

Chapter 4 The circumstances leading up to the Public Health Declaration

A. Introduction

On the 14th of November 2001 the WTO Ministerial Conference adopted the Public Health Declaration. Contrary to the public perception, this decision was neither the beginning nor the end of a long period of political and legal uncertainty as to the meaning and role of the TRIPS Agreement.

The Public Health Declaration marked a convergence of a number of political, social and legal conflicts. These clashes of interest insured a high degree of public awareness in the negotiations prior to the Public Health Declaration and those thereafter. The Member States, split along the so-called ‘north-south divide’,⁵⁷ discussed and argued over the scope and extent of intellectual property rights and the role of socio-economic interests such as the right to health as well as the understanding, interpretation and implementation of the TRIPS Agreement. The diverging positions taken by the Member States, in particular the developing countries’ contention that the TRIPS Agreement was inadequate to deal with health issues, were more inspired by political uncertainty than legal necessity.⁵⁸ Despite the lack of legal merit, the issues contained and dealt with in the Public Health Declaration succeeded by virtue of its political importance. This apparent paradox represents the development of the diplomacy-based GATT system into the rules-based WTO system and the lack of faith that the rules will transcend diplomatic pressures.

If the Public Health Declaration was not legally necessary, why was there such intense political momentum to find an agreement? The answer lies in the inter-governmental relations, the domestic pressures being experienced and the Member States perceptions of the scope and nature of the TRIPS Agreement. It was upon these foundations that the Public Health Declaration was shaped.

⁵⁷ A term used to distinguish the developed countries (the ‘north’) from the developing countries (the ‘south’).

⁵⁸ With the exception of para 6 of the Public Health Declaration.

B. The events preceding the Public Health Declaration

I. The GATT system and the Uruguay Round

Towards the end of World War II the coalition parties commenced negotiations on a new world order with economic growth, stable currencies and trade liberalisation as its three pillars. The system they negotiated, known as the Bretton Woods Agreements, sought to realise these goals through the creation of three international institutions. The first two, International Monetary Fund and the International Bank for Reconstruction and Development (now part of the World Bank), were created to manage and finance the system. The third pillar, the International Trade Organisation ('ITO'), would serve to bring about trade liberalisation.⁵⁹ Domestic opposition within the US prevented the completion of the treaty process creating the ITO.⁶⁰ Although the parties were unable to formalise the ITO, they were able to salvage one treaty – the General Agreement on Tariffs and Trade (the 'GATT Agreement'). Making the most of the situation, the 23 signatory parties adopted the GATT Agreement in 1948. To ensure its development the GATT Agreement provided for the implementation of its provisions, the accession of new members and implemented a system of negotiating rounds to expand the scope of the agreement.

As the name indicates, the GATT Agreement governs the use of tariffs and similar trade measures to ensure that GATT Member States are not unreasonably affected by arbitrary or unreasonable measures taken by other Member States. The GATT Agreement recognised that certain circumstances would justify the non-compliance with these rules. To this effect the parties adopted Article XX of the GATT Agreement which allows Member States to ignore the application of the GATT provisions when, *inter alia*, they are 'necessary to protect human, animal or plant life and health'.⁶¹ The exclusions contained in Article XX are extensive; despite this GATT Member States invoking its use have had little success under the GATT Panels.⁶² Beyond tariff measures to protect the public health in accordance with Article XX(b) of the GATT Agreement, the role of health, and intellectual property rights for that matter, played little or no role.⁶³

59 Parry *et al*, Encyclopaedic Dictionary of International Law (Oceana New York 1986) p. 188.

60 Matsushita *et al*, The World Trade Organization: Law, Practice, and Policy (2nd edn OUP Oxford 2006) p. 1-2.

61 GATT Agreement Art XX(b).

62 For example GATT Japan – Custom Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages – Report of the Panel (10.11.1987) L/6216 – 34S/83, GATT Thailand – Restrictions on the Importation of and Internal Taxes on Cigarettes – Report of the Panel (07.11.1990) DS10/R – 37S/200, GATT Tuna/Dolphins I – Report of the Panel 39S/155 and its successor GATT Tuna/Dolphins II – Report of the Panel.

63 With the exception of Art XX(d) of the GATT Agreement and the only two GATT disputes concerned with intellectual property protection GATT *United States – Imports of certain automobile spring assemblies* Report of the Panel (26.05.1983) L/5333 30S/107, GATT *United States – Section 337 of the Tariff Act of 1930* Report of the Panel (07.11.1989) L/6439