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A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME, by **Graeme B. Dinwoodie & Rochelle C. Dreyfuss.** Oxford University Press, 2012. 203 pp. Hardback \$85.00.

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Professors Dinwoodie and Dreyfuss's recent book, *A NEOFEDERALIST VISION OF TRIPS*, is an important and exciting new addition to debates about international intellectual property governance. In this book, the authors take on one of the field's most central questions: is the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) in fact an intellectual property "code"? The authors argue that TRIPS is commonly misconstrued, both by rights holders and academics, as a supranational code that tells members of the World Trade Organization (WTO) "*what* they must do and *when* and *how* they must do it" (p.5). Although many have argued that TRIPS imposes only minimum standards, Dinwoodie and Dreyfuss provide in this book the most thorough and decisive refutation of the "code" view of TRIPS to date. The authors contend that TRIPS is not a code but a "neofederalist" regime that imposes basic substantive expectations in order to promote coordination but which nonetheless preserves considerable member state autonomy.

A NEOFEDERALIST VISION OF TRIPS addresses both the fragmentation of norms and the fragmentation of authority in international intellectual property law,² with a particular emphasis on the latter. In particular, the book draws attention to the TRIPS regime's allocation of authority between states and international institutions.³ Dinwoodie and Dreyfuss consider this "vertical" allocation of authority between states and international institutions under the TRIPS agreement in historical, textual, and structural terms. They argue that the TRIPS regime is "neofederalist"—not in a constitutional sense,⁴ but rather in terms of the considerable discretion it reserves to states to implement intellectual

property policies in ways responsive to local needs. Calling for increased use of techniques such as proportionality analysis (p.107), the book makes a compelling case for state autonomy in regulating innovation policy through the framework of the TRIPS agreement.

The book proceeds in three sections, looking at the past, present, and future of global intellectual property lawmaking. The first section, entitled “Where We Were”, considers the history of this regulation and the genesis of the TRIPS agreement. The authors support their case for a neofederalist understanding of TRIPS by pointing to the central demands that have shaped global intellectual property lawmaking over time—the need for balance, diversity among countries in terms of priorities and innovation strategies, and changes in the creative ecosystem. These demands are best accommodated within a structure that “gives states autonomy to address the complexity, diversity, and historical contingency of intellectual property law” but at the same time “requires them to act within the overlay of a coordinated international intellectual property regime” (p.14). Dinwoodie and Dreyfuss then turn to the negotiating history of TRIPS, arguing that although some of the states involved in the negotiations sought to make TRIPS into a global “code”, the resulting document was the product of real compromise and protects considerable state discretion and autonomy in implementing TRIPS’s minimum standards.

The second part of the book, entitled “Where We Are”, examines how TRIPS operates in practice. The authors first consider a series of national innovations in intellectual property lawmaking in light of the existing jurisprudence of the dispute settlement bodies of the World Trade Organization (WTO). They conclude that the impact of dispute resolution has been mixed, with some decisions respecting national autonomy and others adopting a more restrictive approach. The authors then turn to the structural features of the TRIPS agreement, including the principles of national treatment, most favored nation, and non-discrimination. They argue that national treatment, in particular, would provide more appropriate guidance for panels addressing the validity of new innovations such as sharing workloads among national patent offices and the EU Database Directive. The final chapter in this section argues that in evaluating local policy innovations, dispute settlement panels should consider tradeoffs in legislation overall rather than looking at particular policies in isolation; afford more room to states seeking to respond to changes in the innovation ecology; and consider the special problems of capacity faced by developing countries.

The final section, “Where We Are Going”, presents the authors’ vision for the future. The first chapter in this section considers the fragmentation of intellectual property lawmaking. Arguing that fragmentation must be managed in order to ensure the coherence needed for a robust innovation, Dinwoodie and Dreyfuss suggest several techniques for integrating non-WTO law into TRIPS lawmaking in order to “gain the benefits of regulatory competition while minimizing its costs” (p.147). In considering whether to use non-trade law, the authors contend that panels and the Appellate Body should consider the source of the norm, its timing, governance issues (e.g., “hard” versus “soft” law), and the degree of overlap in coverage between the norm and the subject matter of TRIPS. The final chapter then introduces the idea of a global intellectual property “*acquis*”—a set of “background norms” that might guide intellectual property policy-making on the international level (p.176)—and begins to identify in national and international sources, judicial lawmaking, and scholarship some of the normative commitments that might form the basis of such an *acquis*. Dinwoodie and Dreyfuss argue that identifying shared normative commitments would aid the WTO’s dispute settlement bodies and remedy some of the overly restrictive interpretations identified earlier in the book. An international intellectual property *acquis* could also help foster normative integration across regimes and guide future international lawmaking in this area. Among these intellectual property “meta-norms” (p.180), the authors include principles about access to knowledge goods (what they call “access-regarding principles”), norms designed to adapt to the challenges of new technologies, and national treatment for both users and producers.

