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# Balancing the Protection of Public Health Interests and Trademark Rights in Plain Packaging of Tobacco Products: A South African Perspective.

By
**SHARON NYATSANZA**

A Thesis submitted to the School of Law (Faculty of Commerce, Law & Management) University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Doctor of Philosophy

Under the supervision of **Professor Pamela Andanda**

Johannesburg, 2018

**ABSTRACT**

In introducing plain packaging measures in the marketing of tobacco products, South Africa is confronted with the need to balance trademark and public health interests; and competing obligations under the World Health Organizations' Framework Convention on Tobacco Control and the World Trade Organization. Tobacco trademark owners challenge the proportionality of plain packaging measures under both Constitutional and WTO law. Health advocates have challenged the even-handedness of the test for proportionality at the WTO level and proposed a health – over – trade approach. Under this approach, plain packaging measures become immune to the WTO proportionality test and assume an automatic pre-eminence over trademark rights.

This study locates itself at the crux of this conflict. Although the central problem to be addressed is whether plain packaging measures are proportional, the claims over the even-handedness of the proportionality test cannot be overlooked. The study uses a predictive and proactive approach as it foresees the challenges that South Africa will face and makes recommendations in that regard. It proceeds from the premise that a balancing of competing interests guided by proportionality is desirable to ensure that no interest is left to redundancy or inutility. However, before arriving at the balancing stage, the study establishes that there exists a genuine conflict between trademark rights and public health interests. Aspects pertaining to the substantive nature of trademark rights and the right to use debate are traversed to assess the implications of plain packaging measures on trademark rights. Simultaneously, the study unveils the dire effects of tobacco prevalence and the health interests involved. Health rights are comprehensive and their importance is unrivalled, but does not support a health – over – trade approach in South Africa or abroad.

An analysis of the South African proportionality review is undertaken and predictions are made on how the balancing process will play out. It is found that the existing jurisprudence has been developed in the corporeal property context, and cannot be directly transposed to intellectual property. A nuanced approach should be adopted to ensure that trademark interests are properly considered. An analysis of the necessity of plain packaging measures under WTO law is also undertaken with the aim of examining the justifiability of the criticisms levelled against the WTO proportionality test. It is found that there are differences in proportionality under the domestic and the WTO sphere. However, the

differences are not substantial enough to result in different outcomes on the proportionality of plain packaging measures, it is anticipated that the measures will also pass the proportionality test at the domestic level of governance. Another finding is that, there is no merit in assertions that the WTO proportionality test is biased against public health and the health – over –trade approach is unwarranted.

## DECLARATION

I, Sharon Nyatsanza, hereby declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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STUDENT NUMBER: 987246

DATE: 7 MARCH 2019

## DEDICATION

This work is dedicated to my husband, Chikomborero Hamudikuwanda. Without your love and unwavering support, this work would not have seen the light of day.

## ACKNOWLEDGEMENTS

First, l would like to thank God Almighty for watching over me and for seeing me through to the end of this journey.

Special mention and appreciation goes to my supervisor, Professor Pamela Andanda who selflessly and professionally mentored me in this research. Thank you for your patience, encouragement, guidance and for funding my last academic year, which greatly aided me in my studies. Your constant guidance facilitated the production of this work.

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I also owe an immense debt of gratitude to my family who put up with all the emotional stress and whose love and courage inspires me still. Especially my son Shona Hamudikuwanda and my daughter Melanie Mandenyika, thank you my children. I would also like to thank Kudakwashe Chiringa, Donald Makasi, Patience Nyatsanza, Vimbai Nyatsanza, Rudo Nyatsanza, Tendai Nyatsanza, Chipo Nyatsanza, Patience Jona, Samuel Mapungwana, Hilda Mapungwana, Marvellous Fungurani and all my family. God bless you all.

Lastly, special mention goes to my parents, Gilbert and Jessina Nyatsanza, thank you for believing in me always.

## LIST OF ACRONYMS

AIDCP - Agreement on the International Dolphin Conservation Program

AIDS - Acquired immune deficiency syndrome or acquired immunodeficiency syndrome

CESCR - United Nations Committee on Economic, Social and Cultural Rights

COP - Conference of the Parties

DSU - Dispute Settlement Understanding

ECtHR - European Court of Human Rights

ETP - Eastern Tropical Pacific

FCA - Framework Convention Alliance

FFDCA - Federal Food, Drug and Cosmetic Act

FNB – First National Bank

GATS - General Agreement on Trade in Services

GATT - General Agreement on Tariffs and Trade

HIV - Human Immunodeficiency Virus

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

IGWG - The Intergovernmental Working Group

IPRs - Intellectual property rights

LMICs - Low and Middle-income countries

LTR - Least trade restrictive

NHS - National Health Service

NRT - Nicotine replacement therapy

PM1 - Philip Morris International

RAF - Road Accident Fund

SPS Agreement - Agreement on Sanitary and Phytosanitary Measures

TB - Tuberculosis

TBT Agreement - Agreement on Technical Barriers to Trade

TFI - Tobacco Free Initiative

TIRC - Tobacco Industry Research Committee

TRIPS Agreement - Agreement on Trade Related Aspects of Intellectual Property

TPP - Tobacco Plain Packaging Act

UN CEDAW - UN Committee for the Elimination of All Forms of Discrimination against Women

U. N - United Nations

UDHR - Universal Declaration of Human Rights

WHO - World Health Organisation

WHO FCTC - World Health Organisations' Framework Convention on Tobacco Control

WIPO - World Intellectual Property Organisation

WHA - World Health Assembly

WTO - World Trade Organisation

## Publications and Conference Papers

During my research, the following peer-reviewed publication was published from parts, sections and or ideas in this thesis:

**Publication**

Nyatsanza S 'Plain packaging of tobacco products and the South African trade mark system' (2016) 6 (4) *Queen Mary Journal of Intellectual Property* 493 - 502.

**Conference Paper Presentation**

Second Annual International Mercantile Law Conference, 4-6 November 2015, University of Free State, South Africa. Presentation: Plain Packaging of Tobacco Products: The Trademark System Caught Off Guard?

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# CHAPTER ONE

## 1.1 INTRODUCTION AND BACKGROUND TO THE STUDY

The introduction of plain packaging of tobacco product measures in South Africa[1] brings to the fore the competing values of public health and trademark rights. Plain packaging[2] involves the removal of all graphic, fancy design elements, logos, imagery, colours and trademarks in an effort to reduce the appeal of tobacco product packages.[3] Plain packaging of tobacco products measures can potentially result in a significant intrusion on tobacco trademark rights. Essentially, the recognisable sign, design or expression, which distinguishes cigarette products of a particular source from those of others, will be diminished.[4]

For health advocates the step towards plain packaging of tobacco products is not in vain, as there is considerable evidence that implicates tobacco as a major human health threat; killing an estimate of six million people annually and projected to be the leading preventable cause of death by 2020.[5] Health activists assert that, by reducing the appeal of cigarettes the consumption and prevalence of tobacco products too will be curtailed.[6] Further, that such a measure will make health warnings more visible; and as a result contribute to the protection and promotion of public health.[7]

Consequently, plain packaging of tobacco products is encouraged by the World

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[1] The Control of Tobacco Products and Electronic Delivery Systems Bill of 2018, published in GG 41617 of 9 May 2018.

[2] Wherein l mention plain packaging in this study, l will be referring to plain packaging of tobacco products measures.The terms plain packaging of tobacco product measures, plain packaging of tobacco products and plain packaging measures shall be used interchangeably in this study.

[3] A Alemanno & E Bonadio 'Do you mind my smoking? Plain packaging of cigarettes under the Trips Agreement' (2011) 10 (3) *The John Marshall Review of Intellectual Property Law* 451.

[4] C Snowdon 'Plain packaging commercial expression, anti-smoking extremism and the risks of hyperregulation' (2012) Adam Smith Research Trust 5

<http://www.adamsmith.org/sites/default/files/research/files/plain-packaging.pdf>.

[5] WHO Global status report on non - communicable diseases 2010 (2011) 17 <http://www.who.int/nmh/publications/ncd_report_full_en.pdf>; See also F J Chaloupka & K Warner 'The Economics of Smoking', in T Culyer & J P Newhouse (eds) *Handbook of Health Economics* (2000) 1539. The WHO estimates that by 2020 tobacco will cause 8.4 million deaths.

[6] WHO 'Plain packaging of tobacco products: evidence, design and implementation' (2016) 10 – 13 < http://apps.who.int/iris/bitstream/handle/10665/207478/9789241565226_eng.pdf?sequence=1>; R Ashcroft 'Smoking, health and ethics' in A Dawson (ed) *Key Concepts and Issues in Policy and Practice* (2011) 85 – 100.

[7] Ibid.

Health Organisation (here in after the WHO) to protect human health in response to the tobacco epidemic.[8] Like most health related regulations, plain packaging of tobacco products is an emotionally loaded subject, with health advocates proclaiming that law should not by any means limit this endeavour to protect human health. Predictably, plain packaging of tobacco products has raised a horde of legal issues; its compatibility with various national, international investment and the world trade laws is far from certain. To keep this study within manageable limits this study focuses on the potential of plain packaging measures to limit trademark rights. Philip Morris New Zealand a major tobacco company asserts that it:

> supports evidence-based regulation of all tobacco products. In particular, [they] support measures that are effective in preventing young people from smoking. Plain packaging fails this standard because it is not based on sound evidence and will not reduce youth smoking.[9]

Additionally, Philip Morris South Africa emphasises that they do not support regulation that prevents adults from buying and using tobacco products or that imposes unnecessary impediments to the operation of the legitimate tobacco market. Accordingly, they oppose generic packaging of cigarettes.[10] However, Philip Morris South Africa agrees that there is 'overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema, and other serious diseases.'[11]

Nevertheless, questions are being raised regarding the 'proportionality' or 'necessity' of plain packaging measures as a public health regulation.[12] What is at issue is not the objective at hand since curbing tobacco consumption is widely accepted as a legitimate objective. Instead, the attention is on the means to achieve the end. Philip Morris International (herein after the PMI) raises the following questions, which inform this study: Is plain packaging of cigarettes a 'necessary' public health measure? Is it a necessary

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[8] The Framework Convention on Tobacco Control (herein after the WHO FCTC), signed in Geneva on 21 May 2003 <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>.

[9] Philip Morris New Zealand 'Plain packaging of tobacco products will not reduce smoking rates, and will violate New Zealand's international trade obligations: A response to the Ministry of Health Consultation on Plain Packaging of Tobacco products' <http://www.pmi.com/eng/tobacco_regulation/submissions/documents/philip>.

[10] Philip Morris South Africa 'Smoking and Health' <http://www.pmi.com/marketpages/pages/market_en_za.aspx>.

[11] Ibid.

[12] Proportionality and necessity will be used interchangeably in this study. Necessity is more frequently used within the WTO context, whereas proportionality is used in the Constitutional contexts.

limitation on other protected interests and rights? A challenge on the necessity of any government regulation is one query (whether at national or international levels of governance) that cannot be overlooked. Against this background, the heart of this study lies therefore on the legal necessity of plain packaging of tobacco products measures.

Tobacco trademark owners challenge the legal necessity of plain packaging measures; under national laws and the World Trade Organisation's laws (herein after the WTO).[13] On the contrary, the health advocates argue for a health-over-trade approach in dealing with tobacco regulations, including plain packaging of tobacco products measures.[14] They disagree with a necessity review being undertaken in the case of plain packaging of tobacco products especially at the WTO level. For them the WTO and its 'necessity' tests impose undue and unreasonable burdens on members to justify public health measures.[15]

During the WHO Framework Convention on Tobacco Control (herein after the WHO FCTC) negotiations members including South Africa[16] in fear of a WTO case arising out of tobacco regulations had insisted on an explicit health-over-trade provision in the text of the WHO FCTC.[17] Other governmental actors disagreed and opined that the WTO legal framework provided sufficient leeway for public health measures; hence, a silent approach was taken as a compromise to avoid the stalling of the WHO FCTC negotiations.[18] Nevertheless, health advocates are not convinced that the WTO health provisions and exceptions will protect public health; instead, they think the WTO is trade centric and will

[13] Marrakesh Agreement establishing the World Trade Organisation, 15 April 1994 (herein after the WTO).

[14] H M Mamudu, R Hammond & S A Glantz 'International trade versus public health during the FCTC negotiations, 1999-2003' (2011) 20 (1) *Tobacco Control* 5.

[15] Ibid.

[16] South Africa was amongst the countries that supported the explicit inclusion of a health-over- trade provision in the WHO FCTC. Other Countries were China, Namibia, Palau, Panama, Papua New Guinea and Thailand; See H M Mamudu et al (note 14 above).

[17] These members felt that without the health-over-trade provision that explicitly stated that public health measures dealing with tobacco would take precedence over trade considerations such measures were not fully protected against the WTO challenges.

[18] H M Mamudu et al (note 14 above) 6, the World Bank, WHO (through TFI) and WTO continued to argue that WTO health provisions provided protection for public health and do not limit states' regulatory autonomy to enact tobacco control measures, making an FCTC health-over-trade provision unnecessary.

balance away public health interests.[19] Therefore, they are of the view that the 'necessity' test and the whole WTO system is just a safe harbour for tobacco trademark owners.[20]

It is imperative for this study to consider the merits and or legitimacy of the concerns raised regarding the WTO necessity test. Do WTO 'necessity' tests impose undue and unreasonable burdens on members to justify public health measures? Does the WTO provide sufficient leeway for members to regulate in areas of public policy? Is the WTO able to balance trade and non-trade interests? Do the Domestic necessity tests strike a much desirable balance? Or are they riddled with the same concerns? Whilst the trademark owners are within their rights to request a necessity review of plain packaging measures, it cannot be ignored that the even-handedness of the legal test for necessity itself is being questioned. This thesis is situated at the crux of this conflict. Although the main question to be addressed in this thesis is whether plain packaging measures are necessary, the analysis cannot proceed without addressing the claims of the inappropriateness of the test used to review necessity, particularly at the WTO level. Even though the two investigations cannot be mechanically separated, they should not be confused.

## 1.2 THE NECESSITY OF PLAIN PACKAGING MEASURES AT DOMESTIC AND GLOBAL LEVELS OF GOVERNANCE

The previous section sought to identify the debate wherefrom this study emerges. Two trends have emerged from the previous section. Tobacco trademark owners are calling for an opportunity to review the plain packaging measures under domestic constitutional laws, and if futile, under WTO laws. On the contrary, health advocates including the implementers of plain packaging measures are challenging the legal test being employed by the WTO in reviewing necessity; and for this reason, they are advocating that these measures be entirely excluded from a necessity review at the WTO level (health-over-trade perspective). The concept of 'necessity' will be elucidated on in the subsequent sections.

First, this section seeks to explain and validate why this study has chosen a dual (local and global) perspective to the necessity of plain packaging measures. Secondly, it seeks to justify why South Africa is selected as the domestic lens through which the necessity of plain packaging measures is considered. Further, the study addresses the

[19] Framework Convention Alliance 'Why Article XX (b) of GATT is not enough to protect health' (2002) *FCA Bulletin* 18 October 2002 < http://www.WHO FCTC.org/publications/reports?start=6 >.

[20] Framework Convention Alliance 'Delegates Favour Health over Trade' (2001) 11 *FCA Bulletin* 4 May 2001 < www.WHO FCTC.org/publications/bulletins/doc_view/13-fca-bulletin-11-inb2>.

question whether plain packaging measures are necessary public health measures at both the domestic and WTO level of governance.

To begin with, adopting a dual approach to necessity is a realistic and practical lesson learnt from the Australian scenario. Australia was at the forefront with its enactment of the Tobacco Plain Packaging Act 2011 (herein after the TPP Act)[21], in line with its WHO FCTC obligations.[22] As expected a legal challenge was brought before the Australian High Court in 2012. The plaintiffs claimed that the TPP Act was not constitutional,[23] owners of tobacco trademarks such as 'Winfield' and 'Camel' claimed that the TPP Act, contrary to section 51 (xxxi) of the Australian Constitution acquired property without the provision of just terms. The High court rejected the challenge to the validity of the TPP Act, it held that no property was taken, that none had been acquired and lastly that even if acquisition had taken place it was within the just terms of protecting public health.[24]

After losing the domestic battle in Australia the tobacco companies brought a challenge before the WTO citing various provisions from different agreements.[25] On 28 June 2018 the Panel report was circulated.[26] Various provisions are cited in the WTO dispute including Article 2.2 of the Agreement on Technical Barriers to Trade (herein after the TBT Agreement) which requires members to avoid implementation of measures that are 'unnecessary' obstacles to trade; the study will examine this provision in detail in Chapter six.

The necessity of plain packaging measures can be addressed under domestic laws only; however, in view of the implications that the WTO rules have on domestic autonomy it is prudent to address the same legal question under WTO laws. If tobacco trademark owners are unsuccessful in the domestic legal battle it is almost obvious that a global

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[21] Tobacco Plain Packaging Act No. 148 of 2011. See also L Shmatenko 'Regulatory measures through plain packaging of tobacco products in the light of international trade agreements' (2013) 4 *Czech Year Book of International Law* 27, 29.

[22] Chapter 2 of the TPP Act lays out the requirements for plain packaging and appearance of tobacco products. (Section 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the TPP Act).

[23] *JT International SA v Commonwealth of Australia and British American Tobacco Australasia Limited v Commonwealth of Australia* HCA 43 (2012), 86 ALJR 1297 (2012) (Australian High Court Decision).

[24] Australian Government Solicitor (AGS) 'Validity of Tobacco Plain Packaging Law Upheld' (2012) < www.ags.gov.au/publications/litigation-notes/LN22.pdf>; The case dealt mainly with the issue of 'acquisition' which will not be dealt with in this study; however it also dealt with issues of whether there was a legitimate objective of protecting public health and whether deprivation of property had taken place which shall be addressed in this thesis.

[25] *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435, WT/DS467.

[26] *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435, WT/DS467, 28 June 2018.

challenge will be raised. In the event that the tobacco owners emerge victorious in the global challenge, the plain packaging measures implemented at domestic levels will have to be brought into conformity with WTO laws or withdrawn otherwise governments will face retaliatory actions from other WTO members.[27] Being aware of the nature of disputes that can arise from the adoption of plain packaging, it goes without saying that implications of such measures will have to be assessed from both domestic and global levels of governance.

To examine the legal issues surrounding plain packaging in a domestic sphere this thesis takes a South African perspective to the plain packaging debate. From the outset, South Africa is chosen in this study to situate the study within a manageable and definite context. Plain packaging is an issue that has to be addressed throughout the world with the signing of the WHO FCTC, South Africa included. The plain packaging debate is still in its infancy in South Africa with the recent publication of the Draft Control of Tobacco Products and Electronic Delivery Systems Bill, 2018 for public comment; and that creates a greater need for research of this nature. Accordingly, the study will provide insight into the legal issues that must be considered in implementing plain packaging measures in South Africa. It provides a predictive analysis of the necessity of plain packaging if challenged in the South African context. This makes this study predictive and proactive as it foresees the challenges that could arise and makes proposals and recommendations in that regard.

Again, South Africa is chosen because it protects trademarks; the right to trademark property is a constitutionally entrenched right.[28] This alone is important to warrant an investigation into the necessity of plain packaging measures as these could potentially conflict with a constitutionally entrenched human right. In the case of *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* [29] a trade mark right was balanced against and the right to freedom of expression. This remains the only case where a trademark was balanced against another constitutional right, and the case of plain packaging measures presents again another opportunity. Smit opines that South African trademarks must be viewed and protected like

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[27] K Anderson 'Peculiarities of retaliation in WTO dispute settlement' (2002) 1 (2) World Trade Review 123, 124.

[28] See property right under section 25 of the Constitution of the Republic of South Africa, 1996 (herein after the Constitution); See also the Trade Mark Act 194 of 1993 (herein after the Trade Marks Act), which also provides for trademark protection.

[29] 2006 (1) SA 144 (CC); In the *Laugh it Off* case the court held that intellectual property though not explicitly protected in the constitution, was covered under the property protection clause in section 25.

any other property.[30] Trademarks are protectable human rights under the Bill of Rights in South Africa. However, there is still uncertainty as to the nature, scope and extent of the protection provided to trademarks under South African law.[31] This concern will be attended to in chapter four.

Further, the tobacco epidemic remains a major concern to South Africa, with the mortality of South African current smokers almost double that of none or ex – smokers. One third of all male adult deaths (over the age of 35) in South Africa have been ascribed to tobacco use.[32] Smoking thus remains a major concern to South Africa, with smoking related diseases costing an estimated 1.2 billion rand to the economy.[33] The public health concerns of smoking are also best viewed in the context of the HIV/AIDS and Tuberculosis (herein after TB) epidemic that faces South Africa.[34] There is a collision of the TB and the tobacco epidemics and there is more evidence that smoking is an important causal factor for TB infection, disease and mortality.[35]

Additionally, South Africa is supportive of the health – over – trade perspective and is against any form of balancing or necessity review being undertaken at the WTO level in the case of plain packaging measures being a public health measure.[36] This is despite the fact that South Africa is a WTO member and that it embarks on judicial balancing when valid rights or interests collide. South Africa can review the necessity of plain packaging measures in terms of its Constitution, but it questions the competence of the WTO to undertake a necessity review of these measures. Why? This raises a red flag instantaneously and it locates South Africa at the hub of this study. This study will examine

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[30] A Smit 'Trade-mark dilution – You can't laugh it off' (2004) 10 (4) *Juta Business Law* 196.

[31] L Harms 'Plain packaging and its impact on trademark (2013) 46 (2) *De Jure* 387-400; T Voon & A D Mitchell 'Implications of WTO law on plain packaging of tobacco products' in T Voon, D Mitchell, J Liberman & J Bosland & G Ayres (eds) *Public Health and Plain Packaging of Cigarettes Legal Issues* 1 ed (2012) 109 – 136; S Evans & J Bosland 'Plain packaging of cigarettes and constitutional property rights' in T Voon et al (eds) (note 31 above) 48, 51; M Davison 'The legitimacy of plain packaging under international Intellectual property law: why there is no right to use a trademark under either the Paris Convention or the TRIPS Agreement' in T Voon et al (eds) (note 31 above) 81 – 108. [32] R N van Zyl-Smit, B Allwood & D Stickells et al 'South African tobacco smoking cessation clinical practical guideline' (2013) 103 (11) *South African Medical Journal* 869.

[32] R N van Zyl-Smit, B Allwood & D Stickells et al 'South African tobacco smoking cessation clinical practical guideline' (2013) 103 (11) *South African Medical Journal* 869.

[33] Ibid.

[34] The WHO confirmed that TB has reached epidemic proportions in South Africa. See Health 24 'Tuberculosis (TB)' <http://www.health24.com/Medical/Tuberculosis/Abouttuberculosis/Tuberculosis-TB-20120721>.

[35] L Brunnet, M Pai & V Davids et al 'High prevalence of smoking among patients with suspected tuberculosis in South Africa' (2011) 38 (1) *European Respiratory Journal* 139.

[36] H M Mamudu et al (note 14 above) 5.

the merits of the concerns raised against the WTO necessity reviews and the merits of adopting a health – over- trade approach as suggested.

South Africa is a founding member of the WTO and as such is bound by WTO obligations. In implementing plain packaging measures, WTO obligations must be considered. Plain packaging measures should also be considered from a South African perspective considering that South Africa is a signatory of the WHO FCTC and in terms of the general obligations set out in Article 5 of the Convention members shall:

> Develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party.

South Africa is also selected to give a fresh perspective to the debate around plain packaging measures. Vast literature has been written regarding plain packaging under developed countries' and international laws.[37] With the results of the WTO challenge now public, we have already seen how events could play out in a developed country's context – Australia; this thesis now provides a platform to consider how a similar dispute would play out in a developing country's context– South Africa. This study will be especially pertinent for South African policy makers, the judiciary and other developing countries.

This study presents an opportunity to address the necessity of plain packaging from the South African viewpoint. There is not much existing literature on the general legality of plain packaging in South Africa.[38] There is even lesser literature that centres on the legal necessity of plain packaging which makes this study significant.[39] This study intends to create a guiding framework for South Africa.

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[37] British America Tobacco United Kingdom 'Consultation on The Introduction of Regulations For The Standardised Packaging Of Tobacco Products: Response Of British American Tobacco United Kingdom Limited' 7 August 2014 <http://Www.Bat.Com/Group/Sites/Uk_9d9kcy.Nsf/Vwpagesweblive/Do9dkjeb/$File/Medmd9mwb4b.Pdf ?Op enelement>; D Gervais 'Analysis of the compatibility of certain tobacco product packaging rules with the TRIPS Agreement and the Paris Convention' Report for Japan Tobacco International <www.smoke-free.ca/trade-and-tobacco/Resources/Gervais.pdf>; Memorandum from Lalive to Philip Morris International Management South Africa 'Why plain packaging is in violation of the WTO members international obligations under TRIPS and the Paris Convention' <www.pmi.com/.../philip_morris_new_zealand_limited_submission_on_pdf>; S Stern & O Draudins 'Generic packaging – a bridge (over the bodies of intellectual property rights) too far?' (2011) 23 *Australian Intellectual Property Law Bulletin* 146 151.

[38] M Du Bois 'Trade marks for tobacco products as constitutional property: Australian plain packaging legislation' (2013) 25 (2) *SA Mercantile Law Journal* 197-222; L Harms (note 31 above); O Dean 'Deprivation of trademarks through state interference in their usage' Inaugural lecture delivered on 21 May 2013, <http://scholar.sun.ac.za/handle/10019.1/86822>.

[39] A J Van der Walt & R M Shay 'Constitutional analysis of intellectual property' (2014) 17 (1) *Potchefstroom Electronic Journal* 51- 87.

To date scholars have carried out predictive investigations of the implications of adopting plain packaging in South Africa. The literature available indicates that there might be concerns regarding the necessity of plain packaging under South African law, but no attention is given to the requirements and specificities of the necessity review. Scholars caution that public health has been given pre – eminence in cases like the *British America Tobacco South Africa (Pty) Ltd v Minister of Health* [40] (herein after BATSA v *Minister of Health*) and that from such a record any limit to tobacco trademarks could be justified. Dean opines that plain packaging would amount to unjustified limitations on trademarks but does not touch on the necessity review. Van der Walt and Shay deal more closely with the particulars of the necessity review under South African law. Amongst other things their work applies the current approach of the Court in property deprivation cases on plain packaging legislation. This study focuses on plain packaging alone and in so doing seeks to provide a deeper understanding of the necessity of plain packaging under South African law.

### 1.3 TENSIONS BETWEEN THE TWO LEVELS OF GOVERNANCE

The previous section reveals that the study intends to take a dual viewpoint; in investigating the necessity of plain packaging measures under the South African Constitution and under the WTO regime. Attempting to carry out a study of this nature and magnitude is not without problems and limitations. There are inherent tensions which have a direct effect on the analysis to be undertaken in this study and hence require outright unveiling.

The study involves investigations at two distinct layers of governance. The WTO is a multilateral institution; whose aim is to set and enforce rules of trade between nations, promote trade liberalisation and in so doing to improve the welfare of people as they benefit from the global trading system.[41] However, it is not a human rights regime, it is primarily a trade regime; states can breach their obligations to promote trade to pursue other policy objectives like public health but only if necessary. Trade advancement and not human rights advancement is its focus; hence 'balancing' at the WTO level is not a between conflicting human rights, but between a states' obligations; to comply with the WTO rules

[40] *British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (SCA); Du Bois also shares the same opinion that plain packaging is likely to be condoned in South Africa.

[41] The General Agreement on Tariffs and Trade (GATT) Preamble states in part that: 'Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services…'

on the one hand and to pursue national policy obligations on the other hand. The necessity test is hence employed to ensure that whenever member states deviate from trade rules to promote policy objectives; such regulations are necessary and not protectionist.

On the other hand, the South African Constitution aims to protect the values of democracy, social justice and fundamental human rights.[42] Further, to protect all citizens equally before the law. Summarily, it can be said that as a Constitutional regime it seeks to protect the fundamental human rights of its citizens equally. It is therefore a human rights regime and balancing within this regime is between conflicting constitutional rights or between individual rights and state action. In this case, balancing is sought between trademark rights and public health rights. Necessity is hence employed to assess the permissible scope of limiting trademark rights which is a guaranteed right. As such, there are conflicts that flow from the distinct objectives, principles and nature of the two regimes.

Another difference that flows from the nature of the two layers of governance is that domestic regimes tend to reflect the values and interests of local constituents. As such the study will highlight such concerns or internalities that are germane to South Africa in conducting the necessity assessment. However, this indicates that there are externalities that domestic regimes are hopelessly inadequate to deal with. It should not be ignored that domestic states have delegated international regimes to at times deal more effectively with tasks that overlap with various jurisdictions.

When assessing the necessity of plain packaging measures under the domestic realm, the courts have to investigate whether they are a necessary limitation on trademark rights. Thus it will analyse whether there has been an infringement of a right; the nature and purpose of limitation; the extent of limitation; the rational connection between limitation and purpose, the proportionality of the benefit to the harms and whether it is a least restrictive means to achieve the purpose.

On the other hand, when the same legal question is addressed at the WTO level similar inquiries are made. Under the TBT Agreement, it will be asked whether the measures are applied with a view of avoiding unnecessary restrictions on trade and whether it is necessary to protect public health under the TRIPS Agreement. These legal checklists include an analysis into the legitimacy of the purpose, the nature and purpose of the limitation, the suitability of the measure, and the least restrictiveness of the measure.

[42] The Preamble to the Constitution.

Essentially, there are observable similarities between the necessity tests; but they are differences in implementation and in degrees.

This study will carry out a predictive analysis of the necessity of plain packaging measures at both the domestic and international regime. The outcomes of these predictive examinations will be compared. In so doing, it will also establish whether there are significant differences in how the question of necessity is treated in the different layers of adjudication.

This study will not only introduce and compare the features of the domestic and the international realm; it also seeks to identify the provisions which may be the source of conflicts between the two mechanisms.[43] There are aspects that are comparable from which the distinct regimes can draw lessons from each other. There is contradictory evidence on the efficacy of plain packaging of tobacco products.[44] Evidence ranges from statistic type to psychology type evidence. The question which arises is how the WTO will deal with efficacy under the 'necessity' review? Comparably how the South African Courts will handle an area with such divergent opinions or if foreign evidence will be applied to a domestic 'necessity' review. If the answer is in the affirmative how much weight will be attached to such evidence? In its analysis this study will pursue a comparative approach to evaluate how the efficacy requirement of necessity has been dealt with in the two regimes.

Another facet of the necessity analysis that this study will draw a comparative analysis on is the status of the right to public health under both regimes. Is it of equal status? The WTO and the WHO[45] have engaged in a joint strategy vigilant of the interface between

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[43] Keeping in mind that one of the objectives of the comparative approach is to establish the source of tension surrounding the legitimacy of WTO necessity tests.

[44] D T Levy, J Tam, C Kuo, G T Fong F Chaloupka 'Research Full Report: The Impact of Implementing Tobacco Control Policies: The 2017 Tobacco Control Policy Scorecard' (2018) 24 (5) *Journal of Public Health Management and Practice* 448; H Hughes, M Arora, N Grills 'Perceptions and impact of plain packaging of tobacco products in low and middle income countries, middle to upper income countries and low-income settings in high-income countries: a systematic review of the literature' (2016) 6 (3) *BMJ Journal*; L S Rose, C B Chong, E Aspinall *et al* 'Effects of standardised cigarette packaging on craving, motivation to stop and perceptions of cigarettes and packs' (2014) 29 *Psychol Health* 849–60; M Wakefield, K Coomber, M Zacher et al. 'Australian adult smokers' responses to plain packaging with larger graphic health warnings 1 year after implementation: results from a national cross-sectional tracking survey' (2015) 24 (2) Tobacco Control 2); D Germain, M Wakefield & S J Durkin 'Adolescents' perceptions of cigarette brand image: Does plain packaging make a difference?' (2009) 46 (4) Journal of Adolescent Health 1–8; KPMG, 'Illicit tobacco in Australia: 2013 Half Year Report,' London: KPMG, LLP, (2013) <http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9879X3/$FILE/medMD9D4L6C.pdf>; K Paul-Emile 'Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy' (2009) 19 Cornell Journal of Law and Public Policy 691-737.

[45] WHO & WTO 'WTO Agreements and Public Health: a Joint Study by the WHO and the WTO Secretariat' (2002) < http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf>.

the spheres they govern and to bridge the gap between the multilateral organisations. The WTO, WHO and WIPO have again under the same observations of the need for policy coherence engaged in a joint study.[46] These initiatives to develop coherence in the spheres of international trade, public health and intellectual property are critical to this study. Related to this facet is the role and status of the WHO FCTC which will be assessed through a comparative perspective in both regimes. The status of international law in both regimes will be assessed particularly in relation to the necessity requirements. Whether the WTO will adopt horizontal subsidiarity in dealing with the plain packaging matter will be considered. This study is hence not merely a mechanical analysis of the necessity assessment at two different layers of governance. Comparisons will be made where possible in order to draw lessons for both regimes. Simultaneously to assess the legitimacy of the concerns raised against the WTO necessity tests.

## 1.4 LITERATURE REVIEW

This literature review is designed and limited to address central issues relevant to the legality of plain packaging of tobacco product measures in particular questions regarding the necessity of the limitation it imposes on trademark rights. This review adopts a thematic approach in reviewing the literature which is pertinent to crucial issues to be examined in this study. The issues surrounding the necessity of plain packaging will be addressed through the following themes; the 'necessity test'; the closely related issue of the 'health over trade perspective'; the 'trademark right of 'use' argument' and then the 'role of the WHO FCTC' in the necessity analysis of the plain packaging measures.

### 1.4.1 The necessity test

Much has been written about the necessity test under the South African legal system (the general limitation clause) and the WTO regime. In dealing with the necessity of plain packaging measures it is essential to establish the content and purpose of the relevant necessity tests; as well as to convey what current literature reveals about the status of the necessity tests.

Vast literature has been written regarding the necessity principle (necessity test) under constitutional law and comparative law. The necessity test under various national

[46] Promoting Access to medical Technologies and Innovation: Interactions between public health, intellectual property and trade.

constitutions is embodied in the limitation clauses; in which the reasonability of limitations on protected human rights is reviewed. Section 36 of the South African Constitution embodies the limitation clause or as the term preferred for the purposes of this study the 'necessity test'. When criticised for not explicitly including the term 'necessary' in its limitation clause, South Africa held that even without explicit inclusion of the term necessary, Section 36 was generally structured to conform with the general interpretation of necessity.[47]

There is wide consensus that the rationale behind the necessity test is to allow a balance between individual rights and collective rights or state actions. Through the lens of the necessity test the permissible scope of limiting individual rights is assessed.[48] Barak[49] and Cohn describes it as a balancing tool used by judges.[50] The South African courts have confirmed that the role of the necessity analysis is to weigh up the limitation of a right against the purpose of such a limitation.[51] It ensures accountability and openness. There seems to be a fair amount of consensus on the role of the necessity test under the South African constitutional legal system as a balancing tool.

Literature also indicates that first the courts will establish whether the exercise of a right is impaired and then whether the limitation is reasonable and necessary in 'an open and democratic society based on human dignity, equality and freedom.'[52] The jurisprudence surrounding the application and interpretation of the necessity test is well developed with it having been applied extensively in Constitutional cases.[53] This is valuable in carrying out a balancing exercise of guaranteed rights in the novel and rather vexed issue of plain packaging of tobacco products. A predictive analysis of the necessity

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[47] A S Sweet & J Mathews 'Proportionality balancing and global constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; See also J Brown 'The Doctrine of proportionality: a comparative analysis of the proportionality principle applied to free speech cases in Canada, South Africa and the European Convention on Human Rights and freedoms' (Unpublished LLM Dissertation, Central European University 2012).

[48] S Abiola 'Limitation clauses in national constitutions and international human rights documents: Scope and juridical Interpretation' (2010) Research Memorandum Prepared for the Open Society Institute's Public Health Program Law and Health Initiative <www.cop.healthrights.org/files/2/.../235f6c838eef0eed5df064d54d41da83>.

[49] A Barak Proportionality Constitutional Rights and their Limitations (2012) 20.

[50] M Cohn 'Three aspects of proportionality' Paper presented at the VIII World Congress of the International Association of Constitutional Law, Mexico City 2010, 4.

[51] *S v Bhulwana* 1996 (1) SA 388 (CC); *S v Makwanyane* 1995 3 SA 391; *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC); *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 203.

[52] Section 36 of the Constitution of the Republic of South Africa, Act 108 of 1996.

[53] *Christian Education v Minister of Education; 2000 (10) BCLR 1051 (CC); British American Tobacco South Africa (Pty) Ltd v Minister of Health* [2012] 3 All SA 593 (SCA) 107.

of plain packaging measures under the South African legal system will hence be guided under the direction of this well-developed jurisprudence.

Despite wide consensus regarding the application of the necessity analysis it also faces opposition from other academics. The application of the necessity test in the South African constitutional system has been criticised for being unpredictable, incoherent and inconsistent among other concerns. [54] Brown in his work addressed the concerns about incoherence and irrationality of the proportionality principle in judicial balancing; in a comparative study of the application of the proportionality principle in South Africa, Canada and the European Convention on Human Rights.[55] The author argued that the problem was not tied to the proportionality framework or the limitation framework per se but instead the problems were a result of the misapplication of the framework.

The author remarks that to minimise the problems raised regarding the application of the South African limitation clause the reviews should proceed according to the formulated stages [56] and in a particular order. In his analysis of the South African application[57] of the principle, he concludes that it does not follow any order and that factors are not considered separately. Petersen shares the same view regarding the application of the necessity principle in South Africa.[58] He opines that the principle is not applied in a particular sequence as stated in *S v Manamela*[59] where the court held that the five factors in Section 36 were not exhaustive and that the court was not bound to a sequential checklist. [60] The question which arises from this concern is whether not following a sequential list distorts the balancing function the necessity analysis is intended to achieve.

Literature indicates that the South African Constitutional text does include a necessity test. What is not agreed upon is the application thereof. Particularly the claims of

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[54] S Tsakyrakis 'Proportionality: An assault on human rights?' (2009) 7 *International Journal of Constitutional Law* 468, 470; T J Gunn 'Deconstructing proportionality in limitations analysis' (2005) 19 *Emory International Law Review* 465, 471. See also J Brown (note 47 above).

[55] J Brown (note 47 above) 20.

[56] The four stages are: The purpose of the limitation; the suitability of the limitation; the necessity; and the proportionality *stricto sensu* of the limitation.

[57] The work undertakes an analysis of the courts approach in two cases, *State v Mambolo* [2001] 10 BHRC 493 (CCT 44/0), and *The Islamic Unity Convention v The Independent Broadcasting Authority* [2002] (5) BCLR 433 (CCT36/01).

[58] N Petersen 'Proportionality and the incommensurability challenge – some lessons from the South African Constitutional Court' (2013) *New York University Public Law and Legal Theory Working Papers*, Paper 384 3.

[59] *S v Manamela and Another* 2000 (2) BCLR 491.

[60] N Petersen (note 58 above) 22-23.

incoherence and thus its capability to perform the balancing function. Barak asserts that proportionality is employed differently across the globe.[61] This indicates that the same textual designs of the necessity test can result in different outcomes. Therefore problems raised regarding the WTO necessity tests by members like South Africa which seem to apply similar tests domestically might be because of differences in application. This is a possibility that will be explored in this study.

The necessity analysis has various meanings in law depending on the legal regime concerned. However, it can at times in different legal regimes assume similar connotations. Therefore a question that this study will address is whether the differences in necessity at the two layers of governance are a matter of semantics or whether they lie at the centre of the outcomes of the necessity analyses.

Current literature similarly recognise the balancing function of the WTO necessity tests and emphasises that the necessity requirement is at the centre of the WTO's aim of opening up trade liberalization and eliminating protectionism. The WTO does not mandate but, it promotes trade liberalisation and market access and hence denounces barriers to trade. Scholars like Van den Bossche,[62] Fontanelli[63] and Delimatsis[64] recognise the role of the necessity test as a tool that has been employed under WTO law to do away with unduly burdensome behaviour and protectionism.

According to the WTO Secretariat the necessity test is the tool the WTO uses to balance between two competing values or priorities namely allowing the freedom of Members to set and achieve regulatory objectives through measures of their own choice, and discouraging Members from implementing or maintaining measures that excessively and unjustifiably restrict trade.[65] This is the intended role of the WTO necessity test, to reflect the balance in the WTO.

Fontanelli and Delimatsis importantly convey a source of tension in WTO necessity tests that the interpretation of the necessity test has evolved, from the classical necessity test which focuses on the availability of least restrictive alternatives. They indicate that the

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[61] A Barak (Note 49 above).
[62] P Van den Bosche *The Law and Policy of the WTO: Text, Cases and Materials* 605.
[63] F Fontanelli 'Necessity killed the GATT - Art XX GATT and the Misleading Rhetoric about "weighing and balancing"' (Autumn/Winter 2012/13) 5 (2) *European Journal of Legal Studies* 36, 37.
[64] P Delimatsis 'The Principle of necessity in the WTO – Lessons for the GATS negotiations on domestic regulation' (2014) *Tiburg Law School Legal Studies Research Paper Series* 6.
[65] WTO, unpublished note by the Secretariat, Working Party on Domestic Regulation, *Application of the Necessity Test: Issues for Consideration*, Job No. 5929 (19 Mar. 2000).

necessity test now includes a cost-benefit proportionality analysis which is more rigorous and more intrusive on the domestic sovereignty.[66] These two distinct versions of necessity are both being used interchangeably under the WTO; and will definitely result in two different outcomes for plain packaging measures.

The Centre for International Environmental Law gives two distinct dictionary definitions of 'necessity'. [67] The first defines necessity as prerequisite, obligatory or essential. Simply stated something that cannot be balanced or proportioned against anything else. This definition is in line with the approach that necessity means that no least restrictive alternative measures exist. On the other hand it gives the other definition that necessity can be defined in relation to or in connection to, in which it is used and is susceptible to various meanings on a case by case basis, it can mean conducive to the end sought.[68] This definition is in line with the approach that proportionality must be read into the determination of necessity.

In the WTO case of *Korea - Import Measures on Fresh, Chilled and Frozen Beef* (herein after the *Korea – Beef* case)[69] the WTO Appellate Body (herein after the AB) held the view that the WTO necessity test particularly under the WTO TBT Agreement takes the elements of the proportionality principle into account. The AB in this case stated that 'necessary' involves in every case a process of weighing and balancing a series of factors; thus the proportionality type review was employed.[70] Whether this wide reading would render the TBT necessity test an adequate platform for the required balancing of competing values in the plain packaging of tobacco products matter will be dealt with in this study.

Academics such as Nuemann and Turk argue that by adopting the approach to necessity which includes a 'weighing' and 'balancing' of a 'series of factors', the AB effectively extended WTO jurisdiction to judgments formerly reserved for national

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[66] F Fontanelli (note 63 above); P Delimatsis (note 64 above); Ibid.
[67] Centre for International Environmental Law 'Second guessing national level policy choices: Necessity, proportionality and balance in the WTO services negotiations' <http://www.ciel.org/Publications/Necessity_3Sep03.pdf>.
[68] Ibid.
[69] Appellate Body Report *Korea - Import Measures on Fresh, Chilled and Frozen Beef*, WT/DS161, 169/AB/R, 11 December 2000.
[70] P Delimatsis (note 64 above).

governments.[71] This echoes concerns raised by member countries that the WTO necessity tests do impose unreasonable burdens in justifying domestic policies.

Doyle[72] argues that necessity has vague interrelated elements and has become an unwieldy standard. He argues that this test needs to be reformulated to ensure transparency and legitimacy of the WTO.[73] Schoenbaum remarks that, the necessity provision has led to a semantic shift, 'since in the test currently in use 'necessary no longer relates to the protection of living things, but to whether or not the measure is a 'necessary' departure from the trade agreement'.[74] Is the WTO necessity test achieving the desired balance or is it overstepping the intended boundary?

Zleptinig and Hilf argue that the WTO necessity requirement must involve the balancing of trade and non – trade related interests if the WTO is to maintain its legitimacy.[75] Lerche[76] as indicated by Sweet[77] argued that the least restrictive means test and the proportionality test are dependent on each other. Essentially that separating the two forms of necessity will defeat the intended aims of the necessity requirement. The author argues that the least restrictive means test on its own would be ineffective, and thus the proportionality test must be added to the least restrictive means test. Whether the WTO is progressively absorbing this notion is unclear and is an enquiry this study will pay attention to. Current literature on the 'necessity' test indicates that different approaches have been adopted; and that it remains unclear which approach the WTO will adopt in future cases. The literature does not elucidate whether the WTO uses the different approaches to necessity in a systematic or haphazard random manner. In its analysis this study seeks to address this gap.

Literature indicates that WTO necessity tests have been met with vast controversy. In a response to the inclusion of the necessity test in the General Agreement on Trade in

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[71] J Neumann & E Türk 'Second guessing national level policy choices: Necessity, proportionality and balance in the WTO services negotiations' Centre for International Environmental Law, Discussion paper, 3 < http://www.ciel.org/Publications/Necessity_3Sep03.pdf >.

[72] C Doyle 'Gimme Shelter: The 'Necessary' element of GATT Article XX in the context of the China Audiovisual Products Case' (2011) 29 *Boston University International Law Journal* 145, 167.

[73] Ibid.

[74] T J Schoenbaum, 'International trade and protection of the environment: The continuing search for reconciliation' (1997) 91 *American Journal of International Law* 269, 276.

[75] See S Zleptnig *Non Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (2009) 2 – 4; M Hilf 'Power, rules and principles – Which orientation for WTO/GATT Law?' (2004) 4 (1) *Journal of International Economic Law* 111, 119 - 120.

[76] P Lerche in R Alexy's *A Theory of Constitutional Rights* (2002) 35.

[77] A S Sweet & J Mathews (note 47 above) 73 – 159.

Services (herein after the GATS) Rabson Wanjala of Kenya[78] stated that 'the necessity test does not guarantee enough flexibility' and was inconsistent with the reality on the ground. Brazilian diplomat George Marques remarked that the most risky part of the proposals in the GATS negotiations was the necessity provision, because 'it is not clear what is meant by 'necessity.''[79] The legitimacy of these concerns will be tested in this study.

### 1.4.2 The health – over - trade perspective

Proponents of this drastic approach base their reasoning on the nature of tobacco products. They argue that because tobacco is lethal ordinary world trade rules should not be applicable.[80] This includes the necessity test and its rigorous requirements, members should be given space to enact any type of measures no matter the magnitude of such regulations.[81] Accordingly, the thorough checklists and evidence demanded to meet the necessity test should not apply to tobacco products.[82] Zeigler[83] echoes these arguments and asserts that 'ultimately we need to exclude alcohol and tobacco from trade agreements.' The attention is on the product and not on the trademark separately as a legally protected property. This raises concern on the potential differential treatment of trademarks associated with ordinary goods from trademarks associated with antisocial goods. Scassa in her work highlights that this area in trademark law remains relatively unexplored.[84] This study will not centre on the status of antisocial trademarks but will reinforce the need to still protect these trademarks under ordinary trademark laws. Article 7 of the Paris Convention states that 'The nature of the goods to which a trademark is to be applied shall in no case form an obstacle to the registration of the mark'.

South Africa amongst other states also argued that the text of the WHO FCTC must include an explicit health over trade provision with the implications that tobacco regulation measures do not undergo the necessity reviews or any other test under the WTO.[85] Essentially that it becomes immune to WTO regulation because the current necessity test

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[78] Quoted in R K Tayob 'Developing countries voice opposition to 'necessity test' in GATS' (2006) <http://www.twnside.org.sg/title2/twninfo485.htm>.
[79] Ibid.
[80] I S Shapiro 'Trading cigarettes as an exception to the trade rules' (2002) 22 (1) *SAIS Review* 87-96.
[81] W Kingston 'Trademark registration is not a right' (2006) 26 (1) *Journal of Micromarketing* 17-26.
[82] E R Shaffer, J E Brenner & T P Houston 'International Trade Agreements: A threat to tobacco control policy' (2005) 14 *Tobacco Control* 19-25.
[83] D Zeigler 'International trade agreements challenge tobacco and alcohol control policies' (2002) 25 (6) *Drug and Alcohol Review* 567 – 579.
[84] T Scassa 'Antisocial trademarks' (2013) 103 *Trademark Reporter* 1172 – 1213.
[85] H M Mamudu et al (Note 14 above).

under the WTO provides a safe haven to tobacco trademark owners is trade centric and biased against health objectives. This thesis argues against the viability of the health over trade approach; in light of the theory that judicial balancing is necessitated by the nature of rights. This thesis will explore the consequences of such an approach to the entire legal system.

However other scholars[86] highlight the fact that what is of significance is not the human health effects associated with tobacco; but instead the harms associated with the trademark itself. Critics of the health-over - trade approach argue that public health can only be given pre-eminence on the basis of argument not mere assertion. Basham and Luik argue that Article 8 of the TRIPS Agreement provides leeway for members to adopt measures such as plain packaging to protect public health. This is despite the fact that Article 8 explicitly states that members may adopt measures to protect public health if such measures are consistent with the TRIPS. However, they emphasise that the public health exception is not always easy to satisfy and many public health measures may not be able to pass this hurdle. The authors argue that the TRIPS necessity test requires an actual connection between the measure and the objective, rather than a theoretical connection. They argue that the required connection between plain packaging and smoking habits does not exist; they anchor their debate in a discussion of studies which were carried out on the psychological effects of plain packaging of tobacco products on the human mind, behaviour and ultimately smoking habits.

Whilst an array of literature discussing the health – over – trade perspective exists, authors are yet to demonstrate the legal implications of adopting such an approach especially in the plain packaging of tobacco products debate. The study does acknowledge the importance and status of the right to health[87]; however it seeks to reveal the viability

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[86] P Basham & J Luik 'Erasing intellectual property 'plain packaging' for consumer products and the implications for trademark rights' < http://www.smoke-free.ca/plain-packaging/documents/2011/Democracy%20Institute%20%20London%20and%20Washington%20DC %20- %20Attachment%20A.pdf >.

[87] The General Comment No. 14 (2000) to the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) states that: 'Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments.
Moreover, the right to health includes certain components which are legally enforceable.'

and spill outs of such an approach and to establish why the right to trademark is also deserving of considerable recognition and protection.

### 1.4.3 The right of 'use' argument

As highlighted earlier in assessing the necessity of a limitation on a guaranteed right, the tribunal must first identify whether a right is indeed impaired before the enquiry into the necessity of such impairment proceeds. This sums up the weight of this theme in this study. Under the South African and the WTO law, there has to be an infringement, restriction or limitation on a right to instigate a challenge. Accordingly the first step in examining the necessity of plain packaging of tobacco products measures is to establish whether such a measure infringes a protected right. Whether trademark rights under South African or WTO law include a right of use is an investigation that this study is bound to venture into.

The South African literature dealing with trademarks in general, let alone in the particular subject of plain packaging of tobacco products measures has not concentrated on the right of use argument which makes this study novel in this angle. Authors like Du Bois indicate that trademarks are protectable under South African law[88] but do not consider whether the trademark rights are limited to negative rights only. The study seeks to fill this gap. To date South African courts have not dealt with the right of use argument. It has to be carefully considered whether the South African trademark law provides for a right to use. Harms[89] notes that trademark rights are only negative rights, and goes on to note that they are preferential rights to use but not absolute rights to use? Trademark cases in South Africa have been limited to passing off claims and the prevention of unauthorized users from using the same or similar marks to avoid confusion. The cases have certainly not been about stopping the use of a trademark right or limiting how a trademark is to be used. Therefore from a South African perspective this study treads in a new territory of trademark law. Further the study addresses a concern that has not been considered in research regarding the constitutionality of plain packaging.

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[88] See M Du Bois (note 38 above).

[89] L Harms (note 31 above) 387.

According to Harms[90], T Voon and D Mitchell[91] trademark rights only encompass a negative right to prevent what others may do in relation to such a trademark. There is wide literature which confirms that there is no right of using trademarks under the Paris Convention and the TRIPS Agreement.[92] Davison[93] shares this view and argues that no right of use exists because this would create problems with the creation of exceptions to use under international intellectual property law. Davison emphasises that a right of use exists under numerous domestic laws. And that this is because such a right is easy to curtail under domestic laws. He illustrates this with the Australian scenario, he states that the Australian legislation allows for the right to use[94] but this was successfully and easily restricted in the plain packaging of cigarettes constitutional case. The author argues that this would be more complicated if there was a right to use under international law. Hence he concludes that there are domestic laws which allow for the right to use but that such does not exist under international law.

The Gervais[95] and Lalive reports[96] argue that the TRIPS and Paris Convention include an implicit right of use. Stern and Draudins[97] also share the same view and disagree with Davison's argument that trademark rights only include a right to prevent others from using the trademarks. Gervais argues that the negative right argument goes against the spirit of the intellectual property regime. One argument shared among all authors in support of a positive right in trademarks is that if the trademark rights do not include a right to use there would be no need to have registration rights, positive use forms the basis for obtaining and maintaining registration.[98] In other words the authors opine that it is erroneous to allow or confer a right to registration and no right to use the registered trademark.

This study raises the issue whether tobacco trademark owners' claims can stand under the WTO Agreements if their rights are not infringed by plain packaging measures. Davison asserts that although there is no right of use under the TRIPS Agreement, plain

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[90] L Harms (note 31 above) 388.
[91] T Voon & D Mitchell (note 31 above) 115.
[92] S Evans & J Bosland (note 31 above) 45.
[93] M Davison (note 31 above) 81.
[94] Ibid 78. Under Australian law, the tobacco companies' trademarks include a positive right to use the mark, not just a negative right to prevent others from using the mark.
[95] D Gervais (note 37 above).
[96] Memorandum from Lalive to Philip Morris International Management South Africa (note 37 above).
[97] S Stern & O Draudins (note 37 above) 151.
[98] A Kur 'The right to use one's own trademark: A self-evident issue or a new concept in German, European and international trade mark law' (1996) 18 *European Intellectual Property Review* 198, 203.

packaging of tobacco products measures can still be challenged under Article 8 of the TRIPS Agreement (necessity test).[99] This study will interrogate this view. On the other hand Evans and Bosland point out that by accepting such a negative conceptualisation of trademark rights the plain packaging of tobacco products measures have no potential to interfere with property rights in the marks.[100]

As conveyed in this review, academics do not agree on the conceptualisation of the right conferred on trademarks in international law, (Paris Convention and TRIPS Agreement). This study builds on this existing literature. It seeks to go a step further in examining the implications a negative conceptualisation of trademark rights will have on the availability of WTO necessity challenges to tobacco trademark owners. Can challenges to plain packaging of tobacco products measures still be brought before the TRIPS necessity test if there is no right of use under the same Agreement? Does the right of use argument have any implications on the TBT necessity review? Current literature has not clarified these issues, and this is a gap this study will address.

### 1.4.4 The Role of the WHO FCTC in the Necessity Review

Under the South African regime, South Africa has made headway in complying with the WHO FCTC with various amendments to its tobacco regulations. For instance, it became the first country to prohibit smoking in a vehicle where a child less than 12 is present.[101] More importantly, it has a draft bill which plans to mandate plain packaging measures. The judiciary has already acknowledged the role of the WHO FCTC as a standard setter in matters of tobacco control.[102] British America Tobacco South Africa argued that its Freedom of expression constitutional right was limited by section 3(1) *(a)*

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[99] M Davison (note 31 above).

[100] S Evans and J Bosland (note 31 above) 52.

[101] Section 1 and 2 of the Tobacco Products Control Act 83 of 1993 as amended by Tobacco Products Control Amendment Act 63 of 2008; South Africa, 2008; See also J Tumwine 'Implementation of the Framework Convention on Tobacco Control in Africa: Current Status of Legislation' (2011) 8 (1) *International Journal of Environmental Research and Public Health* 4312, 4315; See also Report card on the WHO Framework Convention on Tobacco: South Africa Control <file:///C:/Users/demo/Downloads/SouthAfrica_report_card.pdf>.

[102] *BATSA v Minister of Health* (note 40 above) para 107. The court held that: 'In addition to these objectives, the Act (as amended by the 2007 Amendment Act and the 2008 Amendment Act) seeks to ensure that South Africa complies with its obligations in terms of the World Health Organisation Framework Convention on Tobacco Control ('the WHO FCTC') which came into force on 27 February 2005'; See also Framework Convention Alliance 'South African appeal court cites WHO FCTC' (2012) <http://www.WHO FCTC.org/fca-news/advertising-promotion-and-sponsorship/781-southafrican-appeal-court-cites-WHO FCTC53>.

of the Tobacco Products Control Act 83 of 1993 as amended by the Tobacco Products Amendment Act 63 of 2008. The provision prohibited tobacco advertising.[103] The court found in favour of the Minister of Health and the National Council Against Smoking.[104] More importantly, it showed that the courts can rely on the WHO FCTC in determining the necessity of plain packaging measures.[105]

Honduras,[106] Dominican Republic,[107] Indonesia[108] and Cuba[109] are individually all complainants in the WTO disputes launched against the Australian plain packaging legislation. Amongst the complainants, Honduras is a WHO FCTC member. Most of the third parties to the disputes[110] are WHO FCFC parties.[111] The third parties have an effect on the final verdict[112] and since most of them are WHO FCTC members one would expect that the submissions they will make will be pro WHO FCTC, or will favour Australia the respondent. However, such a prediction is not obvious; Honduras is a WHO FCTC member but still instituted a WTO challenge on plain packaging legislation for being amongst other

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[103] Section 3(1)*(a)* of the Tobacco Products Control Act provides as follows: 'No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.'

[104] *BATSA v Minister of Health* (note 40 above) para 23 'I do not think that it was open to the Minister and the legislature to ignore the Framework Convention when considering what steps to take to deal with the risks posed by tobacco use. In respect of international conventions the Constitutional Court …Moseneke DCJ and Cameron J, clearly indicated the approach to be adopted with regard to conventions that impose obligations on the Republic.'

[105] Ibid.

[106] *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Complainant: Honduras), WT/DS435.

[107] *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Complainant: Dominican Republic), WT/DS441.

[108] *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Complainant: Indonesia), WT/DS458.

[109] *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (Complainant: Cuba) WT/DS467.

[110] See Third Parties before a panel <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm>; Besides the complaining and the responding Members, other Members have an opportunity to be heard by panels and to make written submissions as third parties, even if they have not participated in the consultations if they have a substantial interest in the matter before the panel. Third parties have no rights beyond these although a panel can, and often does, extend the rights of participation of third parties in individual cases.

[111] Brazil; European Union; Canada; Ecuador; Guatemala; Honduras; India; Japan; New Zealand; Nicaragua; Norway; Oman; Philippines; Singapore; Turkey; Uruguay; Zambia; Zimbabwe; Chile; China; Egypt; Malaysia; Mexico; Nigeria; Peru; Thailand; South Africa; Trinidad and Tobago; Russian Federation and Saudi Arabia. The non WHO FCTC members are United States; Dominican Republic; Cuba; Malawi; Indonesia; and Argentina.

[112] M L Busch & E Reinhardt 'Three's a crowd: Third parties and WTO Dispute Settlement' (2006) 58 (3) *World Politics* 446, 447.

queries an unnecessary barrier to trade. Is the stance by Honduras strategic or political or based on legal merits? What exactly is the role of the WHO FCTC in the necessity analysis at the domestic and WTO levels of governance?

The role of the WHO FCTC under the WTO regime is not as clear and optimistic. Drope and Lencucha argue that, without policy coherence and with unpredictability on country positions between the WTO and WHO FCTC commitments the WHO FCTC will not be of much effect in WTO adjudication and in global health governance. The authors state that:

> The fact that both Ukraine and Honduras endorsed the adoption of the packaging guidelines raises important questions pertaining to policy coherence across international legal regimes. From a political perspective, these challenges are not merely more evidence that the trade regime of the WTO is potentially hampering the ability to regulate products for health purposes.[113]

However, they argue that if these tensions are resolved the WHO FCTC will change the game in how public health is dealt with under the WTO system.[114] The WHO FCTC is viewed as the beginning of the international regime to address public health.[115] A 2002 joint study by the WHO and the WTO recognises the crucial role of the WHO FCTC in tobacco regulation. The study recognises that the transnational tobacco reduction strategies are based on overwhelming empirical evidence regarding their effectiveness.[116] It further remarks that none of the WHO FCTC provisions seem inherently WTO inconsistent, and that the provisions may well be found to pass the 'necessity test' under WTO laws. This is a very optimistic remark by the WHO and the WTO. However, raising the unpredictability of the WTO rules, the study goes further to state that the WTO compatibility of the WHO FCTC provisions will depend upon how the rules will be applied by the WTO members. Thus the WTO did not clear the WHO FCTC of possible contravention of the WTO rules; instead it emphasises the possibility of different implications that may arise depending on how these rules are applied.[117]

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[113] R Lencucha & J Drope 'Plain packaging: an opportunity for improved international policy coherence?' (2013) 30 (2) *Health Promotion International Journal* 281, 283.
[114] Ibid.
[115] Ibid.
[116] WHO & WTO (note 45 above).
[117] Ibid.

A study by the Framework Convention Alliance (the FCA), shares the view that the WHO FCTC will have a determining effect in the WTO compatibility of plain packaging of cigarette measures.[118] The FCA director opines that after the *United States – Measures Affecting the Production and Sale of Clove Cigarettes*[119] case (herein after the *US- Clove Cigarettes case*) the position of the WHO FCTC remains unclear but that it is clearer than ever that the WHO FCTC is now acknowledged as the final word in defining the best tobacco control practices.[120] Whether this is true or too premature to give the WHO FCTC such weight; 'final word in defining best practices in tobacco control' remains unconfirmed.

Shmatenko,[121] based on his interpretation of the Panel's reasoning in *US – Clove Cigarettes,* opines that the Panel will not question the effectiveness of the plain packaging of cigarettes measures because the WHO FCTC represents a growing consensus that plain packaging will be effective. The WTO TBT Agreement encourages members to base their measures on international standards and there exists a rebuttable presumption that measures based on international standards are 'necessary' under the TBT Agreement. This raises questions on the definition of international standards and whether the WHO FCTC guidelines are international standards.

Eckhardt[122] importantly warns that the plain packaging measure will have to undergo the WTO necessity test however the author is convinced that because plain packaging measures are based on the WHO's WHO FCTC and not on unilateral decisions the measures will be found compatible with WTO laws. McGrady[123] opines that the WHO FCTC weakens the position of members challenging the legitimacy of plain packaging of cigarette measures. It emphasises that the WHO FCTC will play a major role in the 'necessity' of plain packaging of cigarettes. Cameron also opines that the WHO FCTC is a significant document which should not be underestimated as it is being proven by recent

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[118] Framework Convention Alliance (note 101 above).

[119] Panel Report in *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/R, 2 September 2011.

[120] Ibid.

[121] L Shmatenko (note 21 above).

[122] J N Eckhardt 'Balancing interests in free trade and health: How the WHO's Framework Convention on Tobacco Control can withstand WTO scrutiny' (2002) 12 *Duke Journal of Comparative and International Law* 197, 198.

[123] B McGrady 'Tobacco Product Regulation and the WTO US – Clove Cigarettes' (2011) O'Neill Institute for National and Global Health Law 7 <http://www.law.georgetown.edu/oneillinstitute/documents/ONeill%20Briefing_TobaccoProductRegulation.pdf>.

trade disputes.[124] The WHO FCTC is being used in national court systems, international investment forums and in the WTO.[125] Liberman, Scollo, Freeman and Chapman also agree that the WHO FCTC represents global solidarity for the need to regulate tobacco products.[126] McGrady indicates that there is a general impression that the WHO FCTC legitimized tobacco regulation in a manner that settled disputes regarding the efficacy and legitimacy of measures included in the treaty.[127] However as Lannan[128] notes it is still untimely to predict whether this encouraging approach to the WHO FCTC will continue, its legal status in WTO disputes remains an open question.

An array of literature indicates that there is a wide belief that the WHO FCTC will have a major and decisive role in the necessity review of plain packaging of tobacco product measures. Literature shows that this line of thought originates in the understanding that plain packaging of cigarettes is based on a global consensus and that the WTO used the WHO FCTC as a decisive factor in *US- Clove Cigarettes*. What the literature does not thoroughly attend to, is how and why plain packaging of tobacco products measures should be regarded as international standards? The study will build on existing literature to establish whether WHO FCTC provisions and hence plain packaging should be considered as an international standard and the implications of such on the necessity review of plain packaging of tobacco products.

## 1.5 THEORETICAL FRAMEWORK

According to Carl Schmitt balancing 'can be found in every aspect of intellectual life'[129] Reminiscent to its title, 'Balancing the protection of public health interests and trademarks in plain packaging of tobacco products: A South African perspective' this study speaks to the need to balance two conflicting interests. It is therefore vital that the concept

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[124] J Cameron 'Emerging Disputes: In courts around the world, the WHO FCTC and its nationally implemented provisions are being put to the test.' (2012) Tobacco reporter <http://jcicinternational.com/wordpressjc/wpcontent/uploads/2012/07/WTO_Tobacco_disputes>.

[125] Ibid. In mid-2006, Israeli High Court Justice Eli Rubinstein based his decision on the WHO FCTC in the case *Irit Shemesh v. Fucachetta Ltd.* 2006 - CLA 9615/05, rendered July 5, 2006 by the Supreme Court

[126] J Liberman, M Scollo & B Freeman et al 'Plain tobacco packaging in Australia: The historical and social context' in T Voon, D Mitchell, J Liberman & G Ayres (eds) *Public Health and Plain Packaging of Cigarettes Legal Issues* 30 – 47.

[127] B McGrady *Trade and Public Health: The WTO, Tobacco, Alcohol and Diet* (2011) 229

[128] K Lannan 'The WHO framework Convention on Tobacco Control: The international context for plain packaging' in T Voon et al (eds) (note 126 above) 11-29.

[129] G C N Webber 'Proportionality, balancing, and the cult of constitutional rights scholarship' (2010) 23 (1) *Canadian Journal of Law and Jurisprudence* 179.

of 'balancing' be clarified. The physical definition of balancing refers to the act of balancing two sides of a scale. Judicial balancing refers to a judicial decision making process that requires the weighing up of two interests in favour or against an action.[130] Balancing is mostly used to resolve intra- constitutional conflicts, as conflicting rights cannot always be fully reconciled, the courts are forced to conduct a balancing exercise.[131]

Alexy's theory of judicial balancing will form the basis of the balancing analysis to be undertaken in this study. Alexy's law of balancing states that the greater the detriment to one principle the greater the need to satisfy the other.[132] Further according to this theory of judicial balancing, no value or principle can be considered unconditionally preeminent; a conflict between two principles can only be resolved through a balancing act.[133] Rights are not absolute and individual rights are often in competition with each other or in competition with community rights as a result balancing is fundamental to the rights discourse.[134]

Constitutional rights and interests are usually conceptualised as anti-absolutes. Declaring that that no right is absolute, drives the judicial system into a balancing mode whenever a conflict of interests arises. [135] Judicial balancing clarifies that the two parties are both pleading a valid constitutional norm or value; that complex policy considerations will be undertaken to decide which of the two interests will prevail and that future disputes involving the same values may be decided differently depending on the particular circumstances at hand.

In South Africa, balancing takes place under the section 36 (1) assessment.
The rights in the Bill of Rights are subject to limitations contained in section 36 of the Constitution. Balancing also occurs in section 25 (1) of the Constitution, in determining whether a deprivation of property is arbitrary thereby violating the Constitution. Section 36 (1) provides that the rights in the Bill of Rights may be limited only:

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[130] I Porat 'The dual model of balancing: A model for the proper scope of balancing in constitutional law' (2006) 27 *Cardozo Law Review* 1393, 1398.
[131] S A De Vries 'Balancing fundamental rights with economic freedoms according to the European Court of Justice' (2013) 9 (1) *Utrecht Law Review* 169, 170.
[132] R Alexy *A Theory of Constitutional Rights* (1986) (trans J Rivers, 2002) 10.
[133] M Andenas & S Zleptnig 'Proportionality and balancing in WTO Law: A comparative perspective' (2007) 20 (1) *Cambridge Review of International Affairs* 71, 77.
[134] M Cooray 'Human Rights are not Absolute' (1996) <http://www.ourcivilisation.com/cooray/btof/chap225>.
[135] A S Sweet & J Mathews (note 47 above).

> in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

In assessing whether a limitation on rights conferred by the Bill of rights is reasonable and necessary in a democratic society a balancing process is undertaken, as competing values are weighed against each other.[136] Further, section 25 (1) of the Constitution provides that '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. In deciding whether plain packaging measures result in an arbitrary deprivation of trademark property, balancing is inescapable. If the benefits are disproportional to the harm, a deprivation will be arbitrary, resulting in a violation of trademark property rights.

Under section 36 (1) balancing test the public health interests will be on the one side of the scale and trademark rights on the other.

> In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[137]

The South African Constitution in essence requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation against the importance and purpose of the limiting enactment. [138]

The need for sensitive balancing of competing non-trade and trade-related values and principles remains an on-going challenge for the WTO.[139] Balancing at the WTO level

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[136] Ibid.

[137] *S v Bhulwana* 1996 (1) SA 388 (CC).

[138] I M Rautenbach and E F J Marlherbe *Constitutional Law* 3 ed (2009) 346; I Currie and J de Waal 6 ed *Bill of Rights Handbook* (2013) 163 -164; In *S v Makwanyane* the court held that in the 'balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.'

[139] Marrakesh Agreement establishing the World Trade Organisation, 15 April 1994 (Herein after the WTO); See also C Bellmann, J Hepburn & M Wilke 'The challenges facing the multilateral trading system in addressing global public policy objectives' (2013) 3(3) International Development Policy | Revue internationale de politique de développement 117,119.

is struck between maintaining the freedom of Members to set and achieve regulatory objectives through measures of their own choice, and promoting trade liberalisation or discouraging Members from adopting or maintaining measures that unduly restrict trade.[140] In practice the same balancing reflects conflicting values of trade versus non – trade interests.[141] Members can for instance impose technical regulations to protect public health but these are permissible only if they are 'necessary' to achieve the Member's policy objective.[142]

Why then are members like South Africa opposing balancing to be undertaken at the WTO level? Is the WTO or its balancing mechanism antithetical to the promotion of public health? The WTO has fast become one of the most influential international organisations in existence, largely because of its dispute settlement system which is binding on its members. The reports of the Panel and the Appellate Body often require members to bring their domestic measures into conformity with WTO obligations or face retaliatory actions from other WTO members.[143] Accordingly the WTO has immense impact on regulatory autonomy. As indicated earlier critics are against any form of balancing being undertaken at the WTO level. They argue that the WTO is institutionally not prepared for such an essential balancing of rights and interests. In the case of plain packaging, the WTO will be called to consider whether such measures are necessary public health measures, which will thrust the dispute settlement body into some form of balancing. The results of such a balancing exercise will either allow or hinder members from implementing plain packaging of tobacco measures in their own jurisdictions.

Necessity (proportionality) is an essential concept in this study and is discussed in more detail in Chapter five as it is central to the whole study. This study is concerned with necessity as a balancing tool at both domestic and WTO levels of governance. Therefore, it is almost impossible to separate it from the concept of balancing which has been elucidated on above. There are two characterizations of the necessity concept. Necessity in the narrow sense (classical type) is conceptualised as a least restrictive means test only. Meaning that the necessity test requires that of two alternative

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[140] T V Warikandwa & P C Osode 'Managing the trade-public health linkage in defence of trade liberalisation and national sovereignty: An appraisal of United States-Measures Affecting The Production And Sale Of Clove Cigarettes' (2014) (17) 4 PELJ 1263, 1276

[141] M Andenas & S Zleptnig (note 132 above) 422.

[142] 141 C Doyle 'Gimme Shelter: The 'Necessary' Element of GATT Article XX in the Context of the China Audiovisual Products Case' (2011) 29 Boston University International Law Journal 145, 152.

[143] S Shadikhodjaev Retaliation in the WTO Dispute Settlement System (2009) 55

means suitable to promote a legitimate interest, the one that interferes less intensively on another right should be chosen. This concept of necessity does not inquire into anything more than ensuring that measures chosen are least restrictive to achieve their stated purposes. Accordingly, if no other alternative measures are brought before the judicial system the necessity test will not have much effect.

The wider concept of necessity (proportionality type) includes the balancing and proportionality tests. This study is more concerned with this form of necessity. Thus it looks into the nature and extent of restriction; it requires measures to be suitable to achieve the objective. It also requires that the measure be least restrictive and that relevant factors be weighed to ensure that the benefit achieved by a measure is proportional to the costs of infringement it causes. For instance, it would be disproportional to ban imports on all apples to deal with a negligible or unlikely risk; which could be avoided if proper screening processes are undertaken.

The necessity review under South African Constitutional law includes a proportionality form of assessment which is embodied in its general limitation clause. The South African court held that the limitation clause required the weighing up of competing values, and eventually an assessment based on proportionality. In *S v Williams*[144] the court held that:

> It is true that international human rights instruments indicate that limitations on fundamental rights are permissible only when they are 'necessary' or "necessary in a democratic society.' But 'necessity' is by no means universally accepted as the appropriate norm for limitation in national constitutions. The term has, moreover, been given various interpretations, all of which give central place to the proportionate relationship between the right to be protected and the importance of the objective to be achieved by the limitation.[145]

From the onset the study reveals that there are issues related to the competency of the WTO necessity test to achieve the desired balance between trademark and public health interests in the plain packaging debate. WTO agreements contain a number of provisions, which in whole or in part are commonly referred to as 'necessity tests'. This study is concerned only with the necessity tests embodied in the TBT Agreement; the Agreement of Trade Related Aspects of Intellectual Property (herein after the TRIPS Agreement) and also the General Agreement on Tariffs and Trade (hereinafter the GATT) (for interpretive

[144] *S v Williams & Others* 1995 (3) SA 632 (CC) at 804.
[145] Ibid.

purposes only). The TBT Agreement necessity test is relevant in this study. Plain packaging measures are technical measures and as such are governed under the TBT Agreement. The TBT Agreement requires members to ensure that they do not apply technical regulations in any means that amounts to unnecessary restrictions on global trade.[146] It is also important to examine whether a necessity test is also embodied in the TRIPS Agreement; which sets minimum levels of the protection of intellectual property rights. In Article 20 it precludes unjustified encumbrances on trademark use in the course of trade.[147] In Article 8.1 it provides a guiding principle that members may adopt policy measures if necessary to pursue policy objectives like public health.[148] Therefore, the WTO in drawing distinctions between legitimate regulation and protectionist abuse employs the 'necessity review'.[149]

At the extreme critics contend that trade liberalisation and the WTO in particular allow for trade to improperly take priority over international human rights law.[150] Necessity provisions are perceived to directly or indirectly limit the ability of governments to regulate for the benefit of human health. The study seeks to interrogate such concerns raised regarding the necessity test by establishing the role of the necessity review only then can it be established whether the current form of necessity is overstepping boundaries. On the contrary, proponents view the WTO necessity tests as an appropriate check against protectionists and unduly restrictive regulatory measures.

Critics of proportionality or necessity review being undertaken at the WTO level opt for a health –over –trade approach. Whether such an approach is more desirable in the

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[146] The Agreement states in Article 2.2 that: 'Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information related processing technology or intended end-uses of products.'

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

[148] The Agreement states in Article 8.1 that: '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.'

[149] P Delimatsis 'Determining the necessity of domestic regulations in services the best is yet to come' (2008) 19 (2) *The European Journal of International Law* 365, 366.

[150] M Cohn (note 50 above).

plain packaging matter shall be considered in this study. By 'health – over- trade' in this study, l refer to an approach where the necessity of plain packaging is not questioned at all under WTO laws. A state where plain packaging is immune from the necessity requirements of the WTO.

## 1.6 RESEARCH PROBLEM

Although it is accepted worldwide that tobacco consumption is a public health threat; the legality of the plain packaging of tobacco product measures is widely contested. Questions regarding its necessity have not been fully addressed; and this is a determinant of its legitimacy at domestic and international levels. The Australian High Court case[151] did not address this question appropriately and according to this study appears to have granted unconditional pre-eminence to public health values. Member countries also show an inclination towards the health-over- trade perspective in fear that the WTO necessity test prejudices actions towards health protection.

This approach is problematic and leaves trademarks rights exposed to extinction and inutility. Moreover it goes against the general law principles to afford recognition to competing legal values. It is therefore important for this study that the competing public health and trademark interests are both weighed against each other; that the necessity of the measure is interrogated and that policy choices are justified.

Accordingly, the central problem which this study seeks to address is whether plain packaging measures are necessary public health measures. It must be examined whether plain packaging measures are a necessary limitation on trademarks. Issues unique to the necessity of plain packaging will be dealt with in this regard. Inevitably, sub - problems on the content, application and interpretation of the necessity test that arise; will be addressed.

A sub – problem is whether the current formulation and application of the WTO necessity test make it an adequate balancing tool. As indicated earlier member countries tend to disprove the capability of the WTO necessity test to provide an adequate balance. A significant aspect of this study will consider the merits of these claims.

This would include an examination of the domestic necessity reviewing mechanism, in this case the South African limitation clause and property rights provision in comparison to the WTO necessity mechanisms. A comparative approach is employed

[151] *JT International SA v Commonwealth* (note 23 above).

on a selective basis with an intention to enrich the understanding of necessity by drawing attention to comparable problems, strengths and concepts existing in the two layers of governance. Keeping in mind that the analysis will provide a practical yardstick when national measures should be assessed for compliance at the two layers of governance. Furthermore, it will contribute to scholarly debate and conceptual development in the disciplines of constitutional law, Trademark law and WTO law; particularly around the principle of necessity as it is applied in these disciplines.

## 1.7 RESEARCH QUESTIONS

This is an investigation into the following questions:

1. Is plain packaging of tobacco products a necessary public health measure?
2. Do plain packaging measures result in a limitation of trademark rights?
3. What is the place of public health in the international trade regime and to what extent does the WTO legal and policy framework recognise this human right.
4. Is a health –over –trade approach viable in the plain packaging matter?
5. Do WTO 'necessity' tests impose undue and unreasonable burdens on members to justify public health measures?
6. Do the Domestic necessity tests (Constitutional Limitation Clause) strike a much favourable balance? Or are they riddled with the same concerns?
7. What lessons can be drawn from the necessity tests standing independently; Do they provide insight on how to address the public health and trademark linkage in the plain packaging matter?

The answers to these questions are of fundamental interest not only to South Africa but to the global village as well, with states' regulatory autonomy in the public health arena being challenged more and more in domestic and international tribunals. Plain packaging of cigarettes is a topical issue globally and this timely study is designed to direct and assist governments, policymakers, and academics on the legal question of 'necessity' which as this study will show is essential to its legality.

## 1.8 RESEARCH METHODOLOGY AND LIMITATIONS

This is a multi-disciplinary legal study; the areas of law that are covered are trademark law, constitutional law, WHO law and WTO law. All the areas of research are

supported by primary and secondary sources; namely, academic literature in books and journals, institutional research reports, and internet sources.

The study carries out a historical analysis of the adoption of plain packaging measures. Essentially, it discusses the critical points in history that have resulted in the adoption of plain packaging. The historical analysis approach is also used in establishing the original formulation, context and rationales of the necessity test. It uses this method with an aim to use history to understand the present. It has been indicated that there are concerns and issues in relation to the current necessity test particularly at the WTO level. Using this approach the study intends to establish whether the problems are inherited from the necessity test; or whether they are recurring concerns or; whether there are because of the variation in the formulations or contexts of the necessity test.

The discussion of the South African position and the WTO position regarding the necessity of plain packaging is based on the analysis of the trademark regulation, the South African Constitution, TRIPS Agreement, TBT Agreement, corresponding case law and academic literature. The discussions of the WTO and South African necessity reviews are undertaken individually and as they are not to be confused.

The study adopts a comparative approach in the analysis of the necessity tests at the two layers of governance. This approach is adopted on a selective basis and whenever this can provide lessons, useful observations and recommendations. Further adopting a comparative approach should assist in establishing the legitimacy of the concerns raised regarding the WTO necessity tests. The outcomes of the necessity reviews under both will be compared where possible. Seemingly identical words may have distinct meanings and apparently different words may have the same meaning, but all provisions must be interpreted within their own context.

In South Africa the right to health and the right to property are protected in the Constitution. I adopt the approach that, a limitation on one of the two rights must be necessary, justified and or reasonable. I argue that this forms one of the central parts of a democratic constitution. To keep this study within manageable limits, l focus on the legal necessity of plain packaging only. The study does not delve into other legal questions surrounding plain packaging like its compliance with investment law and competition laws. It is concentrated on South African Constitutional law and WTO law. Under Constitutional law it focuses on the issue whether plain packaging is a necessary limitation on trademark

rights. Again it does not extend to other forms of intellectual property other than trademarks that could be of concern in plain packaging; for instance copyright and patent rights.

Under WTO law the study only centres on the necessity of plain packaging measures under the TBT and TRIPS Agreement. For instance it does not extend to the discrimination claims which are being challenged in the current WTO dispute under the TRIPS, TBT and GATT Agreements.

## 1.9 CHAPTER OUTLINE

### CHAPTER 1

The purpose of this chapter is to set a scene for the debate that informs this study and to situate the specific chapters that follow. It is also concerned with the introduction and background to the thesis; it establishes the research objectives, justifications, problems and questions that are posed for this study. It also explains the research methodology that is used in undertaking this study.

### CHAPTER 2

Chapter 2 traces the emergence of plain packaging as a tobacco regulation measure. It discusses and unveils the confrontation between trademarks and public health regulation. It also establishes the link between product packaging and tobacco consumption; an important factor which can be used to support the argument that plain packaging measures will be effective. It will also demonstrate that the tobacco industry was and is aware of the persuasive power of branding and packaging.

It cannot be ascertained whether plain packaging measures unduly interfere with trademarks without understanding the particularities of plain packaging regulations. Accordingly, the chapter also examines and explains the requirements of plain packaging measures. The relevant requirements and provisions of the WHO Framework Convention on Tobacco Control will be explained. The South African Draft Control of Tobacco Products and Electronic Delivery Systems Bill of 2018 and the foreign Australian TPP Act will also be utilized to ascertain closely what plain packaging legislation requires.

### CHAPTER 3

This chapter considers the case of plain packaging from a health perspective and whether the right to health gives basis for the health-over-trade approach. It establishes the place for public health in the South African and international trade regime and the extent to which the WTO legal and policy frameworks recognise this human right. It discusses

the nature, scope and content of the right to health and its link to the obligations of the state to implement plain packaging measures. It considers the legal duty of the state to protect public health[152] and the right to 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being...'[153] Section 39 1 (b) of the South African constitution obligates the consideration of international law in interpreting the rights in the Bill of Rights. Therefore, in interpreting the right to health in the bill of rights international law must be considered.

**CHAPTER 4**

The purpose of this chapter is to establish whether plain packaging of tobacco cigarettes measures unduly interfere with trademark rights. Inevitably, it will hence assess whether plain packaging measures limit trademark rights at all. This approach follows from the reasoning that before attempting to balance competing values it must first be established whether any value is limited (nature of the right) and then the nature and extent of limitation must be established. A protected value must be limited; the chapter will proceed by establishing the validity and significance of trademarks and the basis of their protection. The chapter will examine and ascertain the nature, scope and extent of rights conferred on trademark holders in South Africa and under the TRIPS Agreement. To reinforce the position of tobacco trademark owners in this matter. The 'right of use' arguments will be explored fully in this chapter.

In defining the scope of trademark rights the chapter will also establish the functions of trademarks and whether the functions are legally protected. Thereafter, the extent of limitation on trademarks resulting from plain packaging of cigarettes will be ascertained. South African trademark legislation, Constitutional law, the TRIPS Agreement and the corresponding case law will assist in achieving the objectives of this chapter.

**CHAPTER 5**

This chapter will analyse and discuss the principle of necessity (proportionality) which is at the core of this study. It seeks to identify what the original formulation, context and intentions of the necessity test are; and to then ascertain how the current formulation is similar or different to the former.

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[152] According to the WHO Constitution's Preamble 'Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures'.

[153] Article 1 of the WHO Constitution.

The chapter then considers proportionality under South African constitutional law and case law. It discusses the requirements, interpretations and applications of the property right provision and the general limitation clause. An examination of the literature on necessity under South African constitutional law suggested that there are concerns that the courts refrain from balancing as much as possible. This chapter reinforces the need for the courts to undertake balancing in the case of plain packaging. The chapter then undertakes a predictive analysis of how plain packaging will fare out under South African Constitutional necessity review. Comparisons will be made to the WTO necessity tests where possible.

**CHAPTER 6**

This chapter builds on chapter five and focuses on the WTO necessity tests. The TBT and TRIPS Agreement necessity tests are of concern in this study. Corresponding WTO case law will be examined to ascertain previous applications and interpretations of the requirements. It incorporates the recent WTO plain packaging case, which was decided after the predictive study carried out in this study was completed. It discusses how plain packaging measures were dealt with under the WTO necessity test. Simultaneously, comparisons with the necessity test under South African constitutional law will be made, in an effort to assess the legitimacy concerns raised regarding WTO necessity tests. In that vein, lessons will be drawn that can be useful for the domestic approach. In drawing lessons the study adopts a nuanced approach, aware of the differences between the two spheres.

**CHAPTER 7**

The concluding chapter draws together the threads of the previous chapters and offers a final assessment on the necessity of plain packaging measures, and importantly on whether there is merit in the claims that the WTO necessity tests imposes undue, unreasonable burdens and is biased towards economic interests. It offers suggestions and recommendations to South Africa in the wake of plain packaging matters.

