LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES
VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS
Vol. 4, No. 1: Feb 24, 2014

ALLEGRA CRAWFORD, ASSISTANT EDITOR
Research Assistant, Victoria University of Wellington School of Law
allegra.crawford@vuw.ac.nz

LAURA LINCOLN, ASSISTANT EDITOR
Research Assistant, Victoria University of Wellington School of Law
laura.lincoln@vuw.ac.nz

JOHN PREBBLE, EDITOR
Professor of Law, Victoria University of Wellington, Adjunct Senior Research Fellow, Monash University, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien
john.prebble@vuw.ac.nz

Browse ALL abstracts for this journal

Links: Subscribe ~ Unsubscribe | Distribution | Network Directors | Submit ~ Revise Your Papers

## Announcements

Special Issue: Global Issues in Trade, Intellectual Property, Culture and Property: Papers by Susy Frankel

In this collection the interpretation of the TRIPS Agreement (the World Trade Organization's intellectual property agreement) is analysed in the context of the debate over plain packaging of tobacco. The article's authors (Susy Frankel and Daniel Gervais) offer an interpretation of TRIPS based on the rules of the Vienna Convention on the Law of Treaties. An earlier article of Susy's which analyses those rules of interpretation is next. Of relevance to many topics, including trademarks and plain packaging, "Defining the Ambit of Regulatory Takings" (Richard Boast and Susy Frankel) discusses the law in New Zealand, including how investment treaties give greater rights than New Zealand property law. That paper and the next are from the New Zealand Law Foundation Regulatory Reform Project. Susy Frankel, Meredith Lewis and research partners from NZIER, Chris Nixon and John Yeabsley, discuss the effect of trade agreements on national regulatory autonomy. The final paper looks at another global intellectual property issue; the protection of traditional knowledge. The article uses the haka, known as Ka Mate Ka Mate, to discuss the protection of traditional knowledge and justifications for its international protection.

## Table of Contents

Plain Packaging and the Interpretation of the TRIPS Agreement

Susy Frankel, Victoria University of Wellington
Daniel J. Gervais, Vanderbilt University - Law School

The WTO's Application of 'the Customary Rules of Interpretation of Public International Law' to

Intellectual Property

Susy Frankel, Victoria University of Wellington

Defining the Ambit of Regulatory Takings

Susy Frankel, Victoria University of Wellington
Richard Boast, Victoria University of Wellington - Faculty of Law

The Web of Trade Agreements and Alliances and Impacts on Regulatory Autonomy

Susy Frankel, Victoria University of Wellington
Meredith Kolsky Lewis, Victoria University of Wellington Law School, SUNY Buffalo Law School
Chris Nixon, New Zealand Institute of Economic Research (Inc) (NZIER)
John Yeabsley, New Zealand Institute of Economic Research (Inc) (NZIER)

'Ka Mate Ka Mate' and the Protection of Traditional Knowledge

Susy Frankel, Victoria University of Wellington
^top

---

## LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER S ERIES
## VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

"Plain Packaging and the Interpretation of the TRIPS Agreement"
Susy Frankel and Daniel J. Gervais "Plain Packaging and the Interpretation of the TRIPS agreement" (2013) 46 VJTL 1149.
Victoria University of Wellington Legal Research Paper No. 1/2014

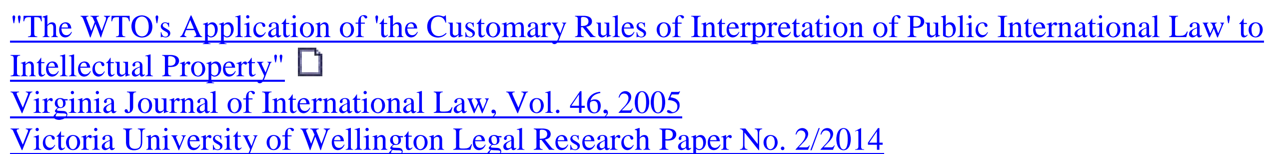
SUSY FRANKEL, Victoria University of Wellington
Email: Susy.Frankel@vuw.ac.nz
DANIEL J. GERVAIS, Vanderbilt University - Law School
Email: daniel.gervais@law.vanderbilt.edu

Plain packaging of cigarettes as a way of reducing tobacco consumption and its related health costs and effects raises a number of international trade law issues. The plain packaging measures adopted in Australia impose strict format requirements on word trademarks (such as Marlboro or Camel) and ban the use of figurative marks (colors, logos, etc.). As a result, questions have been raised as to plain packaging's compatibility with the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

WTO members can validly take measures to protect and promote public health, but in doing so they must comply with the WTO agreements. In order to determine compliance, a proper method to interpret applicable WTO rules is indispensable for the stability and predictability of the world trading system. In this Article, the authors consider the proper interpretation of the TRIPS Agreement as it applies to plain packaging regulations using the Vienna Convention on the Law of Treaties (VCLT). The VCLT has been adopted several times in WTO disputes as a set of interpretive rules. The authors argue that the interpretation of the TRIPS Agreement in the cases

filed in 2012 against Australia by a number of developing countries after Australia's adoption of the plain packaging legislation is likely to impact future cases involving the TRIPS Agreement and specifically the method and approach to be used to interpret it. As such, the cases will likely impact other public health issues (beyond tobacco use) and the interpretation of the TRIPS Agreement in several other contexts.

