

2010

Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements

Bryan Mercurio

Mitali Tyagi

Follow this and additional works at: <https://scholarship.law.umn.edu/mjil>

 Part of the [Law Commons](#)

Recommended Citation

Mercurio, Bryan and Tyagi, Mitali, "Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements" (2010). *Minnesota Journal of International Law*. 262.
<https://scholarship.law.umn.edu/mjil/262>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Journal of International Law collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Article

Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements⁺

Bryan Mercurio* and Mitali Tyagi**

ABSTRACT

This Article explores treaty interpretation in dispute settlement at the World Trade Organization (WTO) by seeking to resolve the unanswered question of whether local working requirements—domestic provisions which allow the grant of a compulsory license when a patent is not “worked” in that country—are legal under the international trade regime. The issue remains in flux as local working requirements appear to be inconsistent with the Agreement on Trade-Related Aspects of International Property Rights (TRIPS) Article 27, which prohibits discrimination as to “whether products are imported or locally produced.” However, TRIPS Article 2.2 incorporates the substantial majority of the Paris Convention, including Article 5(A)(2), which may specifically allow working requirements. Analyzing the issue in strict adherence to the principles of treaty interpretation that guide decision-making in the WTO’s Dispute Settlement Body, we conclude that the incorporation of Article 5(A)(2) of the Paris Convention cannot be read down, and

+ The opinions in this paper belong solely to the authors and do not represent the views of Mallesons Stephen Jaques or the Australian Government. The authors thank Simon Lester, Colin Picker, and Bradly Condon for providing helpful comments and suggestions. All errors belong solely to the authors.

* Professor of Law, Chinese University of Hong Kong; Senior Visiting Fellow, University of New South Wales, Faculty of Law; Fellow, Tim Fischer Centre for Global Trade and Finance.

** Associate, Mallesons Stephen Jaques (Sydney, Australia). Ms Tyagi began researching this article while employed at the Commonwealth Attorney-General’s Department (Canberra, Australia).

thus working requirements are consistent with the TRIPS Agreement. This Article is therefore intentionally and unapologetically a technical analysis which evaluates and resolves a legal conflict using all available sources of law and is not a discussion of the policy rationale behind local working requirements.

I. INTRODUCTION

The completion of the GATT Uruguay Round of trade negotiations transformed the international trading regime.¹ The agreement,² signed as a single undertaking by a large and diverse membership, created the World Trade Organization (WTO) and required the acceptance, in one sweep, of a complex maze of obligations aimed at liberalizing global trade.³

In what has since been termed the "Grand Bargain," proponents of including intellectual property rights into the international trading regime (most notably the United States, the European Community (EC), Switzerland, and Canada) traded access to their potentially lucrative textile and agricultural markets in exchange for increased intellectual property protection.⁴ The resulting negotiations culminated in

1. See generally DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (2d ed. 2003) (providing an in-depth examination of the negotiations); 4 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1994)* (Terence P. Stewart ed., 1999) (providing an in-depth examination of the negotiations).

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

3. Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25, 25-26 (1998) (stating that the agreement required "some 30 multilateral international agreements with supplementary 'Understandings', 'Protocols', 'Ministerial Decisions', 'Declarations' and more than 30,000 pages of 'Schedules of Concessions' for trade in goods and 'Specific Commitments' for trade in services" and "numerous references to other international agreements and general international law rules . . . and the 'customary rules of interpretation of public international law'").

4. See General Agreement on Tariffs and Trade Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations of 20 September 1986, 25 I.L.M. 1623, 1623 (1986) (detailing the framework for the negotiations); GATT Secretariat, *Guidelines Proposed by the European Community for the Negotiations on Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/16 (Nov. 20, 1987) (laying out the European Community's stance towards the negotiations); GATT Secretariat, *United States Proposal for Negotiations on Trade-Related Aspects of Intellectual Property Rights*, MTN.GNG/NG11/W/14 (Oct. 20, 1987) (stating the United States' stance towards the negotiations). See generally Jagdish Bhagwati, Commentary, *Services and Intellectual Property Rights*, in *THE NEW GATT:*

TRIPS.⁵ As a result, intellectual property now forms a part of an international trading regime enforceable through recourse to the “most formidable dispute settlement scheme of any international Organization”⁶—the WTO Dispute Settlement Understanding (DSU). Administered by the Dispute Settlement Body (DSB), the DSU provides the substantive and procedural rules used to interpret and enforce as “hard law”⁷ the “global

IMPLICATIONS FOR THE UNITED STATES 111, 111–14 (Susan Collins & Barry Bosworth eds., 1994); SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 96–120 (2003) (arguing that twelve corporations were responsible for the changes arising from the negotiations); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *TRIPS and the Dynamics of Intellectual Property Lawmaking*, 36 CASE W. RES. J. INT'L L. 95 (2004) (detailing the provisions of the result of the negotiations); Wilfred J. Ethier, *Intellectual Property Rights and Dispute Settlement in the World Trade Organization*, 7 J. INT'L ECON. L. 449, 454 (2004) (noting that countries agreed to protection of intellectual property rights for trade concessions); Laurence R. Helfer, *Mediating Interactions in an Expanding International Intellectual Property Regime* 36 CASE W. RES. J. INT'L L. 123 (2004) (discussing the “successful effort by the United States and European Communities” to shift the intellectual property regime); Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking* 29 YALE J. INT'L L. 1, 20–21 (2004) (stating why the United States and the European Community pushed for GATT); David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 12–13 (2002) (discussing the issue of strategic negotiation of trade agreements); Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries and the Doha “Solution”* 3 CHI. J. INT'L L. 47, 59 (2002) (“[D]eveloping countries accepted the commitments of TRIPS because it was in their mutual interest when coupled with the concessions that they received on other issues.”).

5. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPS]. Although the World Intellectual Property Organization-administered Paris and Berne Conventions contemplated dispute settlement recourse to the International Court of Justice, such recourse required the consent of both parties and was never utilized. One commentator states: “The previously unenforceable Paris Convention was suddenly given vitality because TRIPS incorporates by reference the key elements of the Paris Convention.” Harold C. Wegner, *Injunctive Relief: A Charming Betsy Boomerang*, 4 NW. J. TECH. & INTELL. PROP. 156, 170 (2006).

6. Dencho Georgiev & Kim Van der Borght, *Introduction, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM* 11, 11 (Georgiev & Van der Borght eds., 2006); James Bacchus, *Appellators: The Quest for the Meaning of And/Or*, 4 WORLD TRADE REV. 499, 501–03 (2005). For a discussion concerning the strength of WTO dispute settlement, see generally THOMAS ZIMMERMANN, *NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING* 59 (2006); Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 389 (2000); Petersmann, *supra* note 3, at 33–36; Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 777 (1996–1997).

7. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 404, 406 (2000) (describing the WTO dispute settlement system with regard to the

package deal” of agreements that make up the WTO.⁸

As with any diplomatic agreement, the WTO Agreements are the result of compromise. It is therefore unsurprising that divergent interests and “textual and operational flaws” remain.⁹ It should also not be surprising that the texts of international agreements are purposely left ambiguous by the drafters. Textual ambiguity allows the parties to reach agreement and conclude negotiations without abandoning or compromising their positions.¹⁰ It thus falls upon the DSB to elucidate the meaning of provisions when a dispute arises. Such interpretative power, in an era when the political wing consistently fails to reach consensus and govern, provides the DSB with a form of quasi-lawmaking power.¹¹ Although an adopted report of a WTO panel or the Appellate Body technically only binds the parties to the dispute, it is abundantly clear that reports of the DSB have immense influence on the actions of the entire membership and the subsequent decisions of WTO panels.¹²

concept of legalization); Scott Lucyk, *Patents, Politics and Public Health: Access to Essential Medicines Under the TRIPS Agreement*, 38 OTTAWA L. REV. 191, 195 (2006–2007) (noting that the TRIPS agreement is a “shift from ‘soft’ to ‘hard’ law”).

8. Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 442 (1996–1997) (highlighting the impact of the “global package deal” where parties, in one single stroke, accept obligations in multiple sectors). The diversity of subject matter that comes with this “global package deal” is particularly interesting in dispute settlement where the mechanisms are now applicable to previously compartmentalized areas of international cooperation, such as GATS and TRIPS. *See id.*

9. Bryan C. Mercurio, *TRIPS, Patents, and Access to Life-Saving Drugs in the Developing World*, 8 MARQ. INTELL. PROP. L. REV. 211, 218 (2004).

10. *See* CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 50 (2000) (“WTO Member countries still have the option, within certain limits, of defining the scope of patentability in quite a broad way . . .”).

11. *See* Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. INT'L ECON. L. 17, 75 (2002) (discussing the elasticity that has arisen from the ambiguity of the language of the WTO Agreements); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 258–59 (2004) (discussing the position that the DSU should be allowed to “fill gaps and clarify ambiguities in almost all circumstances”). For a discussion of the failure of the Doha Round of trade negotiations, see Bryan Mercurio, *The WTO and Its Institutional Impediments*, 8 MELB. J. INT'L L. 198, 200–06 (2008); Simon J. Evenett, *Reciprocity and the Doha Round Impasse: Lessons for the Near-Term and After*, CENTRE FOR ECON. POL'Y RES., Sept. 3, 2007, <http://www.cepr.org/pubs/PolicyInsights/PI.asp>.

12. *See, e.g.*, Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 158, 160, WT/DS344/AB/R (Apr. 30, 2008) (“It is well settled that Appellate Body reports are not binding, except with

This Article explores the treaty interpretation principles that have guided, and will presumably continue to guide, the decision-making of the WTO DSB. To give this analysis the benefit of a practical and significant context, this Article focuses on determining the legality of “local working requirements” under the TRIPS Agreement. While this issue is highly politicized and often couched in emotive arguments, it is our belief that a resolution will best be achieved through the adjudicative legal analysis of the WTO DSB. At the very least, given the complete failure of the political wing of the WTO to effectively resolve the dispute through legislation,¹³ recourse to the DSU is the most effective available forum to seek resolution

respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. . . . Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”). See also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 108–09, WT/DS58/AB/RW (Oct. 22, 2001); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996). There is also a growing body of academic literature suggesting that, at the very least, a *de facto* system of precedent has become an integral part of WTO jurisprudence and perhaps even a source of law in itself. For a three part examination of this issue, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. INT’L L. REV. 845, 936–41 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 FLA. ST. J. TRANSNAT’L L. & POL’Y 1, 141–46 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. INT’L L. REV. 873, 957–67 (2001); see also Anne Scully-Hill & Hans Mahncke, *The Emergence of the Doctrine of Stare Decisis in the World Trade Organization Dispute Settlement System*, 36 LEGAL ISSUES OF ECON. INTEGRATION 133, 141–45 (2009).

13. Although we do see encouraging signs of political will in the Doha Round, there are two examples of consensus and progress among members. See Council for Trade-Related Aspects of Intellectual Property Rights, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, IP/C/W/405 (Aug. 28, 2003); World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/W/2 (Nov. 14, 2001) [hereinafter Doha Declaration].

on a question of legality.

To that extent, the object of our study is similar to that articulated by Justice Oliver Wendell Holmes, Jr., in his famous paper *The Path of the Law*:

People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.¹⁴

This analysis differs considerably from the existing literature, which mainly consists of normative, public policy perspectives on the issue.¹⁵ In contrast, this Article is a technical analysis which evaluates and resolves a legal conflict using all available sources of law. Following a brief introduction to the technicalities of local working requirements in international intellectual property law, this Article discusses whether this legal ambiguity can be characterized as a conflict of norms in international trade law. This Article does not consider the exceptions to rights conferred (Article 30) or compulsory licensing provisions of TRIPS (Article 31) to be the platform on which a debate regarding local working requirements should be conducted. Instead, the question is whether the two seemingly conflicting treaty provisions in the TRIPS Agreement are reconcilable. Their reconciliation is the

14. OLIVER WENDELL HOLMES JR., COLLECTED LEGAL PAPERS 167 (1920), quoted in HANS KELSEN, GENERAL THEORY OF LAW AND STATE 166 (Anders Wedberg trans., 2007) (1945).

