used by competitors, as well as of the perceptions of the public. The wide use of a trademark may or may not enhance its distinctiveness; it may also dilute it. In any case, if it were true that distinctiveness may be enhanced through use, this will not prove that the TRIPS Agreement requires WTO members to recognize the right to use a trademark.

Further, in accordance with article 15.1 of the TRIPS Agreement, “[m]embers **may** make registrability depend on distinctiveness acquired through use”.³⁰ This means that they may or may not give any effect to distinctiveness acquired through use. Hence, a measure that would prevent a sign from acquiring distinctiveness through use does not violate the TRIPS Agreement, since there is no obligation to allow for such an acquisition. In addition, the fact that use may be a condition to acquire distinctiveness does not mean that there is a right to use, but only that Members are not obliged to protect trademarks that are not sufficiently distinctive.

Similarly, the TRIPS Agreement defines in Article 16.3 the special protection available when a trademark has acquired well-known status through use or promotion. It determines the **conditions** for an enhanced protection, but does not create an **obligation** to guarantee the preservation of the well-known character of a trademark through a right to use. The only obligation of WTO members is to give owners of well-known trademarks specific protection against third parties, as long a trademark is deemed to be well-known.

In other words, WTO members are not obliged to preserve the well-known status of a trademark; they are only obliged to provide a special protection when the trademark possesses that characteristic. These are completely different obligations: “[t]he purpose of TRIPS is ‘to reduce distortions and impediments to international trade’, but it is not the purpose of TRIPS to protect the economic value of particular trademark owners”.³¹

The TRIPS Agreement requires Members to provide for a number of measures against **infringement by third parties** of the rights conferred in relation to the categories of intellectual property dealt with under the Agreement.³² However, the Agreement does not confer the right to enforce rights **against the States** where protection is obtained. In addition, a prohibition to use a trademark does not impede its owner to prevent others from using it in a way that may create confusion about the source of the products or services. The enforcement provisions in the TRIPS Agreement, including criminal sanctions, may continue to be applied in cases of infringement.

³⁰ Emphasis added.

³¹ Mark Davison and Patrick Emerton, ‘Rights, privileges, legitimate interests and justifiability: article 20 of TRIPS and plain packaging tobacco’, *International Law Review*, vol. 29, No. 3, p. 547.

³² See Part III of the TRIPS Agreement.

Finally, it is worth noting that the function of a trademark not only relates to distinctiveness. They are often used – as it is the case with figurative trademarks – with the intent of influencing consumers’ choices by exploiting their feelings or expectations. In the case of tobacco, trademarks are deliberately used to promote smoking, for example, through messages that evoke health, life style, self-esteem, adventure or dynamism.³³ The TRIPS Agreement cannot be interpreted as supporting an absolute right to use trademarks and preventing governments from adopting measures to protect public interest.

VI. ARTICLE 20 OF THE TRIPS AGREEMENT

The above analysis shows that the theory that the TRIPS Agreement obligates WTO members to recognize a right to use a trademark finds no support in the text, interpreted in accordance with the rules of the VCLT. In fact, this is the conclusion already reached in the context of the WTO dispute settlement mechanism.

In *EC – Trademarks and Geographical Indications*³⁴ the panel dismissed the recognition of a positive right to use a trademark under the TRIPS Agreement. It observed the lack of any specific wording granting such a right under Article 24.5 of the TRIPS Agreement. It held that:

the verb “shall not prejudice” is not capable of supporting this interpretation. It does not provide for the conferral of new rights on trademark owners or GI holders, but provides that the specifically mentioned rights shall not be affected by the measures that are the subject of the provision. **If the drafters had intended to grant a positive right, they would have used positive language.** Indeed, Article 14(2) of the Regulation (which was adopted prior to the end of the TRIPS negotiations) expressly provides that “a trademark ... may continue to be used” under certain conditions. In contrast, there is no language in Article 24.5 of the TRIPS Agreement which would provide for the conferral of a right to use a trademark. Instead, it is a saving provision which ensures that “the right to use a trademark” is not prejudiced, or affected, by measures adopted to implement Section 3 of Part II. Irrespective of how the right to use a trademark arises, there is no obligation under Article 24.5 to confer it (para. 7.610).³⁵

The same argument articulated by the panel in respect of Article 24.5 is applicable to the trademark-related provisions examined above. There is no “positive language” creating a right to use a trademark. This right cannot be either implicit in the provisions of the Paris Convention or the TRIPS Agreement. The panel added in the referred to case that:

³³ See Enrico Bonadio and Alberto Alemanno, "An Analysis of Plain Packaging of Tobacco Products under EU Intellectual Property Law" (2012), p. 8. See also Benn McGrady, "TRIPS and Trademarks: The Case of Tobacco", *World Trade Review* (2004) Vol, 3 No. 1, pp. 57-58.

