ARTICLES

ZACHARY E. SHUFRO*

Crying "Fraud" and Cost-Shifting: U.S. Foreign Trademark Application Regulation and International Trade Law

Introduction 2
I. Agreement on Trade-Related Aspects of Intellectual Property Rights 3
A. National Treatment 5
B. Most-Favored-Nation Treatment 7
C. Due Process and Nondiscrimination 9
II. General Agreement on Trade in Services 10
A. National Treatment 11
B. Most-Favored-Nation Treatment 12
C. Due Process and Nondiscrimination 14
III. New U.S. Guidance for Foreign Trademark Applicants 15
A. Justifications for the Regulation 15
B. Increased Costs 17
C. TRIPS Agreement Compliance 18
D. GATS Compliance 20
IV. Additional Considerations and Conclusion 22

* Associate, Latham & Watkins LLP; LL.M. 2021, New York University School of Law; J.D. 2020, University of North Carolina School of Law. Thank you to Professor Robert Howse for helpful guidance and feedback in drafting and revising this article; to Senior Judge Jane A. Restani of the United States Court of International Trade for fostering my interest in international trade law and encouraging me to delve further into research in the field; and to Alyssa Wright for her indefatigable research and editing assistance.

INTRODUCTION

The Trump Administration ramped up isolationist and Sinophobic rhetoric[1] in American media and executive policy to near unprecedented levels. Among the countless trade policy reversals[2] and American claims of unfair competition and international trade law violations by the Chinese government,[3] in July 2019 a short notice appeared in the Federal Register that significantly curtailed the ability of foreign nationals to benefit from American intellectual property protection under the auspices of the United States Patent and Trademark Office (USPTO).[4] While seemingly innocuous on its face, the regulatory change in question—a requirement that foreign nationals seeking to file a trademark application with the USPTO retain a U.S.-licensed attorney to represent them in such proceedings—poses a significant barrier to entry for overseas trademark applicants seeking to conduct legitimate business in the United States. Justified on the pretense of discouraging fraudulent trademark filings, which the Administration claimed composed the vast majority of foreign filings,

---

1 *See, e.g.*, Edward Wong & Michael Crowley, *The Biggest Obstacle to China Policy: President Trump*, N.Y. TIMES (Nov. 16, 2020), https://www.nytimes.com/2020/06/18/us/politics/trump-china-bolton.html [https://perma.cc/VKC3-8R66] ("[T]rade advisers in the Trump Administration tried crafting get-tough-on-China policies to address what they viewed as America's greatest foreign policy challenge . . . ."); Ana Swanson, *Biden's China Policy? A Balancing Act for a Toxic Relationship*, N.Y. TIMES (Dec. 4, 2020), https://www.nytimes.com/2020/11/16/business/economy/biden-china-trade-policy.html [https://perma.cc/NVL5-JJSP] ("President Trump has placed tariffs on hundreds of billions of dollars of products from China, imposed sanctions on Chinese companies and restricted Chinese businesses from buying American technology . . . ."); Steven Lee Myers & Edward Wong, *Coronavirus Worsens U.S.-China Ties and Bolsters Hawks in Washington*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/world/asia/us-china-coronavirus.html [https://perma.cc/8DLD-TJ6N] (noting already-present tension between the United States and China during the entire Trump presidency).

2 *See, e.g.*, Robert D. Blackwill & Theodore Rappleye, *Trump's Five Mistaken Reasons for Withdrawing from the Trans-Pacific Partnership*, FOREIGN POL'Y (June 22, 2017), https://foreignpolicy.com/2017/06/22/trumps-five-mistaken-reasons-for-withdrawing-from-the-trans-pacific-partnership-china-trade-economics/ [https://perma.cc/JT5C-PJWU] (U.S. withdrawal from the Trans-Pacific Partnership).

3 *See, e.g.*, Nandita Bose & Andrea Shalal, *Trump Says China Is 'Killing Us with Unfair Trade Deals,'* REUTERS (Aug. 7, 2019, 9:00 AM), https://www.reuters.com/article/us-usa-trade-china/trump-says-china-is-killing-us-with-unfair-trade-deals-idUSKCN1UX1WO.

4 Requirement of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants, 84 Fed. Reg. 4393 (proposed Feb. 15, 2019).

the change effectively places a significant financial obligation on foreign nationals who seek to apply for trademarks in the United States.[5]

This Article examines the new regulations through the lens of the United States' international trade obligations and considers to what extent this change in policy violates international treaty law. Analysis proceeds in three parts. Parts I and II identify and summarize the relevant obligations the United States must fulfill as a party to international trade treaties—namely, the Agreement on Trade-Related Aspects of Intellectual Property Rights[6] (Part I), the General Agreement on Trade in Services (Part II),[7] and (as applicable) parallel provisions in the General Agreement on Tariffs and Trade.[8] Part III assesses the United States' regulatory changes to how foreign nationals can seek trademark protection in the United States, and it also surveys the Administration's rationale behind the change and analyzes its legality in light of the United States' international trade obligations. Part IV notes relevant considerations and concludes. Ultimately, the USPTO's new policy governing foreign trademark applicants violates the United States' international treaty obligations; barriers to effective challenges to this policy, however, likely foreclose any meaningful changes to it in the coming years absent a dramatic shift in the Biden Administration's approach to international competition.

I
AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) marked a sea change in

---

5 *See* Requirement of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants, 84 Fed. Reg. 31498, 31489 (July 2, 2019) (to be codified at 37 C.F.R. pts. 2, 7, 11). *See generally infra* Section III.B.