# CHAPTER TWO

## Understanding Plain Packaging Measures: A Historical Background

'It is only by historical accident that tobacco is legally available on the market'[1]

### 2.1 INTRODUCTION

The devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke have become a global problem.[2] Global marketing, transnational tobacco advertising, promotion and sponsorship by tobacco companies have substantially contributed to the tobacco epidemic.[3] With the law closing in on traditional forms of marketing, the tobacco industry has sought innovative means of promoting their products.[4] According to the World Health Organisation, in order to 'sell a product that kills up to half of its users requires extraordinary marketing savvy' the tobacco industry makes it amongst the 'most manipulative product sellers and promoters in the world.'[5]

Tobacco companies have maximised various non – traditional avenues to promote and advertise their products including through promotions of dance parties, fashion shows and music festivals.[6] They have also employed point-of-sale marketing, brand stretching, internet-based marketing and product placements in movies. The industry has further promoted its products through corporate responsibility, for instance in sponsoring sports and scholarships.[7] Tobacco companies have also resorted to package design as a means to market and sustain the tobacco industry.[8] Accordingly, global action has shifted attention from traditional to non – traditional forms of marketing, in the fight to curb the tobacco epidemic.

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[1] R Cunningham 'R.J.R. – Mac Donald Inc. v. Canada (A.G): Reflections from the perspective of health' (1995) 40 *McGill Law Journal* 229, 273.
[2] Article 3 of the World Health Organisation's Framework Convention on Tobacco Control.
[3] L Henriksen 'Comprehensive tobacco marketing restrictions: promotion, packaging, price and place' (2012) 21 (2) *Tobacco Control* 147.
[4] M M Scollo & M H Winstanley *Tobacco in Australia: Facts and issues* 4ed (2012) 32.
[5] WHO 'World Health Organisation's Report on the Global Tobacco Epidemic: Enforcing bans on tobacco advertising, promotion and sponsorship' (2013) <http://www.who.int/tobacco/global_report/2013/en/>.
[6] S M Carter 'Going below the line: Creating transportable brands for Australia's dark market' (2003) 12 (3) *Tobacco Control* 87, 88.
[7] Ibid.
[8] J Doxey & D Hammond 'Deadly in pink: The impact of cigarette packaging among young women' (2011) 20 (5) *Tobacco Control* 353.

This chapter provides a historical account of the introduction of plain packaging of tobacco product measures as a means of regulating non – traditional forms of advertising. It traces their emergence and highlights the forces that have shaped and led to their rise. Importance will be placed on the role of marketing in the sustenance of the tobacco epidemic. It will also examine the roles that packaging has played as an advertising avenue in history.

The chapter will also undertake a historical examination of the constitutionality of tobacco control measures designed to restrict tobacco promotion and advertising. The aim of such an approach is to ascertain whether questions regarding the constitutional validity of tobacco control measures have been raised before in history. Further whether the questions being raised currently regarding the constitutionality of plain packaging measures echo the legal questions raised in history.

Plain packaging measures have already emerged on the international scene through the World Health Organisation's Framework Convention on Tobacco Control (WHO FCTC). The WHO FCTC recommends its parties to adopt plain packaging measures as a tobacco control measure. This chapter will subsequently examine and outline the role of the WHO FCTC as a vehicle for concerted action against the tobacco epidemic and its provisions that are relevant to plain packaging measures. It will also outline the requirements of the South African draft Bill which requires plain packaging in order to reveal the particularities of what plain packaging measures entail.

## 2.2 THE HISTORY AND EVOLUTION OF THE TOBACCO EPIDEMIC

The promotion and protection of public health is one of the oldest functions of governments and definitely one of its earliest regulatory functions. As such toxic substances have always been under regulation from as early as 1848; with the enactment of laws such as the Drug Importation Act.[9] Regrettably, public health regulation was underdeveloped due to the lack of a clear understanding of the causes of diseases and their transmission.[10]

[9] E Monosson 'Regulation of Toxic Chemicals' <http://www.eoearth.org/view/article/155695>; A Walch 'A spurious solution to a genuine problem: An in-depth look at the Import Drugs Act of 1848' (2002) Harvard Law School Student Papers < http://nrs.harvard.edu/urn-3:HUL.instrepos:8846790>.

[10] E D Kinney 'The Evolution of Public Health Regulation' (2002) < www.academic.udayton.edu/health/syllabi/Bioterrorism/4PHealth/PHLaw>.

Clearly, if tobacco were introduced today for product approval, it would not succeed.[11] However, centuries ago, tobacco was not recognised as toxic or hazardous to human health. From its discovery in native America during the 15th century till the 19th century tobacco was known and widely embraced for its entheogenic and medicinal properties.[12] Tobacco was used for ceremonial and religious purposes and it was accordingly considered sacred.[13] It was used for medicinal purposes as it was believed to be a cure-all. It would be used as a pain killer for toothaches, earaches and colds.[14]

Considering its curative properties, tobacco was widely incorporated into Europe by the 15th century.[15] In 1558 Thomas Harriet promoted a daily dosage of tobacco. In 1571 Nicholas Monardes, a Spanish medical doctor, wrote a book about the history of medicinal plants; in which he noted that tobacco could cure at least thirty six health problems.[16] Anthony Chute, a 16th century British physician also wrote that tobacco could cure almost all ailments caused or linked to excess fluids in the human body.[17] The endorsement of tobacco as a pro-health product would delay the introduction of regulatory frameworks to govern tobacco.

Considering that tobacco was not perceived as a threat to public health, antitobacco activism was purely based on moral and religious concerns during the 17th century. History's first public smoking ban was instituted by Pope Urban V11, who issued a tobacco consumption ban in the inside or porch way of a church.[18] In 1633 Sultan Murad of the Ottoman Empire in Turkey banned tobacco consumption and this offence was punishable by death.[19] Tobacco farming was banned in Massachusetts in 1629 except in circumstances where small quantities were grown for medicinal purposes.[20] In 1635, smoking was

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[11] K L Polin 'Argument for the ban of tobacco advertising: A First Amendment analysis' (1988) 17 *Hofstra Law Review* 99, 104.
[12] J Young 'The history of tobacco and its growth throughout the world' <https://web.stanford.edu/class/e297c/trade_environment/health/htobacco.html>.
[13] A Charlton 'Medicinal uses of tobacco in history' (2004) 97 (6) *Journal of the Royal Society of Medicine* 292, 293.
[14] Ibid.
[15] J Young (note 12 above) 1.
[16] Boston University Medical Centre 'History of tobacco' <www.academic.udayton.edu/health/syllabi/tobacco/history.htm>.
[17] J Young (note 12 above) 5.
[18] J Young (note 12 above) 4.
[19] E Trex '7 Historical bans on smoking' <http://www.mentalfloss.com/article/23748/7.historical_bans_smoking>.
[20] National Commission on Marihuana and Drug Abuse 'History of tobacco regulation' < http://www.druglibrary.org/schaffer/library/studies/nc/nc2b.htm>.

allowed in France on the condition that it was prescribed by a qualified medical doctor.[21] In 1683 a Chinese law declared tobacco possession a crime punishable by execution.[22] In this era the negative effects of tobacco on health had not yet been established.

These early anti – tobacco movements were overshadowed and supressed by the economic benefits and the supposed medicinal properties of tobacco.[23] By 1776 the tobacco industry had grown powerful enough to finance the American Revolutionary war, serving as collateral for loans borrowed from France.[24]

Demonstrating the value of the tobacco industry in this era, U.S President George Washington in his request for assistance to finance the American Civil War stated that; 'I say, if you can't send money, send tobacco.'[25] As the tobacco industry became more profitable; the industry gained social and political influence which enabled it to shove aside and silence anti – tobacco campaigns. This paved way for the growth of the tobacco industry and fuelled a massive epidemic which the world is still trying to contain today. To date big tobacco still uses its economic dominance to fight and delay anti – tobacco activism.[26]

It was only during the 19th century, over 400 years since the introduction of tobacco in Europe, that the hazardous properties of tobacco became known. In 1826, scientists found the pure form of nicotine in tobacco and ascertained that nicotine was harmful to human health.[27] In 1836, Samuel Green stated that tobacco was an 'insecticide, a poison, and can kill a man.'[28] However these health claims did not shake the already massive tobacco industry.

Simultaneously, the 19th century also marked the emergence of the big transnational tobacco companies. In 1847 Philip Morris was established in the wake of these health claims. Almost immediately in 1849, J.E. Liggett and Brother was also established in St. Louis, Mo.[29] Furthermore a landmark step in the advancement of the tobacco epidemic

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[21] E Trex (note 19 above).
[22] M O Hyde & J F Setaro *Drugs 101: An Overview for Teens* 1 ed (2003) 77.
[23] J Young (note 12 above) 1.
[24] Ibid.
[25] P Hendrickson 'Hard times on tobacco road' *The Washington Post* 15 March 1984.
[26] G Smith 'Gates Bloomberg set up fund to help poor countries to fight big tobacco' *Fortune Magazine* 19 March 2015 1.
[27] Tobacco Free Life 'History of tobacco' < https://tobaccofreelife.org/tobacco/tobacco-history/>.
[28] Ibid.
[29] Ibid.

took place in 1881 when the first cigarette machine was invented by James Bonsack.[30] This inflated the popularity of cigarette smoking and resulted in the improved access of cigarettes to smokers.[31] This innovative stride took the tobacco industry to new heights.

During World War I (from 1912– 1918) tobacco smoking flared-up. The tobacco industry targeted the military, flaunting cigarettes as a means for soldiers to relax and escape from their environments psychologically, the 'soldiers smoke'.[32] The First World War was good for the tobacco industry as the soldiers grew into its most loyal consumers even after the end of the war. The soldiers had been off to war to fight and protect the livelihoods of the civilians. Regrettably, their return popularised tobacco smoking and endangered the livelihoods of the very same civilians they sought to protect.

Researchers kept the health implications of tobacco in the headlines. In the 1930s researchers in Germany found a statistical correlation between smoking and cancer.[33] The findings from this statistical research were confirmed by the findings drawn from animal experimentation. In 1931 Angel H Roffo, founding director of Argentina's Institute of Experimental Medicine for the Study and Treatment of Cancer, found that distilled smoke could cause tumours when smeared on the hairless skins of rabbits.[34] Further in 1938, Raymond Pearl of John Hopkins Hospital made a report indicating that smokers did not live as long as non-smokers.[35] These findings were later corroborated by UK and American scholars including Ernst Wynder and Evarts Graham from the USA and Richard Doll and Bradford Hill from England.[36] All these studies reinforced the growing suspicion, that smokers of cigarettes were far more likely to contract lung cancer than non-smokers.[37]

The evidence to support the tobacco – cancer link was now in existence. Regrettably, World War II disrupted the impetus gained from this research. During the World War II (from 1939 to 1945) cigarette sales reached unprecedented heights.

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[30] B Erikson & M Stanfors 'A winning strategy? The employment of woman and firm longevity during industrialization' (2014) Lund Papers in Economic History, Education and the Labour Market, No. 136; M Jacobs 'From the first to the last ash: The history, economics and hazards of tobacco' 8 <www.healthliteracy.worlded.org/docs/tobacco/Unit/2history-of-html>.

[31] A Complete Social History of Cigarettes (note 30 above).

[32] E Smith & R Molone 'Everywhere the soldier will be': Wartime tobacco promotion in the US Military' (2009) 99 (9) *American Journal of Public Health* 1595, 1596.

[33] G D Smith, S A Ströbele & M Egger 'Smoking and health promotion in Nazi Germany' (1994) 48 (3) *Journal of Epidemiology and Community Health* 220, 221.

[34] R N Proctor 'The history of the discovery of the cigarette - lung cancer link: evidentiary traditions, corporate denial, global toll' (2012) 21 (2) *Tobacco Control* 87, 89. [35] Ibid.

[35] Ibid.

[36] R D Tollison *Smoking and Society Towards a More Balanced Assessment* 1ed (1986) 18.

[37] R N Proctor (note 34 above) 88

Cigarettes were incorporated in the soldier's C-Rations. The tobacco industry sent millions of cigarettes to the soldiers for free, which proved to be a successful marketing strategy creating a solid stream of loyal consumers.[38] War was good for the tobacco industry with service men consuming nearly 75 per cent of all produced cigarettes.[39] General Pershing interestingly asserted, 'You ask me what we need to win this war? I answer tobacco as much as bullets.'[40] The tobacco industry was by the mid-20th century a powerful and invincible enterprise.

## 2.3 RUTHLESS MARKETING

Plain packaging measures are part of a decades-long process of restricting the advertising and promotion of tobacco products. Tobacco advertising and promotion has been linked to a general increase in overall consumption of tobacco products. Accordingly advertisement and promotion restrictions form part of an integral part of comprehensive tobacco control.

The first record of tobacco advertising was recorded in 1789, when the Lorillard brothers advertised their snuff and tobacco products in a local New York daily paper.[41] Modern advertising as we know it was created during the early 20th century by the tobacco industry. The mass production of cigarettes as a result of the Bosnack machine and the introduction of color lithography prompted the mass marketing of cigarettes.[42] In South Africa tobacco printed advertisements began to appear in the Cape Town Gazette in September 1801.[43] Thereafter in 1818 the first local tobacco products were advertised in the Cape Town Gazette.[44] The advertising of cigarettes in South Africa facilitated the growth of the tobacco industry and of the epidemic.[45] The tobacco companies brought with them sophisticated advertisements of tobacco products and these had the same effects in South Africa as they had in the rest of the world.

By the 1920s tobacco advertising was widespread resulting in the promotion of tobacco consumption and the persuasion of consumers. Smoking was elevated to a lifestyle

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[38] Ibid.
[39] M Jacobs (note 30 above) 9.
[40] E Burns *Smoke Of The Gods: A Social History of Tobacco* 1 ed (2007) 157.
[41] L Pritcher 'More about tobacco advertising and the tobacco collections' <http://library.duke.edu/digitalcollections/eaa/guide/tobacco/>.
[42] D G Gifford *Suing the Tobacco and Lead Pigment Industries: Government Litigation as Public Health Prescription* 1 ed (2010) 15.
[43] Ibid.
[44] Ibid.
[45] Ibid.

through advertising, this could be perceived from the advertisements published in this period. A 1920 advertisement of MURAD the Turkish cigarette read, 'Everyday Murads are held higher in the estimation of the men who smoke them…They never disappoint – never fail- never change…' The tobacco industry also used celebrities to endorse their brands in their advertisements by the 1920s. For instance Ellsworth Vines, Jr. the world's No. 1 ranked tennis player in 1932, 1935, 1936 and 1937 stated in an advert that:

> Championship tennis is one of the fastest of modern sports. After four or five sets, you sometimes feel that you just can't take another step. That's when a Camel tastes like a million dollars. Not only does the rich, mellow fragrance appeal to my taste, but Camels have a refreshing way of bringing my energy up to a higher level. And I can smoke all the Camels I want, for they don't interfere with my nerves.[46]

Tobacco advertisement in the early 19th century kept the tobacco industry alive in light of the health concerns that were growing in this period. By the 1950s television advertisements were the norm, with adverts like the famous Camel advert; 'more doctors smoke Camel than any other cigarette.' Health themed adverts were used by the tobacco industry, and had the effect of misleading the public about the actual health effects of tobacco.

In this era the tobacco industry seemed invincible until the research by Ernst Wynder, Evarts Graham and Adele Croninger in 1953 showed that tobacco had cancer-causing properties. After the release of this evidence the tobacco industry was shaken, and stock prices of American cigarette manufacturers plunged.[47] To overcome the health scare hurdles which saw the sale of tobacco products plummeting, the tobacco industry used mass media and published the Frank Statement. Under the guidance of John Hill the Tobacco Industry Research

Committee (TIRC) was created in 1953. In 1954 the TIRC published the 'Frank Statement' which came in a full –page advert in about 400 newspapers in the country and was also reported on television and radio.[48] The public was promised that this committee was created to pursue the scientific controversy surrounding tobacco and health. Further that

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[46] J Doyle 'Vines for camels 1934-1935' *PopHistoryDig.com* 19 July 2010 <http://www.pophistorydig.com/topics/tag/tobacco-advertising-history/>.

[47] R N Proctor (note 34 above) 88.

[48] A M Brandt 'Inventing Conflicts of Interest: A History of Tobacco Industry Tactics' (2012) 102 (1) *American Journal of Public Health* 63, 69; Tobacco Tactics 'Tobacco Industry Research Committee' <http://www.tobaccotactics.org/index.php/Tobacco_Industry_Reseacrh_Committee>.

the industry would ensure the protection of the health of its consumers.[49] This had a sedative effect on the tobacco – health uproar. In 'A Frank Statement to Cigarette Smokers' the industry reported that:

> Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research…we do not believe that…medical research even though its results are inconclusive should be disregarded or lightly dismissed. At the same time…it is in the public interest to call attention to the fact that eminent doctors….have publicly questioned the significance of these experiments. Distinguished authorities point out:
>
> 1. That medical research in recent years indicates many possible causes of lung cancer
> 2. That there is no agreement among authorities regarding what the cause is.
> 3. That there is no proof that cigarette smoking is one of the causes
> 4. …We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business…we always will cooperate closely with those whose task it is to safeguard public health.[50]

Using the media once again, the industry reassured the public that through the TIRC experts from science, medicine and education would be appointed to look further on the tobacco and health link. The uproar over smoking and health was unsuccessful in crashing the tobacco industry and ending the tobacco epidemic. Instead it led to the creation of a response that propelled the industry into a massive empire.[51]

The media and advertising industries were major drivers of the tobacco sector. By the mid-20th century tobacco was being promoted and advertised widely, through movies, motion pictures,[52] newspapers, magazines, billboards, radios, televisions, sport and product packaging. In 1979, Philip Morris paid some U.S $ 42 500 to have its Marlboro cigarette to appear in Superman II; and another U.S $350 000 to have Marlboro cigarettes appear in James Bond 'Licensed to Kill' movie.[53] Between 1982 and 1996 cigarette advertising in South Africa was responsible for between 10 and 15 per cent of all radio ad spend. Between 50 and 55 per cent of all cinema ad spend in 1987 and between

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[49] A M Brandt (note 48 above) 69.

[50] Tobacco Industry Research Committee 'A frank Statement to cigarette smokers' <http://legacy.library.ucfs.edu/tid/qxp91eoo/pdf>.

[51] A M Brandt (note 48 above) 70.

[52] J D Sargent 'Smoking in movies: Impact on adolescent smoking' (2005) 16 (2) *Adolescent Medical Journal* 345. See also K Pilat 'Hollywood and smoking: A brief history' (2010) <http://www.pastemagazine.com/articles/2010/07/the-glitz-the-glamour-the-smoke.html>.

[53] M R C Carr-Gregg & A Gray ''Generic' Packaging a Possible Solution to the Marketing of Tobacco to young people' (1990) 153 (11) *The Medical Journal* of *Australia* 685, 686.

20 and 22 percent of all outdoor ad spent from 1991 to 1994.[54] Other indicators found that in 1993 tobacco-related advertising made up 48 per cent of the almost R3 billion spent on advertising in South Africa.[55] The value spend on advertising explained the importance of marketing in sustaining and propelling the industry into an economic powerhouse.

Tobacco companies were one of the first to use sport as a marketing tool in the late 19th century.[56] In the 1989 Marlboro Grand Prix, the Marlboro logo could be seen for forty six of the overall ninety four minutes.[57] The Winston logo also appeared for a total of 6 hours and 22 minutes in the 1987 NASCAR Stock Race Circuit, the value of such nonpaid covert advertising was valued at $7.5 million.[58]

In South Africa tobacco companies also employed sport sponsorship as means to promote and advertise their products. The most prestigious horsing event, the Durban July, was sponsored by Rothmans from as early as 1963 until 2000. In the 1990s, a reporter for *Marketplace* commented on how the Benson and Hedges brand campaign sought to convey 'youthfulness and vibrancy of the brand' through its continued heavy sponsorship of cricket.[59] Another illustration of tobacco sponsorship in South Africa is that of the Cape Town Orchestra. In 1989, the Cape Town city council proposed non-smoking by-laws. The Rembrandt Tobacco Corporation as one of the Cape Town Orchestra's leading sponsors threatened to withdraw its sponsorship.[60] Although sponsorship was not withdrawn this raised controversies about the role and impacts of tobacco sponsorship.

The lack of comprehensive laws regulating and limiting tobacco advertising and promotion in this period, played a substantial role in the expansion of the global tobacco epidemic as we know it today.[61]

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[54] C Van Walbeck *The Economics of Tobacco Control in South Africa* (Unpublished PhD Thesis, University of Cape Town, 2005) 174.
[55] Ibid.
[56] K Fredric & A Lavack 'Attitudes toward Beer and Tobacco Sports Sponsorships' (1999) 8 (3) *Sport Marketing Quarterly* 49-58.
[57] B S Lynch, R J Bonnie & J Richard (eds) *Growing up tobacco free: Preventing nicotine addiction in children and youths* 1 ed (1994) 105, 112.
[58] Ibid.
[59] D Yach & G Paterson 'Tobacco advertising in South Africa with specific reference to magazines' (1994) 12 *South African Medical Journal* 838-841; P A Wolfe & J Davis 'South Africa: Freedom, youthfulness and temptation' (1994) 3 *Tobacco Control* 102-106.
[60] I Gollom *The History Of The Cape Town Orchestra: 1914-1997* (Masters in Musicology thesis, University of South Africa, 2000).
[61] L Henriksen (note 3 above) 147; K A Kasza & A Karin 'The effectiveness of tobacco marketing regulations on reducing smokers' exposure to advertising and promotion: Findings from the International Tobacco Control (ITC) Four country survey' (2011) 8(2) *International Journal of Environmental Research and Public Health* 321, 322.

### 2.3.1 The Monumental U.S Surgeon General's report of 1964

Before 1964, tobacco regulation in all forms was close to non-existent. This changed in 1964 with the publication of the monumental Surgeon General's report. The report affirmed that tobacco smoking was hazardous to health and that smoking was causally related to lung cancer[62] and it prompted the U.S government to act accordingly.[63] It was stated in the report that 'Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action'[64]

This report gave the U.S government the basis for regulating tobacco products. In 1965, the U.S Cigarette Labelling and Advertising Act was passed which required all cigarette packages to contain warning labels which read that 'Cigarettes may be hazardous to your health.'[65] In 1971 the tobacco companies were banned from broadcasting advertisements on television and radio following the Public Health Cigarette Smoking Act of 1969, which included a prohibition on broadcast advertising of cigarettes.

The Surgeon General's 1964 report paved way for global action against promotion and advertisement of tobacco products. For the first time in 1970, tobacco was a subject of great concern at the World Health Organisation. The Director General of the World Health Organisation (WHO) presented a report to the 23rd World Health Assembly on 'The limitation of smoking'. The report recommended that the advertisement and promotion of tobacco be 'reduced, with a view to its eventual elimination.'[66]

Elsewhere in the world advertisements were taken off the air, in 1965 in the United Kingdom and in 1973 in Australia.[67] Tobacco control efforts took off around the world at different paces. In 1975 the South African tobacco industry volunteered to take its advertisements off the television broadcasting.[68] Otherwise, tobacco advertising and promotion in South Africa was first regulated in 1993.[69] 1964 marked the start of tobacco

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[62] U.S. Department of Health and Human Services *Reducing Tobacco Use: A Report of the Surgeon General* (2000) 31.
[63] National Commission on Marihuana and Drug Abuse (Note 20 above); M Jacobs (note 30 above) 9.
[64] U.S. Department of Health and Human Services (note 62 above) 33.
[65] M Jacobs (note 30 above) 10.
[66] U.S. Department of Health and Human Services (note 62 above) 19.
[67] J S Mindell 'The UK voluntary agreement on tobacco advertising: A comatose policy?' (1993) 2 (3) *Tobacco Control* 209.
[68] M Malan & R Leaver 'Political change in South Africa: New Tobacco Control and Public Health Policies' in J de Beyer & L W Brigden (eds) *Tobacco Control Policy: Strategies, Successes, and Setbacks* (2003) 122.
[69] Tobacco Products Control Act.

advertising and promotion regulation leaving packages as a popular advertising avenue.[70] Further, the regulations imposed in the developed states 'traditional markets' pushed the tobacco industry to seek markets in the emerging and developing countries.[71]

### 2.3.2 Advertisement and promotion through packaging

'Product package is the communication life-blood of the firm'[72]

Traditionally, the main function of packaging was not to advertise, or compete in the market but was simply to shelter and protect the product. However, the evolution of markets to include competition and clutter on the retail shelves have led to new roles for packaging. Packaging delivers an attractive method to convey information about product attributes.[73] The packaging amongst a clutter of other products on the same shelves has been designed to attract attention, describe the product, advertise and persuade consumers to buy.[74] Package design include the shape, finishes, sizes, typography, colors and imagery.[75]

A source of conflict is the definition of packaging itself; on the one hand it is described as a characteristic of the product, on the other hand it is argued to be an extrinsic attribute of the product.[76] Symbolic messages are conveyed through packaging including environmental consciousness, fashion, ethnicity, health consciousness, prestige, value, convenience and variations in quality amongst others.[77] It is estimated that sixty percent of the respondents consider package design as the most important determinant of new product

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[70] M Malan & R Leaver (note 68 above) 122.
[71] Ibid.
[72] R L Underwood & J Ozane 'Is your package an effective communicator? A normative framework for increasing the communicative competence of packaging' (1998) 4 *Journal of Marketing Communications* 207-220.
[73] S Pinya & M Speece 'The importance of packaging attributes: a conjoint analysis approach.' (2007) 41 *European Journal of Marketing* 1495-1498; K Rita, A Dovaliene & L Navickiene. 'Impact of package elements on consumer's purchase decision' (2015) 14 Economics *and Management* 441-447; F Allison, C Moodie & G Hastings 'The role of packaging for consumer products Understanding the move towards 'plain' tobacco packaging.' (2012) 4 *Addiction Research & Theory* 339-347.
[74] M Wakefield, C Morley & J K Horan et al 'The cigarette pack as image: new evidence from tobacco industry documents. Tobacco Control' (2002) *Tobacco Control* i73; A Harckham 'The Changing U.S Consumer' in A W Harkham (ed) *Packaging Strategy: meeting the challenge of changing times* (1989) 1 - 13; R L Underwood & N M Klein 'Packaging as brand communication: Effects of product pictures on consumer responses to the package and brand' (2002) 10 (4) *Journal of Marketing Theory and Practice* 58, 62.
[75] U R Orth & K Malkewitz 'Packaging design as resource for the construction of brand identity' (2006) 3rd International Wine Business Research Conference, Montpellier July 2006.
[76] R L Underwood 'The communicative power of product packaging: Creating brand identity via lived and mediated experience' (2003) 11 (1) *Journal of Marketing Theory and Practice* 62.
[77] R. L Underwood (note 74 above) 62.

performance;[78] this demonstrates the pivotal role of packaging considering that an estimated seventy three percent of purchase takes place at the point of sale.[79]

The role of cigarette packaging in cigarette sales was first observed in the late 19th century. Cigarettes were initially sold in packs made of paper with a card slotted in to reinforce the packaging.[80] These cards were designed with different prints depending on the various brands of cigarettes. The prints on the cards functioned as a form of advertisement and people began to trade and collect these cards.[81] This in turn boosted sales for the tobacco companies. This practice was termed cartophily.[82] Cartophily was widely practised in South Africa by the late 18th century.[83] A series of cards would be printed with pictorial information on the same subject matter, some of the series included South African stories, for instance the Zulu War and First and Second Anglo-Boer Wars.[84]

The value placed by the tobacco companies on package design indicated the significance of packaging in keeping the industry prosperous. By the 1950s Philip Morris had already realized the importance of packaging, spending an estimated US$150 000 on packaging research. This was to enable Marlboro's 'repositioning' from a woman's cigarette to a man's smoke in the 1950s.[85] Advertising positioned smoking as a modern, progressive behaviour for women. Displaying the importance of package design four of the highest rated female packs, Capri cherry, Capri vanilla, Vogue blue and JPS Pink were predominantly of a white color and lots of pink.[86] The cigarette brand, Pink dreams is another illustration of packaging employed to attract women, the cigarette itself is coloured in pink with a gold filter and the packet is also pink.[87] The slim cigarettes are also another example of the power of package and design; these cigarettes have been perceived as

[78] Ibid.
[79] Ibid.
[80] A Complete Social History of Cigarettes <http://www.datehookup.com/content-a-complete-socialhistory-of-cigarettes.htm>.
[81] The story of cigarette cards and cartophily <http://wwww.cartophily.com>.
[82] Ibid.
[83] C Mazansky 'Cigarette Cards and South African Military History' (1989) 8 (2) *Military History Journal* 3.
[84] Ibid
[85] M Wakefield et al (note 74 above) 73.
[86] J Doxey & D Hammond (note 8 above) 4.
[87] B Freeman 'U.S.A: not so pretty in pink' (2015) 16 *Tobacco Control* 76.

feminine and stylish.[88] 'There is little question that a slimmer product, by its physical dimensions clearly communicates style – fashion – distinctive – female imagery'.[89]

In the famous 1987 Marlboro Study, the power of brand imagery was shown. In this study one thousand five hundred and forty-six regular Marlboro smokers were offered Marlboro cigarettes in generic brown boxes at half the normal price. It was explained to them that the cigarettes were from the same manufacturer, however, only twenty eight per cent of them were interested in buying the cigarettes in the generic packages.[90]

These findings were later corroborated by researchers in the 1990s. Beede and Lawson in their study of packaging effects on 568 adolescents found that cigarette packaging had the effect of promoting smoking. They concluded that brand images could enhance the susceptibility of adolescents.[91] In a separate research of the same sample, Beede concluded that when less brand image cues were shown the respondents were able to perceive and recall the risk warnings information.[92] As limited attention is directed to the brand symbols. Beede concluded that if plain packaging was adopted the link between the physical product and the brand symbols would be extinguished over time.[93]

Carr-Gregg's and Gray's submissions were also in support of plain packaging.[94] The authors opined that the tobacco industry depends heavily on their packaging, and in promoting a strong brand personality. For instance DUNHILL was found to be associated with wealth, sophistication and royal approval. Therefore brand symbols were used to appeal to and persuade consumers.[95]

With tobacco laws closing down on almost all means of advertisement and promotion, the package would remain the sole means of communication. Phillip Morris executive pointed out that the 'final communication vehicle with our smoker is the pack itself. In the absence of any other marketing messages, our packaging...is the sole

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[88] C M Carpenter, G F Wayne & G N Connolly 'Designing Cigarettes for Women: new findings from the tobacco industry documents' (2005) 100 (6) *Addiction* 837, 841.
[89] British America Tobacco Research and Development Marketing Conference – New Brand Development- Post- Lights <http://tobacco.documents.org/bat_cdc/25899.html>.
[90] M Laungesen 'Tobacco Promotion Through Product Packaging' Prepared for the New Zealand Toxic Substances Board in 1989.
[91] P C Beede & R W Lawson 'Brand image attraction: the Promotional Impact of Cigarette packaging' (1991) 18 *The New Zealand Family Physician* 175, 177.
[92] P C Beede 'The Effect of Plain Packaging on the Perception of Cigarette Health Warnings (1992) 106 (4) *Public Health* 315, 316.
[93] P C Beede (note 92) 316.
[94] M R C Carr-Gregg & A Gray (note 53 above) 685.
[95] M R C Carr-Gregg & A Gray (note 53 above) 686.

communicator of our brand essence. Put another way—when you don't have anything else—our packaging is our marketing.'[96]

The move to control package design is explained by the historical use of packaging to promote tobacco by the transnational tobacco companies. In 1988 the WHO 'expressed alarm at the well-financed, highly sophisticated marketing programmes'[97] that the tobacco industry has put in place to promote tobacco worldwide. After various advertising avenues have been closed down, regulating the tobacco package was the next logical step in curbing the power of marketing in propelling and sustaining the global tobacco epidemic.

## 2.4 A CONSTITUTIONAL HISTORY OF THE REGULATION OF TOBACCO

The debate surrounding the constitutionality of regulating the advertisement, and promotion of tobacco products is not new. The tobacco industry has always expressed concern over the implications that tobacco control policies have on other protected rights and freedoms. Philip Morris International and British America Tobacco lost in a law suit against the U.K government over the Standardised
Packaging of Tobacco Regulations Act which introduced plain packaging measures.[98] The same arguments brought before the Australian courts over plain packaging legislation in 2012 by the tobacco industry were echoed in the U.K matter. Big tobacco alleged that the legislation is unconstitutional and that it violates trademark rights.[99]

This section will explore the constitutionality of tobacco control laws. Because plain packaging legislation speaks to the restriction of tobacco marketing; it is relevant to examine whether courts have been faced with similar legal questions regarding the constitutionality of regulating tobacco promotion and marketing. A few cases are selected here to provide a historical perspective of the constitutional acceptability of tobacco control regulations.

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[96] Cancer Research UK 'Why do we need standard packs' <http://www.cancerresearchuk.org/supportus/campaign-for-us/setting-the-standard-for-plain-cigarette-packaging/evidence>.

[97] World Health Organisation 'Smokeless Tobacco Control' WHO Technical Report Series 773, 1988 Geneva, 5.

[98] *British American Tobacco & others -v- Department of Health* [2016] EWHC 1169 (High Court of Justice
Queen's Bench Division, London) para 1169.

[99] G Smith 'Big Tobacco is suing the U.K over plain packaging law' *Fortune Magazine* 22 May 2015.

### 2.4.1 United States: Capital Broadcasting Company v Mitchell [100]

The United States' Public Health Cigarette Smoking Act of 1969 was tried for constitutionality in the 1971 case of *Capital Broadcasting Company v Mitchell*. Section 6 of the Act prohibited cigarette advertising on all mediums of electronic communication nonetheless, it allowed print advertising. The petitioners alleged that the advertising ban was in violation of the First Amendment right to freedom of speech. The U.S courts acknowledged that there was a close relationship between cigarette commercials broadcasted electronically and their influence on young people. The court noted the significant differences between electronic media and print:

'Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.'[101]

Cigarette advertising, especially through the broadcasting, was found to pose a clear and present danger to the states' interest to protect and preserve the health of its citizens. The broadcast ban of cigarette advertisements survived the constitutional challenge. The federal district court of Washington, D.C. and the Supreme Court upheld the broadcast advertising ban as constitutional.

### 2.4.2 France: Law on the Fight against Smoking and Alcoholism (*Décision n° 90−283 DC du 08 janvier 1991)*[102]

In 1991, sixty members of the French Parliament requested that the Constitutional Council declare two provisions of the law on the fight against smoking and alcoholism unconstitutional.[103] The applicants alleged that the provisions which outlawed direct and

[100] Capital Broadcasting Company v. Mitchell, 333 F. Supp. 582 (US District Court for the District of Columbia, 1971).
[101] *Banzhaf v. Federal Communications Commission*, 132 U.S. App. D.C. 14, 405 F.2d 1082, 1101 (1968) quoted in *Capital Broadcasting Company v. Mitchell*.
[102] Law on the Fight against Smoking and Alcoholism (Décision n° 90−283 DC du 08 janvier 1991) <http://www.tobaccocontrollaws/litigation/decisons/>.
[103] Ibid.

indirect forms of tobacco advertising infringed the right to property including a limit on the use of trademark rights and the right to freedom of enterprise. The Council held that violations that go beyond what was necessary to protect health would not pass the constitutional muster. The Council struck down the two provisions, on the basis that, the measures whilst taken to protect the public health were not properly balanced against the right to property and freedom of enterprise as protected under the Declaration of the Rights of Man and of the Citizen. The Council stated that the legislation amounted to an 'arbitrary and abusive' limitation on guaranteed rights.

In this matter the court addressed the necessity issue; the same question that courts have to deal with in disputes related to plain packaging laws. From this case it is construed that, not only must be the public interest be legitimate, but, that it is vital that the measure be necessary to address that interest. If the measure is not necessary to fulfil a legitimate objective, in this case the protection and promotion of public health, it could be struck down for unconstitutionality.

### 2.4.3 Canada: *RJR-MacDonald Inc., et al. v. Attorney General of Canada.* [104]

The Canadian Tobacco Products Control Act of 1988 was successfully challenged for constitutionality in the 1995 case of *RJR-MacDonald Inc., et al. v. Attorney General of Canada*. This is one of the few cases in history that dealt with measures that were close to plain packaging measures in terms of severity. The precedent –setting regulations required health warnings to cover at least twenty five percent of the top of each main panel and one entire side panel was supposed to be used to present the toxic constituents of tobacco. The message was required to be framed by a stipulated border to make it more visible. Further the eight rotating messages were supposed to be either black on a white background or white on a black background.[105] Section 4 and 5 of the Act also prohibited advertisement by publication, broadcast or otherwise of tobacco products offered for sale in Canada. Section 6 provided that the full name of a tobacco manufacturer could be used in representations made to the public that promoted cultural or sporting events, but prohibited the use of brand names in such representations. Section 7 outlawed the free distribution of tobacco products in any form. Section 8 prohibited the use of a tobacco trade mark on any

[104] *RJR-MacDonald Inc., et al. v. Attorney General of Canada* (Supreme Court of Canada, 21 September 1995).
[105] Section 9 of the Canadian Tobacco Products Control Act of 1988.

article other than a tobacco product, and also prohibited the use and distribution of tobacco trade marks in advertising for products other than tobacco products.

Tobacco companies challenged the constitutionality of the provisions detailed above as they related to the regulation of the advertisement, promotion or sale and the labelling of tobacco products. The companies claimed that the Parliament had acted outside the scope of its powers and that the Act violated the petitioners' freedom of expression, as enshrined in Canada's Charter. The issue before the courts was to determine whether the tobacco control legislation was inconsistent with the right of freedom of association and if so whether it constituted a reasonable limit on that right as could be demonstrably justified.[106]

The court held that regulating tobacco advertising and not entirely banning the product itself was more practical because of the addictive nature of the product. The then Canadian Minister of Health and Welfare opined that prohibiting the sale of tobacco was unpractical as most smokers would likely lead many smokers to resort to alternative and illegal sources of supply. However he opined that prohibiting the advertising and promotion of the toxic drug was feasible and necessary.[107] The Canadian legislators had focused on the progressive elimination of the consumption of tobacco products instead of a complete ban of the products. To date, tobacco control has maintained this approach; plain packaging legislation does not prohibit the product but aims to curb consumption.

The Canadian courts acknowledged that the state had the authority to prohibit or control the marketing, labelling and or packaging of products that threatened public health. However the Canadian Court reiterated that no matter how imperative the legislator's objective may appear; the state must demonstrate that the means by which it seeks to achieve this aim is reasonable and proportionate to the infringement of other rights.[108] Justice McLachlin stated that: 'much of the expert evidence relating to the effects of tobacco on health …was…irrelevant to the case and…served…to colour the debate unnecessarily.'[109] The court held that the evidence focused on a problem larger than the one targeted by the legislation at issue. The courts held that the matter at hand was 'not the evil tobacco works generally in our society, but the evil which the legislation addresses.'[110]

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[106] *RJR Mac Donald Inc v. Canada* (note 104 above) para 27.
[107] *RJR Mac Donald Inc v. Canada* (note 104 above) para 35.
[108] Ibid, *p*ara 129.
[109] Ibid, para 145.
[110] Ibid.

The same query is being raised with regard to plain packaging measures, what is at issue is not the legitimacy of the goal to curb the tobacco epidemic; what is at issue is the necessity of the measures to achieve this goal. The Canadian court ruled in favour of the tobacco companies and held that the sections relating to advertising, trademark use, and unattributed health warnings did not constitute a reasonable limit on the right to freedom of expression.[111] Again in this case curbing the effects of the tobacco epidemic were found to be legitimate, but the measure designed to fulfil the legitimate objective was did not pass the necessity test.

### 2.4.4 Germany: Tobacco Company A, et al. v. Federal Republic of Germany

In the 1997 German case of *Tobacco Company A, et al. v. Federal Republic of Germany*, [112] laws regulating the labelling of tobacco packages were held to be constitutional. The tobacco industry challenged tobacco control provisions that obligated the companies to print health warnings on tobacco products. The tobacco industry alleged that the health warning requirements violated their right to freedom of expression and rights to property by requiring them to publish warnings. It was held that the Federal government of Germany was well within its powers in mandating health warnings to protect public health. Further that the Act did not amount to violations of the right to property. Of relevance in this case is the fact that tobacco owners alleged that the implementation of health warnings violated tobacco property owners' rights. In the same manner tobacco property owners in the matter of plain packaging argue that their intellectual property rights are being infringed. Marc Firestone the senior vice president of Philip Morris International argues that they 'respect the government's authority to regulate in the public interest, but wiping out trademarks simply goes too far.'[113] The violation of trademarks is a legal concern plain packaging law disputes will have to address.

### 2.4.5 Sri Lanka: Ceylon Tobacco vs. Minister of Health

History shows that tobacco is a public health evil, however it remains far from obvious that tobacco control laws including the emerging plain packaging measures will stand the constitutional muster. In the Sri Lankan case of *Ceylon Tobacco vs. Minister of*

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[111] Ibid, para 217.
[112] *Tobacco Company A, et al. v. Federal Republic of Germany*, BVerfGE 95, 173, Bundesverfassungsgericht (Federal Constitutional Court of Germany, 1997) <http://www.tobaccocontrollaws.org/litigation/decisions/ph-20000210-philippine-tobacco-stitute>.
[113] Philip Morris International Files Suit Against Standardised Packaging Regulations in the U.K <http://www.businesswire.com/new/home/20150522005215/en/>.

*Health*, [114] big tobacco argued that the requirement of the National Authority on Tobacco and Alcohol Act; which prescribed pictorial warnings to cover eighty percent of the front and back surface areas was unconstitutional. Further that it constituted an intrusion on its intellectual property rights. The court held that the Ministry was well within its authority to require pictorial health warnings. Nevertheless, it held further that the Ministry was supposed to reduce the size of the warnings to cover between 50 per cent to 60 per cent of the cigarette pack to provide tobacco companies reasonable space in which to display their trademarks.

> This court observes that a balance needs to be maintained, having considered the case of either party. The health of each and every citizen of our country and all those living in Sri Lanka permanently or in a temporary capacity is paramount and need to be protected. On the other hand a legally established business/industry cannot be denied its legitimate rights, flowing from the laws of our country.[115]

Disputes involving the constitutionality of plain packaging legislation will have to involve the balancing of competing interests. History shows that this is not a new phenomenon; the clash of protected rights in tobacco control is a matter courts around the world have struggled with. What remains unclear and far from obvious is whether plain packaging laws which have been implemented and those that are still to be implemented will pass the constitutional muster.

## 2.5 THE POSITION OF SOUTH AFRICA WITHIN THE GLOBAL TOBACCO EPIDEMIC

Following the 1964 Surgeon General's report, governments in the developed world have been taking actions to shut down the tobacco industry and to minimize the effects of the tobacco epidemic. The rates of smoking prevalence have been constantly decreasing since the 1960s in the developed world. As a result, the tobacco industry began to focus on growing its market in emerging and developing countries including China, Africa, India, Philippines, Pakistan, Thailand and the Dominican
Republic.[116]

Tobacco consumption has decreased in the developed states; however increase in consumption has been observed in the developing countries. By 1985, seventy five percent

[114] *Ceylon Tobacco Co v. Minister of Health, C.A. 336/2012* (Sri Lankan Court of Appeal 2014).
[115] Ibid.
[116] M Jacobs (note 30 above) 13.

of the world's tobacco was being grown in the developing countries.[117] Even though an estimated sixty three percent of the developing countries were spending more money on tobacco imports than they received from exporting it in 1990.[118] The WHO reports that in 2002, sixty six point seven percent of the one hundred and sixty one countries surveyed imported more tobacco leaf and tobacco products than they exported. Nineteen countries were found to have a negative balance of trade in tobacco products of over US$ 100 million or more, including Cambodia, Malaysia, Nigeria, the Republic of Korea, Romania, the Russian Federation and Viet Nam.[119] Triggering a twin problem for the developing countries, the first, health related and the second monetary.

The tobacco epidemic statistics are appalling, ninety percent of all lung cancers and at least seventy five percent of chronic bronchitis and emphysema are due to tobacco.[120] The WHO estimates that in 2030, seventy percent of nearly ten million deaths will occur in the developing countries.[121] Disturbing trends have been detected in China for instance. Cigarette Consumption in this country escalated from an estimate of five hundred billion in 1980 to an estimate of two trillion in 2010. About one in every three cigarettes smoked globally is smoked in China. Nearly two trillion cigarettes were consumed in China in 2009 which exceeds that of the other top-four tobacco-consuming countries (Indonesia, Japan, the Russian Federation and the United States of America) combined.[122] More horrendous is that the estimates indicate that almost half of these deaths will affect persons in their economically productive age. This presents a problem to developing countries, South Africa included, the 'South' will bear the brunt of the epidemic in the 21st century and as this could cripple the already strained poverty alleviation efforts.

As discussed earlier it is believed that tobacco advertising, promotion and sponsorship results in increased tobacco consumption and initiation.[123] Interestingly, British America Tobacco South Africa still maintains that their marketing techniques are

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[117] J Mackay & J Crofton 'Tobacco and the Developing World' (1996) 52 (1) *British Medical Bulletin* 206, 207.
[118] J Mackay, J Crofton (note 117 above) 207.
[119] WHO 'Tobacco increases the poverty of countries' <http://www.who.int/tobacco/communications/events/wntd/2004/tobaccofacts_nations/en/>.
[120] WHO 'WHO Report on the Global Tobacco Epidemic, 2008: The MPOWER Package' <http://www.who.int/tobacco/mpower/mpower_report_full_2008.pdf>.
[121] Ibid.
[122] WHO 'Tobacco in China' <http://www.wpro.who.int/china/mediacentre/factsheets/tobacco/en/>.
[123] 123 WHO Report 'The WHO Framework Convention on Tobacco Control: 10 years of implementation in the African Region' < http://www.afro.who.int/en/clusters-a-programmes/hpr/health-riskfactors/tobacco/tobacco-publications.html>.

not intended to serve a persuasive role. 'It is not intended to persuade people, whether adults or youth, to begin or continue smoking.'[124] According to the WHO a comprehensive ban on advertising, promotion and sponsorship would result in a substantial reduction of the consumption of tobacco products. Importantly, the WHO cautions that a partial ban on advertising and sponsorship may not be effective and may only result in the tobacco industry shifting its expenditure to the allowable forms of advertising. This is shown by what the tobacco industry did when traditional forms of advertising were prohibited; it resorted to non-traditional avenues to market its products.

### 2.5.1 Regulation of Tobacco Advertisement, Promotion and Packaging in South Africa

As early as the 1960s unilateral action towards restricting the promotion of tobacco products had been initiated. Multilateral acknowledgement of the need to restrict tobacco advertising and promotion at the level of the WHO existed by the 1970s.[125] However, South Africa like the rest of the developing countries was slow to implement tobacco control policies. In actual fact, tobacco control in the apartheid era was close to non – existent. This was despite the call by the South African Medical Association for comprehensive tobacco control policies in 1963.[126] History shows that tobacco consumption took a steep rise during the 1970s and 1980s with tobacco control absent from the country's public agenda. With no laws restricting advertising and no health warnings more than a third of South Africans were smoking.[127]

Nevertheless, this did not mean that tobacco related diseases and deaths were insignificant or trivial in South Africa at this time. By 1988 a third of deaths amongst the white population were attributed to smoking related incidents.[128] Fifteen per cent of coloured deaths and five per cent of black deaths were all due to smoking related diseases.[129] By 1990, 25 000 smoking attributable deaths were recorded annually.[130] There

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[124] British America Tobacco South Africa 'Marketing' <http://www.batsa.co.za/group/sites/BAT_7N3ML8.nsf/vwPagesWebLive/DO7NAF43?>.
[125] WHO Thirty-First World Health Assembly Resolution 'WHA31.56 Health hazards of smoking' May 1978.
[126] Y Saloojee 'Tobacco control: chapter 22.' (2000) 1 *South African Health Review* 429, 433.
[127] J Eberlee 'South Africa's winning tobacco control strategy' (2011) <https://idlbnc.idrc.ca/dspace/handle/10625/17460 >.
[128] D Yach 'Smoking: Review of research and identification of future research priorities' in: J Fourie & K Steyn (eds) *Chronic Diseases of Lifestyle in South Africa* (1995) 51, 53.
[129] Y Saloojee (note 126 above) 434.
[130] Ibid.

was also an estimated three hundred per cent increase in lung cancer deaths in coloured women between 1968 and 1988.[131] If anything history indicates that the tobacco epidemic in South Africa was harboured.

The Apartheid system was based on segregation and exclusion; it therefore proved difficult for such a system to effectively address public health issues that cut across both sides of the South African population. In the apartheid era there was a dual health system. The superior health care system received ninety seven percent of the health care budget. The result of such was a primitive health care system for the majority of the black population. This health system was dysfunctional, and provided room for the growth of the tobacco epidemic in South Africa.[132]

The prominence of the tobacco epidemic in South Africa is best viewed alongside the country's co-epidemic of HIV/AIDS and TB. Tobacco consumption produces worst outcomes for the HIV/AIDS and TB patients.[133] The WHO noted that a major problem for South Africa was the co-epidemic of HIV/AIDS and Tuberculosis.[134] In 1996 the WHO assisted South Africa in an evaluation of the TB epidemiology and control activities.[135] The underlying purpose for this was to come up with recommendations. The results were astounding, the WHO found that South Africa had one of the highest annual TB cases in the world.[136] The primitive health care system was unable to deal with TB control, resulting in under treatment of TB patients.[137]

When the new government came into power in the 1990s, just like with the HIV/AIDS and TB epidemics the attitude towards tobacco control shifted. The Tobacco epidemic found its place on the public agenda. Comprehensive tobacco control policies were introduced in 1990, with the appointment of Dr Nkosazana Zuma as the Minister of Health. The first tobacco control legislation was enacted.[138]

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[131] Ibid.
[132] H Coovadia, R Jewkes & P Barron et al 'The health and health system of South Africa: historical roots of current public health challenges' (2009) 374 (9692) *The Lancet* 817, 818.
[133] R N Van Zyl-Smit, N Richard, G Symons et al 'South African tobacco smoking cessation clinical practice guideline' (2013) 103(1) *SAMJ: South African Medical Journal* 869, 874.
[134] TB Facts.org 'TB in South Africa: The 1960s to the present' <http://www.tbfacts.org/tb-southafrica-html>.
[135] Ibid.
[136] Ibid.
[137] WHO 'WHO Global Report on Trends in Prevalence of Tobacco Smoking 2015' <who.int/iris/bitstream/10665/156262/1/9789241564922_eng.pdf >.
[138] J Eberlee (note 127 above).

*2.5.1.1 Tobacco Products Control Act, 1993 (Act No. 83 of 1993)*

The preamble of this Act reiterated that the purpose of this piece of legislation, was to amongst other things, regulate the 'advertising' and to 'prescribe what was to be reflected on packages.' Section 1 (i) defined advertising as any statement, communication, representation or reference made to the public with the intention of promoting or encouraging the use of tobacco products or with the intention of communicating the nature, properties, advantages or uses of tobacco products.

The 1993 Tobacco Products Control Act did not phase out advertising or promotion of tobacco products. It only required all advertisements of tobacco products, including the packages in which the products were sold to carry prescribed warnings concerning the health hazards of smoking. The Act went further to require that the advertisement or package should reflect the quantities of the hazardous constituents present in the tobacco product.[139]

The Act also placed restrictions on vending machines. It required holders of vending machines to ensure that Section 4 which prohibited sale to children under the age of 16, was complied with. Failure to comply or suspicions thereof could result in the removal of the vending machines. The Act and other tobacco control efforts have had positive results as smoking prevalence fell radically in South Africans, 15 years and older, with prevalence decreasing from thirty two per cent in 1993 to about 24 per cent in 2003.[140]

*2.5.1.2 Tobacco Products Control Amendment Act 12 of 1999* [141]

The 1999 Amendment was made with the strong realisation that the association of tobacco products with 'social success, business advancement and sporting prowess through the use of advertising and promotion' may encourage the youth to initiate smoking.[142] Section 2 (a) of the Act provided for a more detailed definition of advertising. It defined advertising as any communication or statement or reference made to the public in any format. Be it drawn, still or moving picture, sign, symbol, other visual image or message or audible as long as it is intended to draw the public's attention or promote smoking.

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[139] Section 3 of the Tobacco Products Control Act.
[140] The Heart Stroke Foundation South Africa 'Heart Disease in South Africa Report' MR2007 <pmg.org.za/files/docs/080506heartandstroke.ppt>.
[141] Section 3 of the Tobacco Products Control Act.
[142] Preamble Section 1 of the Tobacco Products Control Act.

The Amendment focused mainly on the prohibition of advertising in all its forms. Tobacco trademarks, logos, brand names or company names used on tobacco products were prohibited for the purposes of advertising in organisations or events. The tobacco manufacturers, importers, distributors or retailers were prohibited from organising events and providing financial contribution for organisations or events in the Republic. With this Act advertising was banned in South Africa. South Africa implemented tobacco control regulations late in the journey of the tobacco epidemic as compared to countries like the U.S. However it made quick progress bringing about its receipt of the Tobacco Free World Award in 1999 from the WHO.

*2.5.1.3 Tobacco Products Control Amendment Act 2008*

In 2005 the WHO FCTC was ratified by South Africa. The 2008 Tobacco Products Control Amendment Act was amended to align with some of the WHO FCTC recommendations. The amendment resulted in restrictions of tobacco sponsorship and promotion. The Amendment Act provided further restrictions on advertising, to prohibit advertising and promotion, through direct and indirect means including through sponsorship of events, physical establishments, projects, bursaries or scholarships.

The Act also regulates packaging, it prohibits packaging and labelling that could depict tobacco products in a false or misleading way regarding its properties or health effects. Therefore the South African laws do not only require health warnings but, also prohibit misleading labelling such as 'light' and 'mild' which depict varying levels of harm. In May 2018, South Africa published a draft Bill for public comment that will require various new measures including plain packaging measures. This draft Bill will be examined in more detail in subsequent sections of this chapter.

## 2.6 PLAIN PACKAGING UNPACKED

In 1989 the New Zealand Toxic Substances Board; was one of the first to recommend that tobacco products be sold in generic packaging.[143] However the idea of plain packaging had been in existence since 1976 in France and it soon spread to the rest of the world. The concept of plain or generic packaging was first applied on groceries. The groceries would be sold with no brand name deliberately eliminating the costs of branding and passing the savings to the consumers. This was also done on cigarettes and would result

[143] M Laungesen (note 90 above).

in cigarettes costing U.S $1 to U.S $2 lower than the normal prices. The generic cigarettes increased their market share to about 10per cent of the American cigarette market and now behaved like a new brand.[144]

In the beginning working towards a standard definition of 'plain packaging' proved complex as many factors were to be considered.[145] The assistant Deputy Minister of Health Canada, Kent Foster, defined plain packaging as packaging with no distinguishing features or use of trademarks. The packages would be identical in colour and appearance.[146]

The Centre for Health Promotion at the University of Toronto defined plain packaging as packs that are white or light brown. With the brand name in a standard font in black printing only. Also including the risk warnings and products content information. The Canadian Cancer Society opined that requiring the packages to be white was unacceptable. Mainly because white was a colour that suggested purity and cleanliness. Further that the brand name was not appear on the front of the packages
as this could be destructing, but only at the small ends of the packages.[147]

No specific standard definition of plain packaging was set from these early days but it was common that the purpose was to make tobacco packages unattractive and unappealing to consumers. It was a plan to replace the persuasive packaging with dissuasive packaging.[148] The Canadian Council on Smoking and Health states that plain packaging should make the tobacco packages look like a dispenser for prescription drugs rather than for candy.[149]

The 1989 New Zealand Toxic Board recommendations to the Minister of Health to adopt plain packaging measures provides a more structured definition of plain packaging. These were the first recorded recommendations for plain packaging of tobacco products. The recommendations stated that:

Any tobacco product legislation should include:

1. A requirement that all tobacco product packages should be plain, that it is a white package with black printing, no other colours being permitted

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[144] M Laungesen (note 90 above).
[145] R Simmons; Canada Parliament. House of Commons Standing Committee on Health, Welfare and Social Affairs 'Towards Zero Consumption Generic Packaging of Tobacco Products Report of the Standing Committee on Health' (1994) <http://legacy.library.ucsf.edu/tid/rhz63d00>.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid.

either in printing or on the packet itself. No logo or logotype is permitted in any form.

2. The brand name and company to be printed in a standard font and size on the front main face and the bottom of the pack.
3. Reporting of tar and nicotine levels, the health warnings and bar code to remain as is present.
4. No printing logo, or other means of brand identification to be permitted on the cigarette itself.

5 Variation in dimensions of cigarettes and of packs to be allowed.[150]

The existing plain packaging laws of Australia and Ireland borrowed a similar concept of plain packaging from these 1989 recommendations as will be shown in subsequent sections.

## 2.7 THE GENESIS OF THE WORLD HEALTH ORGANIZATION'S FRAMEWORK CONVENTION ON TOBACCO CONTROL

'We need an international response to an international problem.'[151]

As indicated earlier plain packaging of tobacco product measures were first recommended in the 1980s. However, without the WHO FCTC their implementation might have never occurred. The WHO FCTC provided the much needed platform to execute plain packaging laws. This section discusses the historical context of the rise of the WHO FCTC and the pivotal role it has played in pushing forward the cause for plain packaging measures in tobacco control policy.

Initially, tobacco related diseases were categorised as lifestyle diseases; tobacco control efforts were always met with criticism that governments should not intervene in personal lifestyle choices. According to this approach tobacco control policies were aimed at individual behaviour level and thus it was mainly the responsibility of local governments and not the international community. Tobacco control efforts were therefore scattered across different national jurisdictions.

With the establishment of the WHO in 1948, it was only a matter of time before the control of the tobacco epidemic was governed under the auspices of this multilateral organization. The earliest signs of international cooperation can be traced to the first world

[150] New Zealand Toxic Board, Recommendations to the Minister of Health regarding plain packaging of tobacco products, 18 September 1987.

[151] Dr Brutland Former Director -General of the World Health Organisation, during the seminar on Tobacco Industry disclosures, Geneva, 20 October 1998.

conference on Tobacco and Health held in 1967;[152] where participants shared information and reviewed evidence on the hazards of smoking. As the tobacco industry began to develop global oriented strategies to expand their markets and compensate for declines in sales in the developed world; the rest of the world recognised that tobacco was fast becoming a global tragedy.[153] The transnational activities of the tobacco industry were recognised by the international community which acknowledged that international regulation offered 'a stronger tool to avert the tobacco problem.'[154]

In 1970 at the Twenty – Third World Health Assembly, the Director - General of the WHO presented a report titled 'Limitation of Smoking'. In the report the WHO acknowledged that tobacco impaired health to a serious degree and made recommendations for members to institute appropriate actions within their domestic spheres. The WHO amongst other efforts acknowledged the importance of reducing the advertisement and promotion of cigarettes 'with a view to its eventual elimination.'[155]

> It is difficult to see how, in the long run, cigarettes, involving the health hazards that they do, can continue to be advertised…it seems reasonable, as matter of public policy, that cigarettes should not be advertised.[156]

Although the effects of the tobacco epidemic were accepted by the WHO, there was no concerted action against the epidemic. Although, recommendations were made for member countries to adopt tobacco control policies at national levels; they had no binding effect.

In 1987 the WHO created the first World No Tobacco Day, themed, 'Tobacco or Health: Choose Health.' Cognizant of the massiveness of the global tobacco epidemic and the need to elevate the profile of its tobacco control work, the WHO in July 1998 created the Tobacco Free Initiative (TFI) to focus on the control of the global tobacco epidemic.[157] The road to notable international cooperation against the tobacco epidemic was long.

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[152] D Yach, H Wipfli & R Hammond et al 'Globalisation and Tobacco' in I Kawach & S Wamala (eds) *Globalisation and Health* 1 ed (2007) 54.
[153] C Mcinnes, C Kamradt-Scott & A Lee et al *The Transformation of Global Health Governance* 1 ed (2014) 62.
[154] W Onzivu 'International Legal and Policy framework for WHO framework Convention on Tobacco Control' paper presented at The WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, 7 – 9 January 2000, New Dehli, India.
[155] WHO 'Limitation of Smoking' Report by the Director- General, Twenty – third World Health Assembly', 1 May 1970, 19.
[156] WHO (note 155 above) 16.
[157] See WHO Tobacco Free Initiative <http://www.who.int/tobacco/about/en/>.

Nonetheless after 55 years from the creation of the WHO, the WHO Framework Convention on Tobacco Control (FCTC) came into operation.

The move to use the WHO's constitutional authority to establish an international regulatory mechanism for tobacco control first appeared in a report prepared by the WHO Expert Committee on Smoking Control in 1979.[158] Professor V.S Mihajlov in his 1989 paper also considered the feasibility of an international law framework for tobacco control.[159] The idea of a World Health Organizations' Framework Convention on Tobacco Control (WHO FCTC) was reiterated in 1993 by Allyn Taylor in her academic paper published in the American Journal of Law and
Medicine.[160]

In her paper, she called upon the WHO to adopt the framework convention protocol approach to create a legally binding international law instrument to address public health issues.[161] This approach was borrowed from its success in environmental protection law. Impressed by the approach, Ruth Roemer and Taylor talked over the prospects of applying her approach to the control of the tobacco epidemic.[162] Roemer then embarked on promoting the international legal approach to tobacco control. The approach was presented by Roemer at the first All-Africa Conference on Tobacco or Health in 1993.[163] Roemer also discussed the approach at the WHO headquarters in October 1993.[164] Considerable credit is due to Roemer for her persistence in promoting and selling Taylor's idea.

In her doctoral studies, Allyn Taylor went on to fully develop the idea of the framework convention-protocol approach to tobacco control.[165] She also presented a paper in 1994 on this suggested WHO international legal strategy.[166] At the 9th World Conference on Tobacco or Health in Paris in October 1994, a resolution for the adoption on an international instrument for tobacco control was submitted by Roemer.[167] At the same Conference Taylor made a presentation describing the proposed approach in more detail.

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[158] WHO 'History of the World Health Organization Framework Convention on Tobacco Control' (2009).
[159] WHO (note 158 above).
[160] A Taylor 'Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health' (1992) 18 *American Journal of Law and Medicin*e 301.
[161] R Roemer, A Taylor & J Lariviere 'Origins of the WHO Framework Convention on Tobacco Control' (2005) 95 (6) *American Journal of Public Health* 936.
[162] R Roemer, A Taylor & J Lariviere (note 161 above) 937.
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid.

The domino effects of the presentation by Roemer and Taylor were seen soon after the conference of 1994.[168] A couple of Canadians who had attended the conference who were in support of the idea of an international instrument to deal with the tobacco epidemic contacted Jean Lariviere.[169] Lariviere was a senior medical adviser at Health Canada and a Canadian delegate to the World Health Assembly (WHA). At the 95th WHO executive board meeting, a resolution drafted by Lariviere was tabled. Subsequently the director general made a report to the 49th World Health
Assembly on the feasibility of developing an international instrument.[170]

In mid-July 1995, Roemer and Taylor joined forces to develop a background paper, on the feasible options for international action on tobacco control. In July 1995 a proposal recommending the development and implementation of a WHO framework convention on tobacco control amongst other related protocols were delivered to the WHO.[171]

Despite political opposition within the WHO, the executive in 1996 adopted a resolution 'An International Framework Convention for Tobacco Control' [172] The implementation of the 1996 resolution only went underway in 1998.[173] In 1999, Dr Gro Harlem Brundtland stated that the WHO should take on a leadership role in the effort to tackle the tobacco epidemic through international action.[174] In 1999 a year into her term as director general of the WHO, work began towards the creation of the WHO FCTC. This was the first time after 55 years in operation that the WHO used its
constitutional authority to develop a legal treaty aimed at promoting public health.[175]

During the WHO FCTC negotiations, trade – health tensions arose over language giving trade priority over health.[176] Two schools of thought emerged, the health-over -trade and the trade-over-health perspectives. The WTO Panel had released a report in the

[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] WHO 'The history of the WHO Framework Convention on Tobacco Control' <http://www.who.int/fctc/about/history/en/>.
[174] K Shibuya, C Ciecierski & E Guindon et al 'WHO FCTC: Development of an evidence based global public health treaty (2003) 327 *British Medical Journal* 154.
[175] K Shibuya, C Ciecierski & E Guindon et al (note 174 above) 155.
[176] H M Mamudu, R Hammond & S A Glantz et al 'International trade versus public health during the FCTC negotiations, 1999-2003' (2011) 20 (1) *Tobacco Control* 5.

*Thailand- Cigarettes* case of 1990 [177], where it found that Thailand's measures were not 'necessary' and hence inconsistent with the GATT. Therefore, there were concerns that WTO laws and policies could hinder tobacco control policies.

In 2000 the Intergovernmental Working Group (IGWG) which was tasked to draft the elements of the treaty released the 'Chairs Text' which included Guiding Principle D.4. The controversial Guiding Principle D.4 stated that 'trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.'[178]

There were conflicts over including a trade provision in the WHO FCTC; they were arguments that the WTO placed unacceptable limits on countries' freedom to regulate tobacco and tobacco products. Supporters of the health-over-trade perspective opined that tobacco products should be treated as exceptions to WTO rules.[179] In response to the recognition that the WTO rules have an impact on health and health policies, a joint study was undertaken by the WHO and the WTO in 2002. The purpose of the study was to show 'that there is much common ground between trade and health', and that 'health and trade policymakers can benefit from closer cooperation to ensure coherence…'[180] The WTO noted that the WHO FCTC, did not seem to be inherently WTO –inconsistent. However, it did state that the relationship between the WTO and the WHO FCTC will depend on the manner the FCTC recommendations are applied by the member states.[181]

In 2002 a revised Guiding Principle D.5 was released:

> Priority should be given to measures taken to protect public health when tobacco control measures contained in this convention and its protocols are examined for compatibility with other international agreements or The Parties agree that tobacco control measures shall be transparent, non – discriminatory and implemented in accordance with their existing international obligations or Tobacco control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade or Tobacco control measures taken to protect human health

[177] Panel Report, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 November 1990.
[178] H M Mamudu, R Hammond & S A Glantz et al (note 169 above), table 2 page 4.
[179] D Bettcher & I R A Shapiro 'Tobacco control in an era of trade liberalisation' (2001) 10(1) *Tobacco Control* 65.
[180] WHO & WTO 'WTO Agreements and Public Health a joint study by the WHO and the WTO Secretariat' (2002) 1.
[181] Ibid 15.

should not be deemed as constituting a means of arbitrary or unjustifiable discrimination in international trade[182]

Finally, in May 2003, the WHA adopted an international tobacco treaty, the WHO FCTC, as a means of combating the global tobacco epidemic.[183] A silent approach was adopted as a compromise between the health-over-trade and the trade over-health perspectives. No explicit trade provision was included in the final text of the convention. The WHO FCTC came into operation in February 2005. According to the WHO, it is the most rapidly and widely embraced treaties in United Nations history.[184] Its underlying rationales are to facilitate collaboration and action at global level to curb the epidemic. The WHO FCTC will be addressed in detail in subsequent sections.

### 2.7.1 WHO Framework Convention on Tobacco Control – Plain Packaging Requirements

The WHO FCTC is a paradigm shift in developing a regulatory response to address increase in the worldwide consumption and production of cigarettes and other tobacco products and the burden it places on the poor and the national health systems. Among other strategies, the WHO FCTC proposed that members implement plain packaging measures as non-price measures to deal with the tobacco epidemic. Article 5 (1) states that each member 'shall' develop, review, update and implement its national tobacco control strategy in accordance with the WHO FCTC. The wording of this article makes it compulsory and binding on all parties to the Convention to implement proposed measures including plain packaging of tobacco products. Article 7 which sets out the non-price measures also states that:

> Each Party shall adopt and implement effective legislative, executive, administrative or other measures necessary to implement its obligations pursuant to Articles 8 to 13 and shall cooperate, as appropriate, with each other directly or through competent international bodies with a view to their implementation.[185]

Article 2 (1) of the Convention states that members are 'encouraged to implement measures beyond' the ones required by the FCTC and its protocols. In addition, nothing in

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[182] Ibid.

[183] Ibid.

[184] WHO 'About the WHO Framework Convention on Tobacco Control' <http://www.who.int/fctc/about/en/>.

[185] Article 7 of the WHO FCTC.

the FCTC, 'shall prevent a Party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law.'[186] Therefore, the plain packaging requirements set in the FCTC are only minimum requirements.

Article 11 of the FCTC provides for packaging and labelling measures. Members are expected to adopt and implement measures that warrant that:

> 1 (a) tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as 'low tar', 'light', 'ultra-light', or 'mild.[187]

Article 11 1 (b) mandates each tobacco package to carry health massages, warnings and may include 'other appropriate messages'. The Guidelines formulated by the WHO for the implementation of the packaging and labelling provisions of the FCTC serve as elaborations on the rather simplified requirements of Article 11.[188] The FCTC requires that the messages and warning 'shall be rotating'[189]; in terms of the Guidelines for implementation of Article 11 this means that members should occasionally change the layout and design of warnings.[190] This is done to improve the effectiveness of health warnings. The warnings 'shall be large, clear, visible and legible'[191]; in terms of the Guidelines the warnings must be at the front, back, inserts and onserts of the package.[192] Furthermore, the members are to ensure that the ordinary opening of the package does not obscure the warnings and are encouraged to be innovative in designing warnings.[193]

Article 11.1 (b) (iv) of the FCTC requires that warnings 'should be 50 per cent or more of the principal display areas but shall be no less than 30 per cent of the principal display areas'.[194] The Guidelines referring to this provision encourages members to implement warnings that will cover as much as the principal display areas as possible, that

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[186] Ibid.
[187] Article 11 (1) (a) of the WHO FCTC.
[188] Guidelines for implementation of Article 11 of the WHO FCTC.
[189] Article 11. 1 (b) (ii) WHO FCTC.
[190] Guidelines for implementation of Article 11 of the WHO FCTC paragraph 19 – 20.
[191] Article 11.1 (b) (iii) of the WHO FCTC.
[192] Guidelines for implementation of Article 11 of the WHO FCTC paragraph 8 – 11.
[193] Ibid.
[194] Article 11.1 (b) (iv) of the WHO FCTC.

the warnings be in bold print, in a style and colour that enhances overall visibility.[195] The FCTC also encourages warnings to 'be in the form of or include pictures or pictograms.'[196] The Guidelines elaborate that the pictorials should be in full colour to disrupt the impact of brand imagery and decrease the overall attractiveness of the packages.[197]

In terms of paragraph 46 of the Guidelines to implementing Article 11 members are encouraged to adopt plain packaging. It states that:

> Parties should consider adopting 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 (plain packaging). This may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.[198]

It is also key to emphasise that, the FCTC only requires that warnings should be 50 per cent or more of the principal display areas but shall be no less than 30 per cent of the principal display areas. As such plain packaging measures go beyond what is required under the FCTC. Standing alone the FCTC packaging and labelling provisions do not appear as restrictive as the plain packaging legislation plays out to be.[199] On the other hand, the Guidelines though non-binding, inevitably draw out the course plain packaging measures will take. The Guidelines for implementation of Article 11 paint a different picture. They demonstrate the rigorous and restrictive forms that plain packaging measures can take.

### 2.7.2 Australia: Tobacco Plain Packaging Act of 2011(TPP Act)

The Australian TPP Act was the first plain packaging legislation to be implemented. Its purposes are to discourage the use of tobacco products and to advance public health[200] by 'regulating the retail packaging and appearance of tobacco products.'[201] Further, it seeks to achieve the improvement of public health by improving the effectiveness of health

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[195] Guidelines for implementation of Article 11 of the WHO FCTC paragraph 12 – 13.
[196] Article 11. 1 (b) (v) of the WHO FCTC.
[197] Guidelines for implementation of Article 11 of the WHO FCTC paragraph 14 – 17.
[198] Guidelines for implementation of Article 11 of the WHO FCTC, paragraph 46.
[199] The plain packaging legislation referred to is the South African Draft Control of Tobacco Products and Electronic Delivery Systems Bill, 2018 and the Australian Tobacco Plain Packaging Act No.148 of 2011(herein after the Australian TPP Act).
[200] Section 3 (1) of the Australian TPP Act.
[201] Section 3 (2) of the Australian TPP Act.

warnings, reducing ability of tobacco packages to mislead the public and by reducing the appeal of tobacco products.[202] As indicated earlier, this section will give an outline of the TPP Act to establish the manner in which the FCTC regulations have been set out in national legislation.

Chapter 2 of the TPP Act lays out requirements for the appearance of tobacco products and retail packaging. Before focusing on the details of the plain packaging requirements a number of definitions are of notable interests to be able to understand the breath of what the regulations require. 'Tobacco products' include all processed tobacco and any other product that contains tobacco, manufactured to be used for chewing, snuffing, sucking or smoking.[203] 'Retail packaging' of tobacco products means any container where the tobacco product is placed directly, any container which contains the smaller containers in which tobacco products are directly placed, any plastic or wrapper that covers any retail package, any wrapper that covers the tobacco product itself, any insert placed inside the retail packaging, and any onsert attached or affixed to the retail packaging of the tobacco products.[204]

'Cigarette carton' means a container which contains smaller containers (cigarette packs) in which cigarettes are directly placed.[205] 'Container' means any box, carton, pack, packet, bag, pouch, tube, tin or any other container.[206] 'Insert' means anything other than the tobacco products which is placed inside the container except the lining.[207] 'Onsert' means anything affixed or attached to the package except the lining.[208] 'Mark' means any line, letters, numbers, symbol, graphic or image.[209] The 'outer surface' refers to the whole box including the flip-top lid or bottom of the pack.[210] 'Inner surfaces' of the carton are all surfaces that become visible only when the carton is opened.[211] The plain packaging requirements of the TPP Act were drafted with the intention to leave no space of the tobacco retail package untouched.

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[202] Section 3 (2) (a) – (c) of the Australian TPP Act.
[203] Section 4 of the Australian TPP Act, Definition of tobacco product.
[204] Section 4 of the Australian TPP Act, Definition of Retail Packaging.
[205] Section 4 of the Australian TPP Act, Definition of Cigarette carton.
[206] Section 4 of the Australian TPP Act, Definition of Container.
[207] Section 4 of the Australian TPP Act, Definition of Insert.
[208] Section 4 of the Australian TPP Act, Definition of Onsert.
[209] Section 4 of the Australian TPP Act, Definition of Mark.
[210] Section 6 (1) of the Australian TPP Act.
[211] Section 6 (2) of the Australian TPP Act.

Section 18 deals with the general physical features for retail packaging. It requires that no decorative ridges, embossing, bulges, embellishments or irregular shapes or textures must be found on both the outer and inner surfaces. Moreover, all glues or adhesives used to manufacture the packs must be colourless. It also requires that all containers must be made of rigid cardboard, 'only cardboard'.[212] Interestingly, all outer surfaces must be rectangular in shape and all surfaces must meet at 'firm 90 degrees angle'. Therefore no rounded or embellished edges are allowed. To some, this could be straightforward but to those who trademarked the shape of their containers, or have registered designs this could be encroaching into their space. Section 18 goes further to require only one opening, a flip top lid with straight edges on all tobacco packs. Furthermore, it requires that the lining be made only from foil baked with paper or any other material allowed.

Section 19 deals with the colour and finish of packaging, including inner and outer surfaces and both sides of any lining. It requires that they must be of a matt finish, and that they must be in a drab dark brown colour or any other colour prescribed. The only things exempted from the drab dark brown colour are of course the health warnings, other legislative requirements and luckily the brand or company name. However, the brand names 'might' still be required to be of a particular colour, the brand owners are not at liberty to choose a colour.

Section 20 prohibits trademarks and marks in general to appear on retail packaging other than as permitted by the regulations. The brand, company, business or variant name is permitted by the regulations. However any such name must not obscure any legislative requirements like health warnings.[213] Such name must appear only once on the outer surface of cigarette packages and should appear across one line only.[214] For example it must appear on the front outer surface, 'horizontally below, in the same orientation as the health warning.'[215] The brand name is also not allowed on the tobacco product itself. Section 22 provides for the requirements for wrappers. Wrappers must be colourless, unmarked, unembellished and must not contain any text. No trade mark or any other mark

[212] Section 18 (2) (a) of the Australian TPP Act.
[213] Section 21 of the Australian TPP Act.
[214] Ibid.
[215] Ibid.

must appear on all wrappers. Section 23 requires that no inserts or onserts are to be found on retail packaging.

No part of the package, inner or outer surface, wrapper or lining must produce a noise, contain or produce a scent that could be taken as tobacco promotion or advertising.[216] The legislators of the TPP Act were also aware of the fact that some retail packaging might change after sale. Hence, it prohibits 'heat activated inks', inks and embellishments designed to appear slowly after time, 'inks that appear fluorescent in certain light', 'panels designed to be scratched or rubbed to reveal image or text', 'removable tabs' and 'fold – out panels.' Finally Section 26 prohibits the appearance of trademarks or any other marks anywhere on the tobacco products other than as permitted by the regulations.

The TPP Act is detailed, imposing restrictions on shape, colour, scent, noise, font and even the position of the brand or variant names. It strips tobacco packaging completely not even a 'line' is allowed unless permitted. Undoubtedly, it deprives the tobacco manufactures of all control of how the product is packaged. It deprives the trade mark owners of all control, no trademarks are allowed except as permitted and the brand name is allowed under strict regulations. They cannot choose the typeface, colour or position of where to place the brand name on the retail packaging. They are still allowed to use their brand name or variant name, which is argued to be the root of trademark law.

The South African draft legislation will be examined in the next sub section. It will be demonstrated that the draft legislation is not as detailed as the Australian TPP Act.

### 2.7.3 South Africa: Control of Tobacco Products and Electronic Delivery Systems Bill, 2018

The South African Bill was published for public comment by the Minister of Health on the 9th of May 2018. As such it will take a few more months to be passed as legislation, subject to changes if need be. In this section an outline of the draft law will be given; with particular focus being drawn to differences and similarities with the Australian TPP Act.

In terms of its preamble, the draft law seeks to standardise tobacco product packaging as a means to; discourage use and promotion of tobacco products; reduce the appeal of tobacco products; increase the effectiveness of health warnings and to reduce the ability of such products to mislead consumers about its harmful effects. Close resemblance with the objectives of the Australian TPP Act can be observed.

[216] Section 24 of the Australian TPP Act.

Section 4 of the draft legislation, sets out the requirements for the standardised packaging and labelling of tobacco products. It is important to note, that tobacco products are defined by the draft law, as a product which contains tobacco or extracts of tobacco leaves intended for human consumption.[217] Further, Packaging includes any container which contains a tobacco product; its wrapper or plastic and any other material attached or enclosed to the relevant product.[218] Therefore, the requirements set out in section 4 of the draft legislation do not apply to electronic delivery systems. The number of individual tobacco products and or quantity to be contained in a package will be determined by the Minister of Health.[219] In addition, the individual tobacco products will be of a prescribed shape and size.[220]

The packaging of the tobacco products will have a uniform plain color and texture, size and shape. The openings on the packaging will also be prescribed.[221] Contrary to the Australian TPP Act which specifies that packages will be of a drab brown color, the South African provision does not set out what color will be used. In this respect it is similar to the Irish Public Health (Standardized Packaging of Tobacco) Act No. 54 of 201, which does not also specify the color to be used.[222] The TPP Act also specifies that the texture allowed is only 'rigid cardboard' and that a rectangular shape with side meeting at a firm 90 degrees will be applicable.

Section 4 (2) (d) prohibits branding, promotional elements or logos (on, inside or attached) for both the packaging and individual tobacco products. This implies that non-word trademarks are therefore not allowed on the individual tobacco products and packaging. Section 4 (1) (g) then goes on to state that, the Minister of health will prescribe the markings allowed on and the appearance of individual tobacco products, including the use of branding, trademarks or logos.[223] These two provisions are contradictory, the latter provision implies that it still has not been decided whether non-word trademarks can be used on the individual tobacco products. It is my recommendation that this should be clarified in the reviewed draft legislation.

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[217] Section 1 of the Draft Control of Tobacco Products and Electronic Delivery Systems Bill.
[218] Ibid.
[219] Ibid, section 4 (2) (f).
[220] Ibid, section 4 (2) (h).
[221] Ibid, section 4 (2) (c).
[222] Section 7 (2) (a), (b) and (c) of the Public Health (Standardized Packaging of Tobacco) Act No. 54 of 2014.
[223] Section 4 (2) (g) of the Draft Control of Tobacco Products and Electronic Delivery Systems Bill.

Word trademarks are allowed on the packaging, the draft legislation allows the brand name and product name to appear albeit, in a prescribed typeface and color.[224] Further, these will appear alongside other mandatory information like health warnings and manufacturers details.[225] In this respect the draft Bill is also not specific as it does not state how many times the brand name will appear.

Section 4 (4) of the draft law, requires that tobacco products, tobacco packaging, labelling must not in any ways promote tobacco products in a manner that is deceptive, misleading about its health effects, and characteristics. For instance information that suggests that a tobacco is less harmful than other tobacco products, alternatively, that a tobacco product has lifestyle benefits or contains stimulating, healing, reviving, natural or organic properties. It requires that tobacco products, tobacco packaging, brand names, color or trademarks must not in any way suggest that a tobacco product has lifestyle benefits or contains stimulating, healing, reviving, natural or organic properties. Alternatively, that gives an impression that the tobacco product has a taste, smell, and flavoring of either the tobacco product or any additives in the product or the absence thereof. Features that resemble that of food or cosmetics are also not allowed on the tobacco products.[226]

The draft Bill also provides for advanced health warnings to be applied alongside the standardized packaging requirements. Section 6 (1) (c) provides for pictorial health warnings. Tobacco packaging will contain a message relating to the harmful health, social, economic or other effects related to the products; or the beneficial effects of not consuming the product.[227] The same package will contain a photograph depicting the beneficial or devastating effects.[228] This photograph can appear on the package as part of the health warning or in addition thereto. The products constituents and other mandatory information will also be on the same package.[229] In light of this, it is arguable that the permitted visibility of the word trademarks will be significantly low.

The draft Bill on the Control of Tobacco Products and Electronic Delivery Systems is evidently, less specific than the Australian TPP Act which includes particulars on the wrappers, heat activated links, embellishments etcetera. This could be because this is the

[224] Ibid, section 4 (2) (e).
[225] Ibid, section 4 (2) (e).
[226] Ibid, section 4 (4) (a) – (c).
[227] Ibid, section 6 (1) (a) (i) and (ii).
[228] Ibid, section 6 (1) (c).
[229] Ibid, section 6 (1) (b).

first version of the draft Bill, the Minister of Health could still be deliberating on the fine details, which are best suited for South Africa. On the contrary, this could also point towards a more relaxed plain packaging legislation underway for South Africa.

Nevertheless, both plain packaging laws have a noticeable effect on the physical appearance of tobacco products. The proposed legislation results in almost the same effects. It is clear that the plain packaging Bill aims to strip off various elements of tobacco packages and products that could be attractive in any means. The tobacco industry has no control whatsoever in how their products are presented to the market. Differences could result from how the respective governments in different countries prescribe specific details, such as package color, font sizes, styles or the positioning of brand names etc. Otherwise, the legislation is noticeably modelled after the WHO FCTC minimum requirements. It is therefore reasonably anticipated that the final draft of the South African legislation and future plain packaging laws will be in many ways similar to the Australian legislation.

The extent to which law protects the right of tobacco owners, as manufactures, to choose how their products are presented will be examined in the subsequent chapters. That is if the law does at all protect such liberties.[230] It was important for this section to close in on the specifics of plain packaging requirements.

Without an understanding of what exactly these requirements do to tobacco retail packaging, it would be impossible to undertake the analysis to be undertaken in the subsequent chapters. Importantly, with regard to the extent of the limitations on trademark property and trademark rights.

## 2.8 CONCLUSION

The purpose of the historical analysis was to establish how the world has arrived at the current approach to plain packaging as a tobacco control mechanism. The health concerns related to tobacco are not a modern phenomenon these date back to the 18th century. History demonstrates that the modern attempts by the tobacco industry to slow down tobacco control mechanisms are only a matter of history repeating itself. The difference is that over time, the tobacco industry delay tactics are growing weary because the tobacco epidemic is increasing in magnitude and reaching new heights year after year.

The current legal challenges against plain packaging measures are not unexpected. History shows that initially the tobacco industry battled against the realization that tobacco

[230] This question will be dealt with in detail in subsequent chapters.

was harmful to health. Since the 1970s, when the toxic nature of tobacco was established, the tobacco industry has still been challenging the constitutionality of tobacco control measures. Therefore the necessity challenge brought forward by the tobacco industry is not novel.

A historical examination of the role of packaging in the tobacco industry also justifies the move towards plain packaging measures. It is my submission, that the evidence examined in this chapter can be used to support the claim that there is a logical relationship between plain packaging and the role of packaging in the promotion of tobacco products. Although it remains open whether this would sustain a legal justification, it shows that the step towards implementing plain packaging is definitely not a wild unthought-of move. It was also established that the tobacco industry itself acknowledged the link between consumption and packaging. Philip Morris marketer Mark Hulit stated that; 'In the absence of any other marketing messages, our packaging … comprised of the trademark, our design, color and information … is the sole communicator of our brand essence… when you don't have anything else — our packaging is our marketing.'[231] Further, that 'regulations that infringe upon and distort our fundamental packaging designs must be fought with all the resources and energy Corporate Affairs can muster.'[232] These internal documents demonstrate that the tobacco industry is very much aware of the role of packaging in maintaining and promoting sales.