The two major issues discussed in this Article are (a) Article 20 of the TRIPS Agreement, which prohibits certain unjustified encumbrances on the use of trademarks, and (b) the debate about the nature of trademark owners' rights in the TRIPS Agreement. The latter issue has been referred to as the "right to use" debate — namely, whether trademark owners have a right to use trademarks protected under the TRIPS Agreement. The authors contend that the issue is better seen as a debate over the nature and scope of trademark owners' rights and interests that the TRIPS Agreement seeks to protect. Specifically, the Article argues that the fact that the principal rights of trademark owners under the TRIPS Agreement are rights to exclude others from using their mark (or "negative rights") is not determinative of the issue but rather should inform the interpretation of Article 20 in light of the TRIPS Agreement's object and purpose.


"The WTO's Application of 'the Customary Rules of Interpretation of Public International Law' to Intellectual Property"
Virginia Journal of International Law, Vol. 46, 2005
Victoria University of Wellington Legal Research Paper No. 2/2014

SUSY FRANKEL, Victoria University of Wellington
Email: Susy.Frankel@vuw.ac.nz

The WTO Dispute Settlement Understanding requires that agreements be interpreted in accordance with the customary rules of interpretation of public international law. To this end Panels and the Appellate Body have applied the Vienna Convention on the Law of Treaties, yet they have not fully applied its principles of interpretation to the TRIPS Agreement. Those principles include that the intentions of the parties are revealed through the ordinary meaning of the terms of the treaty, in their context, and in light of its object and purpose. This article assesses the interpretation methods used in connection with the Agreement, and concludes that if the full ambit of those methods, particularly an analysis of the TRIPS Agreement's object and purpose, were utilized in disputes, the intentions of the parties would be more apparent in the reports. The competing objectives of intellectual property protection and the growth of free trade ought to be more readily apparent in the dispute settlement process. The preamble and objectives of the TRIPS Agreement gives neither of those objectives higher status, making TRIPS Agreement interpretation different from GATT. The article additionally analyzes the TRIPS' Agreement interpretative relationship with other intellectual property treaties and free trade agreements.

"Defining the Ambit of Regulatory Takings"
Susy Frankel and Deborah Ryder (eds.) Recalibrating Behaviour: Smarter Regulation in a Global World (2013)
Victoria University of Wellington Legal Research Paper No. 3/2014

SUSY FRANKEL, Victoria University of Wellington
Email: Susy.Frankel@vuw.ac.nz
RICHARD BOAST, Victoria University of Wellington - Faculty of Law
Email: Richard.Boast@vuw.ac.nz

This paper analyses the scope of property rights and the ambit of so-called regulatory takings; that is

if owners' should be compensated, or not, when regulation effects their property. The paper discusses how investment assets are protected as a kind of property through trade and investment agreements and contrasts that with protection of property at domestic law. The paper frames what property rights are protected in New Zealand, why there is not a regulatory takings regime and whether in assessing if there should be a regulatory takings regime whether there should equally be a regulatory givings regime. The paper discusses the property impairment regime that was proposed in the Regulatory Standards Bill 2011 and the later Treasury Option 5 approach that proposes the use of explanatory notes for Parliament to disclose any matter affecting property rights action. The paper discusses where the line should be drawn between what does and what does not amount to a regulatory taking using examples relating to public health, environmental regulation and resource expropriation.

"The Web of Trade Agreements and Alliances and Impacts on Regulatory Autonomy"
Susy Frankel and Deborah Ryder (eds) Recalibrating Behaviour: Smarter Regulation in a Global World (LexisNexis, Wellington, 2013)
Victoria University of Wellington Legal Research Paper No. 4/2014

SUSY FRANKEL, Victoria University of Wellington
Email: Susy.Frankel@vuw.ac.nz
MEREDITH KOLSKY LEWIS, Victoria University of Wellington Law School, SUNY Buffalo Law School
Email: Meredith.Lewis@vuw.ac.nz
CHRIS NIXON, New Zealand Institute of Economic Research (Inc) (NZIER)
Email: chris.nixon@nzier.org.nz
JOHN YEABSLEY, New Zealand Institute of Economic Research (Inc) (NZIER)
Email: john.yeabsley@nzier.org.nz