6 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

7 General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

8 General Agreement on Tariffs and Trade, Jan. 1, 1948, 61 Stat. 5, 55 U.N.T.S. 194, *re-adopted and modernized as* General Agreement on Tariffs and Trade (1994), Apr. 15, 1994, 1867 U.N.T.S. 190, 33 I.L.M. 1153 [hereinafter GATT].

international intellectual property protection.[9] International treaties protecting intellectual property law have been in effect for over a century, the first of those being the 1883 Paris Convention for the Protection of Industrial Property.[10] Agreements prior to the TRIPS Agreement, like the Paris Convention, mandated that signatory parties respect the intellectual property protections granted to the citizens of other signatories in a manner not inconsistent with the object and purpose of the 1967 Convention Establishing the World Intellectual Property Organization (WIPO)[11] or the 1989 Protocol Relating to the Madrid Agreement Concerning the International Recognition of Marks (Madrid Protocol).[12] By contrast, the TRIPS Agreement offered some, albeit mild,[13] enforcement mechanisms for citizens of signatory states whose rights were infringed in other signatory territories.[14] A further innovation of the TRIPS Agreement was the manner in which its provisions apply: unlike under earlier intellectual property treaties, like the Paris Convention,[15] or under international trade agreements, like the General Agreement on Tariffs and Trade (GATT),[16] the TRIPS Agreement instructs Members to "accord the treatment provided for in the Agreement to the nationals of other Members."[17] This Part examines the three key provisions accorded to those foreign nationals: the national treatment clause, the most-favored-nation clause, and the due process and nondiscrimination clauses.

---

9 *See* Zachary Shufro, *Haute Couture's Paper Shield: The Madrid Protocol and the Absence of International Trademark Enforcement Mechanisms*, 45 N.C. J. INT'L L. 645, 664 (2020).

10 Paris Convention for the Protection of Industrial Property, *as last revised* July 14, 1967, 828 U.N.T.S. 305, 21 U.S.T. 1583 [hereinafter Paris Convention].

11 Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3.

12 Protocol Relating to the Madrid Agreement Concerning the International Recognition of Marks, June 27, 1989, WIPO Pub. No. 207E/20, S. Treaty Doc. No. 106-41 (1989), *reprinted in* INTERNATIONAL ENCYCLOPEDIA OF INTELLECTUAL PROPERTY TREATIES 490, 490–99 (Alfredo Ilardi & Michael Blakeney eds., 2004).

13 *Cf.* Shufro, *supra* note 9 (noting the weaknesses inherent to the Madrid Protocol's enforcement mechanisms).

14 *See* TRIPS Agreement, *supra* note 6, arts. 41, 44–46, 50(2) (authorizing signatory states "to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm").

15 *See* Paris Convention, *supra* note 10.

16 *See* GATT, *supra* note 8.

17 *See* TRIPS Agreement, *supra* note 6, art. 1(3).

A. National Treatment

One of the foundational obligations of signatories under the TRIPS Agreement is that of national treatment: a principle that citizens of other signatory nations must accord treatment "no less favourable" than that which a Member affords to its own citizens.[18] In 2002, the WTO's dispute settlement Appellate Body stated that "the significance of the national treatment obligation can hardly be overstated."[19] Due to national treatment's fundamental nature in world trade, it has "long been a cornerstone of the Paris Convention and other international intellectual property conventions"[20] and is "a fundamental principle underlying the TRIPS Agreement, just as it has been in what is now the GATT 1994."[21] To that end, Article 3 of the TRIPS Agreement dictates that "[e]ach Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property," insofar as that treatment is not subject to an exception contained in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention, or the Treaty on Intellectual Property in Respect of Integrated Circuits (Washington Treaty).[22] While the exceptions to this requirement seem broad, "Members may avail themselves of the exceptions" of the Paris Convention, Berne Convention, Rome Convention, or Washington Treaty concerning administrative procedures and "only where such exceptions are necessary to secure

---

18 *Id.* art. 3(1).

19 Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 241, WTO Doc. WT/DS176/AB/R (adopted Jan. 2, 2002) [hereinafter Appellate Body Report, *U.S.—Appropriations Act Section 211*].

20 *Id.*

21 *Id.* ¶ 242.

22 TRIPS Agreement, *supra* note 6, art. 3(1). The Paris Convention governs the protection of industrial property and designs. *See* Paris Convention, *supra* note 10. The Berne Convention governs written, pictorial, sculptural, and graphic works protected by copyright law. Berne Convention for the Protection of Literary and Artistic Works, *as last revised* July 24, 1971, 1161 U.N.T.S 3, 25 U.S.T. 1341 [hereinafter Berne Convention]. The Rome Convention governs the protection of copyrights in performance and audiovisual works. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention]. The Treaty on Intellectual Property in Respect of Integrated Circuits provides protection for the topographies of circuit boards, has been ratified by only three nations (Bosnia and Herzegovina, Egypt, and Saint Lucia), and has not yet entered into force. Treaty on Intellectual Property in Respect of Integrated Circuits, *opened for signature* May 26, 1989, 28 I.L.M. 1477 [hereinafter Washington Treaty].

compliance with laws and regulations which are not inconsistent with the provisions of [the TRIPS] Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade."[23]

The national treatment obligation of the TRIPS Agreement applies only to measures related to the protection of intellectual property. As defined, measures "shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in [the TRIPS] Agreement."[24] Moreover, "the national treatment rule set out in [Article 3] does not apply to use of intellectual property rights generally but only to 'those matters affecting the use of intellectual property rights specifically addressed in [the] Agreement.'"[25] In addition to general national treatment obligations, the TRIPS Agreement "prohibits the imposition of special requirements on the use of a trademark."[26] Presumably, that includes the acquisition, maintenance, and enforcement of registrations for the marks at a Member's trademark office.[27]

Current WTO Dispute Settlement Body precedent employs a two-tier test to determine whether a Member state's regulatory or administrative requirement violates the TRIPS Agreement's national treatment obligation.[28] As a dispute panel explained in 2005, "Two elements must be satisfied to establish an inconsistency with this obligation: (1) the measure at issue must apply with regard to the protection of intellectual property; and (2) the nationals of other Members must be accorded 'less favourable' treatment than the Member's own nationals."[29] With regard to the first requirement, a Member's claim must "concern[] the 'protection' of intellectual

---

23 TRIPS Agreement, *supra* note 6, art. 3(2).

24 *Id.* art. 3(1) n. 3.

