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Intellectual Property, Public Health and Tobacco: a new orientation for developing countries at the WTO?

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Abstract: This paper looks at the relationship between trade, intellectual property and public health, within the specific context of the World Trade Organization (WTO) and, more particularly, its Agreement on Trade Related Aspects of Intellectual Property (TRIPS). From as early as the Uruguay Round (1986-1994), developed countries (most notably the United States) sought to strengthen the international regime for intellectual property, which eventually materialized in the form of TRIPS. This process, however, was thoroughly opposed by developing countries, who argued that TRIPS curtailed their policy options for protecting and promoting public health and led further developments on the topic within the WTO. Strangely enough, when Australia decided to enact plain packaging legislation aimed at curbing tobacco consumption in 2011, five developing countries – Cuba, the Dominican Republic, Honduras, Indonesia and Ukraine – were the first to oppose the measure, under the claim that it violated TRIPS. The paper focuses on this incongruence in developing countries' stance. To that end, we will first discuss the concept of intellectual property and TRIPS' negotiating history. Going forward, we analyze TRIPS Agreement's provisions related to public health and how their interpretation has been developing at the WTO, with a focus on developing countries' demands. Later, we contextualize the global epidemic of tobacco, Australia's plain packaging legislation and the WTO disputes, following which we will strive to understand what has led the complainants to challenge this measure. The research showed a strong correlation between transnational tobacco companies and the WTO case: they have challenged the Australian Act in two other fora and effectively paid the costs for three of the disputes; furthermore, analysis of the macroeconomic indicators related to the tobacco economy (sales, taxes, exports etc.) in those territories demonstrated that complainant countries hold a relationship of interdependence with tobacco corporations, with the exception of Ukraine –which at its turn is consistent with its decision to withdraw from the dispute.

Keywords: Intellectual Property; Public Health; World Trade Organization; Developing Countries; Tobacco Plain Packaging

Resumo: Este artigo analisa a relação entre comércio internacional, propriedade intelectual e saúde pública, no contexto específico da Organização Mundial do Comércio (OMC) e, mais particularmente, de seu Acordo sobre Aspectos dos Direitos de Propriedade Intelectual Relacionados ao Comércio (TRIPS). Desde a Rodada Uruguai (1986-1994), os países desenvolvidos (principalmente os Estados Unidos) procuraram fortalecer o regime internacional de propriedade intelectual, o que acabou se concretizando na forma do TRIPS. Esse processo, no entanto, foi amplamente contestado pelos países em desenvolvimento, que argumentaram que o TRIPS restringia suas opções em termos de políticas públicas para

proteger e promover a saúde pública, liderando também outras discussões sobre o tópico na OMC. Curiosamente, quando a Austrália decidiu promulgar em 2011 uma legislação determinando embalagens genéricas para produtos de tabaco, de forma a reduzir seu consumo, cinco países em desenvolvimento – Cuba, República Dominicana, Honduras, Indonésia e Ucrânia – foram os primeiros a se opor à medida, alegando que ela violava o TRIPS. O artigo explora essa incongruência na posição dos países em desenvolvimento. Para tanto, discutiremos primeiro o conceito de propriedade intelectual e o histórico de negociações do TRIPS. Na sequência, analisaremos as disposições do Acordo TRIPS relacionadas à saúde pública e como sua interpretação vem evoluindo na OMC, com foco nas demandas dos países em desenvolvimento. Posteriormente, contextualizaremos a epidemia global do tabaco, a legislação australiana sobre embalagens genéricas e as disputas na OMC, depois do que procuraremos entender o que levou aqueles países a contestar essa medida. A pesquisa mostrou uma correlação forte entre as empresas transnacionais de tabaco e o caso na OMC: elas contestaram a Lei Australiana em outros dois fóruns e efetivamente pagaram os custos de três das disputas; além disso, a análise dos indicadores macroeconômicos relacionados à economia do tabaco (vendas, impostos, exportações etc.) nesses territórios demonstrou que os países queixosos mantêm uma relação de interdependência com as empresas de tabaco, com exceção da Ucrânia – o que, por sua vez, é consistente com sua decisão de se retirar da disputa.

Palavras-chave: Propriedade Intelectual; Saúde Pública; Organização Mundial do Comércio; Países em Desenvolvimento; Embalagens Genéricas para Produtos de Tabaco

1. Introduction

In the contemporary globalized economy, intangible assets that result from intellectual activity (such as knowledge, inventions and symbols) are one of its determining elements (BARBIERI, 2001, p. 108). As a consequence, intellectual property rights (IPRs) have moved to the forefront of global economic policymaking (MASKUS, 2000, p. 1), insofar as they allow their owners to reap the economic benefits of these intangible assets.

But not all is perfect in this equation, as IPRs hold severe implications for public health, such as higher (and often forbidding) prices for health technologies and a lack of research and development (R&D) initiatives for some diseases. To make matters worse, research persistently shows that these problems tend to affect disproportionately developing and least developed countries.

Given that the right to health is a human right of top priority in the global agenda, many countries, international organizations and non-governmental organizations have been placing efforts to understand the relationship between intellectual property and public health, looking to render them compatible. In this work, we will focus on how the World Trade Organization[1] (WTO) has been addressing this relationship in the context of international trade.[2]

In particular, we will look at WTO's Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement). Born from the Uruguay Round (1986-1994), its negotiating history shows that the issue of public health was the subject of opposed views between developed countries on the one side and developing countries on the other. These views have been more or less stable throughout the years, but have experienced a dramatic shift from 2012.

Concerned with the costly and deadly implications of tobacco consumption, Australia was the first country to enact the so-called "plain packaging" legislation, in 2011. This measure, which aimed at discouraging smoking by requiring tobacco products and their retail packaging to appear in a uniform manner, was challenged at the WTO by Ukraine, Honduras, the

[1] The World Trade Organization is an intergovernmental organization created in 1995 by the Marrakech Agreement. It performs three main functions: (i) monitoring international trade and its Members' trade policies; (ii) it serves as a permanent negotiating forum for the improvement of the rules governing the multilateral trade system; and (iii) resolving trade disputes between its Members (BENJAMIN, 2013, p. 31).

[2] Although apparently simple, this choice presumes some abstentions. For the one part, we will not be concerned about how that relationship is addressed in the context of other international organizations, such as the World Health Organization (WHO), the World Intellectual Property Organization (WIPO), or the United Nations' Conference on Trade and Development (UNCTAD). For the other part, we will also refrain from looking at bilateral, regional or multilateral free trade agreements; or at other WTO Agreements beyond TRIPS (although they might be mentioned as applicable).

Dominican Republic, Cuba and Indonesia,[3] who argued that it was in breach of Australia's obligations under the TRIPS Agreements, amongst others.

Although this was not the first time a developed country issued a measure aimed at advancing public health goals, it *was* however the first time developing countries opposed to such a measure, rather opting for claiming their IPRs instead.

In light of the above, this paper is concerned with the question of "why did these developing countries depart from their solid negotiating position that public health concerns take precedence over intellectual property?" Our hypothesis is that they succumbed to the power of the multi-billionaire, transnational tobacco corporations (also referred to herein as Big Tobacco) that are established in the complainants' territories, to which they hold a relationship of interdependence.

To answer this question, we will be working with the concepts of dependence and interdependence, as set forth by Robert Keohane and Joseph Nye[4] (2012). According to the authors, *dependence* is described as "a state of being determined or significantly affected by external forces", whereas *interdependence* is a state of mutual dependence (KEOHANE & NYE, 2012, p. 7). And where dependence is mutual, but not symmetrical, the resulting interdependence can be a source of power – the ability to get others to do something they otherwise would not do (control over resources) or the control over outcomes (KEOHANE & NYE, 2012, p. 10).