This book makes several important contributions to international intellectual property scholarship. First, Dinwoodie and Dreyfuss decisively refute the “code” vision of the TRIPS agreement. Despite what might seem to be widespread agreement in some circles that TRIPS imposes only minimum standards, the belief that the treaty is instead a comprehensive supranational code of intellectual property rules continues to have considerable vitality. Efforts to use a European Union Regulation to seize shipments of medicines while in transit, for example, even when the shipments would not violate the intellectual property law of either the sending or receiving country, are tied to a perception of TRIPS as imposing global norms and limiting individual state discretion to vary intellectual property rules in ways that allow generic production.⁵ More recently, this “code” vision is reflected in Eli Lilly’s initiation of arbitration proceedings under the North American Free Trade Agreement challenging the invalidation of one of its patents by Canadian courts, despite the

considerable discretion that TRIPS leaves to member states to decide what inventions meet the standards it imposes.⁶ Dinwoodie and Dreyfuss's refutation of the "code" vision of TRIPS is particularly important in light of these new intellectual property claims being asserted through enforcement measures and in the investment treaty context.

Second, the book provides an extraordinarily useful playbook for defending local innovations in intellectual property policy making. Dinwoodie and Dreyfuss provide a comprehensive and pragmatic assessment of how the WTO dispute settlement bodies might respond were they asked to assess the validity of three recent examples of local policy innovations—raising the inventive step, new statutory defenses to patent infringement, and varying the relief for infringement. Their analysis of these innovations is especially valuable given how few cases address the scope of TRIPS flexibilities and, in particular, the lack of cases litigated by parties with an incentive to defend state autonomy. For TRIPS litigants, scholars, and governmental officials, especially from the developing world, the book provides a very useful and instructive assessment of the arguments that might be marshaled for and against these recent policy initiatives.

Third, the book calls attention to the difficulty tribunals face interpreting ambiguous treaties. Treaties are notoriously indeterminate: capable of multiple interpretations and inconsistent both internally and externally.⁷ There is no requirement of a "meeting of the minds" in treaty drafting, and indeed, many of the ambiguities in treaties might be understood as precisely the opposite—as agreements to disagree.⁸ Ambiguities in treaties, and particularly the use of standards instead of rules, also reflect the fact that anticipating all possible contingencies might have been prohibitively costly or even impossible.⁹ Dinwoodie and Dreyfuss's argument can be understood in part as a critique of the interpretive methodology chosen by the dispute settlement bodies in the face of such ambiguity in TRIPS cases.¹⁰ For intellectual property cases, the dispute settlement bodies have chosen a strictly textual interpretive methodology, which has resulted in awkward and strained reasoning that—as the book persuasively argues—is both inconsistent with the text of the agreement and fails to fulfill its goals. A methodology that considers context as well as the object and purpose of the treaty would better achieve the goals of the global intellectual property system that the book articulates at the outset.

The book also points, however, to what is I think an even more fundamental problem with interpretation by adjudicators in TRIPS cases: the challenge of resolving ambiguities in a text that is designed to achieve a complex

variety of goals, many of which are in considerable tension with one another.¹¹ In choosing one interpretation over another—for example, in deciding whether databases are covered by the TRIPS agreement—the “object and purpose” of the TRIPS agreement could point in several different directions at once, as the authors discuss (pp.95-97). In such situations, the WTO’s dispute settlement bodies will inevitably be required to choose between competing visions of “the good.” Even when a broader reading would seem consistent with the purpose of the TRIPS agreement—such as a broader definition of “diagnostic” (p.67) or a more flexible interpretation of the term “limited” (p.62)—panels and the Appellate Body will still be required to determine where precisely to draw the line between monopoly and access. The TRIPS agreement, however, often provides little by way of guidance for navigating hard cases such as these (indeed, as the authors note, where the agreement *does* provide guidance, such as with the mention of “fair use” in Article 17, the panel interpreting this provision in the *EU-GI* case was able to better respect the balance that intellectual property law seeks to achieve (p.69)). The result of the lack of overall guidance has been a retreat into textual methodologies, an approach that is particularly inappropriate in “public law” cases, which require evaluation of the state’s authority to regulate in the public interest.¹² Such cases may require more “purposive” methodologies that allow the decision maker, in construing ambiguities in the treaty, to consider the object of the challenged state regulation and the interests of non-parties affected by that regulation.

