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REPORT OF THE GROUP OF GOVERNMENTAL EXPERTS ON THE ROLE OF THE INDUSTRIAL PROPERTY SYSTEM IN THE TRANSFER OF TECHNOLOGY

on its session held at the Palais des Nations, Geneva,
from 6 to 14 October 1977

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DECLARATION OF GOVERNMENTAL EXPERTS FROM DEVELOPING COUNTRIES MEMBERS OF THE GROUP OF 77 ON THE ROLE OF THE INDUSTRIAL PROPERTY SYSTEM IN THE TRANSFER OF TECHNOLOGY */

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*/ Text submitted by the expert from Yugoslavia on behalf of the Group of 77 and circulated to the Group of Experts under the symbol TD/B/C.6/AC.3/L.6. For the decision to annex this text to the report of the Group of Experts, see the report of the Group (TD/B/C.6/24 - TD/B/C.6/AC.3/4), para. 51.

I. INTRODUCTION

1. The industrial property system and its role in the transfer of technology and, in general, in the development process of developing countries has constituted an important item in the discussions on the establishment of a new international economic order.

2. In 1961 the General Assembly of the United Nations requested the Secretary-General to prepare a study of the effects of patents on the economy of under-developed countries and also to recommend on the advisability of holding an international conference in order to examine the problems regarding the granting, protection and use of patents, taking into consideration the provisions of existing international conventions and the special needs of developing countries.1/

3. Paragraph 64 of the International Development Strategy for the Second United Nations Development Decade called for "the review of international conventions on patents".

4. At the third session of the United Nations Conference on Trade and Development, the Conference unanimously adopted resolution 39 (III) which, in paragraph 10, called for a study on the role of the patent system in the transfer of technology to developing countries and invited the Secretary-General of UNCTAD "to devote special consideration in this study to the role of the international patent system in such transfer [of technology], with a view to providing a better understanding of this role in the context of a future revision of the system".

5. In July 1974 the UNCTAD Intergovernmental Group on Transfer of Technology, at its third session, adopted resolution 2 (III) which noted with appreciation the report prepared jointly by the United Nations Department of Economic and Social Affairs, the UNCTAD secretariat and the International Bureau of the World Intellectual Property Organization (WIPO) entitled The Role of the patent system in the transfer of technology to developing countries.2/ That resolution invited the Secretary-General of UNCTAD to convene a group of experts to study all relevant aspects of the international patent system that have a bearing on the development process of developing countries with a view to providing a better understanding of the role of that system in the context of its possible future revision aimed at reflecting the special needs of the developing countries and to make recommendations thereon.

1/ See General Assembly resolution 1713 (XVI) of 19 December 1961.

2/ TD/B/AC.11/19/Rev.1 (United Nations publication, Sales No. E.75.II.D.6).

6. In September 1975 a Group of Governmental Experts on the role of the patent system in the transfer of technology to developing countries met in Geneva under the auspices of UNCTAD. The agreed conclusions and recommendations of that Group of Experts considered that patent legislation can be an important instrument for the economic development of the developing countries, if it is designed to serve the public interest, i.e. the development needs, regional or subregional plans, policies and priorities. The Group was also of the opinion that it is desirable to strike an equitable balance between the public interest and the private interest involved. Furthermore, the Group considered it important that national legislation of developing countries on inventions, where it existed, should ensure that the granting of property rights between States is accompanied by corresponding obligations on the part of the patentee. The Group further agreed that the adequate exploitation of the patents granted would contribute towards fulfilling the development needs stated above. The Group also indicated the main considerations that should guide the process of revision of the Paris Convention, as well as of the Model Law for Developing Countries on Inventions.

7. Experts from developing countries who participated in the meeting of the Group of Experts in 1975 had the opportunity to exchange among themselves the experience of their own countries concerning the international patent system and its administration and, in the light of that experience, they issued their conclusions on the role of the patent system in the transfer of technology to developing countries. The main purpose of those conclusions was to identify the central issues of concern to developing countries and to facilitate the future work to be carried out for the revision of the industrial property system.3/

8. The meeting of the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology (October 1977) gives the experts from developing countries a new opportunity to make an assessment of the on-going process of revision of the industrial property system and its impact on developing countries. At the same time, this meeting enables them to state their positions regarding the further work to be carried out for the revision of the industrial property system.

9. It is important to note that in the last two years some positive developments have taken place.

3/ See the report of the Committee on Transfer of Technology on its first session: Official Records of the Trade and Development Board, Seventh Special Session, Supplement No. 4 (TD/B/593), annex III.

10. At its seventh special session the General Assembly adopted resolution 3362 (S-VII) on development and international economic co-operation. Section III, paragraph 3, of that resolution provides that "international conventions on patents and trade marks should be reviewed and revised to meet, in particular, the special needs of the developing countries, in order that these conventions may become more satisfactory instruments for aiding developing countries in the transfer and development of technology. National systems should, without delay, be brought into line with the international patent system in its revised form".

11. The Committee on Transfer of Technology at its first session (November/December 1975) endorsed the agreed conclusions and recommendations of the Group of Governmental Experts on the Role of the Patent System in the Transfer of Technology (see para. 6 above).

12. In December 1975 the WIPO Ad Hoc Group of Governmental Experts on the Revision of the Paris Convention adopted the Declaration on the Objectives of the Revision of the Paris Convention, underlining that "the revision of the Paris Convention should aim at contributing to the establishment of a new economic order in the world in which social justice prevails and economic inequalities between nations are reduced".

13. The Third Ministerial Meeting of the Group of 77 held in Manila (January/February 1976) stressed in the Manila Declaration and Programme of Action that "the economic, trade and development interests of the developing countries should be fully reflected in the revision of the international system of industrial property and, in particular, in the revised Paris Convention".[4/] The Manila Declaration also provided that the conclusions reached by the experts from developing countries who participated in the meeting of the Group of Governmental Experts on the Role of the Patent System in the Transfer of Technology to Developing Countries should be one of the bases for subsequent negotiations (see para. 7 above).

14. At its fourth session, the United Nations Conference on Trade and Development adopted resolution 88 (IV) which, inter alia, affirmed that any new orientation in

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4/ Document TD/195. See Proceedings of the United Nations Conference on Trade and Development, Fourth session, vol. I, Report and Annexes (United Nations publication, Sales No. E.76.II.D.10), annex V, section five, para. 18.

the industrial property field should give full recognition to the needs of economic development, particularly of developing countries, and should ensure an equitable balance between these needs and the rights granted by industrial property. The Conference reaffirmed the conclusions of the Intergovernmental Group of Experts on the Role of the Patent System in the Transfer of Technology. It recommended that the conclusions of experts from developing countries on the role of the patent system in the transfer of technology to developing countries should be taken into consideration by all States and organizations concerned during the process of the revision of the Paris Convention.

15. It is also encouraging to note some new developments at the national level concerning the implementation of new policies and the establishment of new institutions in the field of industrial property.

16. The international community is at present committed to working out and establishing an international code of conduct on transfer of technology which should take into account the interest of developing countries.

17. The experts from the developing countries reaffirm the conclusions reached in September 1975 (see para. 7 above).

II. REVISION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY: PATENTS

1. In the conclusions they adopted in 1975 the experts from developing countries stated that the process of revision of the Paris Convention must fulfil, as a minimum, three basic objectives:

(a) The industrial property system can serve as a useful tool for facilitating the transfer of technology to developing countries if the international standards are adapted to the economic, social and political conditions and national development objectives of developing countries and if they do not constrain in any way the flexibility of each country to adapt its laws and practices to its own needs;

(b) The immediate and continuing task of the system should be to provide in the shortest possible time the broadest possible technical assistance to help developing countries strengthen their scientific and technological infrastructures and to train their specialists;

(c) The international standards should reflect the historical and economic changes which have taken place, and the new trends in national legislation and practices of developing countries (whether members or not of the Paris Union).

2. The actual process of revising the Paris Convention is taking place in the World Intellectual Property Organization. A Preparatory Intergovernmental Committee has been established and has held two sessions, the last one in July 1977. It is the first time in the history of the Paris Convention that the developing countries are playing a significant and leading role in its revision. For the first time, the interests of the developing countries are being expressed and attention is directed towards exploring solutions appropriate to the needs of their development. This is particularly important since developing countries played a marginal role in the six previous revisions of the Paris Convention. The result of the six previous revisions was basically a strengthening of the position of the patent holders. In the present revision, and in accordance with paragraph 1 (a) above, developing countries are attempting to establish a fair balance between the public interest and the broader needs of development, on one side, and the patent holders rights on the other.

