

this view is a minority view amongst academics.<sup>633</sup> The diverging views, not only amongst academics but also amongst the WTO Member States themselves, created a large degree of uncertainty in how to implement a TRIPS-compliant exhaustion regime.<sup>634</sup>

Despite the differing opinions on what Article 6 permits, it is clear that the inability of the TRIPS negotiators to reach a common understanding on the matter means that the issue is, at least *prima facie*, up to the Member States to decide upon.<sup>635</sup> This ‘agreement to disagree’ in Article 6 of the TRIPS Agreement guarantees Member States the freedom to construct an exhaustion regime that would best suit the domestic circumstances.<sup>636</sup> The sheer magnitude of diverging exhaustion regimes, even amongst developed Member States, and the inconsistencies in their national application<sup>637</sup> would render any attempt to implement a common system futile and inappropriate. The ability to tailor each Member States exhaustion system permits Member States to optimise their intellectual property rights system to better reflect public interest policies.<sup>638</sup> The benefits of an international system of exhaustion grant Member States more flexibility to source products beyond its borders, thus providing a competition stimulus.<sup>639</sup> It would also enable a government the possibility to suspend the exhaustion regime when there is either a transfer of technology, improved access to the product or to encourage the local production of the product.

#### D. Conclusion

The TRIPS Agreement is a remarkable treaty. Never before have so many countries been able to reach an agreement that went to the core of intellectual property rights. The price for this global consensus is the treaty itself. Despite having the effect of reaching deep into the national legislative domain it lacks the clarity and precision a national statute would require. This lack of precision – both intentional and unintentional – has been the source of much disagreement in the WTO arena. Yet without the intentional ambiguity, termed ‘flexibility, no agreement could have been

633 *Straus and Katzenberger*, Parallelimporte: Rechtsgrundlagen zur Erschöpfung im Patentrecht (Schweizerische Eidgenossenschaft Munich 2002) p. 41.

634 The dispute surrounding the South African compulsory license for the importation of certain medication is effectively a question relating to international exhaustion. See Chapter 4(B)(II) above.

635 *Gervais*, The TRIPS Agreement: Drafting History and Analysis (2nd edn Sweet and Maxwell London 2005) p. 114.

636 *Chiapetta*, 21 Mich.J.Int'l.L 3 (2000) p. 339, 346.

637 *Straus and Katzenberger*, Parallelimporte: Rechtsgrundlagen zur Erschöpfung im Patentrecht (Schweizerische Eidgenossenschaft Munich 2002) p. 10-35, *Chiapetta*, 21 Mich.J.Int'l.L 3 (2000) p. 347-348.

638 For a discussion of the factors that are relevant in deciding which system is most appropriate *Chiapetta*, 21 Mich.J.Int'l.L 3 (2000) p. 333-392.

639 *Carboni*, A Review of International Exhaustion Development in Europe in: Hansen (ed) International Intellectual Property Law & Policy (Juris Huntington 2001) vol 6.

reached. The haggling over how much flexibility or wiggle room the TRIPS Agreement provisions afford is the price the Member States will pay for this accord. How it will be paid and how the TRIPS Agreement will evolve is a matter of practice, pressure and time. The basis for this however, is legal jurisprudence.

The most contentious of the wiggle areas was that of patent rights, in particular their impact on domestic health policies. The Public Health Declaration reflects the culmination of these disputes.