At its turn, the issue of corporate power has been developed by Kevin Farnsworth and Chris Holden (2006), who divide it into structural and agency power:

> Corporate structural power operates where governments are constrained to act in ways that safeguard or promote the fundamental needs of business without particular businesses or their collective organisations having to exert agency (i.e. to take explicit action). […] Where structural power is insufficient to protect a corporation's interests, they may turn to agency power. (HOLDEN & LEE, 2009, p. 2)

A key aspect of structural power is that it is directly dependent "on how mobile capital is; the number of alternative investment opportunities open to firms; the relative strength of the economy and the degree to which governments will be prepared to compete to retain present investment or attract new investments" (FARNSWORTH & HOLDEN, 2006, p. 475). As such, we will look at macroeconomic data to try to assert whether Big Tobacco and the complainant countries are interdependent and whether power asymmetries tilt in favour of the former.

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[3] Cases DS434, DS435, DS441, DS458 and DS467.

[4] Keohane and Nye were some of the first authors, back in the 1970s, to call attention to the ability of non-state actors to influence the results of international relations (SARFATI, 2005, p. 17).

The importance of this study derives from its novelty: we have no news that the debate on intellectual property, trade and public health has been regarded from this point of view so far. This is partly due to the novelty of the WTO case, whose proceedings started on 2012 and whose Panel Report was just issued on June 2018. Our objective is to shed light on how this debate has been happening historically at the WTO, how the plain packaging case changed this pattern and why it has done so.

To that end, we will first discuss the concept of intellectual property and how did it come to be a matter of international interest; in particular, we will be looking at the main political issues involved in the TRIPS Agreement's negotiating history and how they came to shape its text. The second section analyses TRIPS Agreement's provisions related to public health and how their implementation has been developing, with a focus on developing countries' experiences. Later, section three will contextualize the tobacco global epidemic, Australia's plain packaging legislation and the WTO dispute settlement cases, following which it will strive to understand what has led the complainants to challenge this measure. We finish by offering a few concluding thoughts and suggestions for further research.

2. Intellectual Property and TRIPS

According to economic theory, goods can be classified with regards to two characteristics: rivalry and excludability. A rival good is one whose consumption by any individual diminishes its availability to others (SHAFFER, 2004, p. 461). At its turn, an excludable good is one whose owner can exclude others from consuming it (JOSEPH, 2011, p. 240). Goods that are simultaneously non-rivalrous and non-excluding fall into the category of public goods.

Public goods have a unique feature that derives from the combination of its two characteristics. Since it is not possible to exclude those who have not purchased the good from consuming it, "there is an incentive for people to become free riders. A free rider is someone who enjoys the benefits of a good but avoids paying for it" (MANKIW, 2020, p. 174). At the same time, "the market will produce only those goods for which the producers who bear the costs can also capture the benefits" (CAPORASO & LEVINE, 2005, p. 93). As a result, public goods tend to be produced in suboptimal quantities.

Creations of the mind, be they technical or aesthetic, are one example of public goods. To make matters worse, these intangible goods are usually easily appropriated and cheaply reproduced, which further hampers the incentives for their production (CIPR, 2002, p. 14).

In order to address those issues, the majority of countries has enacted legislation providing for IPRs – temporary[5], revocable and transferable proprietary rights[6] over intellectual creations (UNSGHLPAM, 2016, p. 20). By granting their owners the power "to prevent others from making unauthorized use of their property for a limited period" (CIPR, 2002, p. 12), IPRs look to make those goods excludable, thereby allowing right holders to secure financial benefit from their commercial exploitation. This, in turn, acts as an incentive for the production of such goods, and society benefits from the increased levels of innovation and creativity.

Although mankind has been exerting its intellectual capacity from time immemorial, it was only after the Industrial Revolution (1760-1840) that IPRs were granted full statutory expression. In this new context of increased technological development and merchandise flows, both nationally and internationally (SILVA, 2018, p. 143), manufacturers sought the legal means to gain control over the production and distribution of their goods (CHAVES *et al.*, 2007, p. 258), causing "patent law [to] spread throughout Europe in the first half of the nineteenth century" (CHADHA, 2014, p. 6).

But this would soon pose a threat to right holders: because IPRs are only valid in the country in which they were granted or recognized, this meant that creations could "be freely counterfeited and plagiarized [elsewhere], to the serious detriment of the right holders" (CNIPA & WIPO, 2019, p. 13). Looking to "simplify practice through international standardization and mutual recognition of rights and duties among nations" (WIPO, 2008, p. 7), countries started entering into international agreements in the various fields of intellectual property – by 1883, there were 69 in place (CHADHA, 2014, p. 6).

The two major initiatives for international harmonization of IPRs were the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works, "each of which establishes a 'Union' of countries which agree to grant to nationals of other countries of the Union the same protection as they grant to their own, as well as to follow certain common rules, standards and practices" (WIPO, 2008, p. 7). The international intellectual property system created by the two Conventions was further expanded during the 20th century through the proliferation of intellectual property treaties, the great majority of which are currently administered by WIPO, a United Nations specialized agency as of 1974.

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[5] Temporality is a unique feature to IPRs. Intellectual creations are only protected "for a limited period of time, beyond which it is no longer protected and falls into the public domain. When an IP right expires, everyone may use it with no restrictions from the right holder" (CNIPA & WIPO, 2019, p. 15).

[6] Property rights relates to disposal of property and concern acts such as ownership, use, sale and access to wealth (CAPORASO & LEVINE, 2005, p. 87).

However, and as knowledge became the principal source of competitive advantage for both companies and countries and one of the fastest-growing sectors in international trade (CIPR, 2002, p. 11), developed countries started voicing concerns over the effectiveness of the protection granted by the two Conventions (BARBIERI, 2001, p. 110; SILVA, 2018, p. 146): despite their harmonizing intent, they still allowed significant autonomy for signatories to decide on which protection regime better serves their social, technological and economic interests (CHAVES *et al.*, 2007, p. 265). This feature, combined with "the absence of a dedicated dispute settlement mechanism, was seen by developed countries as evidence of the precarity and incipience of the [WIPO] system" (SILVA, 2018, p. 146). As a result, these countries pushed for the inclusion of intellectual property into the (stronger) trade regime, in a decades-long process which we analyse next.

2.1. Reaching TRIPS

The current international trade regime traces its origins back to 1944, when States gathered in Bretton Woods (USA) to structure a new global economic order aimed at securing peace, taming economic nationalism and rebuilding the capitalist economy[7] after World War II (BARBIERI & CHAMAS, 2008, p. 3; SELL, 2016, p. 160):

> From that meeting emerged plans for the creation of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) and the creation of an International Trade Organization[8] (ITO). The first two projects had better luck, but the ITO never materialized, fundamentally due to opposition from the US Senate. In its place, the General Agreement on Tariffs and Trade (GATT-1947) provisionally entered into force, [a smaller, less ambitious agreement] whose main objective was to serve as a negotiating forum for the reduction of tariff barriers. (BARRAL, 2007, p. 17)

Despite being a mere international treaty with no legal personality of its own (BARBIERI & CHAMAS, 2008, p. 3), the GATT would eventually function as a *de facto* international organization, fostering "a series of [eight] multilateral trade negotiation rounds, which represented important steps towards organizing international trade" (BERMUDEZ, OLIVEIRA & CHAVES, 2004, p. 27). GATT was undeniably successful in its quest for progressive trade liberalization, which, as Wilkinson (2013, p. 31 *apud* SELL, 2016, p. 161)

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[7] The post-war trade regime was tightly linked to US strategic and normative interests. According to Susan K. Sell (2016, p. 159-160), the US sought to shape a multilateral trade regime that would "help to stem the spread of communism, bolster its allies, promote capitalism and expand markets for its goods", thereby facilitating the spread of its power and influence.

[8] According to Debra Steger (2002, p. 41 *apud* CAVALCANTI JR, 2013, p. 401-402), the ITO was supposed to cover a wide range of economic policies linked to trade, such as labour rights and restrictive business practices.

points out, “concentrated on the opening of industrial and manufactured goods markets while excluding agriculture, textiles and clothing”. Table 1 below summarizes each Round’s key developments.

