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Legal Options for Implementing Paragraph 6 of the Ministerial Declaration on the TRIPS Agreement and Public Health

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As indicated in the paper of my colleague Prof. Fred Abbott, I subscribe to much of his analysis of the appropriate legal technique to implement Paragraph 6 of the Doha Declaration on Public Health. I think it is useful to emphasize up front that there is a large measure of agreement on legal technique. This shows that the work to be done by the negotiators mainly is a matter of substance: bridging the gap between different policy views and economic interests.

With this in mind, I will limit my remarks to a few points.

Contrary to Prof. Abbott, I do not think that implementing Paragraph 6 through an authoritative interpretation of Art. 30 is workable. Such a move will be seen in the developed world, to begin with by the public health sector, as ignoring and undermining the checks and balances negotiated for compulsory licenses in Art. 31. Moreover, the implications of an authoritative interpretation of Article 30 to resolve the issues raised by Paragraph 6 will go much beyond the public health sector (such an interpretation will create a precedent for all patent rights; a limitation of such an interpretation to 'patents in the public health sector' will legally, and politically, be very weak, as the interpretation would show what WTO Members think can be done under Art. 30). Accordingly, if other patent industries outside the public health sector catch on to the impact of an authoritative interpretation of Art. 30 on their position, there will be strong resistance. At the very least, this will delay the process of implementing Paragraph 6 of the Doha Declaration. In fact, I doubt very much that an authoritative interpretation on Art. 30 will ever be adopted by consensus. This would mean that such a delayed interpretation, if ever adopted by a requisite majority, would be legally fragile and politically controversial.

In my view, the issues that need to be resolved in order to implement Paragraph 6 require a reassessment of Art. 31. This is the TRIPS provision that expressly deals with the situation that is occupying us here: the use of a patented invention by, or at the behest of, a government against the will of the patent holder. If Art. 31 is now causing a problem, then this is the provision we should be speaking about. In this way, the problem would be addressed directly, through 'the front door' so to speak.

However, an authoritative interpretation of Art. 31 (like an interpretation of Art. 30) will have implications that stretch beyond the public health sector. Such a solution therefore will require the involvement of other sectors, and therefore produce delays. Furthermore, I recognize that politics is the art of the possible. In order to get to a solution, the most direct route may appear forbidding. Some WTO Members believe that Art. 30 does have potential for them to address

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the problems they see in the public health sector. They will be concerned that, if they agree to an interpretation of Art. 31, this may be construed as an implicit agreement to renounce the rights they perceive they have under Art. 30.

Determining the full scope of Art. 30 and Art. 31, as well their interrelationship, can be the subject of interesting discussions in the future, but need not be established now. Prof. Abbott and I have tried to come up with a legal vehicle that allows all WTO Members to preserve the legal interpretation they have of Arts. 30 and 31 for the future, while resolving the public health issues identified in Paragraph 6 before the end of this year.

To this end, we are suggesting that a *sui generis* solution might be considered. In this way it will not be necessary to focus on the specific TRIPS provision that needs to be 'interpreted', 'waived' or 'amended' to obtain the solution that is required to resolve the specific concerns identified in Paragraph 6. All parties' rights or perceptions of different TRIPS provisions may therefore be preserved. A *sui generis* solution might involve the combination of a waiver that would bring the new legal situation into immediate effect, along with a new article to the TRIPS Agreement or a protocol to it that would embody a long term solution. The waiver will create legal certainty for as long as it lasts, which can be quite long (for example, until an amendment becomes effective for all Members) as Prof. Abbott's paper argues. Another conceivable advantage of the *sui generis* formula is that provisions of the other WTO Agreements might be addressed as well. For instance, the WTO Members might want to incorporate certain safeguards (import restrictions) against diversion of goods produced under compulsory license to address the specific public health needs of a particular country. In order to eliminate any questions about the compatibility of such safeguards with the GATT Agreement, this Agreement might then be included in the solution as well.

I note that if as a result of substantive discussions, the WTO Members would consider it useful to waive provisions from other WTO Agreements, such as the GATT 1994, different adoption procedures may have to be followed for the different parts of the waiver. Thus, in accordance with Art. IX.3 WTO Agreement, the TRIPS part of the waiver would have to be considered first by the TRIPS Council before it could be considered by the Ministerial Conference; conversely, a GATT part would first have to be considered by the Goods Council.

As noted above, to enable the adoption of a legally secure solution tailor-made for the public health issues identified in Paragraph 6 in the longer term, Prof. Abbott and I suggest considering an additional article (or a specific protocol) to the TRIPS Agreement. In this way, the longer term solution for the public health issues identified in Paragraph 6 will not depend on resolving the relative merits of a (re-) interpretation or (re-)negotiation of the relationship between Art. 30 and 31, which may involve many other interests.

I myself see an important advantage in starting with a *sui generis* waiver. This allows all parties concerned to gain experience with the solution that is to be found on short notice to deal with the health problems identified in the Doha Declaration. Experience may show that this solution is not adapted to these problems. In that case we ought to rethink what needs to be done before resorting to an amendment of the TRIPS Agreement. By definition, treaty amendments are more final than waivers.