

given to LDCs with respect to pharmaceutical products. The Public Health Declaration instructed the TRIPS Council to give effect to this concession.

### B. *The legal status of the Public Health Declaration*

The Public Health Declaration, like the Doha Ministerial Declaration,<sup>657</sup> was adopted by the WTO Member States at the Doha Ministerial Conference in November 2001.<sup>658</sup> Although separate documents, both Declarations were adopted by a consensus decision of the Ministerial Conference – the core decision making body at the WTO.<sup>659</sup>

The Public Health Declaration was hailed as a political success at the Doha Ministerial Conference. However, before the dust could settle, questions arose concerning the precise effect of the Public Health Declaration.<sup>660</sup> In the years that followed much was written and said about the legal status of the Public Health Declaration – much of it sought to ignore the public law realities of the document and grant it an extraordinary legal status.<sup>661</sup> Viewed from a legal standpoint, the Public Health Declaration will only constitute an original source of WTO law if it was granted such.<sup>662</sup> As the WTO does not accord ministerial declarations any specific legal status<sup>663</sup> it must be determined whether the consensus achieved at Doha has fulfilled any other requirements that afford binding consequences. Under the WTO Agreement and international treaty law the Ministerial Conference is empowered to make decisions

657 WTO Ministerial Declaration (20.11.2001) WT/MIN(01)/DEC/1 ('Doha Ministerial Declaration').

658 A similar course was used in both the Singapore and Geneva Ministerial Conferences. Cf. WTO Ministerial Declaration on Trade in Information Technology Products (13.12.1996) WT/MIN(96)/16, WTO Ministerial Declaration on Global Electronic Commerce (25.05.1998) WT/MIN(98)/DEC/2.

659 WTO Agreement Art IV, IX.

660 *Davey*, Institutional Framework in Macrory, Appleton and Plummer (eds) *The World Trade Organisation: Legal, Economic and Political Analysis* (Springer New York 2005) vol 1 p. 63, *Hestermeyer*, 37 GRURInt 3 (2004) p. 196. The EC and US view on the binding nature of the separate declaration was at times diametrically opposed. The then USTR Zoellick referred to the Public Health Declaration a 'landmark *political* declaration on the TRIPS Agreement and public health' (emphasis added). The EC on the other hand were initially unwilling to conclude a separate declaration on the grounds that an independent declaration might be assumed to have more weight than the principal Ministerial Declaration. Cf. EC in TRIPS Council Minutes (19.09.2001) IP/C/M/33 p. 58.

661 The political consequences of the Public Health Declaration are not doubt as important as the legal consequences. A political evaluation of the Public Health Declaration is however beyond the scope of this dissertation.

662 *Gregg Bloche*, 5 JIEL 4 (2002) p. 842, *Matsushita et al*, *The World Trade Organization: Law, Practice, and Policy* (2nd edn OUP Oxford 2006) p. 37.

663 *Correa*, *Implications of the Doha Declaration in the TRIPS Agreement and Public Health* (WHO Geneva 2002) p. 44.

that, depending on their nature, can either constitute an amendment,<sup>664</sup> a waiver,<sup>665</sup> an authoritative interpretation<sup>666</sup> and/or a new treaty.<sup>667</sup> There is no history that a ministerial declaration has, *ipso facto*, sought to amend,<sup>668</sup> waive or interpret a WTO provision. As the Public Health Declaration does not contain any express terminology indicating otherwise, there is no evidence that the Public Health Declaration intended to generate specific or direct rights or obligations.<sup>669</sup> However certain 'legal' consequences will flow from the Public Health Declaration. The *pacta sunt servanda* rule binds parties in good faith to the performance of the agreement they have concluded.<sup>670</sup> The Public Health Declaration is littered with terminology that reflects the agreement of the parties to the contents thereof.<sup>671</sup> This mass of consensus regarding the contents of the TRIPS Agreement can therefore not go unnoticed. However as the Public Health Declaration does not follow the formal route for the adoption of an authoritative interpretation, it must be concluded that it was not the parties' intention to afford the agreement a formal interpretation.<sup>672</sup> Instead the Public Health Declaration will lend assistance to the interpretation of the TRIPS Agreement by the DSB and the Member States.<sup>673</sup> To this effect, Article 31(3)(a) of the Vienna Convention confirms that in interpreting treaties the subsequent agreements between the parties will be taken into account together as if it were part of the context of the original agreement.<sup>674</sup> This, according to *Abbott*, amounts to 'a very close approxi-

664 WTO Agreement Art X.

665 WTO Agreement Arts IX(3 and 4).

666 WTO Agreement Art IX(2).

667 Vienna Convention Art 9.

668 *Gregg Bloche*, 5 JIEL 4 (2002) p. 841.

