

Compulsory licences, TRIPS and the waiver debate

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The Agreement on Trade-Related Aspects of Intellectual Property Rights, concluded as part of the Uruguay Round in 1994, obliged all members of the World Trade Organization to grant patents for pharmaceutical products after transitional periods. It also permitted compulsory licences, under which a state authorises the use of a patent without the consent of the holder, subject to conditions including adequate remuneration.¹ The Doha Declaration on the TRIPS Agreement and Public Health of 2001 confirmed that members may use these flexibilities to protect public health. A decision of 2003, later converted into Article 31bis of the agreement, allowed compulsory licences for the export of medicines to countries without their own production capacity.²

Swiss law implements these rules. The Patents Act provides for compulsory licences in several cases, including the dependence of one patent on another, the public interest, and research tools in biotechnology. Since 2008 it has also contained a special compulsory licence for the manufacture and export of pharmaceutical products to countries with insufficient production capacity in the event of public health problems.³ In practice compulsory licences have played almost no role in Switzerland, where no case is known in which one was granted for a pharmaceutical product. Their importance lies elsewhere: the possibility that a government might use them strengthens its position in price negotiations.

The debate became acute during the COVID-19 pandemic. In October 2020 India and South Africa proposed that the World Trade Organization should waive the obligations of the TRIPS Agreement for patents, industrial designs, copyright and undisclosed information relating to the prevention, containment and treatment of COVID-19. The proposal was supported by many developing countries and later, in a more limited form, by the United States. Switzerland, the European Union and the United Kingdom opposed it, arguing that intellectual property had not been an

obstacle to vaccine production and that the waiver would damage the incentives that had made the rapid development of vaccines possible.⁴

The compromise reached at the Twelfth Ministerial Conference in Geneva in June 2022 was much narrower than the original proposal. It permitted eligible developing countries to authorise the use of patents for COVID-19 vaccines without the consent of the holder, under simplified conditions and with an easing of the export restrictions of the agreement, for a period of five years.⁵ The question of extending the decision to diagnostics and therapeutics was postponed and was not resolved by the deadline that the ministers had set. Most observers consider that the decision has had little practical effect, because it was adopted after vaccine supply had ceased to be the main constraint.⁶

For Basel the debate had symbolic weight. The industry regarded the strong Swiss position as a defence of the foundations of its business model. Non-governmental organisations in Switzerland criticised the Federal Council for placing the interests of the pharmaceutical industry above access to medicines in poorer countries. The historical irony noted in Part D is that the Basel dye industry was itself born in the shelter of a country without patents. The arguments that Swiss politicians used against German pressure before 1907, namely the right of a developing industry to learn by imitation, are close to those that India and South Africa used a century later. The pandemic also gave the WHO negotiations on a pandemic agreement an intellectual property dimension, with provisions on technology transfer and benefit sharing that remained contested until the adoption of the agreement in May 2025.⁷

1 Notes

1. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization of 15 April 1994, in particular Art. 27, 28 and 31. To be verified. ↩
2. WTO, Declaration on the TRIPS Agreement and Public Health of 14 November 2001; General Council Decision of 30 August 2003; Protocol amending the TRIPS Agreement of 6 December 2005 (Art. 31bis), in force since 23 January 2017. To be verified. ↩
3. Art. 36–40e PatG on compulsory licences, in particular Art. 40 (public interest), Art. 40b (research tools in biotechnology) and Art. 40d (export of pharmaceutical products), with jurisdiction of the Federal Patent Court under Art. 26 PatGG. To be verified. ↩

4. WTO document IP/C/W/669 of 2 October 2020 (proposal by India and South Africa) and the Swiss statements in the TRIPS Council in 2020–2022 opposing a broad waiver. To be verified. ↩
5. WTO, Ministerial Decision on the TRIPS Agreement of 17 June 2022 (WT/MIN(22)/30), covering patents for COVID-19 vaccines for a period of five years. To be verified. ↩
6. On the limited use of the Ministerial Decision of June 2022 and the failure to agree on an extension to diagnostics and therapeutics, see WTO TRIPS Council reports and the academic literature since 2023. Status to be verified. ↩
7. WHO Pandemic Agreement adopted by the World Health Assembly in May 2025, with the annex on pathogen access and benefit sharing still under negotiation; on its provisions on technology transfer "on mutually agreed terms". Status to be verified. ↩

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