Dinwoodie and Dreyfuss’s proposal for an *acquis* is an important step toward developing a common body of values from which adjudicators can draw in reaching interpretive decisions. Of course, at least in the near term, the development of an *acquis* will not necessarily help panels resolve the difficult cases. Because the *acquis*, as proposed by the authors, is restricted to values shared by all WTO members—as must be the case, or risk imposing obligations without consent—it will likely be limited to principles too general to be of much use in hard cases. For example, intellectual property exporting and importing states might agree that access is an important value, but disagree strongly on the precise balance to be struck between monopoly and access in particular cases. That said, an *acquis* might serve—at least for the moment—the more modest goal of reorienting the dispute resolution bodies and WTO members alike on the values underlying the system and on the interests of non-parties affected by their decisions. Recognizing an *acquis* will not help panels decide where precisely to draw lines, but it may encourage them to view access and other public interest values as important countervailing concerns that they can and should consider.

I do think, however, that the authors might have more fully embraced the interpretive role of the WTO dispute settlement bodies. In several places, the authors disavow that the dispute settlement bodies should be engaging in “gap filling” (pp.41, 196), express concern over panels making value judgments (p.101), and condemn the idea of “judicial activism (p.196). Although Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes prohibits the dispute settlement bodies from adding to or varying the rights of the parties, it also charges them with clarifying the existing provisions.¹³ Interpretive authority necessarily involves some measure of law creation, and delegation accompanied by imprecision—such as we see throughout the TRIPS agreement—constitutes a transfer of substantial interpretive authority.¹⁴ Such delegation is not, however, incompatible with state autonomy in setting intellectual property policy. For all the reasons that the authors set forth in the book, the authority delegated to the dispute settlement panels should in many instances be re-delegated or re-allocated to the member states.¹⁵ Their proposals for more deferential standards of review and the use of a margin of appreciation (e.g., pp.56, 90, 102, 107-108) are two possible techniques for achieving this goal.¹⁶ Moreover, the interpretive moves recommended by the authors for protecting local intellectual property innovations might in fact *require* the panels to exercise a certain measure of interpretive authority. A departure from strict textualism—even if only to re-delegate authority to the state—inherently requires some gap filling.

I would also have been interested in even more discussion of the political context in which the dispute settlement bodies operate. It may be that what is constraining the dispute settlement bodies and causing them to be so conservative in their decisions is a function of the political space in which they operate.¹⁷ Perhaps the discourse around TRIPS has been so contested and impassioned that it has led panels to be particularly concerned about their expertise and legitimacy. If this is true, legal arguments alone will not be enough to persuade dispute settlement bodies to be less conservative in their interpretive methodology. Attention to the political context may make it possible to foster a more supportive political environment for neofederalist decision making. For example, in their work comparing the European Court of Justice (ECJ) with the Andean Tribunal of Justice, Professors Helfer and Alter have argued that the ECJ’s more expansionist lawmaking can be attributed to the support of external actors, such as legal advocacy networks, non-governmental organizations (NGOs), national courts, and even government officials.¹⁸ In the TRIPS context, greater

engagement by NGO networks and other constituencies around particular disputes could help support more flexible interpretations of the treaty by panels and the Appellate Body.¹⁹

With this book, Dinwoodie and Dreyfuss have moved the discussion about global intellectual property regulation forward in significant and important ways, providing detailed analysis of new local innovations, focusing attention on the structural features of the TRIPS agreement, and generating new proposals for resolving conflicts of authority and norms both internal and external to the TRIPS regime. It would be a highly valuable read for anyone who works in the field of international intellectual property.

ENDNOTES

¹ The author thanks Harlan Cohen, Cynthia Ho, and Lisa Ramsey for very helpful comments and feedback on this review.

² See Tomer Broude, Fragmentation(s) of International Law: On Normative Integration as Authority Allocation, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* 99, 101-102 (Tomer Broude & Yuval Shany eds., Hart Publishing, 2008) (distinguishing between fragmentation of norms and fragmentation of authority).

³ See Joel P. Trachtman, Fragmentation and Coherence in International Law 4 (Aug. 12, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908862 (distinguishing between horizontal and vertical allocations of authority). Fragmentation of authority is typically thought of primarily as a question of the applicable standard of review or judicial abstention. See, e.g., Steven P. Croley & John H. Jackson, WTO Dispute Panel Deference to National Government Decisions: The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 187 (Ernst-Ulrich Petersmann ed., Kluwer Law International, 1997); William W. Burke-White & Andreas von Staden, Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations, 35 *Yale J. Int'l L.* 283 (2010); Matthew Windsor, A Fine Balance? Delegation, Standards of Review, and Subsidiarity in WTO Dispute Settlement, 14 *Auckland University L. Rev.* 41 (2008); Laurence R. Helfer, Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy, 39 *Harv. Int'l L. J.* 357 (1998).