This chapter not only attempted to provide a historical insight into the rationale behind calls for plain packaging. It further outlined the current conceptualisation of plain packaging measures. The WHO FCTC requires that member parties implement plain packaging measures; this chapter examined how South Africa and Australia have given effect to these obligations in its draft legislation. The rationale behind outlining the specific requirements of plain packaging measures; is to provide a foundation for the analysis to be undertaken in subsequent chapters. Such analysis will examine whether plain packaging legislation results in a deprivation of trademark property.

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[231] M Hulit Marketing Issues Corporate Affairs Conference, Philip Morris, Manila, 27 May 1994 <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=qsbd0116>.
[232] Ibid.

## CHAPTER THREE

### Plain Packaging Measures: Through the Lenses of the Right to Health

'One would be hard pressed to find a more controversial or nebulous human right than the 'right to health' which is characterised by conceptual confusion as well as a lack of effective implementation.'[1]

### 3.1 INTRODUCTION

The previous chapter focused on the historical background of plain packaging measures. Throughout that chapter, the devastating consequences of tobacco consumption and exposure to smoke on human health were reiterated. In addition to the direct public health impacts[2], tobacco consumption also leads to serious economic losses.[3] The so called 'benefits' of tobacco to the economy are far outweighed by the tobacco –related disease burden and loss of lives.[4] Tobacco leads to a redirection of funds from essentials such as food and education to tobacco –related health care expenditures.[5] In view of that, the connection between tobacco and the realisation of the human right to health is recognisable.

For the purposes of this chapter, it is worth recapping that this thesis has highlighted the following: (a) tobacco trademark owners argue that plain packaging measures are not 'necessary' public health measures; (b) that they do not constitute a necessary means to the realisation of the right to health; (c) the proponents of plain packaging measures have shown disregard over the WTO's necessity tests and (d) have instead argued that a health-

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[1] B Toebes *The Right to Health as a Human Right in International Law* 1ed (1999) 259-60.

[2] A D Mitchell & T Voon 'Introduction' in A D Mitchell & T Voon (eds) *The Global Tobacco Epidemic and the Law* 1 ed (2014) 1; African Union Commission 'The Impact of Tobacco Use on Health and Socio-economic Development in Africa: A Status Report' (2012) <http://www.carmma.org/sites/default/files/PDF-uploads/AU_report_English_FINAL.pdf>; World Health Organization 'WHO Report On The Global Tobacco Epidemic, 2008: The MPOWER Package.' (2008) <http://www.who.int/tobacco/mpower/mpower_report_full_2008.pdf>; M A William & N H De Klerk 'History of tobacco and health.' (2003) 8 (3) *Respirology* 286-290; H Kuper, H Adami & P Boffetta. 'Tobacco use, cancer causation and public health impact.' (2002) 251 (6) *Journal of Internal Medicine* 455, 456; R Linda & D M Richter 'Exposure to parental tobacco and alcohol use: Effects on children's health and development' (2001) 71 (2) *American Journal of Orthopsychiatry* 182; A Yürekli *et al* 'Poverty and tobacco' (2001) 10 (3) *Tobacco Control* 210.

[3] P D Rice et al 'The economic costs of the health effects of smoking, 1984' (1986) 64 (4) *The Milbank Quarterly* 489-547; C Bates 'Study shows that smoking costs 13 times more than it saves' (2001) 323 *British Medical Journal* 1003; P Jha & F J Chaloupka *Curbing the Epidemic, Governments and the Economics of Tobacco Control* 1ed (1999) 22-25; R Doll & J Crofton *Tobacco and health* 1ed (1996); J H Holbrook 'Tobacco and health' (1977) 27 (6) *A Cancer Journal for Clinicians* 344-353.

[4] C Bates (note 3 above) 1003.

[5] C Wu 'State responsibility for tobacco control: The right to health perspective' (2008) 3 (2) *Asian Journal of WTO and International Health Law and Policy* 379; P Jha & F J Chaloupka (note 3 above) 76.

over-trade approach be taken. The health-over-trade approach means that plain packaging measures will become immune to the WTO rules and take automatic pre-eminence over trademark rights.

In this chapter, the plain packaging debate is pursued from the lenses of the right to health. The chapter explores whether the existing human rights regime creates a right to health that mandates the regulatory authorities to implement tobacco control measures. Could the right to health serve as a counterweight or provide leverage for proponents of plain packaging measures?

A pertinent research question this chapter seeks to answer is whether taking a health- over-trade approach to the plain packaging debate is justifiable. This will be examined from the perspectives of the right to health. The status of the right to health will be explored against the backdrop of the conflict between health and trademark rights. Does this right encourage or justify a health-over-trade approach to the plain packaging debate?

As will be shown in this chapter the health-over-trade approach emanates from fears that the WTO is antithetical to human rights. It is therefore important in examining the justifiability of the health-over-trade approach to explore whether the international trade regime has room for the right to health. Is the right to health given the status befitting to it? Or is the advancement of a health-over-trade approach a fallout or a result of the inadequate recognition of the right to health in the international trading regime. This is done with the full acknowledgement that the subsequent chapters of this thesis will again contribute to the answering of these questions.

Part II of this chapter will explore the tensions between intellectual property and health rights and will establish that the conflict is not unexpected due to the nature of the rights in conflict. Part III will examine the nature, content and implications of the right to health within the context of international human rights law and the South African legal system. It will explore the implications of the right to health on tobacco control and on the health-over-trade approach. It concludes that the right to health is of fundamental importance to tobacco control; however there exists no apparent basis for an approach which grants the right to health automatic pre-eminence over conflicting rights. Part IV of the chapter will analyse whether the WTO regime allows space for the realisation of the right to health. The WTO is not a human rights organisation; however it is pertinent to explore whether the regime allows space for its members to fulfil obligations related to the right to health. It will argue that the WTO does allow member states to fulfil obligations to

secure the right to health and therefore that the health-over-trade argument is without basis. It will establish that the right of WTO members to regulate is conditional upon the satisfaction of checks and balances which are effective and necessary in stamping out protectionism. Part V will conclude the chapter.

## 3.2 NAVIGATING THE TENSIONS BETWEEN INTELLECTUAL PROPERTY AND HEALTH RIGHTS

The distinction between individual and community rights lie at the centre of the conflict between intellectual property and health rights.[6] In cases of a conflict of rights, public or community rights have been argued to take precedence over individual or private rights.[7] An expansion of public rights usually results in the contraction of private rights.[8] If public rights then trump over private rights, it is vital for the maintenance of private rights that the public right be justified and clearly defined.[9] 'If public right claims are merely a justification for any public action or limitation on private rights, private rights will have been reduced to irrelevance.'[10] Public rights have been said to possess 'a rhetorical appeal over private rights' therefore it has become almost obvious that proponents of any policy appeal to public rights to reinforce their stance.[11] There are risks associated with this approach, it is marred with space for abuse, public rights or public goods can be used as a term to settle questions and gain the moral high ground,[12] whilst pursuing protectionist and illegitimate goals.

On the other hand, it is argued that it is the expansion of private rights that results in a contraction of public rights. For instance the English enclosure movement, involved fencing off common land and privatising it.[13] It was unjust, robbing commons of their

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[6] J Boyle 'The second enclosure movement and the construction of the public domain' (2003) 66 *Law and Contemporary problems* 33; C M Correa 'WHO commission on social determinants of health: Intellectual property rights and inequalities in health outcomes' Globalization and Health Knowledge Network: Research Papers <http://www.globalhealthequity.ca/electronic%20library/Intellectual%20Property%20Rights%20and%20Inequalities%20in%20Health%20Outcomes%20Correa.pdf>; J Lipton 'Balancing private rights and public policies: Reconceptualising property in databases.' (2003) *Berkeley Technology Law Journal* 773.

[7] J L Huffman *Private Property and the Constitution: State Powers, Public Rights and Economic Liberties* 1ed (2003) 83.

[8] J L Huffman 'The evolving public trust doctrine: An obstacle to water marketing' in B.D Gardner & R T Simmons (eds) *Aquanomics: Water markets and the Environment* 1ed (2012) 205.

[9] J. L Huffman (note 7 above) 83.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] J Boyle (note 6 above) 34.

entitlements and in the end causing economic inequalities, crime, and social dislocation.[14] Polanyi asserts that:

> Enclosures have appropriately been called a revolution of the *rich against the poor*. The lords and nobles were *upsetting the social order*, breaking down ancient law and custom, sometimes by means of violence, often by pressure and intimidation. They were literally *robbing the poor* of their share in the common, tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs and their heirs'. The fabric of society was being disrupted.[15] (My emphasis)

It is evident from the above quotation that property rights are controversial. Boyle opines that similar to the enclosure movement property rights through privatisation turns common property and what was outside the context of property into private property.[16] The comparison of the enclosure movement to the current intellectual property regime, begs for attention. Is the intellectual property regime also undermining the rights of those in most peril? Similar to the debate on private and public rights, one school of thought argues that intellectual property is antithetical to human rights, whilst the other school of thought argues that the so called public interests undermine well deserved rights to intellectual property.

The advent of the TRIPS Agreement and pharmaceuticals debate represent a platform to showcase the interplay between intellectual property and the right to health.[17] The U.S policy prioritises intellectual property protection since pharmaceuticals offer a promise of advanced medicines and a cure, as such they are seen as drivers of public health initiatives not barriers. Accordingly, in this context intellectual property rights are presented as pro human rights. Regardless, critics argue that health catastrophes such as the HIV/AIDS pandemic require immediate attention instead of waiting for unpredictable and distant hopes of the development of cures or treatments.[18] Access to essential medicines is argued to be a human right, and intellectual property protection results in the

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[14] J Boyle (note 6 above) 34.
[15] See K Polanyi *The Great Transformation: The Political and Economic Origins of Our Time* (1957) 35 as quoted in J Boyle (note 6 above) 34.
[16] J Boyle (note 6 above) 34.
[17] The TRIPS has been criticised for its impact on the right to health, particularly the impact of patent rights on the accessibility and affordability of medicines. See S Joseph *Blame it on the WTO? A human rights critique* 1 ed (2011) 217.
[18] J Crook 'Balancing intellectual property protection with the human right to health' (2005) 23 *Berkeley Journal of International Law* 524, 531.

inaccessibility of essential drugs.[19] In that context intellectual property protection is then perceived as antithetical to the realisation of the right to health.

There are two prime approaches at the interface of health and intellectual property rights. The first is that there exists a fundamental conflict between health and intellectual property rights.[20] According to this approach strong protection of intellectual property undermines the protection of human rights.[21] The solution advanced to resolve this conflict is to recognise the primacy of human rights over intellectual property protection.[22] This resonates with the argument for the health over-trade approach. The second approach is that human rights and intellectual property actually coexist.[23] The protection of intellectual property is seen as indispensable to the realisation of the right to health. The solution advanced is to strike a balance between the two competing rights. Although there is no consensus on where to strike a balance between the rights of the commons to access and the rights of the inventors to incentives, the second approach views the rights as compatible.[24]

In support of the first approach Boyle submits that traditionally the general public was at the centre of the protection of intellectual property, 'it may sound paradoxical, but in a very real sense protection of the commons was one of the fundamental goals of intellectual property law. In the new vision of intellectual property, however, property should be extended everywhere—more is better.'[25] With oppositions to the explosive expansion of intellectual property warded off as

'economically illiterate'.[26]

Reinforcing Boyle's sentiments the U.N Sub Commission on the Promotion and Protection of Human rights recommended the 'primacy of human rights obligations over

[19] M Levin 'The pendulum keeps swinging –present discussions on and around the TRIPS Agreement' in A Kur, M Levin (eds) *Intellectual property in a fair world trade system: Proposals for reform of TRIPS* 1ed (2011) 28.
[20] L R Helfer 'Human rights and Intellectual Property: Conflict or coexistence?' (2003) 5 (1) *Minnesota Intellectual Property Review* 47, 48.
[21] Ibid 49.
[22] Ibid 48.
[23] Ibid.
[24] Ibid 49.
[25] J Boyle (note 6 above) 40.
[26] Ibid 41.

economic policies and agreements.'[27] This approach would find solace in the argument that intellectual property rights are devoid of any human rights dimension.[28] It would then be a matter of weighing human rights versus non-human rights (intellectual property). This is an over-simplification of the conflict at hand. Peter Yu argues that this hierarchical approach is complicated due to the fact that intellectual property rights possesses attributes that are also protected in the international human rights regime.[29] Chapter four will advance arguments in support of Peter Yu's submissions that intellectual property rights are also recognised human rights. For instance copyrights are based on 'human rights and justice and that authors, as creators … deserve that their rights in their creations be recognized and effectively protected both in their country and in all other countries of the world.'[30]

The Universal Declaration of Human Rights, in Article 17, recognises that 'everyone has the right to own property alone as well as in association with others' and, that 'no one shall be arbitrarily deprived of his property.' As a point of departure all basic rights and freedoms including intellectual property rights deserve recognition and respect.[31] However the categorisation of intellectual property as a fundamental right [32] does not 'guarantee commitment, respect or exclusivity in any abstract or absolute manner.'[33] It can be limited, albeit in a justified manner. A lack of intellectual property protection can impede the societal benefits of innovation, whilst over protection could undermine other fundamental human rights.[34]

Chapman agrees that intellectual property rights are human rights; however the author posits that the rights of the intellectual property holder are not absolute but instead are conditional upon contributions to the general welfare of the society.[35] The right to

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[27] Intellectual Property Rights and Human Rights, Sub Commission on Human Rights 20000/7, UN Doc E/CN.4/Sub.2/RES/20007/7
<http://wwww.unhchr.ch/Hundocda.nsf/0/c462b62cf807bl2569700046704e?>.

[28] D Matthews 'Intellectual property rights, human rights and the right to health' in W Grosheide (eds) *Intellectual Property Rights And Human Rights: A Paradox* 1 ed (2009) 118.

[29] P K Yu 'Reconceptualising intellectual property interests in a human rights framework' (2006 – 2007) 40 *University of California, Davis Law Review* 1039, 1042.

[30] Assembly of the Berne Union, 'Solemn Declaration' of 9 September 1986 quoted in D Matthews (note 28 above) 120.

[31] M Levin (note 19 above) 26.

[32] F Papadopoulou 'TRIPS and human rights Agreement' in A Kur, M Levin (eds) *Intellectual property in a fair world trade system: Proposals for reform of TRIPS* 1ed (2011) 267.

[33] M Levin (note 19 above) 27-28.

[34] M Levin (note 19 above) 28.

[35] A R Chapman 'Implementation of the International Covenant on Economic, Social and Cultural Rights' Discussion paper: American Association for the Advancement of Science (AAAS), Washington, USA, to the

intellectual property can only be defined and limited by its societal purposes.[36] For intellectual property to be recognised as part of the body of universal human rights it must be consistent with the realisation of other human rights.[37] Having been criticised for having adverse effects on human rights; 'the question is essentially where to strike the right balance, namely whether greater emphasis should be given to protecting interests of inventors and authors or to promoting public access to new knowledge.'[38]

That sums up the traditional debate around the rights of access to intellectual innovations and the rights of inventors to incentives. Which should enjoy greater protection? And essentially where should the balance be struck? Peter Yu, builds up from this traditional conflict and presents a more dynamic conflict.[39] He recognises that the two prime approaches address the external conflicts, the human rights versus intellectual property rights conflict.[40] He goes further to reveal the internal conflicts between human rights and intellectual property that possesses both human rights and non-human rights attributes all in one.[41] Peter Yu submits that the better approach is to focus on the resolution of conflicts between human rights and the non - human rights aspects of intellectual property.[42]

Attention must therefore be shifted to the non-human rights aspects of intellectual property. Ensuring that protection is extended to the human rights aspects of intellectual property would allow a roll back of the excess protection provided for the non-human rights aspects of intellectual property which could be evading the space reserved for the protection of human rights.[43] The breaking up of the intellectual property rights brings a new dimension to the interface between health and trademark rights. In the case of trademarks and health rights; it would then be about balancing health rights and the non-human rights aspects of trademarks. Instead of placing the whole component of a trademark right on the other end of the scale.

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United Nations Committee on Economic, Social and Cultural Rights, E/C.12/2000/12, 3 October 2000, para 23.

[36] M Levin (note 19 above) 28.

[37] D Matthews (note 28 above) 4.

[38] Ibid 5.

[39] P K Yu (note 29 above) 1079.

[40] Ibid.

[41] P K Yu (note 29 above) 1079-1093.

[42] P K Yu (note 29 above)1079

[43] P K Yu (note 29 above) 1080.

Plain packaging measures present another instance where focus will be placed at the intersection of the right to health and intellectual property rights. It is argued that tobacco trademarks increase the noticeability, likeability and appeal of tobacco products. To combat the tobacco epidemic plain packaging measures are proposed by the World Health Organisations' Framework Convention on Tobacco Control (WHO FCTC). Tobacco product packaging and labelling including trademarks should not promote tobacco products.[44] The qualities and diverse status attributed to different rights, in this case the right to health and trademark rights, is of importance in the evaluation of questions regarding their protection in cases of conflict. Trademark rights will be explored in chapter four, the normative content of the right to health under international law and within the South African legal system will be examined in this chapter.

## 3.3 CHARTING THE CONTOURS OF THE RIGHT TO HEALTH

The conflict reflected above between intellectual property rights and health rights carries over to the international law rule-systems that govern these conflicting areas. As such Plain packaging measures trigger the applicability of overlapping and competing legal orders. Parties in the plain packaging debate will raise human rights issues from the WHO FCTC or the International Covenant on Economic Social and Cultural Rights (ICESCR) which could be addressed by the South African courts in domestic spheres or by the African Commission in regional spheres.[45] The international, regional and national tribunals which will handle disputes arising from plain packaging legislation will also be exposed to competing and overlapping rules in the form of interdisciplinary international instruments and treaties; on which claims could be based or disputed.[46]

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[44] Article 11 of the World Health Organisation's Framework Convention on Tobacco Control (herein after the WHO FCTC), adopted by the 56th World Health Assembly, 21 May 2003.

[45] See D Reubi 'Making a human right to tobacco control: Expert and advocacy networks, framing and the right to health' (2012) 7 *Global Public Health* S176 –S190, on how the tobacco control community has adopted a human rights approach to tobacco in order to tap into the powerful, judicial monitoring and enforceability mechanisms that make up international human rights. 'For them, human rights is a discourse that has been highly successful in other areas of global health, like HIV/AIDS and access to medicines, which they are keen to tap into.'; see also O A Cabrera & J Carballo 'Tobacco Control Litigation: Broader Impacts on Health Rights Adjudication' (2013) 41 Journal of Law, Medicine & Ethics 147, 148, on the linkages between international law, the WHO FCTC, international human rights law, and the domestic incorporation of international legal obligations on tobacco control.

[46] H G Ruse-Khan 'Conflict-of-Laws Approach to competing rationalities in international law: The case of plain packaging between intellectual property, trade, investment and health' (2013) 9 (2) Journal of Private International Law 309, 312-16; T Lin 'FCTC in interpretation of indirect expropriation and the right to adopt 'stricter' tobacco control measures' (2014) Asian journal of WTO & international health law and policy 123, 125; O A Cabrera & J Carballo (note 45 above) 149 – 153.

In South Africa, it cannot be ignored that the tribunals, which will address the legitimacy of the claims emerging from the right to health, for instance would have to look at the right to health from the holistic perspective of national, regional and international human rights law.[47] Most human rights instruments which give normative content to the right to health were drafted before the emergence of the South African Constitution.[48] As such the South African content of the right to health draws inspiration in both the wording, and interpretation from international human rights instruments.[49] In light of this, it would not only be incomplete but also misdirected to undertake an isolated review of the right to health under the South Africa Constitution. More so in light of the recognition of the need to adopt a global approach to the control of the global tobacco epidemic.[50] The right to health as relating to tobacco control cannot be reviewed in isolation.

Inevitably, this acknowledgement is accompanied by the need to address the role of international law in the South African legal system. Such an exercise will be relevant in the interpretation of the South African Constitution; in this context in defining the contours of right to health. As will be subsequently shown in this chapter it will also assist in establishing the position and role of the WHO FCTC, within global health governance. Considering the possible conflict that arises from treaty obligations it will also become necessary to establish the legal position of international law in South Africa. Before exploring the right to health, the following section will take a step back and briefly examine the role and position of international law within the South African legal system.

### 3.3.1 International Law in the South African Legal System

Commendable weight and recognition is given to international law in the South African legal system, Moseneke submits that this is partly due to the country's history with

[47] D Reubi (note 45 above) S183. On how the current human rights-based approach to tobacco control' is about 'utilizing the legal remedies and reporting requirements of current [human rights] treaties and conventions'

[48] For instance the International Covenant on Economic, Social and Cultural Rights, adopted by the U.N. General Assembly Resolution 2200 A (XX) of December 16, 1966, entered into force January 2, 1976. (herein after the ICESCR).

[49] P Roger 'South Africa's Right to Health Care: International and Constitutional Duties in Relation to HIV/AIDS Epidemic' (2004) 11 (2) Human Rights Brief 9; See also M Pieterse Can rights cure? The impact of human rights litigation on South Africa's health system (2014) 16, on how the understanding of the right to health at international law should influence the understanding of the right to health under the South African Constitution.

[50] See Preamble to the WHO FCTC.

international law in the apartheid era.[51] The international human rights community played a vital role in ending apartheid and as 'beneficiaries of international solidarity and the fight for minimum global standards of human decency'[52] it is not surprising that the 'leitmotif' of the South African Constitution is the commitment to globalised standards of decency.[53]

Section 232[54] provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or with an Act of parliament. A monist stance is therefore adopted with regard to customary international law, the latter and domestic law are essentially in solidarity.[55] The Universal Declaration of Human Rights (hereinafter the UDHR) is part of what is termed the 'international Bill of Rights'; and has been regarded as customary international law.[56] It represents the international human rights community's demarcations of acceptable minimum standards of state practice.[57] This will impact the interpretation of rights in the Bill of Rights including the content of the right to health in South Africa.

On the other hand a dualist stance is taken regarding treaty law. Dualism, recognises that domestic and international law are distinct and self-standing in their application.[58] According to dualism international law can only be applicable if incorporated into municipal law by a legislative act.[59] South Africa is hence bound by the International Covenant on Civil and Political Rights (Herein after the ICCPR) which it ratified.[60] In its interpretation of the Bill of Rights and practice it must observe the duties and obligations imposed by the ICCPR. On the other hand, South Africa is not bound by the ICESCR which it has signed but has not yet ratified. However, South Africa is also expected not to

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[51] D Moseneke 'The role of comparative and public international law in domestic legal systems: a South African perspective' (2010) *Advocate* 63, 64.

[52] D Moseneke (note 51 above) 65.

[53] Ibid.

[54] Section 233 of the Constitution of the Republic of South Africa, 1996 (herein after the Constitution or the South African Constitution).

[55] D Sloss 'Domestic Application of Treaties' (2011) *Santa Clara Law Digital Commons* 2.

[56] J von Bernstorff 'The changing fortunes of the Universal Declaration of Human Rights: Genesis and symbolic dimensions of the turn to rights in international law' (2008) 19 (5) *The European Journal of International Law* 903, 913; H Hannum 'The UDHR in national and international law' (1998) 3 (2) *Health and Human Rights* 144. 145.

[57] Human Rights Watch 'South Africa's obligations under international and domestic law' <https//www.hrw.org/legacy/report98/sareport/App1a.htm>.

[58] D Sloss (note 55 above) 2.

[59] Ibid.

[60] International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly Resolution 2200 A (XX) of December 16, 1966, entered into force March 23 1976. (herein after the ICCPR).

act contrary to the purposes of the treaties it has not yet ratified.[61] The importance of the ICESCR in the interpretation of the right to health will be shown in the subsequent sections of this chapter.

The South African courts are compelled to consider international law when interpreting the rights contained in the Bill of Rights in terms of section 39 (b) of the Constitution.[62] South Africa places itself within the ambit of broader international law. Further section 233 of the Constitution states that courts 'must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law' when interpreting the Bill of Rights.

As highlighted above a self-executing treaty will become part of South African law if it is signed. A non-self-executing treaty will only bind South Africa at ratification unless it is part of customary international law. This creates a presumption of supremacy of binding over non-binding treaties. However, South Africa blurs the lines drawn by dualism, as both binding and non-binding international law must be considered under section 39 (b) and under section 233 of the Constitution. In *S v Makwanyane*,[63] it was held that 'public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation.'[64]

Significant weight is placed on the non-binding ICESCR in the interpretation of the rights in the Bill of Rights. The court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*[65] held that, although the concept of adequate housing was not sufficiently discussed in the case of *Government of the Republic of South Africa and Others v Grootboom and Others* the subject had 'been dealt with by the United Nations Committee on Economic, Social and Cultural Rights (the Committee) in the context of the ICESCR.[66] Accordingly, it held that 'guidance may be sought from international instruments that have considered the meaning of adequate housing.'[67] Similarly, in defining the contours of the

[61] Human Rights Watch (note 57 above).
[62] Section 39 (b) of the South African Constitution (note 53 above).
[63] *S v Makwanyane* 1995 (3) SA 391 (CC).
[64] *S v Makwanyane* (note 63 above) para 35.
[65] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 23-24.
[66] Ibid.
[67] Ibid.

right to health in South Africa guidance will be sought from international human rights instruments.

This approach confirms the global convergence of public international law norms. In defining the limits and potential of the right to health one ought to take into account international human rights instruments; so far as the latter are not contrary to the Constitution of South Africa. This approach is of value considering that there are apparent similarities between the right to health as set out in international human rights instruments and the right to health as set out in the text of the Bill of Rights in the South African Constitution.[68] This will be shown in subsequent sections of this chapter.

Despite the wide approach taken to allow room to all international law, customary international law and binding international instruments would be considered supreme in situations where applicable instruments or treaties overlap or are in conflict. In *Azanian People's Organisation v The President of South Africa* [69] the court reiterated that binding international law had greater persuasive force.[70] Thus although South Africa takes guidance from an extensive range of international law in interpreting the Bill of Rights and in setting aside laws that violate human rights, caution should be exercised regarding the limits of such instruments to provide frameworks in which the rights can be construed.

The WHO FCTC is a self-executing U.N treaty and South Africa signed it on 16 June 2003, and the treaty entered into force for the country on 18 July 2005.[71] Accordingly, South Africa is legally bound by the treaty's provisions.[72] The Draft Control of Tobacco Products and Electronic Delivery Systems Bill of 2018, seeks to align the health system with its obligations under the WHO FCTC.[73] In so doing it has shown respect for key principles that underpin the human rights system – the obligation to respect, protect and fulfil international human rights.[74] In the case of *BATSA v Minister of Health* the courts took a very strong stance in support of international law obligations.[75] It was held that the

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[68] D Moseneke (note 51 above) 63-64.
[69] *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (25 July 2006) para 26.
[70] Ibid, para 26.
[71] P Lambert & K Donley 'Best practices in implementation of Article 8 of the WHO FCTC Case study: South Africa' (2013) 6 < http://www.who.int/fctc/publications/final_southafrica_art8_national_2.pdf>
[72] See the Foreword to the WHO FCTC; See also L Gruszczynski 'The WHO FCTC as an international standard under the WTO Technical Barriers To Trade' in A Mitchell & T Voon (note 2 above) 105.
[73] Draft Control of Tobacco Products and Electronic Delivery Systems Bill of 2018, preamble.
[74] BATSA v Minister of Health (463/2011) [2012] ZASCA 107 (20 June 2012) para 20.
[75] Ibid, para 21 – 22.

challenged tobacco control provisions were 'heavily steeped in public health considerations',[76] which are addressed by the WHO FCTC. It was further held that South Africa had 'international law obligations to ban tobacco advertising'.[77] From that basis the court submitted that it was not 'open to the Minister and the legislature to ignore the Framework when considering what steps to take to deal with risks posed by tobacco use.'[78] The state is accordingly guided or directed by its international obligations. Implementing plain packaging legislation is therefore a matter of complying with the obligations imposed on South Africa.

In implementing plain packaging the obligations under the WTO, the WHO FCTC and other human rights instruments will have to be considered by South Africa. As stated in chapter two, in the case of Australia,[79] plain packaging measures, though implemented in a genuine effort to fulfil commitments under global health law, have been under attack from the international community.[80] Rhetorically, the attacks arise from the legislation's alleged inconsistency with Australia's other international law commitments under the Hong-Kong Bilateral Agreement and the WTO Agreements.[81]

*3.3.1.1 Conflicting or Competing International law Obligations*

Whilst it is admirable that South Africa is open to international law, the complexities that an increasingly fragmented, overlapping and inconsistent international law regime can bring to a state must not be undermined. It is predictable that legal challenges will arise if South Africa passes its Draft Bill which requires plain packaging measures. Whilst this chapter seeks to define the contours of the right to health, the international obligations arising from it are indispensable to that exercise. This analysis would fall short if it overlooked the reality that in fulfilling its obligations under the right to health; South Africa could possibly violate its obligations under other international law instruments.[82] How then can South Africa deal with conflicting obligations arising from the same subject matter?

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[76] Ibid, para 22.
[77] Ibid, para 23.
[78] Ibid, para 23.
[79] H G Ruse-Khan (note 46 above) 312.
[80] H G Ruse-Khan (note 46 above) 312-16.
[81] Ibid.
[82] For instance South Africa has obligations under existing bilateral investment treaties and in the transitional protections under terminated BITs.

Treaties that are ratified or are self –executing would take primacy over nonratified treaties, this would be because non-binding international law does not always impose obligations on South Africa. Otherwise treaties binding South Africa have no hierarchical order. Unless one of the treaties protects *jus cogens* norms, from where no derogations are allowed.[83] The value protected by the WHO FCTC- the right to health, is not a non-derogable right.[84] In the negotiations of the WHO FCTC, South Africa was part of the proponents of the health-over-trade approach; it advocated for a provision in the WHO FCTC which would ultimately state that nothing in the WTO
Agreements should be construed to apply to tobacco products.[85]

It is logical to argue that South Africa was well aware of the pitfalls of binding itself to conflicting commitments. [86] The international law regimes are institutionally programmed to prioritise their own concerns over the others; therefore fragmentation in international law is not new.[87] General international interpretation rules can offer solutions in resolving conflicts in a fragmented global system.[88] This chapter will not undertake a comprehensive review of the laws governing interpretation of treaties or conflict of laws. As stated in chapter one of this thesis, the study 'foresees the challenges that could arise and makes proposals and recommendations in that regard.'[89] It is sufficient for this thesis to point out the direction South Africa should take in balancing the competing interests which arise from the plain packaging debate.

It would not be advisable for South Africa to adopt an 'all-or-nothing approach' in favour of either the WHO FCTC or the WTO rules. This chapter maintains the balancing approach adopted by this study. I submit that the conflict in the plain packaging debate is

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[83] Article 53 of the Vienna Convention on the Law of Treaties (herein after the VCLT), adopted on 22 May 1969, and entered into force on 27 January 1980.

[84] The ICCPR in Article 4 enumerates non-derogable rights and the right to health is not included.
None of the economic, social and cultural rights are non-derogable.

[85] B McGrady *Trade and Public Health: The WTO, Tobacco, Alcohol and Diet* 1 ed (2011) 224.

[86] The potential of conflicting international obligations is not new to South Africa, its legal regime of economic relations reveals a set of treaty arrangements often overlapping in subject matter. See R H Thomas 'The EU-South African Trade Development Cooperation Agreement: Precedent or complicating factor' (2000) 25 *SAYIL* 20.

[87] H G Ruse-Khan (note 46 above) 329.

[88] H G Ruse-Khan (note 46 above) 309-12; see generally C J Borgen 'Resolving Treaty Conflicts' (2005) 37 *The George Washington International Law* Review 573-648, on the inadequacy of current treaty conflict rules; G Teubner & A Fischer-Lescano 'Regime collisions: The vain search for legal unity in the fragmentation of global law' (2004) 25 *Michigan Journal of International Law* 999; R Michaels & J Pauwelyn 'Conflict of norms or conflict of laws? Different techniques in the fragmentation of international law' (2012) 22 *Duke Journal of Comparative & International Law* 349.

[89] Page 8 of chapter 1 of the study.

not an absolute one where fulfilling one obligation would robotically result in the violation of the other obligation. Jenks defines a conflict in the strict sense of incompatibility as a situation where a party 'to the two treaties cannot simultaneously comply with its obligations under both treaties.'[90] South Africa should strive to achieve coherence in its regulatory functions. Lencucha and Drope submit that plain packaging could actually be an opportunity for improved international coherence.[91]

Honduras adopted an all-or-nothing approach in favour of WTO laws, by instituting a WTO Dispute against Australia's plain packaging laws. Honduras is also bound to the WTO FCTC provisions.[92] As will be established in this chapter, it could be found in violation of the right to health. Honduras undermined the obligations imposed on them by international health law- the WHO FCTC. Ukraine has since withdrawn its complaint under the WTO Dispute settlement system.[93] The WHO has shown support for Ukraine's decision to withdraw and states that it is reflective of the country's constant commitment to tobacco control and the realisation of the right to health.[94]

This study submits that consideration should be accorded to both the right to health and the WTO obligations in the adoption of plain packaging measures. In dealing with inter-systematic conflicts, Ruse-Khan considers various conflict of law approaches which could be used to resolve conflicts.[95] The option of what he terms 'characterisation' fits in with the objectives of this study. According to this approach, when confronted with a subject matter that cannot be addressed without conflict; the subject matter must be divided into several sub-issues.[96] Thereafter, the rule-systems relevant to each issue should then be applied. The rule-systems would thereby apply to different parts of the subject matter.[97] This is not a simple approach, but it reflects the unavoidable complexities involved in global health governance. In the case of plain packaging the approach requires the WHO FCTC to deal with the health-related aspects and to allow the WTO law to deal with

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[90] W Jenks 'Conflict of law-making treaties' (1953) 30 *British Year Book of International Law* 401, 426.
[91] R Lencucha & J Drope 'Plain packaging: an opportunity for improved international coherence?' (2013) 30 (2) *Health Promotion International* 281, 288.
[92] R Lencucha & J Drope (note 91 above) 282.
[93] WHO 'Ukraine's decision to withdraw its complaint at WTO: an evidence-based move' < http://www.who.int/fctc/ukrainestmnt/en/>.
[94] WHO (note 93 above).
[95] H G Ruse-Khan (note 46 above) 309-348.
[96] H G Ruse-Khan (note 46 above) 323.
[97] Ibid 324.

intellectual property or technical barriers. This thesis argues that this approach is an attractive option for South Africa especially at policy level.

In legislative processes related to plain packaging measures this approach requires South Africa to adopt a cautious approach. It should therefore ensure that there is basis under the right to health to implement plain packaging measures in South Africa. On the other hand, it must ensure that it does so in a manner least intrusive on WTO rules. For instance South Africa must ensure that the measures are applied without discrimination. In this way South Africa can fulfil its international law obligations or at least part of them.

Ruse-Khan also proposes the approach of 'conflict-of-rule-integration'.[98] This approach allows decisions on conflicts to be based on which rule-system would be able to integrate the other system's rules.[99] This rule is built on the principle that competing interests can be aligned. This would involve an examination of whether in applying the WHO FCTC laws the objectives of trademark rights would be taken into account. On the other hand, do the WTO rules take into account the objectives of the right to health? According to this approach if a choice has to be made to choose one rule-system over another it has to be towards the rule-system with a higher integrative capability.[100]

How should South Africa approach this conflict? What is the extent of this conflict? These questions cannot be fully answered here, however these are some of the questions which underpin the aims of this thesis. It is pertinent in any balancing exercise to clearly define the conflict; only then can it be possible to resolve or balance the competing interests. In defining the contours of the right to health- one side of the conflict will be made clearer.

### 3.3.2 Health defined

According to the classical biomedical concept, the absence of disease both physically and mentally is what health represents.[101] This definition of health is criticised for excluding injuries from trauma or environmental hazards which do not fit in the definition of disease.[102] The WHO deviated from the 'absence of disease' conceptualisation of health and defined health as a 'state of complete physical, mental and

[98] Ibid 329.
[99] Ibid 330.
[100] Ibid 331.
[101] J Tobin *The Right to Health in International Law* 1ed (2011)125.
[102] J Tobin (note 101 above) 125.

social well-being and not merely the absence of disease or infirmity.'[103] Although not embraced by all,[104] it is accepted as consistent with the nexus between disease and the social environment.[105]

Public health refers to organised measures which seek to prevent disease, prolong life and promote health. On the other hand, the notion of public health recognises that health issues now require cross border and concerted efforts as a result of globalisation.[106] Although one universally accepted definition of public health does not exist, it is accepted to be what the community does collectively to ensure conditions in which people can be healthy.[107] Therefore, the formulation and implementation of policies to address health problems and priorities such as the tobacco epidemic fall within the spectrum of public health.[108]

### 3.3.3 The right to the highest attainable standard of health

The complete formulation of the right to health in international law is the 'highest attainable standard of health.' The WHO in its Constitution expressly provides for the 'enjoyment of the highest attainable standard of health' as one 'of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition.'[109] The ICESCR in Article 12 and the Covenant on the Rights of the Child in Article 24 (1)[110] all reiterate the right to the highest attainable standard of health. The African Charter on the Rights and Welfare of the Child protects 'the best attainable

[103] Preamble to the Constitution of the World Health Organisation (herein after the WHO) as adopted by the International Health Conference on 22 July 1946. The full text was < *www.who.int/governance/eb/who_Constitution_en.pdf* on 10 September 2013.

[104] M Huber, K J André & G Lawrence et al 'How should we define health' (2011) 344 *British Medical J*ournal 2.

[105] Annotations on the Text of the Draft International Covenants on Human Rights, UN Doc A/2929 (I July 1955) ch VIII, 111-12 para 151.

[106] WHO 'Public Health' <http:www.who.int/trade/glossary/story076/en/ on>.

[107] R Baird & M Haas 'Introduction to public health, public health agencies and the APHA' in M T Haneline & WC Meeker (eds) *Public Health for Chiropractors* 1ed (2011) 1-2.

[108] WHO (note 106 above) .

[109] Preamble to the Constitution of the World Health Organisation (note 103 above).

[110] Article 24 (1) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990 'States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.'

state of physical, mental and spiritual health.'[111] Whilst the African Charter on Human and Peoples Rights protects the rights to enjoy the best attainable state of physical and mental health in Article 16.[112]

Like the rest of the economic, social and cultural rights, the status of the right to the highest attainable standard of health is still debated and is accompanied by much criticism in international human rights law.[113] The U.S government remarked that economic, social and cultural rights are goals which cannot be guaranteed, and are not justified 'to speak of them as rights.'[114] Although there is a general agreement regarding its existence, there is no consensus surrounding its relevance, scope, meaning and delimitations in practice.[115] Tobin cautions that the absence of clarity regarding the right to health creates loopholes through which actors with agendas detached from the realisation of the right to health can manipulate it.[116] The next subsection will examine the right to health as formulated and interpreted by the ICESCR as one of the main guiding international instruments on the meaning and content of the right to health in international law.

### 3.3.4 The Right to health within the International Covenant on Economic, Social and Cultural Rights

The ICESCR is one of the most important international instruments which gives a comprehensive disposition on the right to health. It also provides the primary basis for the legal obligations necessitated by the right to health. In Article 12 it provides that:

> 1. The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full

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[111] See Article 14 of the African Charter on the Rights and Welfare of the Child adopted in 1990 and entered into force, November 29, 1999.

[112] African Charter on Human and Peoples Rights Adopted in Nairobi June 27, 1981, Entered into Force October 21, 1986. See also In the case of *Purohit and Moore v The Gambia (2003) AHRLR 96* (The African Commission on Human and Peoples' Rights, 2003), the African Commission on Human and Peoples' Rights held that the enjoyment of the right to health, as it is widely known, was central to all aspects of a person's life and well-being, and is vital to the realisation of all the other fundamental human rights and freedoms.

[113] J Tobin (note 101 above) 47; K Roth 'Defending economic, social and cultural rights: Practical issues faced by an international human rights organisations' (2004) 26 *Human Rights Quarterly* 63-73; M Ssenyonjo *Economic, Social and Cultural Rights in International law* 1ed (2009).

[114] Comments submitted by the U.S.A, Report of the Open-ended Working Group on the right to development, UN ESCOR, Commission on Human Rights, 57th session, UN Doc E/CN.4/2001/26 (2001) paragraph 8.

[115] J Tobin (note 101 above) 45-48.

[116] J Tobin (note 101 above) 48; D Kennedy 'The international human rights movement: part of the problem?' (2002) 15 *Harvard Human Rights Journal* 101.

> realisation of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.[117]

The Committee on economic, social and cultural rights submits that the right to health is fundamental and indispensable for the realisation of other rights.[118] What is clear is that since it takes into consideration biological, socio-economic conditions and the availability of resources, the right to health has and will continue to undergo substantial changes. The interpretive community posit that the right to health is the right to the enjoyment of a variety of goods, facilities, services, and conditions vital for the realisation of the highest attainable standard of health. Determinants of health will continue to change and so will the right to health. Taking this into regard, the thesis of a right to tobacco control is not farfetched. The right to health can easily be interpreted to include tobacco control policies, since these are also health determinants.

Article 12.2 (b) provides that the right to health includes the 'improvement of all aspects of environmental and industrial hygiene.' This includes environments free from the inhalation of tobacco smoke; and therefore it necessitates the regulation on public smoking. It also provides for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases.' From this, it could also be reasoned that this would include the prevention and control of the tobacco epidemic; making all measures enacted for curbing the tobacco epidemic relevant.

The right to health also includes obligations, whose non-fulfilment may amount to violations of this right. In Article 2(1) the Covenant provides that:

> Each state party to the present Covenant undertakes to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

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[117] Article 12 of the ICESCR. .

[118] CESCR General Comment 14 on the right to the highest attainable standard of health (Twentysecond session, 2000), U.N. Doc. E/C.12/2000/4 (2000) at para 1, office of the United Nations High Commissioner for Human Rights < http://www2.ohchr.org/english/bodies/cescr/>.

Griffin argues that the right to health lacks an adequate normative account because the obligations are ambiguous.[119] For instance Griffin remarks that there lacks a limit on what states must spend respectively to realise the right to health.[120] O'Neill argues that the obligations imposed are 'vague', 'muddled' and 'insufficiently specified'.[121] Despite the criticisms levelled against the obligations related to the realisation of the right to health, Tobin opines that the obligations reflect the considerations in light of the dilemmas associated with realising economic and social rights.[122]

*3.3.4.1 The Progressive Realisation of the Right to Health*

There is recognition that the fulfilment of economic, social and cultural rights is heavily reliant on the availability of state resources.[123] This informed the formulation of the obligation to progressively realise the highest attainable standard of health.[124] It was also acknowledged that resource restraints and availability would vary from state to state and thus a guaranteed right to health would be far from practical.[125] Concerns were raised that the formulation of the right to health provided gaps and loopholes which would allow member states to evade their obligations.[126] To address these concerns the obligation was further explained by the CESCR Committee, it elucidated that 'while the full realisation of the' right to health will be achieved progressively, the states must take clear steps targeted towards fulfilling the obligation within reasonable time.[127] Member states are required to

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[119] J Griffin *On Human Rights* (2008) 208.

[120] Ibid 208.

[121] O O'Neill 'The dark side of human rights' (2005) 81 (2) *International Affairs* 427, 431.

[122] J Tobin (note 101 above) 176.

[123] P Hunt & G Backman 'Health systems and the right to the highest attainable standard of health' (2008) 10 (1) *Health and Human Rights* 81; P Hunt 'The human right to the highest attainable standard of health: new opportunities and challenges' (2006) 100 (7) *Transactions of the Royal Society of Tropical Medicine and Hygiene* 603.

[124] L Chenwi 'Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) 46 (3) *De Jure* 742*;* E Felner 'Closing the 'escape hatch': A toolkit to monitor the progressive realisation of economic, social, and cultural rights' (2009) 1 (3) *Journal of Human Rights Practice* 402-435; P Braveman & S Gruskin 'Poverty, equity, human rights and health' (2003) 81 (7) *Bulletin of the World Health Organization* 539-545; C R Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) John M. Olin Program in L. & Econ., Working Paper No. 124; P Hunt, G Backman (note 123 above) 81-92; P Alston 'A third generation of solidarity rights: progressive development or obfuscation of international human rights law?' (1982) *Netherlands International Law Review* 307-322; M Green 'What we talk about when we talk about indicators: current approaches to human rights measurement' (2001)*Human Rights Quarterly* 1062-1097; D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) *South African Law Journal* 119, 484; K Ho 'Structural violence as a human rights violation' (2007) *Essex Human Rights Review* 1-17.

[125] J Tobin (note 101 above) 177.

[126] Annotations on the Text of the Draft International Covenants on Human Rights (n5) 20, para 23.

[127] CESCR (note 118 above) para 1- 2.

act as expeditiously and effectively as possible towards full realisation of rights.[128] States cannot just sit idle, visible and concrete steps must be observed to meet this obligation.[129] This could include initial forecasting as to how member states intend to progressively realise the right to health.[130] To fulfil this obligation a reasonable tobacco control policy must be in place.

*3.3.4.2 The obligations to take 'all appropriate means'*

The obligation to realise the right to health requires that the member states take all appropriate means. This phrase is fluid and lacks clarity when taken in isolation.[131] Article 12 identifies specific measures to be undertaken by member states to realise the right to health; these inform at least in part, the meaning of all appropriate means. The measures 'include' and are therefore not limited to measures which address the reduction of the stillbirth-rate, infant mortality and for the healthy development of the child; the prevention, treatment and control of epidemic, endemic, occupational and other diseases. The WHO FCTC in its preamble acknowledges that prenatal exposure to smoke causes adverse health and developmental effects for infants.[132] Further, the WHO FCTC acknowledges that the health implications of tobacco smoking and inhalation have grown into an epidemic; therefore its control and prevention would form part of the required 'appropriate means' to realise the right to health. Within this context, an argument can be advanced that failure to control the tobacco epidemic could be taken as a violation of the right to health.

Sovereignty is respected in the obligation to undertake 'appropriate' measures; as states are given the discretion to decide which measures are most appropriate within their jurisdictions. To close down gaps and loopholes on this discretion the CESCR Committee requires that the member states not only indicate the measures taken but they should also indicate the basis upon which the measures are considered the most appropriate.[133] Although legislation is not the only means to secure the realisation of the right to health[134];

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[128] L Chenwi (note 124 above) 744.
[129] J Tobin (note 101 above) 178.
[130] J Tobin (note 101 above) 178 - 179.
[131] J Tobin (note 101 above) 179.
[132] Preamble to the WHO FCTC.
[133] CESCR General Comment Number 3, The nature of State parties obligations (Fifth session, 1990), U.N. Doc.E/1991/23, annex III at 86 (1991), para 8.
[134] M Craven *The International Covenant on Economic Social and Cultural Rights: A Perspective on its Development* 1 ed (1995) 125 – 6.

the ICESCR expressly require states to adopt legislative measures.[135] The breadth of the tobacco epidemic necessitates legislative measures to fulfil the states' obligation to progressively realise the right to health.[136]

The human rights treaty monitoring bodies have correctly identified the need for members to implement legislation to realise the right to health; however Tobin argues that the need to justify health legislation which interferes with other rights has been overlooked.[137] Plain packaging legislation presents one clear indication of the potential conflict that arises from legislation intended to realise the right to health. In cases of limitations on competing rights, the limiting legislative measures must be generally reasonable and justifiable.[138] The ICESCR does pay attention to the potential conflict that arises from legislative measures; it however focuses on the need to justify limitations imposed on economic, social and cultural rights including the right to health. It provides in Article 4 that:

> The states parties to the present covenant recognise that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

According to the ICESR the economic social and cultural rights can be limited, if it is necessary for the promotion of the general welfare of the country. Muller opines that this general welfare condition refers to the economic and social well-being of the people and the community.[139] Would the benefits that can arise from intellectual innovations, render it justifiable to limit the right to health? This thesis submits that protecting intellectual property can be beneficial to health and the economic and social-well-being.[140] In such instances limitations on the right to health would be justified. In light of the above,

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[135] CESCR, Draft General Comment No 9: The Domestic Application of the Covenant, UN Doc E/C.12/1998/24 (3 December 1998) para 8.

[136] CESCR (note 118 above) para 15.

[137] J Tobin (note 101 above) 181.

[138] Kudakwashe Chiringa *Human Rights Implications of the Compulsory HIV/AIDS Testing Policy: A Critical Appraisal of the Law and Practice in South Africa, Uganda and Canada* (Unpublished LLM Dissertation, University of Fort Hare, 2014) 7.

[139] A Muller 'Limitations to and derogations from economic, social and cultural rights' (2009) 9 *Human Rights Law Review* 557, 573.

[140] See J A Lewis 'Intellectual Property Protection: Promoting Innovation in a Global Information Economy' A Report of the CSIS Technology and Public Policy Programme (2008) 8 <https://csisprod.s3.amazonaws.com/s3fspublic/legacy_files/files/publication/080802_LewisIntellectualProperty_ Web.pdf>.

it is worth mentioning that in implementing measures to control the tobacco epidemic, the effects of such regulatory efforts on the economic and social well-being of the public must also be considered. A balance must be struck; also because the social and economic well-being of the community indirectly affects the realisation of the right to health.

To examine whether the interference on the economic and social rights is for the state's general welfare, the interfering measures will undergo a necessity test.[141] The ICESCR limits itself to justifications required for limiting the right to health. This thesis argues that the opposite is also true, where public health legislation interferes with other rights, it must also undergo a necessity or proportionality test.[142] The particularities of this test will be dealt with in chapter five. To fulfil the obligation to take appropriate measures to progressively realise the right to health; the measures must therefore be effective as alluded to above. Only if the measure is effective will it be deemed 'appropriate', 'proportional' and or 'necessary' in cases of conflict with other rights. In the case of tobacco control measures, the measures must hence contribute to the realisation of the right to health.

The CESCR Committee indicated that legislative measures are only part of the appropriate means that can be taken to realise the right to health. Appropriate means could also be realised through international cooperation. States undertake to take steps, 'individually and through international assistance and cooperation' to realise the right to health. This international obligation has been referred to as a third state obligation, a shared responsibility and even an extraterritorial obligation.[143] The WHO has submitted that health is a shared responsibility.[144] Any means achieved through international efforts if effective would therefore form part of appropriate means. In this regard, the WHO FCTC, states that 'recognising that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation',[145] the participation of all countries is encouraged. In complying with the

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[141] CESCR (note 118 above) para 29; B Griffley 'The 'Reasonableness' test: assessing violations of state obligations under the international covenant on economic, social and cultural rights' (2011) 11 *Human Rights Law Review* 275, 286.

[142] J Tobin (note 101 above) 183.

[143] B M Meier & A M Fox 'International obligations through collective rights: Moving from foreign health assistance to global health governance' (2010) 12 (1) Health and Human Rights 61, 63; J Tobin (note 101 above) 326.

[144] Preamble to the WHO Constitution, 'The health of all peoples is fundamental to the attainment of peace and security and *is dependent upon the fullest co-operation of individuals and States*'.

[145] Preamble to the WHO FCTC.

WHO FCTC members would be taking appropriate means towards the realisation of the right to health.

*3.3.4.3 The Obligations to respect, protect and fulfil the right to health*

The interpretive community indicates that states must respect, protect and fulfil the right to health.[146] This 'tripartite typology'[147] can be used as a tool to inform other appropriate measures that states can take and the international obligations imposed on states to realise the right to health.[148] The CESCR Committee elucidated that 'the obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right to health'.[149]

There is an obligation for states to respect the right to health thus ensuring that their actions are not harmful to health beyond its jurisdiction. Before assisting other states to realise the right to health, states must refrain from acts that make it harder to realise this right.[150] 'At the very minimum, every actor has a duty to refrain from preventing countries from securing the health of their own people.'[151] Tobin cautions however that this is not an absolute obligation, not all actions taken that have negative impacts on health in other countries result in a violation of this obligation.[152]

The CESCR Committee has remarked that as part of the international obligation to secure the right to health state parties must 'ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments.'[153] Accordingly, states should ensure that in their actions as members of other international organisations the right to health is considered.[154] As

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[146] J Tobin (note 101 above) 186; CESCR Committee General Comment No 14.

[147] The tripartite typology is traced to the work of Henry Shue and was formally adopted by the CESCR Committee first in its General Comment No 12 on the Right to Adequate Food and this typology has been extended to other rights including the right to health. See J Tobin (note 101 above) 186; As quoted in J Tobin (note 101 above) footnote 59, H Shue *Basic Rights, Subsistence, Affluence and US Foreign Policy (1980);* CESCR General Comment on the Right to Adequate Food, UN Doc E/C.12/1999/5 (12 May 1999) para 15.

[148] J Tobin (note 101 above) 186.

[149] CESCR (note 118 above) para 33.

[150] Report of the Special Rapporteur on the Right to Health to the General Assembly 2004, UN Doc A/59/22 (8 October 2004) paragraph 33.

[151] J Røttingen, T Ottersen & A Ablo et al 'Shared Responsibilities for Health a Coherent Global Framework for Health Financing', Final Report of the Centre on Global Health Security Working Group on Health Financing < https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140521HealthFinancing.pdf >.

[152] J Tobin (note 101 above) 333.

[153] CESCR (note 118 above) para 39.

[154] CESCR (note 118 above) para 39.

members of the WTO for instance, the right to health must be considered in carrying out duties and obligations imposed under the WTO regime.[155] Subsequent sections of this chapter will address claims that in complying with WTO obligations, WTO members could be violating their obligation to realise the right to health.[156]

The CESCR Committee continues to state that 'The obligation to protect requires states to take measures to prevent third parties from interfering with article 12 guarantees.'[157] The international obligation also requires states to protect the right to health beyond its own jurisdictions especially in the developing countries.[158] This includes preventing third parties from violating the right beyond its own jurisdiction.[159] The WHO FCTC acknowledges the need to protect the right to health in its preamble. It states that there is need to be 'alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts.'

In light of the above, included in the obligation to realise the right to health is the need to regulate the behaviour of non-state actors to ensure that the right to health is not interfered with.[160] The obligations under international law were traditionally understood to be held by states and not non -state actors. However, it is now acknowledged that non – state actors and inter-governmental organisations also hold responsibilities to secure the right to health.[161] Multinational corporations possess the capacity to interfere with the realisation of the right to health.[162] For instance the General Comment of the CESCR states that states must 'ensure that third parties do not limit access to health related information.'[163] This resonates with the regulations that require tobacco manufactures to

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[155] J Tobin (note 101 above) 332-334.
[156] This issue will be dealt with in detail in subsequent sections of this Chapter.
[157] CESCR (note 118 above) para 33.
[158] CESCR (note 118 above) para 40.
[159] CESCR (note 118 above) para 39.
[160] A E Yamin 'Not just a tragedy; Access to medicines as a right under international Law' (2003) 21 *Boston University International Law Journal* 325, 364.
[161] D Ileana 'Harmonization in the regulation of pharmaceutical research and human rights: The need to think globally' (1997) 30 *Cornell International Law Journal* 245, 248; L Zita 'Access to HIV Drugs: are we changing the two world paradigm?' (2002) *Connecticut Journal of International Law* 281-296; A E Yamin (note 186 above); P Hunt & R Khosla 'The human right to medicines.' (2008) 5 (8) *International Journal on Human Rights* 99, 109.
[162] A Clapham & M G Rubio 'The Obligations of States with regard to non-state actors in the context of the right to health' (2002) Health and Human Rights Working Paper Series No. 3.
[163] CESCR (note 118 above) para 35.

provide information regarding the constituents of tobacco products[164]; sufficiently warn the public about the dangers of smoking on health[165] and refrain from misleading the public about the health effects of tobacco.[166] The WHO FCTC provides as a guiding principle that 'every person should be informed of the health consequences, addictive nature… posed by tobacco consumption.'[167]

On the other hand, the obligation raises questions regarding the role of nonstate actors in the realisation of the right to health.[168] Although there is no legal basis to transpose the obligations of states on non-sate actors,[169] states could still implement measures that force obligations on non-state actors and in turn secure the right to health.[170] In controlling the activities of the tobacco industry (in implementing tobacco control policies) states can be justified as giving effect to and protecting the right to health.

It is therefore the duty of the state to guard against the potential human right violations that can arise from actions of non-state actors. The African Commission had to address a challenge by the people of Ogoniland against the Nigerian government.[171] The complainant alleged that the Nigerian government had violated the right to health by failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium.[172] NNPC Shell Consortium had exploited oil reserves in Ogoniland with complete disregard for the health and environment by disposing toxic waste into waterways and the environment.[173] The African Commission held that this was a violation of the right to health as contemplated in Article 16 of the African Charter. The Commission ordered the

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[164] Article 10 of the WHO FCTC provided for regulation of product disclosures; it states that, '…Every party shall adopt…effective measures for public disclosure of information about the toxic constituents of the tobacco products and the emissions that they may produce.'

[165] Article 12 of the WHO FCTC provides for education, communication, training and public awareness of the health risks associated with tobacco, the benefits of the cessation of tobacco smoking and information on the economic and environmental consequences of tobacco production and consumption.

[166] Article 11 of the WHO FCTC provides that tobacco packaging and labelling must not promote tobacco products by any means that is false, misleading, deceptive or likely to create false impressions about its health effects, emissions or characteristics.

[167] Article 4 (1) WHO FCTC.

[168] A Clapham *Human Rights Obligations of Non- State Actors* (2006) 10.

[169] J Tobin (note 101 above) 14 -16.

[170] CESCR (note 118 above) para 51, 'Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as . . . the failure to discourage production, marketing and consumption of tobacco.'

[171] A Clapham & M G Rubio (note 162 above) 9-11.

[172] Ibid.

[173] Ibid 9-10.

provision of compensation to victims.[174] This case highlights the role of non-state actors in the securing of the right to health and more importantly the obligation upon states to protect the right to health against activities of non-state actors.[175] South Africa could therefore be found in violation of the right to health if it failed to regulate the activities of the tobacco companies.

The obligation to fulfil is the last of the tripartite typology that can be used to inform the meaning and scope of 'appropriate' measures that can be taken to realise the right to health. According the CESCR Committee this includes adopting a detailed national health policy in the aim of realizing the right to health.[176] This ambitious task highlights the problems of delimiting the right to health. The right to health is justiciable and states can be held accountable for failing to fulfil the obligations imposed on them by the ICESCR. The right to health under the ICESCR imposes obligations on states to implement tobacco control measures to realise the right to health.

### 3.3.5 South Africa and the right to health

As indicated above, the right to the highest attainable standard of health is guaranteed in international human rights law.[177] It does not only refer to immediate health care but it also embraces a wide-range of factors that support environments where human beings can be healthy.[178] The text of the South African Constitution does not replicate the phrases 'the right to the highest attainable standard of health' or 'the best attainable state of physical, mental and spiritual health' as done in the international human right instruments. However, as shown in previous sections of this chapter international law instruments are indispensable to the interpretation of the right to health under the South African Constitution.

#### *3.3.5.1 The right to have access to health care services*

Section 27 of the South African Constitution provides that:

> (1) Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security,

[174] P Hunt 'Our Right to the highest attainable standard of health' (2007) <http://www.ifhhro.org/images/stories/ifhhro/Right_to_Health/3_2_2_factsheet_our_rth_2007.pdf>.
[175] S Skogly *Beyond National Boundaries: States Human Rights obligations in International Cooperation* 1ed (2006) 11, 17.
[176] CESCR (note 118 above) para 36.
[177] M Pieterse (note 49 above) 10-16.
[178] Article 12 of the ICESCR; See also M Pieterse (note 49 above) 11.

including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other means, within its available resources to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency treatment.

Section 27 refers to access to health care services, access to sufficient food and water. All these are determinants of the right to health under the ICESCR. The CESCR in its General Comment 14, states that the right to health is dependent upon the realisation of the rights to food, housing and education.[179] The approach adopted by the international human rights community is that these are all 'integral components of the right to health.'[180] Drawing on the CESCR's approach regarding the right to health, section 27 of the South African Constitution constitutes some of the underlying determinants of the right to health. The Constitution refers to the right to access to adequate housing in section 26 whilst section 28 provides for the right to basic nutrition, and social services for the child, which are all determinants of the right to health.

Health care services as provided for in section 27 are necessary for the realisation of the right to health. Health care services are not limited to hospitals and or essential medicines, according to the CESCR the term health care services varies depending on the state's level of development.[181] Health care services could extend to preventive, curative and rehabilitative services, and preventive services.[182] To that extent section 27 is relevant for tobacco control. It is logical to hold that section 27 could impose obligations on South Africa to provide tobacco related preventive, curative rehabilitative services. The right to access to health care in Section 27 is however qualified by the availability of resources which is line with the CESCR's observations that the context of health care services depends on the state's level of development. Whether South Africa, a country already struggling with a high disease burden from the HIV/AIDS pandemic would be able to provide rehabilitative and preventive services for tobacco dependence is highly uncertain.[183]

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[179] CESCR (note 118 above) para 4.
[180] CESCR (note 118 above) para 3.
[181] CESCR (note 118 above) para 12 (a).
[182] CESCR (note 118 above) para 17.
[183] South Africa has the biggest and most high profile HIV epidemic in the world and simultaneous the largest antiretroviral treatment programme globally. Health care resources will tend to be allocated to HIV related concerns which are of higher priority in South Africa than to tobacco-related or any other concerns. See J Maurice 'South Africa's battle against HIV/AIDS gains momentum' (2014) 383 *The Lancet* 1535 – 36, on the antiretroviral treatment programme in South Africa, See also UNAIDS 'The gap report' (2014)

The WHO FCTC in Article 14 provides that:

> 1. Each Party shall develop and disseminate appropriate, comprehensive and integrated guidelines based on scientific evidence and best practices, taking into *account national circumstances and priorities*, and shall take effective measures to *promote cessation of tobacco use and adequate treatment for tobacco dependence*.
> 2. towards this end, each Party shall endeavour to: … (b) *include diagnosis and treatment* of tobacco dependence and counselling services on cessation of tobacco use in national health …, plans and strategies…(d) … *facilitate accessibility and affordability for treatment of tobacco dependence* including pharmaceutical products.[184] (My emphasis)

As a party to the WHO FCTC South Africa is obliged to include diagnosis, counselling, preventive, treatment and rehabilitation services for tobacco dependence as part of health care. The CESCR indicates that states would be in violation of the obligation to *protect* if it omits or fails to regulate or discourage production, marketing and consumption of tobacco.[185] Smoking cessation services[186] form part of the obligation to discourage and regulate consumption of tobacco.[187] Considering the WHO FCTC and the ICESCR which are both relevant in the interpretation of the right to health in South Africa, failure to include smoking cessation services in South Africa could be regarded as violations of the right to health.

The WHO Director for tobacco control Vera de Costa e Silva has lamented the failure of public health sectors to invest in smoking cessation services.[188] In South Africa smoking cessation should be considered in light of its importance and effectiveness in people living with HIV/AIDS and Tuberculosis.[189] Smoking cessation is an important and effective intervention, since smoking exacerbates the conditions

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http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf>.

[184] Article 14 of the WHO FCTC.

[185] CESCR (note 118 above) para 51

[186] The phrase Smoking Cessation programme is used primarily for rhetorical convenience and does not exclude other tobacco products; See CANSA 'How to quit smoking' < ttp:www.cansa.org.za/how-toquit-smoking-and-why>. 187 Article 14 of the WHO FCTC.

[187] Article 14 of the WHO FCTC.

[188] B M Meir 'Breathing life into the FCTC: Smoking cessation and the right to health' (2013) 5 Yale Journal of Health Policy, Law and Ethics 137, 144.

[189] WHO, International Union Against Tuberculosis and Lung Disease 'A WHO/The Union Monograph On Tb And Tobacco Control: Joining efforts to control two related global epidemics' <http://www.who.int/tobacco/resources/publications/tb_tobac_monograph.pdf>; See also R N van ZylSmit, B Allwood & D Stickells et al 'South African tobacco smoking cessation clinical practice guideline' (2013) 103 (11) The South African Medical Journal 869-76.

of HIV/AIDS and TB patients. [190] Accordingly, it should be regarded as an attractive option in South Africa. Meir submits that, for states still struggling with resource allocation, smoking cessation, 'relative to other public health measures, can offer greatest returns on a state's investment.'[191]

Dr Van Zyl-Smit echoes that view and states that preventive care would be cheaper in the long run for South Africa.[192] The cost of smoking-related diseases which would require curative care would cost much more to South Africa than smoking cessation programmes.[193] This raises two issues relevant for the right to health. First is there access to behavioural intervention in South Africa? The factor that this does not impose heavy burdens on resource allocation could be a fundamental push factor to mandate South Africa to provide this as part of its obligations to realise the right to health care services. The second issue is whether the access and availability to pharmacotherapy intervention can be motivated under section 27 of the South African Constitution?

The South African Tobacco Products Control Act 83 of 1993 recognises that tobacco use has caused widespread addiction in society[194], but it does not address treatment for tobacco dependence in this piece of legislation.[195] Behavioural intervention is available in South Africa but its accessibility is highly debatable, Saloojee submits that smoking cessation services have been provided through a nationwide telephone advice service since 1995.[196] The National Council against Smoking[197] and the Cancer Association of South Africa also provide behavioural intervention services in support of smoking cessation. However, behavioural intervention remains an untapped section of tobacco control in South Africa.[198] According to the WHO behavioural intervention is not offered in public hospitals, or health clinics in South Africa as of December 2014 and the government does

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[190] V Zyl-Smit (note 189 above) 869 – 76.

[191] B M Meir (note 188 above) 167.

[192] M Hanker 'Hopeful evidence – smoking cessation medication' < https://www. phsa.org.za/hopefulevidence-smoking cessation medication>.

[193] Ibid.

[194] Preamble to the Tobacco Products Act 83 of 1993.

[195] Tobacco Products Control Act 83 of 1993.

[196] Y Saloojee 'Tobacco control: chapter 22.' (2000) 1 South African Health Review 429, 433.

[197] < http://www.againstsmoking.co.za/tag/why-should-you-stop-smoking-2/ on 25 December 2015.

[198] Y Saloojee 'Tobacco control in South Africa' *Chronic Diseases of Lifestyle in South Africa since 1995 – 2005* 53 <http://www.mrc.ac.za/chronic/cdlChapter5.pdf>, on the gaps in research on smoking cessation in South Africa, for instance on 'What methods are used by South Africa to stop smoking and what are natural cessation rates?', 'How effective is the Tobacco or Health Information Line in helping people quit?', 'How affordable are smoking cessation aids?', 'How can economically disadvantaged groups be supported in their quitting attempts?', 'How can we make the most of health professionals?', and 'What strategies might be effective in assisting pregnant women to quit?.'

not cover the cost of such support.[199] This thesis submits that section 27 of the Constitution can be used to make behavioural intervention for tobacco dependant patients more accessible, available and acceptable.

Pharmacotherapy intervention to treat tobacco dependence is not publicly accessible in South Africa although the current WHO model list of essential medicines now includes nicotine replacement therapy (hereinafter NRT)[200] as part of required medicines to treat psychoactive substance abuse.[201] Of importance is what Sithembiso Magubane, the Western Cape Department's spokesperson also indicated, that no smoking cessation medication is available on the Essential Drug List in South Africa.[202] NRT medicines are only provided over the counter in South African pharmacies.[203] In light of the above it is concluded that diagnostic, preventive, rehabilitative services for tobacco dependence are still at infancy levels in South Africa or at the very least do not form part of primary health care services.

Dresler and Marks advance the importance of improving access to smoking cessation interventions.[204] It is noted that the National Health Service (NHS) in the United Kingdom was the initial national programme which emphasised the importance of smoking cessation only in 2001.[205] The policy provides for ready access to expert assistance and pharmacotherapy and has proven results of effectiveness above the standard accepted benchmarks.[206] In an ideal situation, a complimentary tobacco control strategy should include a smoking cessation approach.

To further showcase the potential that the right to health has for tobacco control, the state can be compelled to provide for smoking cessation in order to protect children.

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[199] WHO 'WHO Report on the Global Tobacco Epidemic 2015: Country Profile South Africa' (2015) < http://www.who.int/tobacco/surveillance/policy/country_profile/zaf.pdf >.

[200] 'Nicotine replacement therapy (NRT) is a class of nicotine delivering medicines which help people to stop smoking by acting at brain nicotine receptors, thus reducing withdrawal symptoms.' See WHO Tobacco Free Initiative 'Proposal for Inclusion of Nicotine Replacement Therapy in the WHO Model List of Essential Medicines' (2008) 4 <http://www.who.int/selection_medicines/committees/expert/17/application/NRT_inclusion.pdf >.

[201] WHO '19th WHO Model List of Essential Medicines (April 2015)' (2015) 39 <http://www.who.int/medicines/publications/essentialmedicines/EML2015_8-May-15.pdf >.

[202] M Hanker (note 192 above).

[203] WHO Tobacco Free Initiative (note 200 above) 33.

[204] C Dresler & S Marks 'The emerging human right to tobacco control' (2006) 28 (3) *Human Rights Quarterly* 599, 631-32.

[205] Ibid 632.

[206] Ibid.

Section 28 (1) (c) of the Constitution provides that every child has the right to basic health care services. The inclusion of smoking cessation within the caption of health care services has already been emphasised. Of paramount importance is the recognition that the child's best interests are given special status.[207] Smoking cessation would be very important since one of the primary objectives of tobacco control is to protect children, curb child and teenage smoking, and prevent the pre and postnatal effects of smoking on children's development.[208]

Section 27 and 28 of the Constitution strengthens the position of tobacco control as part of the right to health in South Africa. It also shows the potential of the provisions to propel a blown out debate regarding which tobacco control strategies should be prioritised. Although this thesis focuses on plain packaging measures, the importance of exploring the smoking cessation measures should not be undermined. Smoking cessation measures are cheaper, effective and less intrusive on other rights (as compared to plain packaging measures) and this could be of significance in the 'necessity' review as will be shown in chapter five and six. Which amongst other requirements, requires that regulators choose the 'least restrictive' measure to attain the legitimate objective.

*3.3.5.2 The right to an environment that is not harmful to health*

Section 24 of the South African Constitution captures the broader concept of tobacco control measures, plain packaging measures included. It provides that; 'everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation'[209]

The provision establishes a right to an environment that supports health and well-being. The National Environment Management Act (NEMA)[210] defines environment as the 'surroundings within which humans exist and are made up of (i) the land, water and atmosphere of the earth; … (iv) the physical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing.'[211] Since the

[207] CESCR (note 118 above) para 22; Section 28(2) of the Constitution; Preamble to the WHO Constitution.
[208] Preamble to the WHO FCTC, Preamble to the Tobacco Products Control Act.
[209] Section 24 of the Constitution.
[210] National Environment Management Act 107 of 1998 (herein after NEMA).
[211] Section 1 (xi) of NEMA.

Constitution does not define environment this could appropriately be taken to decide the content of environment. Ferris submits that the term environment must also include the relations between humans and other human beings.[212] Kidd also argues that NEMA's definition is narrower than the dictionary definition which includes the totality of a beings surrounding.[213] This study argues that as long as it does not go against the values of the Constitution, the widest definition of 'environment' would be applicable in the interpretation of section 24.

Considering the prominence given to international law in the Constitution, a wide approach should also be taken in defining 'health or well-being'. Thus section 24 can be read as the right to an environment or conditions conducive to a state of complete physical, mental and social well-being. It is argued that a wide approach could create space for the full content of the right to health as expressed in Article 12 of the ICESCR to be read into section 24. Negative effects on 'any' determinant of health could therefore trigger violations of section 24. Pieterse posits that section 24 is broad enough to guarantee 'a variety of other non-medicinal, health-conducive social goods.'[214] This chapter will however confine itself to 'environment' as related to tobacco consumption and exposure to smoke.

The CESCR confirms that the right to health includes the provision of a healthy environment.[215] There is a clear link between the protection from a harmful environment and tobacco control.[216] The WHO FCTC in its preamble acknowledges that there is clear evidence that 'prenatal exposure to smoke causes adverse health and development conditions for children'; that 'tobacco consumption and exposure to tobacco' causes death, disability and diseases. Accordingly, the right to health violations that may arise from an environment exposed to tobacco are obvious.

At first glance tobacco control within section 24, would raise the direct applicability of smoke-free laws. This thesis submits that section 24 allows for the implementation of tobacco control in all forms. Exposure to tobacco smoke arises from tobacco consumption. Following that logic the reduction of tobacco smoke exposure will necessitate strategies that address the source of the exposure which is tobacco consumption. Plain packaging

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[212] I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 520.
[213] Ibid.
[214] M Pieterse (note 49 above) 19.
[215] CESCR (note 118 above) para 12 (2) (b).
[216] *BATSA v Minister of Health* (note 74 above) para 40.

measures would therefore be enacted as measures to indirectly address exposure from tobacco smoke. Tobacco control includes all supply, demand and harm reduction strategies aimed at reducing, or eliminating consumption of tobacco consumption and exposure to smoke.[217] Illustrating the breadth of 'tobacco control' without dwelling on the details, the WHO FCTC incorporates a range of mechanisms from price and tax measures, protection from exposure to tobacco smoke; regulations on illicit trade in tobacco products to packaging and labelling of tobacco products measures, the last forming the subject of this thesis.

Having determined that the right to health as provided in sections 24, 27 and 28 of the Constitution respectively extend to tobacco control measures- it is now imperative to examine the obligations that arise from these rights. As a point of departure section 7 (2) of the Constitution imposes obligations to respect, protect, promote and fulfil the rights in the Bill of Rights. These obligations can be used as a vehicle to mobilise the state to implement plain packaging measures in South Africa. These obligations are similar to the obligations imposed on states by the ICESCR which have been analysed in the previous sections of this chapter. The normative content accorded to these obligations by the CESCR[218] shall also apply here.

Section 27 of the Constitution contains crucial qualifications for the right to have access to health care services. It requires that the state should take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. This qualification is not provided with regard to section 24 and section 28 respectively. Whether this implies that the latter rights are to be effected immediately is doubtful. The state is also required to take reasonable measures to fulfil these rights.

*3.3.5.3 Progressive realisation and available resources*

The South African courts have adopted the CESCR's approach to progressive realisation. The rights cannot be achieved immediately and are subject to the availability of resources. In the case of *Soobramoney v Minister of Health, Kwa-Zulu Natal* [219] the courts elucidated on the concepts of 'available resources' and 'reasonable measures'. It was held that:

[217] Article 1 (d) of the WHO FCTC.
[218] These have already been addressed in the previous sections of this chapter.
[219] *Soobramoney v Minister of Health, Kwa-Zulu Natal*, 1997 (12) BCLR.

> What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.[220]

The courts emphasised the implications of resource limitations on the realisation of the right to health. In achieving its goals to progressively realise the right to health, and in managing the scarce resources the state will have to adopt a holistic approach and consider the needs of the society instead of focusing on individuals.[221] It was emphasised that the provisions of the Bill of Rights should not be interpreted in a way which would result in courts directing hospitals to 'furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others.'[222] Sachs J held that the decision to allocate the available resources should be left to those better equipped to make such decisions, therefore the court showed deference to health personnel.[223]

In considering a right to health which mandates the implementation of tobacco control in South Africa; the availability of resources will play a pivotal role. The availability of resources is closely linked to the issue of resource allocation. As indicated it is the duty of the state to allocate resources according to the priorities in South Africa. Pieterse opines that 'the availability of resources, their distribution and the manner in which they are appropriated, directly determine the extent and quality of access to health care services.'[224] This is an important factor for tobacco control efforts.[225] As shown in chapter one and two, the tobacco epidemic is a public health concern in South Africa and according to the WHO FCTC plain packaging is of critical importance to the tobacco control initiative, this can be used to mandate South Africa to adopt these measures.

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[220] Ibid, para 11.
[221] Ibid, para 31.
[222] Ibid, para 58.
[223] Ibid, para 59.
[224] M Pieterse (note 49 above) 93.
[225] Y Saloojee (note 198) 48; P Reddy et al 'A decade of tobacco control: The South African case of politics, health policy, health promotion and behaviour change' (2013) 103 (11) *South African Medical Journal* 835, 837, on how tobacco use in South Africa has steadily declined since 1994.

*3.3.5.4 Minimum core right to health and tobacco control*

An issue closely related to the obligation of states to progressively realise the right to health is the minimum core approach. The minimum core is the floor from which progressive realisation begins. States are therefore supposed to at least satisfy as a matter of priority the minimum essentials of each right.[226] With regard to the right to health, its core elements would include access to health facilities, goods and services in a non-discriminatory manner especially for the marginalised groups and the prevention and treatment of epidemic diseases.[227] Even though the South African Courts rejected the minimum core approach, it held that for measures to be reasonable they must address the needs of those in most need.

In the *Grootboom* case,[228] the Constitutional Court addressed the applicability of the 'minimum core' approach and created the normative content of 'reasonable measures'. In this case social security rights in section 26 and section 28(1) (c) of the Constitution were invoked. The appellants claimed that their right to 'have access to adequate housing' had been violated and that the state had failed to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right' as per section 26(2) of the South African Constitution. The high court rejected the argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter which would obligate the state to provide some form of shelter pending implementation of the programme to provide adequate housing.[229]

A definition of minimum standards in relation to tobacco control would be hard to define. The first challenge would be including tobacco control within the core of the right to health. The CESCR includes as part of the core of the right to health, the provision of essential drugs, access to maternal and child care and the prevention, treatment and control of epidemics and endemic diseases.[230] Nicotine Replacement treatment to treat tobacco dependence is required as part of the WHO essential drug list.[231] The importance of treating tobacco dependence in HIV/AIDS and TB patients could also increase the prospects of including treatment for tobacco dependence in the South African Essential drug list.[232]

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[226] CESCR (note 118 above) para 43.
[227] Ibid.
[228] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46.
[229] *Government of the Republic of South Africa and Others v Grootboom* (note 228 above) para 14.
[230] CESCR (note 118 above) paras 43(c), 44 (a) and 44 (c) respectively.
[231] WHO Tobacco Free Initiative (note 200 above).
[232] M Hanker (note 192 above).

Further the injurious effects of tobacco smoking in pregnant women[233] and the need to deter children and teenagers from smoking could also motivate the need to provide treatment for tobacco dependence and the need for broader tobacco control.[234] Tobacco control could justifiably form part of the minimum core of the right to health.

The second challenge would be to determine which tobacco control strategies would fit into the minimum core of the right to health. Would plain packaging regulation form part of the minimum core content of the right to health? Or less rigorous measures of banning public smoking? This concern is based on the breadth of tobacco control mechanisms, and the recognition that it would be difficult to require states to include a wide range of measures as part of just the minimum core content of the right to health. In this regard this study submits that the order of priority taken in enacting tobacco control measures in South Africa would be of useful guidance, in developing the core requirements in relation to tobacco control. According to the Minister of Health:[235]

> The Department has been committed to limiting and preventing the spread of tobacco usage among South Africans since the early 1990's. This policy was initiated in response to growing concerns, not simply in South Africa, but around the world, about the extremely harmful effects of tobacco on those who consumed it and those exposed to secondary smoke. To this end, the Act was passed in 1993 and began by restricting smoking in public places, and certain forms of tobacco advertising. The Act was amended in 1999, 2007 and 2008 to further restrict tobacco usage and advertising in an attempt to meet government's concerns about the harmful effects of tobacco usage.[236]

South Africa is now in the process of enacting plain packaging measures; which is considered as best practice in regulating packaging and labelling of tobacco products. Practice shows that countries implement the least restrictive requirements and then work their way up; for example under the category of regulations of packaging and labelling of tobacco products countries start with small warnings, medium warnings, large warnings, pictorial warnings and then plain packaging measures.[237] Should members be required to

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[233] Preamble to the WHO FCTC; Preamble to the Tobacco Products Control Act.
[234] Ibid.
[235] In his answering affidavit in *BATSA v Minister of Health* (note 74 above) para 20.
[236] *BATSA v Minister of Health* (note 74 above) para 20; See also J Tumwine 'Implementation of the Framework Convention on Tobacco Control in Africa: Current Status of Legislation' (2011) 8 (11) *International Journal of Environmental Research and Public Health* 4312 - 4331.
[237] See table on the status of FCTC implementation in Africa in J Tumwine (note 236 above) 4322- 4324.

include at least small warnings as part of the minimum core? And then be obliged to progressively enact measures that require pictorial warnings and plain packaging?

The WHO FCTC offers no hierarchical order for implementing the tobacco strategies it proposes. In relation to package warnings it provides in Article 11 that warnings 'should be 50% or more of the principal display areas but shall be no less than 30% of the principal display areas.' Should the 30% be then considered as the minimum core or standard?

Dresler and Marks argue that 'it would be difficult to consider that a country was carrying out its minimum core obligation regarding the right to health if it did not implement the right to everyone to adequate tobacco control.'[238] Their submission falls short of the clarification on what 'adequate tobacco control' would mean. This could be explained by the recognition within the tobacco control community that measures will not work well in isolation. The WHO FCTC reiterates the need for comprehensive approaches to tobacco control.[239] The individual components of tobacco control 'are most effective when they work together to produce the synergistic effects of a comprehensive state-wide' program.[240] Cabrera and Gostin submit that the convention sets the floor minimum standards each member must implement.[241] The WHO FCTC sets concrete standards that state action must be measured against, if states fail to implement these minimum standards they could be found in violation of the right to health.[242] The minimum core with regard to tobacco control would therefore include all WHO FCTC measures. The WHO FCTC sets the minimum standards for tobacco control. This thesis maintains that considering the extensiveness of tobacco control measures it would be difficult to mandate a state like South Africa to implement all WHO FCTC measures as part of the minimum core right to health.

*3.3.5.5 The obligation to take reasonable measures*

In considering whether the obligation to take reasonable measures has been fulfilled the court will not look into whether alternative appropriate or favourable measures

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[238] C Dresler & S Marks (note 204 above) 631.
[239] Article 4.2 of the WHO FCTC.
[240] Atlanta: U.S. Department of Health and Human Services, Centre for Disease Control and Prevention, National Centre for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health 'Centre for Disease Control and Prevention: Best Practices for Comprehensive Tobacco Control Programs — 2014' <http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf>.
[241] O A Cabrera & L O Gostin 'Global tobacco control: A vital component of the right to health' in J M Zuniga, S P Marks & L O Gostin (eds) Advancing the human right to health 1 ed (2013) 265.
[242] O A Cabrera & L O Gostin (note 241 above) 265-266.

could have been implemented, or whether public money could have been spent in a better way. The court will confine itself to examining the reasonableness of the measures taken.[243] The programme in place must provide a clear allocation of responsibilities and tasks to the different spheres of government and guarantee that the appropriate financial and human resources are available.[244] These policies and programmes must be reasonable both in their conception and their implementation.[245]

Further, those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.[246] If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[247] In the context of tobacco control it could be argued that in considering the reasonableness of measures, the rights of children should be of paramount importance. Tobacco control measures would therefore not be reasonable if they neglected the importance of protecting children from exposure to tobacco smoke.

This thesis submits that the tobacco control advocates can use the legally recognised and defined human right to health to drive tobacco control. Global health activists have successfully pushed for access to essential medicines and HIV/AIDS patient's protection from stigma by appealing to the values and norms of the international human rights framework.[248] The tobacco control advocates can similarly frame, as they have been doing, the tobacco epidemic as a human rights issue. In light of the above analysis the human right to health is wide and powerful enough to propel the adoption of plain packaging measures. The potential the right to health offers for the tobacco control campaign is yet to be maximised.

### 3.3.6 The Implications of the right to health on tobacco control

The contours of the right to health are defined by the underlying determinants of health, which are not rigid but evolve over time. It is elastic, and whether this opens it up for potential abuse is debatable. The underlying determinants will keep changing

[243] *Government of the Republic of South Africa and Others v Grootboom and Others* (note 228 above) para 41.
[244] Ibid, para 39.
[245] Ibid, para 42.
[246] Ibid, para 44.
[247] Ibid, para 44.
[248] D Reubi (note 45 above) S 176-177.

depending on what the world will perceive as factors that interfere with health.[249] Tobacco control is now well recognised as an underlying determinant of health; UN member states recognised that 'substantially reducing tobacco consumption is an important contribution to reducing non-communicable diseases'[250] and have therefore shown commitment to accelerate implementation of the WHO FCTC. The human right to health has the potential to fuel the need for tobacco control as a rightful claim and gives rise to corresponding obligations on the state. States could be forced to implement tobacco control measures or be held liable for violating the right to health, if they fail to do so. Cabrera argues that:

> The state must also fulfil the right to health by implementing all the relevant measures, legislation, regulation and budgetary allocation that will be conducive to effective tobacco control regulation... [This includes:] providing health services for people afflicted by diseases stemming from tobacco use, facilitating smokers' access to cessation programmes; and prevention campaigns that inform...the...population...about the dangers associated with tobacco use.[251]

Dresler and Marks argue that adequate tobacco control should form part of the minimum core obligations of the right to health.[252] Lawsuits have been filed against the government of India and Mexico for violating the right to health by allegedly failing to adopt the 'necessary tobacco control policies to protect their health.'[253] Reports have been submitted to both the CESCR and the UN Committee for the Elimination of All Forms of Discrimination against Women (UN-CEDAW), by local human rights and health activists in Argentina and Brazil, in which claims have been made that the respective States are violating the right to health by failing to implement 'strong anti-smoking' policies.[254] Worth pointing out is that the claims are based on failure to implement', 'adequate', 'necessary' and 'strong smoking' policies. As pointed out earlier it would be hard to hold a state to implement all tobacco control measures as set out in the WHO FCTC. Failure to

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[249] CESCR (note 118 above) para 11.