15. Accordingly, this article will not rehash the well-documented desperation of developing countries struggling to gain access to essential medicines or the possible impact of intellectual property rights in that regard. Those issues have been thoroughly discussed elsewhere. See generally Jonathan Michael Berger, *Tripping over Patents: AIDS, Access to Treatment and the Manufacturing of Scarcity*, 17 CONN. J. INT'L L. 157, 158–62 (2002) (discussing the struggle for access to medicine within the context of South Africa); David P. Fidler, *Neither Science nor Shamans: Globalization of Markets and Health in the Developing World*, 7 IND. J. GLOBAL LEGAL STUD. 191, 194–96 (1999) (discussing the disparity in health conditions between wealthy and poor nations); Zita Lazzarini, *Making Access to Pharmaceuticals a Reality: Legal Options Under TRIPS and the Case of Brazil*, 6 YALE HUM. RTS. & DEV. L.J. 103, 104–07 (2003) (discussing the impact of a lack of access to health care in developing countries); Mercurio, *supra* note 9, at 225–28 (describing the effect of the Doha Declaration on patent protection in developing countries); Charles T. Collins-Chase, Comment, *The Case Against TRIPS-Plus Protection in Developing Countries Facing AIDS Epidemics*, 29 U. PA. J. INT'L L. 763, 766–69 (2008) (describing the access problems related to antiretroviral HIV/AIDS drugs in developing countries).

basis for the legality of local working requirements. The Article then introduces the tools of treaty interpretation necessary to resolve the conflict, before considering the effect of the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration)¹⁶ on this issue. Finally, we provide legal analysis to determine the legality of local working requirements under the TRIPS Agreement. This Article is therefore intended to be an exploration of treaty interpretation in WTO dispute settlement with the aim of determining the legality of local working requirements under the TRIPS Agreement.

II. LOCAL WORKING REQUIREMENTS

The traditional view of intellectual property rights is “as instruments of public policy which confer economic *privileges* on individuals solely for the purpose of contributing to the greater public good. The *privilege* is therefore a means to an end, and not an end in itself.”¹⁷ This privilege—in the form of a limited period monopoly right to exploit the creation—must then come with certain restrictions to ensure that the public interest is adequately protected.¹⁸ Local working requirements came about as a balancing mechanism between a monopoly right and its impact on the public interest.

Local working requirements require the patent holder to manufacture the patented product or apply the patented process (i.e., “work” the patent) within the country granting the patent rights in order to maintain its exclusive exploitive rights.¹⁹ Under the Paris Convention, a failure to work the patent is deemed an abuse of the exclusive rights attached to the patent and allows the government of the patent granting country to issue a compulsory license for the patent to a local producer.²⁰

16. Doha Declaration, *supra* note 13, ¶ 5.

17. COMM’N ON INTELLECTUAL PROP. RIGHTS, DEPT OF INT’L DEV., INTEGRATING INTELLECTUAL PROPERTY AND DEVELOPMENT POLICY 6 (2003), *quoted in* Hans Morten Haugen, *Intellectual Property—Rights or Privileges?*, 8 J. WORLD INTELL. PROP. 445, 445 (2005).

18. *See generally* KEITH E. MASKUS, INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY 36–65 (2000) (discussing the forms and limitations placed upon various forms of intellectual property).

19. G.H.C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 71 (1968).

20. Paris Convention for the Protection of Industrial Property, art. 5, ¶ A(2), Mar. 20, 1883, *revised* July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] (“Each country of the Union shall have the right to take

Thus, while the patent remains the property of the abusive patent holder, the owner no longer has the *exclusive* right to exploit the patent.²¹ Article 5 does, however, place limitations on the granting of a compulsory license. For example, the patent holder must have sufficient time to work the patent (defined in Article 5(A)(4) as a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last), and a compulsory license will not be issued if the patent holder has legitimate reasons for not working the patent.²²

The 1886 Rome Conference of the Paris Convention left the parameters of adequately working a patent—then referred to by the official French term *exploiter*—undefined. Thus, each country had the ability to tailor its laws to match its policies and needs. Bodenhausen states the prevailing view of the 1967 revision to the Paris Convention:

The member states are also free to define what they understand by “*failure to work*”. Normally, working a patent will be understood to mean working it *industrially*, namely, by *manufacture* of the patented product, or *industrial application* of a patented process. Thus, importation or sale of the patented article, or of the article manufactured by a patented process, will not normally be regarded as “working” the patent.²³

The use of the word “abuse” for non-working patent holders

legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.”).

21. However, the Paris Convention also provides that forfeiture can be an option where “the grant of compulsory licenses would not . . . [be] sufficient to prevent the said abuses.” See *id.* art. 5, ¶ A(3). Compulsory licenses were introduced relatively recently in the long history of local working requirements. In fact, when the Paris Convention was first negotiated and drafted, forfeiture of the patent was the only consequence for failing to work a patent. This drastic 19th century remedy was moderated with the introduction of compulsory licenses to address abuse of patents in the 1925 Hague Revision of the Paris Convention. See Paul Champ & Amir Attaran, *Patent Rights and Local Working Under the WTO TRIPS Agreement: An Analysis of the U.S.-Brazil Patent Dispute*, 27 YALE J. INT'L L. 365, 371 (2002); Wegner, *supra* note 5, at 160.

22. Article 31 of the TRIPS Agreement adds to the Paris Convention by requiring the provision of adequate remuneration to the patent holder in instances where a compulsory license is granted over the patent. See Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 33–34 (2002); Jennifer Bjornberg, Note, *Brazil's Recent Threat on Abbott's Patent: Resolution or Retaliation?*, 27 NW. J. INT'L L. & BUS. 199, 203 (2006) (discussing the compulsory licensing requirements of Article 31).

23. BODENHAUSEN, *supra* note 19, at 71.

hints at the traditional and economic significance attached to this concept. As one commentator summarizes:

[The local working requirement] has the effect of forcing foreign patentees to situate production facilities within the patent granting country. Such transfers of technology are desirable from the patent granting country's point of view because they contribute to a variety of public policy goals such as employment creation, industrial and technological capacity building, national balance of payments, and economic independence.²⁴

Although not a contentious point, we note for posterity that by reading the term "local" into working requirements we are not proceeding based on an unfounded assumption. The importance of technology transfer as a rationale for working requirements²⁵ necessitates working the patent locally. Furthermore, the prevailing view, as articulated by Bodenhausen above, allows state parties to determine the burden that a working requirement places; however, that view specifically excludes importation as a means of satisfying that burden. In light of this, it is very difficult for us to envisage a persuasive argument that working requirements are offended by the term "local."

In fact, contention regarding local working requirements generally only became an issue after the creation of the TRIPS Agreement. Until that point, local working requirements had been part of international intellectual property law for well over a century, but were rarely discussed. Not only did the TRIPS Agreement call into question the legality of these requirements,²⁶ it did so at a time when issues of public health

24. Michael Halewood, *Regulating Patent Holders: Local Working Requirements and Compulsory Licenses at International Law*, 35 *OSGOODE HALL L.J.* 243, 246 (1997).

25. See WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE, ¶ 5.46 (2d ed. 2004), available at <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf> ("The main argument for enforcing working of the invention in a particular country is the consideration that, in order to promote the industrialization of the country, patents for invention should not be used merely to block the working of the invention in the country or to monopolize importation of the patented article by the patent owner. They should rather be used to introduce the use of the new technology into the country."); see also INTRODUCTION TO INTELLECTUAL PROPERTY: THEORY AND PRACTICE 146 (World Intellectual Prop. Org. ed., 1997) ("The principal goal of requiring local working of a patented invention is the transfer of technology, the actual working of patented inventions in a given country being seen as the most efficient way of accomplishing such a transfer to that country.").

26. Unfortunately, most commentators and even Gervais's acclaimed treatise on TRIPS virtually ignore the negotiating and drafting history of this issue. See, e.g.,

and access to medicines gained worldwide attention. Thus, at almost the exact moment public health activists began to recommend the use of local working requirements as a tool to increase access to medicines in the developing world, the legality of such measures were, for the first time, being questioned.²⁷ Local working requirements are highly relevant to public health because the governments of developing countries could potentially intervene if the patent holder refuses to work the patent locally and allow generic production of essential pharmaceuticals and/or importation in instances of scarcity or prohibitively priced pharmaceuticals.

As noted in the introduction, this Article will not delve into the issue of whether the link between intellectual property and international trade law impeded developing country access to pharmaceuticals or even whether local working requirements should, for public policy reasons, be deemed TRIPS compliant.²⁸ This study is more contained: we simply provide legal analysis on the issue of whether local working requirements as they relate to local production are compliant with the TRIPS Agreement.²⁹

This issue was the subject of a WTO complaint in 2001 when the United States filed a complaint against Brazil for enforcing local working requirements in its national laws.³⁰ The two countries reached a mutually agreeable solution to the dispute, which left the question of the legality of local working

Gervais, *supra* note 1, at 222. Others curtly dismiss the possibility that Article 27 of the TRIPS Agreement impacts upon working requirements. See, e.g., THIAMANGA KONGOLO, UNSETTLED INTERNATIONAL INTELLECTUAL PROPERTY ISSUES 6 (2008) (“[U]nder TRIPS, ‘working’ has an extensive meaning to include the import of patented products.”).

27. Sol Picciotto, *Private Rights vs. Public Interests in the TRIPS Agreement: The Access to Medicines Dispute*, 97 AM. SOC'Y INT'L L. PROC 167, 169 (2003).

28. See generally *supra* text accompanying note 15.

29. The scope of this article is therefore limited to non-local working as per local production as opposed to non-working of a patent as such. The issue is not merely academic, and the likelihood of ultimate resolution by the DSB remains high. Correa states: “The interpretation of this clause is debatable. Though Article 27.1 has been understood as prohibiting any obligation to execute a patented invention locally, this interpretation is not unanimous. . . . The interpretation of this Article is likely to be finally settled under WTO procedures.” Carlos M. Correa, *Pro-competitive Measures Under TRIPS to Promote Technology Diffusion in Developing Countries*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS 49 (Peter Drahos & Ruth Mayne eds., 2002).

30. Request for the Establishment of a Panel by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/3 (Jan. 9, 2001).

requirements unanswered.³¹ In addition, it left developing countries and generic pharmaceutical manufacturers in a perpetual state of uneasiness about whether taking advantage of legally uncertain options to provide greater access to essential medicines will eventually be challenged.³²

Before discussing the United States' complaint against Brazil regarding the legality of local working requirements, we introduce the legal framework of the dispute.

III. THE PROBLEM

A. THE LEGAL FRAMEWORK—MEET THE PLAYERS

As outlined above, Article 5(A)(2) of the Paris Convention explicitly grants a right allowing the use of local working requirements:

Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

Article 5(A)(2) of the Paris Convention is therefore the starting point in outlining the legal provisions that frame any discussion on the legality of working requirements. Article 5(A)(2) remains relevant to the issue as Article 2 of TRIPS imports the obligations that bind members under the Paris Convention.³³ In particular, Article 2.2 of TRIPS imposes the

31. Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4, G/L/454, IP/D/23/Add.1 (July 19, 2001).

32. See Naomi A. Bass, *Implications of the TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century*, 34 GEO. WASH. INT'L L. REV. 191, 212 (2002) ("Despite the AIDS epidemic in South Africa, the country has neither characterized the health crisis as a national emergency nor requested a compulsory license to produce generic copies of necessary medications to treat HIV/AIDS . . . because it feared the imposition of sanctions by the United States and other Western trading partners.") (citations omitted).

33. Absent any articulated intention from the drafters that the incorporation of the WIPO treaties, such as the Paris Convention, into the WTO TRIPS Agreement is "a dynamic one", we agree with the academic thought on this point and proceed on the basis that the WIPO treaties were incorporated as they stood at the date of the TRIPS Agreement in 1994. See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER LAWS OF INTERNATIONAL LAW* 265 (2002); see also Suzy Frankel, *WTO Application of the "Customary Rules on Interpretation of Public International Law" to Intellectual Property*, 46 VA. J. INT'L L. 365, 408 (2005–2006) (noting that TRIPS members are subject to the obligations of the agreements incorporated into the treaty).

Paris Convention provisions on TRIPS rules relating to patents: "Nothing in Parts I to IV of this Agreement [i.e., including Part II(5) – Patents] shall derogate from existing obligations that members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits."³⁴

The incorporation of the earlier treaties administered by the World Intellectual Property Organization (WIPO) into the TRIPS Agreement demonstrates that it is meant to build upon, rather than replace, the earlier conventions. However, the incorporation of the Paris Convention is complicated by Article 27(1) of the TRIPS Agreement, which requires members to ensure that, "patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced."³⁵

On its face, Article 27(1) appears to prohibit the use of local working requirements. This is the case for several reasons. First, it is unquestionable that local working requirements could detrimentally impact the patent holder's enjoyment of patent rights based on the location of production. Simply stated, while local production of a product would satisfy the local working requirement, overseas production would violate it and may attract the imposition of a compulsory license. Second, the obligations in Article 27(1) are made subject to provisions such as Articles 65(4) and 70(8), which are not related to the imposition of local working requirements.³⁶ Therefore, one could reasonably conclude that Article 27(1) is only subject to the enumerated provisions. A third possible argument against local working requirements can be made by reference to the construction of Article 2 of TRIPS, which requires that members shall not "derogate from existing obligations" agreed under the WIPO conventions.³⁷ It could thus be argued that obligations differ from rights (for example, the right to impose compulsory licenses for the non-working) and that Article 2 merely confirms the continuation of obligations as opposed to rights.³⁸

34. TRIPS, *supra* note 5, art. 2.2.

35. *Id.* art. 27.