⁴ Robert Howse and Kalypso Nicolaidis have argued against understanding the WTO as a “federal construct” in a constitutional sense because doing so would raise significant legitimacy concerns. See Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, in *DELIBERATELY DEMOCRATIZING MULTILATERAL ORGANIZATION*, 1-2 (Marco Verweij & Tim Josling eds., 2003) (special issue of *Governance*, vol. 16, no. 1).

⁵ In her recent book on access to medicines, Professor Cynthia Ho considers this debate about in-transit seizures and connects it to competing visions of patent rights as either privilege or property. She observes that while the privilege view would be opposed to such seizures, those who view patents as property rights “may believe so strongly in the sanctity of patent rights that if an invention is granted in one country, a patent should be granted in other jurisdictions as well.” Cynthia M. Ho, *ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS* 290 (Oxford University Press, 2011).

⁶ See, e.g., Henning Grosse Ruse-Kahn, *Investor-State Arbitration to Challenge Host State Compliance with International IP Treaties?*, *International Economic Law and Policy Blog* (Dec. 11, 2012, 11:07 AM) <http://worldtradelaw.typepad.com/ielpblog/2012/12/investor-state-arbitration-to-challenge-host-state-compliance-with-international-ip-treaties.html>; Brook K. Baker, *Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines—Eli Lilly and the TPP 18-22* (PJIP Research Paper Series No. 36, May 2013), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1038&context=research>.

⁷ Joel P. Trachtman & Kamal Saggi, *Incomplete Harmonization Contracts in International Economic Law: Report of the Panel, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, 10 *World Trade Rev.* 63, 82 (2011).

⁸ Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *American J. Int’l L.* 247, 273 (2004); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harvard Int’l L. J.* 333, 351 (1999).

⁹ Trachtman & Saggi, *supra* note 7, at 83.

¹⁰ Although the Vienna Convention on the Law of Treaties, which as part of customary international law is relied on by the WTO adjudicatory bodies, provides a rough priority of approaches (favoring textual and purposive above the drafting history), there is more than enough “wiggle room” for adjudicators to resort to nearly any methodology at any point in time.

¹¹ The creation of adjudicatory bodies exercising public authority but not embedded in a functioning legislature also leads to problems of democratic accountability. See Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 23 *European J. Int’l L.* 7 (2012).

¹² In the investment law context, Professors Burke-White and von Staden have defined public law disputes as those “in which the outcome-determinative issue in the arbitration requires a determination of the state’s power and legal authority to undertake regulation in the public interest.” Burke-White & von Staden, *supra* note 3, at 288. They argue that arbitrators should adopt a more deferential standard of review when the subject matter of the arbitration involves public law elements and the relevant treaty includes language indicating that the states “sought to maintain some freedom of action to regulate in these circumstances.” *Id.* at 293.

¹³ In other areas, it appears that the Appellate Body is in fact engaging in a kind of constitutional lawmaking designed to protect the purpose of the parties’ agreement but which exceeds its ostensible powers under the relevant treaties and customary international law. See Sungjoon Cho, *Global Constitutional Lawmaking*, 31 *University of Pennsylvania J. Int’l L.* 621 (2010) (discussing the Appellate Body’s decision to strike down “zeroing” in the anti-dumping context).

¹⁴ See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *Int’l Organization* 401, 415 (2000) (“Imprecision is not synonymous with state discretion, however, when it occurs within a delegation of authority and therefore grants to an international body wider authority to determine its meaning.”); see also, e.g., Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 *Virginia J. Int’l L.* 103, 111 (2011).

¹⁵ Shaffer & Trachtman, *supra* note 14, at 147-149.

¹⁶ Other re-delegation techniques include the principle of judicial economy, abstention doctrines such as political question or justiciability, interpretive principles such as in *dubio mitius* and *non liquet*, among others. See Steinberg, *supra* note 8, at 272.

¹⁷ See *id.* at 267-274 (discussing the political space of the Appellate Body and concluding that it had largely attended to political signals from the states in trade matters); see generally Tom Ginsburg, Bounded Discretion in International Judicial Lawmaking, 45 *Virginia J. Int'l L.* 631, 656-668 (2005).

¹⁸ These actors “provide [international courts] with constituencies that encourage lawmaking and promote compliance with expansionist rulings.” Karen J. Alter & Laurence R. Helfer, Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice, 64 *Int'l Organization* 563, 587 (2010).

¹⁹ See also Joost Pauwelyn, The Transformation of World Trade, 104 *Michigan L. R.* 1, 8 (2005) (arguing that the World Trade Organization needs law *and* politics to ensure both loyalty and efficiency).

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