3. The evidence shows that (a) nationals of the developing countries hold a bare one per cent of the world total of patent grants; (b) foreigners own in the developing countries six times more patents than the nationals of these countries; and (c) 90 to 95 per cent of the patents so owned by foreigners are never used in the production process in these countries. This evidence suggests that the present patent system, as embodied in the Paris Convention and in national legislation, has had a negative effect on the economic and technological development of developing countries. The large majority of patents in developing countries are held by non-residents and few of them are actually applied in the manufacturing process. So far, they seem to protect mostly import monopolies and to discourage the technological development of domestic firms in developing countries. Developing countries should continue their efforts to remove the constraints and imbalances of the Paris Convention and to transform it into a more suitable instrument of national industrial development.

4. The new proposal on Article 5 A of the Paris Convention, as agreed at the second session of the Preparatory Intergovernmental Committee on the Revision of the Paris Convention, constitutes a positive development. The acceptance of the possibility of granting exclusive non-voluntary licenses is a step forward which could prove to be of benefit to the developing countries. The inclusion in the text of the recognition that importation does not constitute working of a patent is a sound clarification. The revocation of a patent without its link with the grant

of a non-voluntary licence is a positive measure to prevent the non-working of patents and other abuses resulting from the exercise of the rights granted by the patent.

5. The new proposal for article 5 A would be a firmer step in the right direction if the time limits supported by developing countries, in connexion with paragraphs 6 and 8 of the proposed Article 5 A, are accepted.

6. Some progress is being made towards setting up a system for exchange of information on patent applications to avoid the problems related to the principle of independence of patents, as embodied in article 4 bis of the Paris Convention. However, developing countries should insist on establishing a compulsory system of exchange of information among patent offices of all orders passed by administrative and judicial authorities with regard to the granting and validity of a patent concerning novelty, inventive step and industrial applicability.

7. Less encouraging is the progress made in other key areas of the Paris Convention. Article 5 quater should be deleted to avoid the present constraint upon national legislation in relation to the rights on importation of a process patent. This is of particular interest for those developing countries that still have not excluded the right of importation in their national laws.

8. Article 5 quater of the Paris Convention provides per se for a privilege of the patentee. Control over process is enough to give monopoly to the importer and thereby control the domestic market in the patent-granting country (provided that the privileges of the patent holder include sale and use, as is the case in some developing countries). Therefore, this provision is in conflict with any attempt to eliminate the exclusive right of importation on products manufactured abroad by a patented process. Consequently, the burden of proof should rest upon the patent holder rather than upon the importer.

9. It can be concluded, therefore, that developing countries do not derive any benefit from the maintenance of such a provision, and it should not, as such, have any place in a convention which, in its revised form, is aimed at safeguarding their interests.5/

5/ The deletion of article 5 quater has been proposed by experts from Latin American countries in the Round Table on the Revision of the Paris Convention and its Relation to the Transfer of Technology in Latin America, held in Mexico, in May 1976. See Industrial Property, 1976, p. 204.

10. The principle of national treatment, as provided for in Article 2 of the Convention, has several unfortunate consequences for the developing countries. The principle of formal equality embodied in it operates to the mutual advantage of parties to the Convention if they are at approximately the same level of development and if there is genuine exchange of patent protection. When the parties are at vastly different levels of development and technological capacity, the provision simply gives the stronger party unlimited freedom to utilize his power at the expense of the weaker party.

11. Thus, as far as the developing countries are concerned, the principle of national treatment merely protects the monopolistic rights of foreign patent holders and can be described as a reverse system of preferences in the markets of developing countries for foreign patent holders. There would be no justification for a national patent system if it were not to encourage inventive capacity and lead to research, development and production. If that objective is to be achieved, rules to favour domestic nationals and institutions may be necessary. The principle of national treatment, rigidly applied, can however make it difficult to adopt a patent policy which would answer the needs of a developing economy.

12. Little progress has been made in granting preferential treatment to developing countries in relatively minor questions such as fees and length of the priority period. This issue must be taken up in a more serious and constructive way and the proposals made by the developing countries should find their place in the Paris Convention. Developing countries should have non-reciprocal preferential treatment expressly embodied in the Convention, whenever it is found necessary.

13. Old voting practices for the revision of the Convention are in conflict with modern trends in international law: the old unanimity principle should be abandoned in the Paris Convention Union and in the other unions administered by WIPO.

14. An adequate revision of the Paris Convention would imply not only the removal of the constraints and imbalance of the present text, but would also permit the transformation of the patent system into a useful tool for the technological and economic development of developing countries.

15. To transform the patent system into a positive instrument of technological development for developing countries, serious efforts should be made to use patents and other industrial property rights, in conjunction with other policies, to encourage domestic inventiveness.

16.*/ Developing countries reiterate that Article 5 A of the Paris Convention, as stated in the Declaration of the Objectives of the Paris Convention, should reflect the main concerns particularly of developing countries, promote the actual working of inventions in each country and enable member countries to take all appropriate measures to prevent abusive practices in the field of industrial property.

17.*/ In order to serve as a useful tool for facilitating the transfer of technology to developing countries and the development of indigenous technology and to respond to the historical and economic changes which have been taking place in the last few decades, the current revision of the Paris Convention should recognize that all rights granted by a patent should be related to the working of the patent and guided by the following considerations:

(a) The deletion of Article 5 quater, at least as it concerns the developing countries;

(b) Particular attention should be given to efforts to improve the quality of patent disclosure for granting patents in order to fulfil its basic development function and facilitate adequate diffusion of patent documentation and information among potential users, particularly in developing countries;

(c) The revision of Article 4 bis of the Convention, in order to incorporate the concept of compulsory exchange of information by patent offices of all orders passed by administrative and judicial authorities with regard to the validity of a patent concerning novelty, inventive step and industrial applicability;

(d) The principle of national treatment contained in Article 2 should not be in conflict with efforts by certain developing countries to design in their national laws types of patents or other industrial property rights whose purpose could be to foster inventive capacity, the diffusion of inventions and their effective use in local manufacture;

(e) The Convention should recognize effective measures for granting preferential treatment to developing countries in some of the areas covered by the Convention, such as fees, right of priority, etc.;

(f) In the revision process, the unanimity practice should be abandoned.

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*/ Paragraphs 16 and 17 were originally paragraphs 2 and 3 of TD/B/C.6/AC.3/CRP.2 submitted to the Group of Experts by Cuba on behalf of the Group of 77.

III. TRADE MARKS IN DEVELOPING COUNTRIES

1. Trade marks are widely used in developing countries and the proliferation of brands is quite impressive, particularly in some consumer goods industries. While developing countries have about 7 per cent of world industrial production, trade marks in force in those countries account for 27 per cent of the world total. These trade marks are brought to the market-place at the cost of an enormous expenditure in advertising - twice as much as the expenditure which the developing countries devote to research and development. Four billion United States dollars were devoted to advertising in developing countries in 1973. About half of these trade marks are owned by foreigners, regardless of the level of international trade. They are propagated in developing countries through the mass media with the help of transnational advertising agencies and to benefit foreigners.

2. In many developing countries, foreign trade marks have played a role in creating a situation of cultural and commercial dependence in which foreign products are regarded as "good" while domestic ones are regarded as "bad". This is achieved directly to the extent that the products bearing the trade marks are often symbols of foreign influence in developing countries, and indirectly, because of the key role that trade-mark owners play in financing advertising campaigns and mass media programmes. Trade marks create a particular sort of goodwill in developing countries, not simply in favour of advertised goods but in the sense of a fundamental bias towards foreign products, names, symbols, values and cultures.

3. The benefits derived from the existence of trade marks, and particularly of foreign-owned trade marks, are outweighed by the costs imposed on individuals and on the society as a whole. In addition to the higher prices paid by consumers for trade-marked goods, consumption patterns are distorted in favour of branded products which leads to a misallocation of resources in the production of goods and services that do not satisfy the basic needs of the population. In the case of foreign-owned trade marks, this misallocation not only has a harmful effect on the balance of payments in many developing countries but also plays against the competitive position of nationally-owned enterprises.

4. This situation is of great concern to developing countries and some initiatives at the national and regional levels have already been taken to modify the current situation. New laws and policies on trade marks in Mexico, Brazil and the Andean Pact are a case in point, as are initiatives to shift from brand names to generic names in the pharmaceutical industry as actually applied in Cuba and proposed in

some Asian countries. These measures should have the full support of the developing countries and are an important basis on which to modify the present situation.