[250] Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases, Draft resolution submitted by the President of the General Assembly, Sixty-sixth session Agenda item 117, UN Doc A/RES/66/2, adopted 19 September 2011 as quoted in J Liberman 'The power of the WHO FCTC: Understanding its legal status and weight' in A D Mitchell & T Voon (eds) *The Global Tobacco Epidemic and the Law* 1 ed (2014) 49.

[251] O A Cabrera & A Madrazo 'Human rights as a tool for tobacco control in Latin-America' (2010) *Salud Pu´blica de Me´xico*, 52 (Suplemento 2), S288S297 S291-S292 as quoted in D Reubi (note 44 above) S181.

[252] C Dresler & S Marks (note 204 above) 631.

[253] D Reubi (note 45 above) S179.

[254] Ibid.

clarify this issue will lead to a proliferation of claims against states for failing to implement all tobacco control measures.

The WHO FCTC can be used to inform obligations under the right to health.[255] In the 2014 Netherlands case of *Dutch Association of CAN v. Netherlands*[256] the state was compelled to comply with the WHO FCTC. Netherlands enacted a smoking ban in public places with the limited exception of small cafes. The small cafe exception was challenged as a violation of Article 8 of the WHO FCTC, which requires Parties to prohibit smoking in all indoor public places. The Supreme Court agreed that the limited exception violated the WHO FCTC and was illegal.[257] Likewise states may possibly be mandated to adopt plain packaging measures to fulfil obligations under the WHO FCTC.

In the Brazilian case of *Souza Cruz S/A v Dornells*,[258] the wife and son of a deceased tobacco smoker brought an action against a tobacco company. Claiming that the company's misleading advertisements had lured the deceased to smoke which had eventually led to his death. After considering the WHO FCTC's position regarding tobacco advertisements the court ruled in favour of the claimants. In light of the above lawsuits and the WHO FCTC's stance on the promotional effects of packaging, South Africa could be in violation of the right to health in not implementing plain packaging measures.

Dresler and Marks argue that the elements of the right to health support the emergence of a human right to tobacco control. First, it is acknowledged that tobacco creates health related problems which require urgent attention.[259] Secondly, tobacco control is a prerequisite for the realisation of other human rights.[260] Thirdly, the right to tobacco control although not mentioned in the basic human rights instruments derives from the right to health and the right to life.[261] Dresler and Marks go beyond advocating for a

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[255] O A Cabrera & L O Gostin (note 241 above) 264.

[256] *Dutch Association of CAN v. Netherlands* [Netherlands] [October 10, 2014] <http://www.tobaccocontrollaws.org/litigation/advancedsearch/?country=Netherlands>; See also the proliferation of claims brought against states for failing to implement tobacco policies and against tobacco companies on this website.

[257] Ibid.

[258] *Souza Cruz S/A v. Dornelles, et al.* [9th Civil Chamber of the Court of Justice of Rio Grande do Sul, Brazil] [December 12, 2007] < http://www.tobaccocontrollaws.org/litigation/decisions/br-20071212souza-cruz-sa-v.-dornelles,-et>.

[259] C Wu (note 5 above) 7.

[260] C Dresler & S Marks (note 204 above) 629-630.

[261] Ibid 629-631.

right to health that mandates tobacco control to argue that there must be separate right to tobacco control.

Water was considered a determinant of health in the ICESCR, but in 2002 the CESCR adopted a separate General Comment on the Right to Water. Drawing analogies from the approach taken with regard to the right to water, Dresler and Marks claim that the tobacco epidemic has reached unprecedented heights and as such a 'strong case can be made for the emergence of an implied derivative human right to tobacco control.'[262] More so bearing in mind that this will not add to the 'proliferation of rights but rather to identify the elements of a norm *de lega ferenda.*'[263] This will allow the CESCR to address the normative content of the right to tobacco control and to devote special attention to issues that are foreign to tobacco. The WHO FCTC should be the starting point for a 'legally grounded enumeration of the human right to tobacco control.'[264]

This thesis argues that the field of tobacco control is too broad and it would be complimentary to the realisation of the right to health, if a separate right to tobacco control would be formally recognised to address the intricacies and specifications tailor made to tobacco. In the previous sections of this chapter, complex issues were highlighted concerning tobacco related claims that could be raised within section 27 and section 24 of the South African Constitution which could be resolved by the recognition of a formal human right to tobacco control.

Like the right to access to medicines it will be hard to reach consensus regarding the separate existence of a right to tobacco control. Ndlovhu submits that a textual basis for a right to access to medicines does not exist but instead a universal right to health exists of 'which access to medicines constitutes an important subset.'[265] It is rational to hold that tobacco control is an important subset of the right to health.[266] However, this thesis maintains that it would be valuable in combating the tobacco epidemic and in realising the right to health if the CESCR would develop a general comment to the right to tobacco control.

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[262] Ibid 647-648.
[263] Ibid 650.
[264] Ibid 648.
[265] L Ndlovhu *Access to Medicines Under the World Trade Organisation Trips Agreement: A Comparative Study of Select SADC Countries* (Unpublished LLD Thesis, UNISA 2014) 95.
[266] O A Cabrera & L O Gostin 'Human rights and the Framework Convention on Tobacco Control: mutually reinforcing systems' (2011) 7 (3) *International Journal of Law in Context* 285, 288.

The above analysis established that the right to health substantiates calls for plain packaging measures. However, the right to health does not substantiate a health over-trade approach with regard to tobacco measures. First, the right to health is not a non-derogable right. Under international human right instruments, it can be limited for the 'purpose of promoting the general welfare in a democratic society.' Under the South African Constitution it can also be limited under section 36. The Constitution clearly states that the rights in the Bill of Rights are subject to limitations and provides a table of non-derogable rights which the right to health does not form part of.

Is the right to health of higher priority than the right to intellectual property? The Vienna declaration affirms that 'all human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'[267] Indivisibility is associated with the absence of a hierarchical distinction in the order of rights. Therefore, there exists no legal basis for health rights to dominate intellectual property or any other rights.

*3.3.6.1 The health-over-trade approach in tobacco control*

Taking a closer look at the health-over-trade argument, it is apparent that the move was because of fears that the WTO laws would hinder states from implementing tobacco control measures. The exclusion of tobacco from the WTO review is a common notion within the tobacco control community. Callard, Chitanondh and Weissman argue that states should not have to subject their tobacco control regulations to the WTO reviews.[268] Weissman writing separately also argued that excluding tobacco from the WTO requires a simple declaration that the agreement does not apply to tobacco products.[269] Shapiro defended the health-overtrade approach and argued that the WTO placed unreasonable burdens on governments in justifying public health measures.[270] In light of that Shapiro concluded that a health-over-trade provision was essential to sustain the rights of sovereign

[267] Vienna declaration and programm of Action, U.N GAOR, World Conference on Human Rights 4th Session.
[268] B McGrady (note 85 above) 223.
[269] B McGrady (note 85 above) 224; R Weissman 'International trade agreements and tobacco control: Threats to public health and the case for excluding tobacco from trade agreements' (2003) <http://www.takingontobacco.org/trade/tobacco.trade.v02.backgrd.pdf>.
[270] Mamudu H M, Hammond R & Glantz S A 'International trade versus public health during the FCTC negotiations, 1999-2003' (2011) 20 (1) Tobacco Control 6.

countries to 'institute tobacco control measures without fear of losing a WTO case or retaliation from other countries.'[271] On the other hand, the WHO Tobacco Free Initiative and the WTO maintained that the health-over-trade approach was not necessary because the WTO provisions provided protection for public health policies and did not obstruct the states' regulatory duties to enact tobacco control measures.[272]

As indicated above although the right to health is far-reaching and substantiates calls for tobacco control it does not confirm a health-over-trade approach. It becomes relevant to examine whether the health-over-trade approach could be a consequence of the disregard of the right to health under the WTO. The WTO is not an organisation created to advance or regulate in the field of human rights. However, the duties and obligations it imposes upon its members could affect
their ability to regulate in areas sensitive to human rights.[273]

The next section of this chapter will examine whether the WTO creates sufficient space that allows members to fulfil obligations under the right to health without necessarily violating WTO commitments.

### 3.4 IS THERE ROOM FOR THE RIGHT TO HEALTH AT THE WTO?

There have always been concerns surrounding the compatibility of the international trade system and the human rights regimes.[274] The General Agreement on Tariffs and Trade (GATT)[275] makes no explicit mention of human rights. However, in its preamble it makes mention of its aims to raise the standards of living, ensure full employment and to increase income through trade liberalisation and the enhancement of market access.[276] It is worth pointing out that, the GATT's objectives are actually in support of the realisation of the right to health.

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[271] Ibid.

[272] Ibid 6 -7.

[273] A M Pollock & D Price 'The public health implications of world trade negotiations on the general agreement on trade in services and public services' (2003) 362 (9389) *The Lancet* 1072-1075.

[274] J Waincymer 'The Trade and human rights debate: Introduction to an interdisciplinary analysis' in S Joseph, D Kinley & J Waincymer (eds) *The World Trade Organization and Human Rights: Interdisciplinary perspectives* 1ed (2009) 1; G M Zagel 'WTO and human rights: Examining the linkages and suggesting convergence' (2005) 2 (2) *IDLO Voices of Development Jurists Paper Series;* J Hu 'The role of international law in the development of WTO law' (2004) 7 (1) *Journal of international economic law* 143; C Ochoa 'Advancing the language of Human rights in a global economic order' (2003) 23 *Boston Third World Law Journal* 57, 95.

[275] The General Agreement on Tariffs and Trade, 15 April 1994 (Hereinafter the GATT).

[276] Preamble to the GATT.

Similar to its predecessor the WTO does not explicitly mention human rights and has received even more criticism from the human rights community.[277] On one extreme is the question whether the WTO unduly interferes with human rights, or whether it fails to do enough to protect or promote human rights.[278] Trade liberalisation has been accused of being antithetical to human rights protections.[279] The WTO has been referred to as a 'veritable nightmare' for human rights; favouring the agendas of the North and ignoring its human rights' implications.[280] The WTO has been condemned for not only failing to protect, but for actually diminishing human rights conditions in some of its member countries.[281]

As a result of their commitments under the WTO, member states have been accused of failing to fulfil their international human rights obligations.[282] WTO Members should promote human rights including the right to health in their actions within the ambit of WTO.[283] It is reported that of the 164 members of the WTO, all have ratified at least one human rights instrument.[284] Of the 148 parties of the ICESCR, 116 are WTO members; this validates the focus between the two regimes of international trade and international human rights law. If the obligations under one regime are incompatible with obligations under the other regime there is a conflict, which could hamper the realisation of the obligations flowing from one of the regimes.

Others have argued instead that trade liberalisation as encouraged by the WTO, promotes economic efficacy which in itself is a precondition for the advancement of human rights.[285] For instance economic efficacy has a significant impact on the realisation of the right to health. This view has been met with criticism because the benefits of trade liberalisation have not to date been shared by all.[286] There have been concerns that the

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[277] Preamble to the WTO, Agreement, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.
[278] S Joseph (note 17 above) 1- 4.
[279] Ibid.
[280] P Ala'I 'A human rights critique of the WTO: Some preliminary observations' (2001) 33 *Article in Law Reviews and other Academic Journals* 537, 539.
[281] Ibid.
[282] P Ala'I (note 280 above) 542.
[283] Ibid.
[284] Ibid.
[285] J Waincymer (note 247 above) 3.
[286] G N Horlick & K Fennell 'WTO Dispute settlement from the perspective of Developing countries' in Y Lee, G N Horlick & W Choi et al (eds) *Law and Development Perspective on International Trade Law* (2011)

world trading system fails to deliver visible benefits of international trade to the majority of developing countries and fails to address the gap between the rich and the poor.[287] Accordingly it is argued that the WTO as it currently operates does not protect the interests of the persons in need, but rather reinforces the interests of the developed nations.[288] Waincymer submits that:

> Even if trade liberalisation is desirable from an efficacy perspective at least, does it nonetheless interfere with some human rights by shifting resources from less efficient, but still deserving people, to more efficient traders who accumulate wealth but do not show any responsibility for the welfare of those who may have lost out in the process.[289]

The WTO regulates disputes at the intersection of health and trade through various Agreements, however there is concern that the WTO is not well suited to deal with this relationship.[290] Criticism has been levelled against the WTO that its rules impede states from granting adequate protection to national health.[291] In light of this could a health-over-trade approach be the solution? This would be an over simplification of the reality surrounding public policy regulation.

> Even if one started with the hypothesis that human rights are more important than trade liberalisation…the WTO system still has a real need to prevent protectionism. A particular problem would be where protectionist measures are inappropriately labelled as human rights measures simply to protect them from a successful challenge.[292]

There is an obvious need to curb protectionism. Failure to do so would create obvious loopholes which could be susceptible to abuse by members who would implement protectionist measures under the guise of securing public health. An interesting thought regarding this concern is whether 'protectionism itself can ever be a means by which to promote human rights.'[293]Are there instances where WTO members implement measures

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162; A Subramanian & S Wei 'The WTO promotes trade, strongly but unevenly; (2007) 72 (1) *Journal of international Economics* 151-175.

[287] R W Staiger 'What can Developing Countries Achieve in the WTO?' A Book Review of Jawara & Kwa Behind the Scenes at the WTO: the real world of international trade negotiations, the University of Wisconsin 2005 <www.stanford.edu/~staiger/jel.book.review.113005.pdf>.

[288] Ibid.

[289] J Waincymer (note 247 above) 3.

[290] G A Bermann & P C Mavroidis *Trade and Human Health Safety* (2006) 1.

[291] R Howse & E Turk 'The WTO impact on Internal Regulations: A case study on the Canada-EC Asbestos Dispute in G A Bermann & P C Mavroidis (note 290 above) 71.

[292] J Waincymer (note 247 above) 11.

[293] Ibid.

that protect health but are still lacking in the eyes of the WTO? This is a delicate issue which this chapter will also attempt to answer.

The exceptions from the general rules which are evident in various agreements within the international trading system are an indication that the regime is pro-health. The GATT creates exceptions in Article XX (b), it allows for measures that are necessary to protect human health.[294] There have been arguments that this shows that the WTO is capable of preserving sound public health measures.[295] The Agreement on Sanitary and Phytosanitary measures (SPS Agreement) also reaffirms that 'no member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health'[296] Similarly to Article XX (b) of the GATT, it provides that members are allowed to implement sanitary or phytosanitary measures as long as these are 'applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence'.[297] In light of such provisions, it is argued that the WTO is not antithetical to the securing of the right to health. The WTO perceives itself as sensitive to human rights.

> WTO Agreements are sensitive to health issues. In fact, health concerns can take precedence over trade issues. If necessary, governments may put aside WTO commitments in order to protect human life and according to WTO jurisprudence, human health has been recognized as being 'important in the highest degree[298]

In light of the above, the WTO advances the position that obligations under the trading regime do not hamper states from pursuing obligations to realise the right to health. McGrady suggests that this pro-health position should not be taken at face value. In particular considering the uncertainty surrounding the requirements for necessity and the considerations by a WTO Panel of the importance of a member's regulatory goal.[299] The WTO is criticised for limiting domestic regulatory autonomy. Although states are granted

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[294] Article XX (a) to (b) of the GATT provides that: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (*a*) necessary to protect public morals; (*b*) necessary to protect human, animal or plant life or health…'

[295] B McGrady (note 85 above) 12.

[296] Preamble to the Agreement on Sanitary and Phytosanitary measures.

[297] Article 2.2 of the Agreement on Sanitary and Phytosanitary measures

[298] Miguel Rodríguez Mendoza( Deputy Director-General and the principal coordinator for the WTO) in WTO 'WTO Agreements and Public Health — a joint study by WHO and the WTO Secretariat', 20 August 2002 <https://www.wto.org/english/news_e/pres02_e/pr310_e.htm>.

[299] B McGrady (note 85 above) 12-13.

the freedom to regulate in the space of public health, this is subject to checks and balances which are argued to be burdensome in some instances.[300]

The SPS Agreement's[301] provision on the appropriate level of protection (ALOP) or the acceptable level of risk is one example of the freedom states are given in regulating in the sphere of public health. The ALOP is the level of protection considered appropriate by the member instituting a sanitary or phytosanitary measure within its jurisdiction.[302] It is the prerogative of the member concerned and not of a Panel or of the Appellate Body to choose the ALOP therefore a member can choose a zero risk level of protection. The Appellate Body in *EC - Hormones* held that the member has a prerogative right to establish its own level of sanitary protection under Article 3.3.[303] It was held that this was an autonomous right and not an exception from a general obligation.[304] It could be argued from this position that the WTO does allow sufficient freedom for members to exercise regulatory autonomy and as such that there is room for the right to health within the international trade regime. The SPS Agreement in Article 5.5 provides that:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

Thus although the WTO allows members to set their own acceptable level of risk, it imposes a requirement that there must be some form of consistency in doing so. Atik submits that a rational legislation could in some instances prefer different levels of

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[300] R K Tayob 'Developing countries voice opposition to 'necessity test' in GATS' (2006) <http://www.twnside.org.sg/title2/twninfo485.htm>.

[301] The health aspect of the SPS Agreement basically means that WTO members can protect human, animal or plant life or health by applying measures to manage the risks associated with imports. The measures usually take the form of quarantine or food safety requirements. See Australian Government Department of Agriculture, Fisheries and Forestry 'The WTO Sanitary and Phytosanitary Agreement: Why you need to know' < www.daff.gov.au/.../pdf_file/0007/146896/wto_sps_agreement_booklet.pdf>.

[302] Article 5 of the SPS Agreement.

[303] *EC Measures Concerning Meat and Meat Products (*EC *– Hormones)* Report of the Appellate Body, WT/DS48/AB/R, para 104; R Quick & A Blüthner 'Has the Appellate Body Erred: An Appraisal and Criticism of the Ruling in the WTO Hormones case' (1999) 2 (4) *Journal of International Economic Law* 603, 615-612.

[304] M D Prévost & Van Den Bossche 'The Agreement on the Application of Sanitary and Phytosanitary measures' in Macroy *et al* (eds) *WTO: Legal, Economic and Political Analysis* (2005) 276.

protection.[305] However inconsistency in ALOP is usually suggestive that the motive for a measure is not 'a bona fide health concern, but rather protectionism.'[306] In the case of *Australia – Measures Affecting Importation of Salmon* (*Australia Salmon*),[307] the WTO Panel held that there was a violation of Article 5.5 because the differences in the level of protection were arbitrary and unjustifiable.[308] In this case, different levels of protection were applied by Australia against risks from imports of salmon and other fish. The levels of protection against risks from salmon imports were higher than those of the other fish.[309] However, scientific evidence indicated that there was a greater risk of disease introduction linked with the other fish (bait fish and live ornamental fish) than the risk posed by imports of salmon for human consumption.[310] It was submitted that the risks associated with the other fish were higher than those associated with salmon, therefore, a higher level of protection would have been more justifiable.[311] In light of the above although the WTO does allow members to regulate in areas of human health, this right is subject to conditions imposed by the regime. Usually measures are tried for necessity[312], non-discrimination[313] and arbitrariness in an effort to stamp out protectionism and discrimination.

This case brings back the question whether measures which protect public health can still be held to be WTO inconsistent. The measures in the case of *Australia – Salmon* could protect health but were discriminatory and hence inconsistent with the WTO rules. On the other hand it cannot be ignored that these measures could have simply been put in place with the aim of discriminating against salmon products. Consistency in addressing health risk is crucial under WTO law.

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[305] J Atik 'On the efficiency of health measures and the 'appropriate level of protection'' in G Calster & D Pre'vost (eds) *Research Handbook on Environment, Health and the WTO* 1ed (2013) 127.

[306] J Atik (note 305 above) 127.

[307] Appellate Body Report in *Australia – Measures Affecting Importation Of Salmon* (*Australia Salmon*), WT/DS18/AB/R, and 20 October 1998.

[308] Panel Report in *Australia - Measures Affecting Importation of Salmon (Australia - Salmon)*, WT/DS18/RW, 6 November 1998, para 9.1

[309] S Nyatsanza *Opening up global food trade to developing countries: An evaluation of the world trade organisation's SPS Agreement* (Unpublished LLM dissertation, University of Fort Hare 2013) 59.

[310] Panel Report in *Australia – Salmon* (note 308 above) para 8.137.

[311] T Kelly *The Impact of the WTO: The Environment, Public Health and Sovereignty* 1ed (2007) 132.

[312] See Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement), 'Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.'

[313] See for example Article 4 of the TRIPS Agreement, 'With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.'

Various Agreements under the WTO have implications on the right to health. However this thesis will be restricted to the TRIPS and TBT Agreements as these are the two main Agreements cited in the on-going WTO plain packaging case.[314] It is therefore crucial to examine whether the Agreements create space for the realisation of the right to health.

### 3.4.1 WTO TRIPS Agreement and the right to health

The TRIPS Agreement has been subjected to wide criticism regarding its compatibility with the right to health.[315] This criticism flows mainly from the pharmaceuticals debate.[316] The Agreement fell under the auspices of the WTO mainly because of the realisation that wide spread piracy, counterfeiting and intellectual property rights infringements constituted a barrier to trade because market access for legitimate goods was diminished.[317] Strong intellectual property protection was therefore supposed to be beneficial to developing countries. It was supposed to lead to increased investment and trade. It was also supposed to foster creativity.[318] The TRIPS Agreement establishes minimum substantive standards for the protection of intellectual property rights.[319]

One of the main objections raised against the TRIPS is that the Agreement wages the north south divide even wider. The south opines that the Agreement forces them to protect intellectual property rights which are detrimental to their developmental interests. Diffusion of technology is impeded and this results in high prices for goods.[320] Accordingly the TRIPS Agreement is perceived as anti-health as it hampers access to medicines.[321] There are other factors such as structural problems, political issues that play a vital role in the access to medicines debate, however the TRIPS has been labelled the culprit.[322] As indicated in the previous sections access to vital medicines is a necessary determinant of

[314] 314 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging WT/DS467.
[315] B Mercurio 'TRIPS and access to essential medicines' in G Calster & D Pre'vost (eds) *Research Handbook on Environment, Health and the WTO* 1ed (2013) 235.
[316] Ibid.
[317] M Matsushita *et al The World Trade Organisation: Law, Practice and Policy* 2ed (2006) 697.
[318] Ibid 710.
[319] Ibid 705.
[320] Ibid 709.
[321] Ibid 718.
[322] Ibid.

the right to health. The ICESCR actually includes access to medicines as a minimum core requirement for the right to health.[323]

The TRIPS Agreement includes an inbuilt mechanism that allows it to consider objectives of realising the right to health. Article 8.1 of the Agreement provides that;

> 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.

At face value the above mentioned provision implies that TRIPS obligations can be overridden to fulfil public health interests. The intention was to preserve adequate space for members to regulate in the area of public policy.[324] This principle like most WTO freedoms is conditional on the necessity of the measures. To prove that challenged measures are necessary to protect public health, members can employ non-WTO law as evidence of fact to fulfil the necessity test.

*3.4.1.1 Non –WTO law as evidence of fact*

Non-WTO law can be used throughout all WTO Agreements including the TBT Agreement as evidence of fact. It has become part of standard practice for the WTO Dispute settlement and the WTO members to employ non-WTO law in interpreting the WTO rules.[325] This is consistent with the recognition that WTO law forms part of broader international law.[326]

South Africa, like Australia is in the process of enacting plain packaging legislation with the intention to fulfil its obligations under the WHO FCTC.[327] It is expected therefore that South Africa will base its arguments in support of the Draft bill requiring plain packaging on the WHO FCTC. Margaret Chan, the WHO Director General pointed out that the WHO FCTC was a tool for fighting back lawsuits launched against plain packaging

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[323] CESCR (note 118 above) para 43.
[324] H G Ruse-khan 'Assessing the need for a general public interest exception in the TRIPS Agreement' in A Klur & M Levin (eds) *Intellectual property rights in a fair world trade system* 1ed (2011) 170.
[325] J Pauwelyn 'How to win a World Trade Organisation Dispute Based on Non-World Trade Organisation Law?' (2003) 37(6) *Journal of World Trade* 997.
[326] J Pauwelyn 'The role of public international law in WTO law: How far can we go?' (2001) *The American Journal of International Law* 538.
[327] H G Ruse-Khan (note 45 above) 313.

legislation.[328] A WTO Panel faced with a claim of infringement of the TRIPS provisions in this context would be forced to look beyond TRIPS rules and consider the health perspective governed by the WHO FCTC and the human rights instruments into account.[329]

In the *U.S –Shrimp* case the WTO Appellate Body made reference to environmental treaties in interpreting Article XX (g) of the GATT.[330] WTO law cannot be read in clinical isolation from the rest of public international law.[331] This approach allows the infusion of human rights principles into the WTO and this could assist in addressing the coherence problems facing global health governance. Ssenyonjo submits that the WTO has a responsibility to assist states in respecting human rights.[332] Further that the WTO system has the potential to contribute to the realisation of economic, social and cultural rights.[333]

However there are problems with the infusion of non-WTO law into the WTO system.[334] Matsushita argues that allowing non-WTO law into the WTO dispute settlement system would pose the danger of conflicting interpretations in human rights law and pose danger to the WTO itself.[335] Without getting into the details of the criticism raised by Matsushita it is worth noting that, although the WTO cannot be turned into a 'human rights organisation, it must take steps to acknowledge fully the human rights effects of its work in order to maintain its…credibility'.[336]

Non-WTO law can be used as facts or evidence in support of, or against, a claim of violation of WTO law. Article 20 and 8.1 of the TRIPS Agreement incorporates a 'non-WTO defence' mechanism in allowing members to regulate in the area of public health. A measure could be prohibited under WTO law but prescribed under non-WTO law. In this event, the WTO would have to decide whether the non-WTO law justifies the measure in question.[337] In the present context the WTO will have to rely on WHO FCTC rules to

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[328] M Chan 'Galvanising Global Action towards a tobacco-free world' keynote address at the 15th world conference on Tobacco or Health, Singapore, 20 March 2012 quoted in H G Ruse-Khan (note 45 above) 316.
[329] H G Ruse-Khan (note 45 above) 324.
[330] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/ABR Adopted 6 November 1998 para 128-132.
[331] J Pauwelyn (note 326 above) 538.
[332] M Ssenyonjo (note 113 above) 136.
[333] Ibid 137.
[334] Ibid 138.
[335] M Matsushita *et al* (note 317 above) 923-4.
[336] M Ssenyonjo (note 113 above) 138.
[337] J Pauwelyn (note 326 above) 1024.

justify plain packaging measures; and therefore decide whether the convention justifies plain packaging measures.

Pauwelyn opines that in considering non-WTO law as a justification for an otherwise WTO prohibition conflicts may still arise. The WTO Panel might need to interpret provisions of the non-WTO treaty, if it finds conflict the WTO Panel will have to decide whether the non-WTO norms override the WTO rules violated. If the non-WTO law prevails the Panel would accept the justification and not find a WTO violation.[338] Hence non-WTO law including human rights law can override WTO law. In light of the above, this thesis argues that it is inappropriate to perceive the WTO as antithetical to human rights.

Issues surrounding the capacity of the WTO in dealing with non-WTO law and concerns that the WTO risks tainting these non-WTO laws with an inherent trade bias[339] go beyond the reach of this chapter. There are risks that the WTO could water down non-WTO treaties.[340] Pauwelyn submits that it is commendable that the WTO at least tries to consider international law and that risking misinterpretation and or watering down of non-WTO treaties is inevitable but is by far 'a lesser evil'.[341] This thesis shares this view; it would be catastrophic if the WTO were to completely ignore non-WTO treaties. Without proper coordination the fragmentation of rules in global health governance is seen as a challenge to the realisation of the right to health.[342] If the WTO would only look at plain packaging measures from the WTO point of view, without considering the human rights implications involved it would be difficult for South Africa to implement tobacco control policies and in turn impossible to realise the right to health.

*3.4.1.2 The Doha declaration on the TRIPS Agreement and public health*

The Doha declaration on the TRIPS Agreement and public health affirmed the importance of intellectual property protection in improving access to medicines; more importantly it showed that the right to health was confirmed by the WTO.[343] The TRIPS

[338] Ibid.
[339] J Pauwelyn (note 326 above) 1030.
[340] Ibid.
[341] Ibid.
[342] McGrady (note 85 above) 217.
[343] F M Abbott 'The 'rule-of reason' and the right to health: integrating human rights and competition principles in the context of TRIPS' in T Cottier, J Pauwelyn & E Burgi *Human Rights and International Trade* 1ed (2005) 279.

Agreement (through the protection of patent rights) has implications for access to medicines which as indicated earlier is a determinant of the right to health. Put in other terms the right to health cannot be realised without access to essential medicines. The TRIPS Agreement presented another example of the complex interaction between WTO law and non-WTO law in the form of human rights. Generally, WTO law and human rights law share equal statuses under international law, therefore conflicts are inevitable. WTO law would only give way to international human rights laws if the latter constituted *jus cogens* as no derogations are allowed from *jus cogens* norms.[344]

To further complicate the issues, human rights instruments introduced the concept of core rights, the CESCR indicated that states cannot under any circumstances justify derogations from core rights.[345] The right to health also has an irreducible core. As established in previous sections of this chapter South Africa has rejected the minimum core approach and since the realisation of core rights is still subject to availability of resources its practicality is still questionable.[346] However its operability should not be overlooked in international law including in WTO law. Abbott submits that the minimum core approach raises significant questions regarding the 'hierarchy of international legal rules – including the WTO.' The answer to this would be difficult to give considering the questionable status of core rights. Abbott opines that this in an indication that the interface between human rights and WTO law may be more complex than it is perceived to be.[347]

From an international human rights law perspective, it means that there are core health rights and non-core health rights. 'If a TRIPS Agreement rule might be ordinarily inconsistent with a human rights rule…, might a 'core' human right have a special status that precludes such interference?'[348] The right to health is not static; it depends on determinants that are ever evolving. Its 'core' constituents will continue to evolve. Tobacco was not a major human rights problem at the time of inception of international human rights instruments, but it is now considered a determinant of the right to health.[349] Similarly, the weight accorded to 'core rights' will shift with time. The WTO TRIPS Agreement could therefore be required to submit to core health rights.

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[344] F M Abbott (note 343 above) 280.
[345] M Ssenyonjo (note 113 above) 41.
[346] On South Africa and the minimum core approach see M Pieterse (note 49 above) 28.
[347] F M Abbott (note 343 above) 280.
[348] F M Abbott (note 343 above) 281.
[349] C Dresler & S Marks (note 204 above) 629.

The current 'core' of health rights include the provision of essential drugs;[350] which is exactly what the TRIPS Doha declaration seeks to achieve. The devastating effects of the HIV/AIDS epidemic were of exceptional value to the weight placed on access to medicines as indispensable for the realisation of the right to health.[351] Adopting the same approach, core health rights also include maternal and child care and the obligation to take measures to prevent, treat and control epidemic and endemic diseases. All these aspects can be read into tobacco control.

The WHO FCTC acknowledges that there are hazards from tobacco consumption and exposure to smoke.[352] The injurious effects to the development of children and the general health of human beings is also emphasised.[353] Tobacco effects have reached epidemic heights, what differentiates it from the HIV/AIDS epidemic is that its full effects are suspended and are yet to be experienced.[354] Dresler and Marks caution that the developing world is too focused on current epidemics like HIV/AIDS, so much that it fails to address the looming predicted death toll from tobacco.[355] Read in this light, the TRIPS Agreement could conflict with measures addressed to fulfil the core health rights, plain packaging is one example of tobacco control measures that could conflict with TRIPS rules. The Doha declaration presents an example of how the TRIPS Agreement can give way to human rights law, the question is whether the same could occur again in the context of plain packaging measures? It is very much possible that trademark rights protection under the TRIPS Agreement could succumb to health rights in the plain packaging debate. In paragraph 4 the Doha declaration states that:

> 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.

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[350] CESCR (note 118 above) para 43 (d).

[351] B M Meir (note 188 above) 163, on the role of the HIV/AIDS pandemic in refocusing the right to health to focus on primary health care as the bedrock of health.

[352] Preamble to the WHO FCTC.

[353] Ibid.

[354] C Dresler & S Marks (note 204 above) 604

[355] Ibid.

It is evident from the above quotation that the Doha declaration emphasised the importance of interpreting the TRIPS Agreement in a manner supportive to the realisation of the right to health. This thesis focuses on trademarks whereas patents were the main focus in the Doha declaration. Nevertheless what makes the Doha declaration relevant is that it allows members to undermine obligations under WTO law (TRIPS Agreement) to protect patents (which are part of intellectual property) in order to promote the realisation of the right to health. This thesis argues that the same approach could also be taken with regard to plain packaging legislation.

The Doha declaration represents exceptions and flexibilities to the TRIPS rules in an effort to protect public health. [356] Under Article 31 of the TRIPS, members are permitted to use compulsory licencing. Thus members can use the subject matter of a patent without the patent holders' authorisation.[357] This provision allows members to do so in cases of national emergency. The Doha declaration also gives members the discretion to decide what constitutes national emergencies. This allows member states to fulfil their obligations regarding the right to health by improving access to medicines for epidemics by not adhering to patent protection rules.

The TRIPS Agreement also provides for parallel importing, this allows member states to import needed medicines at a lower price from any distributor instead of buying from the manufacturer.[358] This provision allows members to buy generic drugs produced in other countries under compulsory licencing. In this case the generic version of the patented products is again sold without the patent holders' authorization.[359]

Further, the TRIPS Agreements provides for transitional arrangements, which allows developing and least developed members additional time to comply with the TRIPS Agreement. Recently the TRIPS council extended the drug patent exemption for the LDCs which was to expire in January 2016 to 2033.[360] Under this exemption the generic manufacturers in LDCs can continue to copy and reproduce essential medicines which would have required patent protection.

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[356] B Mercurio 'TRIPS and access to medicines' in G Calster & D Prevost (eds) *Research Handbook on Environment, Health and the WTO* 1ed (2013) 238.
[357] M Matsushita *et al* (note 317 above) 719.
[358] Ibid 720.
[359] Ibid 721.
[360] WTO 'WTO members agree to extend drug patent exemption for poorest members' <*https://www.wto.org/english/news_e/news15_e/trip_06nov15_e.htm*>.

In light of the provision for transitional periods, Mercurio argues that 'it should be apparent that patent protection and the TRIPS Agreement could not have been the cause'[361] of the access to medicines problem. Countries like Brazil have thriving generic pharmaceutical industries but are still unable to adequately provide access to essential medicines in their respective territories.[362] It is also argued that developing nations lack resources to implement the TRIPS flexibilities.[363] Further that there is still potential for unilateral retaliation for not protecting intellectual property.[364] This shows that the access to medicines problem goes beyond the TRIPS Agreement. This faults the argument that the TRIPS Agreement impedes the realisation of human rights including the right to health. As shown above the Doha Declaration only accentuated TRIPS flexibilities that were already in existence. The TRIPS Agreement had always recognised the potential of patent protection to impede member states from realising the right to health. The Doha Declaration affirms that acknowledgement.

Mercurio argues that caution should be taken when receiving the human rights criticisms of the WTO and the TRIPS Agreement. It is argued that the 'blame is largely misplaced and often serves to disguise the true culprits.'[365] It is not within the context of this thesis to explore the validity of such claims. What is of notable interest to this thesis is that the TRIPS Agreement does allow space for WTO members to fulfil their obligations to realise the right to health. Further that the supposed antihuman rights implications of the TRIPS system could be unwarranted.

Although the Doha declaration centred mainly on access to medicines, it can also be taken to refer to all other measures taken to regulate public health including plain packaging measures. Accordingly, it gives the WTO members a broad mandate to implement measures to realise the right to health irrespective of the obligations to protect intellectual property rights.[366] The declaration is of value on all matters decided within the TRIPS Agreement which have implications on public health. Including the conflict between plain packaging measures and trademark protection. On the other hand, the Doha declaration is not a WTO Agreement and cannot therefore add or diminish any rights or

[361] B Mercurio (note 356 above) 240.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Ibid 269.
[366] H G Ruse-khan (note 324 above) 178.

obligations under the TRIPS Agreement. Caution must therefore be taken to recognise the obligations under the TRIPS Agreement.[367]

In light of the above, the WTO's TRIPS Agreement both in its text and interpretation allows room for members to realise the right to health. This thesis submits that the claims by the proponents of the health-over-trade opponents that, the WTO Agreements have negative public health consequences, and that the trading regime fails to cater for the right to health are unfounded.

### 3.4.2 WTO's Agreement on Technical Barriers to Trade (TBT) and the right to health

One of the objectives of the TBT Agreement is to ensure that technical regulations and standards, including packaging, marking and labelling requirement do not create obstacles to global trade.[368] Thus it acknowledges that packaging requirements for instance can be used to further protectionist goals.[369] Plain packaging of tobacco products measures are technical regulations and fall under the TBT Agreement.

Like most WTO Agreements, the TBT Agreement allows regulatory space for members to realise the right to health. In the preamble it states that:

> Recognizing that no country should be prevented from taking measures necessary …for the protection of human, animal or plant life or health, of the environment, … subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

Thus plain packaging measures will have to undergo a necessity test; if they satisfy the requirements of this legal test they might be found to be WTO compliant. Article 2.2 of the TBT Agreement affords ample leeway for members to pursue any legitimate objectives; it does not limit states to an exhaustive list of objectives.[370] Members are permitted to set standards at levels they consider suitable, but have to be able to defend

[367] Ibid 179.
[368] M Matsushita *et al* (note 317 above) 477 -80
[369] Ibid.
[370] M Matsushita *et al* (note 317 above) 497.

their choices if requested by another member to do so.[371] The Panel in *EC-Sardines*[372] held that Article 2.2 and the above mentioned preambular text confirm that members are free to choose which policy objectives to pursue and to set the levels of protection. Accordingly a degree of deference is given to member states choices to pursue policy objectives. The Panel held further that the TBT Agreement, shows less deference to 'the means which Members choose to employ to achieve their domestic policy goals.'[373]

The case of *United States- Measures Affecting the Production and sale of clove cigarettes*[374] concerned Section 907(a)(1)(A) of the Federal Food, Drug and Cosmetic Act *('FFDCA')* of the United States of America. The provision banned the sale of clove cigarettes but allowed the sale of menthol flavoured cigarettes. Indonesia claimed that this was discriminatory and unnecessary and therefore violated the relevant TBT Agreement provisions. The Panel rejected the claim that the measures violated Article 2.2, and were therefore 'necessary'.[375] Basically because there was extensive scientific evidence which showed that the ban on clove cigarettes could contribute to the reduction of youth smoking. The Panel in *US — Clove Cigarettes* held that it was self-evident that the objective of reducing youth smoking was legitimate, it stated that:

> We have already concluded that the objective of the ban on clove cigarettes is to reduce youth smoking. It is self-evident that measures to reduce youth smoking are aimed at the protection of human health, and Article 2.2 of the TBT Agreement explicitly mentions the 'protection of human health' as one of the 'legitimate objectives' covered by that provision. In *EC — Asbestos*, the Appellate Body stated that 'the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.[376]

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[371] World Trade Organisation, World Health Organisation 'The WTO Agreements and Public Health' (2002) 34 < *https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf*>.

[372] Panel Report, *European Communities – Trade Description of Sardines (EC — Sardines)*, WT/DS231/R, 29 May 2002, paras 7.119–7.120.

[373] Ibid.

[374] Panel Report, *United States- Measures Affecting the Production and Sale of Clove Cigarettes (US- Clove Cigarettes)* WT/DS406/R.

[375] *US – Clove Cigarettes* (note 384) para 7.432.

[376] Iid, para 7.347.

Instead, the Panel in *US-Clove Cigarettes* held that the measures violated Article 2.1[377] of the TBT Agreement because the measures were discriminatory.[378] Clove cigarettes and menthol flavoured cigarettes were regarded as 'like products' and the fact that less favourable treatment was accorded to clove cigarettes was discriminatory. The measures were therefore found to be WTO inconsistent. From this case it is evident that the WTO does recognise the importance of pursuing public health objectives. This case shows that the emphasis in WTO law is on how policies are pursued and not on the underlying objective.[379]

In light of the reasoning adopted in the aforementioned WTO *US-Clove Cigarettes* case, in as much as plain packaging measures might contribute to the realisation of the right to health, the manner in which they are applied could be WTO inconsistent. As an illustration, plain packaging measures that are applied to Marlboro cigarettes and not to Rothmans cigarettes would be declared discriminatory and WTO inconsistent.

*3.4.2.1 Non-WTO law and international standards*

The room for basing technical regulations on international standards is another avenue through which non-WTO law including human rights law could be infused into WTO law. According to the joint study by the WHO and the WTO, the TBT strongly recommends that members use international standards.[380] The joint study goes on to state that 'If a Member considers certain WHO standards appropriate to be adopted as national standards or technical regulations, it should use them.'[381] The question then would be whether the WHO FCTC provisions and guidelines are WHO standards? The joint study which was undertaken during the WHO FCTC negotiations period, submits further that:

> None of the provisions of the FCTC are inherently WTO-inconsistent; and many of the restrictions called for by some of its provisions may well be determined to be 'necessary' for health protection under WTO rules. However, some governments and NGOs are arguing that health objectives should take precedence over trade agreements. Thus, the relationship between WTO rules and the FCTC will depend on the direction that future negotiations of the FCTC take, and the manner in which its rules are applied by governments.[382]

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[377] Ibid, para 7.293.
[378] Ibid.
[379] World Trade Organisation, World Health Organisation (note 371 above) 13.
[380] Ibid, 14.
[381] Ibid, 34.
[382] Ibid, 76-77.

The status of the WHO FCTC under the WTO regime could play decisive role on the legality of plain packaging measures. The TBT creates a 'safe-haven' for international standards adopted outside the WTO regime (non-WTO law) - the question is do the WHO FCTC provisions fall under the category of international standards? The WTO has concluded that the WHO FCTC are not international standards. Later in this section the reasoning behind the WTO's decision will be evaluated.

Article 2.4 of the TBT Agreement provides that technical regulations can be based on international standards.[383] The provision on international standards in Article 2.4 of the TBT Agreement compels a three-step inquiry. First, an inquiry into whether there is an existing or imminent completion of a relevant international standard? Secondly, an inquiry into whether the international standard has been used as basis for the technical regulations? Lastly, whether the international standard is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued?[384] In the context of this thesis, it would have to be established whether the WHO FCTC provisions and guidelines including those requiring plain packaging measures are relevant international standards. Thereafter, it would have to be established that the plain packaging measures, are based on the WHO FCTC (the international standard). Lastly, it would have to be established that the plain packaging measures (international standards) are effective and appropriate in pursuing the legitimate objective of protecting and promoting public health.

The attractive incentive of basing TBT measures on international standards is the rebuttable presumption that such measures are in conformity with the necessity test in Article 2.2 of the TBT Agreement.[385] Article 2.5 of the TBT states that:

> Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

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[383] Article 2.4 of the TBT Agreement states that: 'Where technical regulations are required and relevant international standards exist or their composition is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulation except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.'

[384] Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US — Tuna II (Mexico))*, WT/DS381/R, para. 7.627.

[385] L Gruzczynski (note 72 above) 106.

The downside of this provision is the opaqueness within the TBT Agreement regarding what relevant international standards are. No specific organisations are enumerated as standard setting bodies within the TBT Agreement. To worsen the situation it defines the terms 'standard' and 'international body or system' separately in the Agreement.[386] It defines international body or system as a 'body or system whose membership is open to the relevant bodies of at least all members.'[387] Whilst a standard is defined as:

> A document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method[388]

The Panel in *US-Tuna II (Mexico)* held that of relevance is the definition of international standards provided by the *ISO/IEC Guide 2*(General Terms and Their Definitions Concerning Standardization and Related Activities) which states that these are standards adopted by the international standardizing organisations and made available to the public.[389] In *US- Clove Cigarettes* the Panel used the WHO FCTC as evidence of international consensus on aspects of tobacco control; however it did not consider whether it qualified as an international standard.[390]

The WHO FCTC is an international treaty that is legally binding and was adopted under the auspices of the WHO. The WHO is an international organisation with specific tasks in global health law.[391] To create the treaty the WHO relied on its Constitutional authority to adopt conventions with respect to matters falling under its competencies.[392] As a framework Agreement the WHO FCTC establishes general rules that are further elaborated through guidelines or protocols. It is worth noting that plain packaging measures

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[386] L Gruzczynski (note 385 above) 107.
[387] Annex 1.4 of the TBT Agreement.
[388] Annex 1.2 of the TBT Agreement.
[389] Annex 1 states that its terms unless defined otherwise in the TBT Agreement, shall have the same meaning as those included in the 1991 sixth edition of the ISO/IEC Guide 2(General Terms and Their Definitions Concerning Standardization and Related Activities); See also Panel Report, *US — Tuna II (Mexico)* (note 384 above) paras 7.663–7.665.
[390] Panel report *US – Tuna II (Mexico*) (note 384 above) para 7.414.
[391] WHO 'What we do' <http://www.who.int/about/what-we-do/en/>.
[392] Article 19 of the WHO Constitution.

as shown in chapter two of this thesis are proposed in the Guidelines for the implementation of Article 11 of the WHO FCTC.[393]

The WHO FCTC establishes a Conference of the Parties (COP) and the permanent Convention Secretary. The COP is composed of all the parties to the Convention which shows its international composition.[394] Of important note is that most of these are WTO members.[395] It is tasked with supervising the implementation process of the Convention and importantly is authorised to adopt additional protocols which regulate particular aspects of tobacco control policies.[396] It is also authorised to develop guidelines for the implementation of specific provisions.[397] The Guidelines are however non-binding.[398] The activities of the WHO FCTC and the COP include establishing common provisions for repeated use and can be taken as international standards under the TBT Agreement.[399]

The WHO FCTC is aimed at giving priority to the parties' right to protect public health.[400] Proponents for plain packaging measures can justifiably refer to the WHO FCTC. Liberman opines that the WHO FCTC is the 'international community's most powerful tool to combat tobacco and the tobacco industry.'[401] The convention is also an 'evidence-based treaty that reaffirms the right of all people to the highest standard of health.'[402] Accordingly plain packaging measures are supposed to be effective and appropriate to protect public health.

After it is established that the WHO FCTC provisions are international standards it must then be proven that they are relevant and form the basis for implementing plain packaging measures. The Appellate Body in *EC-Sardines* held that for the standard to be relevant it must have a 'bearing upon or relating to the matter in hand.'[403] In the context of

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[393] WHO Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control (decision FCTC/COP3 (10)) <http://www.who.int/fctc/guidelines/adopted/article_11/en/>.
[394] WHO 'Conference of the Parties to the WHO Framework Convention on Tobacco Control' <http://www.who.int/fctc/cop/en/>.
[395] L Gruzczynski (note 72 above) 113.
[396] Article 33 of the WHO FCTC.
[397] Article 7 of the WHO FCTC.
[398] L Gruszcynski (note 72 above) 108- 109.
[399] L Gruszcynski (note 72 above) 118.
[400] In the preamble the WHO FCTC affirms that it aims to realise the right to health as provided for in international human rights instruments.
[401] J Liberman (note 250 above) 50.
[402] Foreword of the WHO FCTC.
[403] Panel Report *EC — Sardines* (note 372 above) para. 7.68, quoting Webster's New World Dictionary (William Collins & World Publishing Co., Inc. 1976), p. 1199.

this thesis it is self-evident that the WHO FCTC is relevant, because it recommends the adoption of the measures in question. The WHO FCTC forms the basis for implementing plain packaging measures. The Appellate Body in *EC-Sardines* stated that 'as basis for' meant that 'there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other.[404] The WHO FCTC forms the fundamental or determining principle behind and is the primary constituent of plain packaging measures, therefore the latter measures would be held as based on the WHO FCTC.

The Appellate Body in *EC-Sardines* held that the TBT Agreement also requires that the international standard must not be ineffective or inappropriate in accomplishing the legitimate objective.[405] The WHO FCTC states in its preamble that it is evidence based. The WTO in *US-Clove cigarettes* as indicated above used the WHO FCTC as evidence that clove cigarettes were attractive to the youth. The WTO in *Australia – Tobacco Plain Packaging* also acknowledges the role the WHO FCTC plays as evidence that plain packaging measures are effective and appropriate.[406] Accordingly, it is arguable that the WHO FCTC provides basis for the implementation of plain packaging measures.

Nonetheless, the Panel in *Australia – Tobacco Plain Packaging* concluded that the WHO FCTC guidelines did not constitute an international standard, particularly that the guidelines did not meet the classifications of a standard. The Panel did not proceed to determine their international character or whether the WHO FCTC provided a basis for their implementation. For a document to constitute a standard it was supposed to be approved by a recognised body; provide for rules or guidelines for products or related processes or production methods; be meant for common and repeated use and not require mandatory compliance.[407]

Australia specifically mentioned elements of Article 11 and 13 of the WHO FCTC guidelines as the specific elements containing the document from which the TPP regulations were based. Due to the broadness and generality of the WHO FCTC guidelines it was necessary to identify with precision the specific parts that had been invoked as the

[404] Appellate Body Report, *European Communities – Trade Description of Sardines (EC — Sardines*), *WT/DS231/AB/R* para 245.
[405] Panel Report, *EC — Sardines* (note 372 above) para. 7.116.
[406] Panel Report, *Australia – Tobacco Plain Packaging.*
[407] Ibid, para 7.281.

international standards.[408] The absence of such clarity would hinder a proper assessment of whether it met the elements a standard was to be measured against.

According to the Panel, Australia failed to clearly identify the elements of the WHO FCTC which it relied on. Article 11 and 13 Guidelines did reflect plain packaging measures; but the WHO and FCTC Secretariat also identified additional elements as also relevant to plain packaging measures. There were differences in the identification of the core and relevant elements and these were also set in non-exhaustive, generic manner.[409] In fact these elements were meant to be read as part of the entire set of guidelines. Ultimately, the Panel established that the elements of the WHO FCTC could not be read independently and separately from their broader context.[410]

It was not clear which elements formed the document a WTO member should follow if they sought to adopt plain packaging measures. Although the Panel highlighted that this did not disqualify instruments which address various issues simultaneously;[411] it is evidently difficult to single out specific guidelines or rules from such instruments.

In addition even though the WHO FCTC Guidelines provide guidance they do so in different ways, showing the flexibility provided to parties of the convention. In that regard they were not meant for common and repeated use. To qualify as meant for common and repeated use, they are meant to be frequently shared alike, and be capable of achieving an optimum degree of order. On the contrary, the WHO FCTC guidelines can be implemented in an inconsistent and unpredictable manner. They recommend plain packaging features in different terms and with different levels of precision.[412] Members can then implement different plain packaging measures and be still equally consistent with the FCTC Guidelines.

Accordingly, the TPP regulations do not benefit from the rebuttable presumption under the second sentence of Article 2.5 that they are not more trade-restrictive than necessary. Members still have to show the necessity of plain packaging measures under Article 2.2 of the TBT Agreement. Could the WTO have watered down non-WTO law in this case? The Panel tried to reinforce the key role the WHO FCTC possessed in tobacco control policy, stating that:

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[408] Ibid, para 7.306.
[409] Ibid. para 7.328.
[410] Ibid, para 7.330.
[411] Ibid, para 7.301.
[412] Ibid, para 7.386.

> [the] FCTC and its Guidelines [were] referred to as evidence in support of specific arguments not only by Australia, but also by certain complainants. [there was no] basis to dismiss ex ante the relevance of these instruments, based solely on the fact that they do not constitute an 'international standard' [the WHO FCTC and its Guidelines will still] inform, together with other relevant evidence before us, our understanding of relevant aspects of the matters [of] "tobacco control measures … to reduce … the prevalence of tobacco use". Our determination above in respect of the second sentence of Article 2.5 is, therefore, *without prejudice to the relevance and probative value to be given to the FCTC* and related instruments in the context of other aspects of our analysis of the claims before us.[413]

However, this judgement indicates that the WHO FCTC cannot be used as a triumph card in a WTO dispute, it is relevant but it is not a decisive factor. On the other hand, this judgement does not refute the notion that the WTO allows space for members to pursue objectives to realise the right to health.

Ruse-Khan makes a proposal in relation to conflict of treaties, that if 'two or more valid and applicable rules point to incompatible decisions so that a choice must be made between them, the underlying rule-system which is more able to integrate the other system's rules applies.'[414] Wide criticism has been levelled against the WTO and its implications for the realisation of human rights, the right to health included. However it has been demonstrated in the above sections that it is capable of integrating rules from other international instruments. The criticisms levelled against the WTO system by the health-over-trade proponents have no justifiable basis. The WTO does allow policy space for members to fulfil obligations related to the realisation of the highest attainable standard of health. The WTO's recognition of the right to health as an 'interpretive principle…has done so much to establish health as a value in international law as have actions by international bodies directly focused on health.'[415] It has been a prime mover of international health law.[416]

## 3.5 CONCLUSION

The aim of this chapter was to explore the plain packaging debate from the right to health perspective. The conflict between health and intellectual property rights is not unexpected as this flows from the conflict which exists between individual and

[413] Ibid, para 7.416.
[414] H G Ruse-Khan (note 45 above) 330.
[415] M G Bloche 'WTO deference to national health policy: Towards an interpretive principle' (2002) 5 (4) *Journal of International Economic Law* 825, 848.
[416] Ibid.

community rights. The right to health is recognised under both national and international law. The right to health is far-reaching and it imposes obligations which mandate the states to adopt tobacco control policies. Moreover, the WHO FCTC will inform tobacco control related obligations which arise from the right to health. Therefore, plain packaging proponents can base their arguments on the right to health. The potential the right to health offers for tobacco control is yet to be capitalised on.

However the right to health cannot robotically trump the right to intellectual property. It is not a non-derogable rights and can be limited with justifications. Intellectual property rights are also protected by law, chapter four will establish the rationale of its recognition. Although tobacco control advocates are still to make the most out the right to health; they cannot use the right to push a health-over-trade approach. Limitations resulting from efforts to realise the right to health must still be justified.

The WTO does allow policy space for members to pursue public health objectives. Member states can implement any regulatory measures as long as they are proven to be necessary for the fulfilment of legitimate aims. As such WTO members in complying with duties and obligations under the international trading system do not have to violate their obligations to realise the right to health. In view of that the health-over-trade approach is not warranted because the WTO members do have sufficient room to regulate in the field of public health. The next chapter will explore the plain packaging debate from the trademark rights perspective.

## CHAPTER FOUR

## Plain Packaging Measures and Trademark Rights

### 4.1 INTRODUCTION

Chapter two explored the nature of plain packaging measures through an examination of the Australian legislation and the South African Control of Tobacco Products and Electronic Delivery Systems Bill. Additionally the World Health Organisations' Framework Convention on Tobacco Control's (herein after the WHO FCTC) plain packaging requirements were analysed. It was established that plain packaging measures could significantly intrude on the space previously left for tobacco trademarks. Unsurprisingly tobacco trademark owners have claimed that plain packaging legislation reduces their rights to a mere 'husk', and or at the very least that it amounts to a severe impairment of trademark rights.[1]

The trademark owners claim that plain packaging measures make it impossible for them to exploit their trademarks in a meaningful or substantive way, because everything that made the property worth having would be taken away. A key question for this thesis and for future litigation is whether plain packaging measures infringe upon trademark rights.[2] To be able to answer the question whether plain packaging requirements infringe trademark rights, the rights conferred upon a trademark holder must first be established.

The importance of clarifying the legal rights conferred upon trademark owners is evident in the 'right of use' argument. In the Australian High Court case on plain packaging legislation, the Commonwealth of Australia argued that plain packaging measures did not violate trademark rights because by their nature, trademark rights are strictly 'negative' rights and do not include a 'positive' right to use.[3] If contextualised as 'negative' rights only, the introduction of plain packaging measures would not take away 'anything' from trademark rights; rendering the claims made by the tobacco trademark owners null and void. In order to

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[1] *JT International SA v Commonwealth of Australia and British American Tobacco Australasia Limited v Commonwealth of Australia. Case* [2012] HCA 43 (n 12) para 282. Crennan J in her reasons for judgement noted that '…the plaintiffs described the effect on them of the Packaging Act as reducing their proprietary rights to a 'husk', as taking the entire 'substance' of those rights, as effectively 'sterilising' them and stripping them of all their worth or value.'

[2] See research questions in chapter one of this thesis.

[3] *JT International SA v Commonwealth of Australia,* para 5, Submissions by the Defendant <http://www.hcourt.gov.au/assets/cases/s389-2012/BAT_Def.pdf >.

determine the rights conferred on trademark proprietors it is also important for this chapter to scrutinise the 'right of use' argument.

Part II aims to establish what trademarks are and the rationale for their protection. Part III aims to establish the nature, extent and content of the rights conferred upon trademark holders, and discusses the potential limitations that plain packaging requirements could have on these rights. Part IV examines the right of use argument and Part V will conclude the chapter.

## 4.2 AN OVERVIEW OF TRADEMARKS AND THEIR RATIONALES

In terms of the South African Trade Marks Act 194 of 1993[4] a mark is defined as any sign capable of being represented graphically, including a name, letter, device, signature, word, numeral, configuration, shape, pattern, ornamentation, colour or container for goods, or any combinations thereof.[5] For a mark to be protected as a 'trademark', it must be used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in trade.[6] It is evident from the definition that what defines a trademark is actual use and its ability to fulfil a function (to distinguish goods or services in trade) in trade.[7] It is also recognisable that not only conventional trademarks such as 'brand names' can be regarded as trademarks. Non–conventional or non-word trademarks can also be protected. The Coca – Cola bottle is a common example of the recognition of 'shape' trademarks.[8]

From the definition of a mark it can be reasoned that a trademark can refer to a shape, logo or brand name standing individually or a combination thereof. If so it is beyond question that plain packaging requirements interfere with trademarks. The plain packaging measures prohibit the use of logos, colours, brand imagery or promotional information on packaging. Even though plain packaging measures permit the use of brand names, this is again subject to restrictions.[9] For instance the Australian plain packaging legislation prohibits ornaments,

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[4] Trade Marks Act 194 of 1993 (herein after the Trade Marks Act).
[5] Section 2 (x) of the Trade Marks Act.
[6] Section 2 (xxiii) of the Trade Marks Act.
[7] Trademark law applies to both goods and services; however this chapter will focus on goods.
[8] *The Coca*-Cola Company v Commissioner of the Japan Patent Office, Intellectual Property High Court / Decided May 29, 2008 / Case No. Hei 18 (ne) 10016; E Fukushima 'Court allows registration of Coca-Cola bottle as three-dimensional trademark'
<http://www.internationallawoffice.com/newsletters/Detail.aspx?g=2e024288-3ae1-475f-81f2-e70421c0e49c>
[9] Guidelines for implementation of Article 11 of the WHO Framework Convention on Tobacco Control, para 46.

colour or any fancy features on the tobacco product packages.[10] It also mandates that all packages be rectangular in shape, no rounded or embellished edges are allowed.[11] Similarly, the South African Draft Control of Tobacco Products and Electronic Delivery System bill only allows word trademarks on the packaging, albeit, in a prescribed typeface and color.[12] Non-word trademarks are prohibited and word trademarks are allowed in a restricted form.

The plain packaging requirements raise a horde of legal issues from a trademark law perspective, considering the acknowledged legal recognition of trademarks. South Africa recognises that trademarks are property[13], as such they benefit from constitutional protection. In the case of Laugh *It Off v SAB International* Harms J held that the fact that trademark property was intangible did not make it of a lower order.[14] Accordingly trademark holders possess a valuable interest deserving of the same property right protections that real property is given.

Certain statutory rights and protections are also conferred on trademark holders through the Trade Marks Act. For instance under section 34 (1) (a) trademark holders have the right to stop unauthorised use of an identical mark or of a mark so nearly resembling it in the course of trade in relation to goods in respect of which the trade mark is registered, if such use is likely to deceive or cause confusion.[15] Trademarks are also protected through the common law tort of passing off, which prohibits misrepresentations made by another trader that their goods are the goods of the other.[16] It is evident that the law protects trademarks in various forms; and it becomes significant to examine whether such protections include protections from the 'potential legislative threat to trademark law in the form of plain packaging legislation.'[17] The constitutional, statutory and common law rights will be addressed in detail in the subsequent sections of this chapter.

Interfering with an object, whether tangible or not does not automatically raise legal claims. There must be an interference with a recognised entitlement to which an appeal can be

[10] Tobacco Plain Packaging Act No 48 of 2011 (Herein after the Australian Tobacco Plain Packaging Act).
[11] Section 18 of the Australian Tobacco Plain Packaging Act.
[12] Draft Control of Tobacco Products and Electronic Delivery System bill, 2018, section 4 (2) (e).
[13] A Smit 'Trade-mark dilution – You can't laugh it off' (2004) 10 (4) *Juta Business Law* 196, 197.
[14] *Laugh it Off promotions v SAB International CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* (CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005), para 8, 10.
[15] Section 34 (1) (a) of the Trade Marks Act.
[16] *Distilleerderij Voorheen Simon Rijnbende en Zonen v Rolfes, Nebel & Co* 1913 WLD 3.
[17] L Harms 'Plain packaging and its impact on trademark law' (2013) 46 (2) *Dejure* 26.

made and through which support is available for the protection and promotion of the interests or freedoms of the right holder.[18] To be able to examine whether any of the constitutional, statutory or common law rights mentioned above are limited by plain packaging requirements, a full review of the nature, content and extent of these rights will be undertaken. Before exploring that, the next section will take a step back and examine the functions of trademarks and the rationale for their protection.

An exploration of the functions that trademarks perform in commerce will provide a comprehensive understanding of the rationale for their protection. The reasons for their protection must be somewhat associated to their role in commerce. In the same manner this exercise will inform the legal rights that trademark owners hold. It is significant to analyse the relationship between the rights conferred on trademarks and the functions that trademarks discharge in commerce.

### 4.2.1 A trademark as an indicator of origin /source

It has been commonly stated that the essential function of a trademark is to guarantee the identity of the origin of the trademarked product to the consumer by enabling them without any possibility of confusion to distinguish between products in trade.[19] The South African courts have viewed this function as the 'true basis' for the protection of trademarks.[20] In *Shalom Investments (Pty) Ltd v Dan River Mills Incorporated* the court held that the 'essence of a trade mark is that it is a badge of origin'[21] it indicates that the goods to which it is attached originate from the proprietor of the mark.

The trademark discharges two inseparable functions; it indicates origin or source and at the same time distinguishes goods in that process. In its early stages the use of trademarks involved the branding of cattle and pottery products with the objective of distinguishing

[18] J Feinberg 'In defence of moral rights' (1992) 12 (2) *Oxford Journal of Legal Studies* 149, 152. On the definition of a legal right.

[19] R S Smith 'Unresolved tension between trademark protection and free movement of goods in the European Community' (1992) 3 (1) *Duke Journal of Comparative. & International Law* 89, 90; Case 102/77 *Hoffmann-La Roche v. Centrafarm* ECJ 23 May 1978; Case C-487/07 *L'Oréal SA v Bellure NV* [2009] ETMR 58.

[20] B Rutherford 'The law of trade marks' in H Klopper et al (eds) *Law of Intellectual Property in South Africa* (2011) 71, 83. See also *Shalom Investments (Pty) Ltd v Dan River Mills Incorporated* 1971 (1) SA 689 (A); *Protective Mining & Industrial Equipment Systems (Pty) Ltd (formerly Hampo Systems (Pty) Ltd ) v Adio-lens (Cape) (Pty) Ltd* 1987 (2) SA 961 (A).

[21] *Shalom Investments (Pty) Ltd v Dan River Mills Incorporated* (note 20 above) para 44-45.

ownership.[22] In modern times trademarks do not always indicate physical origin, trademarks simply indicate that goods emanate from the same commercial source. Denicola correctly argues that trademarks are indicators of a more general connection between the trademark owner and the trademarked goods, more than they are indicators of physical origin.[23]

The importance of a trademark to identify and distinguish cannot be overemphasised, it is fundamental to the trademark law regime.[24] According to the Trade Marks Act, a trademark can only be registered if it is capable of fulfilling this function.[25] This is the core of trademarks; the ability to fulfil other functions is contingent on the ability to distinguish.[26] The extent to which plain packaging measures limit this function, if it does at all is debatable. In the case of *JT International SA v Commonwealth of Australia* her honour Crennan J held that the claim by the tobacco trademark owners that the Tobacco Plain Packaging Act deprived them of the reality of proprietorship in their property was an overstatement.[27] Crennan J held that:

> The 'reality of proprietorship' of the plaintiffs as registered owners of composite trademarks is that, *used alone,* albeit in the manner restricted by the Packaging Act, the *brand names* 'Winfield', 'Dunhill', 'Camel' and 'Old Holborn' *are capable of discharging the core function of a trademark – distinguishing* the registered owner's goods from those of another, thereby attracting and maintaining goodwill.[28] (My emphasis)

The question raised is whether prohibiting the use on non-word marks and allowing the use on word marks albeit in a limited manner affects the ability of trademarks to discharge their distinguishing function. Crennan J argued that the primary functions of source identification and product distinction were not hindered by the plain packaging legislation because word

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[22] C D G Pickering *Trade marks in Theory and Practice* (1998) 37; B Rutherford (note 20 above) 72; G Richardson 'Brand Names before the Industrial Revolution' (2008) National Bureau of Economic Research, working paper No. 13930 2; M A Naser 'Re-Examining the functions of trademark law' (2008) 8 (1) *ChicagoKent Journal of Intellectual Property* 99, 100.

[23] R C Denicola 'Some thoughts on the dynamics of federal trademark legislation and the Trademark Dilution Act of 1995' (1996) 59 (2) Law *and Contemporary Problems* 75, 77.

[24] See V S Vadi 'Global health governance at a crossroad: Trademark protection v. tobacco control in international investment law' (2012) 48 (1) *Stanford Journal of International Law* 93, 121, on the origin function as one of the main functions of a trademark.

[25] Section 2 (xxiii) of the Trade Marks Act.

[26] M Senftleben 'Bringing EU trademark protection back into shape – Lessons to learn from keyword advertising'
<http://www.epip.eu/conferences/epip06/papers/Parallel%20Session%20Papers/SENFTLEBEN%20Martin.pdf
>

[27] *JT International SA v Commonwealth of Australia* (note 1 above) para 282 -28

[28] Ibid, para 293.

trademarks were still permitted to feature on the tobacco products.[29] Her honour went further to state that composite marks, like marks consisting of words or only the brand name alone, are assessed for registration on their ability to perform the distinguishing function alone and not to 'advertise goods or to promote sales'.[30] She then argued that since plain packaging legislation still allowed the use of brand names it did not prevent the core function of trademarks which was to distinguish between products.[31] Conversely, Harms submits that trademarks risk losing their distinctiveness because even the brand name cannot be used without restrictions.[32] Plain packaging legislation specifies the standardised forms in which the brand names must be used.

Trademark owners can register their brand names in stylised fonts. An illustration of this is the Philip Morris 'Marlboro' trademark, under the US Patent office, which consists of a stylized version of the word 'Marlboro'.[33] With standardised lettering the word trademarks will possibly be less distinctive, as such it can be argued that the ability of trademarks to distinguish in trade would be diminished by plain packaging measures.

A troubling aspect of plain packaging legislation is its complete ban of non-word trademarks. Trademarks can be more than just the wordmark it can combine word and non-word marks. Illustrative of this is a Philip Morris registered trademark consisting of the famous 'roof design located at the top of the design… A crest with an oval centre with the words PM USA located directly under the middle of the roof design. The words MARLBORO SMOOTH are located in the lower portion of the design directly above the words …'[34] Logos, colours and fancy designs also make the trademarks easily identifiable and distinguishable in trade. Consequently, eliminating the non-word segments of a trademark may reduce its distinctiveness and reduce its ability to prevent confusion in trade.

The ability of a trademark to distinguish is not solely dependent on the brand name. In cases of passing off, the South African courts have recognised the role of get-up[35] in distinguishing between products. 'Passing off (unlike trademark infringement …) requires that

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[29] Ibid.

[30] Ibid, para 285.

[31] Ibid.

[32] L Harms (note 17 above) 393.

[33] United States Patent and Trademark Office <http://tess2.uspto.gov/bin/showfield?f=doc&state=4808:9gjjta.2.1>

[34] Justia Trademarks 'Menthol PM USA Marlboro Smooth Uniquely Rich & Smooth - Trademark Details' <https://trademarks.justia.com/770/49/menthol-pm-usa-marlboro-smooth-uniquely-rich-smooth-77049118.html>

[35] This is understood to mean the whole visible external appearance of goods.

a comparison be made between the get-ups of the competing goods and not just the trademarks…'[36] In the case of *Hattingh's Yeast Ltd v Friedlin* the court restrained the imitation of the trader's distinctive get-up.[37] The defendant sold yeast of his own manufacture in boxes which had the exact copy of the plaintiff's package except that the brand names were different. Regardless of the differences in brand names the court found that the public would be deceived as to the source of the products because the get-up of both products was indistinguishable. This demonstrates that the brand name alone is not always able to prevent confusion and or deception as to the source of goods.

Another indicator of the effect that plain packaging legislation might have on the distinctiveness of trademarks is evident in its potential to increase counterfeiting. In response to the plain packaging proposals in the United Kingdom, British America Tobacco stated that the measures would enlarge business opportunities for counterfeiters. The mandated removal of difficult to copy features would not only facilitate counterfeit production but would make it tougher for both retailers and consumers to distinguish between original and fake products.[38] In the same light, Levin recommends that companies should incorporate revolutionary authentication and product differentiation technologies into their packaging as a means to detect and reduce counterfeiting.[39] Regrettably, some of these recommended features such as embellishments and ornaments are the very same features that plain packaging legislation seeks to eliminate.

This counterfeiting enhancing argument has been disputed by proponents of plain packaging measures. They argue that the pictorial health warnings that accompany the plain packaging measures would still make it tough to manufacture counterfeits.[40] However, evidence from experts in the carton-making industry indicates that the pictorial 'health warnings pose no real barrier to counterfeiters.'[41] The scheme creates a market where

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[36] *Adidas AG & another v Pepkor Retail Limited* (unreported case numbers 187/12; [2013] ZASCA 3 (28 February 2013), para 32.

[37] *Hattingh's Yeast Ltd v Friedlin* 1919. T.P.D. 417.

[38] British American Tobacco UK Limited 'UK Standardised Packaging Consultation Response Of British American Tobacco UK Limited' (2012) 54 <http://www.bat.com/group/sites/uk__9d9kcy.nsf/vwPagesWebLive/DO8WZC5E/$FILE/medMD8WZC6J.pdf >

[39] K Lewis 'The fake and the fatal: The consequences of counterfeits' (2009) 17 (1) *Park Place Economist* 47, 54.

[40] British American Tobacco UK Limited (note 38 above) 55.

[41] Transcrime -Joint Research Centre on Transnational crime 'Plain packaging and illicit trade in the UK' (May 2012) 20 <http://transcrime.cs.unitn.it/tc/1069.php> as quoted in British American Tobacco UK Limited (note 38 above) 57.

packaging will look so similar and essentially the same,[42] for instance it would be easier to imitate the brand name 'Marlboro' if it was required to be in times new roman font and black in colour. The brand name by itself, more so with its standardised lettering would be less distinctive and less likely to prevent confusion.

It can be argued that by restricting the manner or form that the word trademarks will appear and by ruling out non-word trademarks; plain packaging measures potentially obstruct the ability of trademarks to guarantee the identity of the origin of the product without any possibility of confusion. In this way plain packaging measures may possibly interfere with the core of trademarks.

### 4.2.2 A trademark as a guarantor of quality

There is an assumption that protecting trademarks would encourage manufacturers to consistently produce quality goods to maintain the value attached to the trademark.[43] This is because the expectations of consumers create economic pressure which induces the producers to keep constant quality. Certain marks naturally become identified with standards of quality, consistency, reliability and excellence.[44] By pointing out the desirable qualities of the products to which they are attached, some marks gain market share more than others. Through this role trademarks attain value. On the other hand, through this function the consumer is guaranteed that products with the same trademark will meet a consistent level of quality. Accordingly, the distinctiveness of trademarks must be protected to enable them to function as reflectors of quality.

It is only when a trademark is able to distinguish between competing products that, trademarked goods are able to maintain consistent desirable characteristics. [45] If their distinguishing capacity is hindered, this could result in counterfeits of lower quality and consumers would refrain from re-purchasing the products. If trademarked goods are unable to indicate a degree on consistent quality this could damage the ability of that mark to attract custom, and would destroy its reputation and value.

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[42] Ibid.

[43] B Rutherford (note 20 above) 84.

[44] C D G Pickering (note 22 above) 38.

[45] W Sakulin *Trademark Protection and Freedom of Expression: An Inquiry into the Conflict Between Trademark Rights and Freedom of Expression under European Law* (2011) 45.

Plain packaging measures would therefore be a barrier to the fulfilment of the quality function to the extent to which they are a barrier to the product distinction function of trademarks. If plain packaging legislation would make it hard to differentiate between fake and original products,[46] customers would not be able to depend on the trademarks as guarantors of quality.[47]

On the one hand consumers would stop purchasing the products all together and the trademark would be devalued. This resonates with the claims by tobacco trademark owners that plain packaging affects the value of their trademarks.[48] The trademark would be unable to stimulate further purchases.[49] On the other hand, the consumers will be at risk of purchasing tobacco products that are more harmful if the quality function is destroyed. The trademark is supposed to protect the consumers from purchasing inferior goods in the mistaken belief that they originate from the same trader.[50] It has been found that counterfeit tobacco products are more dangerous, they have on average five times more cadmium and six times as much lead than the original tobacco products.[51] The former has been known to cause kidney and lung damages and the latter to cause cancer. Tobacco consumption is dangerous, however with the possibility of more counterfeits 'it probably got a lot more dangerous.'[52]

On the face of it, protecting the quality function is about protecting the ability of trademarks to attract custom and the value attached to it. Nonetheless, protecting the quality function is also about protecting the consumers. One can argue that in the plain packaging issue, the health of the public is also dependent on the protection of the quality function. The trademark must guarantee that the product featuring the mark has maintained the known properties and characteristics.

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[46] See V S Vadi (note 24 above) 107, on claims that plain packaging could facilitate trade in counterfeits.
[47] S J Gardiner The nature of the right to a trademark in South African law (Unpublished Thesis, UNISA 1995) 560.
[48] V S Vadi (note 24 above) 97.
[49] F I Schechter 'The rational basis of trademark protection' (1927) 40 (6) *Harvard Law Review* 813, 814, on the ability of trademarks to stimulate repurchases through the quality function.
[50] V S Vadi (note 24 above) 121.
[51] P Navaro *The Coming China Wars: Where they will be fought and how they will be won* (2007) 31; See also J A Grunor *Enough To Make you sick…Tainted and Counterfeit Imports!* (2009) 90.
[52] P Navaro (see note 51 above) 31; See also J A Grunor (note 51 above) 90.

### 4.2.3 A trademark as an advertiser and creator or protector of goodwill

The ability of a trademark to advertise goods, create and protect goodwill is important for the purposes of this thesis, as plain packaging legislation tries to stop the advertising and promotional capacity of tobacco trademarks.

Smaller or less popular trademarks can be just mere indicators of origin or commercial source. Conversely, bigger trademarks like 'Coca – Cola' and 'Marlboro' have been said to have a secondary meaning being 'independent of the goods it identifies and itself is a good.'[53] With time a trademark acquires consumer attracting properties which assists in selling the product on which it is used.[54] Trademarks communicate messages to the consumers, keep and gain their attention, trust and consequently induce or persuade customers to constantly buy the physical commodity.[55] From a general trademark perspective, it is accepted that trademarks can stimulate sales and promote the physical commodities attached to them.[56] In the 1980s advertisers also established that in addition to the physical commodities, consumers were also in search of goods that 'identified and differentiated them as individuals.'[57] By identifying with the consumers the trademark therefore has the ability to tap into the 'cultural or emotional framework' of customers.[58]

Trademarks are employed to exert a significant impact on what the public think of a product.[59] As a result consumers purchase trademarked goods to show their self – image, status, identity or for social inclusion.[60] By defining consumers and giving them a 'feel good' effect trademarks have become separate meta – goods or commodities.[61] As such trademarks have become key to commercial success.[62] Through the advertising function trademarks also facilitate the accumulation of goodwill. Goodwill is an asset that is build up by a good

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[53] W M Landes & R A Posner 'Trade mark law: An economic perspective' (1987) 30 (2) *Journal of Law and Economics* 265, 296.
[54] B Rutherford (note 20 above) 84.
[55] W Sakulin (note 45 above) 9, see also B Rutherford (note 20 above) 84.
[56] R G Bone 'Hunting goodwill: A history of the concept of goodwill in trademark law' (2006) 86 *Boston Law Review* 547, 549.
[57] W Sakulin (note 45 above) 9.
[58] Ibid, 10.
[59] F I Schechter (note 49 above) 813 – 833.
[60] Y J Han, C J Nunes & X Drèze 'Signaling Status with Luxury Goods: The Role of Brand Prominence' (2010) 70 (4) *Journal of Marketing* 15,18; W Sakulin (note 45 above) 12.
[61] W Sakulin (note 45 above) 11.
[62] F Mostert 'Trademark dilution and confusion of sponsorship in United States, German and English Law' (1986) *International Review of Industrial Property and Copyright Law* 80, 86.

reputation as well as constant consumer satisfaction.[63] As such consumers are tied to a brand because of goodwill.[64] Goodwill also enables the trademark holders to transfer positive associations from one product to another totally different product sold under the same trademark.[65] The above discussion, confirms the importance of trademarks in attracting custom or in luring customers.

The ability to attract custom is protected through the law of passing off. Passing off protects the reputation and or goodwill of the mark against free riders.[66] Passing off is where one trader adopts a mark or get-up that resembles that of another trader so much that the public or a substantial section thereof may be confused regarding the source of the goods. The public would be confused or deceived into believing that the goods of the trader are the same or connected to that of the rightful owner of the mark or get-up.[67] In protecting against passing off the 'law does not permit A to use the brains and the money of B in order to establish a trade of his own.'[68]

In the case of *Adidas AG & another v Pepkor Retail Limited* it was recognised that as a result of extensive marketing, promotion and extensive use, the three stripe mark had become highly distinctive such that it was identified with Adidas products.[69] Ackermans and Pep Stores were interdicted from selling trainers and soccer boots which prominently featured two and four parallel stripes. The court found that in doing that the respondent was passing off its goods as being those of Adidas.[70] In restraining passing off the law protects the investments made in building up a trademark or get-up. It recognises that the ability of a trademark to attract custom or its advertising ability is accumulated through extensive promotion and investments. Alberts submits that the nature of a mark, the degree of distinctiveness, sales figures, promotional expenditure on the marketing of products bearing the mark or get-up, and the period of use are all factors that contribute to the building of a reputation.[71] The law of passing off protects that

[63] W Sakulin (note 45 above) 46.
[64] R G Bone (note 56 above) 570; W Sakulin (note 45 above) 46.
[65] W Sakulin (note 45 above) 47.
[66] W Alberts 'A tale of two remedies in Competition and intellectual property law' (2006) 14 (2) *Juta Business Law* 44.
[67] *Adidas AG & another v Pepkor Retail Limited* (note 36 above) para 28.
[68] *Hattingh's Yeast Ltd v Friedlin* (note 37 above) para 420.
[69] *Adidas AG & another v Pepkor Retail Limited* (note 36 above) para 4.
[70] Ibid, para 39.
[71] W Alberts (note 66 above) 1.

right to attract custom and the right to goodwill against free riders.[72] The advertising and goodwill functions of trademarks are therefore protected and respected in South African law.

Plain packaging measures seek to stop exactly that persuasive force or advertising effect of trademarks. The protection of the advertising and goodwill function of trademarks can potentially conflict with the right to health if the trademarked product is hazardous to health. In the case of tobacco products, protecting this function would result in more people consuming tobacco which as indicated in the previous chapters of this thesis, is dangerous to health. Tobacco consumption is responsible for the death of more than five million people yearly and this figure is expected to rise to more than eight million by 2030.[73] Vadi argues that protecting the investment and advertising function of trademarks puts too much emphasis on trademark rights and that this could jeopardise other values, such as free speech and public health.[74] Thus it is argued that protecting trademarks must be balanced with social welfare goals.[75]

Despite this tobacco trademark owners maintain that 'plain packaging would not be effective in reducing smoking… since tobacco packaging is not a relevant factor…' in the decision to smoke or quit.[76] Crennan J disagrees with that statement and posits that the real reason why tobacco trademark owners objected to plain packaging legislation is because of the 'extinguishment of the advertising and promotional functions' of the trademarks.[77] The package is the last space upon which the plaintiffs could promote and advertise tobacco producers.[78] Crennan J held that:

> The restrictions in the Packaging Act *may reduce the volume of the plaintiffs' sales* of tobacco products in retail trade, the *value of associated goodwill* in the trademarks and associated businesses, and the *value of rights to assign or license such marks*. However, s 51(xxxi) is not directed to preserving the value of a commercial business or the value of an item of property. (My emphasis)

In light of the above quote, one can argue that plain packaging measures can reduce the ability of trademarks to not only advertise and attract custom but to also create and perpetuate

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[72] O Salmon *Dilution as a Rationale for Trade Mark Protection in South Africa* (Unpublished LLM Dissertation, UNISA 1990) 14, 15, on how dilution law also protects the advertising value of trademarks.
[73] V S Vadi (note 24 above) 95.
[74] V S Vadi (note 24 above) 121.
[75] Ibid.
[76] British American Tobacco UK (note 38 above) 2.
[77] *JT International SA v Commonwealth of Australia* (note 1 above) para 287.
[78] Ibid.

goodwill. From the above discussion, it is also worth pointing out that, the claim that there is a relationship between the persuasive effects of trademarks and the consumption of tobacco products is not illogical.

### 4.2.4 Preliminary Conclusions

It is argued that a trademark in its entirety includes its ability to advertise, protect goodwill, identify and distinguish products and to guarantee the quality of products.[79] Trademarks acquire varying levels of significance in the course of trade, through the owner's investments in the quality and branding of the underlying products.[80] The strength and value of trademarks come only from use in the course of trade; therefore the legitimate expectations of those who rely on them must not be frustrated. It is also important to note that plain packaging measures could interfere with the discharge of these functions. The next section will explore the rationales for the protection of trademarks.

### 4.2.5 The rationales behind trademark protection

#### *4.2.5.1 The lowered search-costs rationale*

General and welfare economics states that economic decisions and rules are adopted if they contribute to the maximisation of the general good.[81] Trademarks are viewed as important tools in the facilitation of communication in markets and also in incentivising producers to supply quality goods consistently.[82] Accordingly they should be protected as they enhance the general good in markets.[83] Sakulin submits that the economic cost/benefit analysis, which views trademarks as significant instruments in the regulation of market communication is the 'most appropriate' rationale for justifying trademark rights.[84]

Trademarks are viewed as remedies for market failures which can be caused by information asymmetries.[85] A situation of asymmetric information is where consumers make purchasing decisions without full information about the products.[86] It takes considerable time

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[79] T C Jehoram 'The function theory in trade mark law and the holistic approach of the ECJ' (2012) 7 < *http://www.boek9.nl/files/2012/Artikelen/Tobias_Cohen_Jehoram_the_function_theory_in_trademark_law.pdf* >

[80] C D G Pickering (note 22 above) 32.

[81] W Sakulin (note 45 above) 52.

[82] B Beebe 'The semiotic analysis of trademark law' (2004) 51 *UCLA Law Review* 621, 623.

[83] D R Desai 'From trademarks to brands' (2012) 64 *Florida Law Review* 981, 984.

[84] W Sakulin (note 45 above) 53.

[85] D.R Desai (note 83 above) 984; W Sakulin (note 45 above) 52.

[86] A Schwartz & L L Wilde 'Imperfect information in markets for contract terms: The examples of warranties and security interests' (1983) 69 (8) *Virginia Law Review* 1387.

for consumers to be well-informed about the products in a highly competitive market.[87] As a result sub-optimal decisions are made which can lead to market failure.

The search cost theory proceeds from the premise that economic equilibrium is attained in a market where consumers make well informed decisions.[88] Trademarks are viewed as crucial tools in the achievement of a situation of perfect information because they improve the transfer of information to the consumers.[89] In a market where no reliable trademarks exist consumers would find it difficult to search for products and product information.[90] Reliable trademarks carry reliable, readily available information and as such reduce search costs.

In order for trademarks to be able to remedy information asymmetric situations the origin and distinguishing function of trademarks must be protected.[91] Only when trademarks are constantly reliable can they function as communicators. If free riding is allowed consumers will not be able to attach experience characteristics to commodities and this would destroy the search cost reduction ability of trademarks.[92] Accordingly this economic theory justifies the protection of the origin and product distinction function of trademarks.

The search cost reduction theory also justifies the protection of the advertising and goodwill function of trademarks. A trademark that carries goodwill is highly distinguishable and reputable. As a result consumers are able to rely on the reputation which signifies high quality in purchasing decisions and reduces search costs.[93] This ability of trademarks to communicate is protected by anti-dilution law, as dilution could erode this ability.

