

VIII. Other influences on the object and purpose of the TRIPS Agreement

The WTO Agreement preamble gave the WTO negotiating parties the opportunity to update the GATT preamble. The parties no longer desired the ‘full’ use of the world’s resources but rather an ‘optimal’ use that did not ignore the importance of sustainable development, the environment and the differential needs and concerns of the Member States. The importance of these factors was confirmed in the WTO *US – Shrimps* dispute where the Appellate Body held that the intentions of the negotiating parties, encapsulated in the WTO Agreement preamble, ‘must add colour, texture and shading to [the] interpretation of the agreements annexed to the WTO Agreement’, of which the TRIPS Agreement is one.²¹² One of the objectives identified as having a trickle-down effect on the other WTO Agreements was that of sustainable development.²¹³ The emphasis put on this objective is likely to further enhance and secure measures taken by developing Member States that have the aim of securing the advancement of their societies and economies.

The influence of agreements or treaties made subsequent to the adoption of the WTO Agreements is subject to debate. One view holds that the intention of the parties at the time of the agreement is conclusive for interpreting that agreement. Any change in the intention of the parties will need to be formally recorded in the form of an authoritative interpretation or an amendment in order for it to have any effect. A second point of view states that certain terms in an agreement are, by virtue of their nature, ‘evolutionary’. An evolutionary term will reflect important legal, political and social developments. Whereas this may not be applicable to all terms, certain terms such as public interest, social and economic welfare, *ordre public*, morality, national emergency and extreme urgency lend themselves to an interpretation that reflects evolving circumstances. The latter approach has been adopted by the DSU.²¹⁴ In the WTO *Japan – Alcoholic Beverages II* case the Appellate Body announced that:

‘WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world’²¹⁵

To determine the evolving meanings interpreters must concentrate on ‘modern international conventions and declarations’.²¹⁶ Although the Appellate Body in the WTO *US – Shrimps* case referred principally to UN conventions and decisions to assist the objectives and principles of the treaty, it would be faithful to the decision’s principle to include other multilateral decisions into the basket of worthy agree-

212 WTO United States –Shrimps p. 58.

213 WTO United States –Shrimps p. 58.

214 WTO *Canada – Pharmaceuticals* p. 150, WTO *Japan – Alcoholic Beverages II* p. 34, WTO *United States –Shrimps* p. 48, UNCTAD/ICTSD, Resource Book on TRIPS and Development (CUP New York 2005) p. 700-701.

215 WTO *Japan – Alcoholic Beverages II* p. 34.

216 WTO United States –Shrimps p. 48-49.

ments. The rational behind the reference to multilateral agreements is that if all WTO Member States agreed to a certain text in another forum, it would be fitting to import that text or meaning into the WTO arena, should the circumstances apply. The acceptance of the evolutionary interpretation by the DSB decisions will assist developing Member States in structuring their intellectual property regime in a manner that favours development and health. The UN Millennium Declaration is an example of the UN's focus on development and health.²¹⁷ In respect of measures taken to protect health, the WHO resolutions will provide guidance as to their necessity, nexus and the legal weight afforded to them, especially in weighing up the interests of the rights holders and the public.²¹⁸

It goes without saying that the WTO internal decisions and declarations will have a more immediate effect on the interpretation of the WTO Agreements. Of all the agreements reached on intellectual property rights by the Member States, the Public Health Declaration and the subsequent decisions are likely to have the most significant influence on the understanding and implementation of the TRIPS Agreement. The consequences of these agreements are discussed Chapters 6, 7 and 8 below.

C. The material provisions of the TRIPS Agreement

I. The subject matter of patents

An invention that is new, involves an inventive step and has industrial application must be capable of being patented in all Member States.²¹⁹ The obligation imposed on Member States is clear: any invention, regardless in what field of technology it exists and whether it is a product or process invention, must be eligible for patent protection in each and every Member State.²²⁰ Despite the obligations imposed by Article 27.1 having 'universal' application, they are not absolute. Member States are empowered to safeguard their interests by enabling them to exclude certain inventions, 'the prevention within their territory of commercial exploitation of which is necessary to protect *ordre public* or morality'.²²¹ The terminology used in Article 27 and their role in balancing the interests of the parties concerned have left ample room for Member States to structure their implementation according to their own

²¹⁷ UNGA Res S-62/2 'Declaration of Commitment on HIV/AIDS' (02.08.2001) UN Doc A/RES/S-26/2, UNCHR 'Economic, Social and Cultural Rights Report of the Special Rapporteur P Hunt' (01.03.2004) UN Doc E/CN.4/2004/49/Add.1 p. 5.

²¹⁸ WHO World Health Assembly Resolution 'Global Health-sector Strategy for HIV/AIDS' (28.05.2003) WHA56.30.

²¹⁹ TRIPS Agreement Art 27.1. Part VI of the TRIPS Agreement includes transitional measures that postpone the implementation this obligation.

²²⁰ Subject to the requirements of novelty, inventiveness and usefulness and the exceptions set out in Art 27.2 and 27.3 of the TRIPS Agreement. Developing Member States could further limit the patentability in terms of Art 65.4 and 70.8 of the TRIPS Agreement.

²²¹ TRIPS Agreement Art 27.2.