

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)

Negotiating Group on Trade-Related Aspects
of Intellectual Property Rights, including
Trade in Counterfeit Goods

SUBMISSIONS FROM PARTICIPANTS ON TRADE
PROBLEMS ENCOUNTERED IN CONNECTION
WITH INTELLECTUAL PROPERTY RIGHTS

SWITZERLAND

This note contains the submission of Switzerland.

1. Introduction

This submission is presented in the framework of the negotiating plan of the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, in response to the Group's invitation to that effect on 10 June 1987 (NTM.GNG/NG11/2, para. 8). Its purpose is to draw attention to certain types of problems encountered in practice, and thus help to encourage and forge a common perception of the importance of adequate protection of intellectual property for international trade.

Proper protection of property is an essential precondition for trade at both national and international levels. In other words, if property is not protected trade cannot expand and thrive. This remark is self-evident as regards the physical aspect of goods. However, most goods are also the result, materialization and/or underpinning of an intellectual effort (research and creativity) without which they would lose their specific identity (invention, creation, innovation, design, trademark, geographical denomination). This intangible component of products must also be the object of a property right (the right to intellectual property in the broad sense). Infringement of such property has the same effect on trade as if the goods offered on the market were systematically damaged, stolen or destroyed. Failure to recognize or to protect intellectual property in a suitable manner is tantamount to encouraging not only the spoliation of the lawful owners and trade in illegal products, but also cheating and even endangering consumers. The very fact that the notion of property is inadequately recognized and protected with regard to an important aspect of goods - their intangible components - is thus in itself fundamentally harmful to trade. It is therefore right that GATT, whose task it is to create favourable conditions for the expansion of trade, should also deal with this problem from the commercial standpoint. In so doing, it should

ensure that the protection of intellectual property does not give rise to unnecessary and disproportionate obstacles to international trade. It is therefore by no means paradoxical for GATT, in its efforts aimed at liberalization, to seek to improve the protection of intellectual property.

Clearly, however, while the protection of intellectual property is an important and essential element of the legal framework necessary for trade, its objective is not confined to trade alone. The relevant provisions in this field have other specific objectives. It is not a question of challenging these within GATT, but of trying to attain in a more co-ordinated manner the various aims of intellectual property law, including that of facilitating international trade.

2. Problems encountered by Switzerland

For Switzerland and its exporters (many of which are small and medium-sized undertakings), the following factors have led to distortion of competition in foreign markets and, in some cases, in Swiss markets too. They may basically be grouped in six categories:

- lack of a legal framework in the field of intellectual property;
- insufficient or inadequate level of protection;
- discriminatory application of intellectual property law;
- lack of, or inadequate, national procedures;
- counterfeit goods;
- problems related to international law of intellectual property.

2.1 Lack of a legal framework in the field of intellectual property

The lack of legislation in a number of countries in such important fields as patents, trademarks, industrial designs, geographical denominations, copyright and other related rights, is a major problem. This lack of legislation encourages the uncontrolled use of inventions/creations or distinguishing signs, and leads to systematic piracy or counterfeiting.

2.2 Insufficient or inadequate level of protection

In some countries, domestic patent legislation does not cover all sectors of economic activity. Thus, in these countries inventions in chemicals or the pharmaceutical industry are sometimes excluded from patent protection. Contrary to the initial objectives of such legislation, the result is not easier access to such inventions but on the contrary shrinking sources of supply, in particular for the better products. Under the legislation of some other countries, protection by patent, in chemicals

and pharmaceuticals in particular, is possible for process inventions only and does not extend to products manufactured by such processes.

Another serious source of problems for exporters arises when the duration of protection is not in keeping with the pace of technical development or commercial needs. For example, in the pharmaceutical field, mention should be made of the difficulties resulting from a duration of protection that is largely used up by time-consuming national procedures of registration or control that take place before products are authorized to be offered for sale.

Finally, even when the length of protection may be considered adequate in itself, an additional difficulty may stem from the legal obligation imposed in some countries on the patent holder to exploit it industrially within the country.

2.3 Discriminatory treatment with regard to intellectual property

Experience shows that in some countries discriminatory measures have been taken which favour nationals only or the exporters of only certain other countries.

2.4 Lack of, or insufficient or inadequate, national procedures

Even when laws exist and provide for means of recourse, shortcomings have been found to exist in practice:

- procedural or administrative problems hindering access to local judicial or administrative bodies;
- damages that are insufficient to deter lawbreakers;
- lack of provisional measures such as the seizure of certain objects.