Proceeding from the premise that economic rationales support the maximisation of the overall good in commerce, some effects of advertising are problematic. In as much as the advertising and goodwill function of trademarks is capable of reducing search costs, it also has welfare decreasing effects. The goodwill and advertising function enables trademarks to work as psychological commodities.[94] By creating 'commercial magnetism' consumers end up

[87] W Sakulin (note 45 above) 53.
[88] Ibid 54.
[89] S L Dogan & M Lemley 'A search – cost theory of limiting doctrines in trademark law' (2007) 97 *The Trademark Reporter* 1223; W Sakulin (note 45 above) 54.
[90] J Ammar *Think Consumers: The Enforcement of the Trademark Quality Guarantee Revisited, a Legal and Economic Analysis* 1ed (2011) 22- 24.
[91] S.L Dogan, M Lemley (note 89 above) 1226; W Sakulin (note 45 above) 54 – 55.
[92] Ibid.
[93] W M Landes, R Posner (note 53 above) 265 – 309; W Sakulin (note 45 above) 59.
[94] W Sakulin (note 45 above) 61.

purchasing products for style or prestige. [95] This goes against the economic rationale that states that consumers must make rational purchasing decisions.[96]

The consumers buy the physical commodity and the advertised mental image separately. [97] According to the image – congruence hypothesis purchasing decisions are influenced by trademark images. Consumers purchase to achieve congruence between their own self-image and how society views them.[98] In that way trademarks fulfil needs that are totally isolated from the physical commodity.[99] Perception advertising plays on the desires and psychological needs and diverts attention from the real qualities of goods. [100] A relevant example of perception and psychological advertising in tobacco products is the cigarette brands 'pink dreams' and 'slim cigarettes' which were discussed in chapter two of this thesis. In addition to the obviously feminine brand names the cigarette package and products are predominantly pink in colour. Therefore when the advertising functions create barriers to market entry, an over materialistic society and obstructs rational purchasing decisions which in turn reduces economic efficiency, the justifications for the protection of this function could require reconsideration.

*4.2.5.2 The dynamic efficiency rationale*

The dynamic efficiency theory proceeds from the premise that if producers are able to recoup their costs they will invest more in consistently quality goods.[101] Trademark protection therefore has an efficiency enhancing ability. From that basis free-riding should be prohibited, because producers would not get proper remuneration for their trademarked commodities and would not put in effort to improve on quality.[102]

It should however be clarified that incentives in the case of trademarks is limited to secure 'orderly and efficient economic competition, by offering …means to

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[95] J S Bain *Barriers to New Competition, Their Character and Consequences in Manufacturing Industries* (1956).
[96] W Sakulin (note 45 above) 63.
[97] S J Dilbary 'Famous trademarks and the rational basis for protecting 'irrational beliefs'' (2006) John M. Olin Program in Law and Economics Working Paper No. 285 13.
[98] W Sakulin (note 45 above) 62.
[99] R S Brown 'Advertising and the public interest: Legal protection of trade symbols' (1948) 57 *The Yale Law Journal* 1165, 1205.
[100] W Sakulin (note 45 above) 63.
[101] B Andersen 'If 'intellectual property rights' is the answer, what is the question? Revisiting the patent controversies.' (2004) 13 (5) *Economics of Innovation and New Technology* 417, 419 - 420; W Sakulin (note 45 above) 55.
[102] D Barnes 'Trademark externalities' (2008) 10 *Yale Journal of Law and Technology* 23; W Sakulin (note 45 above) 56.

identify…products...'[103] It is not an incentive to create more trademarks. This rationale justifies the protection of the quality or guarantee function of trademarks.[104] Trade mark protection enhances competition by encouraging traders to manufacture and sell high quality goods thus boosting economic efficiency.[105] In view of that, the dynamic efficiency rationale protects the origin and product distinction function because without their protection there would be free – riding and manufactures would not be able to recoup the costs of their efforts.

The dynamic efficiency rationale also justifies the protection of the advertising and goodwill function of trademarks. As indicated earlier the erosion of the distinctiveness of a trademark could hinder the dynamic efficiency of trademarks. If harm on trademarks is properly defined, the theory justifies the prohibition of dilution. For instance third party use of trademark on inferior goods could tarnish the mark and erode its dynamic efficiency.[106]

*4.2.5.3 The Lockean labour rationale*

As part of the ethical and fair – based rationales the focus of the lockean labour rationale is on the entitlement of right holders in a society where there is respect for each other's rights.[107] The theory is grounded in the larger framework of justice. In Locke's theory 'every human in a state of nature owns himself and is owner over his capacity of labour.'[108] As such, anything that a man removes out of the state of nature through his own labour becomes his property.[109] Sakulin observes that in the case of trademarks, it is not only a matter of man and his labour but also a mix of investment.[110] As such the extended version of the theory would be applicable to both labour and investment.[111]

Much work, time and investment is put in the development of a trademark for it to be able to perform the advertising and goodwill functions.[112] Schechter argues that the trademark holders invest money and time to create unique marks, as such there is an ethical based right

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[103] W Sakulin (note 45 above) 56.
[104] Ibid.
[105] J Ammar (note 90 above) 21.
[106] W Sakulin (note 45 above) 61.
[107] B Andersen (note 101 above) 429.
[108] J Locke *Two Treatises of Government* (1823) 115, <http://www.lewport.com/cms/lib/NY19000328/Centricity/Domain/135/2%20treaties%20of%20gov.pdf >.
[109] J Locke (note 108 above) 116.
[110] W Sakulin (note 45 above) 75.
[111] Ibid 76.
[112] F I Schechter (note 49 above) 831.

to protect these marks against the erosion of this uniqueness.[113] To justify protection the advertising value must be as a result of the labour and efforts put into the creation of the mark. Schechter argues that the advertising power of signs that naturally 'carry positive connotations' like 'Lion' cannot be attributed to the right holder alone.[114] The trademark holder must therefore be entitled to the protection of the advertising and goodwill function only to the extent of which he created this function through his labour and investment.[115] In sum, the theories discussed above provide justifications for the protection of the trademark functions.

### 4.3 TRADEMARK RIGHTS IN SOUTH AFRICA

This section seeks to analyse the rights of a trademark holder in South Africa with a view to establish whether the above – mentioned functions of trademarks are protected under these rights. The Trade Marks Act provides proprietors of registered trademarks or famous foreign marks[116] with certain rights that will be discussed in this section.

The rights against confusion primarily protect the origin, product distinction and quality or guarantee functions of trademarks. South African trademark law protects trademarks against confusion through the prohibition of primary and extended infringement.[117] The rights against free – riding, blurring and tarnishment are provided for in section 34 (1) (c) of the Trade Marks Act. Trademark owners also have common law rights; section 33 of the Trade Marks Act provides that institution of claims under section 34 shall not affect the common law rights of trademark proprietors.[118] As such claims based on the Trade Marks Act and another based on common law can be simultaneously brought the court.[119] The Constitution also protects trademarks as property under section 25.[120] The rights conferred upon trademark owners can hence be derived from statute, common law and the Constitution; the section below will address some of these rights.

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[113] W Sakulin (note 45 above) 77.
[114] Ibid.
[115] Ibid.
[116] Section 35 of the Trade Marks Act.
[117] Section 34 (1) (a) and (b) of the Trade Marks Act; see also B Rutherford (note 20 above) 127.
[118] Section 34 of the Trade Marks Act.
[119] *Adidas AG & another v Pepkor Retail Limited* (note 36 above) in this case the appellant brought a claim based on section 34 (1) (a) and on passing off simultaneously.
[120] *Laugh it Off promotions v SAB International v SAB International* (note 14 above).

### 4.3.1 The rights conferred upon trademark owners under the Trade Marks Act

*4.3.1.1 The right against confusion under section 34 (1) (a)*

Section 34 (1) (a) of the South African Trade Marks Act states that an infringement will arise out of the '… unauthorized use in the course of trade in relation to goods in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion.'[121] The unauthorised third party must use an identical or closely resembling mark in the course of trade for which the trademark is registered, that could most likely cause confusion and deception. In primary infringement cases the plaintiff has the onus to prove that the use is in relation to goods in respect of which the trademark is registered.[122] It would suffice to show that there is a reasonable probability that a significant amount of people, particularly average customers would be confused or deceived as to the commercial origin of the goods.[123]

The court in the case of *Verimark (Pty) Ltd v BMW AG*[124] held that in the case of primary infringements what was required was an interpretation of the infringing mark in the eyes of the consumer. 'If the use creates an impression of a material link between the product and the owner of the mark there is infringement otherwise there is not.'[125] Therefore the infringement must create an impression that there is a link with regard to commercial source and the infringing use must be related to goods for which the trademark is registered.

This provision protects the origin and product distinction function of trademarks. Plain packaging measures do not directly infringe trademark rights in the manner provided for in section 34 (1) (a). However, its counterfeiting enhancing effects would lead to primary infringement of trademark rights. The provision creates rights to prohibit the creation of confusion by use of a strikingly similar or identical mark in a related course of trade.
Trademark owners would have a case against counterfeiters, if the latter imitates the formers' mark and creates a likelihood of confusion.

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[121] Section 34 (1) (a) of the Trade Marks Act.
[122] C E Webster & G E Morley *Webster and Page South African Law of Trade Marks* 4 ed (1997) (loose-leaf updated 2011) para 12.7.
[123] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 640; B Rutherford (note 20 above) 128.
[124] *Verimark (Pty) Ltd v Bayerische Motoren Werke AktienGesellschaft; Bayerische Motoren Werke AktienGesellschaft v Verimark (Pty) Ltd* (250/06) [2007] ZASCA 53; [2007] SCA 53 (RSA); 2007 (6) SA 263 (SCA).
[125] Ibid, para 8.

*4.3.1.2 The right against confusion under section 34 (1) (b)*

Section 34 (1) (b) of the Trade Marks Act provides that:

> the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion

This provision protects against extended infringement. Unlike in the case of primary infringement, the extended infringement is not limited to the goods for which the trademark is registered.[126] It also includes similar goods, however these have to be so similar to the registered goods such that this creates a likelihood that the consumers will be deceived into thinking that they are linked to the trademark holder.[127] The South African courts have held that in addition to sufficient resemblance between the goods, the degree of similarity between the marks can also be used to determine whether there is a likelihood of confusion.[128]

*4.3.1.3 The rights against dilution*

The third potential category of infringement is provided for in section 34 (1) (c) of the Trade Marks Act. It involves the prohibition of use of a similar or identical sign in relation to any goods regardless of their similarity to those for which the mark is registered. The sign must be identical or similar to the registered mark.[129] For a sign to be considered as identical it must reproduce without any additions or modifications all the elements constituting the mark or it must have insignificant differences that could go undetected by the average consumers. [130]

The prohibition avoids the possibility of third parties taking unfair advantage or free – riding on the coattails of a well-known mark and trading on the famous mark's reputation. It also prevents detriment to the distinctive character or repute of the registered trademark through blurring or tarnishment.[131] This form of infringement is hence not limited to use of a mark that will cause a likelihood of confusion regarding commercial source. Instead the degree of similarity must lead to the public establishing a connection between the registered trademark

[126] C E Webster & G E Morley (note 122 above) para 12.20; B Rutherford (note 20 above) 130.
[127] B Rutherford (note 20 above) 130.
[128] *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C).
[129] D Kitchin D Llewelyn & J Mellor et al *Kerly's Law of Trade Marks and Trade Names* (2005) 383.
[130] D Kitchin et al (note 129 above) 375.
[131] Ibid 384.

and the defendants sign. This association must then cause detriment or take unfair advantage of the distinctive character of the mark.[132]

Schechter submitted that 'if you allow Rolls Royce restaurants…Rolls Royce pants and …candy, in ten years you will not have the Rolls Royce mark anymore.'[133] The reason for prohibiting dilution is to preserve the reputation and selling power of the trademark.[134] Vast amounts of money are invested in building a strong trademark. Rutherford submits that the business growth is reliant on the meaning and importance of the trademark.[135] As such it becomes important to protect the value in this asset against dilution.

Blurring is the 'whittling away of a trademarks uniqueness,'[136] the distinctiveness of the mark is weakened or reduced.[137] As indicated in the Rolls Royce example this occurs when other traders use a similar or identical mark to identify their own goods. For instance using the famous mark 'Marlboro' for running shoes. In such instances there are no concerns for confusion, rather such use can weaken the power of the well-known mark to identify with a unique trader, through the creation of a relationship between the 'Marlboro' for cigarettes and the sign as used on running shoes. The selling power of 'Marlboro; becomes eroded and the value of the mark is gradually destroyed. On the other hand tarnishment occurs when the registered mark is connected to products of 'shoddy quality.'[138] Alternatively where the mark is portrayed in an unpleasant context, evoking unflattering thoughts about the trademark and the trademark holders.[139] This again is an impairment of the mark's capacity to attract custom or 'stimulate the desire to buy.'[140] Although different, blurring and tarnishment all erode the selling power of the trademark.

From the above discussion it is clear that the goodwill and advertising functions of trademarks are protected in South African law.[141] Webster and Morley submit that section 34 (1) (c) recognises that a trademark has a selling power, advertising function and commercial

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[132] Ibid.

[133] F Schechter (note 49 above) 813; C E Webster & G E Morley (note 122 above) para 12.24.

[134] B Rutherford (note 20 above) 130.

[135] Ibid.

[136] S J Dilbary (note 97 above) 21.

[137] *Laugh it Off promotions v SAB International* (note 14 above) para 41.

[138] *Triomed (Pty) Ltd v Beecham Group plc* 2001 2 ALL SA 126 (T) 15; S J Dilbary (note 97 above) 21 - 22.

[139] *Laugh it Off promotions v SAB International* (note 14 above) para 41; S J Dilbary (note 97bs above) 21.

[140] *Triomed (Pty) Ltd v Beecham Group plc* (note 138 above) para 22.

[141] *Verimark (Pty) Ltd v BMW AG* (note 124 above) para 12, on the protection reputation, advertising value or selling power of a well-known mark.

magnetism.[142] The owner of a mark that has become distinctive has a legitimate interest in maintaining the exclusivity of the mark. Thus the proprietor of the mark has a legitimate interest in avoiding 'everything which could impair the originality and distinctive character…as well as the advertising effectiveness derived from its uniqueness…'[143] Tobacco trademark owners also have a legitimate interest is avoiding everything that could impair the exclusivity and or advertising effectiveness of their marks. This explains the concerns tobacco trademark owners have with regard to plain packaging measures which could impair the distinctiveness, the selling power and the ability of the tobacco trademarks marks to guarantee quality.

However, infringement under section 34 (1) (c) only occurs when an unauthorised third party uses a similar or identical mark; in such a way that it is likely to take unfair advantage of or be detrimental to the repute or distinctive character of the mark.[144] The right to prohibit free – riding, tarnishment or blurring are all rights to exclude. Plain packaging could erode or devalue the advertising value and selling power, but not in the manner provide for by section 34 (1) (c).

Nonetheless it is important that the law protects the advertising value or selling power of trademarks.[145] Section 34 (1) (a), (b) and (c) only provide the manner in which rights acquired by registration can be infringed, it cannot be taken as a full portrayal of the rights conferred to trademark owners on registration. One can still argue that a trademark owner has the right to use the mark, Webster and Morley posit that by defining the ways in which the rights acquired by registration of a trademark maybe infringed, by implication section 34 confers upon the proprietor the exclusive right to use the mark in relation to the goods or in respect of which it is registered.[146] In the same manner it can be argued that the trademark owner has a right to an exclusive mark which includes protecting the selling power and advertising effectiveness of the trademarks. The ability of trademarks to attract custom, sell, create and perpetuate goodwill should be protected by law. Regulations should not reduce or take away this ability without just cause.

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[142] C E Webster & G E Morley (note 122 above) para 12.4

[143] *Premier Brands UK Ltd v Typhoon Europe Ltd* [2000] FSR 767 as quoted in *Laugh if Off Promotions* v SAB *International* (note 14 above) para 39.

[144] O Dean & A Dyer (eds) *Dean & Dyer Introduction to Intellectual Property* (2014) 470,151, 152.

[145] O Dean & A Dyer (note 144 above) 152.

[146] C E Webster & G E Morley (note 122 above) para 12.3.

In sum section 34 of the Trade Marks Act addresses the manner in which trademark rights can be infringed through the actions of unauthorised third parties.

Of importance is that the WTO Panel in the case of *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*[147] held that:

> the possibility of a reduced knowledge of previously well-known trademarks in the market does not, in itself, constitute a violation of Article 16.3, because Members' compliance with the obligation to provide well-known trademark protection under Article 16.3 of the TRIPS Agreement and Article 6bis of the Paris Convention (1967) is independent of whether well-known trademarks actually exist in the market. Outside its express obligation, Article 16.3 does not require Members to refrain from taking measures that may affect the ability of right owners to maintain the well-known trademark status of individual trademarks, or to provide a "minimum opportunity" to use a trademark in the market.[148]

> Further that:

> There is nothing in the text of the first sentence of Article 16.1 to suggest – as the complainants imply – an obligation by Members not only to provide protection where likelihood of confusion does arise but also to maintain market conditions that would enable the circumstances set out in this provision, including a likelihood of confusion, to actually occur in any particular situation. Rather, Members must ensure that in the event that these circumstances do arise, a right to prevent such use is provided. Members can thus comply with this obligation regardless of whether any infringement activities actually occur in the market, or whether and when right owners actually choose to exercise this exclusive and private right that is at their disposal. In other words, whether unauthorized third parties actually use similar or identical signs on similar goods or services in the market, and whether such use actually does or does not result in a "likelihood of confusion" among consumers, is immaterial to the assessment of whether a Member ensures that a trademark owner has at its disposal the right to prevent such acts by third parties, in compliance with Article 16.1.[149]

The implications of this decision are that South Africa is not mandated to maintain market conditions that reduce the possibility of confusion. It is only under obligation to prevent use by third parties that creates the possibility of confusion and dilution. South Africa is also not under

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[147] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R.
[148] Pane Report, *Australia — Tobacco Plain Packaging* (note 147 above).
[149] Pane Report, *Australia — Tobacco Plain Packaging* (note 147 above).

a mandatory obligation to ensure that individual trademarks maintain their well-known status. However, as will be discussed in sections to follow, the TRIPS Agreement only sets the minimum standards for protection. Members are free to provide protection beyond these minimum standards.

### 4.3.2 Common law rights against passing off

Trademark proprietors have the right to attract custom, accompanying this right is the right to prohibit passing off. Passing off occurs when a trader uses the distinctive marks of a competitor in such a way that an impression is formed that those goods are that of the competitor.[150] This misrepresentation infringes the right to attract custom in that the trader uses the competitors' distinctive marks to draw consumers away from the competitor in an unfair manner.[151] The law of passing off therefore protects the reputation which is part of the goodwill or the 'attractive force that bring in custom.'[152]

To succeed in a passing off action it must be proven that there is a reputation connected to the trademark, get-up or trade dress.[153] Reputation has been held to mean an opinion held about a product by a relevant section of the community.[154] To prove reputation the plaintiff should prove that the mark or get-up has become distinctive and renowned among a substantial number of the public as related to his or her products.[155]

It must also be proven that there has been misrepresentation by the adversary that his goods are linked to that of the claimant.[156] Misrepresentation will result in the adversary diverting trade away from its rightful holder. Lastly it must be proven that such misrepresentation results in the deception or confusion of the consuming public.[157] Unlike in trademark infringement in deciding whether there is likelihood of deception or confusion, the courts compare all extraneous factors.[158] This is important as it shows that the brand name is only an element in comparing the distinctiveness of a product. The get-up and trade-dress is

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[150] H Klopper (note 20 above) 25; see also O Dean & A Dyer (note 144 above) 166.
[151] H Klopper (note 20 above) 25.
[152] O Dean & A Dyer (note 144 above) 166.
[153] *Premier Trading Company (Pty) Ltd and Another v Sportopia (Pty) Ltd* 2000 (3) SA 259 (SCA).
[154] *Adidas AG & another v Pepkor Retail Limited* (note 36 above)para 24; *Caterham Car Sales & Coach Works Ltd v Birkin Cars (Pty) Ltd* [1998] 3 ALL SA 175 (A); 1998 (3) SA 938 (SCA).
[155] *Adock Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W).
[156] O Dean & A Dyer (note 144 above) 170.
[157] O Dean & A Dyer (note 144 above) 175.
[158] *Hattingh's Yeast Ltd v Friedlin* (note 37 above)*; see also Hoechst Pharmaceuticals (Pty) Ltd v The Beaiuty Box (Pty) Ltd (in liquidation) and another* 1987 (2) SA 600 (A).

also a means through which traders build up a distinctive product and the goodwill related to it. Passing off therefore protects the distinguishing function of trademarks and get-up as a whole.

Tobacco trademark owners have a right to use and maintain distinctive trade dress and getup, including the arrangements of words, colours, designs, logos, lettering and which is enforceable through a passing off action. The trademark proprietors also have a right to goodwill which can again be enforceable through passing off. Recognition of the investments made in creating a distinctive and reputable mark which is able to attract custom is shown in passing off cases. Plain packaging has the potential to diminish the value attached to trademarks, its distinctiveness, and its ability to attract custom. It was recognised by the Australian courts that plain packaging measures may reduce the volume of the tobacco sales, the value of associated goodwill in the trademarks and associated businesses, and the value of rights to assign or license such marks.[159] Although tobacco trademark owners cannot institute passing off claims in the case of plain packaging legislation, it is recognisable that they have property that is worth protecting.

Tobacco trademark owners cannot institute infringement claims under the Trade Marks Act, or under the common law tort of passing off claims under common law in the case of plain packaging of tobacco products. Dean and Dyer have submitted that the objective of private law property is to protect property rights against third party infringements.[160] The above discussions on statutory and common law rights of trademarks in South Africa shows that the aforementioned rights fall under private property law. Conversely, constitutional property law seeks to protect property against unjustified state interference.[161] Plain packaging involves interferences with property; as such an evaluation of the rights of trademark owners under the Constitution is necessary.

### 4.3.3 Trademarks property under the Constitution

As shown in the discussions above, infringement claims under the Trade Marks Act and the common law tort of passing off do not apply to the issues that arise from the plain packaging case.[162] Instead, the Constitution is the likely medium through which tobacco trademark

[159] *JT international v Commonwealth of Australia* (note 1 above) para 295.
[160] O Dean & A Dyer (note 144 above) 466.
[161] O Dean & A Dyer (note 144 above) 466.
[162] Section 34 (1) (a), (b) and (c) of the Trade Marks Act, on the basis for infringement of rights conferred on registration of trademarks.

owners can protect their rights. Trademarks are recognised as property in South Africa,[163] and it is argued that trademark holders possess a valuable interest deserving of the same property right protections that real property is given under section 25 of the Constitution.

For the purposes of this chapter, the discussion of section 25 of the Constitution will be limited to section 25 (1) and (2). Section 25 (1) and (2) of the Constitution provides that:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application— (a) for a public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

On the one hand, Section 25 protects property rights against arbitrary state interference. On the other hand the provision also allows room for the state to pursue legitimate and valuable social objectives through regulation of the use of property.[164] It can be argued that the unreasonable or unlawful divestment of property rights is restricted under section 25.[165] The wording of section 25 necessitates an understanding of the two sided nature of property rights,[166] the right is determined by law and can be limited to realise important social goals.[167] It is important to examine the rights of tobacco trademark owners under the Constitution in light of the fact that property rights are not absolute and that they are to be balanced against competing societal goals.

The South African courts have gone beyond recognising trademarks as property under the Constitution, to grant them equal status with other fundamental rights in the Bill of Rights.[168] Harms J in *Laugh It Off v SAB International* stated that even though trademarks are intangible or incorporeal they are not of a lower order.[169] In this case the right to trademark property was balanced against the right to freedom of speech.[170] The court held that:

> The question to be asked is whether … the harm done by the parody to the property interests of the trademark owner outweighs the free speech interests involved … It

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[163] *Laugh it Off v SAB International* (note 14 above) para 8, 10, on the protection of trademarks as property.
[164] A J Van Der Walt & R M Shay 'Constitutional analysis of intellectual property' (2014) 17 (1) Potchefstroom Electronic Journal 55.
[165] H Klopper et al (note 20 above) 438.
[166] A J Van Der Walt *Constitutional Property Law* (2005) 13.
[167] A J Van Der Walt & R M Shay (note 166 above) 55.
[168] *Laugh it Off promotions v SAB International* (note 14 above).
[169] Ibid, para 8, 10.
[170] Section 16 (1) of the Constitution of the Republic of South Africa, 1996.

> seems to me that what is in issue is not the limitation of a right, but the *balancing of competing rights* … it would appear once all the relevant facts are established, *it should not make any difference in principle whether the case is seen as a property rights limitation on free speech, or a free speech limitation on property rights*. At the end of the day this will be an area where nuanced and proportionate balancing in a context - specific and fact - sensitive character will be decisive, and not formal classification based on bright lines[171] (My Emphasis)

This position is important for this thesis in view of the health-over-trade argument. It reaffirms the stance taken in chapter three that there is no justifiable basis for the health-overtrade approach, competing rights must be balanced. Trademarks are legally recognised and are of equal standing with the other fundamental rights in the Bill of Rights, including the right to health care services[172] and the right to an environment conducive to health or wellbeing.[173]

Irrespective of the recognition that section 25 protects trademark rights, the specific content of the trademark rights protected by this provision need to be established. In the case of *Laugh It Off v SAB International* the property clause was not dealt with; instead the court balanced the right to free speech against interests of the trademark owner under section 34 (1) (c) of the Trade Marks Act, which deals with dilution. Du Bois submits that the approach taken by the courts can be attributed to the principle of subsidiarity.[174] According to this principle a party cannot directly rely on the Constitution if there is legislation which specifically regulates the issue.[175] It is argued that in the case of plain packaging the Constitution will have to be directly relied upon because legislation does not adequately regulate the issues involved.

The case of *Laugh It Off v SAB International* involved a claim by South African Breweries that certain parody was tarnishing its Carling Black Label trademark. The applicant produced and was offering for sale to the public T-shirts, which bore a print that closely resembled the Carling Black Label trademark, in lettering, colour scheme and background. The only difference was in the wording. The words 'Black Label' were replaced, on the T-shirt, with 'Black Labour'; 'Carling Beer' was substituted with 'White Guilt'; and 'America's

[171] *Laugh it Off v SAB International* (note 14 above) para 82 – 83.
[172] Section 27 (1) of the Constitution.
[173] Section 24 (1) of the Constitution, which was addressed in chapter three of this thesis.
[174] M Du Bois 'Intellectual Property rights and the Constitution' in O Dean, A Dyer (eds) *Dean & Dyer Introduction to Intellectual Property* (2014) 470.
[175] M Du Bois (note 174 above) 470.

lusty lively beer…enjoyed by men around the world', was replaced with 'Africa's lusty lively exploitation since 1652…No regard given worldwide'.[176]

The Constitutional court held that the approach taken by the Supreme Court of Appeal (herein after the SCA) was flawed. First, the SCA had found that there was an infringement of SAB's trademark. Thereafter, it determined whether the value of freedom of expression justified the infringement. It is submitted that there are similarities between the approach taken by the SCA and the first three stages of the methodology developed in the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* case for interpreting section 25. This methodology which shall be discussed in detail later in this chapter provides that the initial enquiry should be whether there is deprivation of a property interest.[177] Thereafter an enquiry should be made into the arbitrariness of the deprivation.[178] One can argue that this is similar to the approach adopted by the SCA which had found that the parody was unfair and detrimental to the trademark, and had then held that the value of freedom of expression did not justify the detriment caused.[179]

As an alternative to the SCA's approach, the Constitutional court held that in determining whether the parody was detrimental or took unfair advantage of the repute of the mark, the value of freedom of expression was supposed to be considered.[180] What was unfair or detrimental to the mark in terms of section 34 (1) (c) was weighed against freedom of expression. The court held that the dilution provision was supposed to be interpreted in a manner most compatible with the Constitution. The purpose of the anti-dilution provision was held to that of preserving trade and commercial interests of marks which have a reputation by prohibiting use that materially undermines well renowned marks.[181] The court found that the appellant had failed to prove that there was likelihood of substantial economic detriment to the mark. The court held that there was '…not even the slightest suggestion that ….there had been a real possibility of a reduction of its market dominance or compromised beer sales.' Consequently, the court found that there was no unfair advantage or detriment to the repute of SAB's trademark.

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[176] *Laugh it Off v SAB International* (note 14 above) para 8.
[177] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), para 47.
[178] Ibid.
[179] *Laugh It Off v SAB International* (note 14 above) para 43.
[180] *Laugh It Off v SAB International* (note 14 above) para 44.
[181] *Laugh It Off v SAB International* (note 14 above) para 40.

The *Laugh it Off v SAB International* case suggests that the manner in which trademark rights are viewed under private property law will be different from that of section 25. In cases of dilution what is required is proof of a likelihood not of actual unfair advantage or detriment to the mark. Further in preventing dilution emphasis is placed on the gradual destruction of distinctiveness or the erosion of its repute. From the famous Rolls Royce example, if you allow tarnishing or blurring there is gradual whittling away of the repute of the mark. The purpose of barring tarnishment is to avoid all negative associations, even if those associations do not immediately confirm detriment. This is because if these negative associations keep showing up once in a while, over time there will be detriment. However in the *Laugh it Off v SAB International* case, the Constitutional court insisted that there was need to adduce evidence to show a likelihood of substantial economic detriment. Either one can argue that the courts moved towards the standard requiring proof of actual detriment, or it could be argued that under the Constitution trademark property rights could be watered down. The right against dilution under constitutional trademark property law is informed by section 34 (1) (c) but is not a direct extraction of that section. As held by the court in the *Laugh it Off v SAB International* case the anti-dilution provision under the Constitution must bear a meaning which is least destructive of other entrenched rights.[182] Dean correctly argues that:

> By virtue of the stature of the Constitutional Court, the necessity to adduce evidence to show the likelihood of suffering substantial economic damage … is now settled law. This evidence may be very difficult to come by … if it wished to succeed, Sabmark International should have adduced evidence that imputations of racist labour practices in the past by the producer of the beer would be likely to affect the eagerness of present - day consumers to consume the product. In factual terms, this evidence would be hard to find even if the factual situation existed. *Having to cross this hurdle is likely seriously to inhibit the use of the remedy provided for in s 34(1) (c) of the Act*. On the other hand, the interpretation placed on the section by the Constitutional Court is in effect no more daunting than the corresponding provision of the British Trade marks Act which requires that evidence of actual damage suffered must be adduced. (My emphasis)

The watering down of the anti-dilution provision could have been avoided if the Constitutional court had adopted the two step approach of the SCA. As indicated earlier the Constitutional court held that in deciding whether the parody was detrimental or took unfair advantage of the repute of the mark, the value of freedom of expression was supposed to be

[182] *Laugh it Off v SAB International* (note 14 above) para 48.

considered. It is submitted that this approach could be problematic if adopted in the plain packaging property disputes. For instance to decide whether there has been deprivation of the right to attract custom; the court must balance the right to health against the interests of the trademark holder. In the courts' words, what would be detrimental to the marks' ability to attract custom would be weighed against the health rights involved. The courts could find that there has been no deprivation and the enquiry would end there.

Alternatively if the court would adopt the approach taken by the SCA the court would first recognise that the right to attract custom is indeed property, which would reinforce this right for future cases. It would then decide whether there has been deprivation, if the answer is in the affirmative; it would then decide on whether the health rights justified the deprivation. The purpose of the balancing process is not to determine whether there has been deprivation on the contrary it is to determine the justifiability of the deprivation. It is submitted that if the Constitutional court had adopted the approach used by the SCA it still could have arrived at the same conclusion based on the justifiability of the limitation. This approach would have been preferable because it would have kept the right against dilution intact.

Regardless of this, the case of *Laugh It Off v SAB International* is still relevant to the protection of trademarks under section 25 of the Constitution. It is significant to the task of establishing the content of the right to trademark property. Although the court did not refer to section 25 it can still be argued that the recognition of the right against dilution 'must have been in terms of the property clause.'[183] It is submitted that the case points towards a right to trademark property which is informed by statutory and common law trademark law. From this case, for example, one can argue that the right to trademark property includes the right against dilution, similarly it would also include the right to goodwill attached to the mark.

It has been repeatedly argued that plain packaging measures restrict trademark rights, without a complete depiction of the content of the rights infringed, this could be explained by the vagueness of the concept of property itself.[184] In terms of Hohfeld's bundle theory of property, property is a 'complex aggregate of separate rights that have been merely bundled

[183] M Du Bois (note 174 above) 470.

[184] J C Crossley, E Lawson & E L G Tyler Crossley Vaines' Personal Property 5ed (1973) 3; A Bell & G Parchomosvsky 'A theory of property' (2004) 90 (3) *Cornell Law Review* 531, 533, 534; A Mossof 'What is property? Putting the pieces back together' (2003) 45 *Arizona Law Review* 371; T W Merill 'Property and the right to exclude' (1998) 77 (4) *Nebraska Law Review* 730 - 754; J E Penner 'The bundle of rights' picture of property' (1995) 43 (3) *UCLA Law Review* 712; E R Claeys 'Property 101: Is property a thing or a bundle?' (2009) 32 (3) *Seattle University Law Review* 617, 618.

together for ease of reference.' The owner of property has a very complex collection of rights not in a thing but rather against people.[185] The bundle theory does not indicate which rights or what has been commonly referred to 'sticks of the bundle', are required for there to be property.[186] Mossoff correctly argues that the bundle theory fails to clearly define property. As with any bundle of items, say a bag of fruits, people are free to pack it and rearrange it in whatever way they see fit.[187] One can take out bananas and still possess a shopping bag of fruit.[188] In the same manner the bundle theory does not say which rights must form the bundle of property. Honore attempted to salvage the bundle of rights theory of property by cataloguing a list of rights including the right to possess;[189] to use;[190] to manage; [191]to the income;[192] to capital; [193] to security; [194] the power of transmissibility; [195] the absence of term; [196] the prohibition of harmful use; [197] and liability to execution.[198] However the right to exclude other people from one's possessions which some have referred to as the *sine qua non*[199] of property was not included in this list.

It is outside the scope of the content of this thesis to delve into the debate of the bundle theory of property. Particularly the issues regarding the relative importance of each stick in the bundle, or the usual content of the bundle.[200] Of importance is that the most minimal

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[185] W N Hohfeld 'Fundamental Legal Conceptions as applied in judicial reasoning' (1917) 26 (8) *Yale Law Journal* 710, 750; P J Badenhorst, J M Piennar & H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 1.

[186] D R Johnson 'Reflections on the Bundle of Rights' (2007) 32 *Vermont Law Review* 247, 253; D B Klein & J Robinson 'Property: A bundle of rights? Prologue to the property symposium' (2011) 8 (3) *Economic Journal Watch* 193, 194.

[187] A Mossof (note 184 above).

[188] Ibid.

[189] See A M Honore 'Ownership' in A G Guest (ed) *Oxford Essays in Jurisprudence: a collaborative work* (1961) 371-374 .This is the right to 'exclusive physical control of the thing owned. Where the thing cannot be possessed physically' because it is intangible, 'possession may be understood metaphorically or simply as the right to exclude others from the use or other benefits of the thing.'

[190] Ibid, the right 'to personal enjoyment and use of the thing as distinct from' the right to manage and the right to the income.

[191] Ibid, the right 'to decide how and by whom a thing shall be used.'

[192] Ibid, the right 'to the benefits derived from foregoing personal use of a thing and allowing others to use it.'

[193] Ibid, it means 'the power to alienate the thing,' meaning to sell or give it away, 'and to consume, waste, modify, or destroy it.'

[194] Ibid, it means 'immunity from expropriation,' that is, the land cannot be taken from the right-holder.

[195] Ibid, It means 'the power to devise or bequeath the thing,' meaning to give it to somebody else after your death.

[196] Ibid, it means 'the indeterminate length of one's ownership rights,' that is, that ownership is not for a term of years, but forever.

[197] Ibid, it means a person's duty to refrain 'from using the thing in certain ways harmful to others.' This shows the limitations imposed on property holders as well.

[198] Ibid, it means liability for having 'the thing taken away for repayment of a debt.'

[199] T.W Merill (note 184 above) 730.

[200] A Bell, G Parchomosvsky (note 184 above) 279, 585.

formulation of the theory which includes the right to use, exclude and transfer, as well as the Honore's expansive conception can be useful in establishing trademark property rights. It is submitted that the right to use, exclude and exploit are constitutive elements of trademark property rights. Most of the incidents of ownership in Honore's list can be classified into these three elements. For instance Bell and Parchomovsky correctly argue that the right to income and capital should be seen as corollaries of the right to use.[201] This thesis concurs with Bell and Parchomovsky; however a slightly different approach is taken. Although three elements are advanced, it is argued that some of the rights fall into more than one category. Hence it is not easy to completely separate the three elements.

The right to use[202] the trademark property will therefore include the right to use the mark in in the manner in which it was registered.[203] It would mean the right to use the mark as a source indicator and to sell or advertise, create and protect goodwill. It would also consist of the right to use the mark to fulfil its functions free from encumbrances and free from infringement, or passing off.

The right to exclude would encompass the right to exclude others from benefiting from the mark or from damaging the mark. It would also include entitlements to prevent confusion, dilution or passing off. More importantly it would mean the right to a distinctive mark and to the benefits that arise from constructing and maintaining such a mark – such as goodwill and reputation. [204]

The right to exploit the mark would include the right to benefits and or income derived from use of the mark, from assigning and licencing the mark. It would also comprise of the rights to enjoy the ability of the mark to attract custom and to exploit the goodwill created and associated to the mark. This conception of trademark rights under the Constitution is in no way exhaustive, it is only suggestive in light of the interests protected under the Trade Marks Act and the common law tort of passing off.

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[201] A Bell, G Parchomosvsky (note 184 above) 585.

[202] The right to use argument will be addressed in a different light in subsequent sections of the chapter as it is relevant to plain packaging issues.

[203] International Trademark Association 'Brief of Amicus Curiae Submitted to the Dispute Settlement Panel of the World Trade Organisation in the cases DS434, DS435, DS458 DS467 of Australia – Measures concerning trademarks and other plain packaging requirements applicable to tobacco products and packaging' < http://www.inta.org/Advocacy/Documents/2015/INTAWTOPlainPackagingAmicusBriefApril2015.pdf>.

[204] D Scott, A Oliver & M Ley-Pineda 'Trademarks as property: A philosophical perspective' in L Bentley, J Davis & J C Ginsburg (eds) *Trademarks and Brands: An Interdisciplinary Critique* (2008) 290.

Although private trademark law does not provide a complete picture of trademark rights it informs the 'sticks' of the bundle. This approach would provide recourse for tobacco trademark owners in light of a scheme which erodes the distinctiveness of the mark, its ability to guarantee quality, to attract custom and protect goodwill. It also concurs with Gummow J's submission that the courts 'should lean towards a wider rather than a narrower concept of property and look beyond the legal forms to the substance of the matter.'[205] Du Bois submits that the South African courts should utilise Gummow J's approach in deciding when incorporeal property interests which could not necessarily be recognised as property in private law may be protected as property under the Constitution.[206]

It is argued that the right under section 25 is the right not to be arbitrarily deprived of trademark property. This property or bundle of rights includes the right to use, exclude and exploit the mark in the course of trade. These three elements form a collective component, as such interference with one or more sticks of the bundle could result in deprivation of the property.

*4.3.3.1 Do Plain Packaging measures amount to a deprivation of trademark rights?*

One of the aims of the previous section was to establish the 'sticks' of the trademark property bundle. The trademark holders have a right not to be arbitrarily deprived of those entitlements under section 25 (1). Further in terms of section 25 (2) if deprivation amounts to expropriation, compensation must be paid. A seven - step methodology was established in the *First National Bank of SA Ltd t/a Wesbank v Commissioner* case to interpret claims based on section 25.[207] In interpreting section 25 the court held that the questions to be asked were as follows:

a) Does that which is taken away from FNB by the operation of section 114 amount to 'property' for purpose of section 25?
b) Has there been a deprivation of such property by the Commissioner?
c) If there has, is such deprivation consistent with the provisions of section 25(1)?
d) If not, is such deprivation justified under section 36 of the Constitution?
e) If it is, does it amount to expropriation for purpose of section 25(2)?
f) If so, does the deprivation comply with the requirements of section 25(2) (a) and (b)?

[205] *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 (Federal Court of Australia), para 136.
[206] M Du Bois (note 174 above) 479.
[207] *First National Bank of SA Ltd t/a Wesbank v Commissioner* (note 177 above).

g) If not, is the expropriation justified under section 36?[208]

The approach developed by the courts is necessitated by the wording of section 25, which disallows arbitrary deprivation of property. Although there have been concerns that the provision could inhibit a general limitation analysis, the non-arbitrariness requirement compels the courts to make inroads into the rationality and proportionality of the deprivation. The examination for arbitrariness can be a mere rationality test or a full proportionality review depending on a case by case basis.[209] Some authors have submitted that in adopting this approach it is highly unlikely that an infringement found inconsistent with section 25 (1) and (2) could be conversely found consistent with section 36.[210] The proportionality test and the limitation clause in section 36 of the Constitution will be examined in chapter five and six of this thesis. To avoid repetition this chapter will focus on part two and five of the seven – step deprivation or expropriation of trademark rights and not on the arbitrariness of the deprivation.

Regulatory interference with the use, enjoyment or exploitation of the property was held to qualify as a deprivation in the *First National Bank of SA Ltd t/a Wesbank v Commissioner* case.[211] To qualify as deprivation the courts now require a substantial interference with the use, enjoyment and exploitation of property.[212] Trademark rights are like other property a bundle of rights, the question is which rights should be interfered with and to what degree should they be interfered with to amount to a deprivation of property. With regard to the former question, it is submitted that a comprehensive approach should be taken. All the elements, the right to use, exclude and exploit are all fundamental and give full meaning to the concept of trademark property. In view of that even if there is interference with only one of the elements this could still amount to deprivation.

In determining whether there has been a deprivation it must hence be proven that there is substantial interference with the elements of the property. From the discussion on private trademark property law, important issues were established which are relevant at this stage. Plain packaging measures reduce the distinctiveness of the trademark which is essential for the

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[208] Ibid, para 47.

[209] A J Van Der Walt & R M Shay (note 166 above) 60.

[210] P J Badenhorst, J M Piennar & H Mostert (note 185 above) 530.

[211] *First National Bank of SA Ltd t/a Wesbank v Commissioner* (note 174 above) para 57.

[212] *Mkontwana v Nelson Metropolitan Municipality; Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng (KwaZulu – Natal Society and Msunduzi Municipality* 2005 1 SA 530 (CC).

prevention of confusion, the ability of the mark to retain custom and to the value of its associated goodwill. Even the value to be exploited through the assignments and licences is reduced.

The right to use the marks is of significance considering that the real value of a trademark is in its use and commercial exploitation.[213] This right is limited as the regulations require trademark owners to cease using marks they have registered.[214] The scheme also interferes with the ability of a trademark to guarantee quality which could also reduce the value of its associated goodwill and its selling power. Plain packaging interferes with the right to use the mark, to exclude others from using it (by impairing the ability to distinguish and by creating a likelihood of confusion) and to exploit value or income from the marks. On these grounds it can be argued that plain packaging regulation does amount to a deprivation of trademark rights. The Australian[215] and the U.K[216] High courts have both acknowledged that plain packaging amounts to a deprivation of trademark rights.

To respond to the question presented in the introductory section of this chapter, whether plain packaging measures infringe upon trademark rights, a finding of deprivation is not enough.[217] There will be infringement of the right to trademark property under the Constitution only if the deprivation is arbitrary. Nonetheless a finding of deprivation is vital for the trademark regime. It reaffirms the importance and recognition of trademark rights as equal to other fundamental rights and discredits the health-over-trade arguments. More importantly it compels the state to furnish sufficient reasons for the deprivation.

Only arbitrary deprivations are unconstitutional, it is important to highlight that the state is allowed to regulate the use of property, in this case for the protection of public health. This makes the right to property complex as it has an inbuilt limitation clause unlike other fundamental rights. It is submitted that tobacco trademark owners will most likely succeed in the claim that plain packaging deprives them of valuable property. However, there are

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[213] *British American Tobacco & others -v- Department of Health* [2016] EWHC 1169 (High Court of Justice Queen's Bench Division, London) para 742.

[214] International Trademark Association (note 203 above).

[215] See *JT International v Commonwealth of Australia* (note 1 above) para 216, where Heydon J held that as a matter of form, the legislation had not deprived the proprietors of their proprietorship. But in substance it had deprived them of everything that made the property worth having.

[216] *British American Tobacco & others -v- Department of Health* (note 213 above) para 748, where the court held that plain packaging measures resulted in a 'curtailment of use.'

[217] See the research questions in chapter one of this thesis.

possibilities that the courts will find such deprivations justifiable. The links between tobacco and its devastating health effects are widely acknowledged. The challenge is whether plain packaging measures are effective in reducing tobacco consumption. Although not conclusive, in the most recent case on plain packaging laws in the United Kingdom, *British American Tobacco & others -v- Department of Health* the Australian Government gave evidence that stated that the scheme was working well and that it had a salutary effect upon the use of tobacco in Australia.[218] If the state proves that the deprivation is not arbitrary and is in compliance with section 36 of the Constitution; there will be no infringement of the right to trademark property under section 25.

Even if deprivations are justified, trademark owners could argue that the interference amounts to expropriation which would trigger compensation.[219] The main hurdle is to prove that there is expropriation and not mere deprivation.[220] Deprivations within the context of section 25 include extinguishment of rights previously enjoyed, or where property or rights therein are either taken away or significantly interfered.[221] The approach taken by the South African court shows that, deprivations can be extreme and still not amount to expropriation. In deprivation property holders may have to make sacrifices without compensation,[222] whereas in expropriation the state acquires property in the public interest and is required to pay compensation.[223] The problem is in proving that there was an acquisition of property, the court held that:

> To prove expropriation, a claimant must establish that the state has *acquired the substance or core content of what it was deprived of*. In other words, the rights acquired by the state do not have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired. Exact correlation is not required.[224] (My emphasis)

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[218] *British American Tobacco & others -v- Department of Health* (note 213 above) para 4.
[219] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), para 48, on the requirement of compensation for expropriations.
[220] E J Mararis 'Where does state interference with property (now) amount to expropriation? An analysis of the Agri SA court's state acquisition requirement (Part 1) (2015) 18 (1) *Potchefstroomse Elektroniese Regsblad* 2984, 2985.
[221] *Agri South Africa v Minister for Minerals and Energy* (note 219 above) para 48.
[222] Ibid.
[223] Ibid.
[224] Ibid, para 58.

Courts are wary not to extend the meaning of expropriation to situations where the deprivation does not effect an acquisition of the property by the state.[225] Mogoeng J argued that section 25 imposes an obligation to not over-emphasise private property rights at the cost of the state's social responsibilities.[226] On the one hand, adopting a meaning of acquisition that is too narrow could militate against the constitutional protection sought to be given to property rights. On the other hand an 'overly liberal interpretation of the concept of acquisition could blur the line drawn … between deprivation in section 25(1) and expropriation in section 25(2).'[227] In the case of plain packaging, it could be argued that the state would benefit in being in control of the tobacco packages. Further that in promoting health and pictorial warnings, a benefit accrues to the state. A proprietary interest had not been acquired, but the state would benefit from the effects of the scheme.[228]

In the Australian case of *JT International v Commonwealth* the claim that plain packaging amounted to acquisition of property other than on just cause failed upon the basis that there was no acquisition.[229] The court recognised that the restrictions effectively prohibited the plaintiffs from using their property for advertising or promotional purposes. Importantly that this was 'severe from a commercial viewpoint'[230] but it was held that that there was no acquisition of any proprietary right or interest by the Commonwealth. The benefit required by section 51 (xxxi) must be of a proprietary nature. This case revolved around the analytical pivot of 'acquisition', it failed on the basis that no identifiable proprietary benefit accrued to the state.

Similarly, in the plain packaging case of *British American Tobacco & others -v- Department of Health* case it was held that there was no expropriation.[231] The court based its judgement on the fact that the title or ownership of the trademark rights remained in the hands of the tobacco companies. The other factor was that the restrictions were for a legitimate public interest.[232]

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[225] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC), para 64.
[226] *Agri South Africa v Minister for Minerals and Energy* (note 219 above) para 62.
[227] Ibid.
[228] *JT International v Commonwealth of Australia* (note 1 above) para 364.
[229] M S Kennedy 'Australia's Tobacco Plain Packaging Act: Convergence of public health and global trade' (2013 - 2014) 39 *North Carolina Journal of International Law and Commercial Regulation* 591, 611.
[230] *JT International v Commonwealth of Australia* (note 1 above) para 306.
[231] *British American Tobacco & others -v- Department of Health* (note 213 above) para 39.
[232] Ibid, para 38.

This thesis disagrees with the reasoning presented in the two foreign cases, what should be considered is the substance of the property or whether there is meaningful use left for the property. Expropriation should also be said to have taken effect where the effect of the measures taken by the state has been to deprive the owner of access to the benefit and economic use of the property.[233] Plain Packaging measures not only take away the right to use but also deprive owners the economic benefits attached to maintaining the distinctiveness of the mark. It can be argued that although ownership remains in the tobacco trademark proprietors, these rights are rendered useless.[234] The *Agri South Africa v Minister for Minerals and Energy* case indicates that there is potential for the courts to interpret the requirement of acquisition differently. The court correctly held that there was no one-size-fits-all determination of what acquisition entails; a case by case determination of whether acquisition would have to be undertaken.[235] Considering the nature of the rights in issue, this approach would be beneficial for future property law cases.

This thesis argues that plain packaging requirements amounts to deprivation of trademark rights under the constitutional property clause. Further that such measure can be construed as effecting an expropriation of property.[236] Therefore it has to be proven that plain packaging measures are necessary and proportional.

### 4.3.4 The Rights conferred to Trademark holders under the TRIPS Agreement

The TRIPS Agreement recognises that trademarks are private rights,[237] and provides minimum protection for intellectual property rights.[238] Trademark proprietors of registered or well-known trademarks enjoy TRIPS protection, in WTO member countries.[239] In terms of Article 16.1 of the TRIPS Agreement, the trademark holder has the exclusive right to prevent all unauthorised third parties from using an identical or similar mark in the course of trade on

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[233] *Compañia del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica* (2000) (International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/96/1) para 77.

[234] *Starrett Housing Corporation, Starrett Systems, Inc, Starrett Housing International, Inc v The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat* (1983) 4 (The Iran-United States Claims Tribunal) 122 at 154; See *JT International v Commonwealth of Australia* (note 1 above) para 306, where the court conceded that the effects of plain packaging where severe from an economic point of view.

[235] *Agri South Africa v Minister for Minerals and Energy* (note 219 above) para 64.

[236] S A Hinchliffe 'Comparing apples and oranges in trademark law: Challenging the international and constitutional validity of plain packaging of tobacco products' (2013) 13 *John Marshall Review of Intellectual Property Law* 130,154.

[237] Preamble to the TRIPS Agreement.

[238] Article 1 of the TRIPS Agreement.

[239] D Gervais *The TRIPS Agreement: Drafting history and analysis* 4 ed (2012) 330.

identical or similar goods to those in respect of which the trademark is registered, where this would result in a likelihood of confusion.[240] As stated, albeit in a different context,[241] this right is not applicable within the plain packaging context. However, it is reflective of a right to use the trademark and of the interests in maintaining the exclusivity of the mark.

Article 20 of the TRIPS Agreement is applicable to the issues that arise in the plain packaging context.[242] It provides that the use of a trademark in the course of trade shall not be unjustifiably burdened or encumbered by special requirements. These special requirements include, 'use in a special form or use in a manner detrimental to its capability to distinguish the goods …'[243] The purpose of Article 20 is to avoid instances that make it impossible to maintain and use a trademark. For instance by impeding, hampering or imposing burdens in the discharging of its functions. In light of Article 20 it can be argued that trademark owners have the right, albeit a limited one to use trademarks in the course of trade free from unjustifiable encumbrances.

The WTO held that use in a special form means precise, specific details, unusual and even distinctive in a particular manner.[244] This thesis argues that plain packaging measures are special requirements which would meet the requirements of a special form. They encumber the use of tobacco trademarks.[245] Davison and Emerton submit that in light of this provision, restrictions on use of word trademarks imposed by the plain packaging laws must be

[240] Article 16.1 of the TRIPS Agreement states that: 'The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.'

[241] See the discussion on section 34 of the Trade Marks Act.

[242] M S Kennedy (note 229 above) 622, on the possible inconsistency of plain packaging measures with Article 20 of the TRIPS Agreement.

[243] Article 20 of the TRIPS Agreement.

[244] *United States – Article 110 (5) of the Copyright Act*, WT/DS160/R, June 1 2000, para 6.109.

[245] B Freeman, S Chapman & M Rimmer 'The Case for the Plain Packaging of Tobacco Products' (2008) 103 (4) *Addiction* 580, 585.

justifiable.[246] However there is contention that the provision for the ultimate ban on non-word trademarks does not fall under Article 20.[247]

Gervais argues that this approach is of questionable validity. It is questioned why Article 20 should be interpreted to prohibit the smaller and leave out the major encumbrances.[248] It is correctly argued that non – word marks are trademarks and that preventing their use would impede their ability to distinguish.[249] Use in a special form or use in a manner detrimental to its capability to distinguish between goods includes the total ban of non-word trademarks. This thesis argues that trademarks can include a combination of word and non – word trademarks, they all work collectively to distinguish in trade. The court in the *British American Tobacco & others -v- Department of Health* case disagreed with the argument that trademarks were capable of having standalone characteristics, when the tobacco trademark owners had claimed that a clear distinction had to be made between their word and non-word marks in dealing with the effect of the regulations.[250] The court held that the combined effect of logos and brand names was the bundle of property rights which had been affected by the regulation.[251] 'Whilst it is true that each trademark is in legal terms an independent property it is nonetheless the cumulative effect of the rights that matters…'[252] If one adopts the courts approach, it can be argued that prohibiting segments of a trademark (the non-word marks) is an encumbrance in the course of trade as provided for in Article 20 of the TRIPS Agreement.

What remains unsettled is whether the encumbrance is unjustified. Special requirements on the use of trademarks can therefore be allowed if justifiable.[253] Gervais argues that it would

[246] M Davison & P Emerton 'Rights, Privileges, legitimate interests, and justifiability: Article 20 of TRIPS and plain packaging of tobacco' (2014) 29 *American University International Law Review* 505, 539.
[247] A D Mitchell 'Australia's Move to the Plain Packaging of Cigarettes and its WTO Compatibility' (2010) 5 (2) *Asian Journal of WTO and International Health Law and Policy* 12; M Davison & P Emerton (note 243 above) 539; S A Hinchliffe (note 236 above) 19.
[248] D Gervais 'Analysis of the compatibility of certain tobacco product packaging rules with the TRIPS Agreement and the Paris Convention' Report for Japan Tobacco International < www.smoke-free.ca/trade-andtobacco/Resources/Gervais.pdf > 14.
[249] D Gervais (note 248 above) 14.
[250] *British American Tobacco & others -v- Department of Health* (note 213 above) para 746, the appellants argued that regardless of the position in relation to word marks; the analysis of the non-word marks was far more extreme and was a clear cut case of *de facto* expropriation of rights.
[251] *British American Tobacco & others -v- Department of Health* (note 213 above) para 749.
[252] Ibid, para 753.
[253] D Gervais (note 248 above) 330.

be justifiable under the TRIPS Agreement to allow health-related information to be displayed on a package without impeding reasonable use of the trademark.[254]

Justifiability should also be read in light of Article 8 of the TRIPS Agreement and the Doha Declaration on TRIPS and Public Health. Article 8 allows members to adopt measures necessary to protect public health provided that such measures are consistent with the provisions of this Agreement. Additionally the Doha Declaration on TRIPS and Public Health reiterates that the TRIPS should not prevent members from taking measures to protect public health. In light of the above plain packaging measures will have to materially contribute to the promotion and protection of public health, to justify the burden it imposes on the use of trademarks.

Justifiability in the context of Article 20 of the TRIPS Agreement should also be read in light of the provisions of the WHO FCTC. It is debatable, whether the fact that plain packaging measures are recommended by the WHO FCTC, is enough to satisfy the justifiability requirement The WTO makes provision for consideration of outside legal principles; as such it will consider the WHO FCTC in deciding whether plain packaging measures amount to an unjustified encumbrance.[255] However it has been submitted that given the limited scope of its obligations and the non-binding nature of the guidelines, the WTO might find the WHO FCTC 'is of little relevance.'[256]

In light of the above, trademark owners in South Africa have a right to use their trademarks free from unjustifiable encumbrances.[257] However, much like the property rights derived from the Constitution,[258] this right will only be infringed if the encumbrance is unjustified. Albeit in a different context, the WTO Panel and or Appellate Body will also employ the rationality and or proportionality tests to determine the justifiability plain packaging measures under the TRIPS Agreement.

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[254] Ibid.

[255] D W Layton & J C Lowe 'The Framework Convention on Tobacco Control and the World Trade Organization: A Conflict Analysis under International law' (2014) 9 (6) *The Global Trade and Customs Journal* 246, 249.

[256] D W Layton & J C Lowe (note 255 above) 250.

[257] South Africa is a WTO Member and bound by the obligations imposed by the TRIPS Agreement.

[258] Which allows for non-arbitrary deprivations.

## 4.4 THE RIGHT TO USE A TRADEMARK

The previous section of this chapter established the rights conferred upon trademark proprietors and the possible limitations that plain packaging legislation might have on those rights. This section examines the 'right to use' debate which has clouded the plain packaging matter, some have even argued that this argument is determinative of whether trademark rights are limited by plain packaging measures.[259]

Property is a bundle of rights and the right of use argument involves the debate over the granting of too many 'sticks' of the wrong type to trademark property. The question is whether the trademark bundle only has one stick, the right to exclude, or whether it has more 'sticks' including the right to use. It has been argued that trademarks are only negative rights, comprising of the right to exclude.[260] Conversely, others maintain that trademarks include both positive and negative rights, the right to use and to exclude.[261] Although this argument is momentous in the plain packaging debate,[262] the argument is not new to the property discourse. The right of use argument has been made in general property theories, where it has been termed the 'exclusion theory'.[263] Property theorists have argued that the right to exclude is the *sine qua non* of property,[264] however, it is important to note that even the right to exclude is not absolute. Merill argues that to deny someone the right to exclude then they have no property.[265] Conversely, Mossoff argues that property is more than the right to exclude, instead that the right to acquire, to use and to dispose exist before the right to exclude.[266] Mossoff submits that

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[259] V S Vadi (note 24 above)122.

[260] L Harms (note 17 above); see also T Voon & A D Mitchell 'Implications of WTO law on plain packaging of tobacco products' in A Mitchell, T Voon & J Liberman (eds) *Public Health and Plain Packaging of Cigarettes Legal Issues* 1 ed (2012) 109-136 ; M Davison 'The legitimacy of plain packaging under international Intellectual Property law: Why there is no right to use a trademark under either the Paris Convention or the TRIPS Agreement' in A Mitchell, T Voon & J Liberman (eds) *Public Health and Plain Packaging of Cigarettes Legal Issues* (2012) 81-108 .

[261] D Gervais (note 248 above); Memorandum from Lalive to Philip Morris International Management South Africa 'Why Plain Packaging is in Violation of the WTO Members International Obligations under TRIPS and the Paris Convention' < www.pmi.com/.../philip_morris_new_zealand_limited_submission_on_pdf >; S Stern & O Draudins 'Generic packaging – A bridge (Over the bodies of Intellectual Property Rights) too far?'(2011) 23 *Australian Intellectual Property Law Bulletin* 146, 151; A Kur 'The Right to use one's own trademark: A self-evident issue or a new concept in German, European and International Trademark Law' (1996) 18 *European Intellectual Property Review* 198, 203.

[262] *British American Tobacco & others -v- Department of Health* (note 38 above) *para* 73.

[263] A Bell, G Parchomosvsky (note 184 above) 597.

[264] T.W Merill (note 184 above) 730.

[265] Ibid.

[266] A Mossoff (note 184 above) 393.

exclusion is only to be understood by reference to these prior existing entitlements.[267] Evidently, there is lack of consensus on the exact rights which form the bundle of property.[268] Therefore, it is unsurprising that this discourse has extended to trademark property.

The precise characterisation of the rights conferred on trade mark owners is important in the investigation of the impact plain packaging measures have on trademark property. If contextualised as negative rights, the introduction of plain packaging measures could be argued not to affect trademark rights at all.[269] A negative right is defined as a right to be let alone, not to be interfered with; it obligates others to refrain from performing.[270] It thus permits or forces inaction by other persons. In the trademark context it means that a trademark right encompasses only the right to prevent third parties from using the registered or well-known mark.

On the other hand a positive right is defined as a right to permit or oblige action, it goes beyond non-interference.[271] Meaning that if a trademark right would be contextualised also as a positive right, it would entail a right or entitlement to use the trademark in the course of trade. Consequently, plain packaging measures would encroach on trademark rights as such measures limit the use of trademarks.

In the precedent setting Australian case of *JT International SA v Commonwealth of Australia,*[272] the issue regarding the nature of trademark rights was raised. The plaintiffs alleged that their statutory intellectual property rights had been acquired other than on just terms by the TPP Act.[273] To decide whether the TPP Act amounted to acquisition of property other than on just terms, the first aspect was whether there had been a 'taking'. The Commonwealth argued that the TPP Act did not take any property, essentially because the rights conferred on trademarks were negative rights and did not include a positive right to use

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[267] A Mossoff (note 184 above) 394.

[268] Ibid.

[269] S A Hinchliffe (note 236 above) 27.

[270] The Free Dictionary < *http://medical-dictionary.thefreedictionary.com/Negative+right* >

[271] Globalisation 101 'Negative vs. positive rights' <h*ttp://medicaldictionary.thefreedictionary.com/Negative+right*>

[272] *JT International SA v Commonwealth of Australia* (note 1 above).

[273] *JT International SA v Commonwealth of Australia* (note 1 above) Submissions by the Plaintiffs, 'BAT's trademarks: The registered owner of a trademark has the exclusive right to use or authorise others to use the trademark in relation to the goods in respect of which it is registered (here, tobacco). The concept of 'use' of a trademark involves use on or in relation to goods to distinguish the goods from other goods. A trademark is personal property and the registered owner of a trademark may deal with it as the absolute owner. The proprietary nature of a trademark inheres in the denotation of 'trademark' in Section 51 (xviii) of the Constitution.'

or exploit the trademarks.[274] Therefore, imposing restrictions on the use of trademarks would not take away anything from the rights granted, which did not include a right to use. It was stated that:

> What an owner gains by registration of a Trademark is relevantly no more than a monopoly right to exclude others from using the mark without the owner's authority, that is clear on the face of the Trademark Act and is supported by the history and context of its enactment... The imposition of new restrictions on use...takes nothing away from the rights granted. No pre-existing right of property has been diminished.[275]

Two important assertions were raised by the Commonwealth, firstly that trademark rights were negative in character, secondly that because of this, plain packaging legislation did not affect any pre-existing right. The judges did not agree on the first issue; however they all agreed that they had been a taking of property. French C J[276] agreed with the Commonwealth of Australia that trademarks were negative rights but held that the TPP Act rendered trademarks useless and this was sufficient to amount to a 'taking'. Gummow J also held that no liberty to use was granted by intellectual property rights but that their worth had been substantially impaired.[277] It can be argued that the majority of the judges did not completely respond to the assertions made by the Commonwealth. Although they agreed with the Commonwealth that trademark rights did not confer a right to use, they did not respond to the second assertion, which spoke to the effect of such a negative characterisation. Instead the judges proceeded to find that there was a restriction of trademark rights.

This gap leaves room for various interpretations. It could be that the court disagreed with the Commonwealth's reasoning. It could also be that trademark rights have other elements besides the right to exclude. One could also argue that the court erred in finding that trademark rights were only a right to exclude. The court ignored the legislation which explicitly provides that the rights conferred include a right to use under Australian law.[278] A trademark is more

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[274] *JT International SA v Commonwealth of Australia* (note 1 above), Submissions by the Defendant, para 44 – 46.

[275] Ibid, para 47 – 48.

[276] *JT International SA v Commonwealth of Australia* (note 1 above) para 36, it was held that 'It is a common feature of the statutory rights asserted in these proceedings that they are negative in character...'

[277] Ibid, para 78, it was held that 'As noted above, the TMA, like other trademark legislation, does not confer on registered owners or authorised users a liberty to use registered trademarks free from restraints found in other statutes**.'**

[278] E Bonadio 'Are brands untouchable? How availability and use of trademarks can be restricted for furthering public interests' (2014) 1(Fall) *Charlotte Intellectual Property Journal* 24. On the right to exclude in Australian trademark law.

than the right to exclude and that is the reason why the court still proceeded to find that they had been a 'taking' of property.

Significant dicta can still be drawn from the judgement, Heydon J for the minority, correctly held that the Commonwealths' assertions were 'utterly wrong'[279], and that trademarks included a positive right to use.[280] His Honour held that:

> Each property right conferred included a right of use by the owner. As a matter of form, the legislation had not deprived the proprietors of their proprietorship. But in substance it had deprived them of everything that made the property worth having.[281]

Heydon J held that this was 'more than the destruction of a substantial range of property rights.'[282] Although he arrived at the same decision regarding the 'taking' of property, Heydon J adopted a more coherent approach. His honour denied the first assertion and found that trademarks include a right to use; accordingly he held that this right was restricted and that they had been a 'taking' of property.

As indicated, French CJ did not fully respond to the assertion made, that plain packaging did not affect any pre – existing rights because of the supposed negative character of trademarks. However his honour went further to construct linkages between the supposed negative character of trademark rights and the failure to meet the requirements for acquisition. French CJ held that 'it may also be observed that the negative character of the plaintiffs' property rights leaves something of a logical gap between the restrictions on their enjoyment and the accrual of any benefit to the Commonwealth.'[283] Although this was not decisive of the question whether a proprietary benefit had accrued to the commonwealth, this makes a bad precedent. Even if the majority had agreed that trademarks conferred a right to use, the nature of the regulatory taking makes it impossible for the state or any other person to accrue a benefit of a proprietary nature. In so far as the state does not assume ownership of the mark, it is hard to prove accrual of a proprietary benefit. For one to acquire a proprietary benefit from a regulatory taking of a trademark, one would have to use the mark as their own.

In the *British American Tobacco & others -v- Department of Health* case on plain packaging the Secretary of State also asserted that restrictions on use is not a curtailment of

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[279] *JT International SA v Commonwealth of Australia* (note 1 above) para 216.
[280] Ibid, para 216.
[281] Ibid, para 216.
[282] Ibid, para 217.
[283] Ibid, para 43.

anything that can be said to be a trademark right.[284] Unlike the Australian court, these assertions were dismissed by the court which correctly held that the focus is on the substance not the classification of the right. It was held that the real value of a trademark resided in its commercial exploitation and use, and that without use a trademark would be an economic hollow.[285] The right of use argument is likely to be raised in future litigation arising from plain packaging measures, which makes it important for this thesis to examine this argument. The following sub-sections will primarily examine whether the TRIPS Agreement and South African Trade Marks Act provides for the right to use a trademark.

### 4.4.1 The Right of use under the TRIPS Agreement

It is acknowledged that the TRIPS Agreement does not confer an express right to use.[286] Some scholars have argued that TRIPS provides an implied right to use.[287] Conversely other scholars have argued that if it was the intention of the TRIPS Agreement to confer the right to use, it would have done so expressly.[288] One of the main contentions raised against a positive right to use is that it is unclear what the scope of the right would be. Bonadio questions whether the right to use would include 'the right to use brands for advertising harmful products such as tobacco … No doubt such an interpretation would jeopardize legal certainty.'[289]

Bonadio draws attention to the harmful nature of tobacco which is widely accepted however it is important to note that tobacco is still a legal product. As such tobacco trademarks should enjoy the same status as any other trademark.[290] extending a right of use to trademarks would ensure that governments only limit that right when it is necessary and justifiable to do so. It is equally important to ask what the effects of granting only a negative right to exclude would mean for the trademark system. Would it mean that governments can restrict use of any trademark for any other reason, on the basis that the negative right would not be jeopardized.[291]

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[284] *British American Tobacco & others -v- Department of Health* (note 38 above) para 737.
[285] *British American Tobacco & others -v- Department of Health* (note 38 above) para 742.
[286] S A Hinchliffe (note 236 above)15.
[287] D Gervais (note 245 above)11.
[288] E Bonadio (note 278 above) 23.
[289] E Bonadio (note 278 above) 23.
[290] See Article 15 (4) of the TRIPS Agreement which provides that 'The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.'
[291] Panel Report, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (*EC – Trademarks and Geographical Indications*), WT/DS174/R. March 2005, para. 7.210, on how the negative rights ensure that WTO Members pursue policy goals freely.

Bornadio also argues that Article 16.1 of the TRIPS Agreement confirms that trademark rights are negative.[292] In terms of Article 16.1 of the TRIPS Agreement, the trademark holder has the exclusive right to prevent all unauthorised third parties from using an identical or similar mark in the course of trade on identical or similar goods or to those in respect of which the trademark is registered, where this would result in a likelihood of confusion. Of relevance to this thesis, is the characterisation of the rights conferred on the trademark owners as negative. This stance was confirmed by the WTO Panel in *EC — Trademarks and Geographical Indications*, where it interpreted the exclusive right provided under Article 16.1 as a negative right that belongs to the owner of the registered trademark alone, to prevent unauthorised users from exploiting the trademark.[293] The Panel held that 'Article 16.1 of the TRIPS Agreement *only* provides for a negative right to prevent all third parties from using signs in certain circumstances.'[294] The right is therefore an exclusive right against all third parties to prevent use of similar or identical marks that could create a likelihood of confusion.[295]According to the Panel the TRIPS Agreement did not accommodate positive rights to exploit intellectual property.

If anything this negative feature of intellectual property was seen as fundamental by the WTO Panel. It allowed WTO Members the freedom to pursue public policy objectives, '…since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement.'[296] Accordingly members can regulate in the area of public policy without interfering with these negative rights.[297] At a closer look it is evident that the argument advanced by the Panel, is effectively the same argument advanced by the Commonwealth of Australia, that plain packaging measures would not affect trademark rights because they are negative in character.

One can argue that even if positive rights to use trademarks are conferred on trademark owners, this will not necessarily stop governments from implementing measures that prohibit or restrict trademark use to pursue legitimate objectives. The TRIPS Agreement in Article 8

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[292] E Bonadio (note 278 above) 12, 21, 22.

[293] *EC – Trademarks and Geographical Indications* (note 291 above) paras. 7.601–7.603.

[294] Ibid, para 7.611.

[295] D Gervais (note 239 above) 330.

[296] *EC – Trademarks and Geographical Indications* (note 291 above) para. 7.210.

[297] H G Ruse-Khan 'Assessing the need for a General Public Interest Exception in the TRIPS Agreement' in A Kur & M Levin (eds) *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (2011) 167-198.

provides room for members to pursue public policy objectives. As such the argument presented that the right of use would restrict pursuance of public objectives is mistaken.[298]

It is also important to note that the WTO Panel in the *Australian – plain packaging case* maintains that there exists no right to use a trademark. It states that:

> Article 16.3 does not establish a positive right to use a well-known trademark, and only provides for an undertaking by Members to refuse or cancel a registration, and to prohibit the use, of a trademark conflicting with a registered well-known trademark that is used on non-similar goods and services where (a) use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark, and (b) the interests of the owner of the registered trademark are likely to be damaged by such use.[299]

Further, Article 20 of the TRIPS Agreement provides that trademark use may not be unjustifiably encumbered by special requirements. Accordingly, Article 20 in restricting unjustified encumbrances recognises the privilege of holders to use their trademarks. Gervais correctly argues that Article 20 indicates that the spirit of the TRIPS Agreement is to allow use; otherwise there would be no reason to 'cabin the power of the WTO Members to 'encumber' such use'.[300] It provides a strong, 'positive entitlement to use' trademarks, not just a privilege to use the mark.[301] Frankel and Gervais submit that the TRIPS Agreement does not grant an absolute entitlement to use however, the absence of the latter would make the negative right to exclude irrelevant.[302] Governments have a duty not to interfere with this positive entitlement to use unless it is necessary within the meaning of article 8 of the TRIPS Agreement.[303]

This thesis argues that the absence of a positive right to use would make the negative right futile. Article 20 of the TRIPS grants trademark holders the right not to be unjustifiably encumbered in the use of their trademarks in the course of trade. From this provision it is submitted that the TRIPS Agreement includes a right to use the trademark, albeit an implicit one.

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[298] E Bonadio (note 281 above) 22, on the argument that 'the fact that the registration does not offer its owner a positive right to use the trademark allows governments to introduce measures that prohibit or restrict such use on public interest grounds.'

[299] *Australian – Plain packaging case* (see note 147 above) para 7.2098

[300] D Gervais (note 248 above) 12.

[301] S Frankel & D Gervais 'Plain Packaging and the interpretation of the TRIPS Agreement' (2013) 46 *Vanderbilt Journal of Transnational Law* 1149, 1212

[302] Ibid.

[303] Ibid 1204 – 1206.

The absence of an explicit right to use a trademark in the TRIPS Agreement only 'tells part of the story - namely, that there evidently is no absolute right to use, but that is far from a complete answer.'[304] They indicate that property rights by nature focus on the right to exclude to 'give parameters' on what third parties may or not do, 'the ability to exclude others from the property is frequently a touchstone of what makes something property.'[305] It does not define what the owner can do.[306] Further they highlight that the absence of an explicit right to use is not uncommon in most rights to property.[307] The right to use and the right to exclude are inseparable. Trademarks are meant to be used, despite the fact that the TRIPS Agreement does not contain an explicit right to use a trademark.[308]

A closely connected issue is the argument that plain packaging legislation will not jeopardise trademark rights because of their supposed negative character. Evans and Bosland posit that:

> Accepting such a negative conceptualisation means that the government's proposal to prevent tobacco companies from using trademarks on their products has no potential to interfere with property rights in the marks.[309]

The implications of an assertion that trademarks do not include a positive right to use are unclear. In the Australian High Court case, no common position was taken regarding the characterisation of trademark rights as negative or positive.[310] In fact the court rejected the Commonwealth's submission that because no positive right of use existed there was nothing for the plain packaging legislation to take.[311] It has been submitted that 'to use the debate over the…corresponding absence of an explicit right to use …as a full answer to whether or not plain packaging may be a TRIPS Agreement violation' is a defective interpretive technique.[312] However, in view of the WTO's stance on the nature of trademark rights it remains to be seen how the WTO Panel and Appellate Body will address this assertion.

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[304] Ibid 82.

[305] Ibid 1182 - 1183.

[306] Ibid 1184.

[307] Ibid 1182.

[308] D Gervais (note 248 above) 331.

[309] S Evans & J Bosland 'Plain packaging of cigarettes and constitutional property rights ' in T Voon, D Mitchell, J Liberman and G Ayres (eds) *Public Health and Plain Packaging of Cigarettes Legal Issues* (2012) 52.

[310] *JT International SA v Commonwealth of Australia* (note 1 above).

[311] Ibid.

[312] S Frankel & D Gervais (note 300 above) 1196.

Evans and Bosland highlight that the TRIPS Agreement provides for minimum levels of protection for intellectual property rights and this makes the 'all trademark rights are negative-rights'[313] argument of less importance. The TRIPS Agreement only sets out the minimum rights which Members must provide to the owners of registered trademarks. Instead Evans and Bosland argue that what is more important is the rights that have been actually granted to trademark holders under national laws.[314] Even critics of the presence of a right to use under the TRIPS Agreement posit that such a right could exist under national laws.[315]

### 4.4.2 The right to use trademarks in South Africa

Section 34 of the Trade Marks Act provides circumstances where unauthorised 'use' of marks would result in the infringement of trademark rights.[316] Primary and secondary infringement were both analysed in the previous sections of this chapter. The infringement clauses revolve on the notion of preventing use of a mark that is similar or identical which could cause likely confusion, deception and also detriment to a marks repute or distinctive character.[317] The Act therefore protects against 'use' by third parties or unauthorised use which would damage the distinguishing function and reputation of trademarks– the negative right. The infringement provisions are all exclusionary in nature,[318] they do not include a positive right of use – one can only bring a claim for infringement of trademark rights if the action interferes with the negative rights of trademark owners. Coca – Cola can bring an infringement claim where a third party imitates the 'shape' of the Coca – Cola bottle.[319] Conversely, the infringement clauses do not offer relief in circumstances where Coca – Cola is 'prohibited or prevented from using their trademarked bottle shape and instead required to use a plain looking bottle shape.'[320]

The common law tort of passing off is also focused on third-party-infringement and prohibits misrepresentations by an adversary that creates an impression that that those goods

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[313] Ibid.

[314] S Evans & J Bosland (note 309 above) 52.

[315] E Bonadio (note 278 above) 24.

[316] Section 34 of the Trade Marks Act.

[317] S Nyatsanza 'Plain packaging of tobacco products and the South African trade mark system' (2016) 6 (4) *Queen Mary Journal of Intellectual Property* 493, 497.

[318] W Alberts 'Trade Mark Infringement: Does a Retailer 'Use' The Trade Mark?' (2009) 126 (1) *South African Law Journal* 14 – 23.

[319] S Nyatsanza (note 317 above) 497 – 498.

[320] Ibid 498.

are that of the competitor.[321] Accordingly, it is not surprising that a lot of trademark cases in South Africa have been about preventing a third party from using an identical or similar mark which causes confusion or deception[322] – the negative right. Traditionally trademarks have hence been considered as negative or exclusionary rights,[323] however there are views from both a South African[324] and global perspective[325] that trade mark rights also encompass a positive right to use. One can even argue that in preventing use of a mark in the course of trade by unauthorised persons; trademark law in fact protects the right of the proprietor to use the mark free from interferences.[326]

It is not explicitly mentioned in the South African Trade Marks Act whether trademark rights include positive, negative or both rights. Section 34 (Infringement provision) opens up by a statement that 'the rights acquired by registration of a trademark shall be infringed by...' However, unlike the Australian Trade Marks Act No. 119 of 1995[327] or the New Zealand Trade Marks Act No. 49 of 2002[328] there is no enumeration of the rights acquired by trademark

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[321] Ibid.

[322] *Plascon Evans Paints Ltd v Van Riebeeck Paints* (note 123 above) ; *Bata Ltd v Face Fashions CC & Another* 2001 (1) SA 844 SCA; *Cowbell AG v ICS Holdings Ltd* 2001 (3) SA 941 (SCA);

[323] South African Institute of Intellectual Property Law 'Trade Marks' <http://www.saiipl.org.za/introip/72-trademarks >; L Harms (note 17 above) 392, on how trademarks are said to be negative rights. Harms goes further to state that trademark ownership 'gives a preferential right to use to the owner but not an absolute right to use the mark on the particular goods for which it is registered'.

[324] W Alberts 'The (Positive) Right To Use A Trade Mark: The Kurt Geiger Case' (2010) 21 (3) *Stellenbosch Law Review* 479 – 488; See also W Alberts 'The 'right' to use a registered trade mark or company name' (2006) 14 (3) *Juta Business Law* 110 – 113.

[325] M Oker–Blom & B D Alaminos 'Whether a trademark can be considered a positive or negative right has implications for many subjects, like the drive toward plain packaging legislation for tobacco products' (2014) *Intellectual Property Magazine* <http://www.intellectualpropertymagazine.com/trademark/the-right-to-use-a-trademark-103521.htm >

[326] S Nyatsanza (note 317 above) 498.

[327] Section 20 of the Australian Trade Marks Act No 119 of 1995, in section 20 it states that the trademark owner is given the exclusive right to use the mark and to authorise other persons to use the trade mark. However as shown earlier in this chapter, in the *JT International SA v Commonwealth of Australia* arguments were made that the Australian Trade Marks Act only grants trademark holders a negative right.

[328] Section 10 of the New Zealand Trade Marks Act 49 of 2002, enumerates the rights attached to trademarks. Section 10 states that:

'(1) The owner of a registered trade mark has, in relation to all or any of the goods or services in respect of which the trade mark is registered, the rights and remedies provided by this Act and in particular, has the exclusive right to—

(a) use the registered trade mark; and

(b) authorise other persons to use the registered trade mark; and

(c) assign or transmit the registered trade mark (either in connection with the goodwill of a business or not); and

(d) give valid receipts for any consideration for any such assignment or transmission.

(2) For the purposes of subsection (1)(a), a member of a collective association that owns a collective Trade mark that is registered in respect of goods or services

(a) has, along with the collective association, the exclusive right to use the trade mark in respect

owners at registration anywhere in the South African Trade Marks Act. The question therefore remains open; what is the nature and extent of rights conferred on trade mark owners? Are they negative rights only as shown in the instances where trademark rights are infringed?

The South African Trade Marks Act is unclear on whether it grants a right of 'use.' The activities that constitute use of a trademark are enumerated in Section 2 (2). It states that:

> (2) References in this Act to the use of a mark shall be construed as references to—
>
> (a) the use of a visual representation of the mark;
>
> (b) in the case of a container, the use of such container; and
>
> (c) in the case of a mark which is capable of being audibly reproduced, the use of an audible reproduction of the mark.
>
> (3) (a) References in this Act to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in physical or other relation to, such goods.
>
> (b) References in this Act to the use of a mark in relation to services shall be construed as references to the use thereof in any relation to the performance of such services.
>
> (4) The use or proposed use of a registered trade mark shall include the use or proposed use of the trade mark in accordance with the provisions of section 38, whether for the purposes of this Act or at common law.

Use hence refers to 'use' in the course of trade, in the market for which the trade mark is registered for. Section 1 of the Trade Marks Act mentions an 'exclusive right to use' firstly in relation to the definition of a 'limitation'. A limitation is defined as:

> any limitation of the exclusive right to the use of a trade mark given by the registration thereof, including a limitation of that right as to the mode of use, as to use in relation to goods to be sold, or otherwise traded in, or as to services to be performed, in any place within the Republic, or as to use in relation to goods to be exported from the Republic.[329]

The definition makes mention of an exclusive right to use stemming out of registration. It can be drawn from that definition that although the Trade Marks Act does not contain a provision which explains or lists the rights which stem from registration, trademark rights include both a right to use the trademark and the right to exclude third parties from using the

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of those goods or services; and does not have the right to exclude any other members from using the trade mark in rest of goods produced or services provided by the other members'

[329] Section 1 of the Trade Marks Act.

trademark. Limiting an exclusive right to use denotes that there exists an exclusive right to use, and it is very different from prohibiting a right to use. There is a right to use which can of course be limited under South African trademark law.

Further Section 62 (1) (d) of the Trade Marks Act imposes a penalty for persons who falsely make a representation to the effect that 'the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered in the register, the registration does not give that right.' Misrepresentations that an exclusive right to use exists are prohibited, it flows from this provision that an exclusive right to use can be granted, it exists. These two provisions support the argument that an implicit right to use is acquired through registration. It is the spirit of trademark law that the proprietor obtains a right to use the registered mark in the course of trade.

Additionally, the definition of a trade mark highlights that the mark must be 'used' or proposed to be 'used' meaning that one cannot register a mark for decorative purposes, 'use' and trademarks are inseparable. The Trade Marks Act defines a trademark as a mark intended to be used or used in relation to goods for the purposes of distinguishing goods connected in the course of trade. The definition of a trademark highlights that trademark use is significant.[330]

One qualifies to be a trademark applicant if they have a bona fide intention to 'use' a mark. Section 10 (3) provides that a mark in relation to which the applicant for registration has no bona fide claim to proprietorship is not registrable. Whilst section 10 (4) provides that a mark in relation to which the applicant for registration has no bona fide intention of using it as a trade mark, either himself or through any person authorised cannot be registered. In the *Victoria's Secret* case it was held that 'one can claim to be the proprietor of a trade mark if one has appropriated a mark for use in relation to goods or services for the purpose stated.'[331] Further, in the case of *Tie Rack PLC v Tie Rack Stores (Pty) Ltd* the court defined a claim to proprietorship as one where the applicant used the mark so extensively as to develop its repute or the applicant must have originated, acquired or adopted the trademark with the intent of using it. [332] The applicant must show that they have an intention to use the mark in the course

[330] D Kitchin et al (note 129 above) 28.
[331] *Victoria's Secret Inc v Edgars Stores Ltd* 1994 (3) SA 739 (A) 7441.
[332] Allie J quoting from *Tie Rack PLC v Tie Rack Stores (Pty) Ltd 1989* (4) SA 427 (T), in *Thabana Li Meli (Pty) Ltd v Thabani Wine (Pty) Ltd and Another* (unreported case numbers A552/2008) [2009] ZAWCHC 142 (28 August 2009) para 16.

of trade. The intention must be present, determined or settled at the time of application.[333] From this it is evident that 'use' is essential in trademark law.

Trademarks can again be removed from the register on the grounds of non – use.[334] Where there was no bona fide intention to use the trademark and where there has been in fact no bona fide use a trademark the life of registration will cease to exist. 'Use' is hence a strong prerequisite for trademark registration and protection. In the case of *New Balance Athletic Shoe Inc v Dajee* the court reaffirmed that trademarks are registered in order for the proprietor to use them and not merely to prevent others from using it.[335] The court went further to recognise that this principle was evident in section 27(1) (b) of the Trade Marks Act which allows for the removal of a trade mark from the register for non-use.[336]

It can be argued that if a trade mark owner is given the right to register then the mark is meant to be used in the course of trade. 'A trader registers or acquires a trade mark primarily not in order to prevent others from using it but in order to use it himself. Use by the proprietor is indeed a central and essential element of ownership…'[337] It would be pointless to register a trade mark and not 'use' it, because non-use leads to deregistration. If it is a prerequisite for a trademark to be registered that there must be an intention to 'use' and if non – use is a ground for deregistration[338] then registration and 'use' cannot be separated. Although not stated explicitly the South African trademarks system allows for both the positive right to 'use' and the negative right to prevent third parties from 'using' the mark.