36. Arguably, the second part of Article 27(1), which contains the discrimination obligation, is not even subject to the "public health exception" of Article 27(2). See Berger, *supra* note 15, at 177.

37. TRIPS, *supra* note 5, art. 2.2.

38. The analysis in the next section yields the answer that rights and

The three provisions covered thus far form the direct legal framework applicable on the question of the legality of local working requirements. Also of relevance are Articles 7, 8, 30, and 31 of the TRIPS Agreement. Articles 7 and 8, entitled “Objectives” and “Principles,” respectively, are relevant from a treaty interpretation standpoint. Article 30 is a general exception, which allows limited exceptions to the exclusive rights conferred under TRIPS. Article 31 of TRIPS regulates compulsory licensing by setting the conditions, including time periods and remuneration payable, for patent use that is not authorized by the patent holder.

B. CONFLICT IN PUBLIC INTERNATIONAL LAW

The WTO legal order, as with any legal regime, is a system of norms.³⁹ In order to clarify WTO law, the relevant norms must be identified and the hierarchy of those norms assessed. The preceding section began this assessment by querying whether the term “right” possibly subordinates the allowance or right of local working requirements contained in the Paris Convention to the anti-discrimination obligation in the TRIPS Agreement.

Pauwelyn’s contemporary contribution to the study of the conflict of norms separates norms into four categories: a command which obliges states *to do* something; a prohibition which is an obligation to *not do* something; a permission which grants a right *to do* something; and an exemption which grants a right to *not do* something.⁴⁰ For our study, the question is whether the prohibition against discrimination in Article 27 of TRIPS is reconcilable with the permission to impose local working requirements in Article 2 of TRIPS (importing the Paris Convention).

A narrow definition of the term “conflict” would answer this question in the positive. As seminally propounded by Jenks, under the narrow definition, a conflict only arises where a state party “cannot simultaneously comply with its *obligations* under both treaties.”⁴¹ If this definition for “conflict” is used to analyze the states’ obligations under TRIPS, then there is no conflict

obligations are similarly incorporated and confirmed by Article 2 of TRIPS.

39. See KELSEN, *supra* note 14, at 123 (“The legal order is a system of norms.”).

40. See PAUWELYN, *supra* note 33, at 158.

41. Wilfred Jenks, *Conflict of Law-making Treaties*, 30 BRIT. Y.B. INT’L L. 401, 426 (1953) (emphasis added).

between provisions relevant to the legality of local working requirements. Article 27, as an obligation, simply trumps any right to impose local working requirements. The absence of an irreconcilable conflict⁴² necessitates the fulfillment of all of the states' obligations under TRIPS, including Article 27. The matter would be closed.

The matter remains open because in the first consideration of "conflict" in the context of WTO dispute settlement, the panel in *EC—Bananas* considered and rejected the avoidance of conflicts through the subordination of rights to obligations. The panel stated:

It is true that Members could theoretically comply with [both provisions], simply by refraining from invoking the right. . . . However, such an interpretation would render whole Articles or sections of Agreements redundant and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994.⁴³

Ultimately, the panel in *EC—Bananas* decided to recognize conflict in both situations: (i) where there are clashes between obligations that are mutually exclusive, so a member cannot comply with both obligations simultaneously; and (ii) where a rule in one agreement prohibits what a rule in another agreement explicitly permits.⁴⁴ To the contrary, the second panel to consider the definition of conflict, *Indonesia—Autos*, opted for a narrow construction, stating that "under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter."⁴⁵

42. See Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 69, WT/DS56/AB/R (Mar. 27, 1998) (deciding that Argentina's inability to establish an irreconcilable conflict between provisions meant that nothing superseded Argentina's obligations under GATT 1994).

43. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 3(a)(ii), WT/DS27/R/USA (May 22, 1997).

44. See *id.* ¶ 7.159.

45. See Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 14.49, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998); see also Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement From Mexico*, ¶ 65, WT/DS60/AB/R (Nov. 2, 1998). The Appellate Body Report opined that a case of conflict only existed where provisions could not be read as complementing each other and that the special or additional provisions are to prevail. A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to

In balancing the two contradictory panel reports on the issue of conflict discussed above, it is noteworthy that the panel's decision in *Indonesia—Autos* was not appealed; however, in *EC—Bananas* the panel's decision was reviewed by the Appellate Body. Although the Appellate Body in *EC—Bananas* did not directly consider the panel's unambiguous statement on conflict, it upheld the panel's findings based on the recognition of a conflict between rights and obligations.⁴⁶

We also note that the panel in *Indonesia—Autos* gave its judgment on the existence of conflict with the proviso that, even if it were to accept the ruling of the panel in *EC—Bananas* of a broad definition of conflict, “there [could be] no conflict because the SCM Agreement does not ‘explicitly permit’ local content subsidies.”⁴⁷ We thus seek to distinguish the panel's findings in *Indonesia—Autos* from direct application to the question of local working requirements for the reason that the panel in *Indonesia—Autos* contemplates a scenario where the broader definition put forward in *EC—Bananas* might be correct in assuming an explicit right were to exist, as one does in Article 2 of TRIPS.⁴⁸

It is also interesting to note that the panel in *Indonesia—Autos* justified its narrow definition by the principle of “presumption against conflict” (discussed later in this Article). This presumption has subsequently been applied without subordinating rights to obligations and applied to specifically uphold rights in an incorporated WIPO treaty.⁴⁹ Further, the Appellate Body has recognized conflict in situations that fall

a violation of the other provision. The impact of this statement on the definition of conflict, broad or narrow, is uncertain, not least because we are dealing with an incorporated provision and not an additional or special one. While the idea of “adherence” is considered by some to limit conflict to situations where two obligations clash, i.e., a narrow definition of conflict; other commentators find that the adherence of a provision can extend to rights and obligations, and therefore this statement does not necessarily espouse a narrow definition of conflict. Compare Gabrielle Marceau, *Conflict of Norms and Conflicts of Jurisdictions*, 35 J. WORLD TRADE 1081, 1085 (2001) (stating that adherence limits the definition of conflict) with PAUWELYN, *supra* note 33, at 195 (arguing that adherence extends the definition of conflict).

46. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 255, WT/DS27/A,B/R (Sep. 9, 1997).

47. See Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 5.345, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998).

48. See *id.* ¶ 5.346.

49. See Panel Report, *United States—Section 110(5) of the US Copyright Act*, ¶ 6.6, WT/DS160/R (June 15, 2000); see also *infra* Section 4.1.3.

beyond the narrow scope of the panel's definition in *Indonesia—Autos*. For example, the Appellate Body in *United States—FSC* and *Brazil—Aircraft* accepted that conflict existed where the provisions in question provided different obligations that were not mutually exclusive (mutual exclusivity being a required element of conflict as per *Indonesia—Autos*).⁵⁰

Further support for a broader definition of “conflict” is found in the authoritative commentary of Sir Humphrey Waldock, who remarked in the preparation of Article 30 of the Vienna Convention on the Law of Treaties (VCLT)⁵¹ that “[t]he idea conveyed by the term [conflict] was that of a comparison between two treaties which revealed that their *clauses* . . . could not be reconciled with one another.”⁵² The term clause, of course, encompasses clauses granting rights as well as clauses placing obligations.

If conflict can exist between a right and an obligation, then it only follows logically that rights are on par with obligations. This is by no means a novel idea. For instance, preeminent jurist Hans Kelsen stated:

[A] distinction is drawn between legal norms which command or forbid, on the one hand, and legal norms which permit, on the other: “Law is permissive or imperative.” But the distinction does not hold. *The legal order gives somebody a permission, confers on somebody a right, only by imposing a duty upon somebody else . . . Law is imperative for the one, and thereby permissive for the other.*⁵³

Interestingly, the Appellate Body in *US—Section 211* applied this formulation of rights as imposing corresponding obligations.⁵⁴ In that dispute, the rights granted under the Paris Convention were characterized as obligations on other WTO members to confer those rights. The Appellate Body held:

WTO Members are *obliged to confer an exceptional right* on an applicant in a Paris Union country other than its country of origin, one

50. See Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations”*, ¶ 117, WT/DS108/AB/R (Feb. 24, 2000); see also Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, ¶ 191, WT/DS46/AB/R (Aug. 2, 1999).

51. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. We elaborate on the applicability of the VCLT to WTO disputes in Part IV.

52. Sir Humphrey Waldock, Special Rapporteur, Remarks at the 742nd meeting on the Law of Treaties (June, 10 1964) in 1 Y.B.Int'l L. Comm'n 125, ¶ 68 (1966) (emphasis added).

53. See KELSEN, *supra* note 14, at 77 (emphasis added).

54. See Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 136, WT/DS176/AB/R (Jan. 2, 2002).

that is over and above whatever rights the other country grants to its own nationals in its domestic law. . . . [I]f [a] country is a Member of the Paris Union – and, now, of the WTO – then an applicant from another WTO Member who seeks registration in that country of a trademark duly registered in its country of origin has the additional rights that WTO Members are obliged to confer on that applicant under [the Paris Convention].⁵⁵

Thus, the rights under the Paris Convention are granted the status of corresponding obligations on other members. These rights have taken on the language of obligations, and the obligations owed under both the TRIPS Agreements and the incorporated Conventions are on equal footing. This interpretation was confirmed by the Arbitrators in *EC—Bananas*, which explicitly held that when TRIPS incorporates other instruments, membership in the TRIPS Agreement does not excuse compliance with one instrument's obligations at the expense of another.⁵⁶

The possibility of a conflicting relationship can be further explored through the scholarship of Pauwelyn in relation to conflict of norms in international law. Pauwelyn prescribes three requirements that must be fulfilled before two norms can be in conflict: overlap in the subject matter (*ratione materiae*); overlap in the state parties to which the norms apply (*ratione personae*); and the point-in-time operation of the norms (*ratione temporis*).⁵⁷

The conflict between Article 27 of TRIPS and Article 5 of the Paris Convention covers all three of these requirements. They both deal with rights enjoyable under a patent (overlap in subject matter) and the application of Article 2 of TRIPS makes their operation simultaneous in cases of non-working a patent (temporal overlap). The temporal overlap occurs because the obligation not to discriminate in TRIPS is a general obligation which applies continuously to regulate conduct, while the rights granted under the Paris Convention are individual in that they are triggered in the specific circumstance of abuse by non-working.⁵⁸ Thus there is a temporal overlap at the point when the right under the Paris Convention is triggered.

55. *Id.* (emphasis added).

56. Decision of the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas: Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 149, WT/DS27/ARB/ECU (Mar. 24, 2000).

57. PAUWELYN, *supra* note 33, at 165.

58. *Id.* at 160.

Lastly, with respect to *ratione personae*, Article 2.1 of TRIPS clearly states that “[TRIPS] Members *shall* comply with Articles 1 through 12, and Article 19, of the Paris Convention.”⁵⁹ This *obligatory* language demands compliance with the incorporated parts of the Paris Convention, including Article 5, from all TRIPS members. Thus every member of the WTO (and therefore TRIPS) is bound by both legal provisions: Article 5 of the Paris Convention and Article 27 of TRIPS. We believe Article 2.1 is unequivocal in its intent that all WTO members—whether or not they are in fact members of the Paris Convention—must comply with the incorporated provisions of the Paris Convention. Even if the weight of the language in Article 2.1 does not suffice, the result is likely to remain unchanged because, as a practical matter, the membership of the Paris Convention (173 contracting parties)⁶⁰ largely overlaps with the membership of TRIPS (i.e., the WTO membership, 153 members).⁶¹ Further there are no industrialized nations in the WTO that have not signed the Paris Convention,⁶² making it highly improbable that a country that is not a signatory of the Paris Convention, but has influential industrial interests in patents, will bring an action against local working requirements. The instigators of such a dispute would almost certainly be countries with significant intellectual property, and the TRIPS members who are not parties to the Paris Convention do not fit that bill. Therefore, we can safely assume that a WTO dispute regarding local working requirements will have the characteristic of *ratione personae*.

Based on the analysis above, we are faced with a situation in which there is likely to be a conflict between the obligation under Article 27 of TRIPS and the rights granted by Article 5 of the Paris Convention (as incorporated into TRIPS by Article 2.2). Simply stated, the action permitted by the Paris Convention is prohibited by TRIPS. This conclusion is subject to

59. TRIPS, *supra* note 5, art. 2.1 (emphasis added).

60. World Intellectual Prop. Org. [WIPO], Contracting Parties, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2 (last visited Jan. 23, 2010).

61. World Trade Org. [WTO], Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 23, 2010).

62. Compare WIPO, Contracting Parties, *supra* note 60, with WTO, Members and Observers, *supra* note 61. Only the following WTO members are not party to the Paris Convention: Cape Verde, Brunei, Darussalam, Fiji, Hong Kong (China), Kuwait, Macao (China), Myanmar, Solomon Islands, and Chinese Taipei.

a principle of treaty interpretation—the presumption against conflict—which seeks to find means of interpreting the potentially conflicting provisions in harmony to give effect to each provision (discussed below in Part IV.A.3).

