

16 December 2002

**IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON  
THE TRIPS AGREEMENT AND PUBLIC HEALTH**

Note from the Chairman

Attached is a draft Decision on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health which is being circulated for the consideration of the Council for TRIPS. The text of this draft Decision represents the Chairman's best assessment, based on the extensive consultations that have been held, of how to take into account, in a balanced way, the positions and concerns of the membership at large.

It has to be emphasized that the text is being circulated on the Chair's own responsibility. While it is hoped that the text will prove broadly acceptable, virtually all delegations will find that there are some provisions in it which they would prefer to see drafted differently. In particular, there continue to be concerns about the language of paragraph 1(a) as it relates to the coverage of diseases/public health problems. One suggestion that has been made in this regard is to relate the coverage to HIV/AIDS, malaria, tuberculosis or other infectious epidemics of comparable gravity and scale, including those that may arise in the future. Another suggestion is to relate the coverage to the public health problems referred to in the Doha Declaration as a whole.

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**IMPLEMENTATION OF PARAGRAPH 6 OF THE DOHA DECLARATION ON  
THE TRIPS AGREEMENT AND PUBLIC HEALTH**

**DRAFT**

Decision of [date]

The General Council,

*Having regard* to paragraphs 1, 3 and 4 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization ("the WTO Agreement");

*Conducting* the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the WTO Agreement;

*Noting* the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2) (the "Declaration") and, in particular, the instruction of the Ministerial Conference to the Council for TRIPS contained in paragraph 6 of the Declaration to find an expeditious solution to the problem of the difficulties that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the TRIPS Agreement and to report to the General Council before the end of 2002;

*Recognizing*, where eligible importing Members seek to obtain supplies under the system set out in this Decision, the importance of a rapid response to those needs consistent with the provisions of this Decision;

*Noting* that, in the light of the foregoing, exceptional circumstances exist justifying waivers from the obligations set out in paragraphs (f) and (h) of Article 31 of the TRIPS Agreement with respect to pharmaceutical products;

*Decides* as follows:

1. For the purposes of this Decision:
- (a) "pharmaceutical product" means any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address the public health problems as recognized in paragraph 1 of the Declaration. It is understood that active ingredients necessary for its manufacture and diagnostic kits needed for its use would be included<sup>1</sup>;
  - (b) "eligible importing Member" means any least-developed country Member, and any other Member that has made a notification<sup>2</sup> to the Council for TRIPS of its intention to use the system as an importer, it being understood that a Member may notify at any time that it will use the system in whole or in a limited way, for example only in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. It is noted that some Members will not use the system set out in this Decision as importing Members<sup>3</sup> and that some other Members have stated that, if they use the system, it would be in no more than situations of national emergency or other circumstances of extreme urgency;
  - (c) "exporting Member" means a Member using the system set out in this Decision to produce pharmaceutical products for, and export them to, an eligible importing Member.
2. The obligations of an exporting Member under Article 31(f) of the TRIPS Agreement shall be waived with respect to the grant by it of a compulsory licence to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s) in accordance with the terms set out below in this paragraph:
- (a) the eligible importing Member(s)<sup>4</sup> has made a notification<sup>2</sup> to the Council for TRIPS, that:

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<sup>1</sup> This subparagraph is without prejudice to subparagraph 1(b).

<sup>2</sup> It is understood that this notification does not need to be approved by a WTO body in order to use the system set out in this Decision.

<sup>3</sup> Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and United States of America.

<sup>4</sup> Joint notifications providing the information required under this subparagraph may be made by the regional organizations referred to in paragraph 6 of this Decision on behalf of eligible importing Members using the system that are parties to them, with the agreement of those parties.

- (i) specifies the names and expected quantities of the product(s) needed<sup>5</sup>;
  - (ii) confirms that the eligible importing Member in question, other than a least-developed country Member, has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the product(s) in question in one of the ways set out in the Annex to this Decision; and
  - (iii) confirms that, where a pharmaceutical product is patented in its territory, it has granted or intends to grant a compulsory licence in accordance with Article 31 of the TRIPS Agreement and the provisions of this Decision<sup>6</sup>;
- (b) the compulsory licence issued by the exporting Member under this Decision shall contain the following conditions:
- (i) only the amount necessary to meet the needs of the eligible importing Member(s) may be manufactured under the licence and the entirety of this production shall be exported to the Member(s) which has notified its needs to the Council for TRIPS;
  - (ii) products produced under the licence shall be clearly identified as being produced under the system set out in this Decision through specific labelling or marking. Suppliers should distinguish such products through special packaging and/or special colouring/shaping of the products themselves, provided that such distinction is feasible and does not have a significant impact on price; and
  - (iii) before shipment begins, the licensee shall post on a website<sup>7</sup> the following information:
    - the quantities being supplied to each destination as referred to in indent (i) above; and

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<sup>5</sup> The notification will be made available publicly by the WTO Secretariat through a page on the WTO website dedicated to this Decision.

<sup>6</sup> This subparagraph is without prejudice to Article 66.1 of the TRIPS Agreement.