Critics of the existence of a right to use trademarks in the international intellectual property regime argue that the boundaries of the nature and extent of the right to use would be difficult to create.[339] Davison questions, if 'adult magazines with their many trademarks such

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[333] C E Webster & G E Morley (note 122 above) para 3.53.
[334] Section 27, Section 10 (4) of the Trade Marks Act.
[335] *New Balance Athletic Shoe Inc v Dajee NO* (unreported case numbers 251/11) [2012] ZASCA 3 (2 March 2012) para 10; *AM Moolla Group Ltd v The Gap 2005 (6) SA 568 (SCA)*, para 26, where this was confirmed by the court.
[336] *New Balance Athletic Shoe Inc v Dajee NO* (note 326 above) para 10.
[337] Harms JA, quoting from the European Court of Justice, in *AM Moolla Group Ltd v The Gap* (note 326 above) para 26; European Court of Justice, 14 May 2002, *Holterhoff v Freiesleben*, Advocate General Jacobs Opinion <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=46621&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=220315 >; See also *The Gap Inc v Salt of the Earth Creations (Pty) Ltd and others (695/11)* [2012] ZASCA 68 (23 May 2012), a case where appeal to an order of expungement from the Register of Trade Marks on the basis of non-use in terms of the provisions of s 27(1) of the Trade Marks Act.
[338] Section 27, Section 10 (4) of the Trade Marks Act.
[339] M Davison (note 260 above) 88.

as Hustler and Penthouse [would] be permitted for sale to anyone of any age anywhere?'[340] The answer would be 'no.' the existence of a right to 'use' a trademark would not mean that the right is absolute; it can be subjected to limitations like any other right. However such limitations should be reasonable and justifiable.

Other South African scholars like Harms have submitted that intellectual property rights are negative rights.[341] In contrast Gardiner writing on the nature of trademark rights in South Africa has submitted that trademark rights include a positive right to use.[342] Gardiner posits that the positive aspect of the right is derived from the relationship between the trademark holder and the trademark.[343] The holder can hence assert entitlements derived from the trademark functions in a positive manner.[344] The act of registration confers on the holder the exclusive right to use the mark in relation to the goods for which the mark is registered.[345] The negative aspect of the trademark right on the other hand is derived from the relationship between the trademark holder and the third parties.[346] Thus the holder has a right to deny third parties use in situations which give rise to infringement provisions provided for in section 34 of the Trademark Act,[347] but also has a right to use the mark themselves.

The South African Court in the case of *Turbek Trading CC v A & D Spitz Limited* held that:

> It is often said that intellectual property rights are negative rights meaning that they do not give the holder a right to do something but only a right to prevent others from doing so. It is not necessary to debate the correctness of the theory in the present context *because trademarks are granted on the understanding that they will be used*. This flows not only from the definition of a trade mark but also from the fact that they are subject to revocation on the ground of non-use[348] (My emphasis)

The South African case of *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation* is also of relevance to the issue of the nature of intellectual property right.[349] In

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[340] Ibid.
[341] L Harms 'The Role of the Judiciary in the Enforcement of Intellectual Property Rights: Litigation under the Common Law System with Special Emphasis on the Experience in South Africa' (2004) 26 *European Intellectual Property Review* 483, 484.
[342] S J Gardiner (note 47 above) 561.
[343] Ibid 562 – 3.
[344] Ibid 568.
[345] Ibid 572.
[346] Ibid 562 – 3.
[347] Ibid 572 – 573.
[348] *Turbek Trading CC v A & D Spitz Limited* [2010] 2 All SA 284 (SCA), para 10.
[349] *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation* 1986 2 SA 623 (T) 631I-632A.

this case the right to use was recognised though in the context of copyright law. It was held that:

> Ownership in a thing is not the right to prevent others from using it that is merely an incident of ownership. It is the right… to do what one pleases with the thing to which it relates, to use it, consume it or exploit it so, too, is it with copyright[350]

These cases point towards the existence of a right to use a trademark and the right to prohibit unauthorised use of a trademark as two sides of the same coin that cannot be separated. The approach taken in the above mentioned South African cases was also taken in the 1891 case of *Rose & Co v Miller*.[351] The court also held that a trademark holder, Rose & Co had the 'exclusive right to use' its trademark for the sale of 'Limejuice Cordial'. The court granted an interdict against Miller for selling limejuice in bottles of Rose & Co. and in others similar to it, labelling these with almost the exact mark.[352] It is worth pointing out therefore that the positive aspect of trademark rights has long been recognised in South Africa. Alberts argues that the above case shows that South African trademark law places a high premium on the use of a mark, accordingly it is correct that a mark is registered in order to be used.[353] Other South African cases have also reiterated that there is a right to use trademarks,[354] even though South African trademark law does not explicitly provide for a positive right to use trademarks. One can argue that it is an inherent feature of trademarks that they be used.

Foreign case law has also supported the argument that intellectual property, trademark rights in particular include both the negative and positive rights. In the Sri Lankan case of *Ceylon Tobacco Company PLC vs Minister of health*[355] it was alleged that the prescribing of pictorial warnings to cover 80% of the front and back surface areas of tobacco retail packages illegally subverted the right of trademark owners to effectively use its property.[356] The court stated that:

> Where 80% of the pack is covered with the health warning, the practical issue that arises is whether the remaining 20% is reasonably sufficient to present and exhibit the mark or in other words to use the mark… Such a situation will unreasonably interfere

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[350] Ibid.
[351] *Rose & Co v Miller* (1891) 4 SA R 123 p125.
[352] Ibid; The court held that allowing such practice would cause damage to Rose & Co and would amount to fraud on the public. Therefore, preserving exclusive use also serves the role of consumer protection.
[353] W Alberts (note 324 above) 481 – 3.
[354] *Shalom Investments (Pty) Ltd v Dan River Mills Incorporated* (note 20 above); *Nino's Italian Coffee & Sandwich Bar CC v Nino's Coffee Bar & Restaurant* CC 1998 3 SA 656 (C) 673D-E.
[355] *Ceylon Tobacco Company PLC v Minister of health and others,* C.A Application No. 336/2012
[356] Ibid 5.

with the statutory *right of the owner of the trademark to use it frustrating the whole purpose of a trademark and of the trademark law.*[357]

In this case the court held that trademark rights took both a positive and negative form. The court held that the registered owner of a trademark had the right to use the trademark. The use is intended to achieve the owner's reasonable business objectives - to reach the consumers and promote the commercialization of the concerned goods.[358]

Some authors adopt the approach that the infringement provisions only indicate the 'negative mirror image of the control or monopoly the owner holds…'[359] Conversely, Du Plessis takes the approach that the positive aspect is inherent in intellectual property.[360] The latter approach was confirmed by the Advocate General of the European Court of Justice in the case of *Hölterhoff v Freiesleben*[361] where it was held that:

a registered trade mark confers exclusive rights on the proprietor. The remainder of the paragraph … is expressed essentially in negative terms, in that it specifies what the trade mark proprietor may prevent others from doing. However, such negative rights of prevention should in my view be considered in the light of the positive rights inherent in ownership of a trade mark, from which they are inseparable. A trader registers or acquires a trade mark primarily not in order to prevent others from using it but in order to use it himself …Use by the proprietor is indeed a central and essential element of ownership.[362]

More attention has been paid to the negative right of trademarks, protecting their ability to distinguish between competing products. Nevertheless that does not imply that only a negative right is conferred on trademark owners. The trademark system has always included a positive right to use; it is an inherent constituent of the system. For a trademark to perform its functions which form the basis of the negative right, the trademark must be used. The existence of the right to 'use' a trademark must be re-emphasised to safeguard the trademark system. Tobacco trademark owners have the right to 'use' their trademarks, a right which can be limited only if it is reasonable, necessary and or proportional to do so. 'In the same token the 'use' of

[357] Ibid.
[358] Ibid.
[359] A Rahmatian 'Contracts Infringing Intellectual Property Rights' (2003) 4 *European Intellectual Property Review* 411, 425.
[360] Du Plessis 'Immaterial Property Rights: Negative or Positive?' (1976) 17 *Codicillus* 22, 23.
[361] *Hölterhoff v Freiesleben* [2002] ECR 4187; [2002] ETMR 79, para 34 (European Court of Justice).
[362] Ibid.

ADIDAS or any other trademark can be limited only if it is justifiable to do so.'[363] What must be eliminated is the notion that the 'use' of trademarks and all other intellectual property can be limited at free will in the belief that doing so will 'take away nothing' from the rights conferred on them.[364] The South African trademark law confers a positive and negative right on trademark owners. Therefore, when implemented, legislation requiring the plain packaging of tobacco products must be justified.[365]

## 4.5 CONCLUSION

The aim of this chapter was to explore the plain packaging debate from a purely trademark perspective. It is worth noting that the plain packaging issue is not a third-party-infringement case of the kind set out in section 34 of the Trade Marks Act or in the common law tort of passing off. As such the action of passing off and the prohibitions against infringement under section 34 are unable to adequately protect the interests of tobacco trademark owners against the legislative threat of plain packaging. Instead the interests of trademark owners can be protected under section 25 of the Constitution. However, it is submitted that law of passing off and third-party-infringements informs the broader rights and interests of trademark holders under section 25 of the Constitution.

The chapter also looked at the right to use argument and argues that the rights conferred on trademark holders include the right to use trademarks. The right to use a trademark is inseparable from the right to prohibit unauthorised use of a mark by third parties. The former right which can be reasonably limited, enables the trademark to fulfil its functions, without the right to use a trademark, the negative right to exclude becomes insignificant.

In respect of the infringement of trademark rights, it was established in this chapter that, plain packaging measures amount to a deprivation of rights and can also potentially amount to an expropriation of property. The regulatory measures interfere with the use, enjoyment and exploitation of trademark rights. However, it is worth pointing out that the rights provided for under the Constitution will only be infringed if the deprivation is arbitrary. Consequently the infringement of trademark rights is dependent upon the rationality and or proportionality of plain packaging measures.[366] A similar argument is advanced with regard to violations of the

[363] S Nyatsanza (note 317 above) 502.
[364] Ibid.
[365] Ibid.
[366] Section 25(1) of the Constitution; See also section 36 of the Constitution.

TRIPS Agreement. The rights of trademark owners under the TRIPS Agreement will also be infringed if the measures are found to be unjustifiable[367] and or unnecessary.[368] As such it is crucial for the next chapter to evaluate the legal tests for measuring the justifiability, necessity or arbitrariness of the deprivations and encumbrances.

In conclusion, trademark rights are well recognised in South African law, as such there is no justifiable basis for a health-over-trade approach. This thesis argues for a balancing of the competing rights since it has now been established that they are to be treated with the same emphasis. Chapter five and six will explore in detail the proportionality or necessity test as the balancing tool to be employed in this exercise.[369]

[367] Article 20 of the TRIPS Agreement.
[368] Article 8 of the TRIPS Agreement.
[369] The terms necessity and proportionality are used interchangeably in this study.

# CHAPTER FIVE

## Proportionality under the South African Constitution

### 5.1 INTRODUCTION

It has been shown in previous chapters that the introduction of plain packaging measures brings to the fore the competing values of public health (and or individual rights to health) and trademark rights. Proportionality as a method of judicial review is an attempt to reconcile overlapping and often competing claims. In this case (where a weighing and balancing of competing values is required) it is important for this chapter to address the principle of proportionality.

In the introductory chapter of this study two significant questions were raised. First, whether plain packaging measures are a necessary limitation of trademark rights. Secondly, whether the WTO proportionality (necessity) test imposes undue burdens on states to justify national regulatory measures. These are both matters for proportionality as it exists locally in South Africa and in the international sphere under WTO law.

With regard to the second research question, it was highlighted in chapters one and four that South Africa amongst other countries has shown disregard or raised concerns over the application of the proportionality test at the WTO level of governance. This is despite its own use of proportionality in order to resolve conflicts between competing rights and interests. This chapter is therefore concerned with proportionality as a method of review in the South African constitutional law, where it is employed to determine the justifiability of government action. In examining the application of proportionality in South Africa, this chapter will contribute to establishing the legitimacy of the concerns raised against the WTO application of the test. As will be shown in this chapter these concerns can be partially attributed to the lack of a universal application of the proportionality test. Chapter six will, in turn, focus on the application of the proportionality test under the WTO.

Chapter four established that the implementation of plain packaging measures would result in a deprivation of trademark rights and a potential violation of section 25 (1) of the South African Constitution. However, chapter four stops short of carrying out a predictive analysis on whether the deprivations are arbitrary, and in violation of the Constitution. This chapter will proceed with that analysis. Proportionality becomes relevant at two distinct yet related stages. First, in determining whether the measures result in arbitrary deprivations thus violating section

25 (1) of the Constitution, a full proportionality review could be undertaken. Secondly, if a violation of the rights under section 25 (1) is established, then such could be justifiable under section 36 (1) of the Constitution. Again a proportionality review would be undertaken to establish if the limitation on the constitutional right is reasonable and justifiable in an open and democratic society. The proportionality test is hence central to this study, reiterating the significance of this chapter.

Part II of this chapter will provide a brief overview of proportionality as a background to the analysis to be undertaken in subsequent sections of this chapter and in chapter six. Part III will establish the application of the test in section 25 and 36 respectively. The form proportionality takes under the respective constitutional provisions will thus be examined. Simultaneously, a predictive analysis of how plain packaging measures would be viewed in the current South African constitutional dispensation will be undertaken. Part IV will conclude the chapter.

## 5.2 PROPORTIONALITY: AN OVERVIEW

Proportionality has become a major doctrinal instrument in the resolution of conflicts[1] between ''constitutional', 'fundamental', or 'human rights' – and between these rights and competing public interests…'[2] It has been received as a common analytical framework in domestic, supranational and international courts.[3] This has given rise to claims of a global model,[4] a staple of adjudication[5] or simply the best-practice standard of adjudication on fundamental rights.[6]

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[1] D M Beatty *The Ultimate Rule of Law* (2004) 162; V C Jackson 'Constitutional law in the age of proportionality' (2014) 124 *Yale Law Journal* 3094; A S Sweet & J Mathews 'Proportionality balancing and global constitutionalism' (2008) 47 *Columbia Journal of Transnational law* 72, 74 -75; M Andenas & S Zleptning 'Proportionality: WTO Law: in comparative perspective' (2007) 42 *Texas International Law Journal* 371.

[2] S Greer 'Balancing and the European Court of Human Rights: A Contribution to the Harbemas – Alexy Debate' (2004) 63 (2) *Cambridge Law Journal* 412.

[3] A S Sweet & J Mathews (note 1 above) 75; G Huscroft, B W Miller & G Webber 'Introduction' in G Huscroft, B W Miller & G Webber (eds) *Proportionality and the Rule of Law: Rights Justification and Reasoning* (2014) 1-2.

[4] K Moller *The Global Model of Constitutional Rights* (2012).

[5] G Verdirame 'Rescuing human rights from proportionality' in R Cruft, S.M Liao & M Renzo (eds) *Philosophical Foundations of Human Rights* (2014) 341.

[6] J Mathews & A S Sweet 'All things in proportion? American rights review and the problem of balancing' (2011) 60 *Emory Law Journal* 798, 808.

Proportionality provides a set of rules which determine the necessary and sufficient conditions for a limitation of protected rights or interests to be constitutionally permissible.[7] Therefore, its relevance and centrality to the conflict of rights and interests that arise from introducing plain packaging measures is unsurprising. Enacting plain packaging measures is substantiated by the need to protect and promote human health; which is not only a legitimate public interest but also a human right.[8] Nonetheless, the measures also result in a limitation of trademark rights.[9] Proportionality would attain a balance by requiring state action through policy to reflect a proportional balance between the conflicting rights and or interests.

It has been argued that proportionality is necessitated by the nature of rights and interests. German constitutional scholar Robert Alexy argues that rights are principles that require 'something to be realised to the greatest extent possible given the legal and factual possibilities.'[10] On the contrary, rules are norms that contain 'fixed points in the field of the factually and legally possible'[11], they are either fulfilled or not. Principles can be satisfied to varying degrees; accordingly, competing principles outweigh each other in cases of conflict, depending on the circumstances of each case.[12] In contrast, rules can be resolved by reading exceptions into one of the rules or declaring one of the rules invalid.[13] A conflict of principles (rights and interests)[14] would hence necessitate balancing; making proportionality as the balancing tool inseparable from principles.[15]

Alexy advances a largely accepted model of proportionality with three stages which form the justificatory criteria employed to determine the validity of limitations on fundamental rights and interests.[16] In terms of this model, proportionality consists of three sub-tests; suitability, necessity and proportionality *stricto sensu*.[17] The sub-principle of suitability

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[7] A Barak *Proportionality Constitutional Rights and their Limitations* (2012) 3, 4.

[8] See chapter three of this study, where it was established that the right to the highest attainable standard of health provides the basis for the implementation of plain packaging measures.

[9] See chapter four of this study, where it is argued that plain packaging measures result in a deprivation of trademark property.

[10] R Alexy 'On the structure of legal principles' (2000) 13 (3) *Ratio Juris* 294, 295; See also R Alexy *A Theory of Constitutional Rights* (2009) 47.

[11] R Alexy (note 10 above) 48.

[12] Ibid 50.

[13] Ibid 49.

[14] Ibid 65, where he argues that principles are related to both individual rights and collective interests.

[15] Ibid 51, 67.

[16] Ibid; see also N A J Croquel *The Role and Extent of a Proportionality Analysis in the Judicial Assessment of Human Rights Limitations Within International Criminal Proceedings* (2015) 29.

[17] Ibid.

disallows the use of means which hinder the realisation of a principle without promoting the purpose for which it was adopted.[18] According to Alexy, there is no need to adopt a means (M) if it does not promote a principle (P1) but instead obstructs the realisation of another principle (P2).[19] In simple terms, P1 and P2 can both be realized to the best degree if M is abandoned altogether. Suitability expresses the idea of 'pareto optimality' that one principle can be improved without causing detriment to another. [20]

The second stage of 'necessity' requires that, of the available measures equally suitable to promote P1, the means to be chosen is the one that is least restrictive to P2.[21] P1 and P2 taken together would require that the least restrictive means be chosen.[22] That way both principles can be realised to the greatest extent possible. This sub-principle can also be illustrated by Lord Diplock's oft quoted expression, 'you must not use a steam hammer to crack a nut if a nutcracker would do.'[23]

The third stage of proportionality *stricto sensu*, is equal to Alexy's 'law of balancing' which requires that the 'greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'[24] Proportionality precludes means that result in intensive interference with the optimisation of P2 if it has a very low or insignificant benefit to P1. The importance of satisfying P1 must justify the nonsatisfaction of P2.[25]

Alexy has gone on to concede that the proportionality test includes four sub-tests with the addition of 'legitimate purpose' as the first sub-test.[26] Sweet and Mathews also submit that the fully developed model of proportionality involves four stages.[27]

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[18] R Alexy 'Constitutional rights and proportionality' (2014) 22 *Journal for Constitutional Theory and Philosophy of Law 51,* 52.
[19] R Alexy (note 18 above) 52, 53.
[20] R Alexy (note 18 above) 53.
[21] Ibid.
[22] Ibid.
[23] *R v Goldstein* (1983) IWLR 151 at 155 as quoted in G Letsas 'Rescuing Proportionality' in R Cruft & M Liao, M Renzo (eds) *Philosophical Foundations of Human Rights* (2014) 321.
[24] R Alexy 'On balancing and subsumption: A structural comparison' (2003) 16 (4) *Ratio Juris* 436, 437; See also A.S Sweet, J Mathews (note 1 above) 96.
[25] R Alexy (note 24 above) 436- 437.
[26] R Alexy 'Thirteen replies' in G Pavlakos (eds) *Law, Rights and Discourse: The Legal philosophy of Robert Alexy* 341.
[27] A S Sweet & J Mathews (note 1 above) 76; See also M Klaat & M Meister *The Constitutional Structure of Proportionality* (2012).

### 5.2.1 The broadly accepted formulation of proportionality

It is important for this chapter to present the broadly accepted formulation of proportionality before it proceeds to examine the South African approach to proportionality. Chapter six will also examine the WTO's approach to proportionality. It will be important for these examinations to analyse how different or similar these versions (of proportionality) are to the generally accepted concept of proportionality. Accordingly, this broadly accepted formulation of proportionality will provide the benchmark for such examinations. Bromhoff contests the comparability of proportionality across various jurisdictions.[28] Along similar lines, Neto debates the universality of the proportionality test and asserts that the principle has 'defied consistent definition.'[29] The disagreements about the concept of proportionality range from phraseology issues[30] to matters of genuine conceptual divergences.[31] This is to be expected given the diversity of jurisdictions in which proportionality has been transplanted to.[32] More so due to its flexibility 'it changes over time and adapts to different social contents and … varying' cases.[33] Be that as it may, this study argues that there still exists a generally accepted concept of proportionality.

The four prong test requiring that the objective pursued be 'legitimate'; that the measure be 'suitable' to achieve the objective pursued; that the measure be 'necessary' (less restrictive test) and that the measure be 'proportional in the strict sense' (proportionality *stricto* sensu) constitutes the broadly accepted concept of proportionality.[34] This concept is greatly

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[28] J Bromoff 'Beyond proportionality: Thinking comparatively about constitutional review and punitiveness' (2016) *Law Society Economy Working Papers*, 2.

[29] J A Neto 'The debatable universality of the proportionality tests and the wide-scope conception of fundamental rights' (2012) 12 (1) *Revista Brasileira de Direito* 6.

[30] A S Sweet & J Mathews (note 1 above) 127 -128, on South Africa's response to objections that section 36 (1) was not compliant with international human right norms because it did not include a 'necessity' requirement on right limitations. See also *S v Williams and Others* 1995 (3) SA 632 (CC), para 804 – 805 where it was stated that: 'It is true that international human rights instruments indicate that limitations on …rights are permissible…when…'necessary'…The term has…been given various interpretations, all of which give central place to the proportionate relationship between the right to be protected and the importance of the objective to be achieved by the limitation…But what matters for present purposes is that the conceptual requirement established by international norms relative proportionality of balancing is met. The choice of language lay with the CA [Constitutional Assembly].'

[31] J A Neto (note 29 above) 6, 7.

[32] G Huscroft, B.W Miller & G Webber 'Introduction' in G Huscroft, B.W Miller & G Webber (eds) (note 3 above) 1.

[33] C Lin 'An unprincipled principle? A comparative study on the application of the principle of proportionality in Environmental cases in Taiwan' (2016) 19 *Academia Sinica Law Journal* 99, 102.

[34] C Henckels *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (2015) 24; R Alexy (note 10 above); E Engle 'The history of the general principle pf

influenced by Robert Alexy who developed the principle of proportionality based on German constitutional law cases.[35] Various scholars also share the view that proportionality itself originated and was most fully developed in German law,[36] where it was initially used to challenge police action where it was excessive in relation to the objective pursued.[37] Accordingly, it is not far-fetched to argue that the proportionality concept modelled after German law is the closest to the universally accepted model of proportionality.

*5.2.1.1 Proper purpose*

The first step of the four prong test is the requirement that the measures limiting another right of interests must be aimed at fulfilling a legitimate purpose. This element demonstrates that rights and interests cannot be limited to pursue just 'any' purpose.[38] This examination does not consider the scope of the limitation, the means employed to fulfil the purpose or the relationship between the harm incurred by the limited right and the benefit achieved by fulfilling the purpose.[39] Proper purposes are determined by constitutional and societal values and the rest of the proportionality sub-tests would not be triggered if the purpose is not legitimate.[40]

Barak argues that the urgency of the purpose is also relevant in determining the legitimacy of a purpose.[41] In South Africa, it has also been held that urgency forms part of this determination.[42] This study argues that it would be appropriate to consider the urgency of the purpose at the last stage to avoid balancing being held at the threshold stage. It also argues that plain packaging measures would satisfy the legitimacy subtest with relative ease as promoting public health is widely recognised as a legitimate purpose.

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proportionality: An overview' (2012) 10 *The Dartmouth Law Journal* 9; I Porat & M Cohen-Eliya 'American Balancing and German Proportionality: The historical Origins' (2010) 8 (2) *International Constitutional Law Journal* 263.

[35] R Alexy (note 10 above).

[36] A.S Sweet & J Mathews (note 1 above), M Pivniceru & K Benke 'The principle of proportionality reflected in the case-law of the constitutional court of Romania: German constitutional influences' (2014) Revista de Drept Constituțional, Constitutional Law Review 72, 75.

[37] Ibid; See also P Craig 'Proportionality, rationality and review' (2010) New Zealand Law Review 265, 267.

[38] A Barak Proportionality Constitutional Rights and their Limitations (2012) 277.

[39] 39 A Barak (note 38 above) 245.

[40] Ibid 250, 254.

[41] Ibid 277.

[42] S Woolman & F Botha 'Limitations' in S Woolman, M Bishop & J Brickhill (eds) Constitutional law of South Africa (2002).

*5.2.1.2 Suitability*

Pursuing a purpose that does not improve the public interest (or another right) would disregard the importance of the limited right.[43] If the means were not employed the limited right would be restored with no loss to the public interest.[44] The means does not have to fully realise the purpose, however, a marginal or negligible realisation does not suffice.[45] Sufficient advancement must be shown to fulfil this sub-test. Measures that also have no effect, do not advance the purpose or measures that harm the purpose will not pass the criteria of suitability.[46] The means must hence be capable of achieving the intended purpose. Barack argues that rights should not be limited based on mere speculations that are out of touch with reality.[47]

The burden to prove the suitability of a measure rests on the party arguing that such a measure is suitable.[48] The party would be required to provide the court with the factual basis upon which the legislators' choice is based.[49] The opposing party may also present factual data to the contrary.[50] The court would then analyse the probability of the means to achieve the underlying objective. According to Barack, in carrying out this task wide discretion should be afforded to the legislator, as some considerations would require expertise or be subjects of controversy.[51]

*5.2.1.3 Necessity or Less restrictive means*

This sub-test requires a comparison of hypothetical means capable of realising the same purpose, to the same degree but causing less harm to the limited right.[52] This comparison would hence require a proper understanding of the purpose and the probability of the alternative means

[43] A D P Brady *Proportionality and Deference Under The UK Human Rights Act: An Institutionally Sensitive Approach* (2012) 54.
[44] Ibid.
[45] A Barack (note 38 above) 305.
[46] B Schlink *Proportionality in the Oxford Handbook of Comparative Law* (2012) 723; A Barack (note 38 above) 305, 306.
[47] A Barack (note 38 above) 309-310.
[48] Ibid 309-310.
[49] Ibid 310-311.
[50] Ibid.
[51] Ibid 311.
[52] N Emiliou *The Principle of Proportionality in European Law: A Comparative Study* (1996) 30; J Rivers 'Proportionality and variable intensity of review' (2006) 65 (1) *Cambridge Law Journal* 174, 198.

to achieve the relevant purpose.[53] The limiting means will pass the subtest of necessity if no other alternative exists that can realise the purpose 'at the same level of intensity and efficiency…'[54] The measures in question also pass this sub-test if alternative means impose other limitations or costs.[55] The alternative means should be chosen when all other 'parameters remain unchanged' except it being less restrictive to the limited right.[56]

Cases of under inclusiveness do not form part of the necessity test.[57] They may indicate an improper motive or the unsuitability of the means chosen instead. On the contrary, over-inclusiveness or over-breadth cases fall under the necessity test.[58] This is where the net is cast too wide.[59] In such cases, only a portion of the means is required to fulfil the purpose. If it is possible separation of the means can be a remedy, however, over-inclusive means can be held to be 'necessary' if the means cannot be separated.[60]

*5.2.1.4 Proportionality Stricto Sensu*

This last sub-test is arguably the most important and controversial.[61] It requires that there be a proportional relationship between the benefits gained by fulfilling the purpose and the harm suffered by the limited right as a result thereof.[62] It is a matter of benefits versus harm and the latter should not unreasonably exceed the former.[63] The social importance of the benefits and harm to the limited rights are balanced against each other.[64] Determining the social importance is not 'scientific or accurate' in itself.[65] Political, economic ideologies, cultural and social values which are of course varied, determines the social importance of the benefits versus the harm.[66]

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[53] A Barack (note 38 above) 321.
[54] J Cianciardo 'The principle of proportionality: The challenges of human rights' (2010) 3 Journal of Civil Law Studies 177, 179.
[55] A Barack (note 38 above) 324.
[56] Ibid.
[57] Ibid 334.
[58] Ibid 335
[59] Justice Ngcobo in the *Prince v President of the Law Society of the Cape of Good Hope and Others* 2001 (2) SA 388, para 81.
[60] A Barack (note 38 above) 335 - 336.
[61] Ibid 340, 357.
[62] Ibid 340 -341.
[63] D Grimm 'Proportionality in Canadian and German Constitutional law' (2007) *University of Toronto Law Journal* 396.
[64] M Cohen-Eliya & I Porat (note 34 above) *263;* A Barack (note 38 above) 349.
[65] A Barack (note 38 above) 349 – 350.
[66] Ibid.

To narrow the scope of balancing benefits versus harm, it is important to note that the balance is not between the importance of fulfilling the purpose or preventing harm to the limited right. Instead, the comparison is marginal, it is between the 'social importance of the benefit gained by fulfilling the…' purpose and the weight of the 'social importance of preventing the harm that this fulfilment may cause'.[67] One has to enquire what the state of the public interest (purpose) was before and after the implementation of the means.[68] Further what the state of the limited right was before and after the enactment of the means in the specific circumstances. In the case of plain packaging measures the question would be, the state of public health before and after the adoption of plain packaging measures. On the other hand, what the state of tobacco trademark rights was before and after the enactment of the measures. The comparison is not between the importance of public health as compared to trademark rights. As will be shown in subsequent sections of this chapter this approach though ideal is not easy to apply.

Narrowing the scope to marginal harm and benefits, rationalises the balancing process and maintains its structural integrity.[69] Barack argues that this approach also assists in responding to the critics of the proportionality *stricto sensu* stage.[70] Judicial discretion is limited where the comparison is limited to marginal benefits and harms.[71]

It can be argued that the four-prong test represents proportionality in its most fully developed form. Challenged measures would have to pass the stages cumulatively. If a measure fails the first sub-test the inquiry would end there, but where it passes that stage it would be tested for compliance with the second sub-test. A measure would be proportional if it passes all four sub-tests. As indicated earlier, in practice the approach to proportionality varies. Some legal systems adopt only the last three sub-tests[72] and some view the sub-tests as recommendations and factors that may be considered in determining the proportionality of measures.[73] Whilst it has been argued that the structure and sequence of the inquiry is not

[67] A Barack (note 38 above) 349 – 350.

[68] Ibid 351; D Grimm (note 63 above) 396; S J Heyman *Free Speech and Human Dignity* (2008) 70, where it is explained that 'balancing seeks to determine which right has more weight. This determination should be made at the margin – that is, instead of asking whether freedom of speech or… privacy has greater value in general, one should ask (1) how much the value of privacy would be affected by the speech at issue, and (2) how much the value of free speech would be impaired by the regulations…'

[69] A Barack (note 38 above) 485.

[70] Ibid 357, 460.

[71] Ibid 481.

[72] Ibid 473.

[73] Ibid 132, referring to Article 36(1) of the South African Constitution.

central to proportionality, other authors argue that 'order matters.'[74] Brown claims that following the four elements is essential to the correct application of proportionality.[75] Similarly, Barack asserts that the four structured approach adequately protects rights and is crucial to the understanding of proportionality.[76] It allows judges to think in stages and analytically by ensuring that the decision maker considers appropriate facts and issues at the proper stage of the inquiry.[77]

This debate is important and central to the criticisms proportionality has received. South Africa, as will be shown in subsequent sections, does not follow the structured approach and criticises the WTO's approach to proportionality. Could this be attributed to the lack of a uniform approach to proportionality? Can it then be said that South Africa follows the principle of proportionality? These are questions this chapter seeks to address.

### 5.2.2 Proportionality and intensity of review

Apart from structural issues, proportionality is also applied with varying degrees of intensity.[78] Decision makers can adopt a deferential approach or undertake rigorous and searching examinations at the different stages of the proportionality test.[79] The appropriateness of the level of intensity chosen by the judiciary has always been contentious,[80] even without it being linked to proportionality.[81] This is exacerbated by arguments that the proportionality test allows for a more rigorous review giving 'greater emphasis upon the reasons behind' the

[74] B Schlink (note 46 above) 725.

[75] J Brown J 'The Doctrine of Proportionality: A Comparative Analysis of the Proportionality Principle Applied to Free Speech cases in Canada, South Africa and the European Convention on Human Rights and freedoms' (Unpublished LLM Dissertation, Central European University 2012) 30.

[76] A Barack (note 38 above) 132.

[77] Ibid 460-461; See also D Grimm (note 63 above) 397, arguing that the order has a disciplining and rationalising effect.

[78] P Craig (note 37 above) 267.

[79] C Henckels (note 34 above) 16, 23, 29.

[80] D Dyzenhaus 'The politics of deference, judicial review and democracy' in M Taggart (ed) The *Province of Administrative Law* (1997) 279; C Chan 'A preliminary framework for measuring deference in rights reasoning' (2016) 14 (4) *International Journal of Constitutional Law* 851, 852.

[81] For engagements with deference in constitutional review see H Klug 'Introducing the devil: An institutional analysis of the power of constitutional review' (1997) 13 (2) *South African Journal of Human Rights* 185; T Roux 'Principle and pragmatism on the constitutional court of South Africa (2009) 7 (1) *International Journal of Constitutional Law* 106; D Brand 'Judicial deference and democracy in socio – economic rights cases in South Africa' (2011) *Stellenbosch Law Review* 615- 638.

decisions made.[82] For the purpose of this chapter, it will be sufficient to undertake a brief discussion of the degree of intensity in the application of proportionality.

It is worth pointing out that varying degrees of intensity in applying proportionality can partially explain the legitimacy issues surrounding the WTO's application of the test.[83] Similarly, it can also explain some of the criticisms levelled against proportionality as a whole.[84] According to Henckels adopting an appropriately differential approach in applying proportionality could solve or at the very least attenuate these concerns.[85]

Closely related to the appropriate level of intensity in applying the proportionality review is the concern that too much discretion is placed on adjudicators.[86] Critics argue that the proportionality test is intrusive into government policy making processes.[87] This is argued to result in a violation of the separation of powers principle.[88] This study does not share this view, in fact weighing and balancing competing interests is within the judiciary's territory. A constitutional democracy does not allow the legislative branch to have the final word regarding policy choices; especially in consideration of the limitation of fundamental rights that result from them. The principle of separation of powers does not create walls separating the branches of government but rather creates bridges to allow checks and balances.[89] Democracy necessitates a culture of justification as Mureinik has stated that:

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[82] C Chan (note 81 above), where the author states that proportionality requires a more rigorous review that goes beyond assessing mere reasonableness; See also T Raine 'Judicial review under the Human Rights Act: A culture of Justification (2013) *North East Law Review* 85, 88 – 90 where Raine compares the standard of review under Wednesbury irrationality with proportionality. He argues that the former has a highly restricted role for the judiciary; See also M Taggart 'Proportionality, deference, Wednesbury' (2008) New Zealand Law Review 423, 429.

[83] F Fontanelli 'Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about "Weighing and Balancing"' (Autumn/Winter 2012/13) 5 (2) European Journal of Legal Studies 36, 36; J Neuman & E Turk ' Necessity revisited: Proportionality in the World Trade Organisation Law after Korea- Beef, EC-Asbestos and EC- Sardines (2003) 37 Journal of World Trade 199, 236.

[84] P M McFadden 'The balancing test' (1998) 29 Boston College Law Review 585 – 586, for an analysis of the critique and a retort; See also A S Sweet & J Mathews (note 1 above) 47, 72; G Webber The Negotiable Constitution: On the Limitation of Rights (2009); T A Aleinikoff 'Constitutional law in the age of balancing' (1987) 96 Yale Law Journal 3984.

[85] C Henckels (note 34 above) 29.

[86] M V Tushnet 'Anti-Formalism in recent constitutional theory '(1985) 83 (6) Michigan Law Review 1502, 1508; I Porat 'The dual model of balancing: A model for the proper scope balancing in constitutional law' (2006) 27 (3) Cardozo Law Review 1393; D L Faigman 'Madisonian balancing: A theory of constitutional adjudication' (1994) 88 North-western University Law Review 641, 648; A Barack (note 38 above) 487, 488, 490 – 492; J M Shaman ' Constitutional interpretation : Illusion and reality' (1995) Wayne Law Review 135,152; L B Frantz 'The first amendment in the balance' (1962) 71 Yale Law Journal 1424, 1441.

[87] Ibid.

[88] McFadden (note 85 above) 586, 588.

[89] A Barack (note 38 above) 386, 387; See also C Hoexter Administrative Law in South Africa (2012) 140 alluding to the watchdog model of the judiciary roles.

> If a new constitution is a bridge away from a culture of authority… it must be a bridge to …a culture of justification…in which every exercise of power is expected to be justified, in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command[90]

Quinot correctly identifies the role of the courts as vehicles for upholding a culture of justification which will ensure that public power is justified.[91] The scholar also opines that this culture of justification demands a substantive mode of adjudication. Transformative constitutionalism not only requires public power to be justified, but, that judicial power be also justified. The adjudicative process itself must reflect this culture of justification.[92] Accordingly, proportionality and the balancing at its core (which supports the culture of justification) will remain central as long as this conception of democracy exists.[93]

What then is the appropriate level of intensity in applying proportionality in judicial review? It is important to note that the level of deference cannot be applied in a 'blanket manner.'[94] Instead, the courts must choose a justifiable level of deference with reference to a particular context and issues at hand.[95] Courts must provide an adequate protection of rights, and must not abandon their role of undertaking a meaningful review of state action,[96] by applying a standard of review too weak in intensity. The appropriate level of deference must consider individual justice.[97] The judiciary must be neutral and independent to afford all parties impartial complete hearings on relevant issues.[98] A person whose rights are limited must be given an opportunity to be heard, with reasons for the decision provided.[99] Pieterse argues that

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[90] E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31 -32.

[91] G Quinot 'Substantive reasoning in administrative-law adjudication' (2010) 3 *Constitutional Court Review* 111, 112.

[92] Ibid.

[93] M Cohen-Eliya & I Porat 'Proportionality and the culture of justification' (2011) *The American Journal of Comparative Law* 13.

[94] T Raine (note 83 above) 101.

[95] Ibid 99.

[96] A Kavanagh *Constitutional review under the UK Human Rights Act* (CUP 2009) 172; T Raine (note 83 above) 85; C Chan (note 81 above) 853.

[97] J Aranabia 'The intensity of judicial review in the commercial context: Deference and proportionality' in C Forsyth, M Elliott & S Jhaveri et al (eds*) Effective judicial review* (2010) 287.

[98] J Aranabia (note 96 above) 1.

[99] A Klaasen 'Public Litigation and the concept of deference in judicial review' (2015) *Potchefstroom Electronic Law Journal* 1912.

due to the 'executive's stranglehold over the legislature, citizens increasingly look to the judiciary to ensure accountability…'[100] and to safeguard their rights and interests.

The South African court held that the courts are the ultimate guardians of the constitution.[101] They have the right and the duty to intervene to prevent the violation of constitutional rights.[102] In the same light, Barack notes that:

> Judicial restraint does not equal judicial stagnation. Judicial restraint should not lead to judicial paralysis… when the legislator limits a human right that is constitutionally protected and the limitation is not proportional, the judge has no option but to take a very clear stand. Just as we are not free to render a legislative act invalid merely we, as judges, would not have enacted the same law were we sitting as members of the legislative branch… *we, the judges have the constitutional duty of safeguarding the constitutional criteria by which the constitutionality of a law is measured; we must ensure that those criteria are met in each and every case*.[103] (My emphasis)

On the other hand, courts must not adopt a standard of review too aggressive and exceed their 'institutional and constitutional remit.'[104] Deference must be given where the legislative and executive bodies are better placed in making policy decisions. In other circumstances, the elected government branches are better placed to assess the needs of the society.[105] In light of all this, one can argue that deference is partial and not complete[106] and the level chosen must be justifiable according to the circumstances at hand.[107]

Arguments similar to the appropriateness of the latitude afforded to governments in making decisions by national courts are also made at the international level. Some term it the

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[100] M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 (3) *South African Journal of Human Rights* 383.

[101] *Gleinster v President of the RSA* 2009 1 SA 287 (CC), para 30.

[102] Ibid.

[103] *Israel Investment Managers Association v Minister of Finance (1997) 51 (4) (*Israel Supreme Court Decision*).* para 367 as quoted in A Barack (note 38 above) 396.

[104] C Chan (note 81 above) 853.

[105] D Panick 'Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgement' (1998) *Public Law* 545, 549.

[106] T Raine (note 83 above) 100, where he argues that deference does not encourage courts to abandon their judiciary role, it is 'partial not absolute.'

[107] A Kavanagh (note 95 above) 172; M Du Plessis, S Scott 'The variable standard of rationality review: Suggestions for improved legality jurisprudence' (2013) *South African Law Journal* 130; See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2002 (2) SA 1 (CC) at para 66, where it is stated that '…It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case...'

'margin of appreciation,[108] under the WTO it is termed the standard of review.[109] Generally, the argument at the international level is that the international courts must be highly deferential to domestic issues.[110] This is based on presumptions that those nearer the decisions are in better position to assess the specific requirements in relevant circumstances.[111] The European Court of Human Rights (Herein after the ECtHR) court has recognised that national authorities can evaluate the local needs and conditions much better because of their 'direct and continuous contact.'[112] Similarly, Legg argues that international courts suffer from an institutional constraint which results in them failing to meaningfully consider the political, social and legal contexts of cases.[113] Further, that international courts are unelected and suffer from a democratic deficit and must, therefore, exercise high judicial deference.[114]

Despite having an advantage in evaluating local needs, it is acknowledged that not all decisions must be left to domestic authorities even if they concern traditionally domestic territory.[115] Guzman emphasises the neutrality that the WTO can possess in comparison to states who are prone to advance state objectives rather than those of the multilateral trading system.[116] In light of this even at the international level, a one size fits all approach is incomplete.[117] The standard of review must vary depending on the WTO agreements at issue and the matter being decided upon.[118]

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[108] G Candia 'Comparing diverse approaches to the margin of appreciation: The case of the European and the InterAmerican Court of Human Rights' (2014) *Pontificia Universidad Católica de Chile Law School*, Working Paper No 1, 1-2; T Christakis 'The margin of appreciation in the use of exemptions in international law: Comparing the ICJ Whaling judgement and the case law of the ECtHR' in M Fitzmaurice & D Tamada (eds) *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (2016) 139-159.

[109] C Henckels (note 34 above) 29; A T Guzman 'Determining the appropriate standard of review in WTO disputes' (2009) *Cornel International Law Journal*; See also S E L Boudouhi 'A comparative approach of the national margin of appreciation doctrine before the ECtHR, Investment Tribunal and WTO dispute settlement bodies' (2015) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2015/27, 6, where the author concluded that the WTO is unwilling to borrow the doctrine of national margin of appreciation into its language, preferring to stick to standard of review instead.

[110] C Henckels (note 34 above) 30, she cautions that an overly lenient approach will upset the negotiated balance of rights and obligations set out in the treaty. While intrusive approaches may raise issues such as withdrawal of members and non-compliance to decisions. See also S E L Boudouhi (note 110 above) 1-2.

[111] J McBride 'Proportionality and the European Convention on Human Rights' in E Ellis (ed) The Principle of Proportionality in the Laws of Europe (2009) 29.

[112] Buckley v UK (1996) EHRR 101, para 49 as quoted by T Raine (note 83 above) 92.

[113] A Legg The margin of appreciation in international Human Rights Law: Deference and Proportionality (2012) 1-9; See also G Candia (note 107 above) 5-7.

[114] A Legg (note 114 above) 1-9; G Candia (note 107 above) 5-7.

[115] A T Guzman (note 110 above) 46, 54; See also J Pauwelyn 'The transformation of world trade' (2005) 104 Michigan Law Review 25-26.

[116] J Pauwelyn (note 114 above) 25-26; A T Guzman 'Food fears: Health and safety at the WTO' (2004) 45 Journal of International Law 14-17.

[117] A T Guzman (note 110 above) 51.

[118] Ibid 56.

Choosing the appropriate level of intensity in applying proportionality is a complex task. However clarifying the role of the judiciary is important and possible. It is useful to point out what the courts can and cannot do in applying proportionality. First, in determining the legitimacy of a purpose, judges do not determine the legislative purpose but only review whether the purpose satisfies the constitutional requirements of a legitimate purpose.[119] Secondly, on the suitability sub-test, the judicial role is to examine the suitability of the means to achieve the purpose. It does not replace the legislators' choice by selecting a measure it would have preferred were it part of the legislative body.[120] The judiciary will examine the factual framework presented before it to establish whether a rational connection exists between the means and purpose. This factual framework is the same that served as the legislative prognosis used by the legislature.[121] In establishing whether the means satisfy the necessity sub-test, the judiciary examines whether the legislator chose the measure which limits the constitutional right the least. Again the judiciary bases its decision on the factual framework before it, it does not come up with its own alternative measures. The court will have to decide whether alternative measures achieve the aim on the facts before it and whether the alternative is less restrictive. The latter is a legal question which the court must decide on.[122]

The legislators' discretion is narrower at the last sub-test of proportionality *stricto sensu*. Whether the means is proportional is a legal question which the courts must decide on. The court must decide whether the marginal social importance of the increase in benefits gained by the public interest is proportional to the marginal social importance of the harm caused to the constitutional right. The judiciary is not an expert in public health but once pertinent considerations are presented before it, the court is an expert in balancing these against the constitutional right.[123] Even if the role of the judiciary is clarified, the intensity with which the courts will deal with the requirement of a rational connection between the means and ends or necessity will differ. However, it is arguable that delimiting the scope of judicial discretion is helpful in ensuring that courts do not easily exceed their mandate or negate their role.

It can be drawn from the above discussions that proportionality and the issue of intensity of review are inseparable. Courts have to determine how strictly to apply proportionality.

[119] A Barack (note 38 above) 403.
[120] Ibid 405.
[121] Ibid 406.
[122] Ibid 412 -413.
[123] A Barack (note 38 above) 412 -413.

According to Andenas and Zleptning 'proportionality taken together with varying levels of intensity' can be a 'sharp or blunt weapon in the hands of the judiciary.'[124] Albeit marginally, this study will also draw attention to the level of intensity with which proportionality is applied under the South African and WTO regimes. The level of intensity will vary from case to case; however, if possible general conclusions will be made regarding the level of intensity with which proportionality is applied in the different legal orders. The concerns raised by proponents of plain packaging measures that the WTO proportionality tests impose undue and unreasonable burdens on members to justify public policy measures will form the backdrop of this analysis.[125]

In making this assessment this study will borrow Chan's classifications of deference:

> not deferential, moderately deferential and highly deferential.[126] In her work, she provides useful pointers that legal scholars can use to measure the level of deference chosen by a court.[127] These are not exhaustive but will be used in this study where applicable.

## 5.3 PROPORTIONALITY UNDER THE SOUTH AFRICAN CONSTITUTION

The previous section presented the broadly accepted model of proportionality. It also showed that proportionality is not applied identically across different constitutional jurisdictions and legal orders. Despite this, scholars such as Porat and Cohen-Eliya argue that in its application proportionality retains the 'same basic two-stage structure.'[128] In the first stage the tribunal establishes the infringement of rights and in the second it must be demonstrated that a legitimate aim is pursued and that the infringement is proportional.

This section of the chapter seeks to establish the South African approach or model of proportionality. It is important to note that South Africa subscribes to a form of proportionality in adjudicating a conflict of rights and interests. In *S v William* the court confirmed that the

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[124] M Andenas & S Zlepting 'Proportionality: WTO: In comparative perspective' (2009) 42 *Texas International Law Journal* 372, 391.

[125] See chapter 1 page 5; See also H M Mamudu, R Hammond & S A Glantz 'International trade versus public health during the FCTC negotiations, 1999-2003' (2011) 20 (1) Tobacco Control 5.

[126] C Chan (note 81 above) 861.

[127] The author terms these 'strategies for deference' and emphasises that these are not exhaustive. For instance, a court can give weight to a government's definition and interpretation of a constitutional right. It can also shift the burden of proof from the government and tighten or intensify the burden of proof. Courts can also insist that a measure passes all the four sub-tests or alternatively skip or dilute stages of the test. The courts can again use all or some of the strategies and be more or less differential in applying these strategies.

[128] I Porat & M Cohen-Eliya 'American Balancing and German Proportionality: The historical Origins' (2010) 8 *International Journal of Constitutional Law* 263, 266.

general limitation clause in section 36 (1) required the weighing up of values and eventually an assessment based on proportionality.

It is also crucial to emphasise the role of a culture of justification and transformative constitutionalism that informs the South African approach to proportionality. To transform the South African society from the injustices brought about by apartheid, the system prioritises the role of the Constitution in achieving this transformation. In particular how the Constitution should be interpreted, implemented and enforced. In this regard a formalistic and conservative legal culture of the judiciary would frustrate the objectives of transformation.[129]

Formalism based on abstract and rigid reasoning unresponsive to the social context and power relations in South Africa is not desirable in applying proportionality. Rather, substantive reasoning in applying proportionality is required. Quinot and Liebenberg offer an instructive approach, stating that to properly apply the proportionality requirement, 'a clear understanding of the nature of the right affected, and the impact of the challenged conduct…on the normative purposes and values which the relevant right seeks to promote'[130] is required. South Africa's approach is hence informed by transformative constitutionalism and this explains its flexibility and its rejection of a formal structured approach to proportionality.

Section 36 (1) which allows for a limitation of rights in the Bill of Rights is the main source of proportionality under the South African Constitution. Rights can be limited 'in terms of general application' as long as such limitations are 'reasonable and justifiable in an open and democratic' society. In light of this, a right can be limited and a right holder can be prevented or denied from the full exercise of its right. This right limitation will only be valid if it fulfils the requirements of the limitation clause or if it is proportional. When the limitation fails to meet this criterion the right is breached or violated. It is this criterion that this section is concerned with.

Besides the general limitation clause which applies to all rights in the Bill of Rights, the South African Constitution also contains specific limitation clauses such as that contained in section 25 (1) which provides for property rights. This can also be a source of proportionality. Since this study is concerned with the proportionality of a measure limiting trademark rights,

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[129] F M Githuru Transformative Constitutionalism legal culture and the judiciary under the 2010 Constitution of Kenya (Unpublished LLD thesis, University of Pretoria, 2015) 88.

[130] G Quinot & S Liebenberg 'Narrowing the band: reasonableness review in administrative justice and socioeconomic rights jurisprudence in South Africa' (2011) 3 *Stellenbosch Law Review* 639, 660.

section 25 (1) is even more applicable. This section of the chapter will examine case law that deals with both sections 25 (1) and 36 (1) to establish the approach to proportionality. An exhaustive selection of all cases dealing with the provisions is not possible and this limitation is not critical as many of the decisions do not contain new strands of judicial reasoning. The subsection below will examine section 25 (1) to establish whether it allows for the application of proportionality and the form which such a proportionality review takes.

### 5.3.1 Looking for proportionality in section 25 (1) of the South African Constitution

Plain packaging measures although resulting in a limitation of trademark rights might never undergo a proportionality review. This is because in determining whether measures result in an 'arbitrary deprivation' either a proportionality review or a mere rationality test can be employed. Determining arbitrariness could entail a mere rationality test where the presence of a legitimate purpose would suffice.[131] In the case of plain packaging, it could be argued that the purpose of promoting public health would satisfy the rationality test with ease. On the other hand, determining 'arbitrary' could entail a full proportionality review,[132] requiring that the deprivation should not impose an unacceptably heavy burden on trademark holders. It is hence imperative to examine the space for the application of the proportionality principle under section 25 (1), in particular in the interpretation and application of the 'arbitrariness of a deprivation.' An analysis of a few cases will be undertaken in order to come to a deep and meaningful understanding of the application of proportionality in determining 'arbitrary deprivations.'

#### *5.3.1.1 First National Bank of South Africa*[133]

Acting in its normal course of business *First National Bank* the appellant leased a motor vehicle to Lauray Manufactures CC. The vehicle was detained by the Commissioner of the South African Revenue Services in terms of section 114 of the Customs and Excise Act. Section 114 allows the commissioner to sell goods without prior judgement or authorisation of the court, even where the goods do not belong to the customs debtor.[134] *First National Bank*

[131] A J Van Der Walt *Constitutional Property Law* 3 ed (2011) 237.
[132] A J Van Der Walt (note 128 above) 238.
[133] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance*; 2002 (4) SA 768 (herein after *First National Bank)*
[134] *First National Bank* (note 134 above) para 4.

challenged the constitutionality of section 114 claiming that it amounted to an arbitrary deprivation of property.

Ackermann J held that in interpreting and applying section 25 due cognisance should be given to the tension between social responsibilities and individual rights.[135] This approach shows at the onset the balancing aim of this section. Although property rights are important they are not absolute and cannot be protected at the expense of other social interests. The arbitrariness of a deprivation would hence be interpreted against the need to strike a proportionate balance between the purpose of section 25 to protect existing property rights and to serve the public interests.[136] Based on this preliminary approach, one could argue that there is space for the application of a proportionality test in section 25.

After determining that there was a deprivation of property the court moved on to define what arbitrary meant in the context of section 25 (1). The court in determining the meaning of 'arbitrary' emphasised the importance of context. In this case, the context would not only comprise of the balancing purpose of section 25 (1) but also international jurisprudence as required by section 39 (1) which requires the consideration of international and foreign law in the interpretation of the Bill of Rights.[137] In the case of plain packaging measures the World Health Organisations' Framework Convention on Tobacco Control (WHO FCTC)[138] would then form part of the context in which 'arbitrary' is defined. Further, the interpretation of arbitrary in cases dealing with plain packaging measures in foreign jurisdictions may also be considered.

The court held that non - arbitrariness could simply require the absence of bias and bad faith which could be satisfied with a low level of judicial scrutiny. However, in the context of section 25 (1) arbitrary is not limited to non-rational deprivations. It requires a 'wider concept and a broader controlling principle that is more demanding than…mere rationality.'[139] This enquiry is however narrower than and not as intrusive as proportionality as required by section 36 (1). It is important to note that the court avoided interpreting arbitrary as requiring a full

[135] Ibid, para 50.
[136] A J Van Der Walt *The Constitutional Property Clause: a Comparative Analysis of section 25 of the South African Constitution of 1996* (1997) 15-16.
[137] *First National Bank* (note 134 above) Para 64.
[138] World Health Organisations' Framework Convention on Tobacco Control, hereinafter the WHO FCTC.
[139] *First National Bank* (note 134 above) para 65.

proportionality review. According to the court, the standard of arbitrariness is lower than that required by reasonableness and justifiability in section 36 (1).[140]

Non - arbitrariness requires a proportionate relationship between the sacrifice that an individual is required to make and the public interest the means aims to fulfil. Some form of proportionality is required but it is 'less strict than a full and exacting proportionality examination.'[141] It is insignificant whether one '…labels such an approach an 'extended rationality' test or a 'restricted proportionality' test.'[142] In light of this, it is clear that the court avoided choosing a fixed point in interpreting arbitrariness, it ranges between mere rationality and proportionality.

For a measure to pass the arbitrariness test, it must provide sufficient reason. To establish sufficient reason several factors were laid down by the court in this case which have been followed in subsequent case law in interpreting whether there is sufficient reason. The first factor states that:

> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.[143]

It can be argued that the requirement that there be a relationship between the means and the end equates to the sub-test of suitability. That is the means must be capable of achieving the objectives. The court also held that in cases of deprivation of property, there has to be a relationship between the end sought and the owner of the property. It stated that;

> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.[144]

This requirement confirms what Barack has highlighted regarding specific limitation clauses.[145] Unlike general limitation clauses, the former allows the constituent authority to accurately establish the extent of limitation allowed on a specific right.[146] In other words, it allows the factors to be considered to be more tailor made and specific to the nature of rights. This is the factor the court in *First National Bank* case primarily based its decision on. In this

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[140] *First National Bank* (note 134 above) para 65.
[141] Ibid, para 98.
[142] Ibid, para 98.
[143] Ibid para 100.
[144] Ibid.
[145] A Barack (note 38 above) 144-145.
[146] Ibid.

case, there was deprivation of property to cover debts that did not belong to the debtor. Although the purpose of recovering customs debts was held to be legitimate, the court went on to find that section 114 cast the net far too wide.[147] The means used resulted in a total deprivation of First National Bank's property even when neither the property owner (First National Bank) nor the property had a connection to the debt.[148] In the absence of a relationship between the property, the property owner and the purpose of deprivation, it was held that no sufficient reason existed for section 114 to deprive persons other than the customs debtor of their goods.[149]

The above-mentioned factor is specific to property cases and forms part of the complexity of relationships to be considered. It is not a factor that equates to any of the four sub-tests of proportionality. Nevertheless, one can argue that this factor can be considered under the sub-test of proportionality *stricto sensu* which requires a proportional requirement between the sacrifice made by the individual and the purpose the means is meant to achieve. The harm suffered by the property owner would be weighed against the benefit gained, and at this stage the fact that the property owner bears no connection to the customs debt could be considered.

In determining the arbitrariness of a property deprivation, regard is also to be given to the extent of the deprivation. The court stated that,

> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the *extent of the deprivation* in respect of such property.[150] (My emphasis)

This indicates that the extent of deprivation could have an effect on the burden of proof placed upon the state to justify the reasons for a property deprivation. A serious deprivation would require an enquiry closer to the pole of proportionality. The extent of deprivation would play an important role in determining whether a mere rationality between means and ends suffices or whether a stricter enquiry closer to proportionality would be required. The court went further to state that;

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[147] *First National Bank* (note 134 above) para 108.
[148] Ibid, para 108, 110 – 111.
[149] Ibid, para 109.
[150] Ibid.

> (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.[151]

As stated above, the extent of deprivation would play an important role in determining whether a mere rationality test suffices or not. A way to measure the extent of deprivation, is to examine which incidents of ownership are limited. If only one incident of ownership is limited, one could argue that the deprivation is marginal. In chapter four it was argued that plain packaging measures limit more than one incident of ownership.[152] It limits the right to use, exclude and to exploit the mark.[153] In light of this, a mere rationality enquiry would not suffice in the case of plain packaging measures.

To establish whether sufficient reason exists to justify a deprivation, the court in *First National Bank* also held that, a more compelling reason would be required if the property was a corporeal movable. It held that:

> (e)…where the property in question is ownership of land or a corporeal moveable, a *more compelling purpose* will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. *This judgment is not concerned at all with incorporeal property*.[154] (My emphasis)

According to the courts' dicta above, it was unlikely that the deprivation of corporeal property would be satisfied with a mere rationality test. It was also stated that the *First National Bank* judgement did not deal with incorporeal property. What this means for incorporeal property like trademarks is unclear. Nonetheless, it is important to emphasise that intellectual property is not of lower order by virtue of it not being corporeal property. This was confirmed by the court in *Laugh it Off Promotions* case where it was emphasised that trademarks have equal status to corporeal property.[155] The approach laid down by the court in *First National Bank* case was directed towards corporeal property. Accordingly, the same considerations cannot be directly transposed to intellectual property.

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[151] Ibid.

[152] See chapter four of this study.

[153] Ibid.

[155] Ibid.

[154] *First National bank* (note 134 above) para 109.

[155] *Laugh it Off Promotions v SAB International CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), para 17.

The court held that the factors discussed above would determine if a mere rational relationship between means and ends is sufficient or whether a proportionality evaluation closer to that required by section 36(1) of the Constitution would be required.[156] The factors are not exhaustive. The court, in this case, did not explicitly state where in the range between mere rationality and proportionality the enquiry it undertook rests. It did however conclude that the relationship between the ends and the means are disproportional, as there was no connection between First National Bank or its vehicles and the customs debt in question.[157] From this, it is obvious that a mere rationality test was not undertaken. One could also argue that to conclude that the means are 'disproportional' to the ends some form of proportionality review was undertaken.

Where in this range does the enquiry lie? The means passed the first sub-test of proportionality as the purpose was held to be legitimate by the court.[158] The means could also have been held to be suitable to achieve the aim of recovering custom debt. The court, in this case, did not explicitly address this question. However, it did highlight that the measures in question were so expansive[159] and that the net was cast too wide.[160] From this finding, it can be inferred that the suitability of the measure to achieve the purpose was not in dispute. It was self-evident and unnecessary for the court to address this sub-test.

The court did not address the third sub-test of necessity. It is not reflected in the decision that less restrictive alternative measures were presented before the court. The court pointed out that the provisions of section 114 made no distinctions between categories of non-custom debtor owners.[161] Further that the legislature could have devised a narrower category of non-debtor owners which could have passed the constitutional muster.[162] The court concluded that the legislature had failed to do so and that it was impermissible for it to attempt to select such categories.[163] It stated that:

> It is not this Court's function to … speculate … about what the legislature might have done ... Under these circumstances it is impermissible for this Court to attempt to

[156] *First National Bank* (note 134 above) para 100.
[157] *First National Bank* (note 134 above) para 111.
[158] Ibid, para 108, where it was held that '…This is a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all its inhabitants.'
[159] Ibid, para 36.
[160] Ibid, para 108.
[161] Ibid, para 39.
[162] Ibid, para 40.
[163] Ibid.

> formulate a narrower set of categories of third parties falling within the purview of section 114(1)(a)(ii) and only to consider the section's constitutionality in respect of such categories; this would in effect be a legislative act.[164]

As such one could also argue that the court did not need to address whether there were less restrictive measures as they were not tendered before the court. Lastly, it can be argued that the sub-test of proportionality *stricto sensu* was addressed. The court considered a complexity of factors and decided that the means was grossly disproportional. As highlighted earlier, in weighing the relationship between the custom debt, property and property owner, this analysis formed part of the proportionality *stricto sensu* sub-test. The court found that the harm exceeded the benefit to the public interest. An approach similar to that adopted by the courts in interpreting and applying section 36 (1) of undertaking an overall balancing act was adopted as no sequential checklist was followed. The court focused on the relationship between the property, the property owner and the objectives pursued. It paid little attention to the other sub-tests required by proportionality. In so doing, it could be argued that, an approach more intrusive than the rationality test but, less intrusive than a full proportionality review was adopted.

On the other hand, it can also be argued that the facts of the particular case required the court to focus on the lack of a relationship between the customs debt, the property and the property owner. Therefore, this does not mean that, a review short of a full proportionality analysis was undertaken. It could also reflect that it is unrealistic to expect the courts in every case to follow a sequential checklist of the sub-test. Courts have a discretion to focus on different sub-tests of proportionality depending on the facts of each case.

According to the court in *First National Bank*, if a measure is not consistent with section 25 (1) of the Constitution, the next enquiry would be whether the deprivation is justifiable under section 36 of the Constitution.[165] Section 36 applies to limitations of all rights in the Bill of Rights. On the other hand, if the deprivation is not arbitrary the section 25 (1) right is not limited and the section 36 justification does not arise.[166] Despite this, the potential application of section 36 in property cases is improbable.[167] The court adopted the approach that it was unnecessary to embark on the section 36(1) justification analysis, leaving the question open. The extent of

[164] Ibid.
[165] Ibid, para 46.
[166] Ibid, para 70.
[167] A J van der Walt & R M Shay 'Constitutional analysis of intellectual property' (2014) 17 (1) *Potchefstroom Electronic Law Journal* 55, 63; *First National Bank* (note 134 above) para 110.

the deprivation was severe and there was no connection between First National Bank or its vehicles and the customs debt in question, as such section 114 is grossly disproportional to the infringement of FNB's property rights. One can argue that the court did not find it necessary to embark in detail on the justification analysis under section 36 (1) because such an analysis would be repetitive.

*5.3.1.2 Reflect-all*[168]

This case was concerned with the constitutionality of the Infrastructure Act, which was concerned with the planning of provincial roads.[169] Sections 10(1) and 10 (3) of the Infrastructure Act imposes legal restrictions on land affected by route determinations and preliminary designs. The primary issue the court had to address was whether the legislation arbitrarily deprived owners of their property contrary to section 25 (1).[170] This analysis will focus on Nkabinde J's judgement for the majority court in its interpretation of substantive arbitrariness.[171]

Again, in this case, the balancing purpose of section 25 was emphasised, property rights were deemed relative, determined by law and capable of being limited to facilitate the achievement of other social purposes.[172] 'The idea is not to protect private property from all state interference but to safeguard it from illegitimate and unfair state interference.'[173] Arbitrary deprivations or deprivations without sufficient reason would fall foul of section 25. The court adopted the approach taken in the *First National Bank* that substantive arbitrariness equalled limitations without sufficient reason. In this case, it was again emphasised that there was the potential application of proportionality in determining the arbitrariness of a deprivation. In other cases, mere rationality would suffice but in other cases, the means would have to be proportional to the ends sought to justify the deprivation.[174] The court held that the factors enlisted in *First National Bank* were relevant and applicable depending on the facts of the case.[175] Of those factors, the means and end relationship and the extent of deprivation were central to the

[168] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC).
[169] Ibid, para 1.
[170] Ibid, para 26.
[171] Ibid, para 1 – 61.
[172] Ibid, para 33.
[173] Ibid.
[174] Ibid, para 49.
[175] Ibid.

arbitrariness enquiry.[176] Thus a mere rationality test could suffice for marginal deprivations whilst more severe deprivations could warrant a proportionality analysis.[177] In this case, the court held that the deprivations were sufficiently serious to require a proportionality analysis.[178] To decide on the proportionality of the measures the court held that due regard was to be given to the purpose of the means, the nature of property, the extent of deprivation and the availability or non-availability of a less restrictive means.[179] From this, it can be concluded that the court planned to consider the legitimacy of the purpose, its suitability, the necessity and proportionality of the benefits to the sacrifice made by the property owner.

In application, no sequential checklist of the sub-tests was undertaken and some of them were never addressed. The court addressed the first sub-test of proportionality and found that the means were designed to fulfil a legitimate purpose. Strategic forward planning of roads was held to be important considering rapid urbanisation and the dangers of inadequate transport systems.[180] The court did not explicitly deal with the sub-tests of suitability. However, it can be deduced from the decision that the court considered the means capable and effective in protecting and promoting the strategic forward planning of roads. Moreover, the sub-test of necessity was not addressed, the availability or non- availability of less restrictive means was never dealt with. In this regard, it is important to note that it would be unnecessary for the court to address this sub-test if the applicants did not raise the availability of less restrictive measures. It is not for the court to come up with alternative means.

The court addressed the last sub-test and undertook some form of balancing. Significant weight was given to the extent of deprivation. The court held that the legislation did not result in complete deprivation of property because, only portions of their land that fell within the road reserve were affected.[181] Moreover, the legislation also allowed for the property owners to apply for amendment of the preliminary road designs. In allowing for amendment, the Act was designed to strike a balance between the legitimate interest of protecting the hypothetical road

[176] Ibid.
[177] Ibid.
[178] Ibid, para 52.
[179] Ibid, para 49.
[180] Ibid, para 34, 50.
[181] Ibid, para 53, 55.

network and individual property rights. On that basis, it was held that the legislation was not disproportional to the ends sought.[182]

On one hand of the scale was the importance of the legislation which was given considerable weight.[183] On the other hand was the extent of the deprivation which was found to be marginal and was subject to allowances for amendments.[184] This resulted in the benefits of the legitimate public interest, outweighing the harms to the private property rights. The majority court, in this case, did undertake some form of proportionality analysis, with all elements observable.

The court did not deal with the section 36(1) because no violation of section 25 (1) was found. This confirms the concerns that if a proportionality review is not undertaken in determining whether there is an arbitrary deprivation, plain packaging measures could escape the proportionality review.

*5.3.1.3 Shoprite Checkers (Pty) Limited [185]*

The analysis of this case will focus on the main judgement of Froneman J. The case was concerned with whether the legislative termination of a commercial licence that allowed the selling of wine in a grocery store constituted an arbitrary deprivation of property under section 25 (1). The legislative termination permitted the selling of wine together with other liquor in premises separate from the grocery stores.[186] Shoprite argued that the change of the regulatory regime amounted to an arbitrary deprivation of property.[187] Under the new provisions of the Eastern Cape Liquor Act, Shoprite could continue to sell wine in grocery stores for ten years after the commencement of the Act.[188] Five years after the commencement of the Act, Shoprite could also apply for registration to sell all kinds of liquor in separate premises.[189]

Shoprite submitted that the deprivation was total and that the respondent was supposed to provide evidence based reasons to justify such a deprivation.[190] The respondents argued that if there had been a deprivation the same was not substantial in light of the leeway to convert the

[182] Ibid, para 58, 61.
[183] Ibid, para 50.
[184] The designs had not obtained the status of a blue print for development, which admits of no deviations.
[185] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape and Others* [2015] ZACC 23
[186] Ibid, para 1.
[187] Ibid, para 2 - 4.
[188] Ibid, para 2.
[189] Ibid.
[190] Ibid, para 21.

licences to registrations to sell wine in separate premises.[191] Further, the respondents submitted that the legislative facts which the courts are not in a position to second-guess had been submitted as reasons for the deprivations.[192] The court echoed the respondents' opinion that Shoprite lost some 'legal entitlement' but that it 'was not too much.'[193]

The courts did not depart from the approach adopted in *First National Bank* that a law was substantively arbitrary if no sufficient reason for deprivation was provided.[194] Further that the standard in determining the existence of sufficient reason ranged from rationality to proportionality.[195] The court held that a complexity of relationships was to be considered in choosing where within that range the enquiry should fall. Including the relationship between means and end, the purpose of the law and property owner, and between the nature of property and the purpose of the law, and the extent of deprivation.[196]

In M*kontwana* the court held that rationality would suffice if the nature of the property right was not strong and if the deprivation was not significant.[197] The court, in this case, introduced a new factor, it held that if the property was closely related to other fundamental rights and constitutional values, then the enquiry would approximate proportionality.[198] It then concluded that rationality would suffice in this case because the change in regulatory regimes did not affect any fundamental rights of the holders of the licences.[199] For instance the right of choice of vocation.[200]

The court then held that it was rational to change the 'regulatory regime of liquor sales to provide for simplification in the licencing system.'[201] Further that it was rational based on the need to control the sale of liquor and reduce exposure of children to liqour.[202] The court, in this case, adopted the approach that the rationality test was to be applied to legislative facts to ensure that restraint is exercised.[203] Accordingly, the court held that it was not in a position to engage with different opinions whether children are worse off being exposed to liquor in grocery stores

[191] Ibid, para 27, where it was argued that the deprivation 'did not constitute removal of all incidents of ownership…'
[192] *Shoprite Checkers* (note 186 above) para 28.
[193] Ibid.
[194] *Shoprite Checkers* (note 186 above) para 77.
[195] Ibid.
[196] *Shoprite Checkers* (note 186 above) para 79.
[197] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC), para 34-5.
[198] *Shoprite Checkers* (note 186 above) para 80 – 82.
[199] *Shoprite Checkers* (note 186 above) para 83.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] *Shoprite Checkers* (note 186 above) para 85.

or being in the vicinity of premises that only sold liquor.[204] The court, therefore, took the legislative facts provided as adequate to satisfy the rationality test without questioning the evidence behind these legislative facts. By so doing, the court was highly deferential, however, it can be argued that this standard fits the rationality test which the court chose to employ.

The court also emphasised that considering that a ten-year gap was provided and a leeway was given to apply for a licence to sell liquor in separate premises, the legislative change was not arbitrary.[205] This case is important as it shows that arbitrariness can be decided on a mere rationality test. This is in line with the jurisprudence of *First National Bank*, which did not mandate but only introduced the possibility of the application of proportionality in section 25(1) cases. Section 25 (1) can activate either a rationality or a proportionality test.

In this case, the court took a clearer position on the application of section 36 (1) in property cases, and advanced that if a deprivation is found to be arbitrary, a justification under section 36 would be hard to find. It held that section 36 (1) finds no practical application because once it has been established that a deprivation is arbitrary, it cannot be said that it was reasonable and justifiable in terms of section 36 (1).[206] Therefore the deprivation, in this case, escaped a proportionality review.

#### *5.3.1.4 Predictive Analysis*

It is important for this section of the chapter to examine how the court's dicta relating to the meaning of 'arbitrary deprivation' could be applied to intellectual property, in particular trademarks in the plain packaging case. The jurisprudence on section 25(1) has been primarily focused on corporeal or traditional property cases. Although seldom applied to the context of intellectual property, guidance can be sought from the jurisprudence on section 25 (1).[207]

Proportionality under section 25(1) will involve the weighing and balancing of a complexity of relationships (the factors) enlisted in the *First National Bank* case. It is important to note that the applicability of these factors will vary from case to case. Some of the enlisted

[204] Ibid, para 83.
[205] Ibid, para 86.
[206] Ibid, para 22, 87.
[207] *Phumelela Gaming and Leisure (Ltd) v Gründlingh and Others* 2006 (8) BCLR 883 (CC); *National Soccer League T/A Premier Soccer League v Gidani (Pty) Ltd* [2014] 2 All SA 461 (GJ); *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ).

factors were relevant only to the facts of the *First National Bank* case and some are only germane to corporeal property cases. Nevertheless, the discussion of the cases indicate that there are predominant factors (taken into account across the different cases) considered in the section 25 (1) analysis, and it is my submission that these are also applicable to intellectual property cases.

The predominant factors central to the arbitrariness enquiry are the relationship between the means and the end; the extent of deprivation and the importance of the value pursued by the measure.[208] Central to all proportionality reviews is whether the harm is proportionate to the benefits achieved by the measure. The harm is measured through the enquiry on the extent of the deprivation, whilst the benefit is reflected by the extent to which the means achieves the ends (the means - end relationship). Although, in the case of plain packaging measures, the property in question will be trademarks – the central question will remain whether the harm resulting from the implementation of the measures unreasonably exceeds the benefit accrued to public health interests.

Plain packaging measures will only escape arbitrariness if they satisfy a proportionality type review, a mere rationality test will not suffice. According to the criterion set by the courts in the cases discussed above, a mere rationality test will not suffice if a measure results in severe deprivation of property. Further, it has also been held that where more than one incident of ownership is affected more compelling reasons are required for justification. This study argues that the deprivation resulting from plain packaging measures is severe and affects more than one incident of ownership. I have argued in chapter four of this study that plain packaging measures result in a significant interference with the right to use a mark, the right to exclude others from using it (by impairing its ability to distinguish between different goods and services) and the right to exploit the value from the marks. It erodes the distinctiveness of a mark, its ability to guarantee quality, to attract custom and to protect goodwill. Regulating the visual elements of a trademark as in this case will result in a severe diminution of its value.

The courts have also held that if the nature of the property right is not strong and if the deprivation was not significant a mere rationality test could suffice.[209] What is meant by the nature of property not being 'strong' has not been clarified. Further, it is important to note that

[208] *Reflect All* (note 169 above) para 49, where it was held that the means and end relationship and the extent of deprivation was central to the arbitrariness enquiry.
[209] *Mkontwana v Nelson Mandela Metropolitan Municipality* (note 194 above) para 34-5.

these judgements were not dealing with intellectual property cases and this factor pointing towards the strength of the nature of property should therefore not be directly transposed to intellectual property cases. The developed dicta is relevant, but, a 'nuanced and…context – specific and fact sensitive…'[210] approach must be adopted when applying these factors to deprivations of intellectual property. The *First National Bank* case was also not 'concerned at all with incorporeal property.'[211] The courts must thus develop an approach suitable for intellectual property cases. Such an approach should treat the 'strength of the nature of property' consideration with caution in determining whether a mere rationality test would suffice. The strength of the nature of property consideration clearly accords more weight to property with human rights attributes. Considering that intellectual property are primarily economical, such a consideration would automatically offset the balancing process. Accordingly, in cases such as the one at hand, such a factor should not be determinative of whether a proportionality type or mere rationality test is applicable.

As stated above, the approach to be adopted in examining the extent of deprivation in the case of trademarks will have to consider that trademark rights are primarily economic in nature. The only meaningful means to exploit them is commercially. Their value is acquired and maintained in the visual elements of the mark. Even though the trademark owner maintains ownership, the mark is of no value if it cannot distinguish between goods or services and simultaneously maintain the goodwill associated with the mark. Accordingly, the main consideration should be the extent to which the mark loses its distinguishing capability; since this is the core of the trademark property. In light of this, one can argue that plain packaging measures affect the core of the trademark rights resulting in a severe deprivation.

For the deprivation resulting from plain packaging measures to escape the test of arbitrariness under section 25 (1), it has to be proven that the harm caused does not unreasonably exceed the benefit added to public health. Initially, there must be a relationship between the means and the end. Since the deprivation is seriously severe, the relationship must be close. Plain packaging measures must be suitable to achieve its public health objectives.

It is anticipated that in demonstrating the extent of contribution attainable by plain packaging, heavy reliance will be placed on the World Health Organisations' Framework Convention on Tobacco Control (WHO FCTC). In *BATSA v Minister of Health* the court found

[210] *Laugh It Off Promotions* (note 156 above) para 82 – 83.
[211] *First National Bank* (note 134 above) para 100.

that similar tobacco control policies were based on evidence because they were recommended by the WHO FCTC.[212] The appellant in this case had argued that the Minister of Health had failed to provide evidence to justify the limitations caused by tobacco advertising ban on the right to freedom of expression.[213] The court held that the WHO FCTC was proof that the global community had accepted that the link between 'advertising and consumption (was) incontrovertible.'[214] In fact, it held that it was not open to the Minister of Health to ignore the WHO FCTC when considering what measures to implement as part of South Africa's tobacco control policy.[215]

In the same manner, plain packaging measures are also recommended by the WHO FCTC on the basis of evidence that there is a link between product packaging and consumption.[216] The WHO FCTC will be used as proof that plain packaging measures are suitable and will contribute to its public health objectives. It is improbable that the court will require actual evidence that plain packaging measures will achieve its public health objectives in South Africa. The fact that the measures are based on the WHO FCTC will make a compelling case for justification and the means and end relationship sufficient nexus requirement will be satisfied.

Included in the complexity of relationships to be considered in determining whether the deprivation is arbitrary, is the importance of the values pursued. As held by the courts in *BATSA v Minister of Health* 'there can be no question that government has an obligation to protect its citizens from the ravages of tobacco use.'[217] The importance of public health interests was held to be high and they made a strong case for the limitation of the right to freedom of speech.[218] Similarly, it is anticipated that in the plain packaging case the public health interests related to reducing tobacco consumption will be accorded significant weight in the overall balancing process under section 25 (1). Further, the societal and political importance given to public health would weigh heavily towards the proportionality of plain packaging measures.

This study argues that care must be taken in considering the weight accorded to public health interests in the arbitrariness enquiry; otherwise public health considerations will tip the

[212] *BATSA v Minister of Health* (2012) 3 All SA 593 (SCA), para 107.
[213] Ibid, para 19.
[214] Ibid, para 22.
[215] Ibid, para 23.
[216] Article 11 of the WHO FCTC; Para 46 of the Guidelines for the Implementation of Article 11 of the WHO FCTC.
[217] *BATSA v Minister of Health* (note 212 above) para 28.
[218] Ibid.

scales in the balancing process. The comparison must stay between the benefits accrued versus the extent of deprivation; and not between public health interests and trademark rights. Although trademarks are property, they are different from traditional property and from other forms of intellectual property. As indicated earlier the purpose of awarding trademark rights is purely commercial in nature. If a hierarchical approach is taken it will be unmanageable to accurately balance off public health interests with the commercial interests related to trademark rights.

The minimal impairment test or availability of less restrictive means has not been a predominant factor in section 25 (1) cases. Although mentioned as a factor to be considered in the case of *Reflect All,*[219] it was never applied. It was argued in the case law discussions above, that the courts could have neglected this factor because none of the appellants ever pleaded the availability of alternative less restrictive measures. Bearing in mind that plain packaging measures form part of an extensive tobacco control policy, one can argue that it will be next to impossible to find a less restrictive measure. As such, it is conceivable that this is one factor that will not be considered in the plain packaging case.

However, it is submitted that the availability of less restrictive measures is a factor which can potentially weigh in favour of intellectual property in other property deprivation cases. Intellectual property is heavily steeped in economic considerations and will often be limited by policies which pursue public interests like health which are evidently related to other human rights. The availability of equally efficient less restrictive means could provide a safe harbour for intellectual property to escape deprivations, which could otherwise be found justifiable. In light of this, it is recommended that the availability of less restrictive means is a factor that must be taken into account in deliberations on the arbitrariness of intellectual property deprivations.

To determine whether plain packaging measures result in arbitrary deprivations, the overall balancing will weigh the importance of public health considerations and the fact that plain packaging measures are based on the WHO FCTC on the one side of the scale. On the other side of the scale will be the severe deprivations resulting from the plain packaging measures. It is likely that the court will find that the harm though severe is proportional to the public health benefits that will result from implementing plain packaging measures. The courts will therefore find that the deprivation is not arbitrary and is in compliance with section 25 (1)

[219] *Reflect All* (note 169 above) para 49.

of the South African constitution. In conclusion, it is my submission that the justification criteria set by section 25 (1) is not rigorous and will not be difficult to satisfy.

*5.3.1.5 Preliminary Conclusions*

The aim of this section was to establish the form proportionality would take under section 25(1), and to gauge how plain packaging measures would fare under this arbitrariness test. The position adopted allows the court to be more deferential in applying proportionality, to dilute the test and or to not pay full attention to all the elements of proportionality. The court has applied proportionality in section 25 (1) as one overall multi-factored balancing process. Some elements of legitimacy, suitability and balancing are present varying from case to case. No sequential checklist is followed, the courts focus more on the factors which determine the cases. Although all four elements are present in the section 25 (1) analysis, the courts do not always follow them individually. Rather, an overall balancing exercise is undertaken to determine whether the harm is proportionate to the benefits resulting from the means. One can argue that, the approach to proportionality is flexible and in that way, it differs from the broadly accepted form of proportionality presented in the earlier sections of this chapter.

It was also established that a mere rational connection between the means and the end could satisfy the need for sufficient reason in the section 25 (1) review.[220] According to the courts' dicta, if the nature of the property right is not strong, if the deprivation is minimal and or if the limitation is not closely related to other fundamental rights then a rationality test could suffice. It is argued that of these considerations, the most applicable to intellectual property cases is the extent of deprivation. If the deprivation is minimal then a rationality test could suffice. On the other hand, section 25(1) also allows a review stricter than rationality but less strict than a full proportionality examination. It was emphasised that proportionality, as applied under the property clause, is narrower than proportionality as required by section 36(1).

If the courts find as this study has, that the deprivation is significant, a review stricter than mere rationality will be undertaken. As argued earlier on, plain packaging measures affect more than one incident of ownership, thus negating the core of the right to trademark property. The inquiry under section 25 (1) will consider the harm or extent of deprivation and its proportionality to the purpose of promoting public health and the extent to which plain packaging measures are closely tailored to fulfil the purpose, in light of the WHO FCTC

[220] See *Shoprite Checkers* (note 186 above).

recommendations. It is predicted that deprivation resulting from plain packaging measures will not be found to be arbitrary.

With regard to the application of section 36 (1) in section 25 cases, in the *Shoprite Checkers*, a more recent case, it was concluded that a finding that a deprivation is arbitrary is sufficient to also conclude that its deprivation cannot be justified under section 36(1).

The next section will now discuss proportionality under section 36(1), and where possible examine whether the proportionality test under section 36(1) is stricter than the one under section 25(1). Although courts have indicated that it is unnecessary and repetitive to justify arbitrary deprivations under section 36 (1), it cannot be ignored that in other cases the question has been left open.

### 5.3.2 Looking for Proportionality in Section 36 (1) of the Constitution

Section 36 (1) is the main source of the proportionality test in South African constitutional law. Whilst it is heavily influenced by German constitutional law, it takes a different approach.[221] Similar to Canada, Germany adopted a structured version of proportionality.[222] South Africa rejected this approach.[223] Although it considers similar factors as those considered by German and Canadian courts when applying proportionality; it does not follow a fixed structure.[224] The South African Court held that the factors itemised in section 36(1) are not exhaustive and that they form part of an 'overall assessment.'[225] It was held that adhering, 'mechanically to a sequential checklist'[226] was not necessary to 'arrive at a global judgement on proportionality.'[227] This approach would immediately raise concern to those who argue that complying to 'order matters' and that adhering to a sequential checklist is essential to the correct application of proportionality.[228]

[221] N Petersen 'Proportionality and the Incommensurability challenge- Some lessons from South African constitutional court' (2014) *South African Journal on Human Rights* 407.
[222] *R v Oakes* (1986) I (Supreme Court of Canada Decision) where Dickson CJ set out the criteria to be satisfied, which follows the broadly accepted concept of proportionality.
[223] N Petersen (note 221 above) 406.
[224] Ibid.
[225] *S v Manamela and Another* 2000 (3) SA para 32.
[226] Ibid.
[227] Ibid.
[228] See J Brown (note 76 above) 30; A Barack (note 38 above) 132.

Scholars have written about proportionality and the general limitation clause.[229] This section does not seek to duplicate their efforts. Rather it builds on the work done and takes a different approach to the analysis of proportionality under the general limitation clause. The analysis of the section 36 (1) proportionality test is informed by the preceding discussion of the broadly accepted concept of proportionality. To establish the application of proportionality under section 36 (1) it is necessary to turn to case law.

Again exhaustive case law selection was not possible and is not necessary for the purposes of this study. Many of the relevant court judgements do not contain new strands of judicial reasoning.[230] Moreover, in their analysis of proportionality under section 36, many scholars have discussed a variety of landmark constitutional cases.[231] Although this section will examine and refer to the cases that have been examined in previous literature; it takes a different approach and looks at other recent cases that have received little scholarly attention.

*5.3.2.1 S v Makwanyane*

One cannot talk about proportionality in South African constitutional law without mentioning the case of *S v Makwanyane*.[232] Although it was decided before the dawn of the new constitution, the South African approach to proportionality under section 36 was modelled after it.[233] As such, this study will examine this landmark case as a way of tracing the roots of what proportionality under the general limitation clause entails today.