Table 1 - GATT’s negotiating rounds

Year	Location	Member Countries	Main themes covered
1947	Havana, Cuba Geneva, Switzerland	23	GATT implementation and tariff negotiations
1949	Annecy, France	13	Tariff negotiations
1951	Torquay, England	38	Tariff negotiations
1956	Geneva, Switzerland	26	Tariff negotiations
1960-1961	Geneva, Switzerland (Dillon Round)	26	Tariff negotiations, common foreign tariff, Long-Term Agreement on Common Textiles
1964-1967	Geneva, Switzerland (Kennedy Round)	62	Tariff negotiations, antidumping, "Trade and Development"
1973-1979	Geneva, Switzerland (Tokyo Round)	102	Tariff negotiations, technical barriers, subsidies and countervailing measures, antidumping, import licensing
1986-1994	Punta del Este, Uruguay (Uruguay Round)	123	Creation of the WTO, tariff negotiations, technical barriers, sanitary and phytosanitary measures, intellectual property, services, investments, subsidies and countervailing measures, import licensing, safeguards etc.

Source: Adapted from Barbieri & Chamas (2008, p. 4-5)

Regarding intellectual property, the US pushed for its inclusion into GATT as early as 1947, but this initiative failed due to opposition from several countries (LEAL, SOUZA & SOLAGNA, 2014). The issue was once again brought up during the Tokyo Round, where an Anti-Counterfeiting Code was conceived, but once again failed to be approved (SILVA, 2018, p. 146-147). Intellectual property’s status would finally change in the 1980s:

> […] when various companies established in developing countries made use of schemes such as imitation and piracy in their attempts to technologically catch-up and raise their share in the international market. In response, the large, technologically innovative companies – especially in the software, microelectronics, entertainment, chemical & pharmaceutical and biotechnology industries – from developed countries, notably the United States, having perceived intellectual property as a strategic asset and noting the opportunity losses abroad, initiated a lobbying process and pressed their respective governments to reach, at the international level, adequate levels of protections for their inventions. (SILVA, 2018, p. 146 - free translation)

With the support of the then Economic European Community (EEC), the United States successfully secured the inclusion of IPRs in the Uruguay Round (1986-1994) negotiating

mandate[9], against developing countries' position that this issue should be kept at WIPO (BARBIERI & CHAMAS, 2008, p. 7).

As expected, the United States led the negotiations on this front. In the first months of 1990, the USA, the EEC, Japan, Switzerland and Australia proposed a first draft for the TRIPS Agreement (SILVA, 2018, p. 147). Modelled after US domestic practices, the proposal provided for minimum levels of protection that were to be incorporated into each of the Members' national legislation, strengthened administrative and judicial enforcement of IPRs and, last but not least, made trade sanctions available for violation of IPRs (SILVA, 2018, p. 147; SELL, 2016, p. 163). It was a large contrast to the flexible Paris and Berne Conventions.

Developing countries vigorously opposed the first draft (SELL, 2016, p. 163). Given their low technological capacity as a result of their late industrial development, they were keen defenders of a flexible intellectual property regime, seen as key for their socio-economic and technological development (SILVA, 2018, p. 148; CIPR, 2002, p. 29). To them, stronger IPRs would not only mean "large rent transfers from the developing and least developed to wealthier developed countries" (ABBOTT, 2001, p. 7), but they also "might obstruct development goals and access to important goods such as essential medicines" (NICOL & OWOEYE, 2013, p. 533). In response, they drafted a counterproposal that was "much more limited in scope and with few normative aspects" (SILVA, 2018, p. 148).

Negotiations eventually resulted in the adoption of a full, stand-alone TRIPS Agreement, incorporated as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, a real international organization that would finally substitute GATT. Despite US leadership, there remains little doubt

> […] that the driving force behind the negotiations was OECD country industry groups[10] that perceived a significant and growing threat to their valuable commercial assets represented and protected by IPRs. During the Uruguay Round negotiations, these groups devoted their efforts to assembling data intended to demonstrate the extent of this threat. They also promoted the idea that higher levels of IPRs protection would be in the best interests of the developing countries. (ABBOTT, 1997, p. 43)

[9] The Uruguay mandate was a far-reaching one, comprising both the inclusion of new issues (IPRs, services, investment) and the expansion of the more traditional ones, such as subsidies and safeguards (COZENDEY, 2013, p. 380). It also included agriculture and textile – an old request from developing and least developed countries – and a review of GATT's institutional aspects, including its dispute settlement mechanism (MESQUITA, 2013, p. 44-45).

[10] The Pharmaceutical Research and Manufacturers of America (PhRMA), an industry lobby group, was one of the most active ones, with drug manufacturer Pfizer playing a lead role as chair of the Intellectual Property Rights Committee (AZAM, 2016, p. 9). They had a significant hand in shaping TRIPS' final provisions, managing to secure important concessions such as a 20-year term for patent rights on health technologies (ODELL & SELL, 2003, p. 8; LIM, 2014, p. 175). Pharmaceutical companies were also active after the TRIPS Agreement was concluded, working with US public officials to "educate" foreign governments and to shape WTO panellists' conceptions on the appropriate interpretation of the TRIPS Agreement" (SHAFFER, 2004, p. 476).

A compromise was only possible because "negotiations proceeded as a single undertaking, so that states belonging to or seeking to join the WTO had to accept the entire package of agreements" (SELL, 2016, p. 163), no derogations allowed. Under intense political and economic pressure[11] (ABBOTT, 2001, p. 4; ABBOTT, 2002b, p. 1), developing and least developed countries agreed to a more rigid TRIPS Agreement in exchange for concessions to their agricultural and textile exports (ABBOTT, 1997, p. 41) – an old demand that historically failed to be met.

The adopted TRIPS Agreement establishes minimum (but also higher) standards of protection that must be adopted by each Member (WHO & WTO, 2002, p.39) with regard to seven specific IPRs: copyright and related rights, trademarks[12], geographical indications[13], industrial designs, patents[14], layout-designs (topographies) of integrated circuits and protection of undisclosed information. Perhaps more importantly, it also subjected TRIPS violations to WTO's renewed[15] dispute settlement system. The operation of the Agreement is monitored by the TRIPS Council, a special WTO body that meets regularly in Geneva. These new provisions marked a new era for intellectual property, where

> […] the primary rules governing the protection of intellectual property would be promulgated at the WTO. WIPO would step back into a secondary role. It would serve as an IPRs convention administrator, as a provider of technical assistance, and as a forum for considering secondary rules changes. The center

[11] Outside the WTO, the US had launched unilateral offensive campaigns against countries that did not conform to IPRs patterns it deemed appropriate (BERMUDEZ, OLIVEIRA & CHAVES, 2004, p. 28). In 1988, for example, the US Government, under PhRMA pressure, imposed retaliatory surcharges on Brazilian cellulose, chemical and electronic products to compensate for the fact that Brazilian patent legislation did not cover patenting of pharmaceuticals (BARBIERI & CHAMAS, 2008, p. 7). Against this background, developing countries feared that the failure to conclude the TRIPS Agreement would expose them to unilateral retaliatory sanctions (SILVA, 2018, p. 148-149).

[12] According to TRIPS Article 15.1 (WTO, 2017), trademarks refer to "[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other[s]". Registered trademarks allow their holders to prevent non-authorized third-party use of the sign when this is likely to confuse consumers (ABBOTT, 2002b, p. 48).

[13] Geographical indications are signs that "identify the specific geographical origin of a product, and the associated qualities, reputation or other characteristics. They usually consist of the name of the place of origin" (CIPR, 2002, p. 13). Famous examples include the names "Champagne", "Roquefort", "Cognac", "Habanos" and "Tequila".

[14] Patents concern inventions "in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application" (WTO, 2017, Article 27.1). Once granted, patents allow its owners to prevent third parties from making, using, marketing, selling and importing the invention, for a minimum of 20 years (WTO, 2017, Articles 28.1 and 33). During this period, patent holders are allowed to charge a monopolistic price in order to recoup R&D costs, as well as to earn a profit in the distribution and sale of the invention; in return, they are required to disclose the invention in a manner that enables others to put it into practice, so as to increase the body of knowledge available for further research (WTO, 2017, Article 29.1; CIPR, 2002, p. 12; VELÁSQUEZ, 2017, p. 6-7).