<sup>7</sup> The licensee may use for this purpose its own website or, with the assistance of the WTO Secretariat, the page on the WTO website dedicated to this Decision.

the distinguishing features of the product(s) referred to in indent (ii) above;

- (c) the exporting Member shall notify<sup>8</sup> the Council for TRIPS of the grant of the licence, including the conditions attached to it.<sup>9</sup> The information provided shall include the name and address of the licensee, the product(s) for which the licence has been granted, the quantity(ies) for which it has been granted, the country(ies) to which the product(s) is (are) to be supplied and the duration of the licence. The notification shall also indicate the address of the website referred to in subparagraph (b)(iii) above.

3. Where a compulsory licence is granted by an exporting Member under the system set out in this Decision, adequate remuneration pursuant to Article 31(h) of the TRIPS Agreement shall be paid in that Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. Where a compulsory licence is granted for the same products in the eligible importing Member, the obligation of that Member under Article 31(h) shall be waived in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member.

4. In order to ensure that the products imported under the system set out in this Decision are used for the public health purposes underlying their importation, eligible importing Members shall take reasonable measures within their means, proportionate to their administrative capacities and to the risk of trade diversion to prevent re-exportation of the products that have actually been imported into their territories under the system. In the event that an eligible importing Member that is a developing country Member or a least-developed country Member experiences difficulty in implementing this provision, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in order to facilitate its implementation.

5. Members shall ensure the availability of effective legal means to prevent the importation into, and sale in, their territories of products produced under the system set out in this Decision and diverted to their markets inconsistently with its provisions, using the means already required to be available under the TRIPS Agreement. If any Member considers that such measures are proving

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<sup>8</sup> It is understood that this notification does not need to be approved by a WTO body in order to use the system set out in this Decision.

<sup>9</sup> The notification will be made available publicly by the WTO Secretariat through a page on the WTO website dedicated to this Decision.

insufficient for this purpose, the matter may be reviewed in the Council for TRIPS at the request of that Member,

6. With a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products:

- (i) where a developing or least-developed country WTO Member is a party to a regional trade agreement within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903), at least half of the current membership of which is made up of countries presently on the United Nations list of least-developed countries, the obligation of that Member under Article 31(f) of the TRIPS Agreement shall be waived to the extent necessary to enable a pharmaceutical product produced or imported under a compulsory licence in that Member to be exported to the markets of those other developing or least-developed country parties to the regional trade agreement that share the health problem in question. It is understood that this will not prejudice the territorial nature of the patent rights in question;
- (ii) it is recognized that the development of systems providing for the grant of regional patents to be applicable in the above Members should be promoted. To this end, developed country Members undertake to provide technical cooperation in accordance with Article 67 of the TRIPS Agreement, including in conjunction with other relevant intergovernmental organizations.

7. Members recognize the desirability of promoting the transfer of technology and capacity building in the pharmaceutical sector in order to overcome the problem identified in paragraph 6 of the Declaration. To this end, eligible importing Members and exporting Members are encouraged to use the system set out in this Decision in a way which would promote this objective. Members undertake to cooperate in paying special attention to the transfer of technology and capacity building in the pharmaceutical sector in the work to be undertaken pursuant to Article 66.2 of the TRIPS Agreement, paragraph 7 of the Declaration and any other relevant work of the Council for TRIPS.

8. The Council for TRIPS shall review annually the functioning of the system set out in this Decision with a view to ensuring its effective operation and shall annually report on its operation to the General Council. This review shall be deemed to fulfil the review requirements of Article IX:4 of the WTO Agreement.

9. This Decision is without prejudice to the rights, obligations and flexibilities that Members have under the provisions of the TRIPS Agreement other than paragraphs (f) and (h) of Article 31, including those reaffirmed by the Declaration, and to their interpretation. It is also without prejudice to the extent to which pharmaceutical products produced under a compulsory licence can be exported under the present provisions of Article 31(f) of the TRIPS Agreement.

10. Members shall not challenge any measures taken in conformity with the provisions of the waivers contained in this Decision under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994.

11. This Decision, including the waivers granted in it, shall terminate for each Member on the date on which an amendment to the TRIPS Agreement replacing its provisions takes effect for that Member. The TRIPS Council shall initiate by the end of 2003 work on the preparation of such an amendment with a view to its adoption within six months, on the understanding that the amendment will be based, where appropriate, on this Decision and on the further understanding that it will not be part of the negotiations referred to in paragraph 45 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1).

ANNEX

Assessment of Manufacturing Capacities in the Pharmaceutical Sector

Least-developed country Members are deemed to have insufficient or no manufacturing capacities in the pharmaceutical sector.

For other eligible importing Members insufficient or no manufacturing capacities for the product(s) in question may be established in either of the following ways:

- (i) the Member in question has established that it has no manufacturing capacity in the pharmaceutical sector;

**OR**

- (ii) where the Member has some manufacturing capacity in this sector, it has examined this capacity and found that, excluding any capacity owned or controlled by the patent owner, it is currently insufficient for the purposes of meeting its needs. When it is established that such capacity has become sufficient to meet the Member's needs, the system shall no longer apply.
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