The legal question before the court was whether capital punishment was justifiable in terms of section 33 (1) of the interim Constitution of South Africa.[234] Section 33 (1) provided in part that the:

> rights entrenched in this chapter may be limited by law of general application, provided that such limitation (a) shall be permissible only to the extent that it is (i) reasonable; and

[229] N Petersen (note 221 above) 405; G Barrie 'The application of the doctrine of proportionality in South African courts' (2013) *South African Public Law Journal* 40 -54; I M Rautenbach 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17 (6) *Potchefstroom Electronic Law Journal* 2269-2267.
[230] See for example the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 case which refers to many of the landmark decisions like *S v Makwanyane and Another* 1995 (3) SA 391.
[231] See for example G Barrie (note 229 above), who uses landmark cases in his work. For instance the case of *S v Makwanyane* (note 231 above)*; Prince v President of the Law Society of Good Hope* 2002 2 SA 794 (CC); S *v Bhulwana* 1996 1 SA 388; and many other court decisions.
[232] See for example A S Sweet & J Mathews (note 1 above) 125.
[233] A S Sweet, J Mathews (note 1 above) 127.
[234] Act 200 of 1993 repealed by the Constitution of the Republic of South Africa No 108 of 1996 (hereafter the Interim Constitution).

(ii) justifiable in an open and democratic society based on freedom and equality; and (iii) shall not negate the essential content of the right in question.[235]

Chaskalson J in one of the oft-quoted statements of this judgement[236] held that the limitation of rights for purposes that are necessary in a democratic society 'involves the weighing up of competing values and ultimately an assessment based on proportionality.'[237] The factors to be considered included: the nature of the limited right; its importance in a democratic society based on freedom and equality; the purpose of the limitation; its importance to society; the extent of the limitation; the efficacy of the means and whether the desired ends could be reasonably achieved through means less restrictive to the rights in issue.[238]

Here the court did not approach the proportionality test as a sequential checklist, but rather as an overall balancing exercise. The factors included in this overall balancing are similar to the four sub-tests of proportionality, that require a legitimate purpose, suitable, necessary and proportional means. It is important to restate that proportionality under section 25 (1) also does not follow a checklist.

It is unclear why the court did not follow the sequential checklist. Chaskalson did refer to the Canadian Oakes test, which required three of the four stages (suitability, least restrictiveness and proportionality).[239] In the *Oakes* case[240], it was held that a limitation must be directed to the achievement of an objective that is of sufficient importance. Further that, even if rationally connected to the objective, the limitation must impair as little as possible, the right in question. Finally, that proportionality must exist between the objective to be fulfilled and the limitation.[241] However, he did not see any reason why he should 'fit [the] analysis [of section 33 (1)] into the Canadian pattern.'[242] This is indicative of the different approaches to proportionality. Further, Chaskalson held that in weighing these factors courts must keep in mind the fact that their role is not to second-guess the wisdom of policy choices made by the legislators.[243] This confirms the argument that proportionality and deference are inseparable.

[235] Section 33 (1) of the interim constitution.
[236] See A S Sweet, J Mathews (note 1 above) 126.
[237] *S v Makwanyane* (note 231 above) para 104.
[238] Ibid.
[239] *S v Makwanyane* (note 231 above) para 105 – 6.
[240] R v Oakes (1986) 19 CRR 308
[241] Ibid, para 337.
[242] *S v Makwanyane* (note 231 above) para 110.
[243] Ibid, para 104.

In applying the criteria required by section 33 (1) on the limitation of rights the court addressed the legitimacy of the purpose with more rigour compared to the approach taken in section 25(1) cases when assessing the legitimacy of a purpose. Chaskalson acknowledged the importance of the need to deter and prevent violent crimes in South Africa and society's need for retribution.[244] Although no particular order was followed the court also addressed the suitability of the means to achieve the ends. It found that there was prima facie a rational connection between capital punishment and the purpose for which it was prescribed.[245] However, it went further to hold that there were elements of arbitrariness, unfairness and irrationality,[246] which should be considered in deciding whether the means can achieve the end. The court did not make an individual decision on the suitability or rational connection requirement. Instead, it addressed it as a matter to be considered in the overall balancing act. If the courts had followed a cumulative checklist and decided that a rational connection free from arbitrariness was lacking, the proportionality inquiry would have ended at this stage. Differences from the generally accepted model of proportionality which follows a cumulative checklist are observable.

The court also addressed the issue of the need for a less restrictive means. Again it did not make an individual assessment of this question but coupled this question with issues of suitability. For instance, with regard to the deterring purposes, it rejected the Attorney General's argument that there was a surge in crime which was indicative of the need for the death penalty instead of life imprisonment.[247] In reply, Chaskalson J held that there were various factors which contributed to the crime surge.[248] It would be 'deluding ourselves' if it was to be accepted that executing a few people would solve the high level of crime.[249]

According to the court, no information was placed before it that showed that the death sentence had any impact on the behaviour of criminals.[250] Bare statistics of a rise in crime were held to be of no probative value.[251] Instead, the evidence just proved that 'we are living in a

[244] Ibid, para 117.
[245] Ibid, para 106.
[246] The laws governing the death sentence were not uniform in South Africa, for example in Ciskei it had been abolished. There was no rationality behind these differences. See para 27, 42 and 48 where the arbitrariness of the imposition of the death sentence is discussed at great lengths. *S v Makwanyane* (note 231 above) para 27, 42, 48 - 56.
[247] *S v Makwanyane* (note 231 above) para 119.
[248] Ibid, para 119, 121.
[249] Ibid, para 121.
[250] Ibid.
[251] Ibid.

violent society' not that the death penalty was indispensable as argued by the Attorney General.[252]

The court held that the important question was whether the imposition of a death sentence, rather than life imprisonment had a marginally greater deterrent effect.[253] It did not carry out an individual assessment of the suitability of the primary measure and make a decision on that. Instead, it examined whether the sentence of life imprisonment could achieve the same purpose to the same degree. For the court, apprehending offenders was the greatest deterrent to crime, the death penalty did not achieve this any better than life imprisonment.[254] The court also found that life imprisonment could also provide retributive justice and the punishment had to be commensurate and not equivalent or identical.[255] Life imprisonment could fulfil the purpose and would encroach on the rights to life and dignity instead of destroying them altogether like the death penalty did.[256] In light of this, the court could have declared the means unnecessary as there were less restrictive means which could fulfil the same purpose to the same degree whilst causing less harm to the limited rights; and end the inquiry there.

At the proportionality *stricto sensu* (balancing stage) the court weighed the destruction of the rights to life and dignity respectively, the elements of arbitrariness, the possibility of error and the existence of an alternative measure on the one hand of the scale.[257] It is important to note that life and dignity were held to be 'the most important of all rights.'[258] As such complete destruction of these rights, which resulted in more than a negation of the essential content of the rights tilted the scale in favour of the unconstitutionality of the death sentence. Further, the court attributed significant weight to the presence of an alternative measures which would be less damaging to these high order rights.[259]

On the other side of the scale was the deterring effect, and the public demand for retributive justice.[260] It was not proven that the death sentence had a greater deterring effect on murder crimes than life imprisonment.[261] The Attorney General argued that it was not possible

[252] Ibid.
[253] Ibid, para 123.
[254] Ibid, para 121.
[255] Ibid, para 130.
[256] Ibid, para 143.
[257] Ibid, para 135, 145.
[258] Ibid, para 144.
[259] Ibid, para 145, 148.
[260] Ibid, para 145.
[261] Ibid, para 148.

to prove such.[262] The court accepted that lack of proof would not necessarily result in a violation of section 33 (1); but held that it presented a major obstacle in the Attorney General's argument.[263] The 'doubt which exists in regard to the deterrent effect must weigh heavily against his argument.'[264] Moreover, the need for retribution was not accorded much weight, it was held that this factor 'ought not to be given undue weight' in the balancing process.[265] The court in this instance went beyond assessing the legitimacy of the purpose of retribution and assessed its importance. Accordingly, the court found that a clear, convincing case had not been made to justify the limitation of rights and the death sentence was declared unconstitutional.

The court was at most moderately deferential. It did show regard to the legislature's purpose. However, it was barely convinced that a rational connection existed between the means and the end. Further, it did not agree that the means was indispensable. This could be attributed to the fact that life and dignity were considered high order rights and that they had been extremely limited – this required a stronger case for justification. This confirms Alexy's law of balancing: the greater the detriment to one principle the greater must be the importance of satisfying the other.

The court's attitude towards the importance of public opinion in deciding on the constitutionality of the death sentence is also indicative of its level of deference. It held that the societal attitude was important but it was ultimately the judiciary's role 'not society or Parliament' to decide whether the means was justifiable.[266] 'public opinion… is no substitute for the duty vested in the courts to interpret the Constitution without fear or favour.'[267]

Lastly, although a sequential checklist was not followed, the means was subjected to all four sub-tests that form the proportionality test. One could argue that if the analysis had been done in stages the inquiry would have ended at the suitability or at the most the minimal impairment stage. As a result, the court did not adopt a highly deferential approach.

It could also be argued that the means was not subjected to balancing according to the proportionality *stricto sensu* stage. The fourth sub-test requires the balancing of the marginal benefit achieved (benefit in deterring murder) versus the marginal harm suffered as a result thereof (harm suffered by the right to life and dignity). In this case, the balancing was relatively

[262] Ibid, para 127.
[263] Ibid.
[264] Ibid.
[265] *S v Makwanyane* (note 231 above) para 130, 148.
[266] *S v Makwanyane* (note 231 above) para 87.
[267] Ibid, para 87- 88.

easy because there was no proven benefit to the purpose and there was an alternative measure which was less restrictive to the limited rights. As such it would not have made any difference to end the inquiry without carrying out any balancing.

If such an approach would be adopted in the plain packaging case it would be interesting to see how the court would deal with the issue of suitability. As in this case, the effectiveness of plain packaging to curb smoking is disputed.[268] Evidence on both sides has been presented. The importance of trademarks and the court's determination of the extent of limitation could be decisive in which approach the courts will adopt. The presence of doubt could be given significant or trivial weight. If the courts find as l have, that the measures are highly intrusive then a compelling case would be required. On the other hand, if trademark rights are not accorded much weight the burden of justification would be lighter.

The list of factors identified as criteria to determine the justifiability of limitations in an open and democratic society influenced the present general limitation clause in section 36 (1). Section 36 (1) provides that:

> the rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of limitation; (d) the relationship between the limitation and its purpose.[269]

According to the approach taken in *S v Makwanyane*, it has been held that section 36 (1) requires an assessment based on proportionality.[270] I now turn to the 2010 constitutional case of *Road Accident Fund, Minister of Transport vs Vusimuzi Mdeyide*, to examine how section 36 (1) has been applied and interpreted.

*5.3.2.2 Road Accident Fund and Another v Mdeyide*

The case centred around the question whether section 23 (1) of the RAF Act was a justifiable limitation on the right to access courts. Section 23 (1) of the RAF Act provides that claims against the RAF prescribe after three years from the date the cause of action arose.[271]

[268] See D Germain, M Wakefield & S J Durkin 'Adolescents' Perceptions of cigarette brand image: Does plain packaging make a difference?' (2009) 46 (4) *Journal of Adolescent Health* 1-8.
[269] Section 36 of the South African Constitution.
[270] *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) para 66.
[271] Ibid, para 4.

The constitutional attack though is directed at the lack of flexibility.[272] The section does not contain a knowledge requirement, as such, it does not consider whether the claimant knew of the RAF.[273] Further, it does not contain a condonation provision and in doing so disregards the fact that there might be justifiable reasons for the delays.[274]

The respondent Mr Mdeyide was blind, had almost no formal education and was illiterate. He could not leave his home without help, had never held 'gainful employment' and lived in informal settlements.[275] On 8 March 1999 he was struck by a motor vehicle and six months later on 17 September 1999 he consulted an attorney who was to lodge his RAF claim.[276] The attorney then lost contact with Mr Mdeyide until 23 January 2002, on 11 March 2002, three years and three days after the accident the attorney sent an unsigned affidavit to the RAF.[277] The RAF rejected the claim and the High court held that the Act was unconstitutional.[278] The RAF and the Minister of Transport then brought the appeal before the constitutional court.

The constitutional court held that the right to access courts was fundamental and essential for constitutional democracy.[279] It further held that section 23 (1) limited the exercise of a claimants' right to access courts.[280] It disagreed with the RAF and Minister of Transport who argued that section 23 (1) gave a 'real and fair opportunity to lodge a claim' and as a result did not limit the right to access courts.[281] The court then had to consider whether the limitation was justifiable.

The court held that section 36 (1) provided a formula to weigh competing interests.[282] In agreement with the court in *S v Makwanyane*, it highlighted that the general limitation clause required the weighing of all relevant factors mentioned in section 36 (1).[283] Regarding the nature of the right to access courts, Van Der Westhuizen J for the majority court held that it was an

[272] Ibid, para 23, 55.
[273] Ibid, para 4, 20, 32 -33.
[274] Ibid, para 20, 32-33.
[275] Ibid, para 22.
[276] Ibid, para 24.
[277] Ibid, para 25.
[278] Ibid, para 33.
[279] Ibid, para 13.
[280] Ibid, para 62.
[281] Ibid, para 38.
[282] Ibid, para 81.
[283] Ibid, para 63.

important right and that it also 'implied a degree of awareness, or knowledge'[284] on the part of the right holder. Further that it was not absolute and could be limited.[285]

Froneman J for the minority court agreed that the limited right was fundamental.[286] However, he placed more emphasis on knowledge on the part of the right bearer. He held that knowledge was a precondition for the right to access and without it, it would be abstract and illusory.[287] The minority court also held that the question was whether section 23 (1) provided for a relevant time between the cause of action coming to the knowledge of the claimant and the time during which the litigation may be launched.[288] According to the minority, section, 23 (1) had the potential to completely deny persons the right to access courts, negating the essential part of that right.[289] Accordingly, the minority found that the limitation touched on the core of the right to access courts, was a significant limitation and required a 'strong justification.'[290] As will be shown the difference between the majority and the minority judgements had its roots on the divergent opinions about the extent to which section 23 (1) limits the right of access to courts.[291]

The minority and majority courts were in agreement that the purpose of section 23 (1) was legitimate. The purpose was to create legal certainty and prevent inordinate delays which could be detrimental to the interests of justice.[292] A balance was to be struck between the right to access courts and the need for fair and manageable prescription of claims.[293] The first sub-test of legitimacy would, therefore, be fulfilled.

The minority and majority did not agree on the suitability of the measure to achieve the purpose. The claimants put forward three reasons for not allowing provision for knowledge and condonation. The fixed commencement date would allow the RAF to process claims efficiently and expeditiously.[294] It would also ensure that the relevant information would be still reasonably available to assess the value of the claim. Lastly, the claimants argued that allowing for the

[284] Ibid, para 65.
[285] Ibid, para 65.
[286] Ibid, para 100.
[287] Ibid.
[288] Ibid, para 109.
[289] Ibid, para 111.
[290] Ibid, para 112.
[291] Ibid, para 104.
[292] *RAF v Mdeyide* (note 268 above) para 4.
[293] Ibid.
[294] Ibid, para 74.

knowledge requirement and condonation would make it impossible to accurately predict its expenditure.[295] These were the justifications for the limitation resulting from section 23 (1).

Significant weight was accorded to the reasons presented for the inflexibility of section 23(1) by the majority court. It held that it was reasonably safe to say that a more open prescription period would be 'potentially costly at best and calamitous at worst.'[296] The public would bear this burden, the RAF could collapse leaving thousands without the possibility of ever receiving compensation. The court acknowledged that the evidence did not show absolute certainty but it reasonably showed great risk. This approach indicates that to prove suitability or rational connection, absolute fulfilment of the purpose is not required. The majority held that the means were connected to a purpose of high importance,[297] it met the requirements of the suitability test.

On the contrary, the minority required a stronger case for justification and held that there was no rational connection between the means and the end. The minority did not give significant weight to the justifications presented by the claimants. In particular, it pointed out the fact that the previous legislation allowed condonation for late claims. The applicants did not provide evidence that those prior provisions 'materially contributed' to the inefficiency and backlog. As such, they held that there was no rational explanation showing why the shift to inflexible prescriptions was necessary.[298] Instead, the minority court argued that the evidence of backlog, financial and administrative collapse only shows that the change to inflexible prescriptions has not been effective. The two divergent opinions on the suitability of the means show that the same legal question can result in different answers depending on the level of deference adopted or the intensity with which the judiciary approached the question. It also shows that courts can interpret the factual framework presented before it differently. To the majority evidence of backlog created a reasonable conclusion that a flexible prescription clauses would increase the backlog. On the contrary, the minority took it as evidence that the change to inflexible prescription did not place the fund at a better position and was therefore ineffective or unsuitable.

The minority court held that the justification had already failed on the lack of a rational connection between the means and the ends, but there were further reasons to reject the

[295] Ibid, para 74 – 76, 123.
[296] Ibid, para 79.
[297] Ibid, para 79.
[298] Ibid, para 130.

justifications.[299] This approach shows that South African courts carry out an overall balancing act when applying proportionality and do not follow a sequential checklist. In terms of the latter, the measure would not pass the suitability sub-test and the inquiry would end at this stage.

The minority court went further to conclude that less restrictive means were available to alleviate the perceived administration and financial burdens. In other words, the means did not satisfy the third sub-test of proportionality. Again the court held that this consideration was not conclusive but was a factor to be considered in undertaking an overall balancing of various factors. The availability of less restrictive alternative measures was based on the fact that the inflexible prescription did not achieve its purpose, it did not place the RAF at any better position. From this, the minority court concluded that a flexible prescription would not put the RAF in a worse position or at least no evidence was shown to prove that. Accordingly, flexible prescriptions were a less restrictive means.

The requirement for less restrictive means is satisfied where there are alternative means that achieve the purpose to the same degree whilst resulting in less harm to the limited rights. A flexible prescription would be less restrictive however, it was not proven that either the primary or alternative means would achieve the purpose. This justifies the approach that, where the means does not satisfy the suitability test the inquiry should be put to an end. It would avoid an erroneous and incomplete application of the less restrictive sub-test, as seen in this case.

The majority court did not pay much attention to the availability of less restrictive means. It held that the applicants could not have adopted a less drastic means. It also noted that even if they were incorrect the 'mere possibility of less restrictive means'[300] was not decisive. This was similar to the approach adopted by the minority court that the availability of a less restrictive means was not conclusive but would form part of the overall balancing exercise.

With regard to the balancing stage, the majority court held that the final effect of prescription on a claim, the absence of a knowledge requirement and condonation and the socio – economic context must be put on one side of the scale.[301] The generosity of the time period of three years, the need for proper administration of the fund and the potentially harmful effects of a more flexible prescription period was put on the other side of the scale. The majority court held that the time of three years weighed heavily in the balancing process. It held that the three

[299] *RAF v Mdeyide* (note 268 above) para 112.
[300] *RAF v Mdeyide* (note 268 above) para 92.
[301] Ibid, para 66.

years provided considerable flexibility and space for persons with difficulties.[302] In conclusion, the majority held that the potential harm to the functioning of the RAF (should a knowledge and condonation requirement be imported into section 23 (1)) outweighed the possible negative impact on people who might not come to know of the RAF within the three year period.[303]

The minority court based its decision on the lack of a rational connection between the limitations and the stated purpose, and on the availability of less restrictive means.[304] Those two factors were sufficient to find that section 23 (1) was unconstitutional. Although the minority and majority decisions are different, both do not follow discrete steps in applying proportionality. The decisions also show how flexible proportionality can be and how it can be applied with varying levels of intensity.

*5.3.2.3 AB and Another v Minister of Social Development*[305]

The minority court in the constitutional case of *AB v Minister of Social Development* confirmed that in applying the proportionality test the South African courts do not follow a sequential checklist. That is not to say the court completely discards the questions raised in the four stages of proportionality. The majority court, in this case, did not find a limitation of rights and so it does not address the justifiability of a limitation of rights in an open and democratic society.

The minority court adhered to a stage by stage analysis of the five factors enumerated in section 36 (1); the nature of the right, the importance and purpose of the limitation, the nature and extent of limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose.

The claimants in this case challenged the constitutionality of section 294 of the Children's Act. They claimed that it violated the rights to equality, human dignity, psychological integrity and access to reproductive health care.[306] Section 294 of the Children's Act precludes a surrogacy agreement where none of the commissioning parents use their gametes. As such both or at least one of the commissioning parents' gametes must effect the conception of the child. AB, the first applicant was both conception and pregnancy infertile so she could not use her gamete. Furthermore, she was single and did not have a partner who could

[302] Ibid, para 89.
[303] Ibid, para 93.
[304] Ibid, para 139 - 140.
[305] *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) 43.
[306] *AB v Minister of Social Development* (note 303 above) para 33.70

act as a co-commissioning parent and use their gamete. Accordingly, section 294 precluded her from having a child through surrogacy.

The Minister submitted that section 294 existed to protect the best interests of children, by preventing the creation of designer children, ensuring that the adoption process is not circumvented. These were the separate overlapping goals of section 294 according to the Minister.[307] The Centre for Child Law, an amicus curiae in this case, also submitted that the purpose of section 294 was to also ensure that the child knows their genetic origins.[308]

The court held that section 36 (1) required a determination of whether the Minister's justifications for violating rights were proportionate to the extent of the violation.[309] The constitution required the court to take into account the factors enumerated in section 36 (1) to determine the proportionality of the means set out in section 294 of the Children's Act.[310]

The minority court found that the rights were limited, in particular, the right to equality and the right to psychological integrity. In examining whether rights had been limited the minority court addressed the substantive nature of the individual rights in issue. The decision whether the right to psychological integrity had been limited had to be taken in the context of the applicant's infertility.[311] It also interpreted whether the right to equality had been infringed in the context of biology, technology and the social structure of a family. The court's approach was not deferential in this regard, it engaged in its role as the interpreter of constitutional rights. It held that determining whether there was discrimination in respect to the right to equality, was an assessment which was objective and independent of the intentions of the legislature.[312]

Interpreting rights limitations against this backdrop allowed the courts to address the extent of the limitation of the rights in issue. It looked at the nature of the rights which informed the determination of the extent of limitation. This approach should be adopted in measuring the severity of deprivations in section 25 (1) cases. As indicated before the extent of a limitation determines the level of intensity with which proportionality is applied. In this case, it was held that section 294 effected a 'serious infraction' on the rights.

The second factor enumerated in section 36(1) is that of the importance and purpose of the limitation. It can be argued that this factor represents the first prong of proportionality – the

[307] Ibid, para 24, 25, 144.
[308] Ibid, para 30.
[309] Ibid, para 131.
[310] Ibid, para 130.
[311] *AB v Minister of Social Development* (note 303 above) para 83-89.
[312] Ibid, para 105.

need for a legitimate purpose. The main part of the minority decision centred on the purposes of section 294 and the importance thereof.[313] The court first established the purpose of section 294 it did not defer to the purposes presented by the Minister and the Centre for Child Law.

The Minister had submitted that one of the purposes was to prevent commercial surrogacy, an arrangement where the surrogate is paid for carrying the pregnancy.[314] The court rejected that this was a purpose of section 294, it acknowledged the importance of that purpose but held that the factual framework before it did not show that section 294 was aimed at curbing surrogacy.[315] It found that there were other sections of the Children's Act which dealt with prohibiting commercial surrogacy and the removal of section 294 would have no impact on commercial surrogacy.

It can be argued that in examining the importance of the purpose of curbing commercial surrogacy the court considered the suitability of section 294 to prevent commercial surrogacy instead. Therefore the court did not consider the appropriate facts and issues at the correct stage of the inquiry. This could justify the opinion that not following a sequential checklist can result in a mix-up and affect the logic or flow of a courts judgement.[316] This again shows the divergence of the South African courts from assessing proportionality in stages.

Again the court held that the purpose to promote or ensure that the child knows their genetic origin was not legitimate. The court addressed the importance of this purpose in light of section 41 of the Children's Act which provides that a child born out of surrogacy is entitled to medical and other information except for the identity of the surrogate.[317] The court held that if it is accepted that section 294 by requiring at least one of the commissioning parents uses their gametes, ensures that the child knows their genetic origins; then the constitutionality of section 41 was questionable. Section 41 prevents children from knowing their genetic origins while section 294 was claimed to serve the purpose of ensuring that children know their genetic origins. The court held that this was contradictory.[318] It held that 'if this was the purpose of section 294, it would amount to a situation where the Children's Act allows a particular purpose

[313] Ibid, para 139 - 207.
[314] Ibid, para 144.
[315] Ibid, para 148.
[316] A Barack (note 38 above) 460-461; See also D Grimm (note 63 above) 397.
[317] *AB v Minister of Social Development* (note 303 above) para 153 - 154.
[318] Ibid, para 159.

to be pursued in a manner which is not even handed.'[319] In light of this, the court struggled to see how the purpose of section 294 was to ensure that children know their genetic origins.[320]

The Minister also pointed out that another purpose of section 294 was to promote adoption. The court found that this purpose was opportunistic.[321] Instead, the court held that the correct purpose was to prevent circumvention of the adoption process by ensuring that surrogacy was only available where a child was genetically related to one of or both commissioning parents.[322] The court however held that the Minister had failed to show why this purpose was important.[323] Further, it held that surrogacy and adoption were not the same, 'there are important psychological differences.'[324] As such it was held that it was not correct to limit surrogacy because commissioning parents could adopt, the two are different and one must be able to choose. The purpose failed the legitimacy test.

The court then found that the limitation was far reaching. It was an absolute barrier to the use of surrogacy to people who were both conception and pregnancy infertile.[325] The court also addressed the fifth factor enlisted in section 36 (1), the availability of less restrictive means, which is also the third sub-test of proportionality. The court held that because double donor surrogacy is different from adoption less restrictive means were not available. Adoption would not achieve the same purpose to the same degree.

The court was not deferential. It established what the purpose of section 294 was on itself, to ensure that a person only becomes a parent to a child not genetically related to them through adoption. The importance of this purpose was found not legitimate. However, since the court was not following a cumulative checklist, it still went on to note that the purpose was closely related to section 294.[326] It also held that since the limitation was prohibitive less restrictive means would lead to non-attainment of the purpose.[327]

According to the court, the ultimate question was whether section 294 served a purpose which is so fundamental as to outweigh and justify the corresponding limitations of the rights in question.[328] The court concluded that the inroad to fundamental rights was significant and

[319] Ibid, para 163.
[320] Ibid.
[321] Ibid, para 167.
[322] Ibid, para 168 - 170.
[323] Ibid, para 174.
[324] Ibid, para 180.
[325] Ibid, para 226.
[326] Ibid, para 210.
[327] Ibid, para 211.
[328] Ibid, para 217.

was not sufficiently justified.[329] The harm was not proportionate to the importance of the purpose. One can argue that it would not have made a difference had the inquiry ended at the legitimacy sub-test. If the purpose was not legitimate, there was no need to examine whether the means achieved such an illegitimate purpose, further whether less restrictive alternative means could achieve the purpose.

*5.3.2.4 Predictive analysis*

Similar to proportionality under section 25 (1), proportionality under section 36 (1) also involves an overall balancing of factors. Both approaches do not follow a sequential checklist, and the elements of proportionality though observable, are not treated in a cumulative manner. Further, similarities can be drawn between the factors to be considered in the overall balancing act under both section 25 (1) and 36 (1) of the Constitution. These include the nature of the limited right and its importance, the purpose of the limitation, the extent of limitation, the relationship between the means and the end and the availability of less restrictive means. These elements are similar to the four prongs of suitability, legitimacy, necessity and proportionality *stricto sensu*; which form the broadly accepted model of proportionality.

It is unlikely that an arbitrary deprivation will be saved under section 36 (1). The same considerations under section 25 (1) will be taken under section 36 (1). Accordingly, it is expected that the results of the predictive analysis under section 25 (1) will be the same under section 36 (1). Nevertheless, since this study predicts that plain packaging measures do not constitute arbitrary deprivations of property and are in compliance with section 25 (1), the question of justifiability of limitations of constitutional rights under section 36 (1) will not arise.

## 5.4 THE CASE FOR PLAIN PACKAGING OF TOBACCO PRODUCT MEASURES

With this chapter drawing to a close, it is important to revisit some of the key aspects that this study seeks to address. It seeks to provide a guiding framework or a practical yardstick for South Africa in the wake of plain packaging measures. It has been emphasised that the justificatory criteria set in section 25(1), which is most relevant, does allow a proportionality review. This presents an opportunity for the necessity of plain packaging measures to be addressed with completeness. Building a strong case for plain packaging will make a WTO challenge easy to defend and will set a decent precedent for future cases, especially those that

[329] Ibid.

lie at the intersection of intellectual property and matters of public policy. Although the precedents are not binding, their persuasiveness in subsequent cases is vital. Furthermore, it is my submission that, to achieve the balance required in the plain packaging case, or in any other matter, the test for proportionality should not be weak. It must not appear as if plain packaging measures passed the constitutional muster largely because they are designed to protect human health from the ravaging effects of tobacco use. Instead it must be demonstrated that the measures are constitutional because of the particular circumstances of the case.

The Minister of Health must build a solid case to justify trademark deprivations of this magnitude. First, it is commendable that the objectives of the draft Control of Tobacco Products and Electronic Delivery Systems Bill are well elaborated. It is preferable to provide intermediate purposes instead of the overall aim to reduce smoking. In alignment with the WHO FCTC the objectives of the draft Bill include; reducing the appeal of tobacco products; eliminating the effects of tobacco packaging as a form of advertising and promotion; addressing package design techniques that may suggest that some products are less harmful than others; and increasing the noticeability and effectiveness of health warnings.[330] The WHO correctly advised that the manner in which the purpose is defined can affect the defensibility of plain packaging measures in the event of a legal challenge.[331] The discussions above have also demonstrated that courts do not always defer to the legislators definition of objectives. Further, that the manner in which an objective is couched is essential in the analysis of whether such an objective is legitimate and whether the objectives can be achieved.[332]

Notably, South African courts value the legitimacy and importance of the purpose in society. To start with, the purposes of plain packaging measures are all tailored to fulfil the broader aim of reducing tobacco consumption and promoting public health. There is vast evidence indicating the negative effects of smoking globally and more importantly in low and middle income countries (LMICs). The tobacco epidemic kills more than seven million people annually and eighty percent of the one billion smokers worldwide live in LMICs. The burden of tobacco-related illness and death is heaviest in LMICs, this has negative impacts on the cost

[330] The Control of Tobacco Products and Electronic Delivery Systems Bill of 2018, published in GG 41617 of 9 May 2018.
[331] WHO 'Plain packaging of tobacco products: Evidence, design and Implementation' (2016) 8 <http://apps.who.int/iris/bitstream/handle/10665/207478/9789241565226_eng.pdf;jsessionid=07E566E9D4F450AD961707BCC31FEC72?sequence=1 > 8.
[332] See discussions above in the case of *AB v Minister of Social Development* (note 303 above).

of health care and hinders economic development.[333] There is also vast evidence demonstrating the effects of smoking in South Africa.[334] Smoking is estimated to kill more than 44 000 South Africans annually.[335] Although there has been a steady decline in tobacco prevalence, it will be key to highlight that there was an increase in tobacco use between 2008 and 2011 among the youth, particularly girls.[336] This will make a strong case for legitimacy, because there is recognition that there is need to stop and dissuade the youth from smoking.

It was established in chapter three of this study that, the Constitution imposes obligations on the state to respect, protect, promote and fulfil the rights provided in sections 24 of the Constitution which provides for the right to a healthy environment.[337] There is a clear link between the protection from a harmful environment and tobacco control.[338] When viewed in this context, the legitimacy of introducing plain packaging measures is evident.

The fact that South Africa has obligations under the WHO FCTC to implement plain packaging also makes a strong case for the legitimacy of the above-mentioned purposes.[339] It also puts weight on the importance of the objectives. In this regard, South African courts previously held that it was not up to the Minister of Health to decide which measures to implement as part of the country's tobacco control policy.[340] The WHO FCTC is meant to direct South Africa on the measures to be enacted. This will also inform the legitimacy of the objectives pursued and their social importance.

It is conceivable that the party challenging the proportionality of plain packaging measures will stress the severity of the deprivations. In chapter four of this study, the severity of the deprivations was demonstrated. It has also been emphasised that such should be understood in light of the substantive nature of trademark rights. This is a predominant factor

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[333] WHO 'Tobacco' < http://www.who.int/news-room/fact-sheets/detail/tobacco >.
[334] See S K Narula, C J Berg & C Escoffery et al 'South African College Students' Attitudes Regarding Smoke-Free Policies in Public, on Campus, and in Private Spaces' (2012) *Journal of Addiction Research Therapy* S1:005 EO Owolabi, D T Goon & O V Adeniyi, et al 'Prevalence and factors associated with tobacco use among adults attending selected healthcare facilities in Buffalo City Metropolitan Municipality, South Africa' (2017) 59 (6) *South African Family Practice* 201-207.
[335] J A Teare, N Naicker & P Albers et al 'Prevalence of tobacco use in selected Johannesburg suburbs' (2018) 108 (1) *South African Medical Journal* 40.
[336] P Reddy, K Zuma & O Shisana et al 'Prevalence of tobacco use among adults in South Africa: Results from the first South African National Health and Nutrition Examination Survey' (2015) 105 (8) *South African Medical Journal* 648.
[337] Section 24 of the Constitution.
[338] *BATSA v Minister of Health* (note 212 above) para 40.
[339] See chapter two of this study.
[340] *BATSA v Minister of Health* (note 212 above) para 23.

in the weighing and balancing process, and its magnitude must be recognised to maintain the integrity of proportionality as a balancing tool.

It is foreseen that, the suitability of plain packaging measures will be largely debated in South Africa and beyond. Van der Walt and Shay correctly observe that the efficacy of the measures must be demonstrated to avert the risk of undue harm to trademarks.[341] As indicated in this study, the WHO FCTC is evidence -based and it will be vital in proving the efficacy of plain packaging measures. There is also evidence that suggests that plain packaging measures are effective in increasing the visibility of health warnings,[342] in reducing the appeal of tobacco products and in restricting the use of packaging as a form of advertising and promotion.[343] In Australia there is evidence that suggests that there has been a positive relationship between the implementation of plain packaging measures and the reduction in smoking prevalence.[344] Although based on foreign jurisdictions this can still be used in the South African cases. Section 39 of the Constitution provides that the courts and other legal bodies may consider foreign law in the interpretation of the rights contained in the Bill of Rights. In the *British American Tobacco & others -v- Department of Health* case[345] the British Department of Health relied on over 73 empirical articles to prove the effectiveness of plain packaging measures. These were derived from a variety of jurisdictions: fifteen emanated from Australia, fifteen from Canada, thirteen from the United Kingdom, four from France, eight from New Zealand, five from the United States, eight from Scotland, three from Norway, and one from each of Belgium, Greece and Brazil. In addition, 25 published studies relating to the impact of standardised packaging in

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[341] A J van der Walt & R M Shay (note 168 above) 68.

[342] R Borland, S Savvas, F Sharkie & K Moore 'The impact of structural packaging design on young adult smokers' perceptions of tobacco products' (2013) 22 *Tobacco Control* 97–102. M Wakefield, K Coomber & M Zacher *et al* 'Australian adult smokers' responses to plain packaging with larger graphic health warnings 1 year after implementation: results from a national cross-sectional tracking survey' (2015) 24 *Tobacco Control* ii17–ii25; Y Hua-Hie, R Borland & D Hammond et al 'Smokers' reactions to the new larger health warning labels on plain cigarette packs in Australia: findings from the ITC Australia Project' (2016) 25 *Tobacco Control* 182.

[343] M A Wakefield, D Germain & S.J Durkin 'How does increasingly plainer cigarette packaging influence adult smokers' perceptions about brand image? An experimental study' (2008) 17 *Tobacco Control* 416–421; D Germain, M Wakefield & S Durkin 'Adolescents' perceptions of cigarette brand image: does plain packaging make a difference?' (2010) 46 *Journal of Adolescent Health* 385–392; M Wakefield, D Germain & S Durkin *et al* 'Do larger pictorial health warnings diminish the need for plain packaging of cigarettes?' (2012) 107 *Addiction* 1159–1167; C M White, D Hammond & J F Thrasher *et al* 'The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study' (2012) 12 *BMC Public Health* 737–747 J Doxey & D Hammond 'Deadly in pink: the impact of cigarette packaging among young women' (2011) 20 *Tobacco Control* 353e-360.

[344] Post-Implementation Review Tobacco Plain Packaging, 2016, Australian Government, Department of Health, 26 February 2016 < https://ris.govspace.gov.au/files/2016/02/TobaccoPlain-Packaging-PIR.pdf >; T Chipty, Study of the Impact of Tobacco Plain Packaging Measure on Smoking Prevalence in Australia (2016) < https://www.health.gov.au/.../PIR%20of%20Tobacco%20Plain%20Packaging%20-%2...>, paragraph 36.

[345] *British American Tobacco & others v Department of Health* [2016] EWHC 1169 (Admin), para 492 – 493.

Australia since the introduction of plain packaging legislation was also used. [346] This demonstrates that, there is a wealth of evidence now available which South Africa can use to prove the suitability of plain packaging measures.

In comparison to foreign jurisdictions, there is scant evidence showing that plain packaging measures will be effective in South Africa.[347] Moyo's research on the reactions to pictorial warning labels on tobacco packaging on students is particularly useful, as it indicates that the youth are more responsive to pictorial warnings than they are to word warnings.[348] Plain packaging measures, which also carry pictorial warnings would then achieve the objective of making the health warnings more visible. However, additional research on the efficiency of plain packaging to fulfil its objectives in South Africa is required and would strengthen the case for plain packaging.[349] Van der Walt and Shay correctly discern the importance of such research. The authors also argue that research by tobacco and anti-tobacco lobbyists can be biased.[350] Tobacco lobbyists have presented evidence which indicates that plain packaging measures are ineffective.[351] The intrinsic quality of evidence brought before the courts will have to be considered. In this regard the judgement by Justice Green is useful.

In *British American Tobacco & others v Department of Health*, Justice Green found that the evidence brought by the tobacco industry was below the standards set internationally. The evidence was not peer reviewed; it was 'not benchmarked against internal documents'; it ignored the underlying worldwide literature base and was not verifiable.[352] Tobacco expert opinions were not corroborated by internal documents, this was viewed in light of a wide practice by the industry of not adducing or allowing experts to review internal documentation. It was highly suspected that the internal documentation could contradict the evidence tendered

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[346] *British American Tobacco & others v Department of Health* (note 343 above) para 492 -493

[347] G Ganz 'Addressing tobacco smoking in South Africa: Insights from behavioural science' (2016) 106 (11) *South African Medical Journal* 1083.

[348] T N Moyo Reactions to pictorial warning labels on tobacco packs among university students in Tshwane, South Africa (Unpublished Masters in Public Health thesis, University of Pretoria, 2014).

[349] See A J van der Walt & R M Shay 'Constitutional analysis of intellectual property' (note 168 above) 612-613.

[350] Ibid.

[351] J Morris 'Smoking, Plain Packaging and Public Health' (2014) Adam Smith Institute <http://www.adamsmith.org/wp-content/uploads/ASIsmokingplainpackagingWEB.pdf >; London Economics International 'An analysis of smoking prevalence in Australia' November 2013, <http://londoneconomics.co.uk/wpcontent/uploads/2013/11/London-Economics-Report-Australian-Prevalence-Final-Report-25-11-2013.pdf>; KPMG 'Illicit tobacco in Australia: 2013 Half Year Report' London: KPMG, LLP, October 2013, <http://www.bata.com.au/group/sites/bat_7wykg8.nsf/vwPagesWebLive/DO9879X3/$FILE/medMD9D4L6C.pdf>.

[352] *British American Tobacco & others v Department of Health* (note 343 above) para 375.

before the courts.[353] It is recommended that South African courts must probe the reliability of evidence brought by all parties in the plain packaging case. In particular the tobacco industry's evidence must be treated with vigilance.

This approach aligns with Article 5 (3) of the WHO FCTC which instructs member states to treat the tobacco industry with vigilance and caution as they have adopted a deliberate policy of subverting public health policy.[354] The tobacco industry has a prior record of interfering with the implementation of tobacco policy, however, they are still entitled to a fair hearing.[355] At the same time, giving undue weight to evidence submitted by either party would disrupt the balancing purpose of proportionality. Accordingly, fair weight should be given to the evidence it tenders before the court.

It has been argued that the South African courts will not find less restrictive alternatives to plain packaging measures, this will also weigh towards their necessity. In this regard, it is important to note that South Africa has in place various tobacco control measures. Including health warnings, tax measures, a ban on tobacco advertising and public smoke free laws. All these measures and others recommended under the WHO FCTC provide part of a comprehensive tobacco control policy, and cannot be suggested as less restrictive alternative measures.

Lastly, whilst the South African proportionality test does not take the form of a cumulative checklist, elements of the proportionality *stricto sensu* sub-test are observable in its overall balancing process. In section 25 (1) the overall question is whether the extent of the deprivation is proportional to the benefit. This entails on the one hand, the importance and urgency of the legitimate aim to be achieved in society; the efficacy of the means and whether the desired end could be reasonably achieved through means less restrictive to the rights in issue.[356] On the other hand would be the nature of the limited right and its importance in a democratic society based on freedom and equality and the severity of the limitation.[357]

It is my submission that, the South African courts are capable of appreciating the social importance of public health and the need to curb the tobacco epidemic. Similarly, they are familiar with the social importance of the harm suffered by trademarks because of their 'direct

[353] Ibid, para 291, 319, 349.
[354]Ibid, para 280.
[355] Ibid, para 331.
[356] *S v Makwanyane* (note 231 above) para 104.
[357] Ibid.

and continuous contact' with the relevant societies. Barak correctly argues that the social importance of the limited rights or interests vary from country to country.[358] In light of the above, it is likely that the benefits to public health will be found proportional to the harm imposed on trademarks by plain packaging measures. This is not because public health is unconditionally preeminent, but because in this case, a strong case for justifying the deprivation on trademark property can be made. Viewing the case from a trademark law perspective and from a public health perspective, as done in this study, ensures that winners and losers are not constitutionalised.

## 5.5 CONCLUSION

The purpose of this chapter was two – fold. First, to examine the proportionality analysis and establish the South African approach to proportionality. Secondly, to carry out a predictive analysis of how public health interests and trademark rights in the plain packaging case could be balanced under the South African proportionality tests. In this regard, this chapter also sets the parameters for comparing the South African and WTO approaches to proportionality.

It is worth pointing out that proportionality takes different forms from one legal order to another. Some of the differences are structural whilst others are conceptual. Furthermore, the effects of proportionality will depend on the level of intensity with which it is applied. This could partially explain legitimacy concerns raised against proportionality as applied under the WTO. South Africa adopts a form of proportionality that differs from the generally accepted four step methodology. Due to its flexibility, it is also noticeable that no uniform application of proportionality exists in South African constitutional law itself.

It can be drawn from the application and interpretation of section 36 (1) that the South African version of proportionality does not follow a sequential checklist. In this regard, it is similar to proportionality as applied under section 25 (1) of the South African constitution. The court undertakes an overall balancing of factors enlisted in section 36 (1). The court does not treat the sub-tests as cumulative, even if one sub-test is not satisfied the court still goes to address the next sub-test. For instance, failure to fulfil the suitability stage is not conclusive but is a factor that forms part of the overall balancing exercise. Although a different approach is adopted, it is important to note that elements of proportionality are still present. As has been

[358] A Barak 'Proportionality' in M Rosenfeld & A Sajó (eds.) The Oxford Handbook of Comparative Constitutional Law (2012) 745.

shown the court does address the legitimacy, suitability, necessity and proportionality of measures.

South African courts still arrive at the same destination reached by courts which follow a sequential checklist. The latter courts can just arrive there faster. Even if the court can find that failure to satisfy the suitability test is not conclusive, this factor will most likely carry the determining weight in the overall balancing act. However, the court cannot carry out proper balancing according to the proportionality *stricto sensu* stage if the other sub-tests are not fulfilled. This stage requires the weighing of the marginal benefits accrued to the purpose, for example, benefits to public health; against the marginal harms suffered by the limited rights as a result of the means, for example, the harm suffered by trademark rights in enacting plain packaging measures. If the purpose is not legitimate there is no need to address the benefit accruing to an illegitimate purpose, such an assessment is never carried out. If the means is not suitable, then there is no benefit accruing to the purpose to be placed on the one side of the scale. If there are less restrictive means available, it would be pointless to examine the proportionality of the primary means. Where the court finds that the purpose is not legitimate, or that the means are not suitable or that less restrictive means are available they do not carry out balancing in terms of the proportionality *stricto sensu* stage per se. They undertake some form of balancing the result of which is pre-determined by earlier findings on the first three sub-tests.

The case analysis also shows that the courts adopt varying levels of intensity in applying the proportionality test. The extent of deprivation and the nature of limited rights are some of the factors that determine the level of deference a court chooses. This is also similar to the approach adopted in section 25 (1) cases. However, in section 36 (1) the courts have noticeably questioned the legitimacy and suitability of a measure with greater intensity.[359] Similarly, the court can adopt a non-deferential approach in assessing the suitability of a means or in undertaking a less restrictive means inquiry.[360] In light of this, it is important to note that proportionality, as applied under section 36 (1), is stricter than that applied under section 25 (1).

It is predicted that plain packaging measures will be reviewed for proportionality under section 25 (1) and not under section 36 (1). The latter review is more rigorous and lessons therefrom can enrich the section 25 (1) analysis, especially for intellectual property cases. First, in measuring the severity of deprivations, the substantive nature of rights must be considered.

[359] See *AB v Minister of Social Development* (note 303 above).
[360] See *RAF v Mdeyide* (note 268 above).

This approach is observable in *AB v Minister of Social Development*[361] and also in *RAF v Mdeyide*. For instance in the latter case, the court drew in on the importance of knowledge as a precondition for the right to access courts, and how abstract or illusory the right would be without knowledge.[362] What can be observed in these section 36 (1) examinations is the ability of the courts to take a nuanced view to the different limited rights. In intellectual property cases the same approach must be adopted. For trademarks, the severity of its limitations must be measured in light of its ability to perform its functions as indictor of origin, guarantor of quality, advertiser, creator and protector of goodwill.

Further the thoroughness with which matters of suitability of a measure are taken under section 36 (1) cases should be adopted where appropriate. High deference to legislative facts may not always suffice. In *RAF v Mdeyide* it was found that evidence of a backlog of cases was not proof that the measure (a change to inflexible prescriptions) would place the RAF at a better position, it actually was an indication that the measure was inefficient. In the same manner evidence of reduction in smoking would not suffice to prove suitability of plain packaging measures. Instead evidence on the actual effects or ability of plain packaging to reduce the appeal of tobacco products and its consumption would suffice.

The intention of these recommendations is not to make the justification criteria burdensome to legislators implementing public policy regulations per se. Instead, the aim is to set precedents that will keep intellectual property rights intact. A weak section 25 (1) analysis would open up intellectual property deprivations to potential abuse. Measures which interfere with intellectual property rights would easily pass the section 25 (1) analysis and never have to undergo a solid proportionality analysis.

All the same, as indicated in this chapter, it is my prediction that, even if the tests of legitimacy and suitability are approached with more rigour, plain packaging measures will still be found proportional. The public health objectives pursued are legitimate. The WHO FCTC recommendations and various other forms of evidence indicate the suitability of these measures. The fact that most alternative measures will be found complementary, work against the possibility of there being a substitute to plain packaging measures. Lastly, although the

[361] See *AB v Minister of Social Development* (note 303 above) para 83-89. See also discussion on page 46 and 47 of this chapter.
[362] *RAF v Mdeyide* (note 268 above) para 100 see also discussion on page 40 of this chapter.

deprivation is severe, the benefit (in light of the importance of public health) will be found proportional.

As indicated previously in this chapter, the WTO has an impact on domestic autonomy. The WTO Dispute Settlement Body could result in member states having to withdraw or bring into compliance domestic measures, even if such have been declared constitutional by national courts. This study also addresses the legitimacy of claims made by proponents of plain packaging measures, that the WTO proportionality tests impose undue and unreasonable burdens on members justifying domestic measures. This is done by examining the WTOs approach to proportionality and by comparing the results of the predictive analysis undertaken here in chapter five with the analysis undertaken in chapter six. For these reasons, l argue that it is necessary for the completeness of this study, that chapter six examines the WTO's proportionality test as it relates to plain packaging measures.

## CHAPTER SIX

## Proportionality under the World Trade Organisation

### 6.1 INTRODUCTION

For the purposes of this chapter, it is key to reiterate that one of the overarching purposes of this study is to carry out a predictive analysis on the legal necessity or proportionality of plain packaging of tobacco product measures.[1] Chapter five presented a major contribution to this objective; where I undertook a predictive analysis of how plain packaging measures would fare under the South African proportionality tests.[2] It is critical to note that the WTO Panel report on *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*[3] was issued after the completion of this predictive study.

In light of this, this chapter seeks to complete the analysis on the necessity of plain packaging measures by focusing on the World Trade Organisation's (herein after the WTO) regime. Through an analysis of WTO disputes and the recent *Australia – Tobacco Plain Packaging* case, this chapter will examine the WTO's approach to proportionality and ultimately the legitimacy of the concerns raised by health-over-trade proponents that the WTO (and its necessity tests) is trade centric and biased against public health interests.[4] The 'necessity' test and the whole WTO system has been perceived as a safe harbour for tobacco trademark owners.[5]

It was argued in chapter one that WTO laws have a significant impact on the regulatory autonomy of states.[6] When member states exercise their prerogative right to implement domestic measures, these can be challenged under the WTO system. If found incompatible with

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[1] See research questions in Chapter one of this study.

[2] It is important to clarify the use of the word proportionality and necessity interchangeably, especially under the auspices of the WTO. The term proportionality is not explicitly referred to under the WTO. Instead the WTO Agreements contain a number of provisions which in whole or in part are commonly referred to as the necessity tests. Terms such as 'necessary to' or 'least trade restrictive' all illustrate the inherent presence of some kind of proportionality. Under these necessity tests, weighing and balancing takes place, essentially proportionality can be inferred from these tests. Thus, where l refer to the necessity of a measure under the WTO, l will be referring to its proportionality.

[3] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/RWT/DS458/R, WT/DS467/R.

[4] Framework Convention Alliance 'Why Article XX (b) of GATT is not enough to protect health' (2002) *FCA Bulletin* 18 October 2002 < http://www.WHO FCTC.org/publications/reports?start=6 >.

[5] See chapter one of this study; see also H Mamudu, R Hammond & S A Glantz 'International trade versus public health during the FCTC negotiations: 1999 – 2003' (2011) 20 (1) *Tobacco control* 5.

[6] K Anderson 'Peculiarities of retaliation in WTO dispute settlement' (2002) 1 (2) *World Trade Review* 123, 124.

WTO laws, member states can be forced to withdraw or to bring into conformity such domestic measures.[7] Tobacco trademark owners have already challenged the proportionality of plain packaging measures both under domestic constitutional law and WTO law.[8] Hence, it is not far-fetched to argue that various other domestic regulations will be challenged before the WTO. It is with this in mind that this study also addresses the proportionality of plain packaging measures under WTO law.

Proportionality appears in various WTO Agreements; however the present chapter does not proceed to carry out an exhaustive account of all the occurrences of proportionality in WTO law. The evaluation of proportionality will centre on the provisions set out in the Agreement on Technical Barriers to Trade (herein after the TBT Agreement) and the Agreement on Trade Related Aspects of Intellectual Property (herein after the TRIPS Agreement) due to their relevance to the plain packaging dispute.[9] Part II of this chapter will examine the form proportionality takes under the TBT Agreement. Part III focuses on proportionality under the TRIPS Agreement, whether this principle exists in the TRIPS Agreement and how it can be construed. The analysis on how plain packaging measures have fared under the TBT and TRIPS Agreements will be undertaken simultaneously. It is also pertinent that this analysis addresses the legitimacy of the assertions made on the uneven-handedness of the proportionality test.[10] Part IV will conclude this chapter.

## 6.2 PROPORTIONALITY BEYOND HUMAN RIGHTS

The previous chapter dealt with proportionality under constitutional law in South Africa. Under the domain of human rights, proportionality is mostly applied in assessing the validity of restrictions on fundamental rights and interests.[11] It is also used to determine whether measures affecting human rights appropriately respond to legitimate public interests and goals.

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[7] Ibid; see also Chapter one of this study, where l justify why this study has chosen a dual perspective to the necessity of plain packaging measures.
[8] Pane Report, *Australia — Tobacco Plain Packaging* (note 3 above).
[9] In the *Australia — Tobacco Plain Packaging* case (note 3 above), the complainants' claims inconsistency of the measures with Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement.
[10] One of the research questions of this study is whether the WTO necessity tests impose undue and unreasonable burdens on members to justify public health measures, see chapter one of this study.
[11] S Greer 'Balancing and the European Court of Human Rights: A contribution to the Harbenas – Alexy debate' (2004) 63 (2) *Cambridge Law Journal* 412; A Barak *Proportionality Constitutional Rights and their Limitations* (2012) 3, 4.

Proportionality is also employed beyond the field of human rights.[12] It is a prominent legal principle in various legal systems as all legal systems are required to undertake some form of balancing, including the WTO.[13] As a point of departure, the proportionality principle does exist under the WTO; it has been argued that proportionality is a basic principle of the WTO.[14] Under the WTO, there are principles and the nature of these principles implies proportionality and vice versa.[15] Part of the objectives of this chapter is to examine the form proportionality takes within the WTO.

In the context of the WTO, proportionality is employed as a trade-off device, in the reconciliation of trade and non-trade issues.[16] Since the goals of the WTO and human rights regimes are different, what is balanced under the proportionality test is also different. Human rights regimes like the Constitutions are primarily aimed at protecting and promoting individual freedoms and rights. Whilst the WTO regime is focused on 'freeing trade from the constraints of government.'[17]Although member states are afforded leeway to implement domestic measures to fulfil national interests, the WTO discourages against doing so using trade distorting means. Member states eventually implement trade distorting measures under the 'cloud of costly WTO litigation, a process which would deeply probe the evidence base and policy process.'[18]

In light of the purposes of the WTO regime, proportionality in this field, reflects the balance between the multilateral interest to liberalize trade (in the means of discouraging members from implementing measures that excessively or unjustifiably restrict trade) and the member states' prerogative right to set and achieve regulatory objectives through measures of their own choice.[19] The balancing needs to be done with delicacy, either too much scrutiny or too little can result in legitimate problems.

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[12] T Kleinlein 'Judicial lawmaking by judicial restraint? The potential of balancing in international economic law' (2011) 12 (5) *German Law Journal* 1150.

[13] A S Sweet & T Mathews 'Proportionality balancing and global constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 75, 160.

[14] M Hilf 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?' (2001) 4 (1) *Journal of International Economic Law* 111, 120–121.

[15] R Alexy 'On the structure of legal principles' (2000) 13 (3) *Ratio Juris* 294, 295.

[16] S Zleptnig & M Andenas 'Proportionality and Balancing in WTO Law: A Comparative Perspective' (2007) 20 (1) *Cambridge Review of International Affairs* 71, 72.

[17] R Harris & G Moon 'GATT Article XX and Human Rights: What do we know from the first 20 years' (2015) 16 *Melbourne Journal of International Law* 50.

[18] R Harris & G Moon (note 17 above) 51.

[19] S Zleptnig & M Andenas (note 16 above) 2.

Proportionality under the WTO takes three forms. First, proportionality can be observed in the context of countermeasures and penalties under the Dispute Settlement Understanding (DSU).[20] Secondly, in public policy exceptions where it is employed to establish the legitimacy of divergences from WTO obligations. For instance, under Article XX of the General Agreement on Tariffs and Trade (GATT), where it is stated that members may adopt measures necessary to protect human, animal or plant life or health.[21] Lastly, proportionality can again be observed in positive obligations where members are required to undertake a balancing and weighing of factors before implementing measures.[22] For instance under the Agreement on Sanitary and Phytosanitary Measures (SPS) and the TBT Agreement, where members are required to ensure that the measures they implement do not unnecessarily restrict trade.[23] The positive obligations impose some limits on the regulatory autonomy of Members that implement technical regulations, in that they cannot create obstacles to trade which are unnecessary.[24]

## 6.3 PROPORTIONALITY UNDER THE TECHNICAL BARRIERS TO TRADE AGREEMENT

The success of the proportionality test under TBT Agreement will be measured by its effectiveness in balancing the need to mitigate trade restrictions, prevent disguised protectionism and promote market access versus the autonomy of WTO members to regulate in areas of public policy.[25] TBT measures that are not adopted for legitimate objectives can work as extremely effective protectionist devices.[26]

This section will explore some of the disputes involving the TBT proportionality test. Plain packaging measures have recently been reviewed under the TBT Agreement, an analysis of the *Australia – Plain Packaging*[27] case will showcase how plain packaging measures have

[20] A D Mitchell 'Proportionality and Remedies in WTO Disputes' (2007) 17 (5) *The European Journal of International Law* 985, 999; A Desmedt 'Proportionality in WTO Law' (2001) 4 (3) *Journal of International Economic Law* 441, 448.

[21] Article XX (b) of the General Agreement on Tariffs and Trade, 1994.

[22] T Cottier *et al* 'The Principle of Proportionality in International Law' National Centre of Competence in Research on Trade Regulation (NCCR) Working Paper No 2012/38| December 2012, 13.

[23] Article 2.2 of the TBT Agreement.

[24] Panel Report, *European Communities — Trade Description of Sardines*, WT/DS231/AB/R, para. 7.12 referring to Article 2.2 of the TBT Agreement.

[25] Preamble of the TBT Agreement.

[26] M Trebilcock & M Fishbein 'International Trade: Barriers to Trade' in Guzman & Sykes (eds) *Research Handbook in International Economic Law* (2007) 39.

[27] Panel Report, *Australia – Tobacco Plain Packaging* (note 3 above).

fared under the TBT proportionality test. It is also the aim of this case law discussion to show the WTO's approach to proportionality under the TBT Agreement.

Article 2.2 of the TBT Agreement states that:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating *unnecessary obstacles to international trade*. For this purpose, technical regulations *shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.* Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.[28]

### 6.3.1 United States – Measures Affecting the Production and Sale of Clove Cigarettes[29]

In this case Indonesia alleged that section 907(a) (1) (A) of the United States' Family Smoking Prevention Tobacco Control Act was inconsistent with Article 2.2 of the TBT Agreement. The provision at issue prohibited the production or sale in the US of cigarettes containing clove, but still allowed the sale of other cigarettes including those containing menthol.[30] The fundamental issue before the Panel was whether the US ban on clove cigarettes was more trade-restrictive than necessary considering the risks non-fulfilment of the objectives would create.[31] This case analysis will focus on the Panel's application and interpretation of the necessity test in Article 2.2 of the TBT Agreement.

It is important to note that, the burden of proving that the measure at issue is not in compliance with Article 2.2, rests on the complaining party; and not on the member implementing a measure.[32] This works against the assertions that the WTO necessity tests (at least under the TBT Agreement) impose undue and unreasonable burdens on members to justify their domestic measures. In the plain packaging case, tobacco trademark owners would bear the burden of proving that the measures are more trade-restrictive than necessary.

The Panel held that Article 2.2 requires a two-step analysis. The first step requires that the objective pursued be legitimate. The logic of first determining whether the objectives

[28] Article 2.2 of the TBT Agreement.
[29] Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R.
[30] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.311.
[31] Ibid, para 7.325.
[32] Ibid, para 7.331.

pursued are legitimate, resembles the broadly accepted form of proportionality, where the first step of the four-prong test is the requirement that the measure must be aimed at fulfilling a legitimate purpose. If the objective pursued is not legitimate then, the inquiry would not proceed to the second stage. The second step would be an examination of whether the technical regulation is more trade restrictive than 'necessary' to fulfil the legitimate objective taking into account the risks nonfulfillment would create.[33]

The TBT Agreement follows a 'two-step' analysis whilst the broadly accepted form of proportionality follows a 'four-step' analysis. However, in reality both tests encompass the legitimacy, suitability and less-restrictive means sub-tests. The suitability and less-restrictive means sub-tests all fall under the second step of the TBT Agreement analysis which requires that the measure at issue should not be more trade-restrictive than necessary to fulfil the legitimate objective, in light of the risks non-fulfilment would create. Similar to the broadly accepted form of proportionality, the WTO form of proportionality follows a cumulative checklist. If a sub-test is not satisfied, the enquiry does not proceed.

Instant differences can also be drawn between the WTO form and the South African form of proportionality. The latter does not follow a cumulative checklist. As established in chapter five, the South African form of proportionality undertakes an overall balancing of factors, even if one sub-test is not satisfied the courts still proceed to the next sub-test. Failure to satisfy the initial sub-test is not conclusive but rather forms part of the overall balancing exercise. Therefore, measures can be subjected to more than one sub-test, even when this is not essential. One can argue that, in this regard, the South African form of proportionality is more laborious and intrusive.

The Panel turned to the Article XX (b) jurisprudence on necessity to determine what the second step of the 'two-step' analysis (that measures not be 'more trade restrictive than necessary') entailed.[34] Although Article XX (b) jurisprudence cannot be completely transposed it continues to play an important role in the interpretation of 'necessary' under WTO law.[35] I

[33] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.333.
[34] Article XX (b) of the GATT provides that 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:… (b) *necessary to protect human, animal or plant life or health*...' (My emphasis).
[35] Ibid.

submit that, in the same manner Article 2.2 jurisprudence will also shape the future of the WTO necessity tests.

In determining whether measures are necessary to protect human, animal or plant life or health under Article XX (b) of the GATT, elements of proportionality are visible. The Panel will examine whether the measure contributes to the fulfilment of its objective, this equates to the suitability sub-test. 'Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue.'[36] The Appellate Body in *Brazil – Measures Affecting Imports of Re-treaded Tyres*, emphasized that a Panel may conduct either a quantitative or a qualitative analysis of the contribution of a measure to the achievement of its objective.

Necessity under Article XX (b) of the GATT also includes a less-restrictive or minimal impairment sub-test. In *EC — Asbestos*, the Appellate Body held that a measure is necessary 'if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is [not] available to it.' Lastly, in determining whether a measure is necessary, a weighing and balancing of factors must be undertaken. The relevant factors include the contribution of the measure to the achievement of its objective, the trade restrictiveness of the measure, the interests at stake, and a comparison of possible alternatives, including risks.[37]

It is argued that this weighing and balancing test infers a cost-benefit analysis and in that way paves way for a proportionality *stricto sensu* kind of balancing. At the one side of the scale would be the level of contribution achieved by the measure, the importance of interests at stake and the risks that come with possible non-fulfilment of the objectives. On the other hand of the scale would be trade restrictiveness of the measure and possible alternatives. It follows that the risks of non-fulfilment could be more severe for an important value. Further, that an important value, such as human health could justify a severe restriction and a measure pursuing such a high value could also be justified even if the contribution is minimal. However, in practice the WTO avoids a cost-benefit analysis. Du observes that the so called 'weighing and balancing test, despite whatever its name implies, is in essence a refined LTR [Least trade restrictive]

[36] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, para 145.
[37] Appellate Body Report, *Brazil -Retreaded tyres* (note 35 above) para 182.

test.'[38] The reason for weighing and balancing is to establish the availability of less trade restrictive measures. In sum, the WTO does require that the harm be proportional to the benefit in alignment with the proportionality *stricto sensu* sub-test.

As shown above, in determining whether a measure is necessary under Article XX (b) the proportionality sub-tests of legitimacy, suitability, less –restrictive means test and balancing are employed. The framework discussed above will not be entirely transposed but will continue to play a role in the interpretation and application of Article 2.2 of the TBT. A preliminary observation is that the first three sub-tests employed under the necessity test bear close resemblance to the broadly accepted form of proportionality.

After referring to the WTO jurisprudence on necessity, the Panel in *US – Clove Cigarettes* held that the first step of the proportionality test under the TBT Agreement would involve identifying the objective pursued by the ban on clove cigarettes. Thereafter, to examine its legitimacy; to establish whether the means were suitable and to examine whether less-restrictive means were available, in that order.

Regarding the first sub-test, the parties did not agree on the formulation of the objective, particularly, the definition of 'youth'. On the basis of the factual framework presented before it, the Panel found that the evidence better supported Indonesia's claim that the objective of the import ban on clove cigarettes was to reduce smoking by persons under the age of 18.[39] The US also asserted that the measure had an additional objective of avoiding the potential negative consequences associated with banning a popularly smoked product by excluding menthol cigarettes from Section 907(a) (1) (A).[40] The Panel again agreed with Indonesia that the aim of avoiding the potential negative consequences associated with banning products was not an objective but rather a justification for excluding menthol cigarettes from the scope of the ban.[41] In as much as the Panel acknowledged that a measure could have more than one objective, it held that the measure at issue had one objective, which was to reduce smoking by the youth under the age of 18.

In identifying the objective, the Panel did not show deference to the formulations of the objective presented by the US which was the member responsible for implementing the

[38] M Du 'The Necessity Test in World Trade Law: What Now?' (2016) 15 (4) *Chinese Journal of International Law* 26.
[39] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.341.
[40] Ibid, para 7.339.
[41] Ibid, para 7.342 – 7.343.

challenged measure. Simultaneously it did not defer to Indonesia's formulation. Instead it examined the factual framework before it and made an individual finding on the objective of the measure at issue. It can be argued that the WTO Panel is too intrusive in examining the correct formulation of the objective of a measure instead of restricting the examination to the legitimacy of the stated objective. On the other hand, correctly formulating the objective is vital in the enquiry of whether the objective is legitimate and also in whether the measure is suitable to achieve the purpose. The approach taken by the WTO Panel in this case is similar to that adopted by the South African courts in the case of *AB and Another v Minister of Social Development.*[42] In examining the proportionality of the measure in issue, the court also questioned the true purpose of the measure at issue before it made a finding on its legitimacy.

The Panel went on to examine whether the objective to reduce tobacco consumption among the youth under the age of 18 was legitimate. It held that it was self-evident that measures implemented to reduce smoking in the youth were intended to protect human health. It was emphasised that protecting human health was an objective 'both vital and important in the highest degree.'[43] The Panel emphasised that measures designed to protect public health are of the utmost importance. Further that member states had a sovereign right to regulate in response to legitimate public health concerns.[44] The WTO allows sufficient leeway for members to enact public health measures. With this in mind, it is perceivable that the objective of plain packaging measures to reduce tobacco consumption will also be found legitimate. Further, its overall aim to promote and protect human health will be treated as important in the highest degree.

This finding weakens the assertions made by proponents of plain packaging measures that the WTO necessity tests are biased against health objectives. Evidently, public health is treated as the highest value members can pursue. Measures designed to protect and promote public health are likely to comply with the WTO necessity tests. Du opines that where the value at stake is high the WTO tends to respect the regulatory choice.[45] Alternatively, if the WTO does find that a less trade restrictive alternative measure exists, it will ensure that such a measure fulfils the public health objective at the same level of protection because the risks that could arise from non-fulfilment would be more severe.

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[42] *AB and Another v Minister of Social Development* 2107 (3) SA 570 (CC) 43.
[43] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 172.
[44] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.2.
[45] M Du (note 37 above) 13, 14.

Similar to the broadly accepted form of proportionality, the next sub-test after finding that the measure pursues a legitimate objective is whether it is also suitable to fulfil that objective. In *US – Clove Cigarettes* it was held that, for a measure to be necessary it must contribute to the aim and that the contribution must not be marginal.[46] Further, that where a measure is severely restrictive, the standard required to fulfil the contribution requirement would be stricter than where the restrictive effect is marginal.[47] The Panel sought guidance from the Appellate Body where it held that:

> when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be *difficult* for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective.[48] (My emphasis)

This approach implies a requirement that the restrictive effect of a measure must be proportional to the benefits resulting from the adoption of the measure. However, as will be shown in the subsequent sections of this chapter, this is mere judicial rhetoric. In application there is no strict standard requiring a proportionate relationship between the harm and benefits. Samantha Gaul correctly argues that the extent of contribution to achieving a legitimate objective only plays a role in comparing whether a less-restrictive alternative measure is equally effective in furthering the objective.[49] Under the TBT Agreement a measure can be found suitable to fulfil the legitimate objective even when the contribution is minimal. The degree of contribution is more important at the less-restrictive sub-test and is hardly vital at the suitability sub-test level.

In examining the suitability of the measures at issue, the Panel rejected Indonesia's argument that no material contribution was achieved by the ban because the ban excluded other flavoured cigarettes. Indonesia argued that it had not been proved that clove cigarettes posed a greater risk than other flavoured cigarettes. The Panel found that this argument was misplaced and did not address the issue at hand.[50] Indonesia also argued that by failing to ban other products popular with the youth such as menthol cigarettes, the ban could not make a material

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[46] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.381 – 382.
[47] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.380.
[48] Appellate Body Report, *Brazil -Retreaded tyres* (note 35 above) para 150.
[49] S Gaul 'The Technical Barriers to Trade Agreement: A reconciliation of divergent values in the global trading system' (2016) 91 (1) *Kent Law Review* 267 284, 288.
[50] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.382 – 7.385.

contribution.[51] The ban only focused on a 'tiny silver' of cigarettes popular with the youth.[52] The Panel found that the comparison of the challenged measure with other measures was not done to determine the extent to which a measure contributes to its objective. Instead, a comparison with other alternative measures, is a separate inquiry undertaken after the suitability analysis. [53] This approach indicates that the sub-tests of proportionality were addressed cumulatively.

To satisfy the suitability sub-test under the TBT Agreement, evidence must be presented indicating that the measure is capable of fulfilling the legitimate objective. Indonesia argued that there was no scientific evidence to support the claim that a material contribution had been made.[54] After reviewing the evidence before it, the Panel held that the majority and 'potentially unanimous view' was that a ban on clove cigarettes contributed to the reduction of youth smoking. The US presented scientific evidence from qualified and respected sources.[55] Various sources of evidence was relied upon by the Panel, moreover the WHO Partial guidelines reinforced the Panel's decision. The guidelines drew on the 'best available evidence and the experience of parties' and presented a growing consensus to control the content of tobacco products. [56] The guidelines recommended that members regulate tobacco products by prohibiting or restricting ingredients like clove and or menthol that increase palatability in tobacco products.[57]

The Panel found that there was extensive scientific evidence supportive of the conclusion that prohibiting clove and other flavoured cigarettes could contribute to reducing youth smoking. It also found that Indonesia's counter evidence, was insignificant. 'We find it striking that Indonesia has apparently only been able to find one scientific expert [in the form of a blog] who expresses a contradictory view…'[58] The Panel was correct in not ascribing significant value to evidence which was 'in the form of a blog', because it was not peer reviewed, or verifiable. In this regard this case is not ideal in forecasting how the suitability sub-test will play out in the plain packaging case. One can argue that, this was an easy case, as

[51] Ibid, para 7.393.
[52] Ibid, para 7.393, 7.395.
[53] Ibid, para 7.396 – 7.397.
[54] Ibid, para 7.400.
[55] Ibid, para 7.401.
[56] Ibid, para 7.414
[57] Ibid, para 7.414.
[58] Ibid, para 7.416.

there was no competing body of evidence on the one side. Indonesia did not present substantial evidence sufficient to create doubt over the effectiveness of the ban on clove cigarettes. It had the burden to prove that no material contribution was made, which it failed to discharge. In contrast, the US presented extensive evidence to counter the claims of the complainant party. Similarly, members implementing plain packaging measures must present evidence on its effectiveness in fulfilling its objectives, to counter claims raised that it does not contribute to its objectives.

It is worth emphasising that, while significant weight was attributed to the WHO FCTC guidelines, these did not take priority over all other forms of evidence.[59] Other forms of evidence was also considered by the Panel. This also demonstrates that the suitability subtest under Article 2.2 is stringent, voluminous and complex evidence is dealt with. Nevertheless, since plain packaging measures form part of the same WHO FCTC guidelines referred to in the *US – Clove Cigarettes* case, it is likely that they will also be found suitable to make a material contribution to their public health objectives.

By granting considerable weight to the WHO FCTC, the WTO shows respect to non - WTO law that specifically addresses tobacco control. Evidently, the WTO is not biased against the promotion of public health. This also confirms the argument made in chapter three of this study that the health-over-trade approach is unwarranted. The WTO provides sufficient leeway for members to pursue public health objectives by allowing non-WTO law such as the WHO FCTC to be used as evidence in WTO disputes. In this regard, the WTO necessity test is not antithetical to the promotion of public health.

In chapter three of this study l have argued that the WHO FCTC recommendations could be taken as international standards under the TBT Agreement and plain packaging measures would be presumed necessary and consistent with Article 2.2 of the TBT Agreement.[60] In the *US – Clove Cigarettes* case the question of whether the WHO FCTC guidelines form international standards was never considered. That is not to say, this question will never be raised before the WTO. The WTO system lacks a *stare decisis* doctrine, future Panels can consider new questions and can deviate from previous rulings, there is a considerable amount

[59] Ibid, para 7.401

[60] See chapter three of this study, where l evaluate the WHO FCTC against the criteria set out by the TBT Agreement for international standards, and conclude that there are good grounds for regarding the WHO FCTC as relevant international standards.

of flexibility.[61] Accordingly, plain packaging measures can be found automatically necessary under the TBT Agreement, if the WHO FCTC recommendations are treated as international standards. This is again another method in which the WTO shows respect to non-WTO law.

In examining the suitability of plain packaging measures, it will also be key to see how much weight will be attached to evidence presented against their effectiveness in reducing tobacco consumption, likely to be submitted by the tobacco industry. In *Australia – Salmon*, the Panel stated that it enjoyed a margin of discretion in evaluating the value to be and the weight to be ascribed to that evidence.[62] In light of the negative reputation the industry has of manipulating evidence to further the sale of tobacco products,[63] will the evidence they present be regarded as credible evidence from respected and qualified sources? Potentially this is also a critical factor, in determining the extent, to which, if at all, the WTO is indeed a safe harbour for the tobacco industry.

After satisfying the legitimacy and suitability sub-tests, the next stage of the proportionality analysis under Article 2.2 of the TBT Agreement, is to examine whether there are less-restrictive alternative measures available that would equally contribute to the fulfilment of the objective pursued at the level of protection sought by the member.[64] The Panel in the *US – Clove Cigarettes* case held that if an alternative means of achieving the objective of reducing youth smoking entails a greater risk of non-fulfilment of the objective the alternative measure would be illegitimate.[65] Amongst other alternatives, Indonesia asserted that various measures set out by the WHO FCTC such as increasing tax presented less-restrictive measures that were reasonably available.[66] Most of the measures mentioned as alternatives by Indonesia formed part of the complementary measures that the US already adopted.[67] Accordingly, the Panel found that, Indonesia failed to demonstrate that less restrictive alternative measures were

[61] M Wallot 'The proportionality principle in the TRIPS Agreement' in H Ulrich, R Hilty, M Lamping & J Drexl (eds) *TRIPS Plus 20: From Trade Rules to Market Principles* (2016) 240.
[62] *Australia - Measures Affecting Importation of Salmon (Australia - Salmon)*, WT/DS18/RW, 6 November 1998, para 267.
[63] A M Brandt 'Inventing Conflicts of Interest: A History of Tobacco Industry Tactics' (2012) 102 (1) *American Journal of Public Health* 63, 71.
[64] Panel Report, *US – Clove Cigarettes* (note 28 above) para 7.352.
[65] Ibid, para 7.424.
[66] Ibid, para 7.420.
[67] Ibid, para 7.425.

available. It failed to prove that the ban on clove cigarettes was more trade restrictive than necessary.[68]

In light of this, it is predicted that it will be difficult or close to impossible for a complainant to be able to identify alternatives to plain packaging measures that are less restrictive and that achieve the chosen level of protection. Most, if not all tobacco control measures already form part of the comprehensive policy presented under the WHO FCTC, and cannot be presented as alternatives to plain packaging measures.[69] Consequently, plain packaging measures will be found compliant with Article 2.2 of the TBT Agreement.

The Panel in *US – Clove Cigarettes* found that the ban on clove cigarettes satisfied the legitimacy, suitability and minimal impairment sub-tests. Thereafter, an overall weighing and balancing of various factors was undertaken. The Panel held that the objective pursued by the measure was both legitimate and of high value. It also found that the measure made a material contribution to the objectives. These two findings pointed towards a preliminary finding that the measure was necessary. The finding of necessity was further confirmed by the absence of less-restrictive alternative measures. The measure satisfied the first three subtests, but no separate inquiry was undertaken to establish whether the benefit was commensurate to the harm caused by the implementation of the measure. This is termed the proportionality *stricto sensu* stage. Under this fourth sub-test the Panel would have to balance the marginal benefit accrued to the public health interest versus the harm suffered by the clove cigarette industry which was severe since the measure resulted in a total ban.[70] The Panel would have to decide which value takes priority within the concrete circumstances of the case.

The Panel did not address the last sub-test of proportionality *stricto sensu*. According to the broadly accepted form of proportionality, even if the purpose pursued is vital; the means suitable to achieve the objectives and no less-restrictive means is available; a measure is not proportional if the benefit is not commensurate to the harm. Proportionality precludes means

[68] Ibid, para 7.428.
[69] See Preamble of the WHO FCTC where it is stated that, 'the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response.' The WHO FCTC comprises of price and non-price measures including Price and tax measures to reduce the demand for tobacco, and Non-price measures to reduce the demand for tobacco, namely: Protection from exposure to tobacco smoke; Regulation of the contents of tobacco products; Regulation of tobacco product disclosures; Packaging and labelling of tobacco products; Education, communication, training and public awareness; Tobacco advertising, promotion and sponsorship; and, Demand reduction measures concerning tobacco dependence and cessation.
[70] A Barak *Proportionality Constitutional Rights and their Limitations* (2012) 340.

that result in intensive interference if it has marginal or insignificant benefits to the objective. In chapter five, it was established that in some cases South African courts undertake some form of weighing and balancing the harm versus the benefit. It was also argued that in other cases, the South African courts undertake an overall balancing act which is predetermined by the results of the sub-tests; which sometimes does not meet the standards set by the proportionality *stricto sensu* sub-test.

Unlike the South African approach the WTO (under the TBT Agreement) avoids the sort of weighing and balancing required by the proportionality *stricto sensu* stage. In the *US – Clove Cigarettes* case, the Panel found that the sub-tests of legitimacy, suitability and less restrictive means were satisfied. On that basis, it held that the ban on clove cigarettes was not 'more trade restrictive than necessary' to fulfil its legitimate objective, taking into account the risks that nonfulfillment would create.[71] It did not weigh whether the social importance of the benefits was commensurate to the trade restrictive effects resulting from the ban.

The fact that the WTO omits the proportionality *stricto sensu* sub-test, is the major difference between the broadly accepted form of proportionality and the WTO form of proportionality under the TBT Agreement. It avoids undertaking the cost-benefit analysis that involves considering the social importance of the values. This approach also indicates that the WTO shows respect to a member's chosen domestic measure. Omitting and or diluting this controversial last sub-test of proportionality is a strategy for deference. It eases the requirement of necessity under the TBT Agreement. It can be argued that, proportionality as adopted in the *US – Clove Cigarettes* case does not impose undue and unreasonable burdens on members to justify public health measures.

### 6.3.2 United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products[72]

In this case, Mexico challenged the consistency of the US Dolphin- safe labelling scheme, with Article 2.2 of the TBT Agreement.[73] The US scheme was designed to prevent harmful tuna fishing practices in the Eastern Tropical Pacific (ETP). In the ETP tuna schools

[71] Panel Report, *US – Clove cigarettes* (note 28 above) para 7.432.
[72] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R.
[73] Ibid, para 3.1.

frequently swam underneath dolphins.[74] To catch tuna, tuna trawlers then used nets on dolphins to catch the tuna below. This method of fishing (termed setting on dolphins) was harmful and injurious to dolphins.[75]

For tuna caught in the ETP to be given a US dolphin safe label it had to be proven that an Agreement on the International Dolphin Conservation Program (herein after the AIDCP) observer was on board the vessel. Further, the captain had to confirm that no purse seine nets (setting on dolphins) was intentionally deployed to 'encircle dolphins and that no dolphins were killed or seriously injured during the sets in which tuna [was] caught.'[76] In contrast if tuna was harvested outside the ETP they would qualify for the US dolphin-safe label if the captain of the vessel executed a written statement certifying that no purse-seine nets were intentionally deployed to encircle dolphins. However, there was no requirement that an AIDCP observer be present. Further, there was no requirement of an attestation that no dolphins were killed or seriously injured during tuna harvesting.[77] Clearly, the conditions to obtain a US dolphin-safe label were stricter for tuna caught in the ETP.

Mexican tuna was largely caught in the ETP, and had to adhere to stricter conditions to obtain the dolphin-safe label.[78] Large US grocery chains refused to carry Mexican tuna products that did not bear the dolphin-safe label.[79] In essence market access was being restricted to Mexican tuna. Mexico argued that the US measures created unnecessary obstacles to trade because the objective was illegitimate or in the alternative the measure was more trade restrictive than necessary and was in violation of Article 2.2 of the TBT Agreement.[80]

The Panel in this case found that the dolphin-safe labelling scheme was inconsistent with Article 2.2 of the TBT Agreement. As will be shown later in this section, the decision was based on the finding that there were reasonably available less trade-restrictive alternative means of

[74] L G Kelly 'Smoke 'em if you got 'em: Discussing the WTO dispute settlement panel's decision to uphold plain packaging in Australia and its impact on the future' (2018) 35 (2) *Pacific Basin Law Journal* 179, 187- Kelly also analysed the *US – Tuna* case to assess how the WTO applies article 2.2 of the TBT Agreement; see also Panel Report, *US – Tuna (note 72 above)* para 4.115.
[75] Ibid, para 4.396.
[76] Ibid, para 4.33.
[77] Ibid, para 4.34.
[78] Ibid, para 4.2.
[79] Ibid, para 4.29
[80] Ibid, para 4.55.

achieving the objectives pursued by the US. The US successfully appealed this finding before the Appellate Body.[81]

In its submissions before the Panel, the US correctly remarked that 'necessary' ordinarily refers to that which cannot be dispensed with or done without; essential or something that must be done.[82] As such a more trade restrictive than necessary measure is one that restricts trade more than is needed or required to fulfil the objective at hand. This principle, in particular the word 'more' also implies a comparison with other reasonably available measures.[83] The Article 2.2 requirement also echoes Lord Diplocks' oft quoted expression 'you must not use a steam hammer to crack a nut if a nut cracker would do.'[84]

This case confirmed that Article 2.2 of the TBT Agreement required a two-step examination process. The first an examination of the legitimacy of the objective pursued by the technical regulation. Then whether the means is more trade-restrictive than necessary to fulfil the legitimate objective taking into account the risks that non-fulfilment would create.[85] To establish the objective, a Panel must consider the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure. The Appellate Body emphasised that a Panel is not limited by a Member's characterization of the objectives. In this case it was established that the objective of the measure at issue was to ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins.[86] Further, to contribute to dolphin protection, by ensuring that the US market was not used to encourage fishing methods which have adverse effects on dolphins.[87] This approach resembles that adopted by the South African courts, for instance in the case of *AB and Another v Minister of Social Development*,[88] where the courts did not defer to the legislature's framing of the objectives, but instead, made independent determinations of what the objectives of the measure were.

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[81] Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna Products*, WT/DS381/AB/R, para 20.
[82] Panel Report, *US – Tuna* (note 72 above) para 4.96.
[83] Ibid.
[84] I have referred to this quote in chapter five of this study as well, where l dealt with the third sub-test of proportionality, necessity or least-restrictive test; See *R v Goldstein* (1983) IWLR 151 at 155 as quoted in G Letsas 'Rescuing Proportionality' in R Cruft, M Liao, M Renzo (eds) *Philosophical Foundations of Human Rights* (2014) 321.
[85] Panel Report, *US – Tuna* (note 72 above) para 7.388.
[86] Appellate Body, (note 80 above) para 325; see also Panel Report, *US – Tuna* (note 72 above) para 7.408 – 7.413.
[87] Panel Report, *US – Tuna* (note 72 above) para 4.26.
[88] *AB and Another* (note 41 above).

The TBT Agreement prescribes a non-exhaustive list of objectives it considers legitimate. In this case, the Panel found that the objectives identified fell within this list, since it included 'prevention of deceptive practices' and 'the protection of animal or plant life or health or the environment' as legitimate purposes.[89] The Appellate Body confirmed this and also indicated that the requirement of legitimate objective essentially required that the aim or target be lawful, justifiable, or proper.[90] It is predicted that the objective of plain packaging measures easily falls within the list of legitimate objectives enlisted in the TBT Agreement, in particular under the category of measures implemented to protect human health or safety, animal or plant life or health, or the environment.

