

TACD

TRANS ATLANTIC DIALOGUE TRANSATLANTIQUE
CONSUMER DIALOGUE DES CONSOMMATEURS

Ambassador Susan C. Schwab
United States Trade Representative
600 17th Street, NW
Washington, DC 20508
U.S.A

Peter Mandelson
European Commissioner for External Trade
European Commission,
200 Rue de la Loi
B-1049 Brussels
Belgium

17 March 2008

Dear Ambassador Schwab and Commissioner Mandelson,

The TransAtlantic Consumer Dialogue (TACD) Working Group on Intellectual Property has long taken an interest in trade disputes involving access to medicines. According to several news reports and several private communications, both the United States and the European Union have actively engaged the new government of Thailand on the subject of the compulsory licensing of medicine patents. For example, according to one report concerning the European Commission:¹

“The Commission has been in constant contact with the Thai authorities and has stressed that compulsory licensing, while allowed by the WTO rules, should be regarded as a last resort option and that negotiations and collaboration with pharmaceutical companies

1 Sarah Rimmington, "Briefing Note: EU confirms the legality of Thai generic medicines policy; denies threatening WTO litigation," March 12, 2008, Essential Action. For various conflicting reports regarding trade pressures, see: Petchanet Pratuangkrai, "EU to ask WTO to rule on Thailand's drug licensing," *The Nation* (Thailand), March 10, 2008; Nicholas Zamiska, "Thai Ministry to Recommend Ignoring Patents on Cancer Drugs," *Wall Street Journal*, March 10, 2008; Pongphon Sarnsamak, "DRUG POLICY, Cancer patients' lifeline, Chaiya backs down on licensing," *The Nation* (Thailand), March 11, 2008; Achara Ashay Agachat, "USTR: No CL complaint," *Bangkok Post*, March 08, 2008; Nopporn Wong-Anan, "Thailand will override cancer drug patents," *Reuters*, Mar 10, 2008.

should be sought. The EU is hoping that this will be the line of the new Government.”

Likewise, USTR and U.S. Department of State officials have been in close contact with the Thai government over the decisions to issue compulsory licenses.

TACD is concerned that private communications from the United States and European Commission may undermine the Doha Declaration on TRIPS and public health, an agreement adopted, with great fanfare, at a 2001 WTO ministerial meeting. That declaration states:

[W]e affirm that the [TRIPS] Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

In discussing those flexibilities, the declaration notes: “ Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.”

In 2006, Thailand had an average per capita income of \$8.19 per day. For the bottom 80 percent of the income distribution, the average was \$5.22 per day. To illustrate the Thai concerns regarding affordability of products, it is useful to note that the pre-compulsory licensing price for the heart disease drug Plavix was \$2 per day, or nearly 40 percent of the average income of the bottom 80 percent of the population.

There is simply no way that Thailand will be able to honor its Doha pledge to implement its intellectual property laws in a manner consistent with access to medicine for all, if the US and the EC (and EU member states) exert pressure every time Thailand issues compulsory licenses. As citizens of the US or Europe, we expect our governments to honor the terms of the 2001 Doha Declaration.

There is nothing in the Doha Declaration or the TRIPS that makes the use of compulsory licenses a “last resort.” Thailand does not have an WTO obligation to negotiate with patent owners before issuing a compulsory license for its own public health programs. Thailand certainly has no obligation to have such negotiations supervised by U.S. and European governments.

As a body that advises both the US and the EC on matters concerning trade policy, we request the following information.

1. Copies of all correspondence between the US or the EC and the government of Thailand, on the issue of compulsory licensing of medicine patents.
2. Copies of all correspondence between the USTR, the US Department of State, and the EC and pharmaceutical companies or trade associations or their representatives, on the issue of the compulsory licensing of medicine patents in Thailand.
3. A summary of the US or EC position on the use of compulsory licensing of patents by developing countries, including an explanation of how the US and the EC honor their

- 2001 commitment to the Doha Declaration on TRIPS and Public Health.
4. For context and perspective, we request a list of all compulsory licenses issued in the U.S. and Europe since the 2001 Doha Declaration on TRIPS and Public Health, including but not limited to mandatory licensing of software protocols and software, mandatory licensing of patents under the U.S. eBay decision regarding injunctive relief, mandatory licensing of patents as a remedy to anticompetitive practices, including cases involving pharmaceutical drug patents in Italy, and mandatory licensing of patents associated with standards making.

We also respectively ask for meetings with the US Department of State, USTR, and DG-Trade and DG-SANCO, to discuss this issue further.

Thank you very much.

Sincerely:

James Love, KEI
US co-chair, TACD Working Group on Intellectual Property

Jill Johnstone, National Consumer Council, UK
European co-chair, TACD Working Group on Intellectual Property