

# **SWITZERLAND -Comments on the proposal submitted by the delegation of South Africa on behalf of the African Group and the Development Agenda Group (SCP/16/7)**

## **Introduction**

Switzerland has taken note with great interest of the proposal SCP 16/7 on patents and health.

In its essence, the proposal focuses on the relationship between patents and health, in particular access to medicines, a topic that is of utmost importance also to our delegation.

## **Overview**

The World Intellectual Property Organization (WIPO) maintains a trilateral cooperation together with the World Health Organization (WHO) and the World Trade Organization (WTO) that focuses on the relationship between intellectual property (in particular patents), trade rules and health (specifically the dynamics of access to and innovation of medical technology). The collaboration intends to increase the relevant policy makers' knowledge and information in addressing public health issues in connection with intellectual property rights.

WHO, WIPO and WTO are currently finalising a joint study about the promotion of access and medical innovation at the intersection between public health, intellectual property and trade, which intends to provide a holistic presentation of the full set of issues, including a comprehensive consolidation of their technical cooperation activities in the field.

This collaboration between the three relevant international organisations reflects and takes into account the complexity of the topic. *Access to medicines* is a subject that entails many cross-cutting issues and actors. Therefore, this delegation strongly supports that questions with regard to *access to medicines* will continue to be discussed in the existing relevant forums, such as the trilateral cooperation platform between WIPO, WHO and WTO.

WHO's Global Strategy and Plan of Action (GSPA) adopted in 2008 contains a very extensive set of elements, recommendations, proposals for actions and measures addressed at the various stakeholders, among which WIPO, with regard to the application and management of intellectual property to contribute to innovation and promote public health (elements 5.1 and 5.2 probably being the most relevant in this context), particularly with regard to diseases which disproportionately affect people in developing countries. Furthermore, our delegation would like to highlight and commend the recently launched *Re:Search* initiative by WIPO, a new consortium between public and private organisations to share intellectual property and expertise with the international research community in order to promote the development of new treatments for neglected diseases, malaria and tuberculosis.

## **Avoiding Duplication of Work**

Should WIPO Members agree to undertake further work in this field, in addition to the already existing engagements by WIPO mentioned above, an overview on the already existing studies, results, information exchanges and general information on technical assistance projects must be established first. This will help to prevent that work already

undertaken or under way will be unnecessarily duplicated. Without such an overview, Members cannot meaningfully discuss whether and if yes, what exactly could be done by a WIPO committee in a complimentary manner to the already many existing initiatives.

Examples of points where the work program proposed in by SCP/16/7 risks to duplicate work already done or under way include - but are not limited to - the studies in Element I with regard to compulsory and government use licences and the impact on public health (SCP/16/7, para. 8 (a)). As a matter of fact, WIPO has already undertaken activities regarding this topic, as reflected in CDIP/5/4 and CDIP/7/3. In addition, the proposal under Element II (SCP/16/7, para. 12) to evaluate the patent status of a list of medicines is currently being conducted by WIPO with regard to the medicines on the WHO essential medicines list, which contains the most important medicines in practical terms. Also technical assistance projects foreseen as under Element III in SCP 16/7 on IP and health already exist in the form of workshops often organised in cooperation by WIPO, WHO and WTO.

### **Perspectives on the role of intellectual property protection and patents in particular in the context of access to medicines**

This delegation is convinced that the *access-to-medicines* challenge needs to be addressed in a sustainable manner and thus with a systemic and long-term perspective. Proposal SCP/16/7, however, addresses the access to medicines issues and the role of patents in this regard primarily with a short-term perspective. Some of the underlying assumptions of the proposals in SCP/16/7 thus seem not to reflect the complexity of the health issues with regard to innovation, availability and access to medicines and the role of intellectual property in this context.

The proposal SCP 16/7 seems to imply that using the patent flexibilities more systematically will automatically improve the public health objective of access to medicines. For example, in SCP/16/7 para. 4 and 10 only patent flexibilities are highlighted as promoting public health objectives, whilst the contributions of a positive implementation of intellectual property and patent protection to the goal of a sustainable access to medicines are not given any consideration. For instance, the patent system requires research findings to be divulged instead of being kept secret, thus other researchers may build upon relevant new discoveries which results in a positive spill-over and thereby accelerates considerably the development cycle of newer and more innovative medicines.

The area of neglected diseases may illustrate why this delegation is not at ease with some of the underlying assumptions in the proposal SCP/16/7 on *patent and health* and the suggested elements for a work programme which focuses on patent protection respectively on flexibility and exceptions from such protection only: In an economically viable market combined with the incentive of patent protection, a steady flow of innovation is ensured and the patent system can accordingly play its role. In the case of neglected diseases, however, 'insufficient market incentives are the decisive factor' why low innovation and subsequently insufficient availability of relevant medicines occur. However, weakening or even lifting patent protection by extending the flexibilities more systematically do not remedy this situation but may even rather aggravate it, since the research gap would thus extend into other diseases often connected with neglected diseases, but whose research and development often benefit from the incentive of the patent system.

This delegation submitting this paper fully supports the *Doha Ministerial Declaration on TRIPS and Public Health of 14 November 2011* that 'confirms, whilst reiterating the commitment to the TRIPS Agreement, that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health, and in particular to promote access to medicines for all.'

However, a proposal for a work program which focuses exclusively on flexibilities and exceptions to IP and patent rights does not do justice to the complexity of the challenge of providing sustainable access to medicines in the WIPO context and thus from an intellectual property perspective.

### **Choice of adequate forum**

In order to enable a meaningful discussion on the issue of access to medicines, many aspects and factors need to be taken adequately into account, some necessarily going beyond patents and even intellectual property. Such a discussion should not be held in isolation on just one aspect or on one of these many factors. Furthermore, the topic as proposed for discussion has a strong link to development issues. Accordingly, this delegation is of the view that, should Members find it appropriate and agree to carry out additional work on this topic in WIPO, the most adequate place to do so would be the Committee on Development and Intellectual Property (CDIP).

### **Summary conclusions**

There is already a wealth of initiatives that are undertaken at the international level, primarily by WIPO, WHO and WTO, in the area of patents and health with regard to access to medicines. Before WIPO Members take on new engagements, an overview of the already existing technical cooperation projects, studies information exchanges and other measures already taken or under way needs to be established in order to avoid duplication of efforts.

Due to the cross-cutting nature of the topic of access to medicines and the various factors to be taken into account in order to allow for an appropriate and meaningful discussion, many of which are necessarily going beyond the area of patents or even intellectual property, it is the view of this delegation that within WIPO the most relevant forum for such a discussion would be the Committee on Development and Intellectual Property (CDIP).

Finally, should WIPO Members, after the review and on the basis of an overview of the work already undertaken in the field of access to medicines/patents and health, come to the conclusion and agree to engage in further work on this topic, this ought to happen on the basis of a working document which ensures a balanced approach, taking into account the many interfaces and various factors relevant to the subject-matter.

---