PATENTS AND A H1N1

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This year, world history has been characterised by two major events: the global financial crisis and the pandemic of human influenza A H1N1.

These two events have encouraged governments to take drastic measures in order to avoid as far as possible economic disaster in their countries and to prepare for the influenza pandemic reaching them.

Mexico was no exception. Since the global financial crisis at the end of 2008, the country has been immersed in a deep economic crisis, which worsened as a result of the health emergency that occurred at the end of April 2009 (the epidemic of human influenza A H1N1). Over several days, and in some cases several weeks, the operations and incomes of companies, government offices, the educational sector and the tourist industry were drastically affected, as restaurants, office buildings, schools, cinemas, theatres, arenas, stadiums, etc. closed in order to prevent the epidemic from spreading.

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The measures taken aggravated the economic crisis, considering that private companies earned less income (they practically had no sales during the emergency) and suffered a loss of employment (mainly in the tourist industry). Meanwhile, the government had to divert resources in order to take care of the population and acquire medicaments for treating human influenza A H1N1.

This health emergency provided an opportunity for the Mexican government to use the compulsory licensing provisions of the Industrial Property Law (IPL) for the first time. The provisions of the IPL establish that a patent compulsory licence may be granted in Mexico when the utilisation of the patented product or process cannot be proved (lack of exploitation) or when the conditions for its granting are related to the interests of the state (national emergencies or security). These are also called 'public utility licences'.

At the beginning of 2004, the IPL was revised in order to include a mechanism for the partial implementation of the Doha Declaration principles on public utility licensing. The revised law allows compulsory licences for medicines to be granted in times of national emergencies or in the interests of national security, provided that the Mexican government declares a disease as being of 'priority attention' and that the patent jeopardises the access to drugs necessary to treat the disease.

As a result of the above, and after the drastic measures taken by the Mexican government to control the influenza epidemic, many generics companies put pressure to get human influenza A H1N1 declared a 'priority attention disease'. At the beginning of May 2009, the Mexican government did this. However, patent owners followed with an aggressive strategy to demonstrate that access to the necessary drugs was not compromised and that, therefore, public utility licences were not necessary to deal with the disease. In view of the above, in the middle of May, the Mexican government issued a second declaration cancelling the possibility of obtaining compulsory licences.

At the same time, the Senate issued a resolution in which it did not accept a bill of March 2008 proposed by the Institutional Revolutionary Party. The main aim of this proposal was to establish an opposition procedure in the IPL to grant patents and to issue sanctions to 'abusive' practices when enforcing invalid patents.

The preliminary recitals of the refused proposal incorporate the arguments that domestic generic manufacturers have previously used, namely: a) that patent holders extend the life term of the patents without undermining their IP rights; and b) that the extension in the life term of the patents stops the entry of generic medicaments into the pharmaceutical market.

The Senate argued that, in fact, a possibility of delaying the prosecution of patent applications was real, considering that, as proposed, it would be necessary to interrupt this procedure in order to solve the opposition in a first term.

In view of the above, the Senate proposed an alternative opposition procedure (at present under revision by the Congress), which in fact does not interrupt the prosecution of the patent application, but obligates the Mexican Patent Office to issue a resolution at the same time that the patent is granted or denied.

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