

**The Competence of a WTO Member in Determining the
Grounds for Compulsory Licensing: The Compatibility of the
Ground for Triggering Compulsory Licensing on Philips' CD-R
Patents with the TRIPS Agreement in Light of the Vienna
Convention on the Law of Treaties**

*Kuei-Jung Ni**

Abstract

The Taiwan Patent Act specifies the failure to reach a reasonable commercial term as one of the grounds to grant a compulsory license. In effect, several CD-R patents owned by a Dutch land company, the Philips, were licensed to a local Taiwan company as a result of a decision made by the Taiwan Intellectual Property Office. The governmental action has aroused a severe protest from the licensed company. Consequently, the European Commission issued an official report, accusing the decision of violating Taiwan's commitments under the TRIPS agreement of the WTO. Currently, no single dispute regarding the grant of compulsory licensing has been brought to the WTO Dispute Settlement Body. The event provides an opportunity to study the TRIPS-consistency of such a governmental action with a view to comprehending the limit of WTO members in applying the mechanism of compulsory licensing.

As the event involves several critical issues, this Article aims at studying if a WTO member has the competence to determine the grounds for compulsory license, including such a ground applied by the Taiwanese authority in the dispute in question.

This Article is designed to analyze how the presumptive case would be adjudicated by the WTO dispute settlement mechanism. This Article will begin

* Associate Professor, Institute of Technology Law, National Chiao Tung University.
E-mail: kjni@mail.nctu.edu.tw

to review the regulations of compulsory license under the TRIPS and the Taiwanese law incorporating the system. The background and process of granting a compulsory license on Philips' patents will also be revealed. The study then will review the arguments and reasoning of both the European Union and Taiwan. Mainly relying on customary interpretation rules embodied in the Vienna Convention on the Law of Treaties, this Article endeavors to examine and evaluate the legal implications and effect of relevant interpretative elements and authorities that are likely to sustain the arguments of either party.

Keywords: WTO, TRIPS, compulsory licensing, CD-R patents, VCLT, Doha Declaration on TRIPS and Public Health, reasonable commercial terms