It is worth noting that the question of local working requirements has traditionally been analyzed in terms of the ability of Articles 30 and 31 to provide relief from the obligations in Article 27 of the TRIPS Agreement.⁶³ We disagree with this approach and prefer to analyze it as a possible conflict between Article 5 of the Paris Convention and Article 27 of TRIPS. Since local working requirements are clearly and specifically covered under Article 5 of the Paris Convention, it seems logical to frame the discussion within the scope of the specific provision addressing the issue rather than the general exception in Article 30.⁶⁴ Further, Article 31 cannot be the most appropriate analytical tool for the purposes of determining legality of local working requirements because the provisions regulating the grant of a compulsory license become relevant only once it is established that the remedy of a compulsory license is allowed in circumstances of non-working.

C. UNITED STATES V. BRAZIL: THE ALMOST-SHOWDOWN

Even the shallowest exploration of the access to essential medicines in developing countries, or challenges to patent-holding pharmaceutical companies, reveals high emotions at the grassroots level and vigorous debate on an academic and political level. It is therefore slightly surprising that an issue as significant to access to medicines as the legality of local working requirements remains unanswered. A WTO complaint addressing this issue was filed by the United States against Brazil, but a mutually agreed solution between the governments resolved the dispute.

63. See generally Champ & Attaran, *supra* note 21 (discussing the use of Articles 30 and 31 as exceptions to the obligations of Articles 27 and 28 of TRIPS); Kevin J. Nowak, Note, *Staying Within the Negotiated Framework: Abiding by the Non-Discrimination Clause in TRIPS Article 27*, 26 MICH. J. INT'L L. 899, 935–41 (2004) (looking at the obligations Article 27 through application of Article 30); Bjomberg, *supra* note 22, at 201 (adhering to this traditional position).

64. See Daya Shanker, *The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPS Agreement*, 36 J. WORLD TRADE 721, 758 (2002) (arguing that working requirements are compatible with the TRIPS agreement through Article 2 which incorporates Article 5 of the Paris Convention).

The story begins with the slightly forced connection drawn between the anti-discrimination obligation contained in Article 27 and the exceptions provisions in Article 30.⁶⁵ This connection received notable encouragement from the decision of the WTO panel in *Canada—Pharmaceutical Patents*,⁶⁶ which held that any compulsory license granted as an Article 30 exception to Article 27 must comply with the anti-discrimination requirement in Article 27.⁶⁷ The decision was not appealed, and therefore the Appellate Body, which had previously supported a broad interpretation of exceptions, did not have occasion to weigh in on the issue.⁶⁸ Since the debate over the legality of local working requirements has traditionally been framed in terms of the relationship between the obligation in Article 27 and the exceptions to that obligation in Articles 30 and 31, the *Canada—Pharmaceutical Patents* decision was significant for the parties interested in the legality of local working requirements.

Buoyed by the panel's narrow reading of the exceptions in Article 30 in *Canada—Pharmaceutical Patents*, the United States challenged local working aspects of Brazilian patent law.⁶⁹ As expected, the United States' complaint anticipated

65. *Id.*

66. See Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶¶ 7.88–93, WT/DS114/R (Mar. 17, 2000). This dispute did not concern local working requirements.

67. This aspect of the decision has been criticized in the literature. See, e.g., Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Diversifying Without Discriminating: Complying with the Mandates of the TRIPS Agreement*, 13 MICH. TELECOMM. & TECH. L. REV. 445, 448–54 (2007); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 J. INT'L ECON. L. 431, 443 (2004) (“[T]he panel was wrong in applying Article 27.1 to exemptions.”). For an invective condemnation on this and other aspects of the decision, see Frederick M. Abbot, *Bob Hudec as Chair of the Canada—Generic Pharmaceuticals Panel – The WTO Gets Something Right*, 6 J. INT'L ECON. L. 733, 736 (2003); Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 J. WORLD INT'L PROP. 493, 505–06 (2000) (calling the panel's reasoning on this point “totally perverse” and generally criticizing the panel's approach, treaty interpretation, legal interpretations, and conclusions). *But see* Nowak, *supra* note 63 (praising this aspect of the panel's decision).

68. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 104, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (“[M]erely characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.”).

69. The United States formally commenced the legal action in the WTO by a

that the legality of local working requirements would be based on Articles 30 and 31 while Brazil's response relied on Article 5 of the Paris Convention.

Article 68 of the Brazilian Industrial Property Law, promulgated on May 14, 1996, in purported compliance with the new TRIPS regime, requires holders of Brazilian patents to manufacture the patented product in Brazil (a local working requirement). Failure to do so could result in a compulsory license being imposed on the patent after three years unless the patent holder could demonstrate that production in Brazil was not economically feasible or was otherwise unreasonable.⁷⁰

This impugned section of the Brazilian patent law had been used by the government to establish a successful anti-AIDS program that offered free antiretroviral medication to patients. The affordability of the medication was crucial to the continuation of the program, and the introduction of the law greatly contributed to a 79% drop in the price of drugs between 1996 and 2000.⁷¹

In a storm of anti-AIDS demonstrations, premonitions of a Pyrrhic victory, and the weight of a looming public-relations disaster, the United States negotiated a mutually agreeable solution with Brazil and withdrew its WTO complaint in June 2001.⁷² Therefore, this perfect candidate for a legal resolution to

communication dated May 30, 2000. The consultations between Brazil and the United States, joined by the EC, on June 29, 2000 and December 1, 2000 did not reach a mutually satisfactory outcome and the establishment of a panel was requested. Request for the Establishment of a Panel by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/3 (Jan. 9, 2001).

70. See Lei de Propriedade Industrial Brasileira [Brazilian Industrial Property Law], available at http://www.planalto.gov.br/ccivil_03/Leis/L9279.htm; see also 't Hoen, *supra* note 22, at 32.

71. DONALD G. RICHARDS, *INTELLECTUAL PROPERTY RIGHTS AND GLOBAL CAPITALISM: THE POLITICAL ECONOMY OF THE TRIPS AGREEMENT* 159 (2004). This figure, 79%, gives a fair idea of the reasons behind Brazil wanting to defend the section and similarly the reasons for pharmaceutical companies in the United States being threatened by it.

72. Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4, G/L/454, IP/D/23/Add.1 (July 19, 2001). Notably, the Mutually Agreed Solution also included an agreement that Brazil would not launch dispute settlement action regarding sections 204 and 209 of the United States patent law; see also Bass, *supra* note 32, at 208 (noting that the United States withdrew its complaint); Champ & Attaran, *supra* note 21, at 381; Lazzarini, *supra* note 15, at 132; Anthony P. Valach Jr., Note, *TRIPS: Protecting the Rights of Patent Holders and Addressing Public Health Issues in Developing Countries*, 4 CHI.-KENT J. INTELL. PROP. 156, 175–82 (2005); Helen Cooper, *U.S. Drops WTO Complaint Against Brazilian Patent Law*, WALL ST. J. EUR., June 26, 2001, at A2.

the local working requirements question never reached its potential.⁷³ The resolution did not shed any light on the legality of local working requirements and was considered more of a temporary laying down of arms rather than surrender. The nature of the agreement, which merely required Brazil to provide U.S. officials with advance notice prior to invoking Article 68 of its patent law, left such provisions open to challenge in the future.⁷⁴

As Raustiala notes, the resolution of problems which drafters leave in the “too hard” basket often falls to the political stratagem of deferral.⁷⁵ Like the fate of the United States-Brazil dispute, deferral may be preferred because a solution through legal means bears the burden of identifiable losers and winners.

Problematically, the lack of legal certainty leaves countries hesitant to take advantage of available flexibilities for fear of an expensive legal challenge.⁷⁶ Therefore, though not immediately identifiable, there are still losers in this unresolved legal issue.

IV. TREATY INTERPRETATION—LEGAL SOLUTION TO A LEGAL PROBLEM

Lack of predictability in legal obligations can have the practical effect of eroding rights that parties negotiated into the WTO Agreement. Where textual ambiguity in a treaty engenders divergent expectations from the membership regarding their legal rights and obligations, dispute settlement

73. Valach, *supra* note 72, at 177.

74. See Notification of Mutually Agreed Solution, *Brazil—Measures Affecting Patent Protection*, WT/DS199/4, G/L/454, IP/D/23/Add.I (July 19, 2001); see also Champ & Attaran, *supra* note 21, at 381; Valach, *supra* note 72, at 177.

75. Kal Raustiala, *Density and Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021, 1029 (2006).

76. For information on the costs of litigating a WTO dispute, see Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 WORLD BANK ECON. REV. 287, 287–310 (2005); Mark L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 720–23 (2003); Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in INT'L CENTRE FOR TRADE & SUSTAINABLE DEV., TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SYSTEM IN THE WTO 1, 5, 16, 29–32 (Victor Mosoti ed., 2003), available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf. Cf. Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819 (2003) (discussing generally the difficulties and problems with WTO dispute resolution).

presents itself as perhaps the sole means of reaching a satisfactory solution.

In the context of the WTO, Article 3.2 of the DSU provides for such interpretations:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.⁷⁷

The stipulated parameter of customary rules of interpretation of public international law must be respected by panels and the Appellate Body if WTO dispute settlement is to deliver on this promise of providing and maintaining security and predictability.⁷⁸ Therefore the discipline of legal interpretation—as distinguished from judicial activism or judicial lawmaking—is crucial to any benefit that can be attributed to the WTO DSB, or any dispute settlement mechanism for that matter, domestic or international.⁷⁹ Legal interpretation and decision-making based upon objectively-based rules takes on a particularly significant role in the international sphere where agreements come into being after painstaking negotiation between the sovereign states party to

77. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. III(2), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. The applicability of the DSU mechanism to TRIPS related disputes was confirmed in Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 29, WT/DS50/AB/R (Dec. 19, 1997).

78. See generally Wolfgang Weiss, *Security and Predictability Under WTO Law*, 2 WORLD TRADE REV. 183 (2003) (discussing why the WTO should respect customary international legal interpretation).

79. See YANG GUOHUA, BRYAN MERCURIO & LI YONGJIE, WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION 17 n.3 (2005). The scope of the WTO DSB's actions under Article 3.2 has been limited to a point where the interpretation or *clarification* does not add or diminish the rights and obligations provided in the covered agreements. See also Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 19, WT/DS33/AB/R (Apr. 25, 1997) (“Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.”); Lennard, *supra* note 11, at 85–89 (stating that the best approach for the WTO DSB is to use the textual approach of the Vienna Convention).

the dispute. In that sense, parties to an international dispute (i.e., nation states) are much more connected to the body of law governing their dispute (i.e., treaties that they themselves have negotiated) than most individual citizens before a domestic court.

A. VIENNA CONVENTION ON THE LAW OF TREATIES

Articles 31⁸⁰ and 32⁸¹ of the VCLT require that a treaty be interpreted in good faith, according to the purpose, object, and context of the treaty, with resort to supplementary means of interpretation (including negotiating history) only if the preliminary interpretation results in ambiguity or absurdity.⁸²

80. Article 31 General rule of interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention on the Law of Treaties, *supra* note 51, art. 31.

81. Article 32 Supplementary means of interpretation:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id. art. 32.

82. For this reason, while the negotiating history of local working requirements as they relate to local production is interesting, it does not feature as part of treaty interpretation as guided by Article 31 of the VCLT. Negotiating history would only

In *US—Reformulated Gasoline*, the first report of the newly established WTO Appellate Body, the Appellate Body made a timely proclamation that, for the purposes of the interpretation of WTO Agreements: “[Article 31 of the VCLT] has attained the status of a rule of customary or general international law.”⁸³ Not long after inducting Article 31 into the interpretation tool-kit, the Appellate Body in *Japan—Alcohol* announced that “[Article 32 of the VCLT], dealing with the role of supplementary means of interpretation, [has] also attained the same status [of customary or general international law].”⁸⁴

Thus, the Appellate Body has appointed another international agreement, the VCLT, to play the part of the “customary rules of interpretation of public international law” that guide their decisions.⁸⁵ In doing so, the Appellate Body has sought to ensure that the WTO’s treaty interpreters remain subject to “certain common disciplines [imposed] upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned.”⁸⁶

In irony we note that behind an appearance of simplicity,⁸⁷ these articles raise several questions in their interpretive guidance. How is an interpreter to be sure that they have satisfied the requirement of interpretation in good faith? Would a reading of the TRIPS Agreement that read down the obligation contained in Article 27 in light of the right to local working right in Article 5 of the Paris Convention (incorporated in TRIPS) be in good faith? Is the ordinary meaning of a term its dictionary meaning? What exact role does the context play in

become relevant under Article 32 of the VCLT if the interpretation according to Article 31 “leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.” *Id.* Certain criticisms of the *Canada—Pharmaceutical Patents* decision focus on panel’s misapplication of Article 31 of the VCLT in the context of Article 30 of the TRIPS Agreement in resorting to negotiating history over the obligatory interpretive sources under Article 31 of the VCLT. See Howse, *supra* note 67.

83. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 15, WT/DS2/AB/R (Apr. 29, 1996).

84. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 9, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

85. For recent affirmations, see Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 267, WT/DS350/AB/R (Feb. 4, 2009); Bacchus, *supra* note 6, at 504–05.

86. Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 60, WT/DS184/AB/R (July 24, 2001).

87. Frankel, *supra* note 33, at 386.

the interpretation of a provision? Does the interpretation have to be in compliance with the object and purpose provisions of the treaty in order to be valid under the VCLT?

Before working through these issues, it may be useful to identify the elements of the VCLT that are relevant in the context of local working requirements. We noted in Part III.A that Articles 2 (incorporating Article 5 of the Paris Convention), 27, 30, and 31 of the TRIPS Agreement are the main provisions at issue. In addition, Articles 7 and 8 of the TRIPS Agreement provide the object and purpose of the Agreement.⁸⁸ The Preamble is also relevant, as it forms part of the “context” of a treaty provision as an element mentioned in VCLT Article 31(2).⁸⁹

Lastly, the Doha Declaration is relevant as an “instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”⁹⁰

A Textual Interpretation

For some time, the exact role of elements such as the context and object and purpose of agreements, which take us beyond the actual textual language of a provision, was not immediately clear to the GATT/WTO legal community. We know from the VCLT that these elements are relevant, but are they determinative, and if not, then to what extent are they influential? This question formed the crux of the debate surrounding the conclusion of the VCLT in 1969.

When the mode of interpretation of treaties was enveloped in doctrinal controversy at the 1968 Vienna Conference, attendees considered three main approaches.⁹¹ The first used the text of the relevant provisions as a mere starting point, and sought to determine the appropriate interpretation based on the *intentions* of the parties. The second was a *textual* method where an investigation into the intent of the parties at the time of drafting was only relevant to the extent that it was captured

88. In addition to purpose, Mitchell and Voon suggested that Articles 7 and 8 could also serve as context in interpreting other TRIPS provisions. See Andrew D. Mitchell & Tania Voon, *Patents and Public Health in the WTO, FTAs and Beyond: Tension and Conflict in International Law*, 43 J. WORLD TRADE 571, 573 (2009).

89. Vienna Convention on the Law of Treaties, *supra* note 51, art. 31.

90. *Id.*

91. See Lennard, *supra* note 11, at 20.

by the text of an agreement. The third was the *teleological* method, which began with a broad consideration of the treaty's object and purpose and then interpreted the relevant provisions in a manner that was best suited to the fulfillment of the object and purpose.⁹²

It is now beyond doubt that treaty interpretation under the VCLT must follow the textual approach, as confirmed by the WTO Appellate Body and the International Law Commission.⁹³ Therefore, dispute settlement proceeds on the basis that the intentions and expectations of the parties appear in the text of the agreement⁹⁴ and adjudicators are not at liberty to read into the text any intention that is not apparent from the text of the relevant provision. In the words of former chairman of the Appellate Body James Bacchus, "the 'deal' is in the words of the treaty."⁹⁵

This choice of the textual or predominantly literal approach has been justified by reference to the security and predictability that it offers.⁹⁶ However, the task of the treaty interpreter is

92. See *id.* at 20 n.90. See also *Summary Records of the 876th Meeting*, [1966] 1 Y.B. Int'l L. Comm'n 219, U.N. Doc. A/CN.4/SER.A/1966; IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 130–35 (2d ed. 1984); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1 (1951); Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of the Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318, 319–25 (1969) (laying out the three different approaches to treaty interpretation).

93. See *Japan—Taxes on Alcoholic Beverages II*, 17, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) ("[T]he words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation."); *Summary Records of the 876th Meeting*, *supra* note 92. For comments by participants in the Vienna Convention, see Sir Humphrey Waldock, *Third Report on the Law of the Treaties*, [1964] 2 Y.B. Int'l L. Comm'n 5, 56, U.N. Doc. A/CN.4/167; SINCLAIR, *supra* note 92, at 115.

94. See Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶¶ 43–45, WT/DS50/AB/R (Dec. 19, 1997).

95. Bacchus, *supra* note 6, at 512.

96. See Jacques Werner, *The TRIPS Agreement Under the Scrutiny of the WTO Dispute Settlement System: The Case of Patent Protection for Pharmaceutical and Agricultural Chemical Products in India*, 1 J. WORLD INTELL. PROP. 309, 319 (1998) ("Any extension of the TRIPS' textual obligations through interpretation might cause these countries to consider that the delicate, negotiated equilibrium which they had achieved in the WTO Agreement is being altered in favour of the developed countries, which of course might alter their goodwill in honouring their obligations. The Appellate Body's determination not to allow any alteration of the negotiated equilibrium of the TRIPS Agreement transpires throughout its opinion."); see also Olivier Cattaneo, *The Interpretation of the TRIPS Agreement: Considerations for the*

complicated by the fact that influences of the teleological approach remain in Article 31 of the VCLT. Supported by eminent international law figures such as Sir Henry Lauterpacht, the teleological approach to interpretation appears in the VCLT requirement that a good faith interpretation of a treaty can only occur in "light of its object and purpose."⁹⁷

Initially the Appellate Body struggled to reconcile this teleological trait with its textual interpretation agenda, and resorted to addressing the elements required by Article 31 of the VCLT in a hierarchical manner.⁹⁸

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and the purpose of the states parties to the treaty must first be sought. *Where the meaning imparted by text itself is equivocal or inconclusive*, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.⁹⁹

Thus in this early case, the Appellate Body introduced a kind of sequencing for the contextual aspects of Article 31 of the VCLT that resembled the use of supplementary materials in Article 32 of the VCLT.¹⁰⁰ Under this approach the use of object and purpose would be reserved for situations where the text was equivocal. Shanker notes, and we agree, that absent any words in Article 31 of the VCLT requiring this type of hierarchy between elements of interpretation, there is no reason for such dilution of the role of the object and purpose of a treaty.¹⁰¹ The

WTO Panel and Appellate Body, 3 J. WORLD INTELL. PROP. 627, 657–58 (2000); Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 616 (2002).

97. See Lennard, *supra* note 11, at 21 n.12; see also Jacobs, *supra* note 92, at 320 n.3.

98. See Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005); Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US—Gambling: A Critique*, 9 J. INT'L ECON. L. 117, 120 (2006) (discussing the friction between the textual and holistic approaches).

99. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998) (emphasis added).

100. See Shanker, *supra* note 64, at 726.

101. *Id.* See also Ehlermann, *supra* note 96, at 615–16 ("According to Article 31.1 of the Vienna Convention, 'a Treaty shall be interpreted in good faith in

Appellate Body in *US—Zeroing* recently agreed with this reasoning and endorsed a holistic and integrated approach to the interpretive elements in Article 31 of the VCLT. It is worth setting out in full the Appellate Body’s unambiguous pronouncement in *US—Zeroing*, as it clearly answers questions that would otherwise require discussion:

The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. . . . [A] treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. . . . This logical progression provides a framework for proper interpretative analysis. . . . At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise. . . . [R]ules and principles of the Vienna Convention cannot contemplate interpretations with mutually contradictory results. Instead, *the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty.* The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the Vienna Convention if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions.¹⁰²

Although the desire to adopt a holistic approach under the VCLT is not novel, the above-extracted decision of the Appellate Body clarifies the exact objective of the enterprise of interpretation: *one* interpretation which is at harmony with the entire treaty. This can be reconciled with the victory of

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Among these three criteria, the Appellate Body has certainly attached the greatest weight to the first, i.e., ‘the ordinary meaning of the terms of the treaty’. This is easily illustrated by the frequent references in Appellate Body reports to dictionaries, in particular to the Shorter Oxford Dictionary, which, in the words of certain critical observers, has become “one of the covered agreements”. The second criterion, i.e., “context” has less weight than the first, but is certainly more often used and relied upon than the third, i.e., ‘object and purpose’ . . . the Appellate Body clearly privileges ‘literal’ interpretation . . .”).

102. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶¶ 268–73, WT/DS350/AB/R (Feb. 4, 2009) (emphasis added).

textualism over teleological interpretation because the common intention of parties is still sought from the text of the treaty—not predominantly sought from the object and purpose clause (as would be the teleological approach), nor just the single clause of the relevant provision (strict textualism), but rather an interpretation that integrates all of the contextual elements set out in VCLT Article 31.

Even though our analysis below deals with each of the interpretive elements of the VCLT (good faith, ordinary meaning, context, and object and purpose) separately, we acknowledge that the Appellate Body has moved away from treating the various interpretive elements as a “sequence of separate tests to be applied in a hierarchical order,”¹⁰³ and now seeks a conclusion that boasts harmony with *all* requisite elements.

1. Ordinary Meaning of Words in their Context

The legality of local working requirements is probably not going to turn on the pure meaning attributed to the words in the relevant provisions of TRIPS or the Paris Convention. This is unlike disputes such as *US—Gambling*, where a key issue before the Appellate Body was whether the ordinary meaning of “sporting” included gambling, or *EC—Chicken Cuts*, where the meaning given to the word “salted” was relevant.¹⁰⁴ On the other hand, the context which informs the ordinary meaning of the words is bound to be of interest. We make these statements based on the nature of the complaint by the United States in the request for consultations with Brazil discussed in Part III.C above. The political resolution may have deprived us of a legal solution, but the instigation of the complaint did reveal the parameters of the problem.

For the sake of completeness we nevertheless “start the interpretation from the ordinary meaning of the ‘raw’ text of the relevant treaty provision [Article 27 of TRIPS], and then seek to construe it in its context and in the light of the treaty’s object

103. Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.22, WT/DS152/R (Dec. 22, 1999).

104. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 170, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 163, WT/DS285/AB/R (Apr. 7, 2005).

and purpose.”¹⁰⁵ Article 27, which promises to be the focus of any complaint against local working requirements, states that “patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”¹⁰⁶

The term *discrimination* is of interest, as it encapsulates the essence of the obligation in question. A dictionary meaning can really only serve as a starting point because the Appellate Body has made the well-founded point in *US—Gambling* that dictionaries “aim to catalogue *all* meanings of words—be those meanings common or rare, universal or specialized.”¹⁰⁷ Therefore, anything more than an initial consideration of the dictionary meaning would be ineffectual in establishing the *one* meaning of the text which articulates the common intention of the parties.¹⁰⁸ In allocating a meaning which is in tune with the common intention of the parties, the context of the words takes on a prominent role.

We note that the panel in *Canada—Pharmaceutical Patents* considered the meaning of “discrimination” in Article 27 for the

105. *United States—Sections 301-310 of the Trade Act of 1974*, ¶ 7.22., WT/DS152/R.

106. TRIPS *supra* note 5, art. 27.

107. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 164, WT/DS285/AB/R (emphasis added). For a definition of discrimination, see 4 OXFORD ENGLISH DICTIONARY 758 (2d ed., 1989) (“1.a. The action of discriminating; the perceiving, noting, or making a distinction or difference between things; a distinction (made with the mind, or in action). . . . 1.c. The making of distinctions prejudicial to people of a different race or colour from oneself . . . 3. The faculty of discriminating; the power of observing differences accurately, or of making exact distinctions . . .”). For a critique of dictionary use, see Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 59, WT/DS257/AB/R, (Jan. 19, 2004); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 92, WT/DS135/AB/R, (Mar. 12, 2001); Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 153, WT/DS70/AB/R (Aug. 2, 1999).

108. See *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 175 WT/DS269/AB/R, WT/DS286/AB/R (“The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties ‘as expressed in the words used by them against the light of the surrounding circumstances.’” (citing LORD MCNAIR, *THE LAW OF TREATIES* 365 (1961)); Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act Of 2000*, ¶ 248, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (“[D]ictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents.”).

purposes of the TRIPS Agreement, with the panel's interpretation of the term seemingly agreeing with *context* being a benchmark. More specifically, as set out below, the panel seems to view the discovery of the meaning of discrimination as a relative task, taking guidance from the context of the whole agreement to settle on an acceptable explanation:

The primary TRIPS provisions that deal with discrimination, such as the national treatment and most-favoured-nation provisions of Articles 3 and 4, do not use the term "discrimination". They speak in more precise terms. The ordinary meaning of the word "discriminate" is potentially broader than these more specific definitions. It certainly *extends beyond the concept of differential treatment*. It is a normative term, pejorative in connotation, referring to results of the *unjustified imposition of differentially disadvantageous treatment*. Discrimination may arise from explicitly different treatment, sometimes called "*de jure* discrimination", but it may also arise from ostensibly identical treatment which, due to differences in circumstances, produces differentially disadvantageous effects, sometimes called "*de facto* discrimination". . . . "Discrimination" is a term to be avoided whenever more precise standards are available, and, when employed, it is a term to be interpreted with caution, and with care to add no more precision than the concept contains.¹⁰⁹

Even though the Appellate Body did not have the opportunity to weigh in on the issue, it is reasonable to assume that the ordinary meaning of the term "discrimination" consists of two elements: differential treatment and unjustified disadvantage.¹¹⁰ This is in line with the thrust of Article 27 and the TRIPS Agreement in general: safeguarding the availability of patents regardless of national boundaries.