5. Substantial modifications of traditional trade-mark laws and policies are called for in order to counter the negative impact of trade marks in the development process of most developing countries. Some of the initiatives can be taken at the international level in the process of revision of the Paris Convention and in the preparation of an international code of conduct on transfer of technology. Other initiatives will find appropriate place in revising model regulations for developing countries and restructuring the national framework which so far has permitted the proliferation of trade marks in general and of foreign-owned trade marks in particular.

6. */ The process of revision of the Paris Convention should be guided by the Declaration of Objectives of the Revision of the Paris Convention (December 1975), giving "full recognition to the need for economic and social development of countries" to redress the present imbalance between rights and obligations of trade-mark owners, and by the following considerations:

(a) The Convention should explicitly recognize member countries' rights for revocation or forfeiture of trade marks for reasons of public interest;

(b) The Convention should explicitly recognize member countries' rights for revocation or forfeiture of trade marks when the owner or licensee of the mark has speculated or misused price-wise or quality-wise a product protected by the trade mark to the detriment of the public or the national economy of a member country;

(c) Article 7 of the Convention should be deleted because it may be used against national policies on trade marks in particular sectors of the economy;

(d) In spite of the validity of the principle of national treatment, such principle should not constitute an obstacle to the adoption of policies aimed at reducing the harmful effects of foreign-owned trade marks in developing countries;

(e) Non-reciprocal preferential treatment should be granted to nationals residing in developing countries, particularly in the matter of fees;

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*/ Paragraph 6 was originally the text of TD/B/C.6/AC.3/CRP.1 submitted to the Group of Experts by Cuba on behalf of the Group of 77.

(f) Article 6(2) should contain the possibility for developing countries to refuse the registration or to invalidate a registered trade mark when it has not been effected or it has been revoked in the country of origin, whenever the reasons for this revocation are acceptable to the national authorities of developing countries;

(g) Any industrial property office will be obliged to provide, on request, information concerning trade marks directly to the industrial property office of the country requiring the information;

(h) Trade marks may be revoked within a concrete and definite term because of non-use (article 5C (1) of the Convention);

(i) Articles 5 quinquies and 6 sexies should be deleted;

(j) The period of five years for the cancellation of well-known marks should be reduced to three years (article 6 bis (2) of the Convention);

(k) Article 6 quinquies should be clarified and redrafted according to the present needs of developing countries;

(l) Appellations of origin are the sole and intransferable property of the country or State where they exist and they should prevail over trade marks;

(m) Trade marks containing geographical indications could be registered by member countries only when such marks are their own appellations of origin or can be interpreted as an indication of source;

(n) Industrial property offices should be the competent authorities on all questions related to appellations of origin and indications of source.

7. In the context of the draft international code of conduct on transfer of technology, restrictive practices in trade-mark licensing should be especially regulated as provided for in the draft code prepared by the Group of 77. The right of the licensee, if he so wishes, to use a trade mark of the licensor should be recognized in a transfer of technology transaction.

8. In the revision and implementation of national laws and policies, as well as in the drafting of the model law for developing countries on trade marks and related matters, special consideration should be given, inter alia, to the following aspects:

(a) Trade-mark protection should be granted only for those products in which the trade-mark owner has actual industrial or commercial activities;

(b) Fee policies should be modified by applying economic criteria; for example, higher renewal fees could be charged according to the increment in sales obtained as a consequence of the use of the trade mark and/or according to the advertising expenditures;

(c) Special consideration should be given in taxation policies to the possibility of establishing a tax on the market value of trade marks, using criteria such as the increment in sales obtained as a consequence of the use of the trade mark and/or advertising expenditures;

(d) The right of the owner of a trade mark to its exclusive use shall be deemed not to be infringed by a person who legally imports, sells, distributes or advertises goods bearing the same trade mark, provided that they are genuine goods;

(e) The relevant information on any measure taken in the country of origin in respect of the trade mark or of the product to which the trade mark is affixed should be provided by the applicant when filing, registering or renewing the trade mark. The information should be duly certified by the industrial property office in the country of origin;

(f) Revocation or compulsory licensing for reasons of public interest (i.e. abuse of market power) (cf. para. 6 (a));

(g) Abolition and/or reduction of trade-mark protection in sectors of special public concern (for example, pharmaceuticals);

(h) The promotion of combined trade-marks, i.e. the use of a foreign-owned trade mark together with a nationally originated trade mark, both in internal and external markets and for a limited duration;

(i) Regulation of the licensing of foreign-owned trade marks for export markets in order to obtain a long-term benefit for developing countries out of this activity;

(j) Promotion of the use of developing countries' own national trade marks in the exports of those countries;

(k) Regulation of licensing agreements in which trade marks are included, aimed at reducing or eliminating royalties and other payments, and controlling restrictive practices, including duration, in trade-mark arrangements.

9. In contrast with the enormous expenditures devoted to advertising in developing countries, relatively little has been done to build up an adequate system of quality

control independently of the trade-mark system - especially, but not exclusively, in consumer goods industries. It is of great importance to undertake a programme of activities in that area including, inter alia, the following:

(a) Institutions to regulate and control quality and standards should be created or reinforced in developing countries, at the national or regional level, in certain vital sectors of the economy such as pharmaceuticals, food, pesticides, cosmetics and capital goods;

(b) The experience of similar institutions dealing with quality control and standards in developed countries should be put at the disposal of developing countries through technical co-operation, information and training of personnel;

(c) In the activities and programmes of regional and national centres for the transfer and development of technology the question of quality and standards should be especially considered;

(d) An efficient system should be established to permit developing countries to have full access to information on measures taken in connexion with particular products in developed countries;

(e) Special consideration should be given to the taxation of advertising expenditures made in developing countries in order to finance quality control institutions.

10. While action in the field of trade marks and quality control is most important in order to change the existing situation, action on a number of related issues is also relevant. Thus developing countries should consider the possibility of regulating, inter alia, the following:

(a) Price and non-price competition in consumer goods industries as well as overpricing;

(b) The activities of transnational advertising agencies;

(c) Advertising expenditures, which should be especially taxed to finance national research and development as well as cultural activities in developing countries, according to their national interests;

(d) The content of advertising messages, especially in their use of foreign names and symbols;

(e) The use of advertising time and space in the mass media.

Annex V

UNITED STATES OF AMERICA: PRELIMINARY COMMENTS ON THE REPORT BY THE UNCTAD SECRETARIAT ENTITLED "THE INTERNATIONAL PATENT SYSTEM: THE REVISION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY" (TD/B/C.6/AC.3/2)

Text submitted by the expert from the United States of America*/

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*/ For the decision to annex this text to the report of the Group of Experts, see the report of the Group (TD/B/C.6/24 - TD/B/C.6/AC.3/4), para. 51.

I. GENERAL COMMENTS

1. The United States Government has approached the entire subject of revising the Paris Convention for the Protection of Industrial Property, as well as the national industrial property laws of developing countries, with the view of searching for accommodations and changes which would benefit these countries without unduly upsetting the present satisfactory relations among industrialized free market-economy countries. We have repeatedly expressed sympathy with the desires of developing countries to improve their economic and social condition through meaningful changes in the Paris Convention which would accelerate the transfer and diffusion of needed technology to these countries. Regretfully, the report by the secretariat of UNCTAD on revision of the Paris Convention (TD/B/C.6/AC.3/2) does not contribute constructively to this goal.

2. The UNCTAD report evidences much of the same bias against industrial property systems that surfaced in the earlier report entitled The role of the patent system in the transfer of technology to developing countries.[a/] Rather than analysing in depth the problems faced by developing countries and offering constructive suggestions for their correction, the current report merely criticizes the Paris Convention and the protection of industrial property by selective use of expert's commentary and resort to hypothetical problems and abstract situations of unrealistic significance.

3. For example, it is suggested in paragraph 7 of the report that the case for a patent system is far from clear-cut or universally acknowledged, referring in a footnote to a comment made by economist Fritz Machlup in a study prepared for the United States Senate Subcommittee on Patents, Trademarks and Copyrights. Machlup's study was only one (No. 15) of thirty prepared for the Senate Subcommittee, and was clearly not expressing the general opinion of the other authors. In Study No. 1, prepared by Dr. Vannevar Bush, on Proposals for Improving the Patent System, Dr. Bush stated "... great care must be taken lest,

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a/ Report prepared jointly by the United Nations Department of Economic and Social Affairs, the UNCTAD secretariat and the International Bureau of the World Intellectual Property Organization (TD/B/AC.11/19/Rev.1) (United Nations publication, Sales No. E.75.II.D.6.).

in the effort to modernize the patent system, we destroy it and thus decrease the distinguishing vigour it has brought to us as an industrial nation." Again, in Study No. 2, the author, George Frost, asserted "It ought not to be necessary endlessly to defend the patent system against the stigma of a 'monopoly' when it is in fact a source of competition ...". In Study No. 5, by Raymond Vernon, an expert in foreign trade, it is stated that "the great achievement of the treaty [i.e., the Paris Convention] from the point of view of inventors and investors is the fact that its signatories have agreed to grant patent treatment to nationals or residents of other signatory countries equal to the treatment they grant their own nationals". Mr. Vernon also referred to the "Wisdom of avoiding discrimination in economic bargaining". Victor Abramson, an economist, in his Study No. 26 submitted to the same Subcommittee, disagreed fundamentally with Fritz Machlup, stating "It may be concluded that a patent system in some form is the most practicable means under a system of private enterprise to provide a socially adequate supply of new industrial technology". In Study No. 28, C.D. Tuska, long experienced as a Director of Patent Operations for a major laboratory, amassed substantial data supporting his view that "The present study appears to show that the American patent system continues to work for the independent inventor, relatively small business, and the public".

