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Topic 9: The Use of Compulsory Licenses

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THE USE OF COMPULSORY LICENSES

COUNTRY PRESENTATIONS – MAURITIUS

National Intellectual Property Policy

In 2009 Mauritius adopted a National IP Policy with a view to overcoming a major constraint to the effective appreciation of the importance of the role that IP plays in the sustainable economic and cultural development of the country.

The objectives of this policy are

- to encourage the use and development of IP in Mauritius
- to provide for the development of appropriate protection systems and
- to recognize and appreciate international instruments that relate to IP.

The aim of this paper is to focus on a specific section of this policy that deals with the National Health issues.

Access to patented anti-retrovirals is an important issue for Mauritius, which does not have a developed pharmaceutical capacity.

As we are all aware, at the Doha WTO Ministerial Conference in November 2001, the WTO Members adopted the Doha Declaration on the TRIPS Agreement and Public Health (aka Doha Health Declaration)which was the first outcome of a process that started in early 2001 with a request from the African Group to the Council for TRIPS to deal specifically with the relationship between the TRIPS Agreement and Public Health. The conclusion of this process was the Decision of 6 December 2005 whereby the General Council of the WTO adopted a Protocol for the amendment of the TRIPS Agreement which provided for the insertion of Article 31 bis which permits an “eligible importing Member” in accordance with the terms set out in paragraph 2 of the Annex to license the production of a “pharmaceutical product” by an overseas producer. The Annex defines “pharmaceutical products” as those needed to address ‘HIV/AIDS, tuberculosis, malaria and other epidemics” referred to in Clause 1 of the Doha Health Declaration). An “eligible importing Member” is defined as a WTO Member that has made a notification to the Council for TRIPS that it will use compulsory licensing in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.

A new HIV/AIDS Strategic Plan is being developed in Mauritius and an element of this plan would be the implementation of the compulsory licensing of patents for the purpose of anti-retroviral imports as well as, where appropriate, the compulsory licensing of anti-malarials.

Another policy matter for consideration is the quantum of a reasonable royalty rate which will be made available to patent owners. While some countries of the region have set a fixed royalty rate and others have a varying royalty rate, the National IP Policy recommends that the Government of Mauritius should decide upon policies and practices for determining reasonable royalties

The existing legislation – PIDT Act

The legislation currently in force in Mauritius is the Patents, Industrial Designs and Trademarks Act 2002 which was adopted by Parliament in July 2002 and came into force on 06 January 2003.

Section 23 of this Act addresses situations where a patent can be exploited by the government or a person thereby authorized, even without the agreement of the owner of the patent. Such situations may arise

•where the competent authority is satisfied that the public interest including, national security, nutrition, health or the development of other vital sectors of the national economy so requires or

•where the competent authority has, on the application of any party, determined that the manner of exploitation by the owner of the patent or his licensee, is anti-competitive and that it is necessary to remedy such anti-competitive practice.

However, the exploitation of the patented invention shall be limited for the purpose for which it was authorized and shall be subject to the payment, to the owner, of an adequate compensation. In so doing, the competent authority must take into account the economic value of the authorization. It is also provided that the authority shall take its decision after hearing the owner of the patent and any interested person, where necessary.

Pursuant to Section 23 subsection (4) of the PIDT Act 2002, a request for the authorization under subsection (1) shall be accompanied by evidence that the owner of the patent has received from the person seeking the authorization, a request for a contractual licence, but that the latter has been unable to obtain such a licence on reasonable commercial terms and conditions and within a reasonable time.

The law also provides that the above condition shall not apply

•in cases of national emergency or other circumstances of extreme urgency provided that the patent owner is notified of the competent authority's decision as soon as reasonably practicable.

•in cases of public non-commercial use ,and

•in cases of anti-competitive practices.

It is also worth noting that Article 39 of the TRIPS Agreement has been incorporated in our domestic legislation dealing with unfair practices and which is known as the Protection Against Unfair Practices (IPR) Act 2002. Indeed, Section 9(4) of this Act provides that any act or practice, in the course of industrial or commercial activity shall be considered an unfair practice where it amounts to or results in

- an unfair commercial use of secret test or other data, the origination of which involves considerable effort, which have been submitted to a competent authority for the purposes of obtaining approval of the marketing of pharmaceutical or agricultural chemical products which utilize new chemical entities;

- the disclosure of such data, except where necessary to protect the public unless steps are taken to ensure that the data are protected against unfair commercial use.

Also, no person other than the person who submitted undisclosed tests or other data, the origination of which involves considerable effort, shall rely on such data in support of an application for product approval for a reasonable period of time after the submission of those tests or data.

The reasonable period of time mentioned above shall, taking into account the nature of the data and the personal efforts and expenditure in producing them, be not less than 5 years unless the Minister otherwise decides.