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8 January 2005

His Excellency Mr. Urbain Olanguena Awono
Minister of Public Health
Republic of Cameroon
Yaounde, Cameroon

Dear Dr. Awono:

Essential Inventions requests that the Government of the Republic of Cameroon authorize non-exclusive "open"[1] non-voluntary licenses for any and all patents that are relevant in Cameroon for the importation, manufacture or sale of generic versions of the following medicines used in the treatment of HIV/AIDS:

Nevirapine (Brand name Viramune®)
Lamivudine (Brand name 3TC®)
Fixed dose combinations of Lamivudine and Zidovudine (Brand name Combivir®)

We believe the relevant patents on these products in Cameroon are held by Boehringer Ingelheim (nevirapine) and GlaxoSmithKline (for lamivudine and a fixed dose combination of lamivudine and zidovudine).

Legal Basis for an Administrative Enactment

Under Article 56 of Annex I of the Bangui Agreement, signed by the African Intellectual Property Organization (OAPI), of which the Republic of Cameroon is a member, the State may issue non-voluntary licenses for patents "by an administrative enactment of the competent Minister of the State concerned."[2] Specifically, Article 56 of Annex I states:

> Where certain patents are of vital interest to the economy of the country, public health or national defense, or where non-working or insufficient working of such patents seriously compromises the satisfaction of the country's needs, they may be subject, by an administrative enactment of the competent Minister of the member State concerned, to the non-voluntary license regime.[3]

[1] An open compulsory license is one that is available to any person or firm that seeks a non-voluntary license to use the patents necessary to manufacture, import, export, or sell these medicines.
[2] The Bangui Agreement, Annex I, Article 56(1).
[3] *Id.*

When invoking Article 56 of Annex I of the Bangui Agreement, we note that the Management of OAPI published an *Information Memo on the Enforcement of the Revised Bangui Agreement* ("Information Memo"),[4] which makes clear that non-voluntary licenses are available for both the importation and sale of products.

> Thus, when a member State, for the purposes of public health, deems that access to medicines should be improved, the competent Minister may, by an administrative decision, designate an administration or an organization to benefit from non-voluntary license regime to manufacture, import or sell products protected by patents.[5]

We also note that non-voluntary licensing for the importation and sale of medicines is consistent with the Republic of Cameroon's obligations under the World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) and in the spirit of the Doha Declaration on the TRIPS Agreement and Public Health (Doha Declaration). As noted in the Information Memo:

> [T]he revised Bangui Agreement enables each OAPI member State to take measures likely to enhance the protection of public health in general and facilitate access to medicine in light of the DOHA Declaration. There is, hence, no risk of conflict between the revised Bangui Agreement and any possible laws ensuing from the DOHA Declaration.[6]

The flexibilities and safeguards within the TRIPS Agreement and the Doha Declaration clarify that "Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted".[7] Under Article 56 of Annex I of the Bangui Agreement, a member State shall determine the conditions upon issuance of the non-voluntary licenses. Specifically, Article 56 of Annex I of the Bangui Agreement states:

> … [the patents] may be subject, by an administrative enactment of the competent Minister of the member State concerned, to the non-voluntary license regime. The said enactment shall specify the beneficiary administration or organization, the conditions, term and scope of the non-voluntary license and the amount of royalties payable.[8]

To grant non-voluntary licenses under Article 56 of Annex I of the Bangui Agreement, the "licenses shall be subject to the same conditions as the non-voluntary licenses granted under Article 46."[9] Under Article 46 of Annex I of the Bangui Agreement:

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[4] *See* Information Memo on the Enforcement of the Revised Bangui Agreement available at http://www.oapi.wipo.net/en/index.html accessed on July 8, 2004.
[5] *Id at 2*.
[6] *Id at 2*.
[7] Doha Declaration on the TRIPS Agreement and Public Health, Paragraph 5(b).
[8] The Bangui Agreement, Annex I, Article 56(1).
[9] The Bangui Agreement, Annex I, Article 56(3).

> At the request of any person made after the expiry of a period of four years from the filing date of the patent application or three years from the date of grant of the patent, whichever period expires last, a non-voluntary license may be granted where one or more of the following conditions are fulfilled:
>
> (a) the patented invention is not being worked on the territory of a member State at the time the request is made;
> (b) the working of the patented invention on such territory does not meet the demand for the patented product on reasonable terms;
> (c) on account of the refusal of the owner to grant licenses on reasonable commercial terms and procedures, the establishment or development of industrial or commercial activities on such territory is unfairly and substantially prejudiced.

