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.

rium, an Article 30 solution and an Article 6 solution. It was also generally recognised that any solution would have to incorporate safeguards to ensure that the solution is used to resolve the problem identified in paragraph 6 and not as an indirect means to circumvent the TRIPS Agreement provisions.

The discussions on a solution proceeded slowly with Member States playing tug-of-war with the issue and using it to leverage movement in other WTO negotiations.[779] It was only 8 months after the 2002 deadline had passed – the 30th of August 2003 – that the Member States were able to reach a solution. The decision and its effect are discussed below.

B. The 30 August 2003 decision

The decision of the General Council on the 30th of August 2003 (the 'Decision')[780] was hailed as being a 'historic agreement for the WTO'.[781] Although this statement represents more wishful thinking than the legal reality of the solution reached, the Decision represented a milestone in that it introduced a system whereby Member States were empowered to help those fellow Member States without the domestic ability to help themselves.[782] Notwithstanding the Decision being a 'solution', it was by no means meant to be a final decision. It was for the majority an *ad hoc* solution to apply until the Member States could agree on a final decision. Upon a final solution being adopted the Decision would lapse.

The Decision, a 'temporary solution', comprised of 11 clauses and an annex qualifying certain issues therein. Its adoption was made on the premise of certain

779 -- 'Access to Medicines: WTO Members May Snatch Defeat out of the Jaws of Victory' (2002) 6 Bridges 8 p. 1-2.

780 Decision of the General Council 'Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health' (30.08.2003) WT/L/540 ('Decision') (Annex II hereto).

781 Director General Panitchpakdi, WTO Press Release Press/350/Rev.1. The DG was also quoted a saying that the 'final piece of the jigsaw has fallen into place' and that the decision was a completion of the Public Health Declaration. This comment was unfortunately somewhat premature as the decision was an interim solution. Whereas some Member States reiterated the DG's statement, some Member States were not so forthcoming with their compliments. The Djiboutian representative stated that although he was pleased with the decision he was nonetheless 'not satisfied'. The representative from the Barbados 'felt obliged to register [their] disappointment and concern'. The Jamaican representative was 'dissatisfied' with certain elements of the text. These and other Member States felt that opposing the decision would do more harm than adopting it. See in this regard Cuba, Djibouti, Barbados and Jamaica in the WTO General Council Minutes (13.11.2003) WT/GC/M/82 p. 9, 11, 13.

782 *Abbott,* 99 AJIL 2 (2005) p. 327.