25 Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 14.275, WTO Doc. WT/DS54/R (adopted July 2, 1998) [hereinafter Panel Report, *Indonesia—Autos*] (quoting TRIPS Agreement, *supra* note 6, art. 3(1) n. 3).

26 *Id.* ¶ 11.5.

27 *Id. See also* TRIPS Agreement, *supra* note 6, art. 20 ("The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.").

28 Complaint by the United States, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶ 7.125, WTO Doc. WT/DS174/R (adopted Mar. 15, 2005) [hereinafter Panel Report, *E.C.—Trademarks and Geographic Indications (U.S.)*].

29 *Id.*

property, as clarified in footnote 3 to the TRIPS Agreement, within the scope of the national treatment obligation in Article 3 of that Agreement."[30]

Furthermore, the TRIPS Agreement does not provide a specific definition of what would constitute less favorable treatment within the scope of the second requirement.[31] Precedent from the Dispute Settlement Body indicates "that the appropriate standard of examination under Article 3.1 of the TRIPS Agreement is that enunciated" by a prior GATT panel "under Article III:4 of GATT 1947."[32] This standard "call[s] for effective equality of opportunities" between domestic and imported products.[33] As that GATT Panel articulated, "Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favourable treatment standard . . . is met."[34] Although Article III:4 of the GATT applies to products,[35] and the national treatment obligation of the TRIPS Agreement applies to nationals of Member states (due to the intangible nature of intellectual property),[36] the standard is nevertheless instructive. Should a Member state's regulatory or administrative requirement constitute an "extra hurdle"[37] for foreign nationals seeking to obtain or use their intellectual property rights in that Member state's territory when compared to those steps required for a domestic intellectual property owner, then the treatment is unequal.[38]

B. Most-Favored-Nation Treatment

In addition to the national treatment requirement of Article 3, the TRIPS Agreement contains a most-favored-nation provision requiring

---

30 *Id.* ¶ 7.129 (quoting TRIPS Agreement, *supra* note 6, art. 3(1) n. 3).

31 *Id.* ¶ 7.132.

32 *Id.* ¶ 7.133.

33 Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.11, WTO Doc. L/6439 – 36S/345 (adopted Nov. 7, 1989) [hereinafter *U.S.—Tariff Act Section 337*].

34 *Id.*

35 *See* GATT, *supra* note 8, art. III(4).

36 *See* TRIPS Agreement, *supra* note 6, art. 1(3) ("Members shall accord the treatment provided for in this Agreement to the nationals of other Members.").

37 The "extra hurdle" language comes from Appellate Body precedent regarding administrative and regulatory treatment of foreign nationals. *See* Appellate Body Report, U.S.—*Appropriations Act Section 211*, *supra* note 19, ¶ 268.

38 Panel Report, *E.C.—Trademarks and Geographic Indications (U.S.)*, *supra* note 28, ¶¶ 7.121, 7.139, 7.233, 7.272, 7.314.

that "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."[39] This provision may seem superfluous on its face, for it may seem highly improbable that a trade system would exist in a country that provides favorable treatment to the nationals of another country that exceeds the favorability of the treatment of its own citizens (which it would be required to accord to foreign nationals under the national treatment obligation in Article 3 of the TRIPS Agreement).[40] But such circumstances are not entirely unheard of. Indeed, in relation to copyright, the United States is, in some respects, more permissive about the requirements demanded of foreign works than of its own citizens' works.[41] Such circumstances exist that require explicitly stating the most-favored-nation principle in the TRIPS Agreement—and in international trade law more generally.

The Appellate Body emphasized in 2002 that "the obligation to provide most-favoured-nation treatment has long been one of the cornerstones of the world trading system."[42] For over five decades, "the obligation to provide most-favoured nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods."[43] While no most-favored-nation provision exists in the Paris Convention,[44] "the framers of the *TRIPS Agreement* decided to extend the most-favoured-nation obligation to the protection of intellectual property rights."[45] Therefore, most-favored-nation treatment "must be accorded the same significance with respect to intellectual property rights . . . that it has long been accorded with respect to goods under the GATT. It is, in a word, fundamental."[46]

---

39 *Id.* art. 4.

40 *Id.* art. 3.

41 *See, e.g.*, Richard Arnold & Jane C. Ginsburg, *Foreign Contracts & U.S. Copyright Termination Rights: What Law Applies? – Comment*, 43 COLUM. J.L. & ARTS 437, 444 (2020) (quoting Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90–91 (2d Cir. 1998) (examining how choice of law and the status of a work as a work-for-hire is subject to permissive standards under the Berne Convention's requirements for foreign recognition of registered copyrights)); *see also* Berne Convention, *supra* note 22.

42 Appellate Body Report, *U.S.—Appropriations Act Section 211*, *supra* note 19, ¶ 297.

43 *Id.*

44 *Id.*; *cf.* Paris Convention, *supra* note 10 (lacking a most-favored-nation provision).

