

other situations may indeed permit the maximum usage of the existing flexibilities within the TRIPS Agreement. They would include nutrition, the promotion of the public interest and the prevention of intellectual property right abuse, as foreseen in Article 8 of the TRIPS Agreement. The right to use the ‘wobble room’ in a treaty is universal – provided it actually exists and provided it is done in good faith. It therefore seems unlikely that, despite the clear restriction of the Public Health Declaration to public health, that the use of the flexibilities will not have a follow on effect on the other measures. Where Member States are faced with similar public interest situations the Public Health Declaration may indeed provide the affected Member States with a degree of guidance and security.

A further issue regarding the scope of the Public Health Declaration arose in submissions made after the Doha Ministerial Conference wherein it was stated that the Public Health Declaration consequences should only be limited to developing and least-developed countries.<sup>648</sup> The reason being that paragraph 1 of the Public Health Declaration refers to public health problems faced by such countries. As the Public Health Declaration seeks to remove the perceived obstacle in the TRIPS Agreement to resolve the problems it was contended that the Public Health Declaration is not to be applied where the Member States are developed countries. Whereas this may be true in regarding the extension of the transitional provisions in paragraph 6, this interpretation is not supported by the contents or the context of the Public Health Declaration. The central paragraph of the Public Health Declaration, paragraph 4, states that the TRIPS Agreement should not prevent Member States from taking measures to protect public health. It refers to all Member States – there is no restriction.<sup>649</sup> The contents of paragraph 4 are subsequently used to ‘qualify’ the scope and use of the flexibilities in paragraph 5.

## II. Countries without domestic production facilities

The inability that some Member States have in domestically producing pharmaceutical products has meant that granting compulsory licenses in these countries for the domestic production of these products is a fruitless venture; effectively rendering

right existed prior to the Public Health Declaration and, as the TRIPS Agreement was not subject to the public health context of the Public Health Declaration, one can conclude that this right is not restricted to the scope of public health. Accordingly, the scope and purpose reflected in Arts 7 and 8 will be guiding. Cf. *UNCTAD/ICTSD*, Resource Book on TRIPS and Development (CUP New York 2005) p. 131.

648 The US stated that ‘the Doha Declaration on the TRIPS Agreement and Public Health makes it clear that the public health problems addressed by the Declaration are those gravely afflicting many *developing and least-developed countries*’ (emphasis added). Cf. WTO Communication by the US ‘Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health’ (09.07.2002) IP/C/W/358 p. 2.

649 Paragraph 6 also refers to all Member States, not just developed or LDC Member States.

compulsory licenses in these countries toothless and ineffective.<sup>650</sup> This problem is amplified by the fact that Article 31(f) of the TRIPS Agreement prevents these predominantly poor or small countries from having their compulsory license worked in a third country.<sup>651</sup> Although being aware of this technical quandary in the negotiations preceding the Doha Ministerial Conference,<sup>652</sup> the Member States were unable to reach an agreement on how the problem should be solved.<sup>653</sup> To rectify this, the Member States issued a formal instruction ‘to find an expeditious solution’ to the problem of local use of compulsory licenses within the context of pharmaceuticals.

### III. The postponed implementation of certain TRIPS-obligations

Article 66.1 of the TRIPS Agreement acknowledged that LDCs would require additional transitional periods for the enforcement of all TRIPS obligations. Economic, financial and administrative constraints made the implementation of intellectual property rights problematic, especially where the lack of a viable technology base would render these countries more dependent on foreign products. Article 66.1 of the TRIPS Agreement permitted the 10 year transition period – expiring in 2006 – to be extended on making a ‘duly motivated’ request by individual countries. It was however clear in the negotiations preceding the Doha Ministerial Conference that the LDCs were not in the ‘economic, financial and administrative’ position to implement the remaining TRIPS obligation,<sup>654</sup> especially when faced with the constraints they would impose on the access to pharmaceutical products.<sup>655</sup> Despite initial opposition,<sup>656</sup> the developed Member States concurred that LDCs should be afforded more time to implement the TRIPS Agreement. To this effect the Member States at the Doha Ministerial Conference agreed that a further 10 year extension be

650 The option to grant a compulsory license for the importation of pharmaceutical product remains a theoretically valid option. With the global scope of patent protection, especially after the transitional periods expired in 2001 and 2005, the availability of off patent versions of the sought products will progressively wane.

651 Compare Chapter 5(C)(III)(3)(h) above. Cf. *Gregg Bloche*, 5 JIEL 4 (2002) p. 840.

652 The EC submission was first to formally note that Art 31(f) may pose a problem for supplying foreign market without adequate domestic pharmaceutical production facilities. This was followed shortly thereafter by a submission from the developing countries group. Cf. WTO Communication from the EC ‘The Relationship between the Provisions of the TRIPS Agreement and Access to Medicines’ (12.06.2001) IP/C/W/280 p. 3, WTO Submission by Brazil and others to the TRIPS Council ‘TRIPS and Public Health’ (29.6.2001) IP/C/W/296 p. 8.

653 *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. 128-129.

654 WTO Submission by Brazil and others to the TRIPS Council ‘TRIPS and Public Health’ (29.6.2001) IP/C/W/296 p. 9.

655 Compare Zimbabwe in TRIPS Council Minutes (19.09.2001) IP/C/M/33 p. 46. Contrast *USTR*, Special 301 Report (2006) p. 11.

656 Compare Australia, EC in TRIPS Council Minutes (19.09.2001) IP/C/M/33 p. 56, 58.