4. Similarly, it is argued in paragraph 37 of the UNCTAD report that States are subjected to a "severe restriction" on the choice of the nature and the sequency of the measures that might be needed to control abusive activities of patent owners (other than their failure to work the patented invention). It is stated that "forfeiture is only permitted under the conditions specified in the Convention, provided that a compulsory licence is granted before", implying that a number of additional conditions must be satisfied before forfeiture can be ordered. In fact, the only other condition which restricts a State's actions is that proceedings for forfeiture may not be instituted prior to the expiration of two years from the issuance of a compulsory licence. This sole condition would certainly seem reasonable in order that it might be determined whether the compulsory licence would be effective in remedying the abuse. In this regard, it should be noted that a compulsory licence could, for example, be ordered by a court for an antitrust abuse and be available to all at no royalty for the balance of the life of a patent.

5. Again, it is stated in paragraph 99 of the report that the Paris Convention is the most significant agreement circumscribing the capacity of countries to design patent statutes to match national needs and objectives. An unmentioned fact, however, is that the Paris Convention is extremely flexible and that the few limiting provisions in the Convention are present only to promote orderly relations in the industrial property field. In addition, it must be remembered that membership in the Paris Convention is entirely optional and that countries adhere to it because of expected mutual benefits rather than unilateral detriments.

6. Much of the discussion in the UNCTAD secretariat report proceeds upon the basis of a number of invalid assumptions seemingly designed to discredit patent systems and patent applicants from the more developed countries. Thus, it is tacitly assumed that patents usually block areas of technology and that patentees frequently use their patents for this purpose. The report ignores the fact that it is exceedingly rare when there are not several alternatives available for any patented technology and that patentees are only too happy to license their patented technology for a reasonable royalty.

7. It has been said in many places that industrial property systems are only one of the elements which fit into the complex infrastructure necessary for a country to industrialize. Patent systems provide an important stimulus for individuals to develop new technology and to transfer and share that technology with others. Other ways to provide such a stimulus could no doubt be devised. No alternative systems have yet been devised, however, that are less costly or have fewer problems than those imputed to the present patent system. A patent system has many advantages. A strong patent system:

(a) Encourages technology development by smaller and medium-sized corporations, which need the patent system to prevent copying by large competitors;

(b) Permits and encourages disclosure of technology by all so that technology is more available and is not kept secret;

(c) Can be used to encourage technology owners to transfer technology to developing nations and others;

(d) Can be used to encourage residents of developing nations to develop technology and be able to compete locally with larger corporations from developed nations.

Nonetheless, without the other ingredients of a complete infrastructure for industrialization - such as skilled labour, transportation, market potential, etc. - the incentives of a patent system cannot result in the industrialization of a country.

8. Before turning to the specific details of the UNCTAD report, a few comments should be directed towards the suggestions for guiding future efforts to revise industrial property systems. It is suggested that the success of the revision effort should be judged by how little the Convention constrains national freedom and how much preferential treatment is granted to developing countries. At the risk of redundancy, the United States endorses the goal of improving the economic and social conditions in developing countries and, therefore, agrees with much of what is contained in the report to this effect. However, neither general declarations nor sweeping criteria endorsing minimum constraints and maximum preferences can usefully serve and aid the process of revising the Paris Convention to truly benefit developing countries. It is hoped that the Group of Governmental Experts, in reviewing the "international patent system" paper, will concentrate their efforts on identifying the real problems faced by developing countries and on fashioning practical solutions to these problems.

9. The primary purpose of the governmental experts should be the encouragement of technology transfer to the developing countries in the most expeditious and practical fashion possible. The owners of technology should be encouraged to transfer the technology to others who have a need for it, not discouraged from making such transfer. Unfortunately, the UNCTAD report, which was apparently prepared with little practical experience in day-to-day technology transfer and how it actually takes place in the world, is a rather negative document which would, if its suggestions were implemented, have the effect of discouraging transfer of technology. Thus the thrust of the paper is counterproductive to the purpose of the meeting of the Group of Experts.

10. Unfortunately for developing countries, even if the Paris Convention is revised exactly as suggested in the UNCTAD report, transfer of technology will not be encouraged, and the technological gap between the developed and the developing countries will not be reduced, unless the owners of technology have adequate incentives to transfer that technology to others. If these technology owners feel that the patents, which they have obtained as a result of inventions made in

developing their technology, are weakened or made unenforceable by compulsory licensing schemes or revocation, they will devote their energies elsewhere, and the ultimate desire of developing countries to acquire technology and develop their own industry and capabilities to a higher level will, unfortunately, not be attained.

11. In the market-economy countries, the owners of technology are non-governmental organizations which have paid considerable amounts of money to develop their technology. They do not have the time, money and people available to develop all the possible opportunities for the development of technology they have available. As a result, they select those opportunities which seem to them to give the best return on their investment of time and people.

12. Consider, for example, a licensing expert who represents small and medium-sized companies and who receives money from his clients only when a technology transfer agreement is actually negotiated - a not uncommon arrangement. Such an expert is obviously going to spend his time working in areas where he feels people are interested in getting technology and where he can make appropriate business arrangements without expensive, time-consuming negotiations which might, in any event, be upset by subsequent government approval problems. At the present time, there is simply not a great deal of incentive for such an individual to expend a great deal of effort investigating the possibility of licensing in developing countries. There simply does not appear to be a great opportunity for him to receive an adequate return for his efforts in view of the rather negative outlook some of the developing countries appear to exhibit toward the industrial property rights which cover the technology, not to mention the various approvals which he has to obtain. This developing country attitude about technology, patents, and trade marks, which is perceived in developed countries to be growing increasingly negative, constitutes a significant danger to the aspirations of the developing countries.

13. One of the major recurring themes expressed in various international forums is that the notion of legal equality, which is a cornerstone of the Paris Convention, is spurious because of the fact that the developing nations are at present not equal to the developed nations. As has been mentioned, technology transfer from the developed market-economy countries comes primarily from private organizations which may, or may not, be larger or more sophisticated than the developing country

organizations with which they are dealing. It is to be noted that, even within a developed nation such as the United States of America, technology transfer between large and small organizations occurs on a regular basis, and takes place not only from the large organization to the small organization, but also from the small organization to the large one. The actual negotiations are conducted by small and often equal numbers of people on each side. The relative sizes of the organizations are not important in the negotiations.

14. In a developed country, if the particular organization does not feel that it has sufficient expertise to conduct the appropriate negotiations, the obvious solution is to hire a technology transfer negotiator or expert to work for them and represent them or assist them in negotiations. With an appropriate technology transfer expert representing them or assisting them, they become equal in the negotiation and a business arrangement can be arranged which is reasonable to both sides.

15. In fact, some of the most difficult negotiations that experienced licensing and technology transfer people undertake are those where the other party is not sophisticated in technology transfer agreements and negotiations. It has generally been found to be much easier and more efficient to negotiate with competent experts on both sides where each party knows what can be given and what cannot be given, and each knows where flexibility is appropriate and where it is not. With experts on each side, reasonable agreements can be reached promptly. This is done throughout the world within the developed nations and makes technology transfer much easier for all.

II. SPECIFIC COMMENTS

A. Paris Convention: the background for its revision

16. Concern is expressed in paragraph 6 of the UNCTAD secretariat report about the fact that most of the patents in developing countries are owned by foreigners. It should be noted, however, that the vast majority of inventions in developed countries are not patented at all in any developing country. For example, in 1975, Argentina granted a total of 1,341 patents to residents of the Federal Republic of Germany, Japan and the United States. In the same year, these three countries granted 92,672 patents to their own residents. Similar results are to be found for other developed and developing countries. Thus, the vast majority of inventions which are patented in the most developed countries are already available on a royalty-free basis in the developing countries. No compulsory license or patent forfeiture is necessary for any citizen or organization in the vast majority of countries of the world to practice any of these inventions. Copies of these patents are readily available for a relatively small fee. For example, all United States patents are available for only 50 cents a copy. Perhaps it would be wise to reflect on why the availability of these inventions has not provided the development desired by the developing nations.