³⁴ *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Panel Decision, document WT/DS174R (15 March 2005).

³⁵ Emphasis added.

More specifically, the Panel notes that Article 8 of the TRIPS Agreement sets out the principles of that agreement. Article 8.1 provides as follows:

“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.” (para. 7.20)

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 (para 7.210).

In stressing that the grant of “negative rights” is a “fundamental feature of intellectual property protection”, the panel rejected the argument that the TRIPS Agreement confers positive rights, such as the right to use a trademark. The panel did acknowledge, however, the possibility that such positive rights may be conferred at the national level: “[t]he right to use a trademark is a right that Members may provide under national law” (para 7.611). This is, of course, something completely different from arguing that there is an obligation under the said Agreement to recognize such right.

The World Intellectual Property Organization (hereinafter ‘WIPO’) has also expressed the view that the TRIPS Agreement only mandates Members to grant negative rights:

As was already provided for in Article 7 Paris Convention in respect of goods, and has been confirmed and extended by Article 15.4 of the TRIPS Agreement, Members may not refuse the registration of a trademark because of the nature of the goods or services the mark is applied to. Thus, a trademark registration may not be refused merely because the mark identifies products which could be considered immoral, dangerous or otherwise undesirable.

This does, of course, not mean that governments cannot regulate the sale of the goods bearing trademarks. Rather, this rule reflects the nature of intellectual property rights as essentially negative rights – i.e. rights to prevent the use of a trademark by other parties – and not as positive rights to sell or market products.³⁶

The alleged right to use a trademark cannot be derived from article 20 of the TRIPS Agreement. This article allows WTO members to take justifiable measures that may encumber the use of trademarks, including measures that may impair the distinctive character of a trademark,. As noted by Pires de Carvalho, “governments may adopt encumbrances that are detrimental to the distinctiveness of marks. They can do so provided that they have a

³⁶ WTO e-Learning, Detailed Presentation of Trademarks, available at ecampus.wto.org/admin/files/.../TRIPS_Trademarks-L2-R1-E.doc p. 8. See also WIPO, *Introduction to Trademark Law & Practice, The Basic Concepts, A WIPO Training Manual* (1993), pp. 51-52.

justification”.³⁷ Article 20 only requires a justification when it is established that certain “special requirements” encumber the use of a trademark in the course of trade. Since the premise of this provision is the regulatory autonomy of WTO members, the burden of proof that a measure is not justified should be borne by a complaining WTO member, not by the member adopting a challenged measure.

An important question is whether article 20 only applies to cases where the use of a trademark is permitted but “encumbered by special requirements”, or whether it also applies when the use of a trademark is banned. The wording of Article 20, clearly alludes to “special requirements” and provides examples thereof. There is nothing in the wording of article 20, interpreted under the rules of the VLCT, that would permit the interpreter to consider that **prohibitions** on the use of a trademark are also covered.³⁸ A contrary conclusion could only be reached through a distortion of the language utilized in the provision. Article 20 “prevents only measures that impose positive obligations upon the trademark owner, but does not prevent measures in the form of prohibitions on use”.³⁹ As noted by Pires de Carvalho, Article 20 (like Article 8.1) is about government regulation and its limits. Article 20 does not supersede the rights of WTO members to organize their economies as they see fit. Article 20, therefore, does not oblige WTO members to authorize the commercialization of all branded products and services – otherwise, the provisions of Article 15.4, which imply that some goods or services may be excluded from commercialization, and of Article 19.1, which refer to restrictions to commercialization, would make no sense. Nor does Article 20 provide, explicitly or implicitly, that WTO members are obliged to recognize the right to use trademarks, even if commercialization of goods is permitted.⁴⁰

As mentioned, the TRIPS Agreement only covers certain aspects of intellectual property rights. There are many matters that are not dealt with at all. The fact that a particular situation was not regulated—as is the case of a ban on the use of a trademark—simply means that it was left to WTO members to legislate on that situation, without interference from the WTO rules. There is extensive literature on the “flexibilities” of the TRIPS Agreement that discusses which areas are subject to the Agreement’s rules and which are not.⁴¹ Prohibitions on the use of trademarks is one such unregulated area where the concept of flexibilities of the TRIPS Agreement fully apply.