We believe that the condition of Article 46(1)(b) is fulfilled in the case of any and all patents that are relevant in Cameroon for the importation and sale of nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine. The working of the patents in Cameroon relevant to nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine "do not meet the demand for the patented products on reasonable terms."[10]

In evaluating the statutory obligation to "meet the demand for the patented product on reasonable terms," we note that there is a large gap between the number of people who need treatment for HIV/AIDS, and those who receive treatment. There are limited resources to treat people living with HIV/AIDS, resulting in the rationing of treatment. According to the National Committee Against AIDS (CNLS) of Cameroon, approximately 82,000 people are in immediate need of highly active antiretroviral therapy (HAART)[11] to prevent premature death.[12] As of April of 2004, only 9,000 people receive HAART -- a mere 11 percent of those who need treatment.[13]

We note that the most prescribed HAART regimen in Africa, including Cameroon[14] uses the medicines that are the subject of this request, as do many other HAART regimens in Cameroon, making these medicines essential for access to HAART treatment in Cameroon.

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[10] The Bangui Agreement, Annex I, Article 46(1)(b).
[11] Highly active antiretroviral therapy or HAART therapy is a combination of antiretroviral medicines from several classes of antiretroviral medicines, with varying modes of action. A combination of these medicines represents the sate of the art in the treatment for HIV/AIDS. Intervention with HAART therapy suppresses replication of the HIV virus, significantly delaying the progression of immune system disease, thereby restoring patients to appreciable levels of functionality and postponing premature death.
[12] PANA. 2004. "Cameroon steps up provision of antiretrovirals." June 11, PANA.
[13] PANA. 2004. "Les antirétroviraux contre le VIH/SIDA en un seul comprimé" ("HAART against HIV/AIDS in one pill") July 8, PANA.
[14] Laurent, Christian, et al. 2004. "effectiveness and safety of generic fixed-dose combination of nevirapine, stavudine, and lamivudine in HIV-1-infected adults in Cameroon: open-label multicentre trial." *Lancet* 364:29-34 at 29.

At present, prices for HAART treatment are prohibitively expensive for the average Cameroonian, including *at least* the 40 percent of Cameroonians that live on less than one US dollar per day,[15] meaning that "reasonable terms" for the patented products to meet demand do not exist.

Pursuant to Article 46(1)(b) of the Bangui Agreement, the working of the patents in Cameroon relevant to nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine "do not meet the demand for the patented products on reasonable terms"[16]. Accordingly, under Article 56 of Annex I of the Bangui Agreement, the "competent Minister of the member State" may "by an administrative enactment"[17] make any and all patents that are relevant for the importation and sale of nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine subject to the non-voluntary license regime. Compulsory licenses will permit competition from generic suppliers to lower prices. The benefits of competition will increase over time, as generic suppliers become more efficient.

Obligations for Negotiations for Voluntary License

The Bangui Agreement and the TRIPS Agreement normally oblige negotiations with the patent owner prior to issuing non-voluntary licenses under reasonable commercial terms.[18] However, under both the Bangui and the TRIPS Agreements countries may be excused from obligations to engage in negotiations for a voluntary license before issuing a non-voluntary license. Prior negotiations are unnecessary under the Bangui Agreement when a Minister of the member State issues the non-voluntary license under Article 56 of Annex I. Under Article 31(b) of the TRIPS Agreement, countries are excused from obligations to negotiate prior to issuing a non-voluntary license in the case of a national emergency or for government procurement.

The highest members of the government of Cameroon describe the HIV/AIDS pandemic as a major crisis. His Excellency Peter Mafany Musonage, Prime Minister, Head of Government, Republic of Cameroon, representing the Head of State, His Excellency Paul Biya at the Special Session of the United Nations General Assembly on HIV/AIDS on 26 June 2001 in New York, called for "concrete commitments to check this disaster," noting further:

> As you all know, the HIV/AIDS pandemic is today, by its magnitude, the greatest threat to mankind. It is one of the most formidable challenges to human intelligence as it has defied a solution ….Like many other African countries south of the Sahara, Cameroon, with close to one