17. It is argued in paragraph 6 of the report that the effect of the Paris Convention is to extend protection in developing countries to patents held by nationals of developed countries without reciprocal advantages to such developing countries. This argument totally ignores the benefits which flow to developing countries through the transfer of technology protected in part by the patents granted by those countries. Without patent protection to ensure a fair return on investment, private enterprise in developed countries would not, to the same extent, transfer valuable technology and proprietary information to developing countries, and the citizens of such countries would be the losers.

18. The case for a patent system is said, in paragraph 7 of the report, to be far from clear-cut or universally acknowledged, with reference to a Canadian Working Paper and its expression of considerable scepticism about the utility of the patent system to Canada. Some six months prior to the release of the UNCTAD report, the Minister of the Department of Consumer and Corporate Affairs, Anthony C. Abbott, stated in a news release that "I now wish to reiterate that it is my conviction that a well-designed and carefully drafted patent law can and will continue to usefully serve Canada's national interests".

19. Similar to the allegation made in paragraph 6 of the report, it is stated in paragraph 10 that the Convention creates a "free trade" rule, the advantages of which accrue only to countries with relatively heavy activity in exporting industrial property. This statement is supported neither by Study No. 5 of the Senate Patent Subcommittee nor by fact. One has only to consider the example of Japan with its massive import of technology following the Second World War to realize the benefits which flow to countries importing technology protected by strong industrial property rights.

20. It is stated in paragraph 11 and elsewhere in the report that there is little in the Paris Convention concerning the rights of States granting patents and the recognition of the public interest to be served by patents. Indeed, paragraph 15 speaks of the Convention as virtually eliminating the concept of public interest. Quite to the contrary, the very essence of any patent system is in encouraging the development of new products and processes to serve mankind more quickly, more cheaply, with less use of energy, or simply better. In the United States, the patent system is grounded in the Constitution where Congress is granted the power to establish a system to promote the progress of science and useful arts by securing to inventors limited exclusive rights to their discoveries. The mere fact that the Paris Convention does not explain this simple truth, or detail the great freedom which member countries have to regulate the operation of patent systems they may establish, does not signal any lack of recognition of the public interest.

21. Much more useful for present purposes would be an analysis of the types of actions which countries should take to foster and stimulate the transfer of technology, and then a determination of whether any of these actions would, in fact, be prohibited by the Paris Convention. Unfortunately, as will become more evident in subsequent paragraphs, the effort in the UNCTAD report seems to have been devoted to identifying those actions which the Convention would prohibit a country from taking, with little thought given to whether it would be wise for any country to take such an action.

22. Much is said about the Paris Convention having taken shape before a significant number of developing countries became members. Perhaps the greatest single strength of the Convention is the fact that all of the countries which participated in its initial formulation were developing countries then, and that many of them have profited handsomely by membership in the Convention and adherence to its precepts.

23. In paragraphs 19, 20 and subsequent paragraphs of the report, the principle of preferential treatment on a non-reciprocal basis for the benefit of developing countries is praised as a most significant and desirable change in modern international relations. It is emphasized that this notion has been accepted in establishing international policies dealing with labour, taxation, transfer of income, social welfare, and other areas. There is one very significant difference, however, between the economic and social policies to which the concept of preferential treatment has been applied and industrial property rights: namely, that the latter involves principally privately held rights not subject to governmental control to nearly the same extent as economic and social policies.

24. Paragraph 24 of the report warns that the view that the Paris Convention is a highly flexible legal artifact must be treated with considerable caution. Presumably, the basis for this cautionary note rests with Article 25 of the Convention which states that its members undertake the necessary measures to ensure application of the Convention. The mere fact that the Convention requires that a few fundamental rules be implemented, leaving vast areas of patent policy untouched, does not contradict the fact that the Convention is indeed a highly flexible instrument. For example, each country is free to determine for itself:

(a) Whether to have a registration or an examination system of granting patents;
(b) The substantive criteria for granting patents;
(c) Whether to have a system of immediate or deferred examination;
(d) Whether to exclude certain subject matter for patentability;
(e) The term of its patents;
(f) Whether to have compulsory licensing for non-working;
(g) Whether to patent products made by patented processes;
(h) Etc., ad infinitum.

Time and space simply do not permit listing all the possible actions a country can take under the Paris Convention.

B. Main-lines for revision

25. It is stated in paragraph 26 of the report that it is generally recognized that patents are granted to be effectively used and that no departure should be admitted. This is too limited a view of the purpose of granting patents. In the United States, patents are granted to encourage disclosure of new technology. Once granted, market forces and the availability of competitive technology determine the

extent to which such patents are used. Footnote 24 of the report relies on an article by T. Hagan and S.J. Henry to demonstrate that "recent trends" in the United States "seem to admit the granting of compulsory licenses solely on the grounds of non-use of inventions." In fact, the article states in its conclusion that, "Substitution in the United States of a blanket statutory condification for the present flexibility would not only be contrary to lessons that can be learned from foreign experience from compulsory licensing statutes, but would also represent unnecessary, harmful tampering with a patent antitrust system that achieves the objectives of a statutory compulsory licensing scheme without being burdened by its shortcomings. Moreover, the institution of statutory compulsory licensing to eliminate problems of non-use would be contrary to the proprietary thrust of the present patent system, and negate the incentives therein."

26. It is stated in paragraph 27 of the report that a major problem in developing countries has been the failure to work protected inventions. This is not a problem unique to developing countries; it is an economic fact of life for all countries, developed and developing alike. While a greater percentage of patents may be worked in the more industrialized countries, inventors are frequently placed in the position of seeking patent protection before they are in a position to know the extent to which their inventions will actually be used. When it transpires that it is not economically feasible to work a patented invention, that invention is not worked. Moreover, it does not matter that the patent still exists. If the patent is not economically feasible for the inventor to work, it is very unlikely that anyone else will be able to economically practice that patented invention either. And if someone other than the inventor can economically work the invention, it would normally be in the economic interest of the patentee to grant such person a license.

27. For similar reasons, the concern with the alleged abuses of refusal to sell and the charging of excessive or discriminatory prices seems questionable. Rarely would a patentee, faced with the fact that there exist several alternatives for his patented invention, refuse to increase his income by licensing or selling his patented invention for a reasonable royalty, knowing full well that if he asks too much and his invention therefore never gets worked, he may ultimately lose his entire patent right.

28. It is stated in paragraph 28 of the report that, if patents are to be an instrument for the achievement of the development objectives of developing countries,

the system must insure that inventions are put to effective use without delays. Theory should reflect reality. The March 1977 issue of Les Nouvelles contains an article entitled "From invention to commercialization" by Edward Klein which demonstrates the futility of a policy which demands either prompt working or facing compulsory licensing or forfeiture. Penicillin required sixteen years from invention to commercial success. It took twenty-three years from the invention of the helicopter in the Soviet Union to its commercial success in the United States. And even the ball-point pen, invented in Hunary in 1938, was not commercialized until six years later in Argentina.

29. The Klein article clearly shows that patents on the more important technological developments are issued often many years before anyone, including the inventor, has been able to actually use or work the patent. It is true, of course, that many inventions, usually those of a small improvement nature, are worked very quickly, sometimes before the patent issues. But with such a variety of real-world examples, the wisdom of a policy which requires that any patent not used within three or four or five years from issue be forfeited or compulsory licenses granted is very questionable.

30. It is alleged in paragraph 30 of the report that "The role of the patent system" study[b/] in 1974 showed that the compulsory licensing procedure has proved in practice to be of virtually no value whatsoever. On the contrary, the previous study showed only that compulsory licenses are seldom granted. However, whether this result followed from the fact that the existence of compulsory licensing encouraged patentees to license voluntarily in advance, whether this resulted from the fact that most patents which could be economically practiced in a given country were in fact being practiced by the patentee or his licensees, or from any other of a number of reasons was not considered.

