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NEGOTIATIONS
THE URUGUAY ROUND

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

STANDARDS AND PRINCIPLES CONCERNING THE AVAILABILITY,
SCOPE AND USE OF TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS

Communication from Switzerland

Addendum on Proprietary Information

The following communication has been received from the Permanent Delegation of Switzerland, with the request that it be circulated to members of the Negotiating Group.

Proprietary Information

In completion of the Swiss proposals related to standards and principles concerning the availability, scope and use of trade-related intellectual property rights of 11 July 1989 (MTN.GNG/NG11/W/38), and recalling the introduction of that communication, the following considerations and proposals on proprietary information protection are submitted to the Negotiating Group.

1. INTRODUCTION

The common ground of all intellectual property protection is that the law allocates and protects the right of exclusive commercial use and disposition of information by its lawful owner in a competitive environment. From a trade policy perspective, it does not matter whether such exclusivity to use or dispose is achieved by means of publication of the information (patents, trademarks, industrial designs), by legal protection from the date of creation (copyright) or by legal protection of undisclosed information. Ways and means to protect intellectual property and information may change over time, e.g. in Swiss law by allocating software protection from trade secrets or know-how to the sphere of copyright in accordance with new commercial needs. The overall goal, however, of preserving exclusive use or disposition of information based upon investment of time, human and financial resources remains paramount.

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Protection is directed at the preservation of intangible assets of an enterprise essential for its operations. The absence of, or insufficient, protection of investment of resources to build confidential information of commercial value creates distortions of trade and competition and is detrimental to innovation, investment and transfer of technology as much as insufficient protection of other intellectual property rights. The Swiss delegation therefore strongly believes that trade secrets should be included in a future agreement on TRIPS.

Proprietary information such as trade secrets and know-how ranges among the most important intangible assets of an enterprise. It is relevant both in contractual relations among private or public enterprises, as well as in relationship of those to public authorities. It is necessary to protect them from unlawful appropriation, use and disclosure on both levels.

2. STANDARDS ON PROPRIETARY INFORMATION

The following standards are essential in order to achieve effective protection of proprietary information:

Definition of Proprietary Information

- (i) Proprietary information consists of technical or commercial knowledge of any content and in any form, and which is protected under other intellectual property laws, provided that
 1. such knowledge derives actual or potential commercial value from not being known to the public,
 2. such knowledge is not readily accessible, and
 3. the rightful proprietor has the will to keep the secrecy of such information and reasonable efforts are made under the circumstances to that effect.

Protection of Proprietary Information

- (ii) Appropriation and use of proprietary information without the consent of the proprietor shall be unlawful.
- (iii) Voluntary licensing of proprietary information shall not be discouraged and impeded by disclosure of, or legal permission to disclose, such information to third parties or to the public without the consent of the proprietor. In particular, there shall be no laws, regulations and practices limiting the lifespan of a proprietary information or imposing excessive and discriminatory conditions on the use of licensed information.

- (iv) There shall be no compulsory licensing of proprietary information.
- (v) Proprietary information provided to a governmental agency in order to obtain permission to produce or market a product, such as results of clinical or safety tests, shall not be disclosed without the consent of the proprietor, except to other governmental agencies if necessary to protect human, plant or animal life, health or the environment.

Governmental agencies shall not be entitled to use the information for commercial purposes. They may disclose it only to the extent indispensable to inform the general public about the actual or potential danger of a product.

- (vi) Disclosure of proprietary information to a third party, or other governmental agencies, in the context of an application to obtain intellectual property protection, shall be subject to an obligation to hear the applicant and to judicial review.

Third parties and governmental agencies having obtained such information shall be prevented from further disclosure and from commercial use of it without the consent of the proprietor.

- (vii) Contracting Parties shall provide adequate legal remedies in penal, administrative, civil and procedural law to deter unlawful appropriation, use and disclosure of proprietary information and provide full compensation for injury incurred.