[15] While GATT did have a dispute settlement procedure, its effectiveness was close to zero, as decisions would only be *adopted* if all Members agree to it (negative consensus). Under the WTO, however, the consensus pattern shifted to a positive one: decisions could only be *blocked* if all Members agree to it. This is one of the main features distinguishing the WTO from its predecessor, and a great source for its effectiveness.

> of IPRs power, and the police function, would move across Geneva to the WTO. (ABBOTT, 1997, p. 40)

Despite being bound by costly IP commitments, all was not lost for developing and least developed countries, who still managed to secure important concessions to meet their development concerns, particularly with regard to public health – we discuss this in detail in the following section.

3. The TRIPS Agreement and Public Health

3.1. Public Health in the TRIPS Agreement

The World Health Organization's constitution defines *health* as "a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity" (WHO, 2006, p. 1). The right of everyone to the enjoyment of the highest attainable standard of physical and mental health is also a universal human right[16], "an accepted international development goal and one building block for sustainable economic development" (WHO & WTO, 2002, p. 23).

At its turn, the term *public health* relates to "all organized measures (whether public or private) to prevent disease, promote health, and prolong life of the population as a whole" (WHO & WTO, 2002, p. 23). In an era where global trade and travel facilitates the spread of diseases and infectious agents across borders and where treatments can be taken in or imported from other countries, public health becomes an inherently global challenge (CHADHA, 2014, p. 21).

Public health interacts with intellectual property in a number of ways, the most notorious one of them being the effect of patents on access to health technologies (medicines, devices and equipment). The issue is two-fold: patents affect their affordability when new products are sold at forbidding prices by patent holders seeking to recoup their R&D costs and a return on their investment (JOSEPH, 2011, p. 217). But there also are availability problems, as there may not be any incentives to invest in R&D for drugs that won't return a high profit, such as those related to rare diseases or to those that predominantly affect the poor (UNSGHLPAM, 2016; ABBOTT, 2002a, p. 473).

[16] Article 25 of the 1948 Universal Declaration of Human Rights.

In this context, TRIPS' higher standard of intellectual property protection posed a policy dilemma for developing countries, where a great part of the population is of low income and strongly dependent of public services (BARBIERI & CHAMAS, 2008):

> On the one hand, governments embraced the agreement for the economic benefits of increased trade. On the other, the obligation to grant patents on medicines and other health technologies would affect the availability and affordability of health technologies. This obligation had a clear potential to strain national budgets and to place health technologies out of the reach of those in need. Meanwhile, human rights law – both binding international treaties and national statutes – required governments to progressively realize the highest attainable standard of health. (UNSGHLPAM, 2016, p. 17)

To address these tensions, negotiators included two important safeguards "that could be used by signatories to tailor national intellectual property regimes so that countries could fulfil their human rights and public health obligations" (UNSGHLPAM, 2016, p. 7). The first one of them is contained in Article 8.1, which reads as follows:

> **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. (WTO, 2017)

As a principle to the TRIPS Agreement, Article 8.1 does not have any direct application, but provides guidance on how to interpret its provisions:

> it advises that developing country Members were expected to have the discretion to adopt internal measures they consider necessary to protecting public health. The constraint is that the measures they adopt should not violate the terms of the agreement. This suggests that measures adopted by developing and least developed Members to address public health should be presumed to be consistent with the TRIPS Agreement, and that any Member seeking to challenge the exercise of discretion should bear the burden of proving inconsistency. (ABBOTT, 2001, p. 26)

The other safeguard secured at the Uruguay Round was the inclusion of "flexibilities" in the TRIPS Agreement, that is, "a set of norms, rules and standards that allow variations in the implementation of the TRIPS Agreement obligations, including limits on the exercise of intellectual property rights" (UNSGHLPAM, 2016, p. 18). Among these flexibilities, which in its majority relate to patents, there are seven which concern public health directly, summarized as follows:

Table 2 - Public health-related TRIPS flexibilities

Flexibility	Article	Explanation
Parallel imports	6	Goods legitimately placed on another market may be imported from another market without permission of the right holder because of the exhaustion of the patent holder's exclusive marketing rights.
Patentability criteria	27	WTO Members may develop their own definitions of 'novelty', 'inventive step' and 'industrial application'. They can also refuse to grant patents for certain subject matters, e.g. plants and animals.
General exceptions	30	WTO Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner.
Compulsory licensing	31	A non-voluntary license may be granted by a duly authorized administrative, quasi-judicial or judicial body to a third party to use a patented invention without the consent of the patent holder, subject to the payment of adequate remuneration in the circumstances of each case.
Government use	31	A government authority may decide to use a patent without the consent of the patent holder for public, non-commercial purposes, subject to the payment of adequate remuneration in the circumstances of each case.
Competition-related provisions	8, 31(k), 40	Members may adopt appropriate measures to prevent or remedy anti-competitive practices relating to intellectual property. These include compulsory licenses issued on the basis of anti-competitive conduct and control of anti-competitive licensing.
Transition periods	65, 66	LDCs are not required to provide patent or data protection in general until 1 July 2021 and on pharmaceutical products are not required to grant or enforce patents or data protection until 1 January 2033, or a subsequent date as agreed by WTO Members.

Source: UNSGHLPAM (2016, p. 18)

Article 8.1 and TRIPS flexibilities represent important victories for developing and least developing countries and have a relevant role to play in promoting public health. Nevertheless, the early practice of the TRIPS Agreement in the late 1990s proved to be very challenging for those who wished to make use of the policy options left open by its text (ABBOTT, 2002a, p. 471). We analyse developing countries' experience on the matter in the following section.

3.2. Post-TRIPS developments

The most notorious case involving the intellectual property and public health debate concerned South Africa, who in the late 1990s implemented health care reform aimed at reducing medical apartheid and addressing a growing HIV/AIDS crisis (ABBOTT, 2002b, p. 52). These measures, which employed instruments such as parallel importation and compulsory licenses (AZAM, 2016, p. 16), were the object of a two-front attack to force the Mandela administration to withdraw the legislation.

On February 1998, the South African Pharmaceutical Manufacturers Association and 39 brand-name pharmaceutical companies (mostly multinationals) brought suit against South Africa in the High Court of Pretoria, contending that the new legislation violated the country's obligations under TRIPS and the South African Constitution (BERMUDEZ, OLIVEIRA & CHAVES, 2004, p. 43-44; WHO & WTO, 2002, p. 17). In parallel, the US Government (under corporate pressure from the Big Pharma) and the European Commission threatened "to instate trade sanctions if South Africa did not revoke the Amendment, which damaged the commercial interests of their industries" (BERMUDEZ, OLIVEIRA & CHAVES, 2004, p. 44). Both the US and Pharma eventually withdrew their threats after global public outrage raised their political and reputational costs to unbearable levels (CHADHA, 2014, p. 19; ABBOTT, 2002a, p. 471).

In the lead of the South African case, and again at the behest of US PhRMA (ODELL & SELL, 2003, p. 14), the US went on to initiate a WTO dispute[17] against Brazil's 1996 compulsory licensing legislation, whose "local working" requirement was thought to be a protective industrial policy and thus inconsistent with the TRIPS Agreement (AZAM, 2016, p. 16-17). Brazil countered that the US legislation also had a local working requirement on its own, and thus requested consultations with the US (ODELL & SELL, 2003, p. 14). The disputes were settled on June 2001 after intense international pressure from NGO activists, who argued that the case could negatively impact the continuity of Brazil's (exemplary) National AIDS Program (BERMUDEZ, OLIVEIRA & CHAVES, 2004, p. 47).

