

much of the necessary tools required to treat public health problems.⁷⁷⁶ Supporting an expansive interpretation of pharmaceutical sector is the notion that chemical compounds, *per se*, would also be excluded from the definition of a pharmaceutical. An exclusion of chemicals would perpetuate the problem identified in paragraph 6 and would not bring about a real solution.

V. Effective use of the compulsory license system

Paragraph 6 of the Public Health Declaration identified the scope of the problem as being the ‘difficulties in making effective use of the compulsory licensing under the TRIPS Agreement’. The inability to make use of a compulsory license system because of absent or inadequate pharmaceutical production capacities meant that the affected Member States were unable to make ‘effective’ use of the TRIPS Agreement. By making express mention of the effective use of compulsory licenses the Member States directed the solution to the use of compulsory licenses. This formulation did away with certain pre-Doha suggestions that the insufficient production capacities could be resolved, as Canada suggested, through ‘other TRIPS flexibilities, such as parallel importation’.⁷⁷⁷ Whilst this is indeed a possible solution the Member States clearly identified the problem as being the inability to make effective use of compulsory licenses. Hence, the solution should enable the effective use of compulsory licenses. Other tools that might alleviate the difficulties experienced under Article 31(f) thus bore no further relevance when seeking a solution to the paragraph 6 dilemma. For many Member States being able to use the compulsory license system effectively was one of the safeguards they had bargained for when negotiating the TRIPS Agreement. Being able to use this safeguard, as well as all other safeguards, was a ‘right’ they sought to exercise. Had the Canadian approach been followed it would have effectively resulted in the loss of a safeguard.

VI. Potential paragraph 6 solutions

A number of alternative solutions and/or justifications were proposed by Member States and academics alike.⁷⁷⁸ The proposals made can be divided into 5 distinctive categories: a TRIPS Agreement amendment, an interpretative solution, a morato-

776 The access to medicines by way of compulsory licenses for patented products or processes would be equally affected should there be no domestic pharmaceutical industry. The Public Health Declaration accordingly applies to both patented products and patented processes.

777 Canada in the TRIPS Council Minutes (19.09.2001) IP/C/M/33 p. 42.

778 WTO Secretariat note ‘Proposals on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Thematic Compilation’ (11.07.2002) IP/C/W/363, *Matthews*, 7 JIEL 1 (2004) p. 83-94, *Abbott*, Quaker Paper 7 (2001) p. 12-17, *Correa*, Implications of the Doha Declaration in the TRIPS Agreement and Public Health (WHO Geneva 2002) p. 25-35.