

IV. Member States without domestic pharmaceutical production facilities

There was a general willingness amongst the WTO Member States to find a solution to the inability some Member States had in exercising compulsory licenses where they had no domestic production facilities to exercise the compulsory license. This willingness to find a solution stalled at the question of how the solution should be structured. Despite numerous suggestions⁷⁶³ no solution could be reached at the Doha Ministerial Conference. To ensure that the matter did not fall from the negotiating table the Member States agreed that the negotiations should proceed in order to ‘find an expeditious solution to this problem and to report to the General Council before the end of 2002’.⁷⁶⁴

Although there are numerous grounds that can be attributed to why Member States were not able to reach a solution at the Doha Ministerial Conference, the reality of the matter was that the negotiations on the issue raised its head relatively late in the pre-Doha negotiations and, despite the complexity of the issue, were only superficially discussed.⁷⁶⁵ This length of time was insufficient to enable the Member States to find a solution that would address what some Member States saw as a shortcoming of the TRIPS Agreement and what others saw as a potential dissolution of certain fundamental intellectual property issues.⁷⁶⁶ The Member States were however able to agree that the dilemma, then set out in paragraph 6 of the Public Health Declaration,⁷⁶⁷ required further negotiations.

763 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 at 3–4, Malaysia, Tanzania (on behalf of the LDCs), Hungary in the WTO Special Discussion on Intellectual Property and Access to Medicines in the TRIPS Council (10.07.2001) IP/C/M/31 p. 18, 29, 56, respectively WTO Submission by Brazil and others to the TRIPS Council ‘TRIPS and Public Health’ (29.6.2001) IP/C/W/296 p. 8.

764 Public Health Declaration para 6.

765 Norway stated in the pre-Doha negotiations that Art 31(f) ‘raises many important questions, most of which cannot be dealt with in-depth at this stage’. Cf. Norway in the WTO Special Discussion on Intellectual Property and Access to Medicines in the TRIPS Council (10.07.2001) IP/C/M/31 at p. 17. The minutes of the TRIPS Council in September of 2001 also reflect the infancy of the discussions on the Art 31(f) dilemma.

766 The issues of territoriality, independence of patents (Art 4bis of the Paris Convention), exhaustion and safeguards all played a role in negotiating a solution to the para 6 dilemma.

767 Paragraph 6 of the Public Health Declaration states: ‘We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.’