It is as yet not entirely clear, based on this limited analysis of Article 27, that the grant of a compulsory license for non-work of a patent satisfies the ordinary meaning of discrimination. There may be differential treatment for patent holders who do not produce in the country that granted the patent, but does the

109. Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.94, WT/DS114/R (Mar. 17, 2000) (emphasis added).

110. Although several commentators sharply criticize the panel for its application of discrimination to Article 30 exceptions, the two-tiered meaning of discrimination suggested by the panel whereby it is differentiation with an element of unjustified discrimination has not been subject to criticism. See generally Dinwoodie & Dreyfuss *Diversifying Without Discrimination*, *supra* note 67; Howse, *supra* note 67 (criticizing the interpretation of "discrimination" while supporting a more nuanced approach). In our opinion, the ordinary meaning of discrimination suggested by the panel is acceptable; however, it is our belief that the panel failed to properly analyze the issues under the VCLT and incorrectly imposed the discrimination obligation on the exceptions in Article 30 and 31.

treatment qualify as unjustified discrimination?

The nature of any obligation beneath the word can only be determined if the ordinary meaning above tests its mettle against the context of the words and in line with the object and purpose of the agreement between parties. We reiterate at this point that this is necessary to achieve the requisite holistic interpretation of the agreement discussed above. Therefore, having come to an ordinary meaning of the relevant provision, we now seek agreement as to the meaning from the context.

Context

The arguments against local working requirements are held in place by the strength of the obligation in Article 27 of the TRIPS Agreement. This article is sought to be enforced as an absolute bar against acts by a member of TRIPS that discriminate on the basis of, among other things, whether products are imported or locally produced. But is there such a thing as an absolute clause?¹¹¹

The history of treaty interpretation under the VCLT and the Appellate Body gives a clear negative answer to this proposition, in favor of an interpretation in line with the treaty *as a whole*.¹¹² For instance, the panel in *Canada—Pharmaceutical Patents* answered this question specifically in the context of Article 27:

[T]he context to which the Panel may have recourse for purposes of interpretation of specific TRIPS provisions, in this case Articles 27 and 28, is not restricted to the text, Preamble and Annexes of the TRIPS Agreement itself, but also includes the provisions of the international instruments on intellectual property incorporated into the TRIPS Agreement, as well as any agreement between the parties relating to these agreements within the meaning of Article 31(2) of the Vienna Convention on the Law of Treaties.¹¹³

111. See Champ & Attaran, *supra* note 20, at 368.

112. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 268, WT/DS350/AB/R (Feb. 4, 2009) (“The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole”). See also Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, ¶ 151, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008) (stating that the context includes all of the text of the treaty (i.e., the WTO Agreement) and is relevant for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue).

113. *Canada—Patent Protection of Pharmaceutical Products*, ¶ 7.14,

Even though the panel used permissive language such as “may have recourse to” above, the Appellate Body has recently stated that “a treaty interpreter *is required to have recourse to context* and object and purpose to elucidate the relevant meaning of the word or term.”¹¹⁴ Accordingly, we must include in our ordinary meaning of Article 27 consideration of a key provision of TRIPS in any dispute regarding local working requirements: Article 2 of the TRIPS Agreement, which enlivens the obligations owed by a state under the Paris Convention.¹¹⁵ As we have already established above, Article 2 brings Article 5(A)(2) of the Paris Convention into the fold. Moreover, it must be remembered that the Appellate Body has extended the non-derogation of the Paris Convention obligations as per Article 2 of the TRIPS Agreement to rights granted under the Paris Convention.¹¹⁶

This incorporation of most of the substantive parts of the Paris Convention into the TRIPS Agreement via Article 2 also addresses the issue of the two agreements being distinct agreements. As there is no hierarchy of norms in international law, the incompatibility of treaties is usually resolved, in line with the contractual freedom of states, by established rules of international law such as *lex specialis derogat legi generali* (the special prevails over general legislation) or *lex posterior legi priori* (later legislation supersedes earlier legislation).¹¹⁷

In our case the later timing of the TRIPS Agreement, or the specificity of the Paris Convention,¹¹⁸ cannot be determinative because the two principles mentioned above (*lex specialis* and *lex posterior*) are resigned to the position of residuary rules, which take a backseat to the terms of the treaty—more specifically the terms of the treaty that define the relationship

WT/DS114/R.

114. *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 268, WT/DS350/AB/R (emphasis added). This is compatible with the use of the word “shall” in Article 31(1) and (2) of the VCLT.

115. TRIPS *supra* note 5, art. 2.

116. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 136, WT/DS176/AB/R (Jan. 2, 2002).

117. Weiss, *supra* note 78, at 204. See PAUWELYN, *supra* note 33, at 96 (discussing that a later statement must logically prevail over the prior). These rules find codification in Article 30 of the VCLT, which has not been formally inducted into the applicable rules of customary law for WTO dispute settlement. Panels and the Appellate Body, however, have not hesitated in referring to them when they have become relevant.

118. Arguably, the Paris Convention deals specifically with patents whereas TRIPS deals with intellectual property in general.

between instruments (i.e., Article 2 of the TRIPS Agreement). Ian Sinclair's authoritative writings on the Vienna Convention, and treaty interpretation in general, clarify this point:

[I]t is clear that the rules laid down in [VCLT] Article 30 are intended to be residuary rules – that is to say, rules which will operate in the absence of express treaty provisions regulating priority. . . . Sir Humphrey Waldock [has] confirmed 'that the rules in paragraphs 3, 4 and 5 were thus designed essentially as residuary rules'.¹¹⁹

The panel in *India—Pharmaceuticals* referred to Sinclair's pronouncement in confirming that for the purposes of the WTO DSB, "If the treaty provides for the relationship between the two 'conflicting' rules, the principle [*lex specialis*] no longer applies."¹²⁰ In that case, since a footnote to the 1994 Understanding on Balance-of-Payments Provisions provided for the application of the DSU to balance-of-payments matters, the residuary rules of treaty interpretation could not be called upon to resolve any conflict.¹²¹

The TRIPS Agreement also makes such a provision for the relationship between the TRIPS Agreement and the incorporated Paris Convention. Article 2 of TRIPS explicitly imposes those older obligations on the future actions of the parties under the TRIPS Agreement: "Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention . . ." ¹²²

Therefore, we include, in our consideration of the scope of the obligation in Article 27, the provision in Article 5 of the Paris Convention as a non-derogable obligation imposed on each state party other than the one who exercises "the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work."¹²³ It is not insignificant that members

119. SINCLAIR, *supra* note 92, at 97.

120. Panel Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 4.20, WT/DS90/R (Apr. 6, 1999). In that dispute the panel was only concerned with the *lex specialis* principle, but with the pronouncement by Sinclair that the panel relied upon covered *lex posterior* as well, it can be presumed that the residual characteristic applies to the *lex posterior* principle as well.

121. *Id.*

122. TRIPS, *supra* note 5, art. 2.

123. Paris Convention, *supra* note 20, art. 5(A). See *supra* Part III.B for the "right" of one member being construed as an obligation on the other TRIPS members

decided to actively incorporate this Paris Convention remedy against abuse of patents into the TRIPS Agreement. As we will discuss below, not only is this inclusion important from a contextual perspective, but members also reinforced their distaste for abuse in the object and purpose of TRIPS.

The preamble to TRIPS, included as context by Article 31(2) of the VCLT, further encourages an element of compromise in the construction of obligations in the Agreement. The significance attached to preamble language by the Appellate Body takes root in the opinion that the preamble is an indication of *intention* visible in the text of an Agreement: “[As] preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*”¹²⁴

In the preamble to TRIPS, members preface the agreement to the terms of TRIPS with several points disclosing the vision parties had for the rights and obligations to follow. Relevantly, in coming to an agreement, members “took into account the need to promote effective and adequate protection of intellectual property rights”; recognized “the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives”; and articulated a desire to “establish a mutually supportive relationship between the WTO and World Intellectual Property Organization.”¹²⁵

In light of these words, it is difficult to reason that such an interpretation of the obligation in Article 27 be adopted which ignores a WIPO right explicitly incorporated into the TRIPS Agreement and reduces the public policy space for a member country (most likely a developing country) to implement an intellectual property regime that balances its obligations under the WTO structure with its developmental and technological needs. Local working requirements, as discussed above, are rationalized as a tool available to states to mitigate the demands of intellectual property laws on public interests, which

to grant that right when it is exercised. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2 2002).

124. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 153, WT/DS58/AB/R (Oct. 12, 1998). See also Panel Report, *Egypt—Definitive Anti-Dumping Measures on Steel Rebar From Turkey*, ¶ 7.154, WT/DS211/R (Aug. 8, 2002).

125. TRIPS, *supra* note 5, pmb1.

as the TRIPS preamble recognizes are private rights.

The Doha Declaration

Under Article 31(2) of the VCLT, the treaty interpreter is also required to consider any agreement or instrument relating to the treaty which was made between all the parties in connection with the conclusion of the treaty. We propose that the Doha Declaration is at the very least an instrument which provides the relevant context influencing any reading of Article 27.¹²⁶ Adopted during the WTO Ministerial Conference in Qatar in November 2001, the Declaration on the TRIPS Agreement and Public Health addressed the impact that the international intellectual property regime was having on the public health of several member states.

The membership of the WTO thus declared that the TRIPS 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.”¹²⁷ Further, it reinforced the public space available to members suffering a public health crisis and reinforced some of the flexibilities contained in the TRIPS Agreement (such as the granting of compulsory licenses).

The question then becomes whether the Declaration, made four months *after* the United States and Brazil mutually agreed to a solution to the United States complaint against local working requirements in Brazilian patent law, would make a difference if it was made before the complaint was brought to the WTO. More specifically, how would a WTO panel or the Appellate Body now respond, with the Doha Declaration in the background, to a public health related complaint (such as one challenging the validity of working requirements) filed under the TRIPS Agreement?

The answer is at present uncertain. Without a doubt, the Doha Declaration remains a diplomatic victory for the developing world. However, the legal weight of the Doha Declaration is unclear. Some members, notably the United States, believe that the Declaration has no legal authority

126. See Lucyk, *supra* note 7, at 196–99 (describing the importance of the Doha Declaration and the ways in which a WTO body may use it).

127. Doha Declaration on the TRIPS Agreement and Public Health, ¶ 4, Nov. 14, 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755.

because it is a merely a diplomatic step.¹²⁸ Academic commentary is divided, but some see the Doha Declaration as being of little definitive legal value:

It should be noted that ministerial declarations within the WTO are not legally binding in the dispute resolution process, and in the event of a dispute the language of the treaties as approved by national governments would prevail over any contradictory declaration by the ministers. But the Doha Declaration is primarily interpretive of imprecise obligations in TRIPS, and does not appear to contradict any textual provision. As such, it is likely to be persuasive authority in the interpretation of TRIPS in the event of a dispute.¹²⁹

Arguably, however, the Doha Declaration is more than merely persuasive and would affect the way a panel or the Appellate Body decides such a case.¹³⁰ We support the view that while the Declaration is not technically an authoritative interpretation under Article IX(2) of the Marrakesh Agreement,¹³¹ it has the *look* and *effect* of an authoritative interpretation.¹³² Moreover, the Doha Declaration was delivered

128. USTR Fact Sheet Summarizing Results from WTO Doha Meeting, (Nov. 15, 2001), http://www.usembassy.it/file2001_11/alia/a1111516.htm (describing the TRIPS declaration as a “political declaration”).

129. Sykes, *supra* note 4, at 54.

130. See Valach, *supra* note 72, at 157 (describing the importance placed on the issue by the members of the WTO, and the subsequent weight of the declaration).

131. DSU, *supra* note 77, art. IX(2) (establishing procedure for adoption of authoritative interpretations of the agreement).

132. For further discussion, see World Health Org., *Implications of the Doha Declaration on the TRIPS Agreement and Public Health*, WHO/EDM/PAR/2002.3 (June, 2002) (prepared by Carlos M. Correa)

[G]iven the content and mode of approval of the Doha Declaration, it can be argued that it has the same *effects* as an authoritative interpretation. In particular, in providing an agreed understanding on certain aspects of the TRIPS Agreement in paragraph 5, Members have created a binding precedent for future panels and Appellate Body reports.