31. Paragraph 32 of the report contains the statement that the concept of "legitimate reasons" in Article 5A of the Paris Convention is, on the one hand, wholly ill-defined while on the other hand, is largely dependent upon the free will of the authorities concerned with applying Article 5A. The purpose of this statement is not entirely clear as it seems to call for a close definition of the concept of "legitimate reasons", thereby curtailing the freedom of national authorities to lend their own interpretation to its application. In this sense,

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b/ See footnote a/ above.

the thrust of the paragraph seems inconsistent with those portions of the UNCTAD report urging greater, not less, flexibility. In any event, contrary to the statement in this report, the notion of "force majeure" does not provide a more adequate means [than "legitimate reasons"] for protecting the public interest. While it might simplify the task of tribunals determining whether to grant a compulsory license, such simplification would impose a harsh and arbitrary standard on patentees who, for valid reasons, had not been able to work their patents. The inevitable result would be a reduction in patent filings and in the transfer of the related technology to countries employing such a standard.

32. It is stated in paragraph 34 of the report that unless domestic regulations governing disclosure are so stringent as to eliminate the need for additional co-operation on the part of the patentee, the prospects of establishing successful activity on the basis of a compulsory license are small because of the need for additional know-how to work the patent. If compulsory licenses have any benefit at all, it is that they encourage voluntary licensing by patentees. The prospects for the successful working by licensees of patented inventions will always be significantly greater if the license was voluntary, and the full co-operation of the patentee is obtained. Not only can a patent disclosure not be complete enough to ensure successful working of patented inventions in many cases, but there are also many aspects to a successful commercialization of a patented invention which involve know-how and management expertise far beyond the four corners of the patent document. Because of the usual volume of the know-how needed to commercialize an invention and because of the human contact needed to transfer technology, various schemes to include complete know-how in an issued patent are impractical. Moreover, there is the problem of the necessary early filing dates (when the technology may not be fully developed) and the voluminous nature of modern technological know-how, which might require a patent of thousands of pages with hundreds of drawings. Even then it would be very difficult to use without the appropriate person-to-person contact and explanation necessary to operate the technology. If the patentee is forced into a license relationship, the chances are slim that he will volunteer such expertise - expertise which may have been acquired at great cost and which can frequently be critical to the success or failure of the venture by the licensee.

33. Finally, it should be noted that the reference to the new Mexican law is premature. What needs to be examined is not whether the new law requires the patent holder to supply information necessary to exploitation of the patent, but rather whether inventors, who will be subject to this requirement, will continue to obtain and exploit patents at the same rate as they did before the law came into force.

34. In paragraph 36 of the report it is alleged that the two-year time limit in Article 5A(3) of the Paris Convention, coupled with a reluctance of domestic entrepreneurs to confront foreign patent holders, results in constraining the promotion of actual working of patents in the granting country. Again, this incorrectly assumes that patentees are normally unwilling to license their patents on a reasonable basis. It also assumes, again incorrectly, that a local entrepreneur would be in a better position to work the technology successfully if the patent was forfeited rather than licensed voluntarily or compulsorily.

35. It is argued in paragraph 38 of the report that Article 5A(2) establishes a non-mandatory directive to legislate for compulsory licenses and that a problem might arise in cases where member countries do not provide for such. We do not agree. The United States has never legislated for the possibility of a compulsory license for the purpose of preventing abuses and has not had any trouble either with the Paris Convention or with addressing such abuses when they have arisen.

36. It is suggested in paragraph 39 of the report that Article 5A should contain a listing of the legislative options available to member countries with respect to controlling abuses, and that even the use of compulsory licensing is subjected to so many conditions as to make it unlikely that such licenses can work effectively to prevent abuses. The Paris Convention is not intended to be a treatise on the actions a country can take to prevent patent abuses; rather, it merely establishes a few minimum conditions to encourage national patent régimes to operate rationally and to encourage the development and diffusion internationally of new technology. The WIPO Model Law on Inventions is better suited to the function of listing alternative legislative options under the Convention.

37. Moreover, the United States has found that any real abuses which might arise as a result of a patent grant have been dealt with adequately on a case-by-case basis through various judicial sanctions, including compulsory licensing of patents.

38. It is argued in paragraphs 40 and 41 of the report that developing countries should be in a position to employ the full range of economic policy instruments and that, therefore, explicit recognition will have to be given in the Paris Convention to the right of a member State to adopt all measures it deems adequate, mentioning automatic lapse, revocation and other action. If a country wishes to have maximum freedom to legislate concerning patents and their utilization, this freedom can be obtained by remaining outside the Paris Convention, refusing both its benefits and its obligations. In order to participate in the Paris Convention and to obtain for its nationals the right of national treatment in other countries, a right of priority, and the other benefits which the Convention bestows upon the nationals of member States, a State must be willing to accept the rather minimal obligations of according similar advantages to the nationals of other member States of the Convention. The United States has found that these minimum norms are very important in governing our relations with other countries, primarily other developed market economy countries, in the industrial property field. If "maximum freedom" in the industrial property field is a country's top priority, then, in our view, such a country should not be a member of the Paris Convention.

39. The automatic granting of compulsory licenses and automatic lapse of patents urged in paragraphs 41 to 43 of the report simply will not encourage local working. On the contrary, an arbitrary, automatic lapsing of patent rights, with no consideration for the economic and practical difficulties the patentee may face in his efforts to work a particular patent, would largely destroy the confidence which potential patent holders would have in the patent system of any country adopting such laws and would go far to ensure that technology holders would not apply for patent protection and would not transfer their valuable technology to such a country. Technology represents a valuable business asset obtained at significant cost by private entrepreneurs and its effective transfer must be induced by various means including some method of minimizing risks, such as a patent system offers.

40. It is alleged in paragraph 44 of the report that the "international patent system" results in import monopolies which inhibit domestic production and innovation in developing countries and eliminates competition in imports of the protected products. It has previously been noted that very few of the world's inventions are patented in developing countries, and these unpatented inventions

can be treated in any way desired by developing countries. Clearly, a far greater inhibition to domestic production in developing countries would be the complete elimination of the patent system in those countries. Patents represent the "tip of the iceberg" of the technology needed to implement a manufacturing enterprise. Without protection for at least the major features of a given technology by a patent system, the developers and owners of such technology may not incur the risk of transferring this technology or may not be willing to transfer it at a price the recipient can afford. The clear trend in recent years has been to expand and strengthen patent protection in order to encourage the transfer and diffusion of technology and the development of local industry.

41. Some ability to control imports can also provide direct benefits to developing countries. Once local working has been established in a developing country, the ability to exclude infringing imports could spell the difference between continued local manufacture or failure. While various mechanisms may be available to exclude infringing imports (i.e. tariff and non-tariff barriers), the exclusive rights inherent in the patent are much more acceptable to technology owners (on account of its certainty and legal basis) and to trade policy makers. If local manufacture is not initiated by the patentee or his licensee after a reasonable period of time, compulsory licensing and, ultimately, forfeiture are always available.

42. It is stated in paragraph 46 of the report that depriving the patent holder of the right to prevent importation constitutes a big step forward, with reference to the recently enacted Mexican law. Only if the objective is to discourage local working could this type of action be characterized as a step forward. Moreover, it is questioned whether the Mexican law does deny the patentee the right to prevent importation. The law seems only to state that the patent does not confer a positive right to import, suggesting that some other approval to import is needed. It should also be noted that the Minister of Consumer and Corporate Affairs of Canada, Anthony C. Abbott, has stated that the "exhaustion doctrine", which the current report appears to embrace, is subject to serious objections and is being reconsidered by the Canadian government.

43. Paragraphs 47 to 49 of the report are concerned with the fundamental principle stated in Article 5A(1) of the Paris Convention that importation of a patented article shall not entail forfeiture of a patent. The flat suggestion is made

that this principle must be abandoned if the international patent system is to function so as to assist national development of a developing country. Such reasoning ignores the fact that it would be impossible for any patentee to immediately establish working in every country where he might obtain a patent, or for that matter, to establish working at any time in every country where he might obtain a patent. It is not economically and practicably feasible to work an invention so promptly or completely. To argue for the deletion of this provision with the intention that developing countries would actually legislate for the forfeiture of a patent would, in our view, ignore the commercial realities of technology transfer. Much technology transfer to developing countries, be it through direct investment or licensing, originally occurs in order to meet the requirements of the internal market. Such a market cannot be developed or even identified without importing some of the product, at least for testing purposes. Once a sufficiently large market has been verified, a local licensee or foreign investor is able to justify transferring the productive technology and setting up a local manufacturing facility. If, however, the local facility does not benefit from patent protection and is thus unable to exclude cheaper infringing imports or to suppress locally made infringing products, its economic feasibility may be jeopardized. In the face of such uncertainty which would result from patent forfeiture, the local entrepreneur or the foreign investor may decide to not risk attempting the technology transfer at all, but instead would continue to meet the market requirements by imports.

