

obligation nor does it indirectly extend Article 66.2 to all Member States. The assistance is limited to those who actually require it.

The Decision also draws the attention to the direct obligations found in Article 66.2. It requires the Member States, in performing their obligations under Article 66.2, to pay ‘special attention to ... the pharmaceutical sector’.

IV. Procedure for the adoption of a final solution

The interim nature of the Decision, confirmed in paragraph 11 of the Decision, instructs the TRIPS Council to negotiate and adopt an amendment that would replace the Decision’s solution. Until such time, the provisions of the Decision would apply.⁹²⁰

The process of finding a final solution should be ‘based, where applicable, on this Decision’.⁹²¹ This infers that the final solution should derive from the Decision and not paragraph 6 of the Public Health Declaration. This limitation meant that the scope of the entire solution was already incorporated into the Decision. Hence, issues not found in the Decision would not fall within the scope of the final solution mandate. As such the Decision effectively limited the scope of the final solution to how the Decision could – in form and structure – be transposed into an amendment. The Member States did however recognise that there may be other extraneous issues that would have to be included in the final solution. The contents of paragraph 11 did however indicate that there would be an onus on proving that the ‘new’ issues would be necessary. This view was not shared by all Member States. Rwanda, for instance, stated on behalf of the African Group that:

‘The ordinary meaning of the sentence “the amendment will be based, where appropriate, on this Decision” indicates that it was never the intention of the Members to use the entire August Decision as the amendment. Only the parts of the 30 August 2003 Decision that are appropriate are to be used’.⁹²²

For these and other Member States, the final solution was supposed to constitute a more comprehensive and thought-out decision that made for an effective and operational solution to the paragraph 6 dilemma. They rejected any assertion that the Decision and the Chairman’s Statement should be incorporated in their entirety into the final solution.⁹²³ These Member States sought a solution based upon the Public Health Declaration and paragraph 6 thereof. In addition, emphasis was put on the system itself as being unable to achieve its intended goals. This dispute was aggravated by the potential role the Chairman’s Statement might play in interpreting the

920 Para 11 serves as a resolutive condition: upon the occurrence/adoption of an amendment the obligations under the Decision will terminate.

921 Decision para 11.

922 WTO Communication by Rwanda and others ‘The TRIPS Agreement and Public Health’ (06.04.2005) IP/C/W/445 p. 2.

923 Contrast US in the TRIPS Council Minutes (31.01.2006) IP/C/M/49 p. 36.

contents of the Decision. Those developing Member States fearful of a restrictive interpretation of the scope of paragraph 11 sought to downplay the role and application of the Chairman's Statement.

One of the problems that led to the Decision being temporary and not final was the dispute over the legal form of the solution.⁹²⁴ It is therefore surprising to read that paragraph 11 of the Decision expressly refers to a solution that will *amend* the TRIPS Agreement.⁹²⁵ By referring to an amendment the Member States effectively ruled out solutions on the basis of authoritative interpretations of Article 30, waivers in terms of Article IX.3 of the WTO Agreement and moratoriums. The choice of the word amendment steered the course for future discussions.

C. Article 31bis of the TRIPS Agreement

The negotiations for a final solution to the paragraph 6 dilemma made little headway after the adoption of the temporary Decision. Member States were at logger heads over the scope of the final solution. Some Member States, mainly developing countries, sought to readdress and correct the shortcomings in the Decision in order to ensure that the final system become an effective solution to the paragraph 6 dilemma.⁹²⁶ These plans were viewed sceptically by developed Member States who saw the Decision as being the raw form for the final amendment.⁹²⁷

The Member States' inability to resolve the final solution weighed on the other WTO negotiations. It was the pressure to remove this obstacle and the resignation that a better deal was unlikely to be struck that spurred the Member States to finalise the solution to the paragraph 6 dilemma.

The final solution, adopted on the 6th of December 2005 by the General Council, is a direct transformation of the Decision; merely its format was altered.⁹²⁸ The decision of the General Council (the 'Amendment') provides for the insertion of a new provision into the TRIPS Agreement: Article 31*bis*.⁹²⁹ Only upon the entry into ef-

924 *Oh*, 10 Bridges 1 (2006) p. 22.

925 The Decision notes that the final solution, the amendment, should be based on the Decision. As the Decision is a combination of waivers it seems apparent that 'based' refers not to form but rather to content.

926 Compare WTO Communication by Nigeria and others 'Implementation of Paragraph 11 of the 30 August Decision' (10.12.2004) IP/C/W/437, *Oh*, 10 Bridges 1 (2006) p. 22.

927 ICTSD 'TRIPS Council Considers Public Health, Biodiversity' *Bridges Weekly Trade News Digest* (08.12.2004) 1.

928 *Law*, 18 ELDB 3 (2006) p. 4.

929 The TRIPS Council submitted IP/C/41 to the General Council as a proposal for the amendment of the TRIPS Agreement. This proposal was considered and was adopted by consensus by the General Council on 06.12.2005 (Decision of the General Council 'Amendment to the TRIPS Agreement' (08.12.2005) WT/L/641 ('Amendment')). The Amendment contained an attachment titled 'Protocol Amending the TRIPS Agreement' (the 'Protocol'). Para 1 of the Protocol states that, upon its entry into force, Art 31*bis* will be inserted after Art 31 into the TRIPS Agreement. The Annex to the TRIPS Agreement will be inserted after Art 73. Para 4