45 Appellate Body Report, *U.S.—Appropriations Act Section 211*, *supra* note 19, ¶ 297.

46 *Id.*

While sensu stricto, Article 5 of the TRIPS Agreement exempts the regulation of "procedures . . . relating to the acquisition or maintenance of intellectual property rights" from the most-favored-nation obligation and national treatment requirements contained in Articles 3 and 4, Article 5 does so only insofar as those procedures are subject to other "multilateral agreements concluded under the auspices of WIPO,"[47] such as the Paris and Berne Conventions.[48] Many of those agreements contain similarly intended provisions, such as national treatment obligations. Finally, notwithstanding the TRIPS Agreement's most-favored-nation treatment requirement, "any advantage, favour, privilege or immunity accorded by a Member" is exempt from such an obligation when "granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function . . . of the treatment accorded in another country" or that "deriv[ed] from international agreements . . . which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements . . . do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members."[49]

C. Due Process and Nondiscrimination

The TRIPS Agreement contains language that both implicitly and explicitly demands that, in regulating and legislating on issues affecting a Member's obligations under the TRIPS Agreement, Members must afford adequate due process and nondiscriminatory treatment to the nationals of other signatory Members. Specifically, the TRIPS Agreement has two separate reasonable notice and procedure requirements: one related to the acquisition of intellectual property rights in the Member's territory and one related to the administrative regulation thereof. The Agreement states the following:

---

47 TRIPS Agreement, *supra* note 6, art. 5.

48 *See* Paris Convention, *supra* note 10; Berne Convention, *supra* note 22.

49 TRIPS Agreement, *supra* note 6, arts. 4(b), 4(d). The WTO Agreement entered into force on June 1, 1995. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter WTO Agreement].

> Where the acquisition of an intellectual property right is subject to the right being granted or registered,[50] Members shall ensure that the procedures for grant or registration . . . permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.[51]

That is, Members shall review and issue intellectual property registrations to foreign applicants on a timeline comparable to the timeline for the review and issuance of registrations to domestic applicants.[52]

Beyond this requirement, signatories to the TRIPS Agreement must ensure that "[p]rocedures concerning the acquisition or maintenance of intellectual property rights . . . [are] governed by the general principles" of administrative reasonableness and due process.[53] Paragraph 2 of Article 41 ensures that "[p]rocedures concerning the enforcement of intellectual property rights shall be fair and equitable" and "shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays."[54] Similarly, paragraph 3 of Article 41 demands that "[d]ecisions on the merits of a case shall preferably be in writing and reasoned"; that the decisions "shall be made available at least to the parties to the proceeding without undue delay"; and that the decisions "shall be based only on evidence in respect of which parties were offered the opportunity to be heard."[55] These provisions effectively prohibit signatories to the TRIPS Agreement from making discriminatory changes to intellectual property regulations and from making such changes in a manner that would violate the due process rights of foreign nationals protected under the TRIPS Agreement.

II
GENERAL AGREEMENT ON TRADE IN SERVICES

While the GATT has regulated WTO Members' trade since 1947, WTO Members did not "establish[] worldwide rules on trade in services through the" GATS until 1994.[56] One result of the WTO's

---

50 For example, some nations rely on a first-to-file right for trademarks while others rely on a first-use-in-commerce standard. *See* Shufro, *supra* note 9, at 647–48.

51 TRIPS Agreement, *supra* note 6, art. 62(2).

52 *Id.*

53 *Id.* art. 62(4).

54 *Id.* art. 41(2).

55 *Id.* art. 41(3).

56 Ursula Knapp, *The General Agreement on Trade in Services (GATS): An Analysis*, ORG. FOR ECON. CO-OPERATION & DEV., OECD Doc. OCDE/GD(94)123 at 5, ¶ 1 (Paris 1994).

Uruguay Round negotiations[57] was that the GATS "applie[d] to measures by Members affecting trade in services"[58] but only insofar as a Member enters into "specific commitments" in a sector of services.[59] Because GATS signatories have discretion whether to bind services and in which sectors, "it is only possible to define an individual GATS participant's obligations through the schedule of [the participant's] specific commitments."[60] This Part examines four key obligations of the GATS, of which three (national treatment, due process, and nondiscrimination) are sector-specific and one (the most-favored-nation treatment requirement) arguably applies more broadly.

A. National Treatment

The GATS contains a provision that obligates national treatment among signatory Members. Article XVII of the GATS dictates that "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."[61] Unlike under the TRIPS Agreement, however, the GATS contains a national treatment obligation that "*only* applies to a measure affecting trade in services *to the extent* that a WTO Member has explicitly committed itself to grant 'national treatment' in respect of the specific services sector concerned."[62] The United States' *only* bound commitment is the provision of legal services by a qualified U.S. lawyer; the United States did not schedule any comparable commitments involving non-U.S.-trained legal representation.[63] Moreover, none of the United States' commitments in its Schedule of Specific Commitments covers the need to be a trained attorney for an

57 *Id.*

58 GATS, *supra* note 7, art. I(1).

59 Knapp, *supra* note 56, at 15, ¶¶ 50–53, 106.

60 *Id.* ¶ 106.

61 GATS, *supra* note 7, art. XVII(1).

62 PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 400 (4th ed. 2017).

63 *See generally U.S. Schedule of Commitments Under the General Agreement on Trade in Services*, Investigation No. 332-354, WTO Doc. GATS/SC/90 (adopted Aug. 1998), U.S. INT'L TRADE COMM'N, at 15–34 (noting sector-specific commitments for 1.A.a.1, "legal services: practice as or through a qualified US lawyer," and 1.A.a.2, "legal services: consultancy on law of jurisdiction where service supplier is qualified as a lawyer" other than in specific exceptions).

online trademark registration application.[64] Thus, further discussion of the national treatment obligation under the GATS is inapplicable to the scope of this Article.

