tiated.[199] The application of the object and purpose provisions were seen as being of 'essential importance' for the interpretation of the TRIPS Agreement but did not permit a Member State to downgrade the intellectual property protection required by the TRIPS Agreement.[200]

VII. The role of health in the object and purpose of the TRIPS Agreement

Health, nutrition and other public interest factors were factors used to influence and exercise national intellectual property regimes prior to the TRIPS Agreement. The role of public interest in the patent system was also internationally recognised[201] and even an element recommended by the WIPO.[202] With the adoption of the TRIPS Agreement, public interest evolved into a more tangible factor in the evaluation and implementation of intellectual property rights. Of the various public interest issues referred to in the TRIPS Agreement, health and the protection thereof assumes a particularly prominent role. Article 8 expressly states that 'Members may … adopt measures necessary to protect public health'. This statement does not however permit Member States to use health issues as a ground for breaching the remaining provisions within the TRIPS Agreement. In terms of the proviso in Article 8, any measures taken to protect the public health must also be consistent with the TRIPS Agreement. The consequence is that health measures cannot override the obligations that Member States bound themselves to in the TRIPS Agreement. This consequence gives the impression that intellectual property protection is more important than health measures; that patent rights are more important than the protection of the public's wellbeing. This impression is no more than that, an impression. Legally, the Member States bound themselves to abide by the rules set out in the TRIPS Agreement. The *pacta sunt servanda* notion obliges Member States to abide by the rules

199 Switzerland in the WTO Special Discussion on Intellectual Property and Access to Medicines in the TRIPS Council (10.07.2001) IP/C/M/31 p. 44-45. In the same document Pakistan referred to the so-called carefully negotiated balance as 'rhetoric, especially when the existing flexibilities in the relevant provision hardly do much to provide space to manoeuvre due to the fact that either the relevant provisions have been drafted in a manner which takes away the possible flexibility or these countries lack at the moment in technical expertise and also entrepreneurial skills to undertake production of generic drugs'. See in this regard Pakistan at p. 74. See also Communication by Canada in the Minutes of the TRIPS Council (02.11.2001) IP/C/M/33 p. 40 and the EU position in WTO *Canada – Pharmaceuticals* p. 154.

200 EC in the WTO Special Discussion on Intellectual Property and Access to Medicines in the TRIPS Council (10.07.2001) IP/C/M/31 p. 7-8, EC and US in the TRIPS Council Minutes (19.09.2001) IP/C/M/33 p. 35, 37 respectively.

201 GATT Note from WIPO 'Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms or the Protection of Intellectual Property' (15.06.1988) MTN.GNG/NG11/W/24/Rev.1 9.

202 GATT Note from WIPO 'Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms or the Protection of Intellectual Property' (15.06.1988) MTN.GNG/NG11/W/24/Rev.1 9.

they accepted. Unlike the GATT and GATS Agreements, there is no general exception in the TRIPS Agreement whereby Member States may avoid compliance with an obligation on the grounds of health concerns. This may additionally give the impression that health issues must yield to intellectual property rights. Unlike the GATT and GATS Agreements, the TRIPS Agreement approaches the role of health in an indirect manner. The operative provisions of the TRIPS Agreement permit, as stated already, significant flexible interpretations. The interpretation and implementation of these provisions can and should be done in a manner 'conducive to social … welfare'.[203] This is supported by the contents of Article 8 that expressly permit the implementation of public health measures in a manner that may influence and 'bend' the TRIPS obligations, provided they do not breach the obligations. Article 8 expressly confirms that each Member State is entitled to legislate and administer measures that protect its citizens' interests. Although the discretion is limited to the exceptions, exemptions and flexibilities contained in the TRIPS Agreement, no constraints are made on the kinds and the subject matter of the measures that may be taken. As the flexibilities permit wide-ranging interpretations, health measures can be widely used to influence the scope and extent of an obligation. Thus, health measures, as referred to in the object and principle provisions of the TRIPS Agreement, can influence and redirect specific intellectual property provisions.