Although the US and Pharma attempts at public health policies were consistently unsuccessful,

> […] in large measure the Uruguay Round concerns of the developing countries were being realized. The TRIPS Agreement would in fact be invoked to prevent them from addressing their public health needs. The battles, even if won, were costly and time consuming. Moreover, the highly visible cases were only the tip of an iceberg with a much broader impact. There were many cases in which developing Members changed their policies as a consequence of political and economic pressure asserted on the basis of TRIPS rules. (ABBOTT, 2002a, p. 472)

The difficulties faced by developing countries who wished to make use of TRIPS' public health flexibilities raised the need for clarification on how to interpret and apply them, "so that

[17] Dispute settlement at the WTO consists of three phases: 1) consultations, whereby the parties attempt to settle the dispute through diplomatic channels; 2) if no agreement is found, a panel of three experts is appointed to review the case, issuing a first-level decision (the panel report); 3) should a party disagree with the panel report, it may appeal from the Panel Report to WTO's Appellate Body, who will issue a final decision on the matter (SOTO, 2015, p. 85-86; BARRAL, 2007, p. 48).

they could proceed confidently without the specter of political and legal challenge" (ODELL & SELL, 2003, p. 13). As a result, on April 2001 WTO's African Group[18] requested the TRIPS Council to convene a special session "with a view to clarifying the flexibilities to which members are entitled and, in particular, to establish the relationship between IPRs and access to medicines. The proposal to hold the special session was supported by all members" (WHO, WIPO & WTO, 2012, p. 72).

The TRIPS Council held sessions on June and September 2001. Under the leadership of the African Group, a coalition of 60 developing countries proposed that "Members issue a special declaration on the TRIPS Agreement and access to medicines at the Ministerial Conference in Qatar, affirming that nothing in the TRIPs Agreement should prevent Members from taking measures to protect public health" (WTO, 2001b, p. 4). At their turn, the US and a small group of like-minded countries (Australia, Canada, Japan, and Switzerland) tabled an alternative proposal that was narrower in all respects:

> It restricted the issue to access to medicines, maintaining that language extending to public health in general "could be used to justify broad exemptions to TRIPS rules beyond what is needed to address health emergencies." It referred to medicines needed to treat pandemics such as AIDS, malaria and tuberculosis only and not other diseases. And it would not have widened any exceptions or settled any disputes over the rules' interpretation. (ODELL & SELL, 2003, p. 18)

Given the chasm between the two main negotiating positions, the "drafting task was turned over to the Chair of the General Council, Amb. Stuart Harbison" (ABBOTT, 2002a, p. 486). Failing to craft a compromise, and under the threat from Brazil to reopen the entire Doha package[19], Harbinson sent both negotiating texts to the Doha Ministerial Conference (ODELL & SELL, 2003, p. 19-20).

At the same time, it was made public that both US and Canada had threatened to issue compulsory licenses for Bayer's ciprofloxacin antibiotic to face the anthrax scares that followed the "September 11, 2001" terrorist attacks (CHAVES *et al.*, 2007, p. 261). The public health campaign "capitalized on this hypocrisy and it softened the American stance at Doha" (SELL, 2004, p. 25-26), causing the developing countries' text to be the basis for negotiation.

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[18] The African Group "was a standing organization of 41 WTO member states that had defended common positions in WTO talks since 1999" (ODELL & SELL, 2003, p. 15).

[19] The Doha Round is the WTO's first (and so far only) negotiating round, and focuses largely on developing issues. It was the result of strong pleas by developing countries, who were openly sceptical of the results of the Uruguay Round (SELL, 2016, p. 164) as they had not received the benefits they had been promised for accepting TRIPS and GATS (PICCIOTTO, 2011, p. 313).

Looking to advance other negotiating mandates such as investment and competition, and having failed to open any cracks in the developing countries coalition, developed countries meeting in Doha finally agreed to a meaningful result on the medicines issue, despite objections from their pharmaceutical industry (ABBOTT, 2002a, p. 488; ODELL & SELL, 2003, p. 20-21). The Doha Declaration on TRIPS and Public Health was unanimously adopted by WTO Members on 14 November 2001, representing a political and legal success for developing countries (ABBOTT, 2002b, p. 9).

Its text is comprised of seven paragraphs, the first three being preambular statements to the other four, operative paragraphs (IISD, 2003, p. 2). The core provision is paragraph 4, whose final text closely approximates the initial developing country position (ABBOTT, 2002a, p. 488):

> We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.
> In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose. (WTO, 2001a, p. 1)

Going forward, paragraph 5 confirmed the right to compulsory licensing and reaffirmed WTO Members' sovereignty (IISD, 2003, p. 2-3), while paragraph 7 reaffirmed the commitment of developed Members to technology transfer and further extended the transitional deadline for least developed countries to provide patent protection for pharmaceutical products (WHO, WIPO & WTO, 2012, p. 73).

Most importantly, these provisions confirm "the public health-oriented use of the TRIPS Agreement" (AZAM, 2016, p. 18) and, although not legally binding, would have "an unarguable impact on interpretation of the TRIPS Agreement" (ABBOTT, 2002a, p. 488-489), by tipping WTO's dispute settlement bodies to favour public health goals when asked to apply TRIPS rules in particular disputes (ODELL & SELL, 2003, p. 17).

In exchange for having its top priority met, the coalition agreed to fall back from several other ambitious ideas, the most significant retreat being reflected in Paragraph 6 of the Declaration, by which the issue of compulsory licensing for exports[20] would be referred to the

[20] TRIPS Article 31(f) establishes that compulsory license be made "predominantly for the supply of the domestic market" (WTO, 2017). As a result, Members "with limited or no manufacturing capacity in the pharmaceutical sector will not have the ability to make effective use of compulsory licensing" (IISD, 2003, p. 3). Developing and least developed countries wished to address this problem by allowing drugs to be supplied (that is, imported) under compulsory licensing by a foreign provider (CORREA, 2019, p. 1).

TRIPS Council (ABBOTT, 2005, p. 326; ODELL & SELL, 2003, p. 21), mandated "to find an expeditious solution to the matter and to report to the General Council before the end of 2002" (WTO, 2001a, p. 2).

The answer, however, would only come on August 2003, when the WTO Members adopted an interim waiver to the territorial restriction imposed by TRIPS' Article 31(f) (JOSEPH, 2011, p. 225). This waiver was converted into Article 31*bis* in 2015, under the first (and so far only) Protocol Amending TRIPS (CORREA, 2019, p. 2). This provision, however, would only become enforceable on 23 January 2017, after two-thirds of WTO Membership ratified it (VELÁSQUEZ, 2017, p. 16).

A decision on Paragraph 6 was also no small feat for developing countries either, who once again succeeded to fight off US' aggressive stance over three main points: scope of diseases (limited *vs*. non-limited), eligible importing and exporting countries and the article of the TRIPS Agreement that would be addressed by the solution – Article 30 or Article 31 (ABBOTT, 2005, p. 327).[21] Negotiations were long, difficult and involved various stakeholders, but eventually a system for exporting drugs under compulsory license was put in place, on yet another "success for developing countries in the pursuit of their public health agenda at the WTO" (ABBOTT, 2005, p. 343).

Its practice, however, proved to be very complex, with cumbersome notification, labelling and logistic requirements that Carlos Correa (2019, p. 3) deemed "more suitable for the export of weapons or dangerous materials". Having only been used once[22] in over 17 years, many commentators are sceptical over the effectiveness of the Paragraph 6 System, arguing that it was rendering access to medicines unworkable in practice (CHAVES *et al.*, 2007, p. 263-264; CORREA, 2019, p. 3).

Results aside, what emerges from this historical retrospective is the consistent effort put forward by developing countries to defend derogations from the TRIPS Agreement to cater to their public health needs. The disputes against Australia's plain packaging legislation represent a rupture from this logic, and as such shall be object of an in-depth analysis in the next section.

4. A new orientation for developing countries?

[21] For more details on the 2003 Paragraph 6 Decision's negotiating history and comments on its text, *see* ABBOTT (2005); ABBOTT and REICHMAN (2007); BERMUDEZ and OLIVEIRA (2004).