Some national procedures designed to grant and guarantee intellectual property rights are lengthy, costly and complicated. They make it difficult for small or medium-sized undertakings to gain access to the markets of such countries, thus depriving the latter of essential sources for the supply of goods of reliable quality.

2.5 Counterfeit goods

This subject was dealt with by a GATT Expert Group, whose report (GATT L/5878) already provides an excellent basis for work and need not be considered here. On the other hand, the link between counterfeiting and the shortcomings identified above should be examined. It is above all these shortcomings that lead to the problem of counterfeiting, and to remedy them would represent effective action against counterfeiting.

2.6 Problems related to international law of intellectual property

International co-operative efforts in the field of intellectual property have not only enabled governments to gain a better idea of the issues connected with this branch of law, but have also been conducive to the adoption, at the international level, of converging national approaches to the question of how to devise protection for intellectual property rights. However, international co-operation with regard to intellectual property has not yet gone far enough. It suffers from the following shortcomings:

- lack of conventions: integrated circuits, example;
- insufficient geographical coverage: a number of contracting parties have not acceded to some or any of the existing conventions;
- insufficient material coverage: since in principle the conventions are only outline-conventions, they do not touch upon all the essential aspects of protection of intellectual property. Furthermore, discrepancies arise as a result of different national implementation of the substantive provisions covered by the outline-conventions. Consequently, the level of protection varies from one contracting party to another;
- differing pace of adaptation of national legislation: all parties to a convention have not always ratified the latest Acts;
- ineffectiveness of dispute-settlement provisions.

3. Effects on trade

3.1 Effects felt by Switzerland as an exporting country and by its nationals

The lack of protection of intellectual property or the inadequate protection thereof may be felt in various ways. The producer/exporter reacts differently according to the seriousness and duration of the spoilation of which he is the victim. Such reactions are, however, not mutually exclusive and often become linked, successive and cumulative. They all tend to distort trade conditions, and in the last resort end up by stopping it altogether.

Infringements of intellectual property:

- reduce his turnover because he has to "compete" with the copy of his own product;
- prevent the lawful owner from recouping the resources he invested in developing his product and from financing other research;

- give rise to additional expenses (investigation, lawsuits and so forth).

Consequently, he will seek to:

- increase his prices (to cover his costs more rapidly, in other words before he is prevented from doing so by copies);
- withdraw from that market and avoid any technological transfer to the country in question;
- confine his innovation to what is strictly necessary so as to avoid useless research and development costs.

3.2 Effects on importing countries or their nationals

If some countries do not protect intellectual property, it is usually in order to avoid having to share in the costs of innovation borne elsewhere and thus benefit from it at zero cost. This practice may seem to produce benefits in the short term inasmuch as it is enough to copy the appearance of a product. Nevertheless, in most cases it is ineffectual when the innovation concerns the functioning of a product or its production or utilization. It almost inevitably fails when an innovation is not isolated but part of a context, that is to say, part of a chain of operations or of know-how. In that case, the counterfeit production and products will almost invariably be imperfect and unsatisfactory, if not dangerous. If such "copies" nonetheless sometimes provide an economic return in the short run, it is usually at the expense of the consumer who obtains a product which does not have, with use, the properties of the good he thought he was buying. Only consumers who are not in fact concerned with the properties of the original product can be satisfied with the "incomplete" counterfeit product.

In view of the present importance and scale of technological progress that is permanently advancing on a wide front, the absence of protection of intellectual property inevitably has harmful effects on the economy and trade of the importing country:

- increasing difficulties of supply as regards both products and technology, in particular in the case of high-quality, sophisticated products such as bio-technology and integrated circuits;
- unfavourable conditions for autonomous participation in innovation;
- difficulties in the exportation of domestic products that are technologically backward and face unfavourable prejudices (copies, defects, bad workmanship, and so forth).

Conclusion

Like other participants, Switzerland draws the conclusion that the problems identified in the field of intellectual property create distortions and obstacles in trade. They affect the concessions granted in the framework of the General Agreement. Without advancing any proposals at this stage on how to tackle these problems within GATT, Switzerland reserves the possibility of presenting a second submission on the subject before the meeting of the Group on 23 September. It considers that already at this stage, as a working hypothesis, it would be desirable to negotiate additional provisions in order to remedy as far as possible the distortions arising out of the absence or insufficient level of protection of intellectual property or out of the failure to respect such rights.