



AMERICAN UNIVERSITY

W A S H I N G T O N , D C

Program on Information Justice and Intellectual Property

**APPEAL OF THAILAND COMMISSION ORDER ON ABBOTT'S  
REFUSAL TO SELL AIDS MEDICATIONS IN THAILAND**

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This note explains why the recent order rejecting Thai patient advocates' complaint against Abbott Laboratories for refusing to sell life saving medicines is flawed and should be overturned on appeal.

**BACKGROUND**

Between November 2006 and January 2007, the Thai Ministry of Health granted several compulsory licenses for the government use of generic versions of several costly patented medicines in its public health program. The medicines licensed included the two-in-one AIDS drug lopinavir+ritonavir, sold by Abbott as Kaletra. The licenses were issued for only government use, and included a royalty payment to the patent holder. By all accounts, the licenses issued are fully in compliance with the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights and with Thai law.<sup>1</sup>

In March 2007, Abbott responded to the a lawful government licenses by announcing that it would withdraw applications to register for sale in Thailand of its new heat stable version of Kaletra as well as several other medications not yet approved for sale in Thailand. On April 26, a Thai network of people living with HIV/AIDS (TNP+), the AIDS ACCESS Foundation, and an alliance of supporting organizations and individuals filed a complaint with the Thai Ministry of Commerce to demand that the Thai Trade Competition Commission instigate criminal actions against Abbott. The complaint alleges that Abbott breached the Competition Act by refusing to supply drugs in Thailand in response to a legal government compulsory license in violation of section 25(3) of the Thai Competition Act.

On December 27, 2007, the Thai Trade Competition Commission issued a one page letter ruling rejecting the section 25(3) claim because it found that Abbott is not a dominant firm in the relevant market.

**APPEAL OF SECTION 25(3): THE DOMINANCE OF ABBOTT**

The Thai Competition Commission's finding that Abbott is not a dominant firm is a particularly glaring error.

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<sup>1</sup> For further background, see [http://www.wcl.american.edu/pijip/thai\\_comp\\_licenses.cfm](http://www.wcl.american.edu/pijip/thai_comp_licenses.cfm)

This case involves the withdrawal of various products, including heat stabilized Kaletra, from the Thai market in response to a compulsory license on Kaletra. Abbott is dominant in the markets for both Kaletra and heat stabilized Kaletra because there were no adequate substitutes on the Thai market for either of these drugs at the time the action was taken.

Section 25(3) of the Thai Competition Act prohibits any firm “having market domination” from “suspending, reducing or restricting services, production, purchase, distribution, deliveries, or importation without justifiable reasons.” In common competition law doctrine throughout the world, “justifiable reasons” standards require the offering of pro-competitive reasons for the action.

The Thai Competition Commission does not dispute that Abbott acted without justifiable reasons when it suspended registration for important drugs in response to a lawful government order. Rather, the Commission found that Abbott did not have market domination because it did not meet its regulatory definitions requiring over 50% market share and over 1,000 million baht turnover in the previous year. The Commission’s restrictive definition of market domination is not in accord with international competition law standards and appears arbitrary and unreasonable when assessed against the purposes of the Thai competition law.

Market domination (often called “market power”) is most commonly defined as the power to control prices or to exclude competition. The first, and often definitive, step to determining whether a defendant has monopoly power is to define the relevant market. Product markets are normally defined on the basis of whether there are substitutes in a particular market for the good being offered by alleged monopolist. A product market is one for which there are no effective substitutes.

At the time of the complaint, there was no effective substitute for Kaletra or heat stabilized Kaletra. Kaletra is the only protease inhibitor on the market that comes in a single pill format boosted with ritonavir. Ritonavir boosts the effectiveness of nearly all protease inhibitor treatments, enabling better treatment with less milligrams of medicine. The single pill format cuts the number of pills patients must keep track of and health officials report that adherence to treatment with such regimes is radically improved. Heat-stabilized Kaletra is the only heat stabilized form of a ritonavir boosted protease inhibitor, and also comes in a single pill format. Kaletra is the preferred protease inhibitor in the World Health Organization’s most recent guidelines for second-line antiretroviral therapy.

Because there are not other similar two-in-one ritonavir boosted protease inhibitors, Abbott was a dominant firm in each of these markets. It faced no competition from viable substitutes and had complete power to raise prices and, through refusals to license patents, exclude competitors. Indeed, the price of Kaletra in Thailand at the time of the compulsory licenses was over \$2,000 a year, a substantial portion of the

average income of a person in the country (Thailand's GDP per capita is \$3,000 per year).

There is nothing in the Thai Act that instructs the Commission to give a free pass for the anti-competitive behavior of firms that do not have 1000 million baht turnover. That standard, implemented by regulation of the Commission, is arbitrary and should be overturned by a court. Firms may exert monopoly power in small markets as well as big ones. Indeed, the exertion of market power in small markets may be more harmful to consumers as they may offer fewer incentives for other firms to attempt to enter and compete in the market and therefore may multiply the pricing power of the dominant firm.

The repercussions of competition authorities giving a free pass to the anticompetitive conduct of firms like Abbott are enormous. Thailand committed itself to universal treatment for HIV/AIDS in 2003, which means that more and more PWAs are starting HAART each year. As more people remain on these therapies, more will develop resistance to first-line medications. The Thai government estimates that in the near future, 50,000 Thais will need access to second line treatment including Kaletra. At the price charged by Abbott to the Thai government in 2006, the cost of treatment for this many people would be 3,600 million bhat, a sum exceeding the government's entire budget for all AIDS medicines.

There is a supportive case decided by Thailand's Competition Commission. In early 2000, the Thai Competition Commission received complaints that the newly registered cable television company, UBC, was refusing to offer basic cable service desired by the majority of moderate income cable subscribers. The Commission ultimately found that the refusal to supply the basic product desired by the majority of poorer households was a potentially illegal refusal to supply without justifiable reasons under Section 25(3).<sup>2</sup> Similarly, here Abbott is refusing to offer the version of its Kaletra product that is needed by most poorer consumers.<sup>3</sup> The willingness of the Thai Commission to challenge anti-poor market segmentation strategies for cable television but not for life saving medications is shocking.

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<sup>2</sup> Ultimately the case was decided on other grounds. *See Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries, Thailand, Lao, Kenya, Zambia, Zimbabwe*, UNCTAD 22-23 (2005).

<sup>3</sup> Consider another potentially analogous situation: Envision an energy firm responding to a public utility rate making decision it does not like by pulling applications for building new, improved, transmission lines and generating plants and capping all output at existing levels, thereby restricting access to energy to a growing population. These kind of decisions by dominant suppliers of essential goods appear to "suspend[ ], reduce[e] or restrict[ ] services, production, purchase, distribution, deliveries, or importation without justifiable reasons."