B. Most-Favored-Nation Treatment

In addition to the national treatment obligation, the GATS mirrors the TRIPS Agreement by containing a provision requiring Members to accord most-favored-nation treatment to all fellow signatories. There are two distinct avenues through which the GATS requires such treatment. First, regarding market access, the GATS requires in Article XVI that "each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule."[65] Second, Article II requires more generally that "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."[66] When the Uruguay Rounds concluded and the GATS was signed, the Organization for Economic Co-Operation and Development (OECD) believed that these two obligations combined to create a single obligation of most-favored-nation treatment "applicable to *all measures affecting trade in services*, as defined in Article I, in *all sectors* irrespective of whether specific commitments [were] undertaken or not, *in any form* such measures might take."[67] This sort of obligation, applying to bound and unbound services mutatis mutandis, applies even in circumstances in which a GATS signatory Member accords preferential or disfavored treatment in an unbound sector to one specific State (a GATS signatory or otherwise).[68] Therefore, *all* States must accord the same treatment to other States *except* in certain exempted circumstances.[69]

Beyond this broad applicability, the most-favored-nation requirement under the GATS applies to both de jure and de facto discrimination despite the absence of any specific statement to that effect in the GATS

64 *Id.*

65 GATS, *supra* note 7, art. XVI(1).

66 *Id.* art. II(1).

67 Knapp, *supra* note 56, at 9, ¶ 22 (emphasis in original).

68 *Id.* at 9–10, ¶ 23.

69 *Id.*

itself.[70] The Appellate Body read a prohibition against de facto discrimination in the most-favored-nation obligation of Article II of the GATS because the most-favored-nation obligation could and likely would be used "to devise discriminatory measures aimed at circumventing the basic purpose of" the GATS.[71]

The WTO's Dispute Settlement Body employs a three-step test to determine whether a country's measure is inconsistent with its most-favored-nation treatment obligations under the GATS.[72] The first step requires that the defending Member state have taken a measure that is within the scope of Article II:1 of the GATS.[73] Accordingly, that Member must have enacted a measure—defined as "a law, regulation, procedure, decision, administrative action, or any other" action[74]—that "affect[s] trade in services."[75] That a measure "affect[s] trade in services"[76] merely "implies a measure that has 'an effect on[]'" trade, as "the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing.'"[77] Thus, a measure suffices "to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services."[78] The second step requires that the services and providers involved be similar in their "competitive relationship of the services and service suppliers at issue."[79] Finally, the third step is a test of whether the treatment to the like services and service providers are

---

70 *See* Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 233, WTO Doc. WT/DS27/AB/R (adopted Sept. 9, 1997) [hereinafter Appellate Body Report, *E.C.—Bananas (III)*]; *see also* Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶ 6.105, WTO Doc. WT/DS453/AB/R (adopted Apr. 14, 2016) [hereinafter Appellate Body Report, *Argentina—Financial Services*].

71 Appellate Body Report, *E.C.—Bananas (III)*, *supra* note 70.

72 *See* Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶¶ 170–71, WTO Docs. WT/DS139/AB/R, WT/DS142/AB/R (adopted May 31, 2000) [hereinafter Appellate Body Report, *Canada—Autos*].

73 *Id.*

74 GATS, *supra* note 7, art. XXVIII(a).

75 *Id.* art. I(1).

76 *Id.*

77 Appellate Body Report, *E.C.—Bananas (III)*, *supra* note 70, ¶ 220.

78 Complaint by the United States, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.285, WTO Doc. WT/DS27/R/USA (adopted May 22, 1997) [hereinafter Panel Report, *E.C.—Bananas*].

79 Appellate Body Report, *Argentina—Financial Services*, *supra* note 70, ¶ 6.29.

equal, meaning one Member's services and service providers are not favored over those of another Member.[80]

C. Due Process and Nondiscrimination

The GATS requires that signatory Members abide by standards of due process and nondiscrimination in their regulation of international trade in services. As a general matter, the GATS prevents signatory Members from enacting discriminatory regulations or from violating the due process and notice requirements of fellow Members with a few narrowly construed exceptions.[81] Article XIV, which contains the two exceptions most applicable to the scope of this Article, reads in relevant part:

> 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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order . . .
>
> [or]
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to (i) the prevention of deceptive and fraudulent practices.[82]

Under the framework that Article XIV lays out, the GATS requires at least the same level of due process and nondiscrimination in a Member's regulatory measures as is required under Article 62 of the TRIPS Agreement[83] and Article XX of the GATT.[84]

---

80 GATS, *supra* note 7, art. XVII(3); *see also* Appellate Body Report, *Canada—Autos*, *supra* note 72.

81 *See* GATS, *supra* note 7, art. XIV.

82 *Id.*

83 *See* TRIPS Agreement, *supra* note 6, art. 62.

84 *See* GATT, *supra* note 8, art. XX (providing a series of specific exceptions to the national treatment, most-favored-nation treatment, and other obligations under the GATT).

III
NEW U.S. GUIDANCE FOR FOREIGN TRADEMARK APPLICANTS

On July 2, 2019, the USPTO issued the following amendment:

> The United States Patent and Trademark Office (USPTO or Office) amends the Rules of Practice in Trademark Cases, the Rules of Practice in Filings Pursuant to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, and the rules regarding Representation of Others Before the United States Patent and Trademark Office to require applicants, registrants, or parties to a trademark proceeding whose domicile is not located within the United States (U.S.) or its territories (hereafter foreign applicants, registrants, or parties) to be represented by an attorney who is an active member in good standing of the bar of the highest court of a state in the U.S. (including the District of Columbia or any Commonwealth or territory of the U.S.).[85]

This regulation modified the earlier system whereby foreign individuals and entities seeking to register a trademark at the USPTO had three options for how to proceed. They could either file their applications pro se through the USPTO online portal, obtain foreign counsel to file the online application, or obtain U.S.-licensed counsel for the application process.[86] However, after the enactment of this change, foreign nationals must find a U.S.-licensed attorney.[87] This Part examines the rationale and consequences of the USPTO's new regulations on foreign trademark applicants, and assesses whether the new rules comply with the United States' obligations under the TRIPS Agreement and the GATS.

