

Chapter 1 Introduction

One of the three pillars of the World Trade Organisation ('WTO') is the Agreement on trade-related aspects of intellectual property rights.¹ The agreement, known as the TRIPS Agreement, requires its Member States to enact a system of intellectual property rights that has no comparison in the international arena. What sets the TRIPS Agreement apart from other international intellectual property rights treaties is its comprehensiveness. Not only does it dictate a minimum level of intellectual property protection from all WTO Member States but it also creates a judicial body to adjudicate and sanction those states abiding by its rules.² The combination of a minimum standard of intellectual property protection and a compliance body has made the TRIPS Agreement a formidable tool for the globalisation of intellectual property rights.

Parallel to the expansion of global intellectual property standards has been the spread of the HIV/AIDS virus. The toll this and other epidemics have taken has become a cause for national and international concern. Those countries worst affected by these epidemics, mostly developing countries, lacked the financial resources to provide meaningful treatment or adequate access to the necessary pharmaceuticals. Rightly or wrongly, the affected countries and non-governmental organisations identified patent protection as a barrier to providing access to the needed medicines. The WTO Member States reacted to the conflict of 'patent rights vs. patient rights' with the adoption of the Declaration on the TRIPS Agreement and Public Health (the 'Public Health Declaration').³ By adopting the Public Health Declaration the WTO Member States presupposed three things: Firstly, that the TRIPS Agreement lacked the legal ability to address those policy thoughts contained in the Public Health Declaration; secondly, that the contents of the Public Health Declaration would rectify the problem, or at least point the direction to a resolution; and lastly that a solution would rectify the alleged weaknesses in the TRIPS Agreement.

These presuppositions arise principally out of the lack of a shared understanding of the scope and application of the TRIPS Agreement. It is only within the context of a legal evaluation of the TRIPS Agreement that the policy thoughts of the Public Health Declaration can be evaluated. Hence, it is the intention and purpose of this

1 Agreement on the Trade-Related Aspects of Intellectual Property Rights Annex 1C to the Agreement Establishing the World Trade Organisation. Cf. *Straus*, TRIPS, TRIPS-plus oder TRIPS-minus – Zur Zukunft des internationalen Schutzes des Geistigen Eigentums in: *Ohly et al* (eds) Perspektiven des Geistigen Eigentums und Wettbewerbsrechts (CH Beck Munich 2005) p. 197.

2 The TRIPS Agreement does however provide for the transitional implementation of the agreement in favour of developing and least-developed Member States.

3 Declaration on the TRIPS Agreement and Public Health, 14.11.2001, WT/MIN(01)/DEC/2 (Annex I hereto).

dissertation to conduct a legal appraisal of the scope and application of the TRIPS Agreement and the Public Health Declaration. In doing so this dissertation elucidates what measures are legally tenable under the TRIPS Agreement thus enabling an accurate appraisal of the necessity and applicability of the Public Health Declaration and, ultimately, the correctness of the criticisms levelled at the TRIPS Agreement.

In order to bring light into the TRIPS Agreement, this dissertation analyses the TRIPS Agreement from a neutral, pre-Public Health Declaration situation. Thereafter, the scope and effect of the Public Health Declaration is extensively addressed. Thereafter this dissertation then examines the international and domestic consequences that flowed from the Public Health Declaration.

The legal examination of the TRIPS Agreement alone would be incomplete without putting the exercise into a social and political context. This is done immediately below. Firstly, the relationship between patents and society is addressed and, secondly, the political events preceding the Public Health Declaration is described.