[15] Portfolio of Grants for Cameroon by the Global Fund to Fight AIDS, Tuberculosis and Malaria available at http://www.theglobalfund.org/search/portfolio.aspx?lang=en&countryID=CMR accessed July 2, 2004.
[16] The Bangui Agreement, Annex I, Article 46(1)(b).
[17] The Bangui Agreement, Annex I, Article 56(1).
[18] Under Article 48 of Annex I of the Bangui Agreement, the request for the grant of a non-voluntary license shall be accompanied "by proof that the requestor has previously approached the owner of the patent, by registered letter, requesting a contractual license, but has been unable to obtain such a license from him subject to reasonable commercial terms and procedures within a reasonable time". Under Article 31 of the TRIPS Agreement, "Where the law of a Member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government…(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time."

> million infected, or a prevalence of 11%, is also seriously affected by the AIDS pandemic.

Given the magnitude and the critical nature of the HIV/AIDS epidemic in Cameroon, under Article 56 of the Bangui Agreement, Article 31(b) of the TRIPS Agreement, and Paragraph 5(c) of the Doha Declaration, there is no obligation for prior negotiation for voluntary licenses on "reasonable commercial terms and conditions". Paragraph 5(c) of the Doha Declaration clarifies that members states have "the right to determine what constitutes a national emergency or other circumstances of extreme urgency" in order to forgo otherwise mandated obligations in the issuance of a non-voluntary licence, "it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency".[19]

Nevertheless, Essential Invetions has sought voluntary licenses on the patents relevant to the importation and sale of nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine. The Essential Inventions request to GlaxoSmithKline for voluntary licenses on lamivudine and the fixed dose combination of lamivudine and zidovudine was sent on 15 February 2004 and resent on 12 July 2004. We have yet to receive a reply from GlaxoSmithKline. Our request to Boehringer Ingelheim for a voluntary license of the patents relevant to nevirapine was faxed and sent by registered mail on 15 July 2004. Boehringer Ingelheim denied our request for a voluntary license on 27 July 2004.

Remuneration to the Patent Owner

Upon issuance of a non-voluntary license, the owner(s) of the relevant patents are entitled to remuneration. Under Article 31(h) of the TRIPS Agreement, "the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization." When issuing a license under Article 56 of Annex I of the Bangui Agreement, the "enactment shall specify the beneficiary administration or organization, the conditions, term and scope of the non-voluntary license and the amount of royalties payable."[20] However, Article 56 further states that, "In the absence of amicable agreement between the owner of the patent and the administration concerned on the said conditions, they shall be set by the civil court."[21] Accordingly, the Minister may decide the terms of the non-voluntary license and should these terms be in dispute by the patent owner, the matter shall be referred to the civil court.

Submissions to the WTO TRIPS Council address "adequate remuneration" as included in the TRIPS Agreement. For instance, in a June 2003 communication the European Commission to the WTO TRIPS Council made these comments regarding compensation:[22]

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[19] Paragraph 5(c) of the Doha Declaration.
[20] The Bangui Agreement, Annex I, Article 56(1).
[21] The Bangui Agreement, Annex I, Article 56(2).
[22] June 2003, The Implementation Of The Doha Declaration On The Trips Agreement And Public Health. Communication by the European Communities and their Member States. Council for Trade-Related Aspects of Intellectual Property Rights

> . . . administrative and/or judicial procedures must be transparent and equitable and respect the rights of the patent holders, while ensuring that the grant of a compulsory licence is not hindered by unnecessary delays. In the same vein, equitable, guidelines must be determined for setting royalty rates for the remuneration to the right holder.

The United Nations Development Program (UNDP) published royalty guidelines specifically for compulsory licenses of patents on medicines in its 2001 Human Development Report entitled *Making New Technologies Work for Human Development*.[23] The UNDP guidelines call for royalties in the range of 0 to 6 percent, citing the normal royalty as four percent of the sale price of the generic product, with adjustments for higher royalties when products are of particular therapeutic benefit, and lower royalties in cases where development benefited from public subsidies.

The Japanese Patent Office (JPO), with a long history of standardized royalty rates as recommended by the UNDP, recently issued revised royalty guidelines. The new JPO royalty guidelines range from 0 to 6 percent -- royalties for inventions with a low value are 2 percent, and inventions with a high value are 4 percent, with additional adjustments which may increase or decrease the royalties. The JPO approach includes a "utilization ratio" for each individual patent, which reflects the relative importance of the patent in the product. This is particularly important in cases where there are several patents on the same product. In this case, the combined sum of royalty payments to all patent holders will range from 0 to 6 percent of the price of the generic product. For minor inventions, such as a patent on a dose or the use of a fixed dose combination, royalties are typically low, because of the low utilization factor.