44. It is stated in paragraph 51 of the report that there has been a trend in developing countries and in Italy to exclude patentability of chemical products, as contrasted with the process for producing them. It should be noted in passing that the European Community Patent Convention, successfully negotiated in Luxembourg in 1975, would require all Community countries, which includes Italy, to extend patent protection to chemical products.

45. The fact that the priority right of Article 4 of the Paris Convention defeats the rights of a subsequent applicant to obtain a patent for the same invention during the priority period is said, in paragraphs 61 and 62 of the report, to constitute a strong disincentive to initiate R and D activities in developing countries. The logical conclusion of that argument would be that the grant of any patent discourages research and development activity since somebody always has the possibility of being second. Of course, the entire line of reasoning is

unrealistic since seldom are two applications filed for the same invention in a one-year time span. In the United States, for example, with over 100,000 applications filed annually, less than 400 situations arise in a year where there are conflicting applications for the same invention. Stated another way, this means that the individual who makes any given invention will be first in 99.6 per cent of the cases. This does not seem to be much of a disincentive. For similar reasons, the allegation in paragraph 63 of the report that the priority right of the Convention is also likely to discourage the putting into use of new inventions cannot be squared with the facts. If a country found this "uncertainty" to be a real problem with respect to stifling the use of new inventions, it could, consistent with the Convention, adopt an intervening rights provision in its national law permitting innocent users to continue their use after the patent is issued.

46. In paragraphs 64 and 73 of the report it is suggested that foreign applicants deliberately delay the filing of their applications until the last month of the Convention year to "lengthen the period of validity of the patent" (para.64). In the first place, it should be noted that the earlier or later filing of a patent application does not affect the length of the term of any resulting patent; the patent merely runs from an earlier or a later date. Much more importantly, however, patentees simply do not delay the filing of their applications for the same reasons alleged in the report. In many countries, protection for an invention does not begin until a patent is issued. Prior to that time, the invention may be practiced freely by anyone. In certain rapidly-moving technologies, the useful life of an invention may have expired by the time a patent is issued. Secondly, patent applicants usually take advantage of the priority year to obtain any necessary security clearances to file in foreign countries, to obtain an indication from their home country application of the scope of protection they are likely to receive, and to determine the market potential of the invention in various countries in order to determine those countries in which a patent application should be filed. The attorney's fees, translation costs, and, to a lesser extent, the government fees associated with filing patent applications are considerable, so that technology owners cannot afford to file a large number of applications about the world without some prospects for successfully commercializing their inventions.

47. It is primarily for reasons of expense that the suggestion in paragraph 65 of the report of shortening the priority period makes little sense. Perhaps the best argument for shortening the priority period would be to encourage the prompt disclosure of the technology contained in a patent application; however, this could be accomplished by a country promptly publishing each application, preferably with some provision for interim protection. Moreover, any proposal to shorten the priority period should take into account the equally valid problems which the technology holder faces in deciding whether and where to file patent applications. In fact, reducing the priority period would probably have the effect of increasing the number of unworked patents in developing nations. In addition, many countries, such as the United States, have geared their examination process to receiving priority applications no later than 12 months from the priority date and any lengthening of the priority period would seriously disrupt such examination procedures. For all of these reasons, the suggestions in paragraph 65 of the report concerning lengthening or shortening the priority period, or extending preferential treatment to nationals of developing countries in connexion with various aspects of the priority period should not be seriously considered.

48. It is stated in paragraph 67 of the report that the principle of independence has an unfavourable impact in a patent-granting country when the corresponding patent application or patent in another country has been rejected or nullified, but yet can enter into or remain in force in such patent-granting country. It is suggested that the information concerning the granting and validity of patents applied for in a developed country would be quite useful to a developing country. One should be careful to distinguish, on the one hand, decisions concerning the granting or invalidating of patents and, on the other hand, patent copies and other information on which such decisions are based. The decisions themselves could only be directly applicable if the laws, practices, and factual situation in a developing country were identical to the laws, practices, and factual situation in the developed country in which the decisions were made. The definitions of novelty, unobviousness, and industrial applicability vary considerably from country to country so that a decision concerning unobviousness in one country may or may not be applicable to a second country.

49. In addition, the regulations and laws in one country specifying the manner in which claims are drafted or inventions disclosed could differ considerably from the corresponding laws in another country. Moreover, the prosecution history of a

patent application in one country would undoubtedly differ from the prosecution history of the corresponding application for the same invention in another country.

50. There is also the problem of differences in laws in other respects: for example, in the United States, patents are awarded to the first inventor, whereas in most countries of the world patents are awarded to the first person to file. Similarly, there are judicially created doctrines involving questions such as fraud or inequitable conduct that affect the validity of patents different ways in different countries. For all of these reasons, any requirement to provide more than the information upon which novelty and/or unobviousness could be assessed - patent copies and publications - would burden the patent offices of developing countries and would be unfair to patent applicants and patentees.

51. The system which operates in Canada would seem to be much preferable and would not require any change in the Paris Convention. The Canadian Patent Office, when it feels such information would be useful to them, asks the applicant for the following information:

(a) The serial number and filing date of any application for the same invention that is being or has been prosecuted in any other country;

(b) Particulars sufficient to identify the prior art cited against the application in the country involved;

(c) The form of the claims allowed therein;

(d) Particulars of any application or patent with which such application in the specified other country is, or has been, involved in conflict, or interference, or similar proceedings. (Of course, most countries determine priority by the date of filing, rather than the date of invention, and would not need this information.)

This procedure seems to work well and the Canadians use it frequently whenever necessary. It is provided for in Rule 39 of the Canadian Patent Rules under the Canadian Patent Act. No change in the Paris Convention is necessary for such local legislation.

52. In paragraph 71 of the report it is stated that, even in countries with well-established patent offices, patents are frequently declared to be invalid by the courts, citing a figure of 62.7 per cent in United States Courts of Appeals for the period 1948 to 1954. For the record, it should be noted that less than 0.5 per cent of the patents issued in the United States are litigated. Of these, a recent United States Patent and Trademark Office study covering the years 1960 to

1972 disclosed that approximately 50 per cent are found valid and 50 per cent are found invalid - a result which would be expected on the basis that patents are only litigated when the issue of validity or infringement is in doubt.

53. The higher rate of invalidity in appeal courts was found to be a result of the nature of the case appealed: that is, appeals were taken more often in cases where the holding of the lower court was for invalidity. In any event, since the results of litigation on the validity of a patent in one country may be totally inapplicable to the question of validity of the corresponding patent in a second country, and because, at least in the United States, there are no readily available sources for supplying such information, the Paris Convention should not be amended to require the compulsory exchange of information concerning the results of litigation, as suggested in paragraph 72 of the report.

54. Contrary to the last sentence of paragraph 73 of the report, it is not seen how Article 4 bis (5) in any way contradicts the national treatment concept stated in Article 2 of the Paris Convention.

55. In addition to the argument already put forward with respect to paragraph 67 of the report, the suggestion in paragraph 75 that both national patent offices and patent applicants should be required to supply information concerning the fate of a particular application or patent does not take account of the needs of patent authorities as well as the problems faced by patent applicants, especially in the less developed countries. Clearly, patent offices in less developed countries do not need duplicate copies of information concerning the fate of foreign applications and patents corresponding to an application pending in such offices.

56. In paragraph 76 of the report, it is stated that, because of the national treatment provision in the Paris Convention, it is not possible for a country to discriminate in favour of its own citizens as a means of inducing local inventiveness and initiative. While this is true, it overlooks what is possible and what could be done under the Convention to aid developing countries. It would seem that what a country should attempt to do is encourage local inventiveness and initiatives, regardless of local citizenship. One way this can be accomplished is by providing awards for inventors and by giving publicity and other benefits to those who do create inventions locally. Another possibility for encouraging local inventions would be to provide certain benefits in the country's patent system for those who either conceive or reduce an invention to practice in the country. For example, special assistance in the form of reduced fees or free legal assistance in

obtaining patent protection might be given to any person who first conceives an invention or reduces it to practice in the country - regardless of nationality.

57. It is stated in paragraph 78 of the report that the "evidence" shows nationals of developing countries to hold only 1 per cent of the total of world patents, that foreigners own six times as many patents in developing countries as do the developing country nationals, and that 90 to 95 per cent of the patents owned by foreigners in developing countries are never worked. To begin with, when the same assertion was initially made in The role of the patent system report,[c/] it was at least acknowledged that the "evidence" with all its weaknesses showed these things. It would not seem that the passage of time had made this earlier statement any more reliable. More importantly, however, it should be added that foreigners own more patents than do nationals in all but two of even the industrialized countries, and, furthermore, that most of these patents are not worked as well.