This book chapter analyses how globalisation has changed and continues to change the nature of trade policy, and consequently affects the ways in which international trade policy interacts with domestic policies to shape the structure of domestic regulation. The chapter compares and contrasts the structure and negotiating methods of different types of trade agreements and alliances and looks at the circumstances where one type of agreement may favour New Zealand over another. The chapter proposes that the multilateral (or many party) agreement is the preferred one because New Zealand has a better chance of coordinating interests with like-minded countries. Conversely, agreements where New Zealand interests either are given no say, or where they are not accommodated because the "top-down" dictated terms are too strong, are not considered the best economic strategy. Agreements which are often, although not always, more of a "bottom-up" integration process tend to work better to improve the overall New Zealand position. Whatever the form of the agreement, the pros and cons need to be carefully considered, particularly where the terms of the agreement may become multilateralised.

The chapter uses patent law and particularly the demands of the United States, in the Trans-Pacific Partnership (TPP) negotiations, to illustrate the potential difficulties of such top-down agreements. The chapter relies on detailed research not only about trade agreements, but also about how New Zealand no longer has patent term extension and why the current demands of patent term extension represent an economic loss for New Zealand. The question discussed is that when there is such a loss, what the gain is. As well as the TPP, the chapter looks at what is known as ASEAN 6 negotiations and the durability of that potential arrangement.

"'Ka Mate Ka Mate' and the Protection of Traditional Knowledge"
Rochelle Dreyfuss and Jane Ginsburg (eds) Intellectual Property at the Edge: The Contested Contours of Intellectual Property (2014, Forthcoming).

Victoria University of Wellington Legal Research Paper No. 5/2014

SUSY FRANKEL, Victoria University of Wellington
Email: Susy.Frankel@vuw.ac.nz

"Ka Mate Ka Mate" is an iconic haka. Haka is performance art, particularly originating from the Māori, the indigenous people of New Zealand. A haka can be ceremonial and it can be a challenge or even a welcome. Ka Mate Ka Mate is the opening line of the ngeri (chant) that is performed as part of the haka. Many New Zealanders refer to Ka Mate Ka Mate as the haka. Its fame has travelled beyond New Zealand. This is most probably because New Zealand's national rugby team has performed it around the world. Use of the haka is not, however, confined to that rugby team. Aspects of it have been used to parody the same rugby team, to sell products around the world, including Fiat cars in Italy. The descendants of the warrior who created Ka Mate Ka Mate have, in a variety of legal fora, sought to gain some rights over its use. Ka Mate is old, it is a work of culture and it carries with it the knowledge of the descendants of the Ngāti Toa people. If it was ever protected by copyright such a right would have long since expired. Trade mark registration has mostly not been successful. Yet, the haka is commercially valuable. The government of New Zealand has acknowledged the importance of the haka to Ngāti Toa and has agreed to pass a law which will require attribution of the haka, in certain circumstances including commercial uses, to Ngāti Toa and Te Rauparaha. This chapter discusses the boundaries of the protection of traditional knowledge using the story of the haka.
^top

---

## About this eJournal

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to

twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

### Submissions

To submit your research to SSRN, sign in to the SSRN User HeadQuarters, click the My Papers link on left menu and then the Start New Submission button at top of page.

### Distribution Services

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: RPS@SSRN.com

### Distributed by

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

### Directors

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK
Northwestern University - School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: bblack@northwestern.edu

RONALD J. GILSON
Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)
Email: rgilson@leland.stanford.edu

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

^top

**Links:** Subscribe to Journal | Unsubscribe from Journal | Join Site Subscription | Financial Hardship

### Subscription Management

You can change your journal subscriptions by logging into SSRN User HQ. If you have questions or problems with this process, please email Support@SSRN.com or call 877-SSRNHelp (877.777.6435 or 585.442.8170). Outside of the United States, call 00+1+585+4428170.

### Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site

subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

- Accounting Research Network
- Cognitive Science Network
- Corporate Governance Network
- Economics Research Network
- Entrepreneurship Research & Policy Network
- Financial Economics Network
- Health Economics Network
- Information Systems & eBusiness Network
- Legal Scholarship Network
- Management Research Network
- Political Science Network
- Social Insurance Research Network
- Classics Research Network
- English & American Literature Research Network
- Philosophy Research Network

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact site@ssrn.com for more information.

## Individual Membership (for those not covered by a site subscription)

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User HeadQuarters: **http://www.ssrn.com/subscribe**

## Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to **Subscribe@SSRN.com**
^top

---

To ensure delivery of this eJournal, please add **LSN@publish.ssrn.com (Legal Scholarship Network)** to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email Support@ssrn.com or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

## FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of Social Science Electronic Publishing, Inc. For information about individual subscriptions and site subscriptions, please contact us at Site@SSRN.com
^top

Copyright © 2014 Social Science Electronic Publishing, Inc. All Rights Reserved