Royalty rates recently proposed or instituted for compulsory licenses on HIV/AIDS medicines have been in the .5 to 4 percent range. Specifically using the UNDP guidelines, Malaysia offered GlaxoSmithKline a total royalty rate of 4 percent for all patents on HIV/AIDS medicines. Mozambique recently set a total royalty rate of 2 percent for all patents on a fixed dose combination of three antiretroviral medicines, 3TC+d4T+NVP. Zambia issued licenses for the same product for a total royalty of 2.5 percent of the price of the generic product. Indonesia has issued a compulsory license on antiretrovial drugs with a lower royalty of .5 percent of the generic price.

Canada has recently proposed royalty guidelines for the export of HIVS drugs under a law to implement the August 30, 2003 decision of the World Trade Organization to waive Article 31(f) of the TRIPS agreeement. The Canadian proposal is to set a royalty of 4 percent of the generic price, adjusted downward according to the relative rank of a country in the UNDP Human Development Index. According to the formula proposed by Canada, the appropriate royalty for exports of AIDS drugs to Cameroon would be [(1+177-141)/177] x 0.04 = .84 percent.

The government of Cameroon has considerable descretion in setting royalty rates. Given the World Bank classification of low income for Cameroon, the UNDP Human Development Index ranking of 141 of 177 countries, and the extent of the HIV/AIDS crisis in Cameroon, very low royalty rates are justified. Our own recommendation is to set royalities at no more than 2 percent of the sales price of the generic product as the total compensation to patent owners for the

[23] The 2001 Human Development Report is available at http://hdr.undp.org/reports/global/2001/en/.

medicines that are subject of this request. In the event that there are multiple patents on the same product, the royalties should either be divided among the patent owners in proportion to the number of patents on the each product, or by arbitration using the JPO royalty guideline "utilization factor" as the method of allocation among patent owners. In cases where the generic products are co-formulated fixed dose combinations, royalties should be lowered when one or more components is off patent.

Proposed Terms of Non-voluntary License to Use Patents

The terms of an open non-exclusive non-voluntary license are subject to guidelines both in the Bangui and TRIPS Agreements. Under the Bangui Agreement, the Minister shall set "conditions, term and scope of the non-voluntary license."[24] Article 31(c) to Article 31(j) of the TRIPS Agreement provides conditions on the terms of a non-voluntary license. In accord with these provisions, Essential Inventions asks the Ministry to issue the following order regarding the issuance of compulsory licenses for any and all patents for the importation and sale of nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine:

1. Any generic producer be authorized to use any patented inventions necessary to import, export, manufacture, offer for sale, sell, or use the following products:

   nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine;

2. Any generic producer that uses the patents described in (1) is required to pay the following royalties to patent owners:
   a. For stand alone versions of nevirapine, a royalty of 2 percent.
   b. For stand alone versions of lamivudine, a royalty of 2 percent.
   c. For the fixed dose combination of the patented drug lamivudine and the unpatented drug zidovudine, a royalty of 1 percent.
   d. For fixed dose combinations utilizing lamivudine and nevirapine, plus one or more unpatented drug, a royalty of 1.5 percent.
   e. For drug fixed dose combinations utilizing lamivudine and two or more unpatented drugs, a royalty of 1 percent;

3. In cases when more than one patent exists for a product, the royalties shall be divided among the patent owners in proportion to the number of patents on the product;

4. The royalties listed in (2) shall be paid to patent holder on a quarterly basis, with royalty payments due no later than 30 days after the end of each quarter;

5. If products are exported to a market where the products are subject to another non-voluntary license, the foreign royalty payments are to be credited against the royalties normally associated with the export sales;

[24] The Bangui Agreement, Annex I, Article 56(1).

6. The duration of authorization shall be for the term of the patent, unless HIV/AIDS ceases to be a public health issue in the Republic of Cameroon, and a reduction in the term does not unduly prejudice the interests of the generic supplier.

7. Use of this authorization shall be predominantly for supply of the domestic market, unless greater exports are authorized under the WTO rules for implementation of paragraph 6 of the Doha Declaration on TRIPS and Public Health.