[22] The System was used by Rwanda to import antiretroviral medicines from Canada, in a process that took nearly four years. German Velásquez (2019, p. 16) reports that "the Canadian generic firm stated [...] that the system was so complicated that his firm had no intention of using it again."

4.1. Australia's plain packaging legislation and the WTO dispute proceedings

Tobacco consumption and exposure have long been proved to cause death, disease and disability to humans:

> About one in every two long-term smokers die from their habit. Tobacco use is a major cause of cardiovascular disease, while 90 per cent of all lung cancers and 75 per cent of all cases of chronic bronchitis and emphysema are due to tobacco. WHO estimates that tobacco products currently kill 4.2 million people each year. By the year 2030 this annual toll will rise to nearly ten million deaths, about 70 per cent of which will occur in developing countries. In other words, tobacco will cause 150 million deaths in the first quarter of the century, and 300 million in the second quarter – if current trends continue. In developed countries, about half of these deaths will occur in people in their most economically productive years. Exposure to cigarette smoke causes higher risk of lung cancer and several other children's health problems – sudden infant death syndrome, low birth weight, and respiratory disease. (WHO & WTO, 2002, p. 71)

While the scale of the human and economic tragedy imposed by tobacco makes it "one of the biggest public health threats the world has ever faced", the good news is that it is also preventable (WHO, 2019a). The fight against tobacco has been taken up with great priority by the international health community, who in 2003 unanimously adopted the WHO's Framework Convention on Tobacco Control (WHO FCTC), the first treaty ever negotiated under the auspices of the Organization and one of the most widely embraced in UN history: it has currently 181 Parties covering more than 90% of the world's population (MITCHELL, 2010, p. 404; WHO, 2019a).

With a view to protecting "present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke" (WHO, 2003, p. 5), this evidence-based Treaty provides "a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure" (WHO, 2003, p. 5).

Among the listed measures aimed at reducing demand for tobacco products, the Convention suggests restrictions to packaging and labelling (article 11) as well as to advertising, promotion and sponsorship (article 13). While these two provisions do not explicitly mention tobacco plain packaging, the Guidelines for their implementation recommend that Parties consider implementing plain packaging, defined as "measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font

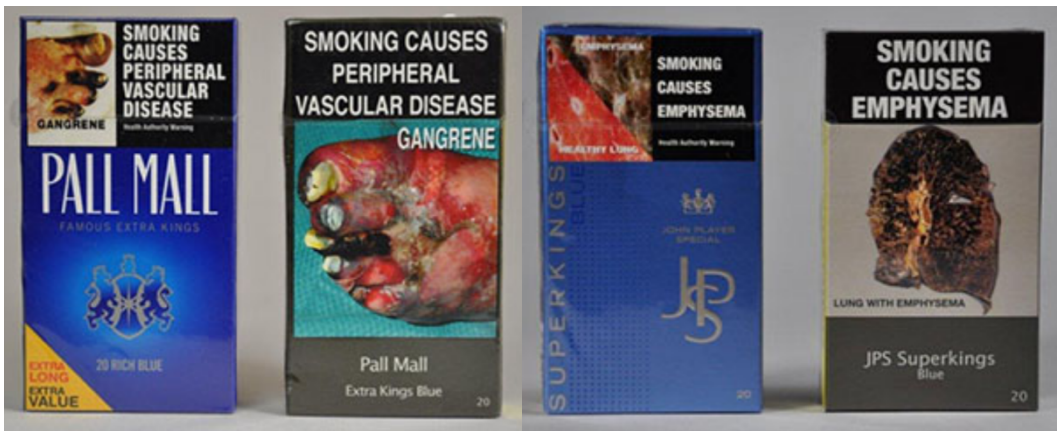
style" (WHO, 2008, p. 9). The standardization of cigarette packs is set to reduce prevalence and up-take of smoking by making tobacco less attractive and by making health warnings and information more visible (ALEMANNO & BONADIO, 2011, p. 451).

This is an aggressive measure against tobacco manufacturers, who, in times of ever-increasing bans on tobacco advertising, have turned to product packaging as "the communication life-blood of the firm" (CHAPMAN, FREEMAN & RIMMER, 2007, p. 75) and a marketing tool in their own right (MITCHELL, 2010, p. 402):

> Tobacco packs promote tobacco consumption not only at the point of sale, but also after the point of sale. Consumers display tobacco packaging when they use tobacco products, when they offer tobacco products to others and in other ways, such as by placing branded packaging on display in a social setting. In this way, tobacco products are "badge products", meaning that they have a high degree of social visibility and that consumers identify with the brand image cultivated on product packaging. [...] tobacco packaging functions like a billboard. (WHO, 2016, p. 11)

Wishing to promote public health and to give effect to its obligations under the WHO FCTC (AUSTRALIA, 2011, Section 3), Australia enacted in 2011 the Tobacco Plain Packaging Act, the first of its kind in the world, which came into force on December 2012 (YOUNG, 2013, p. 534). The pioneer Bill prescribes that packaging must be a standard drab dark brown colour in matt finish, forbids the use of non-word trademarks[23] – word trademarks are allowed under tight restrictions – and subjects non-compliant manufacturers and sellers to civil penalties (DAVISON & EMERTON, 2014, p. 508-509; MITCHELL & VOON, 2011, p. 221). Image 1 below depicts the packages of two international brands before and after the introduction of plain packaging in Australia:

Image 1 - Australian plain packaging legislation's effects on tobacco packaging



Source: (CANCER COUNCIL VICTORIA), [s/d]

[23] By contrast, "the legislation permits the continued registration of tobacco trade marks, even in the absence of an intention to use [...], [and] tobacco trademarks are immune from removal for non-use if the legislation is the reason for that non-use" (DAVISON, 2012, p. 498).

It didn't take long for Australia's measure to be challenged at the WTO. While this may have been expected, given the history detailed in section 3.2, what *was* surprising is that this time complainants were all developing countries: consultations were requested first by Ukraine (on 13 March 2012), followed by Honduras (4 April 2012), the Dominican Republic (18 July 2012), Cuba (3 May 2013) and Indonesia (20 September 2013). A record number of 35 WTO Members plus the European Union indicated their intention to join one or more of the disputes as third parties (AUSTRALIA, 2018).

Complainants argued that Australia's restrictions on their trademark rights and on Cuba's geographical indication rights (over the name *Habanos*) were inconsistent with the TRIPS Agreement, the Technical Barrier to Trade (TBT) Agreement and the 1994 version of GATT[24]. At its turn, Australia defended that its laws are "a sound, well-considered measure designed to achieve a legitimate objective – the protection of public health" (WORLD TRADE ORGANIZATION, 2012).

On its Report of June 2018, the Panel took Australia's view, dismissing all claims that Australia's measure is inconsistent with WTO rules.[25] Its conclusions can be summarized as follows:

> • Plain packaging is no more trade-restrictive than necessary under TBT article 2.2 for the legitimate objective of protecting public health, given its contribution to reducing the use of and exposure to tobacco products, the gravity of failing to address the use of and exposure to tobacco products, and the absence of less trade-restrictive alternatives
> • Plain packaging is not 'unjustifiable' under TRIPS article 20, because the contribution it makes to the protection of public health provides sufficient reasons for the resulting encumbrances on trademarks
> • There is no right to use a trademark or geographical indication under TRIPS, and prohibitions on use do not engage protections relating to registration or infringement of trademarks or unfair competition
> • GATT art IX:4 does not concern whether or not origin marks can be used, but only the procedural requirements regarding how they should be applied (McCABE CENTRE, 2017, p. 4-5)

Hailed as yet another major victory for public health, the Panel Report is likely to foster further developments in the field, the most obvious one of them being its expansion to other

[24] Considering all cases combined, complainants argued violations to TRIPS' Articles 2.1 (compliance with Articles 1-12 and 19 of the Paris Convention), 15.4 (obstacles to registration of a trademark), 16.1 (rights conferred to an owner of a registered trademark), 16.3 (well-known trademarks), 20 (other requirements), 22.2(b) (use of geographical indications constituting unfair competition) and 24.3 (pre-existing domestic protection of geographical indications). Complainants also argue violations to TBT's Article 2.2 (technical regulations shall not create unnecessary obstacles to trade) and GATT's Article IX:4 (laws and regulation on marks of origin). (WTO, 2019, p. 186)

[25] For a summary of its main findings *see* Rimmer (2018), McCabe Centre (2018) and Voon (2019).

countries[26] as well as to other health-hazardous products such as alcoholic beverages and unhealthy foods (ALEMANNO & BONADIO, 2011, p. 454). But it does not answer the central question of this paper: why did developing countries opt to claim their IPRs after spending decades trying to get their public health concerns heard? The answer for this may lie outside the WTO, and inside the Big Tobacco companies. We analyse this hypothesis next.