Id. See also Claus-Dieter Ehlenmann & Lothar Ehring, *The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT'L ECON. L. 803, 816–17 (2005) (“[A]n authoritative interpretation would not have been suitable, given that this Declaration contained statements of a political nature, confirmed (or even merely referred to) existing provisions, and gave a *mandate* for legislative action.”). However, for an argument supporting the position that the Declaration is an interpretation under Article IX(2), see HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES 279–82 (2007). For more detailed discussion on the legal status of the Doha Declaration, see Gathii, *supra* note 128. To date, no panel or Appellate Body has had the opportunity to discuss the status of the Doha Declaration; however, previous panels and the Appellate Body have confirmed the exclusive ability of the Ministerial Conference and the General Council to adopt interpretations. See Appellate Body Report, *United*

by the body with the *exclusive* authority to issue such interpretations. There are also arguments supporting the view that the Doha Declaration was “intended as a binding waiver [paragraphs 3 and 4 of Article IX of the Marrakesh Agreement] of certain TRIPS obligations. . . .”¹³³

Even if the Declaration is to be viewed merely as a diplomatic statement carrying no legal weight, the Appellate Body would undoubtedly find it necessary to consider and discuss the impact of the Declaration. Moreover, even if such discussion is limited to the Declaration forming part of the *context* in which the obligation against discrimination exists, it demonstrates that Article 27 exists as a mere part of an agreement that is balanced by enforceable flexibility.

The obligation in Article 27 operates in an environment where the other provisions of the treaty, the preamble of the treaty, and an instrument completed in relation to the treaty all indicate that the operation of any provision must be sympathetic to the kind of concerns addressed by local working requirements. When viewed in totality, it becomes difficult to conclude that the differential treatment resulting from local working requirements amounts to an unjustified disadvantage (this is especially the case when non-work of a patent has significant public health consequences).

Pursuant to the foregoing discussion, we conclude that the ordinary meaning of the term “discrimination,” in context, casts serious doubt on the proposition that local working requirements breach Article 27. Although the imposition of local working requirements may result in differential treatment, the context of Article 27 precludes a finding of unjustified discrimination.

We now proceed to the impact that the object and purpose of an agreement can have on a WTO panel or Appellate Body’s interpretation.

States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R (Apr. 25, 1997) at 17-20; Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) at 12-15.

133. Mitchell and Voon, *supra* note 88, at 581. The Marrakesh Agreement states, “In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements” DSU *supra* note 77, art. IX(3).

2 Object and Purpose

Earlier in Part IV.A, we looked at the complication that this element of the teleological interpretation brought to the decision-makers in the WTO. We now know that, uneasy or not, a compromise must be reached between the textualism demanded from a treaty interpreter and the “object and purpose” as necessary considerations in interpretation.¹³⁴ This was cemented in the Doha Declaration, which reinforced the flexibilities available under TRIPS for members seeking to address public health issues: “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.”¹³⁵

These objectives and principles are as follows:

TRIPS Article 7 Objectives:

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

TRIPS Article 8 Principles:

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 intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.¹³⁶

It is worth mentioning that the Appellate Body has held that in an interpretation under the VCLT, the object and

134. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 268, WT/DS350/AB/R (Feb. 4, 2009) (“[A] treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term.”).

135. Doha Declaration on the TRIPS Agreement and Public Health, *supra* note 127, ¶ 5(a).

136. TRIPS, *supra* note 5, arts. 7–8.

purpose to be considered is that of the *entire* treaty and not just the object and purpose of a particular provision:¹³⁷

[W]e caution against interpreting WTO law in the light of the purported “object and purpose” of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty on the whole. Even if, *arguendo*, one could rely on the specific “object and purpose” of heading 02.10 of the EC Schedule in isolation, we would share the Panel’s view that “one Member’s unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis” for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the Vienna Convention must focus on ascertaining the common intentions of the parties.¹³⁸

This interpretation further underpins the dismissal of the idea that a provision in TRIPS or another WTO agreement can be absolute or untempered by its context.

The question of *how* the treaty interpreter is expected to maintain an allegiance to the textual approach of interpretation while necessarily considering the teleological element of object and purpose must now be addressed. As discussed earlier, it is not an exercise in ticking boxes in order to reach a validly considered interpretation. Rather it is an exercise in holistic interpretation to give effect to the requirement regarding object and purpose. We therefore start with the ordinary meaning in context. Once this meaning is understood, the interpreter must connect that meaning to the case at hand in order to reach the conclusion. The role of the object and purpose is the third point of reference which proves the conclusion. This *secondary* nature of object and purpose clears the way for a complete, and yet textual, analysis in treaty interpretation.¹³⁹

137. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 239, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005).

138. *Id.*

139. Sinclair, who participated in the Vienna Conference where the VCLT was finalized, noted:

[T]he object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. The initial search is for the ‘ordinary meaning’ to be given to the terms of the treaty in their ‘context’; it is *in the light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified. . . . A number of authors consider that the search for the object and purpose of a treaty is in reality a search for the common intentions of the parties who drew up the treaty. This approach has certain

We now return to the original meaning, in context, viewed through the prism of object and purpose. We saw above that the obligation against discrimination in Article 27 exists in the context of a right to grant compulsory licenses in cases where the patent was abused by non-work; preambular support for cooperation between WIPO and WTO; and, particularly for patents on pharmaceuticals, the Doha Declaration which allows member states to interpret TRIPS to promote access to medicine, particularly through compulsory licensing. Therefore the second limb of the discrimination obligation in Article 27, unjustified disadvantage, becomes relevant. It demands more than the differential treatment (the first limb of the discrimination obligation) that results from local working requirements. Having examined the ordinary meaning in context, the conclusion we reach is that such unjustified disadvantage is difficult to find in circumstances where states call upon local working requirements. Put simply, the context *justifies* the treatment.

Our conclusion is supported by the objectives and principles of the TRIPS Agreement, as articulated in Articles 7 and 8. The objectives seek a balance between the intellectual property rights and obligations, and particularly mention the objective of intellectual property rights to promote “technological innovation and the transfer and dissemination of technology.”¹⁴⁰ This summarizes the rationale of local working requirements. The principles of TRIPS, equivalent to the purpose of the agreement, voice flexibility for members seeking to protect public health and nutrition and promoting technological development. Such flexibility for the protection of public health echoes key concerns of countries seeking to utilize local working requirements.

A balance is required under the ordinary meaning in context, in line with the object and purpose. Allowing the absolute operation of the obligation under Article 27 will impinge on the balance that is sought by the TRIPS Agreement and lead to a conclusion that ignores the context of the provision and the guidance of object and purpose.¹⁴¹ Such a reading will

dangers. . . . The text is the *expression* of the intention of the parties; and it is to that expression of intent that one must first look.

SINCLAIR, *supra* note 92, at 130–31 (citations omitted).

140. TRIPS, *supra* note 5, art. 8.

141. Commentators have criticized the panel in *Canada—Pharmaceutical Patents* for failing to provide sufficient interpretive weight to Articles 7 and 8 of TRIPS, and instead relying on the negotiating history of the parties. *See generally*

therefore subvert the intention of the parties to the agreement (as articulated in the text of the Agreement).

3. *Conflict Avoidance—Good Faith Interpretation*

The amorphous requirement of good faith in treaty interpretation operates with little guidance. This is possibly indicative of a reluctance in the dispute settlement bodies to police the open ended phrase.¹⁴² However, certain international rules of interpretation, which are not explicitly included in the VCLT armory, are used by the dispute settlement bodies to infuse “good faith” into their deliberation.¹⁴³ These rules also play the additional role of providing a basis for compromise and balance between seemingly conflicting provisions through conflict avoidance.

As a word of caution before continuing onto the rules of interpretation that are used in apparent fulfillment of the good faith requirement, particularly the principle of effectiveness, we note that those rules have been questioned for the broad discretion that they impart to judges. The risk of activism and a teleological reading must be borne when applying these rules too broadly.¹⁴⁴

Dinwoodie & Dreyfuss, *Diversifying without Discrimination*, *supra* note 67; Howse, *supra* note 67.

142. See Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶ 7.64, WT/DS152/R (Dec. 22, 1999) (“It is notoriously difficult, or at least delicate, to construe the requirement of the Vienna Convention that a treaty shall be interpreted in good faith in third party dispute resolution, not least because of the possible imputation of bad faith to one of the parties. We prefer, thus, to consider which interpretation suggests ‘better faith’ and to deal only briefly with this element of interpretation.”); ASIF H. QURESHI, *INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES* 14 (2006).

143. See Lennard, *supra* note 11, at 55.

144. *Id.* at 60 (“Ultimately, the goal of ‘effectiveness’ is one to be sought, but one which will have to be treated with some caution in WTO jurisprudence for an additional reason; if the principle is given too large a scope it can amount to a broad teleological approach, reading things into the treaty that lend an air of neatness and regularity in pursuit of a perceived object and purpose, but do not flow from its terms and do not represent a good faith, fundamentally textual, interpretation.”) (citing *Report of the International Law Commission on the Work of its Eighteen Session*, 2 Y.B. Int’l. Comm’n. 219, U.N. Doc. A/CN.4/SER.A/1966/Add.1); Helge Elisabeth Zeitler, *Good Faith in the WTO Jurisprudence – Necessary Balancing Element or an Open Door to Judicial Activism?*, 8 J. INT’L ECON. L. 721, 729 (2005) (noting that effective interpretation allows for potential judicial activism).

a. Presumption Against Conflict

The presumption against conflict rule is a fairly self-explanatory rule that merely champions the view that “[i]t seems reasonable to start from a general presumption against conflict.”¹⁴⁵ In interpreting treaty provisions, the view to be taken is that unless there is explicit language verifying a deviation in the new legal norm from the existing one, states do not simply “change their minds.”¹⁴⁶

This presumption has been applied by the panel in *US—Copyright Act*, a dispute with facts similar to the question of the local working requirements to the extent that it involved the interaction of provisions in TRIPS and a WIPO treaty. We quote the panel here and note that each of the statements made regarding the Berne Convention’s place in the multilateral copyright regime also holds true for the Paris Convention (a WIPO treaty) and patent law:

In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection. Most WTO Members are also parties to the Berne Convention. We recall that it is a general principle of interpretation to adopt the meaning that reconciles the texts of different treaties and avoids a conflict between them. Accordingly, *one should avoid interpreting the TRIPS Agreement to mean something different than the Berne Convention except where this is explicitly provided for*. This principle is in conformity with the public international law presumption against conflicts, which has been applied by WTO panels and the Appellate Body in a number of cases.¹⁴⁷

From the perspective of this presumption, in *good faith*, one might suggest that the panel/Appellate Body should focus on the absence of an explicit provision allowing for a divergence in rights or obligations in the newer TRIPS Article 27 from the existing Paris Convention Article 5. However, TRIPS explicitly maintains the applicability of the relevant provision of the Paris Convention. The presumption against conflict thus operates “to avoid interpreting the TRIPS Agreement to mean something different than the [Paris] Convention” since there is no explicit

145. Jenks, *supra* note 41, at 427; *see also* Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 14.28, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) (“[I]n public international law there is a presumption against conflict.”).

146. PAUWELYN, *supra* note 33, at 240.

147. Panel Report, *United States—Section 110(5) of the US Copyright Act*, ¶ 6.66, WT/DS160/R (June 15, 2000) (emphasis added).

provision demanding an incompatible reading of the provisions.¹⁴⁸ Analysis of the presumption would then reveal that the members did not “just change their mind” about the availability of compulsory licenses for non-work of a patent when they agreed to the TRIPS Agreement.

Thus a good faith interpretation, in line with the presumption against conflict, requires us to give due consideration to the *lack* of an *explicit* provision revoking or altering the right in the Paris Convention that allows local working requirements. The presumption against conflict compels the maintenance of that right in Article 5(A)(2) of the Paris Convention, despite the TRIPS obligation of non-discrimination in Article 27.¹⁴⁹

b. *Ut Res Magis Valeat Quam Pereat*

We now move to another general rule of interpretation, the principle of effectiveness, which the panel in *US—Gambling* correlated to the requirement of good faith,¹⁵⁰ and the International Law Commission viewed as the potential embodiment of good faith in the VCLT.¹⁵¹ This principle seems

148. *Id.*

149. See Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (“It does *not*, however, follow that international law prohibits a State . . . in respect of any case . . . in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States . . . and if, as an exception to this general prohibition, it allowed States to do [*the act*] in certain specific cases.”) (emphasis added).