669 *Van den Bossche*, *The Law and Policy of the World Trade Organisation* (CUP Cambridge 2005) p. 54, 123. The Public Health Declaration will unlikely meet the requirements for a new treaty as the parties' intention to create a new and separate treaty is lacking. By referring to the Public Health Declaration as a 'declaration' within the WTO context it is clear that the parties desired to limit themselves within the structure of the WTO and not create new obligations. Contrast *Hermann*, 13 EuZW 2 (2002) p. 42.

670 Vienna Convention Arts 5, 26, 31(3)(a). WTO *United States – Section 211* (panel ruling) p. 85.

671 The Public Health Declaration is littered with the formulations 'we agree' and 'we recognise'. *Hestermeyer*, 37 GRURInt 3 (2004) p. 197, *UNCTAD/ICTSD*, *Resource Book on TRIPS and Development* (CUP New York 2005) p. 131.

672 *Ehlermann and Ehring*, 8 JIEL 4 (2005) p. 817. Contrast *Hestermeyer*, 37 GRURInt 3 (2004) p. 197, *Kramer*, *Patentschutz und Zugang zu Medikamenten* (Carl Heymanns Verlag Cologne 2007) p. 69-70.

673 The Public Health Declaration confirms as much; Art 4 of the Public Health Declaration states that the TRIPS Agreement 'can and should be *interpreted and implemented* in a manner supportive of WTO Members' right to protect public health' (emphasis added).

674 This element is of particular importance as the Public Health Declaration seeks to clarify provisions that are in their current formulation flexible and thus subject to more than one interpretation. Further, there is also some merit to the Public Health Declaration being considered a 'subsequent practice' in terms of Art 31(3)(b) of the Vienna Convention. Cf. *Gregg Bloche*, 5 JIEL 4 (2002) p. 841. The fact that the Public Health Declaration was an agreement and not a practice tends to indicate that there is more merit to the 'subsequent agreement' view.

mation of an interpretation and, from a functional standpoint, may be indistinguishable'.<sup>675</sup>

### C. *The effect of the Public Health Declaration on the TRIPS Agreement*

Being a 'subsequent agreement' the Public Health Declaration has the potential to shape the TRIPS Agreement like no other WTO Declaration or collective Member State agreement before it. The extent of this interpretational assistance will depend not only on the contents of the Public Health Declaration but also on the respective TRIPS Agreement provisions. The effects of the Public Health Declaration on the TRIPS Agreement are discussed in respect to the TRIPS scope and purpose, the TRIPS material obligation and the transitional period granted to LDCs.

#### I. The scope and purpose

According to the Vienna Convention on the Law of Treaties, the object and purpose help determine the ordinary meaning of the terms of the treaty.<sup>676</sup> In other words, clarity is brought to uncertain clauses and concepts through the use of the treaties object and purpose. As is evident in Chapter 5(B) Seite 47, the scope and purpose of the TRIPS Agreement play an important role in fleshing out the meaning of the numerous flexible provisions of the TRIPS Agreement. The difficulty with the scope and purpose of the TRIPS Agreement is that the provisions incorporating the scope and purpose are themselves flexible and permit a number of diverging, and yet arguably valid, conclusions to be drawn when interpreting the Agreement.<sup>677</sup>

As was intended the Public Health Declaration, as a subsequent agreement to the TRIPS Agreement, will have a vital role to play in clarifying and guiding the use of those provisions containing the scope and purpose of the TRIPS Agreement. The extent of this influence stems from the sometimes express references to the customary rules of interpretation of treaties, the reinforcement of the role of health and, last but not least, the confirmation of the provisions of Articles 7 and 8 of the TRIPS Agreement. These, and their effect on the implementation of the policy thoughts of the Public Health Declaration, are discussed independently below.

675 *Abbott*, 5 JIEL 2 (2002) p. 492. *Correa*, Implications of the Doha Declaration in the TRIPS Agreement and Public Health (WHO Geneva 2002) p. 44. *Straus* notes that part of the Public Health Declaration is to be viewed as an authentic interpretation and other parts as setting mandates for the Member States. Cf. *Straus*, Patentschutz durch TRIPS-Abkommen – Ausnahmeregelungen und –praktiken und ihre Bedeutung, insbesondere hinsichtlich pharmazeutische Produkte in Bitburger Gespräche Jahrbuch 2003 (CH Beck Munich 2003) p. 126.

676 Vienna Convention Art 31.

677 Compare WTO Submission by Brazil and others to the TRIPS Council 'TRIPS and Public Health' (29.6.2001) IP/C/W/296 p. 3.