4.2 Interdependence between complainant countries and Big Tobacco

Despite being formally classified as an intergovernmental organization – i.e., one whose Membership is only allowed to sovereign States – the WTO "does not just involve State actors. Indeed, any close examination of the WTO is bound to find a diversity of both state and nonstate actors influencing and shaping the organization in myriad ways" (LIM, 2014, p. 175). This is especially true for IPRs, given that these are essentially private rights (ABBOTT, 2002b, p. 51).

As seen from Section 3, the American industry (most notably, pharmaceutical companies) took up a large role in securing the inclusion of IPRs in the Uruguay mandate, the negotiation of strong TRIPS provisions and the legal pursuit against countries that wished to make use of TRIPS flexibilities. Therefore, it would make sense to investigate whether tobacco transnational corporations (Big Tobacco) may be linked to the unprecedented move by these five developing countries to claim their IPRs in detriment of public health policies.

Our research has found that the industry has been paying attention to the threat of plain packaging from as early as 1993,

> […] when nine companies were invited to work together in what became known as the Plain Pack Group. The plan was to combat 'the encroachment on the packs of 'health-related' information and the possibility of the 'generic' pack,' according to a letter from an official at Rothmans International Tobacco, now part of British American Tobacco. (MARTIN, 2013)

Accordingly, when Australia was still considering the introduction of a plain packaging legislation in 2009, "industry's opposition to plain packaging was also far greater than typical industry opposition to introduction of other tobacco control measures" (WHO, 2016, p. *x*). Tobacco companies made a number of policy arguments,[27] accompanied by allegations that the

[26] So far 15 other countries have adopted plain packaging laws: France, United Kingdom, New Zealand, Norway, Ireland, Thailand, Uruguay, Saudi Arabia, Slovenia, Turkey, Israel, Canada, Singapore, Belgium and Hungary (CAMPAIGN FOR TOBACCO-FREE KIDS, 2020).

[27] According to the WHO (2016, p. 57), assertions included "suppositions that plain packaging would increase illicit trade, drive prices down, cause consumers to shift to cheaper brands rather than quit smoking, create delays for retailers because they would not be able to identify brands, result in billions of dollars of compensation being

Act was contrary to the TRIPS Agreement and other legal texts (MITCHELL & VOON, 2012, p. 111), as well as threats of legal action (MITCHELL & VOON, 2011, p. 219).

These threats materialized as soon as the Plain Packaging Act was enacted: on June 2011, Philip Morris Asia (PMA) brought a suit against Australia pursuant to a 1993 bilateral investment treaty with Hong Kong, on the basis that it "resulted in indirect expropriation of its property rights [...] and unfair and inequitable treatment (on grounds that the measure is arbitrary and unreasonable)" (WHO, 2016, p. 47). Australia prevailed on procedural grounds, as the Arbitral Tribunal was precluded from exercising jurisdiction over the dispute: PMA's claims were considered inadmissible after it was found that PMA had underwent corporate restructuring at a point in time where the dispute was foreseeable, solely for the purpose of gaining protection under the investment agreement (PCA, 2015, p. 184).

The following year, a constitutional challenge was brought to the High Court of Australia by Japan Tobacco International and members of the British American Tobacco Group. In this lawsuit, the plaintiffs argued that Australian plain packaging laws "amounted to an acquisition of the tobacco companies' intellectual property rights [...] and that the government's use of or control over the packaging itself amounted to an acquisition of property" (CAMPAIGN FOR TOBACCO-FREE KIDS, 2017a). The case was dismissed by a majority of six to one under the finding that "although the Act regulated the plaintiff's intellectual property (IP) rights and imposed controls on the packaging and presentation of tobacco products, it did not confer a proprietary benefit or interest on the Commonwealth or any other person" (RIMMER, 2018, p. 38).

Seen in retrospective, these legal challenges can be thought of as irrational, given Australia's relatively small population (of nearly 25 million) and its low and declining smoking rates (QUIT VICTORIA, 2020). According to Tania Voon (2019, p. 5-6), however, "Australia is a target because of its leadership in tobacco control and the industry's concern that other countries, housing more lucrative markets, will follow". In other words, those legal challenges were intended to have a *regulatory chill* effect, either by discouraging or preventing governments from adopting or implementing plain packaging legislation (ICTSD, 2018).[28]

But when it comes to the WTO, only its Member (i.e. governments) rather than a tobacco company or other entity, could bring such a complaint for non-compliance with TRIPS

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due to tobacco companies as a consequence of litigation, and set in place a slippery slope leading to regulation of other products in the same way."

[28] Accordingly, Big Tobacco has effectively proceeded to litigation against other jurisdictions who have done so, namely the European Union, France, Ireland, Norway and United Kingdom. A summary of these disputes can be found at <https://www.tobaccofreekids.org/plainpackaging/tools-resources/legal/case-summaries>.

(MITCHELL & VOON, 2011, p. 6). So why did Cuba, Dominican Republic, Honduras, Indonesia and Ukraine do it? At a first glance, there is also no apparent reason for such a move.

In the first place, developing countries would seem to be the most interested in asserting the right to public health in detriment of IPRs: all complainants but Ukraine (which only joined the WTO in February 2008) were part of the 60-Member coalition that proposed the adoption of a Ministerial Declaration on TRIPS and Public Health. In the second place, these countries would have a direct interest in allowing for tobacco control measures, as it is well documented that tobacco products have a "disproportionate impact on developing economies, which are home to the vast majority of the world's smokers" (ICTSD, 2018).

In the third place, it appears that developing countries don't have much to gain from a WTO procedure. As Gregory Shaffer (2004, p. 472) explains it, their relatively smaller value, volume and variety of exports tends to translate into lower absolute benefits from participation in WTO litigation; moreover, engaging in a dispute settlement procedure comes at a relatively high cost, which may be too cumbersome for developing countries' reduced economies of scale. Given these two factors, it seems that economic rationale is missing for most of the disputes, as exports to Australia make up a very small percentage of the complainants' total tobacco exports from 2007-2011 (see Table 3 below) and their absolute value does not seem to be worth the high legal fees[29]. This is particularly true with regard to Ukraine, which has *zero* exports to Australia.

Table 3 - Rolled tobacco exports to Australia (2007-2011)

	Cuba	**Dominican Rep.**	**Honduras**	**Indonesia**	**Ukraine**
Value of tobacco exports to Australia	US$ 11,840,994.00	US$ 3,160,847.24	US$ 267,245.25	US$ 2,177,952.65	US$ 0.00
Australia % in country's tobacco exports	1.003%	0.184%	0.039%	0.127%	0%
Australia # in country's tobacco exports	18th	16th	26th	20th	–
Country's % of Australian tobacco imports	2.533%	0.676%	0.057%	0.466%	0%

Source: prepared by the author, with data from OEC (2017)

Given Big Tobacco's history of challenging plain packaging, we investigated if they were somehow connected to the complainants' odd moves and the results were quite telling: according to Bloomberg News (MARTIN, 2013), Philip Morris covered some legal costs for

[29] According to Susan Sell (2004, p. 12), highly specialized attorneys can have their fees ranging from US$ 300,000 to US$ 400,000 for each WTO claim.