A. Justifications for the Regulation

The USPTO advanced two rationales to explain the new regulation for foreign trademark applicants. First, the USPTO noted that "in the past few years, the USPTO has seen many instances of unauthorized practice of law (UPL) where foreign parties who are not authorized to represent trademark applicants [have] improperly represent[ed] foreign applicants before the USPTO."[88] As a result of this trend, the USPTO

---

85 Requirement of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants, 84 Fed. Reg. 31498, 31498 (July 2, 2019) (to be codified at 37 C.F.R. pts. 2, 7, 11).

86 *Id.* at 31498, 31499–500.

87 *Id.* at 31498.

88 *Id.*

claimed that "increasing numbers of foreign applicants are likely receiving inaccurate or no information about the legal requirements for trademark registrations in the U.S., such as the standards for use of a mark in commerce."[89] As the USPTO Director noted, "This practice raises legitimate concerns that affected applications and any resulting registrations are potentially invalid, and thus negatively affects the integrity of the trademark register."[90]

The second rationale as to why this change was necessary is that the regulation was "in response to the increasing problem of foreign trademark applicants who purportedly are pro se (i.e., one who does not retain a lawyer and appears for himself or herself) and who are filing inaccurate and possibly fraudulent submissions that violate the Trademark Act (Act) and/or the USPTO's rules."[91] In explaining this rule change and in other Department of Commerce documents,[92] the USPTO Director alleged that "foreign applicants file applications claiming use of a mark in commerce, but frequently support the use claim with mocked-up or digitally altered specimens that indicate the mark may not actually be in use."[93] Furthermore, as Undersecretary of Commerce for Intellectual Property Iancu noted, many of the individuals filing fraudulent specimens "appear to be doing so on the advice, or with the assistance, of foreign individuals and entities who are not authorized to represent trademark applicants before the USPTO."[94]

While Undersecretary Iancu noted that there are already available enforcement mechanisms at the disposal of the USPTO to punish fraudulent filings and specimens included in trademark applications, "[a]s a practical matter, even if U.S. law enforcement" or the USPTO are "able to devote resources toward prosecution of a foreign national" for criminal perjury before a U.S. administrative agency under "18 U.S.C. [§] 1001, exerting jurisdiction over such a party is not always possible."[95] To address this problem, "[w]hen the USPTO identifies UPL by foreign parties in an application, [the USPTO] sends

89 *Id.*

90 *Id.*

91 *Id.*

92 *See, e.g.*, U.S. PAT. & TRADEMARK OFF., Examination Guide 3-19, EXAMINATION OF SPECIMENS FOR USE IN COMMERCE: DIGITALLY CREATED OR ALTERED AND MOCKUP SPECIMENS (July 2019).

93 Requirement of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants, 84 Fed. Reg. at 31498.

94 *Id.* at 31498–99.

95 *Id.* at 31499.

information to the applicant's address of record informing the applicant that its appointed representative has been 'excluded' from practice before the USPTO and cannot represent the applicant in the matter."[96] But as "in many applications, the address information for the applicant is not legitimate . . . , and the USPTO cannot be sure that the affected applicants receive [this] information."[97] As a matter of administrative efficiency, therefore, the USPTO determined that the best means of preventing those occasional fraudulent filings was to enact an administrative rule change "[r]equiring foreign applicants, registrants, and parties to retain U.S. counsel in all trademark matters before the USPTO."[98]

B. Increased Costs

Although the number of foreign applicants before the USPTO has increased in recent years,[99] the numbers are unclear whether and to what extent such applicants represent the vast majority of fraudulent specimen applications. Furthermore, while it is far easier for the USPTO to censure a U.S.-licensed attorney for fraud than to censure a foreign pro se applicant, the cost to such foreign applicants is substantial. "Most [pro se] foreign applicants have historically filed their applications" before the USPTO "using TEAS Plus, which is the lowest-cost filing option,"[100] costing only $225 per class of goods or services identified.[101] Prior to this rule change, the cost for a pro se applicant—foreign or domestic—amounted to $225 to file a trademark in one class.

In the Federal Register's notice for the adoption of the U.S.-licensed attorney requirement rule, Undersecretary Iancu noted that the average

---

96 *Id.*

97 *Id.* at 31500.

98 *Id.* at 31499.

99 Foreign trademark applications have increased from 70,853 applications (19% of the annual total) in 2015 to 115,402 applications (26% of the total) in 2017. *Id.* Among these applications, the percentage of pro se applicants has increased significantly, from 17,967 such applicants in 2015 (approximately 4.8% of the annual total) to 50,742 such applicants in 2017 (approximately 11.4% of the total). *Id.*

100 *Id.* at 31504.

101 Trademarks are registered in 45 classes—classes 1 through 34 covering goods, and classes 35 through 45 covering services—according to the Nice Classification system. *See* Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks, arts. 1–2, June 15, 1957, 828 U.N.T.S. 191, *reprinted as* 55 TRADEMARK REP. 758 (1965).

cost of a trademark application for a foreign individual (as of December 2018) was $1,806.01 if retaining counsel before filing the initial application and $1,037.92 if retaining counsel after filing, an option that no longer exists under the new rule.[102] Accordingly, under this rule, the average pro se foreign national filing a trademark application before the USPTO faces an increased cost of $1,581.01. The USPTO acknowledged this increase in response to comments raising the unfairness of such an additional financial burden on foreign applicants. The USPTO responded that while this increased cost "will be incurred by foreign applicants, registrants, and parties . . . the costs created by misuse of our existing system . . . borne by all good faith trademark users regardless of where they live" outweighed the burden.[103] Nevertheless, noting the impact of this change on foreign nationals, Undersecretary Iancu concluded that the new rule was necessary and would "result in a more accurate and reliable trademark register."[104] Accordingly, the new regulation went into effect on August 3, 2019.[105]

C. TRIPS Agreement Compliance

On its face, the United States' new trademark regulations do not violate the provisions of the TRIPS Agreement. The USPTO justified the changes under the rationale[106] of preventing unfair competition or abuse of intellectual property rights.[107] Notwithstanding the potential validity of these justifications, the burden those regulations place on foreign nationals seeking to apply for trademark registrations at the USPTO is likely sufficient to qualify as "an arbitrary or unjustifiable discrimination against nationals of other Members."[108] Accordingly, those regulations likely violate the national treatment and most-favored-nation treatment obligations of the TRIPS Agreement.