58. It is argued in paragraphs 78 and 79 of the report that the rule of national treatment stated in Article 2 of the Paris Convention renders it difficult for a developing country to adopt a patent policy addressing its needs and, indeed, results in a system of reverse preferences. It is the view of the United States that the national treatment principle is the cornerstone of the Paris Convention. Contrary to the impression given in these paragraphs, the concept of national treatment can be argued to give one-way benefits for developing country nationals in developed countries. Consider, for example, the fact that a national of a developing country can obtain a patent in the United States and maintain that patent for 17 years, irrespective of whether it is used, and pay no fees for the maintenance of that patent. He may use that patent to establish an import monopoly or to charge any royalty he desires for its use. In many developing countries however, a United States national is not only subject to compulsory license and forfeiture if he is unable to use his patent, but he must also pay periodic maintenance fees to keep his patent in force. Moreover, some countries impose arbitrary limits on the amount of royalties he can charge or expatriate. Thus, the principle of national treatment does not establish a reverse system of preferences; it merely establishes a fundamental concept of fairness which provides benefits to nationals of both developing and developed countries.

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c/ See foot-note a/ above.

59. Beginning with paragraph 80 of the report, a number of derogations from the concept of national treatment are suggested. For example, it is suggested in paragraph 80 that developing country nationals be able to obtain patents of improvement satisfying only a condition of local novelty. In paragraph 81 it is suggested that patents for developing country nationals have a longer duration than patents for foreign nationals and that different standards apply for the granting of compulsory licenses and revocation based on nationality. All of these proposals seem to be aimed at penalizing foreign nationals in developing countries rather than assisting developing countries in the process of industrialization. Considering that most of the technical expertise in the world is owned by foreign enterprise, one would think that developing countries would especially like to encourage such enterprise to share their knowledge and experience and to establish local working in developing countries.

60. The argument in paragraph 82 of the report that modifying the national treatment principle should cause no great difficulty, since such modification is widely accepted in the international economic system, is simply not applicable to industrial property. Unlike the international economic system, which involves government-to-government relations and commitments, industrial property rights essentially involve private property rights, the owners of which can neither afford, nor be expected, to give away.

61. In paragraphs 83 and 84, it is suggested that developing countries could design various types of patents to foster local inventive capacity as well as the diffusion of inventions and their effective use in local manufacture. This concept is sound. If any special rights are granted to encourage local inventions, it seems that benefit to the country should be the criterion, not nationality. For example, should a developing country grant a longer patent term to a life-saving pharmaceutical product that can only be manufactured in an industrialized country, merely because it was invented by a national of that developing country (who, in fact, may reside in a developed country)? It would be better to design a system, within the Paris Convention, to achieve the objectives of developing nations. For example, the establishment of a basic patent term of 15 years, with a five-year extension where the patentee (again irrespective of nationality) can demonstrate that working in the country (or in a specified region) would encourage local working and not violate national treatment.

62. Another possibility would be to consider adoption of a new type of patent along the lines of the "technology transfer patent" considered in the discussions on a Model Law on Inventions underway in the World Intellectual Property Organization. The objective of encouraging working in a developing country should be a central element of any new industrial property policy adopted by a developing country, whether that working be by a local or a foreign enterprise. Thus, a "technology transfer patent" which is jointly owned by an entrepreneur in a developing country and a foreign firm, and in which the absolute requirements for novelty of a traditional patent system are relaxed to permit limited protection notwithstanding the late introduction of a given technology, could promote the initiation of local manufacture and foster the diffusion of technology in the developing country.

63. Paragraphs 86 and 87 of the report discuss the possibility of admitting reservations by developing countries to certain obligations of the Paris Convention. Not only has this matter been previously considered and rejected by developing countries in the series of meetings held under the auspices of WIPO to consider revision of the Paris Convention, but it was agreed that, to the extent revision of the Convention is needed, every effort should be made to achieve a universal revision applicable to all nations.

64. Paragraphs 92 to 96 of the report concern the question of the vote by which the Paris Convention may be revised. It is argued that the traditional requirement of unanimity for changing the Convention is unusual and especially stringent since it would bar amendments desired by a large majority of members, and unnecessary since no existing member is bound by a revision until it accedes. The concept of unanimity for revision of the Paris Convention has been in effect since the first revision conference in 1900. While, on occasion, the unanimity principle has seemed harsh, it has promoted compromise among the parties to the Convention and has provided a moral obligation to adhere to the resulting product. Moreover, it has contributed to the creation of a convention which enjoys such great respect that it survived intact two global wars.

65. With respect to the Vienna Convention on the Law of Treaties referred to in the report, that Convention, in recognition of its prospective character, expressly excludes application to treaties existing prior to the date on which the Vienna Convention enters into force, an event which has not yet occurred.

C. General summary and conclusions

66. It is alleged in paragraph 99 of the report that many developing countries have entered into international agreements that circumscribe their capacity to design local patent policies according to their national needs and objectives, the most significant of these "restricting" agreements being the Paris Convention. As has been demonstrated in this response, the Paris Convention offers its members very wide latitude in shaping their national policies and laws. Moreover, the analysis in the UNCTAD secretariat report of what the Paris Convention prohibits its members from doing has, unfortunately, focused not on what makes economic good sense for a developing country, but rather on what areas does the Convention restrict freedom of action of its members. Upon identifying a few of these obligations, the report paints them as undesirable, without inquiring whether taking actions contrary to those indicated by the Convention would be in the best interest of developing countries. We think an analysis should be undertaken to determine whether taking such actions would truly benefit any member of the Convention.

67. The United States of America has been and remains sympathetic to the legitimate aspirations of developing countries to improve their condition through increased technology transfer and industrialization, and we support the on-going, evolutionary process towards a new international economic order. The key element in this process is its fundamental purpose: the achievement of economic justice for nations and for people. On the other hand, we do not agree with the statement that the Declaration and Programme of Action on the Establishment of a New International Economic Order (adopted by the United Nations General Assembly in resolutions 3201 (S-VI) and 3202 (S-VI)) should be the guiding consideration for revision of the Paris Convention. These largely political documents, with their sweeping calls for unrealistic action, are not appropriate for guiding a revision of the Paris Convention. The United States stated important reservations to these resolutions and we continue to take our reservations seriously.

68. Paragraph 105 of the secretariat report states that the patent system has exercised a negative impact on the economic and technological development of developing countries. Probably a more correct statement would be that the patent system really has little impact on most developing countries, because most developing countries have not attempted to use the patent system to their own benefit in encouraging both local invention and development and in encouraging transfer of technology from organizations and individuals in other countries. If a country so

chooses, it can enact a strong patent system to encourage inventions, innovations and development. However, if the patent system is ignored or minimized, obviously, it will not be of much importance.

69. It is urged in paragraph 108 of the report that any revision of the Paris Convention must introduce a balance between the rights of patent holders and the national interests of the patent granting country, it being alleged that the Convention is "weak" on stipulating patentees' obligations. It must be kept in mind that a patent system is a voluntary incentive system. Patentees disclose the results of their labours in exchange for a limited period of exclusivity. If unreasonable obligations are placed on patentees, they will simply not use the system and the public will lose the potential for the transfer of technology and industrialization which would have flowed from the protection offered. Those countries most in need of providing an adequate stimulus - the developing countries - would lose the most.

70. Paragraphs 109 and 110 of the report establish as tests for the adequacy of revision of the Paris Convention that (a) the more adequate the revised instrument, the less it would constrain national policy-makers and legislators and, (b) the more adequate the revised convention, the greater the extent to which it would require granting preferential treatment to developing countries. Taken together, these statements clearly suggest that, in the view of the UNCTAD secretariat, the "most adequate" Paris Convention revision would place no constraints and obligations whatsoever on the governments in developing countries and would give complete freedom to such governments to pass discriminatory laws against the nationals of developed countries with respect to such matters as length of the patent term, fees, periods for working, etc. It can only be said that if the revised Paris Convention fully satisfies these criteria, it would be questionable whether the United States of America could ratify such an agreement or whether, to the extent that national policies and laws took full advantage of such a Convention, technology owners from industrialized countries would seek patents or transfer technology to such countries.

71. Paragraph 113 of the report states that the attempts to revise the "outdated nature" of the Paris Convention arise from one basic concern, the need to alter the negative impact of the major provisions of the patent system in general and the Paris Convention in particular on the economic interests of the developing countries.

As stated previously, the impact of the patent system on developing countries has been very little because the developing countries have not chosen to use the patent system as it is intended to be used - to encourage inventions, innovations and development. If the Paris Convention is revised as recommended in the UNCTAD secretariat report, the patent system will continue to have little impact on the developing countries and will not be of significant benefit to them.