



AMERICAN UNIVERSITY

WASHINGTON, D C

Sean M. Flynn, Associate Director
Program on Information Justice and Intellectual Property

**ABBOTT'S REFUSAL TO REGISTER MEDICINES AS A
CONTRAVENTION OF SECTION 28 OF THE THAILAND
COMPETITION ACT**

Sean Flynn
sflynn@wcl.american.edu
202-294-5749

October 23, 2007

I have been asked to express my opinion on whether Abbott's action withholding supplies of several needed medicines in Thailand in response to a lawful government compulsory license decree may violate section 28 of the Thai Competition Act. This memo summarizes my view that Abbott's actions do violate section 28.

The basic facts of this matter are that, in March 2007, Abbott responded to a lawful and reasonable government use compulsory license for Kaletra by announcing it would no longer register new drugs for sale in Thailand, and pulling the registration applications for several new drugs that it was seeking marketing approval for. The drugs that Abbott revoked its registration applications for included a new version of Kaletra that does not need refrigeration and therefore is considered an essential medicine in tropical regions such as Thailand.¹ It is uncontested that Abbott will continue to sell and seek approval to sell the drugs it pulled from the Thai market in other countries in which it does business.

Section 28 of the Thai Competition Act states:

A business operator who has business relation, with business operators outside the Kingdom, whether contractual or through policies, partnership, shareholdings or in the form of relation of any other similar description, shall not carry out any act in order that a person who is in the Kingdom and intends to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom.

¹ Other drugs that Abbott is refusing to sell in Thailand include Brufen (ibuprofen), Abbotec (clarithromycin), Clivarine (heparin), Humira (adalimumab), Tarka (trandolapril/verapamil HCl ER), and Zemplar (paricalcitol).

In essence, section 28 prohibits international firms from taking measures that restrict access to goods sold internationally within Thailand. This appears to be a law restricting global market segmentation strategies that disadvantage Thai (and likely other poor or middle income) consumers.

It is clear that Abbott falls under the statute's reach. The statute covers "A business operator who has business relation, with business operators outside the Kingdom, whether contractual or through policies, partnership, shareholdings or in the form of relation of any other similar description." Although there is no definition of a "business operator" in the Act, a "business operation" is defined in the statute as "a distributor, manufacturer for distribution, orderer or importer into the Kingdom for distribution or purchaser for manufacture or redistribution of goods or a person engaging in the business of service providing." It is my information and belief that the international branches of Abbott do business in Thailand through a Thai subsidiary with which it has "contractual," "partnership" or other relations. The purpose of those relations is to facilitate the distribution and import of medicines into Thailand. Accordingly, Abbott's Thai subsidiary is a business operation with business relations with others outside the Kingdom, bringing it within the scope of the Act.

My professional opinion is that Abbott's actions contravene section 28. The underlying purpose of section 28 appears to be to ensure that firms with international business relations that do business in Thailand offer Thai consumers the same opportunities to purchase their products as are offered to those abroad. By refusing to register products in the Thai market that it makes available in other markets, Abbott clearly violates this law.

It may be added that, although section 28 does not require a finding of dominance, Abbott's actions in this case show the telltale signs of abuse of monopoly power. Monopolies raise profits and cause social harm referred to by economists as "deadweight loss" (i.e. loss of sales that would have been made in a competitive market, benefiting both consumer and producer) by intentionally serving only segments of the potential consumer population at much higher prices than would exist in a competitive market. In poor countries with high income inequality, the profit maximizing behavior of firms will be to serve a very small segment of the population, often at prices equal to or greater than those in richer countries. In other words, a monopoly will willingly forego sales to the majority of the population in order to maintain its prices at as high a level as possible.²

On a global scale, the same pattern is repeated. Faced with demands to lower prices in poor countries, the rational monopoly will rather forego sales (i.e. cut output) than lower its prices dramatically. Its goal will be to make up its losses through higher priced sales in countries with less exacting regulatory requirements. Thus, if the world had a legal framework where companies could

² Explication of this economic dynamic is the subject of a forthcoming paper of mine, co-authored with Aidan Hollis and Mike Palmedo.

willingly and selectively pull out of developing country markets in response to regulatory proceedings demanding lower prices or increased competition, monopolies would (rationally) leave the poorest and most unequal countries without access to their goods. This is not because they are evil, but rather because it would be the rational (profit maximizing) choice within the legal framework.

Fortunately, Thailand's law is reasonably constructed to head off exactly this socially harmful monopoly behavior. Section 28 bans a multinational company from operating in Thailand without supplying Thai consumers with products that it supplies to other countries. This case appears to raise exactly the kind of socially harmful behavior that the law was intended to prohibit. While Thailand would have no recourse if Abbott simply pulled out of all operations in Thailand, as long as the company continues to profit from sales in the country, Thailand has the authority to punish the firm's behavior that exploit its market dominance to the detriment of Thai consumers.