The role of health in the interpretation of the TRIPS Agreement is further strengthened by the very nature of the WTO Agreements. The principle of deference, a system whereby international rules defer to a Member States' policies – which is a common thread through the WTO Agreements – confers a unique role upon the protection of health within the scope of the implementation of WTO obligations.[204] The principle, a product of the scope and purpose of the WTO Agreements and its political influences, establishes the protection of health as an interpretive principle that allows Member States leeway to vary their structuring of resources, risk, and the balance between health issues and other policy issues in a manner that best suits the national circumstances.[205] In other words, the protection of health encourages and justifies more extensive use of the flexibilities found within the TRIPS obligations. Although the health prerogative has been applied nationally to shape the domestic legal arena, its role within international fora has been uncertain. It has been convincingly submitted that the protection of health can play a similar role in the international fora when interpreting the extent of the legal obligations Member States are bound to and the degree to which they can be interpreted.[206]

A Member State is thus entitled to interpret a flexibility found in a TRIPS obligation in a manner that favours the public health. As the interpretation of a TRIPS obligation requires a balancing of interests, the protection of health, especially in times of wide-spread ill health, will often be seen as a more important interest than the

203 TRIPS Agreement Art 7.
204 *Gregg Bloche*, 5 JIEL 4 (2002) p. 843.
205 *Gregg Bloche*, 5 JIEL 4 (2002) p. 846.
206 *Gregg Bloche*, 5 JIEL 4 (2002) p. 847.

protection of the patent holder's rights. The role that health plays in the objective and principles of the TRIPS Agreement is mirrored in the sovereign and inalienable duty a state has to ensure the well-being of its citizens and take the necessary steps to achieve better welfare. In doing so a state is entitled, as it has always been, to subordinate private rights to compelling public interests. Article 8 merely confirms this obligation and right and channels the methods of doing so into a formal process under the auspices of the WTO.

Despite an attempt to define the term 'public health', the TRIPS Agreement is silent on the scope or meaning of the term.[207] As such, no reason exists for Member States to interpret the term restrictively. The DSU has accepted that the protection of society's wellbeing can be a valid exception to the requirements of the WTO Agreements; examples include the Appellate Body's acceptance of psychological health and the protection against ill-health as valid exception grounds.[208] However the interpretations given must nevertheless comply with the good faith interpretation of the TRIPS Agreement. As the health measures remain a national prerogative they will only fall foul of the DSU if they defeat the objectives and principles of the TRIPS Agreement.[209] Moreover, once a Member State has found a health measure to be *prima facie* necessary it should be presumed to be consistent with the TRIPS Agreement.[210] Any Member States challenging this would thus be required to prove its inconsistency.

The use of health issues to influence the interpretation of the TRIPS Agreement is thus a valid and potentially invaluable to Member States seeking to balance what negative effects the intellectual property system or the use thereof may bring to certain countries. The DSU has accepted that once adopted, they will only be determined to be false or inappropriate where they are proved to be neither necessary nor reasonable in light of other alternative measures.[211]

207 During the TRIPS negotiations Japan sought to define 'public health' as being 'critical peril to life of the general public or body thereof'. GATT Note from Secretariat 'Meeting of Negotiating Group' (22.06.1990) MN.GNG/NG11/21 p. 24.

208 The DSU has not had the opportunity to rule on the scope of public health measures within the TRIPS Agreement. Notwithstanding this there appears to be no reason why such should not, in the right circumstances, apply to measures taken under the TRIPS Agreement. A similar treatment of the concept of public health within the scope of the TRIPS Agreement would indeed be consistent with the Article 31(1) of the Vienna Convention where it requires that, *inter alia*, in interpreting a treaty due weight must be attached to the context of the treaty; as the WTO Agreements form one undertaking, the DSU would only be required to apply public health concerns similarly, provided the provisions themselves do not require otherwise.

209 WTO *United States – Section* 211 (panel ruling) p. 85.

210 UNCTAD/ICTSD, Resource Book on TRIPS and Development (CUP New York 2005) p. 127. Compare WTO US – Gambling (Appellate Body ruling) p. 103.

211 Compare WTO *US – Gambling* (Appellate Body ruling) p. 102-103, WTO *EC – Asbestos* p. 63.

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.