150. Panel Report, *United States—Measures Affecting The Cross-Border Supply of Gambling and Betting Services*, ¶ 6.49, WT/DS285/R (Nov. 24, 2004) (“The requirement that a treaty be interpreted in ‘good faith’ can be correlated with the principle of ‘effective treaty interpretation’,[sic] according to which all terms of a treaty must be given a meaning.”); see also Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 271, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003); Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act Of 1998*, ¶ 338, WT/DS176/AB/R (Jan. 2, 2002); Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WT/DS98/R (June 21, 1999); Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶¶ 81, 95, WT/DS56/AB/R (Mar. 27, 1998); Appellate Body Report, *United States—Restrictions on Imports of Cotton and Man-made Fibre Underwear*, ¶ 15, WT/DS24/AB/R (Feb. 10, 1997); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages II*, 12, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

151. *Report of the International Law Commission on the Work of its Eighteen Session*, 2 Y.B. Int’l. Comm’n. 219, U.N. Doc. A/CN.4/SER.A/1966/Add.1; see also *Japan—Taxes on Alcoholic Beverages II*, 11 n.21, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (referring to the International Law Commission Commentary: “When a treaty is open to two interpretations one of which does and

to be the means for the implementation of the presumption against conflict; the step to be taken once the treaty interpreter accepts the responsibility of that presumption. The Appellate Body in *US—Gasoline* understood the principle to prescribe “that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹⁵²

The good faith interpretation in line with this principle would be supported by the move towards a holistic interpretation (see Part IV.A) as it attempts to avoid conflict between provisions by preferring the interpretation that gives effect to all terms of the treaty. In this way, the principle of effectiveness also acts as a boundary to the presumption against conflict, i.e., “if a harmonious reading of the two norms is not feasible within the realm of treaty interpretation, the presumption must be seen as rebutted and the existence of conflict acknowledged.”¹⁵³

This principle provides an interesting perspective for local working requirements. In the absence of a provision allowing for an exception from the obligations contained in Article 27, it can be argued that choosing to honor the right in Article 2 (incorporating Article 5 of the Paris Convention) reduces the effect granted to an obligation Article 27.

In addressing this argument, we must first consider whether the discrimination obligation contained in Article 27, construed through ordinary meaning in context, is offended by local working requirements. From the discussion above it is apparent that the TRIPS Agreement contains several flexibilities that enable members to address public health issues. As the flexibilities built into the Agreement are no doubt justified, it is doubtful whether the second limb of the ordinary meaning of discrimination—unjustified disadvantage—can be met. This added limb in the construction of the word discrimination rebuts the argument of redundancy by limiting the intended operation of Article 27:

On closer analysis, it is not true that Article 27(1) must be set at

the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”).

152. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 21, WT/DS2/AB/R (Apr. 29, 1996).

153. PAUWELYN, *supra* note 33, at 251.

naught and reduced to “redundancy or inutility”. . . . [D]iscrimination, which is prohibited, stands in distinction to differential treatment, which is not. Rather, discrimination in law ordinarily consists of the *subset* of differential treatment that is ‘unjustified’ or arbitrary (i.e. a difference maintained without relevant reasons).¹⁵⁴

We accept that the requirement to interpret the treaty to satisfy good faith in interpretation does not allow one to ignore provisions in a treaty. However, strengthening provisions beyond their intended operation, as is the case for Article 27 and local working requirements, would subvert the requirement of good faith under the guise of giving full effect to a particular provision.

c. In Dubio Mutius

We now briefly discuss the conflict avoidance principle of *in dubio mutius*, which is properly characterized as a principle of supplementary interpretation rather than a principle of good faith. The place of the supplementary materials, according to Article 32, is strictly secondary and limited to circumstances where applying Article 31 of the VCLT yields an interpretation where terms remain ambiguous or obscure, or the result reached is manifestly absurd or unreasonable. We do not believe that the result in the situation of local working requirements yields such a manifestly absurd or unreasonable result, and it is for this reason that we do not consider a full exploration of interpretation in line with supplementary means to be necessary in this paper. However, *in dubio mutius* is a principle directly relevant to the local working requirements problem and is therefore discussed here.

The Appellate Body in *EC—Hormones* characterized the principle as follows: “We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating

154. Champ & Attaran, *supra* note 21, at 389. We also note that although there is no specific provision creating an exception for local working requirements in the TRIPS Agreement, other than in Article 5A of the Paris Convention, as incorporated into TRIPS by Article 2, Article 30 TRIPS, titled “Exceptions to Rights Conferred,” is a general exception. Given the support for local working requirements under the flexibilities built into the TRIPS Agreement, Article 30 as a general exception is likely capable of carving out the right in Article 5A of the Paris Convention as a “reasonable” reduction in the effect given to Article 27. *See, e.g.*, Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, WT/DS114/R, (Mar. 17, 2000).

conformity or compliance with such standards, guidelines and recommendations.”¹⁵⁵

The public policy space that local working requirements seek to protect for states is encapsulated as a right in Article 2 (in conjunction with Article 5 of the Paris Convention). Article 27 on the other hand has the opposite intention of placing an obligation on the state. In line with *in dubio mitius*, the nature of the obligation in Article 27, to the extent that there is an ambiguity, will be read down to prefer the less onerous interpretation of the treaty. As discussed above, the ordinary meaning of Article 27 guides one to an interpretation where the term “discrimination” requires more than mere differential treatment, it requires something more pejorative.

As confirmed by the process of treaty interpretation above, this less onerous interpretation also benefits from the *in dubio mitius* principle.¹⁵⁶ With this confirmation from a principle of supplementary interpretation, we complete our consideration of treaty interpretation. It reinforces the outcome achieved from the analysis of treaty interpretation, primary interpretation in Article 31 of the VCLT and hints that the sought “solution” to the problem may be nigh.

B. DOES “THE ONE” EXIST?

The challenge that the Appellate Body has set for interpreting WTO Agreements is to find the one proper meaning of the treaty provisions in question—the one meaning which is at once at harmony with each of the other terms of the treaty,

155. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 64 n. 154, WT/DS26/AB/R, WT/DS48/AB/R, (Jan. 16, 1998). The interpretative principle of *in dubio mitius*, widely recognized in international law as a “supplementary means of interpretation,” has been expressed in the following terms:

The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.

Id.; OPPENHEIM'S INTERNATIONAL LAW 1278 (Robert. Jennings & Arthur Watts eds., 9th ed. vol. I, 1992).

156. We note here that parties, especially respondents, are likely to treat this principle with caution given that narrowing obligations for the benefit of a particular situation may work against their interests in the future when they seek to enforce a different obligation.

the context of the provisions, and the object and purpose of the treaty.¹⁵⁷ This removes the possibility of selecting between several plausible, competing interpretations and instead requires the interpreter to embark on the search for “the one.”

Our examination of the issues indicates that it is not possible under a VCLT analysis to interpret local working requirements as violating the discrimination provision of Article 27 of the TRIPS Agreement. Is it then a possibility that the rights in Article 2 of TRIPS are superimposed on the obligation in Article 27? Or is it necessary to accept that the interpretive conflict avoidance is insufficient to avoid a genuine conflict between the rights in Article 5(A) Paris Convention and TRIPS Article 27, in which case “the one” might not exist?

We consider these possibilities because it is important to remain cognizant of the limits of treaty interpretation in that it “will not suffice to reconcile clearly irreconcilable provision . . . [it] may eliminate certain potential conflicts; it cannot eliminate the problem of conflict.”¹⁵⁸ At the same time, the DSU has been read such that the Appellate Body is not at liberty to “avoid making a legal judgment by seeking sanctuary in *non liquet*.”¹⁵⁹

The Appellate Body has noted that treaty interpretation cannot go beyond or against the *clear* meaning of provisions in a treaty; in other words, it cannot extend to creating new rules.¹⁶⁰ Pauwelyn states that in order for treaty interpretation to have a role in coming to a resolution the provisions must be capable of being interpreted in reference to each other:

[F]or a WTO rule to be interpreted with reference to another, allegedly conflicting rule the WTO provision must, first of all, include terms that are broad and ambiguous enough to allow the input of other rules. In addition, the other rule must say something about what the WTO term should mean, that is there must be a hook up with the WTO term for other rule to impart meaning in the process of interpretation. The

157. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 268, WT/DS350/AB/R (Feb. 4, 2009).

158. Jenks, *supra* note 41, at 429.

159. Bacchus, *supra* note 6, at 507.

160. Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, ¶ 92, WT/DS165/AB/R (Dec. 11, 2000) (“Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.”); *see also* Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 19, WT/DS33/AB/R (May 23, 1997).

other rule, must in other words, be relevant to the WTO rule.¹⁶¹

Interestingly, such a hook-up exists in the case of local working requirements in the form of Article 2.2 of the TRIPS Agreement. The right of a state to impose local working requirements sits as a non-derogable obligation,¹⁶² notwithstanding certain provisions of the TRIPS Agreement.¹⁶³ The relationship set out in the TRIPS Agreement (that the relevant provisions of the Paris Convention are both rights and obligations in the TRIPS Agreement) removes the escape route of a genuine conflict unsolvable by treaty interpretation. Therefore we can search for “the one” through the process of treaty interpretation followed above.

The process of treaty interpretation leads us to conclude that as a matter of law Article 27 is not exclusive or inviolate. It also demonstrates that local working requirements are not inconsistent with the TRIPS Agreement. This is an important result, because if local working requirements were deemed to violate Article 27, it would be incumbent upon the respondent to prove that an exception existed.¹⁶⁴ As it stands, however, the burden of proof is on the complainant to demonstrate the illegality of local working requirements.¹⁶⁵ In order to do so, the complainant must demonstrate that the context of the provision

161. PAUWELYN, *supra* note 33, at 245.

162. See Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 136, WT/DS176/AB/R (Jan. 2, 2002) (“[A]dditional rights that WTO Members are obliged to confer on that applicant under [the Paris Convention].”) (emphasis added).

163. TRIPS, *supra* note 5, art. 2.2 (“Nothing in Parts I to IV of this Agreement [i.e., including Article 27 TRIPS Agreement] shall derogate from existing obligations that Members may have to each other under the Paris Convention . . .”).

164. See generally SIMON LESTER & BRYAN MERCURIO, *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 191 (2008) (providing information on burden of proof in WTO dispute settlement proceedings); WorldTradeLaw.net, Case Law Index, <http://www.worldtradelaw.net/dsc/wtoindex.htm#burden> (subscription required) (containing references to all WTO disputes where burden of proof was an issue); see also Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶ 7.14, WT/DS152/R (Dec. 22, 1999); Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 9.57, WT/DS34/R (May 31, 1999).

165. Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, ¶ 9, WT/DS26/ARB (July 12, 1999) (“WTO Members, as sovereign entities, can be presumed to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency.”) (emphasis added). See also Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement, Who bears the Burden?*, 1 J. INT'L ECON. L. 227 (1998).

(particularly the Doha Declaration and the explicitly incorporated Paris Convention right in favor of local working requirements), the object and purpose of the agreement and principles of good faith, are all insufficient in establishing that the pejorative connotations of discrimination do not apply.

Based on the analysis presented in this Article, it seems highly unlikely that a complainant can meet this burden; and thus, “the one” is revealed. The obligation in Article 27 must be read in conjunction with Article 2.2 (incorporating Article 5(A)(2) of the Paris Convention) and the Doha Declaration. When viewed in totality, it appears the only way in which a complainant can meet its burden is by applying the term “discrimination” to a justifiable exercise of an incorporated right. Such an application would be nonsensical. Thus, “the one” remains—Article 2.2, in conjunction with Article 5(A)(2) of the Paris Convention, which now stands without a competing provision.

V. CONCLUSION

Under Article 5(A)(2) of the Paris Convention, the legality of working requirements is beyond doubt. The drafters could have chosen to exclude Article 5(A)(2) for the incorporation provision of Article 2 of the TRIPS Agreement. Such an exclusion would have considerably simplified the issue—working requirements would very likely be deemed to be inconsistent with TRIPS Article 27, and an analysis under the general exceptions provision of Article 30 would inevitably be called upon to provide a solution.

Such an analysis, however, is unnecessary as the drafters did incorporate Article 5(A)(2) into the TRIPS Agreement. At this stage, it simply does not matter whether the incorporation was intentional, a mistake, or the product of oversight.¹⁶⁶ The fact remains that the TRIPS Agreement incorporates two seemingly contradictory provisions. Given the importance of working requirements to public health efforts in the developing world, it is surprising that their legality remains uncertain and

166. The wording of Article 27 was in fact heavily negotiated during the Uruguay Round, with the pharmaceutical industry requesting but not obtaining a direct prohibition of local working requirements. The language of the provision, therefore, is a “purposely vague” compromise (to use Professor Correa’s term) which allowed both sides to claim victory but ultimately left the true meaning unresolved. See CORREA, *supra* note 10.

in flux almost fifteen years since the advent of the TRIPS Agreement.

This Article attempts to resolve the confusion through an analysis of the principles of treaty interpretation that guide the dispute settlement mechanism of the WTO. In so doing, we conclude that local working requirements are consistent with the TRIPS Agreement. This conclusion is reached through a comprehensive evaluation of the issue under the various elements of Article 31 of the Vienna Convention on the Law of Treaties. When viewed holistically, it becomes clear that the context of the provisions in the TRIPS Agreement taken together with the subsequently negotiated Doha Declaration, the object and purpose of the TRIPS Agreement, and the principles of good faith point to "the one." Domestic legislation providing for local working requirements does not unjustifiably discriminate against other members in violation of Article 27 of the TRIPS Agreement.