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# INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES

Attached is a copy of the intervention of the delegation of Switzerland under item N (Intellectual Property and Access to Medicines) of the agenda of the Council for TRIPS meeting of 18-22 June 2001.

[*] In English only.

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**SPECIAL DISCUSSION ON "INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES", 20 JUNE 2001**
**STATEMENT BY SWITZERLAND**

Mr. Chair,

The question of Intellectual property and access to medicines is a question of utmost importance in the context of the pandemics of HIV/AIDS which, in some parts of the world have taken or are taking extremely worrying dimensions. That is why at the TRIPS Council's last meeting in April, Switzerland welcomed and supported the request of Zimbabwe on behalf of the African Group, that this Council should set aside a full day for a special discussion on the issue of "Intellectual Property and access to medicines".

We would like to thank all those delegations that enable us to come to a structured and result oriented discussion by having provided this Council with written communications for today's meeting.

Mr Chair, first of all, I would like to stress what the distinguished Ambassador of the EC has stated this morning: The TRIPS Agreement should not be looked at as part of the problem but as part of the solution.

This is, because intellectual property protection and in particular patent protection are an important instrument in favour of research and development which again is in favour of development, especially in the field of health care.

Making drugs available at affordable prices includes as a **prerequisite, that drugs have to be available *per se***. If no drugs were available at all, how could we then discuss to make them available at lower costs?

We therefore have to make sure that enough incentives will continue to be given to the private sector, which is responsible for research and development of new medicines which will result - hopefully - one day to a vaccine against such a terrible illness like HIV/AIDS. These incentives are assured in the TRIPS Agreement, in particular by **Articles 27 and 28** which define the patentable subject-matter and the rights conferred to the patent holder. We therefore must resist to any temptation to downgrade these rights, or else we take the risk, to have far less medicines to distribute in the end.

While addressing the issues of flexibility offered by the TRIPS Agreement, we also should bear in mind that any move we make, could finally lead to a reaction from right holders. In other words: any so-called flexibility on which we agree to be in the TRIPS Agreement should have to be construed in such a way, that it does not take away the incentive to research for new drugs and vaccines, if we do not want to face at the end of the exercise a so-called "loose-loose" situation – something which cannot be in the interest of anybody.

A delicate balance between these interests has been achieved by limiting the exclusive right of the right holder to a specific term of protection, by determining the definition of protectable subject-matter, and by the obligation to disclose, already during the term of protection, the invention in order to disseminate new technology and therewith to encourage new research and development and thus ensure faster progress of technology.

Beyond this balance, parties to the TRIPS Agreement have agreed to include even further scope for flexibility on the range of which we have started to discuss by today. This flexibility should enable Members to implement their TRIPS obligations in balance with their public health considerations.

As for the price of medicines, like intellectual property rights, we agree it is an important issue in the access to health discussion. However, even if such medicines were offered at half of their actual price or as low as at one-tenth of that price, they would probably still not be affordable for many people. So price is a core problem that has to be addressed. In that respect, we can only encourage discussions between governments and the private sector in order to agree on prices and UN Secretary General Annan's call for a fund raised to finance the access to and distribution of essential drugs in those countries which desperately are in need of such drugs. It is, however, important to mention that patents are only partly responsible for the price of a patented product:

- First, a patent does not give the right to charge a specific price for a pharmaceutical.

- Second, a patent does not prevent prices for patented pharmaceuticals from being adjusted to take into account the capacity to pay of different countries and their population.

- And third, the market of pharmaceutical products is one of the most regulated in the world and the influence of patents is hence very much reduced.

As to the flexibility of the relevant provisions of the TRIPS Agreement, I would like to cut a long story short: My delegation would like to support what has been said by the European Communities and their member States in document IP/C/W/280 in paragraphs 6-9 and 17-19. We also fully agree with what has been said in the same communication by the EC/MS in the bold typed conclusions at the end of paragraphs 11-16 concerning Articles 7, 8, 30, 31 and 39 of the TRIPS Agreement.

Since the said communication of the European Communities and their member States does not address the issue of parallel imports and local working, we would like to focus on these two points which in our view are of crucial importance to the problem of "access to drugs".

While in the view of this delegation, the TRIPS Agreement in its substantive provisions supports the notion of national exhaustion (Article 28), it is recognized that **Article 6** of the Agreement prevents Members from taking action against Members that do permit parallel imports (and let me be clear, when talking of parallel imports, I mean imports of original products put on the market with the consent of the right holder at a cheaper price in another country than the one offered in the country considering parallel importation). Although this delegation still has some doubts whether parallel importation is really for the benefit of the consumer and not rather the trader, we recognize that Article 6 offers flexibility to developing countries in the search for patented medicines offered at a cheaper price elsewhere in the world.

However, the concept of exhaustion and parallel import need particular scrutiny when talking about **differential pricing,** which has been put forward from various sides as a possible option to increasing accessibility to drugs in developing countries: When considering differential pricing, my delegation would like to emphasize that if such a pricing system should get the support of all the stakeholders necessarily involved in its implementation, one of the main prerequisite would be to ensure that products which are sold at a lower price to developing countries are not re-exported to industrialized countries. Effective safeguards in that respect would be necessary and in place as soon as large quantities of price-reduced pharmaceutical products would be delivered to developing

countries facing a health crisis. The risk of re-exportation would not only undermine research and development of new products, but would also divert the products from those so urgently in need of them, the people, who are the reason why we are having today's special discussion, that is, those suffering from HIV/AIDS, malaria, tuberculosis or other epidemics in the developing world. In our view, **Article 6** of the TRIPS Agreement would provide for the necessary flexibility to find an appropriate solution for this problem, but may be this would have to be expressed by this Council in a more explicit way, for example in a joint declaration.

As regards compulsory licensing and the requirement of **local working of patents** as suggested by some delegations, I have to say that my delegation does not see how such a requirement could be brought into harmony with the wording of Articles 27 and 28 of the TRIPS Agreement, which respectively prohibit discrimination between locally and imported products, and considers **importation** as the working of a patent. But may be we get further clarity on this issue during the continuation of our discussion in this Council.

Having said this, I would like to say that Switzerland is ready to continue in this Council the technical discussion on the issues of flexibility offered by the TRIPS Agreement when facing a health crisis and an "access to medicines" problem.

We are sure that the TRIPS Agreement provides us with enough flexibility in this regard.

We simply would like to recall that in this discussion, the TRIPS Council should not forget the crucial importance of intellectual property protection and in particular patent protection as the core incentive for the development of new, more effective medicines in our battle against health problems.

Thank you, Mr. Chairman.