As a preliminary matter, a TRIPS Agreement signatory's domestic regulation can vary from the baseline requirements of both the national and most-favored-nation treatment under some circumstances. The TRIPS Agreement permits this variance because "[a]ppropriate measures, provided that they are consistent with the provisions of [the

---

102 Requirement of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants, 84 Fed. Reg. at 31502.

103 *Id.* at 31504.

104 *Id.* at 31503.

105 *Id.* at 31498.

106 *See supra* text accompanying notes 85–91.

107 TRIPS Agreement, *supra* note 6, art. 8(2).

108 *Id.* art. 4(d).

TRIPS Agreement] may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade."[109] Nevertheless, a measure taken by a Member cannot be enacted if it runs contrary to the object and purpose of the TRIPS Agreement.[110] Additionally, a Member cannot enact a measure that "constitute[s] an arbitrary or unjustifiable discrimination against nationals of other Members."[111]

In order "to establish an inconsistency with [the national treatment] obligation" of the TRIPS Agreement, "[t]wo elements must be satisfied[.]"[112] First, "the measure at issue must apply with regard to the protection of intellectual property."[113] This is the case regarding the U.S.-licensed attorney requirement, which poses a barrier to the ability of foreign nationals to apply for, register, or maintain registrations of U.S. trademarks without first obtaining the representation of a U.S.-licensed (and U.S.-based) attorney.[114] Second, "the nationals of other Members must be accorded 'less favourable' treatment than the Member's own nationals."[115] Under the past Dispute Settlement Body standard of "effective equality of opportunities" between the treatment of domestic and foreign nationals,[116] the U.S.-licensed attorney requirement of the new regulations provides disparate treatment for foreign nationals and U.S. citizens insofar as the requirement prohibits foreign nationals from applying for trademarks pro se at a vastly reduced cost.[117] Therefore, this requirement creates an "extra hurdle"[118] for foreign nationals seeking to obtain or make use of their intellectual property rights in the United States. Accordingly, the treatment of

---

109 *Id.* art. 8(2).

110 *See* Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (noting signatories of a treaty must "refrain from acts which would defeat the object and purpose of [that] treaty").

111 TRIPS Agreement, *supra* note 6, art. 4(d).

112 Panel Report, *E.C.—Trademarks and Geographic Indications (U.S.)*, *supra* note 28.

113 *Id.*

114 Requirement of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants, 84 Fed. Reg. at 31498.

115 Panel Report, *E.C.—Trademarks and Geographic Indications (U.S.)*, *supra* note 28, ¶ 7.125.

116 *U.S.—Tariff Act Section 337*, *supra* note 33.

117 *See supra* Section III.B.

118 Appellate Body Report, *U.S.—Appropriations Act Section 211*, *supra* note 19, ¶ 268.

foreign nationals under the new U.S. regulation is unequal and contrary to the TRIPS Agreement's national treatment obligation.[119]

Beyond violating the United States' obligation under the national treatment requirement of the TRIPS Agreement, this new regulation could also violate the TRIPS Agreement's most-favored-nation treatment obligation. In order to support the claim that the United States subjects its nationals to less-than-favorable treatment, a country would need to demonstrate either (1) that the United States, in implementing this regulation, grants an "advantage, favour, privilege, or immunity" to the citizens of one or more Members without according such treatment to the complaining state's citizens,[120] or (2) that the regulation creates a system that enforces "an arbitrary or unjustifiable discrimination against nationals of other Members."[121] While such arguments would require data that is not yet available,[122] they remain available to a Member who would be able to produce sufficient evidence as to the consequences of that regulatory change.

D. GATS Compliance

As mentioned above,[123] the United States has not bound a commitment for the provision of legal services *other* than by a qualified U.S. lawyer in its Schedule of Specific Commitments.[124] Thus, any regulation on the ability to complete an online application for which one does not need to be a trained attorney is not subject to the national treatment obligation of Article XVII of the GATS. For similar reasons, the U.S.-licensed attorney requirement likely does not violate the GATS's most-favored-nation requirement. Nevertheless, a colorable argument exists that such a requirement is contrary to the ban on

---

119 Panel Report, *E.C.—Trademarks and Geographic Indications (U.S.)*, *supra* note 28, ¶ 7.314.

120 TRIPS Agreement, *supra* note 6, art. 4.

121 *Id.* art. 4(d).

122 The USPTO provides registration information at a delay of one to two years. This is the reason why, for example, the July 2019 Federal Register's notice of the change in regulation discusses information for registrations only through Fiscal Year 2017. *See* Requirement of U.S. Licensed Attorney for Foreign Trademark Applicants and Registrants, 84 Fed. Reg. at 31500.

123 *See supra* text accompanying note 66.

124 *See U.S. Schedule of Commitments Under the General Agreement on Trade in Services*, *supra* note 63 and accompanying text (noting sector-specific commitments for 1.A.a.1, "legal services: practice as or through a qualified US lawyer," and 1.A.a.2, "legal services: consultancy on law of jurisdiction where service supplier is qualified as a lawyer" other than in specific exceptions).