A final issue is whether an arbitral tribunal would be empowered to develop a binding interpretation of article 20 or other provisions of the TRIPS Agreement in a dispute settled

³⁷ Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs*, Kluwer Law International, 2011, para 20.22.

³⁸ The negotiations dealing to the adoption of this provision confirms this interpretation. See, e.g., UNCTAD/ICTSD, *Resource Book on TRIPS and Development*, Cambridge University Press, 2005.

³⁹ Benn McGrady, ‘TRIPS and Trademarks: The Case of Tobacco’, *World Trade Review* (2004) Vol, 3 No. 1, p. 62.

⁴⁰ Nuno Pires de Carvalho, *The TRIPS Regime of Trademarks and Designs*, Kluwer Law International, 2011, para. 20.1. See also Benn McGrady, ‘TRIPS and Trademarks: The Case of Tobacco’, *World Trade Review* (2004) vol. 3 no. 1; Justin Malbon, Charles Lawson, Mark Davison, *The WTO Agreement on Trade-related Aspects of Intellectual Property Rights. A Commentary*, Edward Elgar, Cheltenham, 2014, para. 20.4; Mark Davison and Patrick Emerton, ‘Rights, privileges, legitimate interests and justifiability: article 20 of TRIPS and plain packaging tobacco’, *International Law Review*, vol. 29, No. 3; Enrico Bonadio and Alberto Alemanno, ‘An Analysis of Plain Packaging of Tobacco Products under EU Intellectual Property Law’ (2012); Carlos Correa, *Trade Related Aspects of Intellectual Property Rights (Volume VI of Commentaries on the GATT/WTO Agreements)*, Oxford University Press, 2007, p. 186.

⁴¹ See, e.g., Germán Velásquez, Carlos Correa and Xavier Seuba, *IPR, R&D, Human Rights and Access to Medicines - An Annotated and Selected Bibliography*, South Centre, Geneva, 2012.

under a BIT. As mentioned the violation of the Agreement has been invoked in cases against Uruguay and Australia. A key consideration in this regard is that, in accordance with article 23 of the DSU, any dispute arising with regard to compliance with a “covered agreement” is subject to the sole jurisdiction of the WTO Dispute Settlement Body. As noted in the Australia’s response in the case initiated by Philip Morris:

It is not the function of a dispute settlement provision such as that contained at Article 10 of the BIT to establish a roving jurisdiction that would enable a BIT tribunal to make a broad series of determinations that would potentially conflict with the determinations of the agreed dispute settlement bodies under the nominated multilateral treaties.⁴²

There is a potential risk that interpretations made by arbitral tribunals under BITs influence those under the WTO dispute settlement mechanism. However, such risk is limited by the constraint imposed, *inter alia*, by Article 3.2 of the DSU and the adherence of the WTO bodies to the customary principles of treaty interpretation enshrined in the VCLT.⁴³

VII. CONCLUSIONS

Accepting the notion that a positive right to use a trademark is implicitly recognized by the TRIPS Agreement would have systemic implications in the context of WTO. On the one hand, it would mean that the interpretative rules of the VCLT are replaced by expansive standards of interpretation and that the expressed will of the WTO members is ignored. On the other, it would mean that a public policy, including in the vital area of public health, could be overridden by an alleged private right to use an intellectual property right. If this were the case, for instance, a patent owner could not be prevented from using his patented invention even if damaging to the environment or public health.

However, the TRIPS Agreement does not oblige WTO members to confer the right to use a trademark. Such a right would nullify the sovereign right to regulate—including to prohibit—the use of trademarks, a right that WTO members retained under the TRIPS Agreement. Sovereign States cannot be deemed to have given up their regulatory rights except to the extent that they have explicitly agreed to restrict them, as under Article 20 of the TRIPS Agreement.

It is not conceivable that the drafters of the TRIPS Agreement agreed to create a right to use a trademark—non-existent under the Paris Convention—enforceable against the States without even mentioning it. If the drafters of the TRIPS Agreement intended to include an obligation to respect a right to use a trademark, this should have been made under Article 16, “Rights conferred”.

⁴² See PMA vs. Australia, Response to the Notice of Arbitration, 21 December 2011.

⁴³ See, e.g., Carlos Correa, ‘Impact of the Economic Partnership Agreements on WTO law’, in EU Bilateral Trade Agreements & Intellectual Property For Better or Worse, Josef Drexler, Henning Grosse Ruse-Khan and Souheir Nadde-Phlix (editors), Springer, MPI Studies series, 2013.

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