After finding that the objective was legitimate the Panel then proceeded to the second stage of the two-stage analysis; examining whether the measure at issue was more trade restrictive than necessary to fulfil their objectives taking into account the risks that non-fulfilment would create.[91] This requires trade to be restricted only to the extent that it is necessary for the achievement of the objective. The second sub-test of proportionality, suitability falls under this second stage of the Article 2.2 analysis.[92] The Appellate Body held that this enquiry was concerned with the degree of contribution that the technical regulation made towards the fulfilment of the aim.[93] The measure does not need to completely achieve the objective, which aligns with the right of Members to implement measures necessary to achieve legitimate objectives at the levels they consider appropriate.[94] The Appellate Body held that the degree of contribution can be 'discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.'[95]

The Panel concluded that the US measures could only partially ensure its objectives.[96] With regard to the consumer information objective, the Panel found that the objectives could be fulfilled if the label allows consumers to accurately distinguish between tuna harvested using fishing methods that adversely affect dolphins and that does not and then make decisions based

[89] Panel Report, *US – Tuna* (note 72 above) para 7.437.
[90] Appellate Body Report, *US – Tuna* (note 81 above) para 315.
[91] Panel Report, *US – Tuna* (note 72 above) para 7.445.
[92] Ibid, para 7.459.
[93] Appellate Body Report, *US – Tuna* (note 81 above) para 316.
[94] Ibid.
[95] Appellate Body Report, *US – Tuna* (note 81 above) 317.
[96] Panel Report, *US – Tuna* (note 72 above) para 7.563.

on this information when buying tuna products.[97] The US dolphin-safe label still granted access to then label, tuna caught by fishing methods that 'may or do in fact' adversely affect dolphins.[98] The Panel also held that the measures also partially fulfilled the dolphin protection objective. Only if the consumers were correctly guided by the label to choose products harvested by methods that did not adversely affect dolphins, could the measures successfully discourage methods that had adverse effects on dolphins.[99] The Panel used the findings on the level of contribution, to compare whether alternative measures could fulfil the objectives at the same level. Clarity was not given on whether there are levels of contribution the Panel will find too marginal or insignificant to satisfy the Article 2.2 analysis.

In this regard, it is also important to emphasise that members are free to pursue legitimate objectives at levels they find appropriate. The real issue is not the level of contribution the measure achieves, but whether its trade-restrictiveness is necessary to achieve the chosen level of protection. By adopting this approach (not focusing on the level of protection chosen, but instead on whether a less restrictive means can meet the level of contribution chosen) the WTO shows deference to national decision makers in implementing domestic policy. In light of this, it is predicted that under the TBT necessity test, less focus will be placed on the level of contribution plain packaging measures achieve. It is sufficient that, the measure only partially fulfils the objectives. The focus will be on whether less restrictive alternative measures are available that can fulfil the objectives at the same level of protection.

However, if the measure at issue does not contribute to the objectives at all, the inquiry will not proceed and the measure will be found inconsistent with Article 2.2 of the TBT Agreement. The Appellate Body dismissed Mexico's ground of appeal that the Panel erred in proceeding to examine whether there was a less trade-restrictive alternative measure after it had found that the measure at issue could, at best, only partially fulfil the legitimate objectives. It held that it was impossible to find that there is a less trade-restrictive alternative measure that fulfils the objectives when the measure at issue itself does not fulfil the objectives. Further that the Panel's analysis should have ended when it was found that the measure at issue did not contribute to the objectives.[100] This approach follows the broadly accepted form of

[97] Ibid, para 7.479.
[98] Ibid, para 7.480.
[99] Ibid, para 7.589.
[100] Appellate Body Report, *US – Tuna* (note 81 above) para 340.

proportionality, where the sub-tests are cumulative. If a measure does not satisfy a sub-test the enquiry does not proceed to the next stage.

The enquiry under the TBT test proceeds to examine whether the same level of protection could be achieved by less restrictive alternatives.[101] This enquiry is equivalent to the third sub-test of proportionality, the necessity or less restrictive means test. The Panel found that the coexistence of the US dolphin-safe label and the AIDCP label provided a reasonably available, less trade-restrictive means of achieving the objectives pursued by the United States at its chosen level of protection.[102] The Appellate Body reversed this ruling since, from its own comparison it found that the alternative did not equally contribute to the objectives. The Appellate Body held that assessing whether the measure at issue is more trade restrictive than necessary, would mostly involve a comparison of the degree of achievement and the level of trade-restrictiveness of the measure at issue with that of possible alternative measures. This comparison must be done in light of the nature of risks involved and the
gravity of the consequences that non-fulfilment would create.[103]

The alternative measure proposed would allow tuna caught by setting on dolphins to be eligible for a US dolphin safe label even if the prerequisites of the AIDCP had been complied with. In contrast, the original measure (US Dolphin-safe label) completely prohibited setting on dolphins, so the label would only be provided for tuna caught by methods other than setting on dolphins. The Appellate Body therefore held that the alternative measure would not achieve the US objectives at the chosen level of protection. In comparison to the original measure, the alternative measure would allow more tuna harvested in conditions that adversely affected dolphins to be labelled dolphin safe. It did not achieve the objectives to the 'same extent' and for these reasons the finding of the Panel was reversed.[104] The approach adopted by the Appellate Body contradicts the criticisms levelled against the WTO's assessment of less trade restrictive alternative measures; in particular that, the focus is on the consistency with WTO Agreements than it is on the efficacy of the alternative measure.[105]

The Panel had acknowledged the argument presented by the US, that the coexistence of the US dolphin-safe label and the AIDCP label did not constitute a reasonably available

[101] Panel Report, *US – Tuna* (note 72 above) para 7.589.
[102] Ibid, para 7.566.
[103] Appellate Body Report, *US – Tuna* (note 81 above) para 318.
[104] Ibid, para 330.
[105] M Du (note 37 above) 9.

alternative.[106] The US had argued that the AIDCP measures and the US dolphin-safe label both formed part of a comprehensive US strategy to protect dolphins.[107] The Panel when dealing with the claim by Mexico that the measure did not fulfil a legitimate objectives because it focused on dolphins and not on the wider marine life; stated that the measures were part of a comprehensive marine protection policy.[108] It reiterated that, 'certain complex public health or environmental problems may be tackled only when a comprehensive policy comprising of a multiplicity of interacting measures.'[109] Interestingly, this was considered at the legitimacy sub-test and not at the less restrictive sub-test level.

The analysis of the Panel and the Appellate Body, both ended at the necessity or less restrictive subtest. In the Panels' case, there was no need to proceed, since the sub-tests are supposed to be cumulative. Accordingly, a finding that less restrictive alternatives are available would justify the decision that the measure is inconsistent with Article 2.2 of the TBT Agreement. In terms of the generally accepted form of proportionality, if no such alternative measures exist, the analysis must proceed to the proportionality *stricto sensu* subtest. The Appellate Body in this case did not proceed to ascertain whether the marginal harm suffered by the Mexican tuna industry was proportionate to the marginal benefits accrued to the consumer information and dolphin protection objectives.

It can be argued that proportionality under the TBT Agreement is hence limited to ascertaining whether the objective is legitimate; whether the measure contributes to this legitimate objective and whether the objective can be equally achieved by less trade - restrictive measures. The last enquiry forms the bulk of the Article 2.2 analysis. It is evident that the WTO avoids weighing and balancing the harms and benefits, in the manner required at the proportionality *stricto sensu* stage.

The Panel confirmed this view, when it referred to the Appellate Body's decision in *China – Publications and Audio-visual Products*, that in assessing the necessity of a measure:

> a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis *yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives*, which may be less trade restrictive while providing an

[106] Panel Report, *US – Tuna* (note 72 above) para 4.99.
[107] Ibid.
[108] Ibid, para 7.442.
[109] Appellate Body Report, *Brazil – Retreaded Tyres* (note 35 above) para 151.

equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake.[110] (My emphasis)

This summarises the focus of the WTO necessity tests. Here the WTO Appellate Body indicates that the values pursued have varying levels of significance. This seems to go against the autonomy of members to choose which policy areas to regulate. At the same time it reflects and confirms the reality that some policy areas are more important than others. For instance the protection of human health and life has been regarded as vital and important to the highest degree. 'Highest' implying that it is the most important value comparable to none other. Accordingly, the risks created by not fulfilling these objectives are more serious. One could also argue that it also indicates that measures designed to protect human life or health are more likely to be found necessary. The extent of contribution and the extent of the restriction on trade is also important. In the *US – Tuna* case, no proportionate relationship between the restrictiveness of the measure and the level of contribution was required. Instead the two factors were employed to assess whether the alternative was less restrictive and whether it equally achieved the objectives.

Evidently, the WTO proportionality test avoids a test that matches the proportionality *stricto sensu* stage. This confirms Desmedt's observation that only some elements of proportionality are used in the WTO jurisprudence.[111] The Panel has assessed the severity of the restriction on trade (the harm) and the extent of contribution (the benefit) separately.[112] Comparing these two values (the harm versus the benefit) side by side would be much more complex and would depend on the importance of the two values in the particular jurisdiction. This justifies the approach adopted by the WTO to focus on the availability of less-restrictive measures and to omit the proportionality *stricto sensu* sub-test. This also weakens the claims that the WTO necessity tests imposes undue and unreasonable burdens on members implementing public health measures.

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[110] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, para. 241.

[111] A Desmedt (note 20 above) 441.

[112] Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, para. 7.788; where it was held that the Panel should weigh not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade.

It is also important to note that, under the TBT necessity test, the complainant bears the burden to prove that the measure creates an unnecessary obstacle to international trade, and to provide a reasonably available alternative measure.[113] It is then for the respondent to rebut the complainant's *prima facie* case, by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to fulfil the aims it seeks to achieve. The latter can be a difficult task, but the burden imposed on the complaining party is heavier. In light of this, one can argue that the proportionality test under the TBT Agreement does not impose undue and unreasonable burdens on members to justify their policy choices.

### 6.3.3 Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging[114]

At the time the WTO Panel report on the *Australia – Tobacco Plain Packaging* case was issued, the predictive study embarked on in this thesis had been completed. This analysis was therefore incorporated into the study. In view of that, this section of this chapter will now examine the outcome of the Panel decision, specifically with regard to Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement.

As predicted, plain packaging measures were found compatible with both Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement. This case arose out of complaints that the Australian Tobacco Products Act[115] was inconsistent with the abovementioned WTO Agreements. As indicated in chapter two, the TPP Act prescribes the manner in which word trademarks are to appear on tobacco packaging and products. On the other hand, it prohibits the appearance of stylised and non-word marks on tobacco products and packaging.[116] In sum the TPP regulations impose severe restrictions on the appearance of tobacco products and packaging.

Accordingly, a challenge was brought before the Panel, for its alleged contravention of Article 20 of the TRIPS Agreement. Article 20 precludes unjustified encumbrances on the use of trademarks in the course of trade. Another challenge relevant to this study was brought on the consistency of the TPP measures with Article 2.2 of the TBT Agreement, since plain packaging measures constituted technical barriers.

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[113] Appellate Body Report, *US – Tuna* (note 81 above) para 323.
[114] Panel Report, *Australia – Tobacco Products and Packaging* (note 3 above) para 7.31.
[115] Tobacco Plain Packaging Act No 48 of 2011 (Herein after the TPP Act or regulations).
[116] See chapter two for a detailed assessment of the TPP regulations.

*6.3.3.1 Article 2.2 of the TBT Agreement*

The Panel found that plain packaging measures were compatible with Article 2.2 of the TBT Agreement, in particular that the measures were not more trade-restrictive than necessary to fulfil a legitimate objective, in light of the risks non-fulfilment would create. It is observable that the Panel adopted the same approach taken in the case of *US -Clove Cigarettes* and in *US -Tuna* in making its determination. It held that the Article 2.2 analysis involved a relational analysis of the degree of contribution made by the measure to the legitimate objective at issue; the trade-restrictiveness of the measure; the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the legitimate objectives.[117] Ultimately, the relational analysis would inform the comparative assessment of whether alternative less trade restrictive measures were available.[118]

Although the Panel held that this relational analysis did not require a particular order a clear pattern can be observed from the TBT cases decided to date. This pattern resembles the broadly accepted form of proportionality, in that, a sequential cumulative checklist of the legitimacy, suitability and minimal impairment means subtests is undertaken. The main difference is the absence of the proportionality *stricto sensu* sub-test.

The objective of the TPP Act was characterised by the Panel as the need to improve public health by the reduction of use and exposure to tobacco products. This confirmed the approach adopted in previous TBT cases, that the Panel is not bound by a member's characterisation of the objectives. The legitimacy sub-test under the TBT Agreement, therefore includes both the identification of the objectives pursued and then an assessment of its legitimacy within the context of Article 2.2 of the TBT Agreement.[119]

Unsurprisingly, because of the implications exposure and consumption of tobacco have on public health, and in line with this study, the objective was found legitimate within the context of Article 2.2 of the TBT Agreement. The Panel also highlighted that the objective of curbing and preventing youth smoking had previously been recognised as legitimate by the WTO in *US – Clove Cigarettes*.[120] It was also reiterated that human health was a value 'both vital and important in the highest degree'.[121] This approach supports the argument made in this

[117] Panel Report, *Australia – Tobacco Products and Packaging* (note 3 above) para 7.31.
[118] Ibid, para 7.32.
[119] Ibid, para 7.192.
[120] Ibid, para 7.250
[121] Ibid, para 7.247.

study that, the value of public health is given substantial weight under the WTO. Moreover, that the WTO is not biased against public health.

Taking on the cumulative approach to proportionality, the WTO then proceeded to determine whether the TPP regulations were suitable. A significant part of the Article 2.2 analysis was focused on the determination of the degree of contribution achieved by the measures. In line with the Appellate Body's approach in *US - Tuna,* the Panel discerned the degree of contribution from the design, structure and operation of the TPP regulations.

Australia argued that the TPP fulfilled its objectives through a mediational or causal chain model. By reducing the appeal of tobacco products, improving the effectiveness of pictorial warnings and by reducing the ability of tobacco packages to mislead consumers about the harmful effects of smoking, the measures would then affect smoking behaviours and contribute to the overall objective of protecting human health.[122]

The argument advanced was that the TPP regulations would first achieve the proximal outcomes, reflected through the three mechanisms and then achieve the distant outcomes, which were the impact on smoking behaviours (initiation, relapse and cessation).[123] Evidence was presented on the potential of the measures to achieve the proximal outcomes, on the actual effect the measures had on the proximal outcomes and on the actual effect the regulations had on the distal outcomes.[124]

A cross-cutting issue at the suitability sub-test was the intrinsic quality and credibility of the evidence submitted by Australia. The Panel addressed the complaints that the evidence presented in support of the assertions that plain packaging measures would achieve the proximal outcomes was methodologically flawed and lacked the scientific rigour and objectivity required to form a reliable evidentiary base.[125] The Panel adopted the correct standard, maintaining that it was not required to draw definitive conclusions on the methodological merits of each study, instead, that it was required to determine whether the evidence provided reasonable basis. It is also commendable that the probative value of the evidence was judged in its totality and not individually.[126]

The Panel found that the criticised studies were in fact from respected and qualified sources, and that they had not been proven to be so methodologically flawed so as to warrant

[122] Ibid, para 7.451.
[123] Ibid, para 7.491.
[124] Ibid, para 7.500.
[125] Ibid, para 7.523.
[126] Ibid, para 7. 641.

their dismissal in their entirety.[127] The evidence was found to meet the standards of the relevant scientific communities and was based on reasonable and coherent reasoning.[128] Of importance is that the same studies on the anticipated impacts of plain packaging measures had been independently reviewed by other experts.[129] These experts had also concluded that the literature provided reasonable basis for the claims that plain packaging could achieve the proximal outcomes.

In addition to the evidence on the anticipated impact of plain packaging on the proximal outcomes, evidence was also presented on the actual effect on proximal outcomes. This evidence was drawn during the post implementation period.[130] The evidence reflected the application of the TPP measures in Australia since their entry into force.[131] Whilst this section will not go into details of how evidence on each and every outcome was addressed, it will be useful to focus on one of the proximal outcomes to illustrate the reasoning of the Panel.

The TPP regulations are designed to contribute to the achievement of their objective by reducing the appeal of tobacco products which should in turn influence smoking behaviours and thereby contribute to a reduction in the use of, and exposure to, tobacco products.[132] In this regard, the Panel considered evidence from the tobacco industry documents that showed that, the industry itself had used packaging as an instrument for communication and as a means to generate positive perceptions of tobacco products.[133] The 'evidence suggests that [packaging and branding] may be used, and has in fact been used, to generate positive perceptions of tobacco products'. Australia also referred to numerous empirical studies, which found that plain packaged tobacco products were rated substantially less attractive, particularly to the youth.[134]

The complainants presented evidence from Professor Steinberg who argued that packaging had no impact on initiation of smoking by the youth. He found it 'highly improbable that an adolescent who was interested in smoking would decline a cigarette from a friend because of the packaging from which the cigarette was offered'.[135] Further, it was argued that

[127] Ibid, para 7.641.
[128] Ibid, para 7.516.
[129] See Chantler Report, where Cyril Chantler reviewed relevant literature on the impacts of the TPP regulations on the proximal and distal outcomes. Panel Report, *Australia – Tobacco Products and Packaging* (note 3 above) para 7.597, 7.641.
[130] Ibid, para 7.500.- is there a primary source that you can refer to here to supplement the panel report?
[131] Ibid, para 7.657.
[132] Ibid, para 7.646.
[133] Ibid, para 7.657.
[134] Ibid, para 7.668.
[135] Ibid, para 7.722.

packaging was not very important because many young people obtained cigarettes from friends without 'necessarily seeing the package in which they were sold'.[136]

On the contrary, an Australian expert, Professor Slovic submitted that tobacco advertising and other promotions were designed 'to associate positive imagery and positive affect with the act of smoking.'[137] Even if a package may not be available to the youth the day he chooses to take a cigarette, what is more important is the role packaging plays in creating an overall positive imagery in the social environment. Dr Biglan also confirmed that physiological needs that induce the youth to smoke include 'having a positive masculine or feminine image, reducing psychological distress, being rebellious, and sensation seeking',[138] and that tobacco companies associate their brands with one or more of these attributes.

The Panel in its determination also considered the tobacco industry's documents, one example is a Philip Morris document on Alpine cigarettes, where the author noted that smokers of the products were identified as fashion consciousness, confidence and popularity.[139] With this evidence, it was hard for the complainants to dismiss claims that tobacco plain packaging could not reduce appeal and change smoking behaviours. The Panel concluded that:

> [the] evidence indicates to us that the tobacco industry and its marketing agencies consider that tobacco packaging (including word, design, shape, and other features) can communicate a wide range of imagery relating not only to the characteristics of the product but also projecting images about its consumer, such as modernity, a youthful image, Inner Substance & Outward Style, Inner Confidence & Outward Success, [o]utgoing/sociable, [m]ost popular, be associated with doing one's own thing to be adventurous, different, adult, or whatever else is individually valued, tough/rugged, trendy, [or] expensive looking.[140]

To support this conclusion, credible evidence in the form of four peer –reviewed empirical studies from the post implementation period also suggested that TPP regulations had statistically significantly reduced the appeal of cigarettes. There was evidence that this had amongst other effects an increased downward trend in cigarette sales in Australia following the introduction of the TPP measures.[141] Accordingly, there was credible evidence showing the actual impact of plain packaging on the proximal and distal outcomes.

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[136] Ibid, para 7.723.
[137] Ibid, para 7.726.
[138] Ibid, para 7.728.
[139] Ibid, para 7.734.
[140] Ibid, para 7.735.
[141] Ibid, para 7.979.

The Panel concluded that in totality, the evidence indicated and provided a reasonable basis in support of the proposition that the TPP measures were apt to and actually contributed to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products.[142]

Of particular interest is the minimal role played by the WHO FCTC in showing that the TPP regulations could achieve its proximal and distal outcomes. Although the Panel mentioned how the findings from the evidence presented before it were 'consistent with certain statements in the Article 13 FCTC Guidelines', it is observable that the guidelines were not used as the primary basis for establishing the suitability of the TPP regulations. In one instance, the Panel referred to paragraph 15 of the Article 13 FCTC Guidelines which states that:

> Packaging is an important element of advertising and promotion. Tobacco pack or product features are used in various ways to attract consumers, to promote products and to cultivate and promote brand identity, for example by using logos, colours, fonts, pictures, shapes and materials on or in packs or on individual cigarettes or other tobacco products.

The Panel referred to paragraph 15 of Article 13 guidelines after reviewing the studies presented as evidence that TPP regulations would reduce the appeal of tobacco products and alter smoking behaviours; mentioning their consistency with its independent findings. In other words, (although the WHO FCTC is evidence – based) Australia did not go before the Panel merely relying on the Convention (WHO FCTC) as evidence that the TPP regulations were apt to make a contribution to its objectives. In fact, one could argue that, minimal weight was given to the WHO FCTC in determining whether the TPP regulations were apt to contribute to the public health objectives.

This also shows the stringency of the TBT necessity test. A full blown review was undertaken, first, on the credibility and intrinsic quality of evidence presented and secondly, on whether the evidence supported the conclusions that the measures were suitable. On the other hand, it also shows that the TBT necessity test is not biased against any of the competing values. By paying attention to arguments from both camps, it shows that a balanced approach was taken. In this regard, it is arguable that the TBT necessity test is capable of achieving the required balance.

[142] Ibid, para 7.984, 7.1025.

At the suitability stage, it is also noticeable that the focus was on whether the measures were apt to make a contribution and not on the degree of contribution. The Panel also acknowledged the difficulty of isolating the actual impact or contribution of plain packaging measures in light of the other tobacco control policies already in implementation in Australia.[143] Guidance in this regard was sought from the Appellate Body in *Brazil – Tyres*, where it stated that it was hard to isolate the contribution made by one measure forming a comprehensive policy in the short-term. Such a contribution can only manifest and be evaluated after an elongated period of time.[144] It is hence, recognised that there are instances where evidence of the effectiveness of a measure can be difficult to prove immediately. Results obtained from measures such as those adopted in order to reduce global warming and climate change, or other preventive actions can only be evaluated after a passage of time.[145] To satisfy this sub-test, a member can resort to 'quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.'[146]

Since the body of evidence on the contribution of plain packaging measures to public health is still being built up, evidence on predictable effects of plain packaging measures would suffice in ascertaining their suitability. In the Australian case, there was evidence on the actual impact of plain packaging measures on the proximal and distal outcomes, drawn after the implementation of the TPP regulations. On the contrary, in the case of South Africa, the scarcity of such evidence has been highlighted in chapter five. Consequently, while evidence from other jurisdictions on the suitability of plain packaging measures can be used in the South African context, the relevance of projections into the future become obvious.

This confirms the observation made that the TBT necessity test does not focus on the degree of contribution, with no minimal threshold required to satisfy the suitability sub-test. This approach also indicates that the WTO respects the prerogative right of member states to set and achieve regulatory objectives through measures of their own choice, and at their chosen level of protection. It also supports conclusions made in this study that the WTO allows sufficient space for members to regulate in the area of public health.

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[143] Ibid, para 7.980.
[144] Ibid, para 7.981
[145] Appellate Body Report, Brazil – Tyres (note 36 above) para. 151, In this respect, we note that, in *US — Gasoline*, the Appellate Body stated, in the context of Article XX (g) of the GATT 1994, that, 'in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable.'
[146] Appellate Body Report, *Brazil – Retreaded Tyres* (note 36 above) para 151.

After determining that the TPP regulations were apt to make a contribution to the objectives, the Panel then examined whether the alternative measures suggested by the complainants were reasonably available. Thus whether they were less trade restrictive and whether they made an equal contribution to the objectives. Although the Panel considered that the WHO FCTC recommended a comprehensive multisectoral tobacco control policy, it proceeded to examine the possible alternatives presented by the complainants.

The measures suggested as possible alternatives, were variations of already existing measures in Australia.[147] The Panel held that variations of already existing measures could be considered as valid alternatives.[148] An important aspect is that, even though the WHO FCTC refers to most, if not all, kinds of tobacco control measures, the determination in Article 2.2 of the TBT Agreement is based on the measures actually implemented in a member's country. As such, there is a possibility that plain packaging measures can be found to be in violation of the Article 2.2 necessity test; if it can be proven that there are other measures (even those recommended by the WHO FCTC) that are reasonably available, less trade restrictive and capable of making an equal contribution to the objectives., which a WTO member can implement. Australia argued that the tobacco control policy was comprehensive and that the different measures were complementary.[149] However, the Panel still proceeded to evaluate whether the proposed alternatives were reasonably available.

Observable also, is the role played by the WHO FCTC in determining whether less trade-restrictive alternative measures are reasonably available. The fact that the WHO FCTC reiterated the comprehensive nature of tobacco control policies, was a consideration, and not a decisive factor. It was considered 'highly relevant' that tobacco control policies were comprehensive in nature. It was stated that the TPP regulations are 'by their design, not intended to operate as a stand-alone policy, but rather were implemented as part of "a comprehensive suite of reforms to reduce smoking and its harmful effects" in Australia.'[150] However, the Panel still proceeded to review the proposed alternative measures.

The Panel found that the suggested alternative measures did not satisfy the requirements under Article 2.2 of the TBT Agreement. The Panel first identified the trade-restrictiveness caused by the proposed alternative measures.[151] Then it evaluated the degree of contribution to

[147] Panel Report, *Australia – Tobacco Products and Packaging* (note 3 above) para 7.1385.
[148] Ibid.
[149] Ibid, para 7.1378.
[150] Panel Report, *Australia – Tobacco Products and Packaging* (note 3 above) para 7.1728 – 7.1729.
[151] Ibid, para 7.1365.

assess their equivalence.[152] An important determination would also be whether the measure is reasonably available. This comparison is made in light of the nature of the risks at issue and the gravity of the consequences that would arise if the objective was not fulfilled.[153]

Apart from pre-vetting, all of the suggested mechanisms were a variation of measures already in existence in Australia. Pre-vetting entailed a disqualifying criteria against which marks and physical features could be assessed allowing Australia to eliminate any packaging or product elements that would likely induce consumption, while allowing all other elements that do not otherwise violate Australian law. It would hence be an individual assessment of the tobacco products and packages before they are allowed on the Australian market.[154] A central premise of the pre-vetting proposal is that it would not require the comprehensive restriction of packaging and design features, but instead would guarantee that such features 'were used only in circumstances to distinguish the products, rather than to promote the use or consumption of tobacco products (or to mislead consumers)'[155]

The Panel found that the alternative was not necessarily less trade restrictive. Instead the measure would introduce implementation costs that did not arise under the TPP measures.[156] The measure would also not make an equivalent contribution to Australia's objective of improving public health by reducing the use of, and exposure to, tobacco products, taking into account the nature of the objective and the risks non-fulfilment would create. It created a potential for entrance on the market of 'packaging features that would create the possibility of a reduced degree of contribution to Australia's objective'. This conclusion was supported by the grave risk that would arise if public health would not be improved.[157]

A consideration of the nature of the risks non-fulfilment would create, also shows the importance of public health values under the WTO. As observed earlier, in the analysis of WTO necessity jurisprudence, the WTO is not quick to find a measure that pursues public health inconsistent with its provisions. It is arguable that the importance of the value pursued by a measure plays its most significant role, when it is determined whether there are reasonably available measures, (in light of the risks non-fulfilment would create).

[152] Ibid, para 7.1366.
[153] Ibid, para 7.1371.
[154] Ibid, para 7.1629 -7.1631.
[155] Ibid, para 7.1665.
[156] Ibid, para 7.1654.
[157] Ibid, para 7.1715.

The Panel accordingly, found that the TPP regulations were necessary, it had not been demonstrated that the TPP measures were more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of Article 2.2 of the TBT Agreement. As observed previously, the WTO ends its enquiry after the third sub-test of proportionality (minimal impairment test). It does not proceed to weigh the benefits against the harm (proportionality stricto sensu); in this case the degree of contribution to public health against the trade restrictiveness resulting from TPP regulations. In doing so, the WTO would have to decide which value is more important and by adopting this approach (omitting the proportionality stricto sensu stage) it avoids an intrusion into the policy space left for domestic authorities.

### 6.3.4 Preliminary Conclusions

The nature and purpose of Article 2.2 of the TBT Agreement is to balance and reconcile the tensions between regulatory autonomy and free market values. The WTO primarily focuses on improving market access and minimising trade barriers[158] and Article 2.2 necessity test aligns with this purpose. It allows members to pursue legitimate goals, as long as they do so, through the least trade restrictive means. It is also important to emphasise that it is the necessity of the restriction on trade and not of the measure itself that is the focus of the Article 2.2 analysis.

From the analysis undertaken above, a clear pattern can be drawn on how the TBT necessity test operates. There are definite elements of proportionality under the Article 2.2 necessity test. The first three sub-tests of legitimacy, suitability and necessity (less restrictive) are all present. Similarities between the WTO's approach to proportionality and the broadly accepted formulation of proportionality; presented in chapter five can thus be easily identified. Another similarity is that the sub-tests are cumulative. The main difference is that under the TBT necessity test, the fourth sub-test of proportionality *stricto sensu* is avoided. The Panels and Appellate Body in the discussed cases did not proceed to ascertain whether the harm, in this case restrictions on international trade, is proportionate to the benefits accrued to the objectives pursued or to the level of contribution.

## 6.4 PROPORTIONALITY UNDER ARTICLE 20 OF THE TRIPS AGREEMENT

The discussion of proportionality under the TRIPS Agreement, in particular with reference to plain packaging measures will focus on Article 20. In the WTO plain packaging

[158] P Van Den Bossche *The Law and Policy of the WTO Cases and Materials* (2005) 86.

dispute member states claimed that the Australian TPP regulations contravene the provisions set out in Article 20 of the TRIPS Agreement.[159] As expected, the Panel found that the TPP regulations are in compliance with Article 20 of the TRIPS Agreement. They did not constitute an unjustifiable encumbrance on the use of trademarks in the course of trade. Article 20 that:

> the use of a trademark in the course of trade shall not be *unjustifiably encumbered* by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.[160] (My emphasis)

Until the *Australia – Tobacco Plain Packaging* case WTO jurisprudence had not interpreted the meaning of 'unjustifiably' under Article 20. Accordingly, jurisprudence on 'unjustifiably' is relatively undeveloped. Although the Article was invoked in *Indonesia – Certain Measures Affecting the Automobile Industry*, the Panel did not go as far as to consider the meaning of 'unjustifiably' because the provisions of the Indonesian law did not meet the standard of 'requirements' within the meaning of Article 20.[161] As a result, the Panel did not proceed to find whether there were unjustified encumbrances.

In chapter two of this study the specific requirements of plain packaging measures were set out and in chapter four, it was argued that plain packaging measures constitute special encumbrances on trademarks that must be justified.[162] This has also been confirmed by the Panel in *Australia – Tobacco Plain Packaging* case.[163] The aim of this section is to examine the meaning of 'unjustifiably.' Further, to establish whether Article 20 allows room for the application of the proportionality principle and how it might be construed. The notion of justifiability is indicative of the need to balance the interests of trademark owners and the public. Davison does submit that the justifiability test under Article 20 of the TRIPS Agreement involves weighing and balancing the harm suffered by trademark owners and the alleged justification.[164] Davison also remarks that the 'smaller the encumbrance, the smaller the

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[159] *Australia —Tobacco Plain Packaging* (note 3 above).
[160] Article 20 of the TRIPS Agreement.
[161] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, para 14.282.
[162] This study argues that both the restrictions of word and non-word marks fall within the scope of Article 20.
[163] *Australia – Tobacco Plain Packaging* (note 3 above) para 7.2239.
[164] M Davison 'The legitimacy of plain packaging under international intellectual property law: why there is no right to use a trademark under either the Paris Convention or the TRIPS Agreement' in A Mitchell & T Voon and J Liberman, (eds) Public Health and Plain Packaging of Cigarettes: Legal Issues (2012) 105,106.

justification needed for that encumbrance.'[165] This echoes Alexy's law of balancing which was discussed in chapter five of this study; which requires that the 'greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'[166] It is not far-fetched to preliminarily argue that the test of justifiability shows notions of proportionality. A mere rationality test would not be able to achieve the balancing and weighing functions, since it does not involve a balancing of competing interests.

Arguing that proportionality exists in the TRIPS Agreement, Wallot states that proportionality can be derived from the WTO law in general. He correctly argues that within the TRIPS Agreement proportionality can be employed as a test to determine whether a certain design of national intellectual property law is permissible, in particular where two conflicting interests are at stake.[167] This can be illustrated in the plain packaging dispute where such national legislation lies at the intersection between the protection of public health and the protection of intellectual property rights. Proportionality would protect intellectual property holders from constant limitation of their rights, especially in cases where there is no just cause for doing so.

Wallot also submits that the rights and obligations under the TRIPS and the WTO as a whole are principles, which are optimization requirements to be realised to the greatest extent possible given the legal and factual possibilities.[168] Principles can be satisfied to varying degrees – denoting an imminent connection with proportionality. The wording, 'justifiable encumbrances', points towards norms that can be realised to a certain extent. Trademarks can be used in the course of trade free from encumbrances to a certain extent and their use can be encumbered to varying degrees in as far as such can be justified.

In the *Australia – Tobacco Plain Packaging* case, South Africa in its submissions as a third party, argues that 'unjustifiably', refers to measures that do not have a reasoned basis or that have no rational connection to the relevant legitimate objective. South Africa explicitly, denounces a connection between 'unjustifiably' and necessity. It argues that the standard imposed by 'unjustifiably' is not similar to the one imposed under Article 2.2 of the TBT

[165] Ibid.
[166] R Alexy 'On balancing and subsumption: A structural comparison' (2003) 16 (4) *Ratio Juris i436. 437.*
[167] M Wallot 'The proportionality principle in the TRIPS Agreement' in H Ulrich, R Hilty, M Lamping & J Drexl (eds) *TRIPS Plus 30: From Trade Rules to Market Principles* (2016) 240.
[168] Ibid, see also R Alexy 'On the structure of legal principles' (2000) 13 (3) *Ratio Juris* 294, 295; See also R Alexy *A Theory of Constitutional Rights* (2009) 47.

Agreement which has notions of least restrictiveness and necessity.[169] In addition, South Africa argues that the term necessary contained under Article 8.1 of the TRIPS Agreement should inform the rationality test and not 'magically change the use of the term 'unjustifiably' in Article 20'.[170] This study does not agree with this reasoning, instead it argues that 'unjustifiably' is closer to the standard of necessity, than it is to the rationality standard. As will be shown in subsequent sections of this chapter, the standard of justifiability requires the special requirements to pursue a legitimate objective; that it contributes to the objective and that no less-restrictive means be available.

The Panel in *Australia – Tobacco Plain Packaging* found that 'unjustifiably', was not to be assumed to be synonymous with unnecessarily.[171] This is despite its finding that Article 20 of the TRIPS Agreement reflected the need for a balance between, the existence of legitimate trademark owners' interests in using their trademarks and, the right of WTO members to adopt measures for the protection of certain societal interests that might adversely affect trademark use.[172] According to the Panel, 'unjustifiably', involves a weighing and balancing of the following factors; the nature and extent of encumbrance bearing in mind the legitimate interests of the trademark owner in the course of trade and thereby allowing the trademark to fulfil its intended function. The reasons for the restrictions or encumbrance and whether the reasons provide 'sufficient support' for the resulting encumbrance.[173]

It is commendable that the Panel observed that the nature and extent of encumbrance can properly be understood in light of the functions a trademark aims to fulfil. In this regard the Panel correctly found that the TPP involved a high degree of encumbrance on trademark use.[174] On the other hand, it is predicted that the meaning of 'sufficient support' will be debated in future jurisprudence on Article 20 of the TRIPS Agreement. In the South African context, jurisprudence on Section 25 of the constitution provides that a deprivation of property will pass the arbitrariness test if 'sufficient reason' is provided. As indicated in chapter five the standard in determining the existence of sufficient reason under section 25 of the South African Constitution, ranges from a rationality to a proportionality review. Although the context is

[169] *Australia – Tobacco Plain Packaging* (note 3 above) para 7.2380.
[170] Ibid, para 7.2380.
[171] Ibid, para 7.2419.
[172] Ibid, para 7.2429.
[173] Ibid, para 7.2430.
[174] Ibid, para 7.2441.

entirely different, one can argue that there is potential application of proportionality through the standard of 'sufficient support'.

The argument that justifiability under Article 20 incorporates some form of proportionality is supported if interpretative guidance is sought from other provisions which are designed to fulfil similar purposes. Justifiable ordinarily means 'for good reason', legitimate, reasonable, acceptable and or able to hold water. The ordinary meaning of the word justifiable implies the balancing purpose of Article 20 of the TRIPS Agreement, which as indicated earlier was identified by the Panel in the *Australia – Tobacco Plain Packaging*. A balance must be struck between the right of a Member to pursue societal interests and invoke Article 20 and the duty of that same Member to respect the treaty rights of the other Members to use their trademarks. A justifiable encumbrance on use of trademarks would hence need to be well founded, valid or reasonable. Encumbrance on trademark use in the course of trade would be a divergence from the norm of allowing trademarks to be used free from special requirements. However, Article 20 of the TRIPS Agreement acknowledges that governments might need to encumber trademark use to pursue other policy objectives.

Elsewhere the WTO permits divergences from ordinary duties and obligations.[175] The popular 'necessity' test is used to defend or justify divergences from WTO rules and obligations and from this test, guidance can be sought to establish the meaning of 'unjustifiably' under Article 20 of the TRIPS Agreement. The necessity test has played a central role in justifying trade-restricting measures pursuing legitimate public policy objectives in WTO law,[176] as such the notions of necessity and justifiability play a similar role.

For instance, the necessity test under Article XIV of the GATS allows members to pursue legitimate objectives, even if, in doing so members act inconsistently with obligations set out in other provisions of the Agreement.[177] Article XIV (b) allows measures necessary to protect human, animal or plant life or health. The necessity test under Article XIV of the GATS is hence used to examine whether divergences from rights and obligations are permissible. In a similar manner, the requirement that, use of trademarks in the course of trade shall not be 'unjustifiably' encumbered, also sets the terms on which members may diverge from their obligation to provide minimum protection of intellectual property.

[175] See for instance Article XIV of the GATS.
[176] M Du (note 38 above) 819.
[177] Article XIV of the General Agreement on Trade in Services.

This study argues that a reading of Article 20 in conjunction with Article 8.1 of the TRIPS further reinforces the link between necessity and justifiability. Article 8.1 enunciates a fundamental principle or purpose of the TRIPS Agreement which is to be considered in the application of the rest of the TRIPS provisions including Article 20. Accordingly, Article 8.1 of the TRIPS Agreement must inform the interpretation of Article 20. Article 8.1 states that:

> 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.[178] (My emphasis)

Article 8.1 falls under the principles of the TRIPS Agreement and therefore plays an interpretive role.[179] As the Panel has stated in *Australia – Tobacco Plain Packaging*, it is not an exception to the obligations set out in the TRIPS Agreement, like the general exceptions found in Article XIV of the GATS or Article XX of the GATT.[180] Article 8.1 provides the context on what the legitimate objectives under Article 20 could entail. That is not to say that the objectives indicated in Article 8 provide an exhaustive list on what could be considered legitimate for the purposes of Article 20 of the TRIPS Agreement.[181] According to the Panel, it only sheds light on the types of recognised societal interests that may provide a basis for justifications.[182]

This study also argues that 'necessary' under Article 8.1 is not in reference to public health only. The provision states in part that measures 'necessary to protect public health and nutrition, and to promote the public interest' may be adopted. The wording of the provisions suggests that 'necessary' refers to measures to protect public health, nutrition and to promote public interest. It is important to note that 'necessary' is the link word, hence the standard is one closer to necessity. Accordingly, measures must be 'necessary' for the promotion of public interests to satisfy the justification test under Article 20 of the TRIPS Agreement.

This approach finds support in WTO jurisprudence on the meaning of the language used in Article XX of the GATT. In paragraph (a), it permits measures 'necessary' to protect public morals whilst in paragraph (c) it permits measures 'relating to' the importations or exportations of gold or silver. The Appellate Body in *US – Gasoline*, recognised that the use of different

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[178] Article 8.1 of the TRIPS Agreement.
[179] P K Yu 'The objectives and principles of the TRIPS Agreement' (2009) 46 *Houston Law Review* 46.
[180] *Australia – Tobacco Plain Packaging* (note 3 above) para 7.2145.
[181] Ibid, para 7.2406.
[182] Ibid.

terms for different categories of measures and stated that the WTO did not intend to require the 'same kind of degree of connection or relationship between the measure… and the state interest…to be promoted or realized.'[183] The standard required by 'relating to' could thus be different from that required by 'necessary to'. Article 8 requires that the measures be 'necessary' to protect public health and nutrition, and 'necessary' to promote the public interest. The former is a narrower category, the latter is wider, as it refers to public interest in general.

Alemanno and Bonadio confirm that Article 8.1 requires that public health measures be necessary.[184] The scholars opine that WTO Member States would have to prove that a causal link exists between the measure and the protection of the specific public interest, and that the measure is the least restrictive on intellectual property rights (IPRs).[185] Article 8.1 also requires the measure to also be consistent with the TRIPS Agreement. Alemanno and Bonadio cautioned that members may find it difficult to meet this second condition of Article 8(1); creating uncertainty around the compliance of generic packaging with the TRIPS Agreement.[186]

As indicated earlier the scope of justifiability under Article 20 is not confined to Article 8.[187] Article 8 constitutes some of the justifications or legitimate interests which could justify encumbrances on trademark use. Article 7 makes mention of social and economic welfare which could arguably form part of public interests.[188] However, this study is mostly concerned with measures necessary to protect public health and necessary to promote public interests which can be used to justify encumbrances on trademark use because of their relevance to the issue of plain packaging measures.

With the foregoing in mind, to determine the standard of justifiability under Article 20 of the TRIPS Agreement, one can argue that guidance should be sought from the necessity standard in the WTO jurisprudence. The jurisprudence on necessity is similar throughout the WTO Agreements, even the TBT and SPS Agreements (whose necessity test form part of a

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[183] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 17

[184] A Alemanno & E Bonadio 'The Case of Plain Packaging of Cigarettes' (2010) 3 *European Journal of Risk Regulation* 268, 269.

[185] Ibid.

[186] Ibid.

[187] M Davison & P Emerton 'Rights, privileges, legitimate interests, and justifiability: Article 20 of TRIPS and plain packaging of tobacco' (2014) 29 *American University International Law Review* 548, indicating that there is a debate whether 'justifiability' should be confined for the purposes of Article 20 to the express terms of Article 8.1.

[188] Article 7 of the TRIPS Agreement states that: 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

positive obligation) also seek guidance from the GATT and GATS exception clauses. The jurisprudence on necessity in other WTO Agreements should also not be transposed in its entirety in the interpretation of justifiability under Article 20 of the TRIPS Agreement. In this context 'justifiability' in Article 20 of the TRIPS Agreement requires encumbrances to achieve legitimate objectives and that no lesser impediment be available that could equally achieve the objectives pursued.[189]

It is also important to note that the test of necessity under WTO law requires a test more stringent than a mere rationality test hence justifiability under Article 20 of the TRIPS Agreement would not be satisfied with simply showing a relationship between the encumbrance and the purpose of the encumbrance. This was stated in the case of *Korea — Various Measures on Beef*[190] where the Appellate Body held that 'necessity' was closer to indispensable than it was to simply making a contribution to a purpose.[191] In that case the Appellate Body further stated that necessity was to be determined through 'a process of weighing and balancing a series of factors', including the contribution of the measure to the achievement of its objective, the trade restrictiveness of the measure, the interests at stake, and a comparison of possible alternatives, including risks .[192]

In terms of the approach adopted this far, highly restrictive measures can be found justifiable even when the benefits are marginal. As long as some form of contribution to a legitimate goal is achieved, the real question is whether a less restrictive measure can equally achieve the same objectives. This approach is consistent with the finding that plain packaging are consistent with Article 20 of the TRIPS Agreement and with the other relevant WTO necessity tests. The value it pursues, public health, has been found to be vital and important to the highest degree. The evidence points towards the measure contributing to public health objectives. Most importantly, it was found that no less restrictive alternative exists.

Although the Panel in the *Australia – Tobacco Plain Packaging* case held that unjustifiability should not be assumed to be synonymous with unnecessarily, the analysis it undertook was essentially a repetition of the Article 2.2 of the TBT analysis. The Panel held that the manner in which the factors are to weighed and balanced in Article 20 depend on the

[189] M Davison (note 142 above) 106.
[190] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R.
[191] Appellate Body Report, *Korea- Beef* (note 167 above) para 161.
[192] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, paras. 306–307

case at hand.[193] In this case it held that the suitable approach would be to consider the nature and extent of the encumbrances resulting from the TPP measures, and the reasons for which these special requirements are applied. Afterwards, the Panel would establish whether the reasons provide 'sufficient support' for the resulting encumbrances, or whether they can and do contribute towards the societal interests they pursue.[194] The special requirements were held to involve a high degree of encumbrance, prohibiting the use of stylized word marks, composite marks, and figurative marks, but this did not make them unjustifiable per se. Elsewhere, it has been held that the less restrictive the effect of the measure is, the more likely it is to be characterized as 'necessary'.[195] As such it has been suggested that where the measure is highly restrictive, the other factors, including the extent of contribution and importance of values must be sufficiently proven to outweigh the restrictive effect.[196] However, in practice it is shown that the severity of the encumbrance is most relevant in determining the availability of less restrictive means.[197]

In addition, the Panel found that the reason for the special encumbrances were already identified under the Article 2.2 of the TBT Agreement analysis, where it was concluded that the objective pursued by Australia through the TPP measures is to improve public health by reducing the use of, and exposure to, tobacco products.[198] The importance of this value was also reiterated, with specific emphasis made on the importance of effective tobacco control measures to reduce the public health burden resulting from tobacco use.[199] Evidently, elements of the legitimacy sub-test were present.

To determine whether the reasons provided 'sufficient support', the Panel held that it had to assess 'the public health concerns that underlie the TPP trademark requirements against their implications on the use of trademarks in the course of trade, taking into account the nature and extent of the encumbrances at issue.' From this statement, one can argue that the standard is definitely more stringent than that of rationality. It can be read that a weighing and balancing approach leaning towards a proportionality test is implied. In other words, the Panel indicated that what is required is an assessment of the value of public health and contributions to public

[193] *Australia – Tobacco Plain Packaging* (note 3 above) para 7.2530.
[194] Ibid, para 7.2531.
[195] Appellate Body Report, *United States –Gambling* (note 169 above) para 310.
[196] Ibid.
[197] *Australia – Tobacco Plain Packaging* (note 3 above) para 7.2441, 7.2442.
[198] Ibid, para 7.2586.
[199] Ibid, para 7.2587.

health against the severity of the encumbrance on trademark use. However, in application the WTO Panel did not determine whether the severity of the encumbrance was proportional to the public health considerations.

The Panel went on to reiterate the importance of the objective pursued which was an 'exceptionally grave domestic and global health problem involving a high level of preventable morbidity and mortality.' [200] From this it is arguable that in determining whether an encumbrance is justifiable under Article 20 of the TRIPS Agreement, the legitimacy and value of the interests at stake must be factored into the weighing and balancing process. In *US-Gambling* the Appellate Body held that the weighing and balancing process required in testing necessity began with the 'assessment of the 'relative importance' of the interests or values furthered by the challenged measures…'[201] This factor also tests the legitimacy of the objectives pursued. The WTO Panel has the discretion to ascribe weight to policy purposes. It would be easier to accept as necessary measures which pursue highly vital interests or values.[202] It is now settled that the preservation of 'human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks' is both vital and important in the highest degree.[203] Evidently, this factor works to the advantage of member states implementing plain packaging measures as tobacco consumption and exposure to tobacco is well recognised as having adverse consequences for public health.[204] Du submits that the importance of a value provides 'a powerful explanation of why [in some instances] a member's regulatory choice is [respected]'.[205]

Further, the Panel held that it had already been identified that the TPP regulations were 'capable of contributing, and do in fact contribute, to Australia's objective[s]'[206] and this was suggestive of the fact that the reasons provide 'sufficient support'.[207] From this approach, one can argue that the standard of sufficient support requires that a measure be apt to contribute to an objective, equating to the suitability sub-test. To fulfil this requirement it has been observed

[200] Ibid, para 7.2592.
[201] Appellate Body Report, *US – Gambling* (note 169 above) para 306 -307.
[202] Appellate Body Report, *Korea- Beef* (note 167 above) para 162.
[203] Appellate Body Report, *EC — Asbestos* (note 40 above) paras. 170–172.
[204] Preamble of the WHO FCTC.
[205] M Du 'Autonomy in setting appropriate level of protection: rhetoric or reality?' (2010)13 JIEL 1077, 1095
[206] Panel Report, *Australia – Tobacco Plain Packaging* (note 3 above) para 7.2592.
[207] Ibid.

that a genuine relationship between means and ends must exist. It has also been held that, the greater the contribution, the more likely it is to be found necessary.[208]

The WTO also recognises that, in demonstrating that a measure contributes to the achievement of a purpose, there might be divergent evidence.[209] First, it is recognised that in implementing a measure, a member can be confronted with divergent evidence. Secondly, that the Panel in determining the necessity of a measure may also be confronted with divergent evidence.[210] The Appellate Body has rejected the argument that in such instances, the Panel or member state must rely or choose the majority scientific opinion. It held that governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from a qualified and respected source.[211] It is up to the Panel to assess the value of the evidence, and the weight to be ascribed to that evidence. In the *Australia – Plain Packaging* case it has been observed that there has been divergent evidence presented before the Panel. The Panel also had to address criticism on the probative and intrinsic quality of the evidence and claims that the evidence lacks scientific rigor and is methodologically flawed.[212] The Panel must ascertain the reliability and reasonableness of the evidence. In *Australia – Plain Packaging* it was easier to find that the reasons provided sufficient proof because this analysis was preceded by the Article 2.2 of the TBT Agreement review. If such analysis had not been undertaken, it remains open whether the same stringency would have been applied in assessing the suitability of the measures under Article 20 of the TRIPS Agreement.

The Panel went further to find that 'the availability of an alternative measure that involves a lesser or no encumbrance on the use of trademarks could' inform the assessment of whether the reasons sufficiently support the resulting encumbrance.[213] Again the Panel recalled earlier findings under Article 2.2 of the TBT Agreement that the proposed alternative measures were not apt to make a contribution to Australia's objective equivalent to that of the TPP measures.[214] In the case of trademarks under Article 20 of the TRIPS Agreement, if an alternative measure capable of achieving the goal at issue is reasonably available; whilst resulting in a smaller or lesser encumbrance on trademark use, it could be argued that the

[208] Appellate Body Report, *Korea - Beef* (note 167 above) para 163.
[209] Appellate Body Report, *Korea — Taxes on Alcoholic Beverages*, WT/DS75, para 161.
[210] Appellate Body Report, *EC — Asbestos* (note 40 above) paras 177–178.
[211] Appellate Body Report on *European Communities — Measures Concerning Meat and Meat Products* (Hormones), WT/DS26 para. 194.
[212] Panel Report, *Australia – Tobacco Plain Packaging* (note 3 above) para 7.523, 7. 641.
[213] Ibid, para 7.2598.
[214] Ibid, para 7.2600.

measure at issue is unjustified. From this, it was then concluded that the complainants had failed to demonstrate that the trademark-related requirements of the TPP measures 'unjustifiably' encumbered the use of trademarks in the course of trade within the meaning of Article 20 of the TRIPS Agreement.[215]

In application, the standard of unjustifiability bears strong resemblance to the necessity test and does allow for a proportionality review. The weighing and balancing test alluded to by the WTO Panels and Appellate Body, indicates that elements of proportionality in particular the legitimacy, suitability and necessity stages are present in the WTO 'necessity' test. However, it has been observed that the weighing and balancing stage is not equivalent to the proportionality *stricto sensu* stage. As shown in the previous sections of this chapter, the proportionality *stricto sensu* stage requires that there be a proportional relationship between the benefits gained by fulfilling the purpose and the harm suffered by the limited interest as a result thereof. The harm should not unreasonably exceed the benefit. Recognising the fact that the model four-pronged proportionality test was formed in the constitutional context, modifications of the stages would also be anticipated in a treaty-based system like the WTO whose main purpose is to liberalise trade.

If a measure makes a material contribution whilst being highly restrictive, it can still be found justifiable if no less restrictive alternative exists. At the same time if a measure makes a marginal contribution and still is highly restrictive, one can still argue that such a measure can still be found justifiable if no less restrictive alternative exists. For that reason, l argue that the bulk of the enquiry under the WTO proportionality test is whether there is a less restrictive alternative that can achieve the objective at the chosen level of protection. The main reason for the assessment of the extent of contribution and the restrictiveness of the measure, is to facilitate the comparison between the original and alternative measures. It is not to facilitate a weighing of the benefits against the harm. Any mention of there being an evaluation of whether the harm is proportional to the benefit is therefore, pure judicial rhetoric. For instance as shown earlier, the Panel mentioned that the greater the contribution, the more likely the measure is to be found necessary. This seems to imply some kind of trade-off requirement between the trade restrictiveness versus the extent of contribution. However, the jurisprudence studied above points towards a different conclusion.

[215] Ibid, para 7.2605.

### 6.4.1 Preliminary conclusions

Although the jurisprudence on 'unjustifiably' under Article 20 of the TRIPS Agreement is still relatively undeveloped, it is arguable that the standard resembles the necessity test. Further, the form that such a review takes, is not be poles apart from the form adopted by similar necessity requirements under the GATT Article XX, TBT Agreement Article 2.2, SPS Agreement Article 5.6 and or GATS Article XIV. Evidently, the necessity test under the TBT Agreement closely resembles the 'unjustifiably' standard under the TRIPS Agreement and the same factors considered in deciding whether plain packaging measures violate Article 2.2 of the TBT Agreement are considered in determining a violation of Article 20 of the TRIPS Agreement.

Plain packaging measures pursue legitimate objectives within the meaning of Article 2.2 of the TBT Agreement. The tobacco epidemic has become one of the biggest public health threats the world has ever faced, killing more than 7 million people a year. [216] It is the single greatest preventable cause of death in the world today.[217] The link between any tobacco control policy and public health is unquestionable. Human health and safety objectives are considered legitimate under the TBT Agreement, in view of that, the determination that plain packaging measures pass the legitimacy sub-test is incontestable.

The same can be said with regard to the suitability sub-test under the WTO necessity tests. According to the WTO Panel, there is a strong evidence base indicating that plain packaging measures are capable of contributing to these public health objectives. The evidence is in relation to the ability of plain packaging measures to increase the effectiveness of health warnings,[218] to reduce the appeal of tobacco products and to restrict the ability of packaging to mislead users of its effects.[219] Evidently, the same evidence brought before the Constitutional

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[216] WHO < http://www.who.int/news-room/fact-sheets/detail/tobacco >.

[217] WHO < http://www.who.int/nmh/publications/fact_sheet_tobacco_en.pdf >.

[218] R Borland, S Savvas, F Sharkie & K Moore 'The impact of structural packaging design on young adult smokers'perceptions of tobacco products' (2013) 22 *Tobacco Control* 97–102. M Wakefield, K Coomber & M Zacher *et al* 'Australian adult smokers' responses to plain packaging with larger graphic health warnings 1 year after implementation: results from a national cross-sectional tracking survey' (2015) 24 *Tobacco Control* ii17–ii25; Y Hua-Hie, R Borland &D Hammond et al 'Smokers' reactions to the new larger health warning labels on plain cigarette packs in Australia: findings from the ITC Australia Project' (2016) 25 *Tobacco Control* 182.

[219] M A Wakefield, D Germain & S J Durkin 'How does increasingly plainer cigarette packaging influence adult smokers' perceptions about brand image? An experimental study' (2008) 17 *Tobacco Control* 416–421; D Germain, M Wakefield & S Durkin 'Adolescents' perceptions of cigarette brand image: does plain packaging make a difference?' (2010) 46 *Journal of Adolescent Health* 385–392; M Wakefield, D Germain & S Durkin et al 'Do larger pictorial health warnings diminish the need for plain packaging of cigarettes?' (2012) 107 *Addiction* 1159, 1167; C M White, D Hammond & J F Thrasher et al 'The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study' (2012) 12 *BMC Public Health* 737–747; J Doxey

court can be used to satisfy the suitability test under the WTO.[220] Moreover, it is important to note that plain packaging measures are recommended by the WHO FCTC which is an evidence – based convention.[221]

Moreover, in Australia there is evidence, which suggests that there has been a positive relationship between the implementation of plain packaging measures and the reduction in smoking prevalence. The body of evidence is 'growing' and it is consistent with the conclusion that plain packaging measures are suitable to contribute to their objectives.[222] However, the WTO Panel in *Australia – Tobacco Plain Packaging* has emphasised that its determination was based on available evidence and cannot be used to prejudge the future evolution of the suitability of plain packaging measures.[223] In light of the minimal role the WHO FCTC played in the determination of the suitability of plain packaging measures, it is recommended that South Africa undertake research on the suitability of plain packaging measures in South Africa. Since the WTO is not concerned with the degree of contribution, with no minimal threshold requirement, [224] if some level of contribution is proven in addition to the WHO FCTC recommendations the suitability sub-test would not be a difficult hurdle to cross.

A challenge against the implementation of plain packaging measures will only succeed if sufficient evidence of a proposed alternative that is equally effective in furthering the objectives is provided. Plain packaging measures form part of an extensive tobacco control policy as indicated by the WHO FCTC. Although the comprehensive nature of tobacco products is given due regard, it has not proven to be a triumphing factor. The WTO Panels will still review proposed measures if they are not implemented in the members' domestic jurisdictions. Thus a strategic implementation of tobacco control measures is required to ensure that there are no gaps which can be capitalised on by the tobacco industry.

These are the considerations which form the enquiry of proportionality under the WTO necessity tests. The enquiry does not include the sub-test of proportionality *stricto sensu*, which would require the Panel to weigh the harms versus the benefits. This entails on the one side of the scale, the importance and urgency of the legitimate aim to be achieved, the benefits that can

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& D Hammond 'Deadly in pink: the impact of cigarette packaging among young women' (2011) 20 *Tobacco Control* 353e-360.

[220] See page 51 of chapter five, where the evidence base for plain packaging measures is discussed.

[221] Paragraph 46 of Guidelines, Article 11 of the WHO FCTC,

[222] Ibid 10.

[223] Panel Report, *Australia – Tobacco Plain Packaging* (note 3 above) para 7.1044.

[224] Appellate Body, *United States – Certain country of origin Labelling* (cool) requirements (*US – COOL)* WT/DS386/AB/R, 29 June 2012, para 416.

be gained, and the likelihood of achieving such benefits; on the other side of the scale, would be the interest which is limited and the damage caused by the limitation.[225] Barak argues that the result of this balancing exercise is largely dependent on the importance of the limited rights or interests, as their social importance vary from country to country.[226] The WTO is correct in avoiding this exercise, it is the national courts, and not international institutions like the WTO, that can best evaluate the social importance of the benefits and harms because of their familiarity with the relevant societies.[227]

In sum, plain packaging measures pursue a legitimate objective and contribute to the achievement of a legitimate objective. Additionally, it was found that, no alternative (less-restrictive) measure exists outside the comprehensive tobacco policy. For these reasons, the plain packaging measures were found in compliance with Article 2.2 of the TBT Agreement. In the same light, even though plain packaging measures result in an encumbrance on the use of tobacco trademarks in the course of trade, this encumbrance was in compliance with Article 20 of the TRIPS Agreement.

The *Australia – Tobacco Plain Packaging* case sets a good precedent for South Africa in defending its own plain packaging legislation, however, it is important to note that it cannot be used to prejudge all cases relating to plain packaging measures. In this regard it is key that a solid case for plain packaging is made in the South African context, if so, it will be easy to succeed at the WTO level. It is evident that the same considerations are taken into account. Although the approach at the domestic level takes an overall balancing act, and the WTO follows a sequential checklist of the sub-tests of proportionality it is predicted that plain packaging measures found necessary under the domestic level could also be found necessary at the WTO level.

## 6.5 CONCLUSION

The aim of this chapter was two-fold, first, to complete the analysis on the proportionality of plain packaging measures under WTO law. Secondly to establish the WTO's approach to proportionality and simultaneously ascertain the legitimacy of the concerns raised

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[225] A Barak *Proportionality: Constitutional Rights and their Limitations* (2012) 348; L Anđelković 'The elements of proportionality as a principle of human rights limitations' (2017) *Facta Universitatis, Series: Law and Politics* 241-242.

[226] A Barak 'Proportionality' in M Rosenfeld & A Sajó (eds.) *The Oxford Handbook of Comparative Constitutional Law* (2012) 745.

[227] *Buckley v UK* (1996) (European Court of Human Rights Decision) 101, para 49 as quoted by T Raine 'Judicial review under the Human Rights Act: A culture of Justification (2013) *North East Law Review* 92.

regarding the uneven handedness of the WTO proportionality test. With regard to the test under the TBT Agreement, it is concluded that the WTO was correct in finding that plain packaging measures are in compliance with Article 2.2 of the TBT Agreement.

With regard to the TRIPS Agreement, it is argued that the proportionality principle does exist under Article 20 of the TRIPS Agreement. It is argued that, the manner in which the proportionality principle is construed is similar to the WTO necessity tests. The approach to proportionality under both the TBT and the TRIPS Agreements is very much the same. A clear pattern can be observed from the WTO jurisprudence studied in this chapter. As a result it is also argued that the WTO was correct in finding that plain packaging are compliant with Article 20 of the TRIPS Agreement.

Evidently, there are similarities between the WTOs' approach and the broadly accepted form of proportionality. The latter consists of four cumulative prongs, legitimacy, suitability, less restrictive tests and the proportionality *stricto sensu* test. The former consists of the first three prongs only. Under the WTO proportionality test the sub-tests are still cumulative and the same standard is followed. Of critical importance is that the proportionality *stricto sensu* is missing in the jurisprudence examined. There is judicial rhetoric pointing towards some form of weighing and balancing, but in practice, the WTO avoids examining the proportionality of the benefit versus the harm.

The real battle in WTO proportionality disputes is in the analysis of reasonably available less WTO-inconsistent measures. The bulk of the proportionality analysis is focused on whether members enact measures less restrictive to trade, confirming that the WTO is a trade-centred regime. Less focus is directed on the policy pursued, instead the focus is on whether the means restrict trade as little as possible. On the contrary, under the South African constitutional law the proportionality test is an overall multi-factored balancing process. It does not follow a cumulative, sequential checklist. In some cases the proportionality *stricto sensu* stage is evident, at times it is not. In some cases the latter element is present even when the necessity element is absent. There is no clear pattern followed, the elements present in each analysis differ from case to case, depending on the dispute at issue and what rights are infringed.

It is submitted that the criticism levelled against the WTO necessity tests is largely unjustified. Immense importance is attached to public health under the WTO and members are given sufficient space to pursue this policy objective. The WTO is not biased against public health. Further, it is indicated that the consideration of importance of the values at stake provides

a ‘powerful explanation’ of why the Panel sometimes accords a wide margin of appreciation to regulatory choices.

The analysis also shows that the WTO suitability sub-test is more stringent, often voluminous and complex evidence is brought before the adjudicators to satisfy this sub-test. However, flexibilities are observable in matters with a relatively underdeveloped evidence base. Further, non-WTO law can be used as evidence of fact in justifying derogations from WTO rules. It can be argued that, the suitability sub-test is strict enough to afford protection to limited values and avert undue harm to trademarks. At the same time it is not overly stringent, resulting in undue burdens on member states.

Much criticisms about the WTOs necessity test also relates to the less restrictive test. It is claimed that the WTO focuses more on the consistency with WTO provisions than the ability of the alternative measure to fulfil the goal and whether it is reasonably available.[228] The Appellate Body’s approach in *US – Tuna Mexico* contradicts this view. The Appellate Body found that the alternative measure would not achieve the US objectives at the chosen level of protection, it did not achieve the objectives to the ‘same extent’.[229] Even in the *Australia – Tobacco Plain packaging* case, the pre-vetting measures were found incapable of making an equal contribution to the objective, creating the possibility of a reduced degree of contribution to Australia's objective.[230] The Panel was able to balance non-trade and trade issues in determining whether an alternative measure was available. Pauwelyn claims that the assessment neglects regulatory difficulties, social, political and economic circumstances.[231] In *China – Publications and Audio-visual Products*, China argued that the alternative measures imposed undue financial and administrative burdens, however, it failed to prove such undue burden. On the contrary, the Panel in *Australia – Tobacco Plain packaging* indicated that the pre-vetting mechanisms also imposed additional implementation costs.[232] This demonstrates that there could be a problem associated with the practical feasibility of alternative measures. The WTO is required to appreciate local political, social and economic regulatory issues involved; and it is necessary that such an exercise be approached with caution.

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[228] T Voon ‘Exploring the Meaning of Trade-Restrictiveness in the WTO’ (2015) 15 *World Trade Review* 451, 465.
[229] Appellate Body Report, *US – Tuna* (note 70 above) para 330.
[230] *Australia – Tobacco Plain packaging* (note 3 above) para 7.1715.
[231] J Pauwelyn, ‘The Unbearable Lightness of Likeness’, in M Panizzon, N Pohl & P Sauve (eds), GATS and the Regulation of International Trade in Services (2008) 366–67.
[232] *Australia – Tobacco Plain packaging* (note 3 above) para 7.1654.

The analysis undertaken in chapters five and six demonstrate that comparable considerations are taken into account. The WTO proportionality test is less flexible, is more mechanical and a clear pattern is observed across the board, whilst the South African approach is more flexible and fluctuating. Nevertheless, in the plain packaging case the key question relates to its suitability to achieve the objectives, in this regard, complex studies, expert reports and the WHO FCTC play a key role at both the Constitutional and WTO level. Notable in this regard, is the minimal role the WHO FCTC played in the determination of the suitability of plain packaging measures under the WTO case. Comparably, this study predicts that the WHO FCTC will play a much more decisive role in the South African constitutional realm.

# CHAPTER 7

## Conclusion

### 7.1 INTRODUCTION

Plain packaging of tobacco product measures have become a reality for South Africa with the publishing of the draft Control of Tobacco Production and Electronic Delivery Systems Bill for public comment in May 2018.[1] Amongst other things, the draft legislation provides for the implementation of plain packaging measures. One of the objectives of the draft regulations is for South Africa to bring its health system into conformity with the World Health Organisation's Framework Convention on Tobacco Control (herein after the WHO FCTC. The WHO FCTC encourages members to consider adopting measures which restrict or prohibit the use of logos, colours, brand images or promotional information on tobacco product packaging other than brand names and product names displayed in a uniform colour and font.[2]

In part, the measures seek to increase the noticeability and effectiveness of health warnings and to reduce the appeal of tobacco products; which will generally contribute to the curbing of the tobacco epidemic.[3] Although reducing the prevalence and consumption of tobacco products is widely accepted as a genuine objective, the move towards implementing plain packaging measures has been met with wide criticism.[4] This study provides a predictive analysis of the legal challenges that South Africa could face in implementing plain packaging. In that sense it is also proactive as it foresees the challenges and makes proposals and recommendations.

Tobacco trademark owners have challenged the legal necessity or proportionality of plain packaging measures under both the Constitutional and World Trade Organisation (herein after the WTO) laws. On the contrary, South Africa amongst other states has shown disregard over the even – handedness of the WTO necessity test, advocating that plain packaging measures be entirely excluded from a necessity review at the WTO level (the health – over – trade approach).[5] It had been claimed that the WTO necessity test is not an adequate balancing

[1] The Control of Tobacco Products and Electronic Delivery Systems Bill of 2018, published in GG 41617 of 9 May 2018.
[2] Para 46 Guidelines to implementing Article 11 of the WHO Framework Convention on Tobacco Control.
[3] Preamble to the Draft Control of Tobacco Products and Electronic Delivery Systems Bill.
[4] See for instance, the *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435, WT/DS467.
[5] H Mamudu, R Hammond & S A Glantz 'International trade versus public health during the FCTC negotiations: 1999 – 2003' (2011) 20 (1) *Tobacco control* 5. See also chapter one of this study.

tool, is trade centric and imposes unreasonable burdens on members to justify public policy measures. This study locates itself at the crux of this conflict. It evaluates the necessity of plain packaging measures under the South African Constitution [6] and under WTO law. [7] Simultaneously, it looks at the merits of the allegations made with regard to the WTO necessity tests.

This necessitated a historical review of the link between advertising, packaging and tobacco consumption; and a cross-jurisdictional review of the constitutionality of tobacco regulations. In addition it required an examination of the extent to which health rights support calls for the adoption of plain packaging measures and whether the health rights endorse a health – over – trade approach. Further, the legal rights conferred upon trademark owners were clarified after charting the conflict between trademark and public health rights. In the end the task required an assessment of proportionality under the South African Constitution and under the TRIPS and TBT Agreements. This undertaking resulted in the overall conclusions discussed below.

## 7.2 OVERALL CONCLUSIONS

The discussion of the necessity of plain packaging measures, boils down to five key findings. First, the health-over-trade approach is unwarranted. Secondly, plain packaging measures result in severe interferences with trademark rights; and thirdly, trademark rights include the right to use, accordingly, that the negative contextualisation of trademark rights is incomplete. Fourthly, plain packaging measures will satisfy the South African form of proportionality and lastly, the WTO proportionality test does not impose undue burdens on members to justify public health measures. The sections below will briefly address each of these findings.

### 7.2.1 The Health – over – trade Approach

Although, plain packaging measures are heavily steeped in public health considerations, the health – over – trade approach advocated for by South Africa and other member states is uncalled-for. There is an unquestionable link between tobacco control and public health, in fact, it was established in Chapter three that tobacco control is an underlying

[6] See chapter five of the study.
[7] See chapter six of the study.

determinant of the right to the highest attainable standard of health.[8] Global health activists can successfully push for plain packaging measures and other tobacco control measures by appealing to the values and norms of the international human rights framework, particularly the human right to health.[9]

Although the human right to health is comprehensive and its importance unmatched, it is not absolute. There exists no legal basis for the health – over – trade approach in South Africa or abroad. Furthermore, the health-over-trade approach is not justified because the WTO provides sufficient leeway for members to implement measures promoting public health. The value of human health is regarded a value important and vital to the 'highest degree' under the WTO.[10] Accordingly, the criticisms levelled against the WTO system by the health-over-trade proponents, that, the WTO is biased against health have no justifiable basis.

### 7.2.2 Severity of trademark deprivation resulting from plain packaging measures

This study maintains that the full implications of plain packaging measures on trademarks have to be viewed in light of trademark functions and the rationales for their protection. Plain packaging measures interfere with the ability of trademarks to discharge their functions as indicators of source or origin and thereby distinguishing between goods and services.[11] By prohibiting word-trademarks and restricting the manner in which word-trademarks are used, plain packaging measures limit the ability of trademarks to guarantee the origin of the product without any possibility of confusion. In so doing the measures interfere with the core of trademarks; as the ability of a trademark to discharge its other functions as a guarantor of quality, an advertiser, creator and protector of goodwill, is dependent on it achieving its main function as indicator of source or origin.[12]

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[8] Political declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases, Draft resolution submitted by the President of the General Assembly, Sixty-sixth session Agenda item 117, UN Doc A/RES/66/2, adopted 19 September 2011 as quoted in J Liberman 'The power of the WHO FCTC: Understanding its legal status and weight' in A D Mitchell & T Voon (eds) The Global Tobacco Epidemic and the Law 1 ed (2014) 49.

[9] D Reubi 'Making a human right to tobacco control: Expert and advocacy networks, framing and the right to health' (2012) *Global Public Health* S 176-177.

[10] Miguel Rodríguez Mendoza (Deputy Director-General and the principal coordinator for the WTO) in WTO 'WTO Agreements and Public Health — a joint study by WHO and the WTO Secretariat', 20 August 2002 accessed fromhttps://www.wto.org/english/news_e/pres02_e/pr310_e.htm on 10 March 2015.

[11] R S Smith 'Unresolved tension between trademark protection and free movement of goods in the European Community' (1992) 3 (1) *Duke Journal of Comparative & International Law* 89, 90.

[12] M Senftleben 'Bringing EU trademark protection back into shape – Lessons to learn from keyword advertising' <http://www.epip.eu/conferences/epip06/papers/Parallel%20Session%20Papers/SENFTLEBEN%20Martin.pdf >.

An evaluation of trademark rights under the Trade mark Act and common law, leads to the conclusion that tobacco trademark owners cannot institute infringement claims under the Trade mark Act, or under the common law tort of passing off. These only provide for protection against primary and secondary infringement, blurring, tarnishment, dilution, free – riding and passing off; which the case of plain packaging measures is not concerned with. Nevertheless, it is submitted that the right to trademark property under section 25 of the Constitution is informed by these functions, statutory law and common law. Section 25 (1) of the Constitution is the medium through which tobacco trademark owners can seek protection. The trademark property protected in section 25 (1) includes the bundle of rights to use, exclude and exploit the mark in the course of trade. Consequently, when viewed in this context, plain packaging measures result in an extensive and severe deprivation of trademark property.

### 7.2.3 The right to use a trademark

The right to use' debate has clouded the plain packaging matter, it has been argued that plain packaging measures do not take away anything from the pre-existing trademark rights; which do not include a right to use the mark.[13] It is predicted that this argument will resurface in South Africa. An analysis of trademark law under the Trade Marks Act and the TRIPS Agreement resulted in the conclusion that trademark rights include the right to use. Further, that portraying trademark property as only negative will open up space for abuse, as any act can limit trademark use without being challenged, essentially because it does not touch on the right to exclude. The right to use trademarks can however, be limited if such a limitation is justified.

### 7.2.4 Proportionality in South Africa

In establishing the justifiability of a limitation of rights under section 36 (1) of the Constitution, a weighing and balancing process, guided by proportionality is undertaken. The analysis undertaken in chapter five demonstrates that, the applicability of section 36 (1) to plain packaging measures is unlikely. Instead the proportionality of plain packaging measures will be reviewed under the auspices of section 25 (1) which protects property against arbitrary deprivations.

[13] See V S Vadi 'Global health governance at a crossroad: Trademark protection v. tobacco control in international investment law' (2012) 48 (1) *Stanford Journal of International Law* 93, 122.

A review of the jurisprudence on arbitrary deprivations shows that there is room for proportionality, but the principle is applied with flexibility. The predominant exercise under section 25 (1) is centred on whether the deprivation of property is proportional to the benefit or potential thereof, to be achieved in fulfilling the objectives. To arrive at this judgement, no sequential checklist is followed. In this sense proportionality under section 25 (1) differs from the generally accepted form of proportionality; which consists of the cumulative sub-tests of legitimacy, suitability, minimal impairment and proportionality *stricto sensu*.

Another finding is that the factors to be considered in a section 25 (1) analysis were developed in corporeal property cases.[14] Plain packaging measures present an opportunity for the courts to adjudicate on the proportionality of intellectual property deprivations. In light of this, it is recommended that a nuanced approach be adopted in applying the factored test (in its current form) to intellectual property deprivations.[15] Such a nuanced approach should still draw major guidance from the current multi-factored test and also from the section 36 (1) weighing and balancing approach.

A review of the application of the overall multi-factored exercise undertaken in section 25 (1) cases revealed that the predominant factors which can be applied in intellectual property cases are the relationship between the means and the end; the extent of deprivation and the importance of the value pursued by the measure.[16] The means end relationship incorporates the suitability sub-test of proportionality, the means must contribute to the achievement of the objectives. It is recommended that this assessment must not be too shallow, to avert chances of undue harm to intellectual property.

It was also revealed that the minimal impairment test or availability of less restrictive means has not been a predominant factor in section 25(1) cases. It was predicted that this factor will not play a vital role in the plain packaging case. Nevertheless, it is recommended that, it is a factor which can potentially weigh in favour of intellectual property in other property deprivation cases. The rationales for trademarks protection are mainly commercial and when these rights are limited to pursue public interests like human health, which is heavily steeped

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[14] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance*; 2002 (4) SA 768 (herein after First National Bank)

[15] *Laugh it Off Promotions v SAB International CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC), para 82 – 83.

[16] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC), para 49, where it was held that the means and end relationship and the extent of deprivation was central to the arbitrariness enquiry.

in human rights considerations; it is conceivable that the latter will be a weightier good. Accordingly, it is recommended that the availability of equally efficient less restrictive means could provide a safe harbour for trademarks to escape deprivations, which could otherwise be found justifiable.

It is predicted that the deprivation of trademark property resulting from plain packaging measures will not be found to be arbitrary. It is conceivable that the means will be found closely tailored to the end. The ability of plain packaging measures to contribute to its public health objectives will be the decisive factor.[17] South African courts will ascribe substantial value to the fact that plain packaging are evidence - based recommendations by the WHO FCTC.[18] The importance of public health will also be a major determinant of the section 25 (1) analysis. Habitually, the courts will accord a wide discretion to the legislature where the value pursued is of high value as in this case. It is likely that, although the deprivation is severe, the courts will find that the value pursued justifies a deprivation of that magnitude and that it is not disproportional.

### 7.2.5 Proportionality under the WTO

The analysis in chapter six established that a form of proportionality is observed in the WTO under the TBT Agreement. Further that, there is an even pattern in its application, it is not as flexible as that adopted under South African Constitutional law. Another finding is that, the TRIPS Agreement has room for the application of proportionality. 'Unjustifiably' under Article 20 of the TRIPS Agreement closely resembles the necessity test. Moreover, that the form such a necessity test will take, is very similar to that adopted by similar necessity requirements under the, TBT Agreement Article 2.2, and or GATS Article XIV. There is a convergence in the manner in which necessity is approached within the WTO.

Proportionality under the WTO is very similar to the broadly accepted form of proportionality, in that it follows a cumulative checklist. Where one sub-test is not satisfied the enquiry comes to a stop. In this regard it differs from the South African form which involves a multi-factored overall balancing process. The TBT Article 2.2 test involves an enquiry into the legitimacy, suitability and less restrictive means tests.[19] These sub-tests form the first three of the four sub-tests encompassed in the broadly accepted form of proportionality.

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[17] A J van der Walt & R M Shay 'Constitutional analysis of intellectual property' (2014) 17 (1) *Potchefstroom Electronic Law Journal* 68; *BATSA v Minister of Health* (2012) 3 All SA 593 (SCA), para 22.
[18] Ibid, para 107.
[19] See chapter six of the study.

The suitability test is notably more intrusive and stringent at the WTO level. The Panel does not defer to the legislator's claims that the means achieve the ends. It undertakes an independent and objective assessment of often complex and voluminous evidence brought before it. Member states must prove that the means can actually contribute to the end. Alternatively, members can also provide 'quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence,'[20] where the evidence base is relatively underdeveloped. Additionally, non-WTO law, such as international standards can be employed to prove the suitability of measures.[21]Accordingly, the suitability sub-test is not overly stringent so as to impose undue burdens on members. Instead, it strikes an adequate balance because it is not too weak and does not leave gaps for potential abuse by members implementing (inefficient) protectionist measures.

Although the requirement of 'some contribution' is mandatory, there is no pre-determined threshold of an acceptable level of contribution a measure must achieve.[22] The WTO desists from deciding on whether the degree of contribution is proportional to the extent of restrictions on trade. Instead, the WTO proportionality test largely focuses on the availability of less restrictive measures. It permits restrictions on trade only where necessary; thus where an alternative measure can still achieve the objective while being less restrictive, the latter is a preferable option. The analysis undertaken in chapter six reveals that where the original measures forms part of a comprehensive policy, a complementary measure is not a reasonably available alternative measure.[23] Additionally, where the original measure is part of a comprehensive policy, it will be difficult to find an alternative measure.[24] In this regard, the WTO shows a wide margin of appreciation to the members' regulatory choices.

The WTO will not proceed to examine whether the measure at issue imposes a disproportionate burden on trade. In this regard, the WTO proportionality test differs from the South African and the broadly accepted form of proportionality. The latter boils down to

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[20] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, (*Brazil – Retreaded Tyres)*, para 51.
[21] World Trade Organisation, World Health Organisation 'The WTO Agreements and Public Health' (2002) 34 < https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf> 13.
[22] D H Regan, 'The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 *World Trade Review* 347, 348.
[23] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para 7.442.
[24] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R WT/DS458/R, WT/DS467/R.

whether the harm is proportional to the benefits. The analysis in chapter six also comes to the conclusion that, the WTO form of proportionality, in omitting the cost-benefit analysis the WTO shows respect to member states' policy choices. A cost-benefit analysis would weigh whether the restriction on trade is proportional to the degree of contribution.[25] It would require the WTO to make legal, value and moral judgements on which value takes priority in the concrete circumstances of the case. In light of this, it is concluded that the WTO proportionality test does not impose undue and unreasonable burdens on member's to justify public health measures.

It was also established that the WTO provides sufficient leeway for members to regulate in areas of public health and the proportionality test is not biased towards trade interests. In determining necessity, the WTO weighs and balances factors including the 'relative importance' of the interests or values furthered by the challenged measures…'[26] It would be easier to accept as necessary measures which pursue highly vital interests or values.[27] In this regard, the preservation of 'human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks' was said to be both vital and important in the highest degree.[28] The WTO therefore accords the highest importance to public health objectives, and a wide discretion is shown to measures pursuing this objective. In light of this, it is concluded that, there is no merit in claims that the WTO is antithetical to public health.

The analysis undertaken in chapter six, also demonstrates that plain packaging measures are not in violation of the WTO necessity tests.[29] Though, undertaken in a systematic manner the WTO necessity tests consider the same factors considered under section 25 (1) of the South African Constitution. Again the decisive factor was the suitability sub-test. There might be differences in intensity with the WTO suitability requirement being more stringent. Nevertheless, there was comprehensive evidence submitted in proving the suitability of plain packaging measures. The legitimacy of the objectives was an easy hurdle to cross, due to the

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[25] D Grimm 'Proportionality in Canadian and German Constitutional law' (2007) 57 (2) *University of Toronto Law Journal* 396.

[26] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, (*US – Gambling)*, para 306 -307.

[27] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, para 162.

[28] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (*EC* — Asbestos), paras 170–172.

[29] Panel Report, *Australia – Tobacco Plain Packaging* (note 24 above), see overall findings on compatibility with Article 2.2 of the TBT Agreement at para 7.1732; see also overall findings on compatibility with Article 20 of the TRIPS Agreement at para 7.2605.

wide recognition of the need to reduce smoking prevalence as a means of protecting and promoting human health. Lastly, the less restrictive means test was addressed with the comprehensive nature of plain packaging measures in mind.[30]

### 7.3 RECOMMENDATIONS

Based on the findings made in this study, the proportionality analysis undertaken under section 25 (1) of the Constitution must not be too weak. A weak proportionality enquiry would fail to achieve the balancing required in the plain packaging case, as deprivations would escape a comprehensive proportionality test. Further, requiring a strong case, would ease the burden of defending a WTO challenge, if such a challenge arises. The suitability sub-test must be more stringent, to avert the chances of undue harm to intellectual property. It need not exact the section 36 (1) or WTO version of the test, but guidance can be sought therefrom. In drawing guidance from the WTO proportionality test, it is recommended that an excessively schematic approach be avoided as flexibility must still be maintained.

In relation to the suitability test, it is recommended that South Africa undertake research on the effectiveness of plain packaging measures locally. Whilst it is accepted that evidence from foreign jurisdictions will be valuable, such evidence cannot be accepted as a perfect fit for South Africa. Evidence specific to South Africa will enable it to take on context-specific regulatory choices.

South Africa should also draw lessons from the WTO which is familiar with dealing with policy areas, where the evidence base is relatively underdeveloped. Allowing 'quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence,'[31] as proof that the means are suitable. This would enable the courts to make a decision on the relatively underdeveloped evidence base. Doing so would not make the proportionality test biased, instead it reaffirms the reality that the test is flexible and requires a nuanced balancing of all relevant considerations. The alternative, a rigid application which fails to take into account the different circumstances of each case, will not strike the appropriate balance.

Related to the evidence presented to prove the suitability of plain packaging measures, is the need for South Africa to approach the evidence submitted with vigilance and caution, as

[30] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, para 172.
[31] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, (*Brazil – Retreaded Tyres)*, para 51.

advised by the World Health Organisation. It is my recommendation that in assessing the suitability of plain packaging measures, South Africa must ensure that the evidence meets the reliability standards set internationally. This approach aligns with Article 5 (3) of the WHO FCTC which instructs member states to treat the tobacco industry with caution as it has been shown that the industry has adopted a deliberate policy of subverting public health policy.[32] Assigning undue weight to evidence submitted by either party would tip the scales and disturb the balancing purpose of proportionality. It is important that the evidence be reliable and verifiable. In this regard, guidance can be sought from the British plain packaging case of *British American Tobacco & others -v- Department of Health,*[33] where it was held that the evidence presented by the tobacco industry fell below international standards as it was not peer reviewed; 'not benchmarked against internal documents'; ignored the underlying worldwide literature base and was not verifiable.[34]

The section 25 (1) analysis must also adopt a nuanced approach, considering the nature of trademark rights. As such, a direct application of the multi-factored test which was developed in the corporeal property context, must be avoided to ensure adequate protection of intellectual property rights. Such an approach should take into account the substantive nature of trademark property when determining the severity of a deprivation. Even though the title or ownership of the trademark rights remained in the hands of the tobacco companies, the mark is of no value if it cannot distinguish between goods or services and simultaneously maintain the goodwill associated with the mark.[35] In substance trademark owners are deprived of everything that made the property worth having. Accordingly, there should be no one-size-fits-all determination of what deprivation entails; a case by case determination would be beneficial for future intellectual property law cases.

On the other hand, it is suggested that the WTO must maintain a cautious approach in applying the less restrictive means test. Even though, it is observable that this sub-test was not problematic in the plain packaging case, in future cases a balance must be maintained between finding an alternative measure that complies with the WTO, yet less restrictive to trade; and ensuring that the same measure fulfils the objective at the chosen level of protection, without imposing financial, social, and administrative or any other burdens. Failure to do so would

[32] *British American Tobacco & others -v- Department of Health* [2016] EWHC 1169, para 280.
[33] Ibid, para 492 – 493.
[34] Ibid, paras 291, 319, 349
[35] See chapter four of the study.

result in a severe intrusion into member states' regulatory autonomy and would upset the balance required to maintain the integrity of WTO necessity tests.

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