"disguised restriction[s] on trade" contained in the language of Article XIV's exceptions to the general obligations of GATS signatories.[125]

The GATS requires that "measures" enacted by a Member "are not applied in a manner which would constitute . . . a disguised restriction on trade in services."[126] As intellectual property protection is in many respects a sine qua non for a business seeking to expand into a new territory, the new regulation creates a barrier for some businesses to enter into the American market. Furthermore, the regulation could be read as one such form of "disguised restriction on trade in services."[127] Applying the three-step test employed by the WTO Appellate Body in such circumstances,[128] the USPTO regulation:

(1) is a "measure" insofar as it is an administrative action which "regulates other matters but nevertheless affects trade in services[;]"[129]

(2) applies to like domestic and foreign services (to the extent that permitting an individual to complete a form online in a pro se proceeding could be called a "service");[130] and

(3) "modifies the conditions of competition in favour of services or service suppliers of the Member compared to the like services or service suppliers of any other Member[,]"[131] as it prevents foreign nationals from applying for trademarks pro se at a reduced cost of $225 per class, compared to an estimated cost of $1,806.01 per application under the new regulatory guidelines.[132]

While the applicability of the GATS prohibition on "disguised restriction[s] on trade"[133] to this regulation may not be the strongest legal argument, the argument would nevertheless be available as a

125 GATS, *supra* note 7, art. XIV.

126 *Id.*

127 *Id.*

128 *See* Appellate Body Report, *Canada—Autos*, *supra* note 72.

129 Panel Report, *E.C.—Bananas*, *supra* note 78.

130 Appellate Body Report, *Argentina—Financial Services*, *supra* note 70, ¶ 6.29.

131 GATS, *supra* note 7, art. XVII(3); *see also* Appellate Body Report, *Canada—Autos*, *supra* note 72.

132 *Cf. supra* text accompanying notes 105–07.

133 GATS, *supra* note 7, art. XIV.

legitimate avenue to attack the change by an affected Member in the future.

IV
ADDITIONAL CONSIDERATIONS AND CONCLUSION

First, the Federal Register's notice for the rule change—requiring that foreign nationals seeking to file a trademark application with the USPTO retain a U.S.-licensed attorney to represent them in such proceedings—provided supposed justifications for the enactment.[134] However, the resulting barrier to entry for overseas trademark applicants seeking to conduct legitimate business in the United States very likely violates the United States' international trade obligations under the TRIPS Agreement and/or the GATS. Second, the United States has not bound a commitment for the provision of legal services *other* than by a qualified U.S. lawyer in its Schedule of Specific Commitments.[135] An argument may be made that the new USPTO regulation could represent a disguised restriction on the trade in services, contrary to the object and purpose of the GATS (liberalization of international trade in services) and/or to the specific provisions of the Agreement itself. Third, the same can be said of the TRIPS Agreement's most-favored-nation treatment obligation: while there is insufficient evidence currently available to allege that this measure violates Article 4 of the Agreement, a Member with sufficient evidence to make a showing of disparate impact on its citizens would likely succeed on such allegations. Finally, it is relatively clear that, in enacting this regulation, the United States breached its most-favored-nation obligation under Article 3 of the TRIPS Agreement. Any one of those violations would likely be sufficient grounds for a Member to challenge the USPTO regulation before the WTO's Dispute Settlement Body. Nonetheless, there are significant barriers to the resolution and enforcement of such a claim.

Regardless of the credibility of the aforementioned legal arguments, and notwithstanding the strengths and weakness of different claims that a WTO Member *could* bring against the United States, one fundamental flaw exists that likely prevents any such claim from being brought in

134 *See supra* text accompanying notes 92–98.

135 *See U.S. Schedule of Commitments Under the General Agreement on Trade in Services*, *supra* note 63 and accompanying text (noting sector-specific commitments for 1.A.a.1, "legal services: practice as or through a qualified US lawyer," and 1.A.a.2, "legal services: consultancy on law of jurisdiction where service supplier is qualified as a lawyer" other than in specific exceptions).

the near future: a lack of proper venue to adjudicate any such claims. At present, there is no proper means by which WTO Members can seek a final adjudication on their claims. "In December 2019, the [WTO Appellate Body] became defunct because of the [United States'] refus[al] to accept new appointments as sitting members stepped down as their terms expired."[136] Only one remains in office of the minimum three required to hear an appeal.[137] In the absence of a sufficient number of Appellate Body members to hear an appeal, there is no way for a complaining Member's claims to receive a final (enforceable) judgment.

Under Article 16.4 of the WTO's Dispute Settlement Understanding, "[i]f a party has notified its decision to appeal," the Panel Report in that dispute cannot be adopted as binding by the WTO membership "until after the completion of the appeal."[138] Accordingly, any appealed dispute with no Appellate Body to review the dispute "remain[s] in limbo and the underlying panel report cannot be adopted," preventing final adjudication of the matter.[139] Accordingly, absent a sudden resurgence in the Appellate Body's bench to the full complement of seven members[140] under the Biden Administration, a party would be effectively unable to challenge the USPTO's new regulation, despite the regulation's blatant violation of one or more of the United States' international treaty obligations. At present, the United States will likely remain unchallenged in asserting its requirement that foreign applicants, registrants, and other affected parties to proceedings before the USPTO obtain U.S.-licensed representation in the application for and maintenance of their trademark applications. This requirement is further protected by the veneer of legality provided by the announced justifications, but the end result is the same: foreign applicants, particularly those for whom a cost increase of over $1,500 per class identified is unduly burdensome, are unlikely to apply for trademark protection at the USPTO. It is unclear whether this reticence to seek protection will affect the expansion of foreign business into the

136 Bernard M. Hoekman & Petros C. Mavroidis, *To AB or Not to AB? Dispute Settlement in WTO Reform*, 23 J. INT'L ECON. L. 703, 703–04 (2020).

137 Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L 297, 297 (2019).

138 Understanding on Rules and Procedures Governing the Settlement of Disputes art 16.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

139 Pauwelyn, *supra* note 137, at 304.

140 *Id.* at 297.

American market. Only time will tell if companies prefer increased consumer markets at the cost of legal protection for their intellectual property. Either way, the United States will continue to stand in breach of its international trade obligations.