



Actions by the Thai Ministry of Public Health raise TRIPS concerns

By Edward J Kelly

On January 29, 2007, while Thai Prime Minister Surayud Chulanont was trying to assuage concerns of foreign investors with vows to respect the rule of law, Thailand announced plans to break patents of Kaletra, useful for treatment of HIV/AIDS, and Plavix, useful for heart disease. More threats to use CL to break further patents were later communicated.

The reported justification for invading the patent owners' exclusive rights was attributed by Public Health Minister Dr Mongkol na Songkhla as the country's inability to cover the cost of treatment due to the limited healthcare budget. It appears the Ministry, borrowing a strategy from Hugo Chavez' playbook, is intent on nationalising the patent assets of foreign pharmaceutical companies, utilising the pretext of compulsory licensing provisions set forth in the Thai Patent Act Section 51.

While the main assumption underlying the policy, Thailand's alleged ability to budget sufficient resources to fund procurement of innovative medicines, went unchallenged by Thai media, some commentators raised the question whether this new policy of issuing a compulsory license based on commercial considerations would violate Thailand's obligations as a founding member of WTO and as a signatory to the TRIPS Agreement.

Does the TRIPS Agreement allow compulsory licensing of patents?

Compulsory licenses are an exceptional remedy for use only in the case of market failure or significant abuse of a patent. Usually, compulsory licensing (CL) is an option of last resort, and one would not expect CL to be invoked in a country (a) where defence spending has been hiked by a double digit percentage following a military coup, and (b) where expensive mega projects such as the state railway system and new Suvarnabhumi Airport burden state coffers much more than Thailand's healthcare spending. Article 31 of TRIPS allows compulsory licensing and government use of a patent without the authorisation of its owner only under certain conditions and historically, only as a last resort after voluntary negotiations fail.

In the main Doha Ministerial Declaration of November 14,

2001, ministers stressed that it is important to implement and interpret the TRIPS Agreement in a way that supports public health - by promoting both access to existing medicines and the creation of new medicines.

A separate statement issued by General Council chairperson Carlos Pérez del Castillo, Uruguay's ambassador, during the Doha Round of trade talks, was designed to provide comfort to those who feared that the decision might be abused and undermine patent protection. The statement described members' shared understanding on how the decision is interpreted and implemented. It says the decision will be used in good faith in

order to deal with public health problems and not for industrial or commercial policy objectives, and that issues such as preventing the medicines getting into the wrong hands are important.

Based on the members' shared understanding as recorded by Dr del Castillo, the Thai Ministry of Public Health (MOPH) policy declaration risks stretching the interpretation of TRIPS Article 31 beyond credible limits. The Ministry's unilateral declaration to break patents based on considerations of affordability certainly calls into question

Thailand's compliance with TRIPS. Moreover, coming on the heels of reports touting record export performance (reports through November 2006 disclosed that Thai exports were valued at US\$129 billion, up 18 percent from 2005) and a record current account surplus, the underlying assumption that the Ministry cannot find the budget for such medicines seems vulnerable to a disciplined analysis.

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