Dominican Republic and British American Tobacco did the same for Honduras and Ukraine; the latter allegedly filed its complaint "at the request of the American Chamber of Commerce,[30] a group with a well-documented history of working on behalf of tobacco companies" (MYERS, 2017). Moreover, leaked internal documents of Philip Morris International indicate that the company was engaged in a "preventive plain packaging plan" which included "support for the WTO cases" (PHILIP MORRIS INTERNATIONAL, 2014, p. 9). We did not find evidence of direct corporate support for Cuba and Indonesia's claims.

Despite the initial guidance that these findings provide, they do not explain why those developing countries agreed to such a strategy. Our hypothesis, once again, is that Big Tobacco made use of its corporate power to get those countries to acquiesce. But because power is hard to measure, we will be looking at other, somewhat more objective indicators, which will serve as a proxy for a country's dependence to tobacco companies[31] – these are set out in Table 4 below.

Table 4 - Indicators of country dependence on tobacco manufacturers

	Cuba	Dominican Republic	Honduras	Indonesia	Ukraine
Tobacco growing (2014)	19,800 MT	9,163 MT	5,928 MT	196,300 MT	< 1,000 MT
Smoking adults (2019)	34.6%	13.9%	19.6%	66.6%	40.6%
Tax excise (2019)	70.2%	51.1%	33.4%	58.5%	74.7%
Tax revenues (2017)	US$ 2,408,586,700.00	US$ 93,095,270.88	US$ 2,380,976.15	US$ 11,215,555,110.05	US$ 1,105,568,611.78
Total output value (2017)	US$ 188,016,800.00	US$ 33,731,079.58	US$ 64,077,387.47	US$ 228,754,526.79	US$ 205,060.52
Rolled tobacco sales (2017)	US$ 1,373,200,000.00	US$ 615,261,351.34	US$ 510,715,446.99	US$ 22,710,646,086.13	US$ 845,258,427.90
Value of tobacco exports (2007-2011)	US$ 1,181,054,867.00	US$ 1,715,626,772.72	US$ 676,760,628.76	US$ 1,715,048,867.20	US$ 835,599,321.54
% of tobacco in country's total goods exports (2007-2011)	11% (3rd most exported good)	4.4% (3rd most exported good)	2.0% (13th most exported good)	0.20% (43rd most exported good)	0.28% (60th most exported good)
% of global tobacco exports (2007-2011)	1.1% (23rdlargest tobacco exporter)	1.6% (13thlargest tobacco exporter)	0.64% (30thlargest tobacco exporter)	1.6% (14thlargest tobacco exporter)	0.36% (28thlargest tobacco exporter)

[30] According to the head of its Ukrainian affiliate, "several 'fantastic tobacco companies' had bought up Soviet-era factories and modernized them, and now they were exporting tobacco to many other countries. It was in Ukraine's national interest, he said, to support investors in the country, even though they do not sell tobacco to Australia" (HAKIM, 2015).

[31] According to Chris Holden and Kelley Lee (2009, p. 4), transnational tobacco companies (TTC) "will have structural power where economies rely on the employment provided by their investment in leaf growing or cigarette manufacture, and the income taxes and export earnings that flow from this. Their room for manoeuvre will be substantially increased where there are many countries from which they can source, or potentially source, tobacco leaf, and alternative countries in which they can situate manufacturing sites". Accession to the WHO FCTC is another strong thermometer for Big Tobacco's structural power, as the more dependent on tobacco companies "the more likely that country's government is to oppose effective tobacco control (TC) policies at the national and global levels" (HOLDEN & LEE, 2009, p. 4).

Party to the FCTC?	Signed on June 2004, not ratified	Not signed nor ratified	Since 2005	Not signed nor ratified	Since 2006

Source: prepared by the author, with data from OEC (2017), the Tobacco and Nicotine Database (2019), WHO (2019b) and the American Cancer Society & Vital Strategies (2020)

The data above suggests that Cuba, Dominican Republic and Indonesia are strongly attached to tobacco manufacturers, either because of their crops, exports, sales and/or tax revenues. The case of Indonesia is particularly remarkable: it has the second largest cigarette market in the world by retail volume (CAMPAIGN FOR TOBACCO-FREE KIDS, 2017b), the world's third-highest smoking rates (NEGARA, 2019) and the 5th largest raw tobacco production (FAOSTAT, 2013 *apud* USNCI & WHO, 2016, p. 353); its tobacco industry employs some 2.5 million workers in farming and manufacturing and accounts for approximately 10% of Indonesia's tax revenue (TJANDRA, 2018).

These attachments, at their turn, are also reflected on their low levels of compliance with the WHO FCTC standards, either by not adhering to it or by promoting lax policies[32] (such as tax excises below the WHO-recommended 70% minimum). The fact that only one of the current four complainants has ratified "the FCTC whereas 93 in 100 WTO Members are FCTC parties is unsurprising; both the WTO complaints and FCTC (non-)participation arguably reflect the strength of the tobacco industry influence in the complainant countries" (VOON, 2019, p. 5). As a result, it is very likely that these countries have no alternative but to pursue the interests of their tobacco majors at the WTO, even if exports to Australia are relatively low.

On the other side of the spectre is once again Ukraine, who not only has no tobacco exports to Australia but also presents overall low levels of dependence on tobacco products – which at its turn is consistent with its strategy to ratify the WHO FCTC and implement high tax excises. Accordingly, it has managed to break ties with the US Chamber of Commerce, having requested that its WTO proceedings to be suspended on 28 May 2015, with a view to finding a mutually agreed solution.

The sum of these evidences suggests a strong correlation between Big Tobacco and the WTO case, which apparently is just the third act of Big Tobacco's regulatory chill strategy, to which it successfully found countries to pursue claims on its behalf (MITCHELL & VOON, 2011, p. 240), based on its corporate structural power deriving from interdependent relationship. As such, our hypothesis is confirmed.

[32] For detailed information on countries' compliance with the WHO FCTC measures, *see* WHO (2019b).

5. Concluding remarks

At 25 years old, TRIPS is anything but an uncontroversial agreement. While its negotiation and conclusion transformed the international intellectual property system by harmonizing and strengthening protection standards, its stricter provisions were also responsible for curtailing public health policies in (but not limited to) developing countries (ABBOTT & REICHMAN, 2007, p. 921).

Slowly and steadily, WTO Members have attempted to render intellectual property, trade and public health compatible: from the negotiation of safeguards in the TRIPS Agreement to the Doha Declaration and the decision on the plain packaging case, the WTO has repeatedly confirmed developing countries' view that the intellectual property obligations set forth by the Treaty should not prevent WTO Members from addressing their public health concerns.

The Panel Report on the plain packaging case was only the latest step in that direction. And it is a very important one, as it inaugurates a new dimension of the intellectual property vs. public health debate, by switching the focus from patents to trademarks and geographical indications. It also provides important insights on industry patterns before the WTO: our research has shown striking similarities between Pharma's actions in the 2000s and Big Tobacco's 2010s moves. As big, multi-billion-dollar transnational corporations with a big stake in the game, they both acted judicially and lobbied at the WTO and other *fora* to prevent the enactment of legislation that could hamper their businesses.

This is certainly not a new phenomenon for tobacco companies, which have adopted as their broad strategy the use of litigation to contest regulation (WHO, 2016, p. 39) – plain packaging is just one among their targets. As part of this strategy, they compel tobacco-producing countries – with whom they hold an interdependent relationship that gives them structural power – into not joining the WHO FCTC and with their help place legal challenges against countries that enact tobacco-control measures.

Due to its limited scope, this paper purposely did not look at the relationship between intellectual property, public health and trade in the context of other international organizations such as WHO, WIPO, or UNCTAD; it also did not look at bilateral and regional agreements. In this context, we conclude by suggesting that further research be undertaken to analyse how that relationship has been evolving under these other organizations and treaties, and more particularly what has been leading developing countries to agree to the inclusion of extensive commitments to IPRs (also called TRIPS-Plus provisions) into their free trade agreements, a trend that has been ever-increasing.

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