

Bills Committee on the Patents (Amendment) Bill 2007

Proposed Committee Stage Amendments - Express Reference to General Council Decision

Introduction

This paper briefs Members on the Administration's proposal to introduce further Committee Stage Amendments ("CSAs") to the Patents (Amendment) Bill 2007 ("the Bill") with a view to incorporating the Decision adopted by the General Council of the World Trade Organization ("WTO") on 30 August 2003 ("GC Decision") in the Bill.

Background

2. As explained in paragraphs 3 to 6 of the Legislative Council Brief on the Bill, the GC Decision is the predecessor of the "Protocol Amending the TRIPS Agreement" adopted by the General Council of the WTO at Geneva on 6 December 2005 ("the Protocol"). It was adopted in August 2003 by the consensus of all WTO members, including Hong Kong, China. The Protocol is in substance identical to the GC Decision. However, unlike the GC Decision which is temporary in nature, the Protocol is intended to be a formal, permanent, treaty amendment to the TRIPS Agreement.

3. The Protocol is open for acceptance by WTO members until 1 December 2007 or such later date as may be decided by the Ministerial Conference of the WTO. Once two thirds of members have notified their acceptance, the Protocol will take effect in those members and will replace the GC Decision for them. For each of the remaining members, the GC Decision will continue to apply until that member accepts the Protocol which would then take effect.

4. It is the Administration's wish to notify the WTO of Hong Kong, China's acceptance of the Protocol before 1 December 2007. As and when the necessary domestic legislation is in place, Hong Kong, China may use the system immediately upon the Protocol's becoming effective.

Latest Development

5. As of 12 September 2007, 10 WTO members (or 6.6% of the membership) have notified the WTO of their acceptance of the Protocol. It is also noted that some WTO

members, including the European Union (with 27 member states) and Canada, are yet to appear on the acceptance list. These members are among the possible trading partners of Hong Kong, China from whom we might import patented pharmaceutical products in situations of extreme urgency. The latest developments have caused us to re-assess the implications of the following scenario, namely by the time when Hong Kong, China invokes the system, the Protocol is yet to take effect in these trading partners.

6. Upon further consideration, it is reckoned that until such time as the Protocol has been accepted by all WTO members (which may take some time to materialize), we could not rule out the possibility that a WTO member from whom we wish to import (or to whom we wish to export) patented pharmaceutical products may still be relying on the GC decision as the basis for exporting to us (or importing from us) the patented pharmaceutical products. Under such a scenario, it is uncertain as to whether reliance on the GC decision (to which the Bill does not make express reference) would cause complications.

7. To remove any doubt as to whether Hong Kong, China may rely on the provisions in the Bill to import or export patented pharmaceutical products from or to these members, we propose certain CSAs which are incidental and related to the provisions of the Bill by incorporating an express reference to the GC Decision.

The Proposed CSAs

8. The proposed CSAs relevant to the incorporation of the GC Decision are at the Annex. The proposed amendments mainly aim at adding the reference of the GC Decision to the relevant definitions in the *proposed section 2(1)*, and to the provisions relating to payment of remuneration to proprietors of the patents (*proposed section 72E*) and application for export compulsory licences for patented pharmaceutical products (*proposed section 72K*).

Advice Sought

9. Members are invited to note and comment on the Administration's proposal.

**Commerce, Industry and Tourism Branch
Commerce and Economic Development Bureau
September 2007**

Clause Amendment Proposed

3 Proposed Section 2(1)

- (a) In the proposed definition of "eligible importing member", in paragraph (b), by deleting "Article 31 bis in" and substituting "the General Council Decision or".
- (b) In the proposed definition of "exporting member", by deleting "Article 31 bis in" and substituting "the General Council Decision or".
- (c) In the proposed definition of "Protocol", by adding ", the Annex to the Protocol Amending the TRIPS Agreement, the Annex to the TRIPS Agreement and the Appendix to the Annex to the TRIPS Agreement" after "2005".
- (d) By adding –
 - ""Doha Declaration" (多哈宣言) means the Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 by the Fourth WTO Ministerial Conference at Doha, Qatar;
 - "General Council Decision" (《總理事會決定》) means the Decision adopted by the General Council of the WTO on 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration;
 - "relevant instrument or legislation" (有關文書或法例) means –
 - (a) the General Council Decision;
 - (b) the Protocol; or
 - (c) legislation made by the exporting member or the eligible importing member, as the case may be, pursuant to or for the purpose of implementing -
 - (i) the General Council Decision; or
 - (ii) the Protocol;"

5 Proposed Section 72E

- (a) In the proposed section 72E(1), by deleting "Article 31 bis in the Protocol and Article 31(h) of the TRIPS Agreement" and substituting "the relevant instrument or legislation".
- (b) In the proposed section 72E(2) by deleting "Article 31 bis in the Protocol and Article 31(h) of the TRIPS Agreement" and substituting "the relevant instrument or legislation".

Proposed Section 72K

- (a) In the proposed section 72K(2)(b), in subparagraph (ii)(C), by deleting "Article 31 bis in the Protocol and Article 31 of the TRIPS Agreement" and substituting "the relevant instrument or legislation".