Summary and conclusion

Essential Inventions requests that Dr. Urbain Olanguena Awono as the Minister of Public Health of the Republic of Cameroon, "the competent Minister of the member State", issue nonexclusive "open" non-voluntary licenses for any and all patents that are relevant in the Republic of Cameroon for the importation and sale of generic versions of nevirapine, lamivudine, and the fixed dose combination of lamivudine and zidovudine, medicines used in the treatment of HIV/AIDS. This authorization should be available to any and all persons or firms that seek non-voluntary licenses to the patents which are necessary for the manufacture, import or sale of these medicines.

The legal authority for this "administrative enactment" is granted by the Bangui Agreement, the Information Memo, the TRIPS Agreement, and the Doha Declaration. For the reasons specified above, there is no obligation for negotiation for a voluntary license under reasonable terms and conditions with the patent owner(s), although Essential Inventions has attempted to negotiate with both GlaxoSmithKline and Boehringer Ingelheim. The granting of non-voluntary licenses legally entitles both GlaxoSmithKline and Boehringer Ingelheim to remuneration, which can be satisfied following the payment of the royalties we have proposed.

It is important to note that virtually all major donors for AIDS treatment have indicated they will support the purchase of generic medicines, so long as sales are consistent with global intellectual property rules, including rules for granting compulsory licenses for patents. The Global Fund (to fight AIDS, Tuberculosis and Malaria) states it favours proposals that "are consistent with international law and agreements, respect intellectual property rights, such as Trade-Related Aspects of Intellectual Property Rights (TRIPS), and encourage efforts to make quality drugs and products available at the lowest possible prices for those in need."[25] The World Bank policy is that "no preference for purchasing from originator/patent holder or generic producer, provided that procurement is lawful and that ARVs meet standards of quality, safety and efficacy."[26] The US government's PEPAR program notes that it will support the purchase of generic AIDS drugs, "as long as international patent laws and local government policies allow it."[27] The US African Growth and Opportunity Act limits eligibility to countries that provide for "the protection of

[25] http://www.theglobalfund.org/en/funds_raised/principles/

[26] A Technical Guide to the Contemporary Context of HIV/AIDS Procurement of Medicines and Supplies under Bank funding, *Intellectual Property Rights in Medicines Procurement,* Strengthening Fiduciary Management in Multi-Sectoral National HIV/AIDS Program for Sub-Saharan Africa, Network of National HIV/AIDS Program Practitioners in Africa (NAPPA) and World Bank, July 2003.

[27] PEPFAR, Bringing Hope and Saving Lives: Building Sustainable HIV/AIDS Treatment, The President's Emergency Plan for AIDS Relief Report on Current Activities Underway to Expand Treatment for HIV/AIDS, Submitted by the Office of the U.S. Global AIDS Coordinator, U.S. Department of State, August 2004, Page 23

intellectual property,"[28] while recognizing the importance of using the flexibilities in TRIPS to issue compulsory licenses to obtain low cost AIDS drugs.[29] By acting upon the request to issue open compulsory licenses on medicines for AIDS, the government will ensure that it can take advantage of the widest number of suppliers of medicine, and seek financing from the widest group of donors for the treatment of AIDS. A failure to grant open compulsory licenses will limit the number of suppliers, or present risks of limiting donor support for treatment.

The scale of the HIV/AIDS pandemic warrants an administrative enactment of this kind, which is consistent with both the OAPI and WTO intellectual property rules. We look forward to your consideration of our request. Should you have any questions or require further information, please feel free to contact myself, or our Cameroon associate, Mr. Jean Marie Talom.

Respectfully,

Terry Gardiner

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[28] Sec 104(a)(1)(C)(ii)

[29] May 10, 2000 EXECUTIVE ORDER 13155, Access To HIV/AIDS Pharmaceuticals And Medical Technologies. Section 1. Policy. (a) In administering sections 301-310 of the Trade Act of 1974, the United States shall not seek, through negotiation or otherwise, the revocation or revision of any intellectual property law or policy of a beneficiary sub-Saharan African country, as determined by the President, that regulates HIV/AIDS pharmaceuticals or medical technologies if the law or policy of the country: (1) promotes access to HIV/AIDS pharmaceuticals or medical technologies for affected populations in that country; and (2) provides adequate and effective intellectual property protection consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)).