

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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# **The role of trade marks in developing countries**

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UNITED NATIONS

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT  
Geneva

# **The role of trade marks in developing countries**

*Report by the UNCTAD secretariat*



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## ABBREVIATIONS

|        |  |
|--------|--|
| BIRPI  | United International Bureaux for the Protection of Intellectual Property |
| EEC    | European Economic Community  |
| ECLA   | Economic Commission for Latin America                                    |
| GNP    | Gross national product   |
| IMF    | International Monetary Fund  |
| OAMPI  | African and Malagasy Industrial Property Office                          |
| UNCTAD | United Nations Conference on Trade and Development                       |
| UNESCO | United Nations Educational, Scientific and Cultural Organization         |
| WIPO   | World Intellectual Property Organization                                 |

## EXPLANATORY NOTES

References to dollars (\$) are to United States dollars, unless otherwise indicated.

The term "billion" signifies 1,000 million.

*In the tables:*

A dash (—) signifies that the amount is nil or negligible.

The listing of countries used has been adopted for ease of comparison, and does not imply any judgement regarding the stage of development of any particular country.

## FOREWORD

The present report has been prepared in pursuance of paragraph 6 of resolution 3 (I) of the Committee on Transfer of Technology of 5 December 1975, which required the Secretary-General of UNCTAD to prepare a study on the impact of trade marks, indications of source, appellations of origin and other subjects of industrial property protection, on the development process of developing countries.\* This report is mainly concerned with the role of trade marks in developing countries.

This report complements the report on the patent system 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, and published by the United Nations under the title *The role of the patent system in the transfer of technology to developing countries*.\*\*

The present report was discussed by the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology at its session held at the Palais des Nations, Geneva, from 6 to 14 October 1977.\*\*\* The agreed conclusions and recommendations of the Group of Governmental Experts are reproduced in annex I to this report.

In preparing this report, the UNCTAD secretariat was assisted by a number of consultants participating in their personal capacity. Two of them—D. Chudnovsky (Latin American Faculty of Social Sciences (FLACSO), Buenos Aires) and D. Greer (Associate Professor, San José State University, California)—took a direct part in the work. Others made written contributions which were used by the secretariat as background material in preparing this report. They were: J. Alvarez-Soberanis (Director of the National Registry on Transfer of Technology, Mexico), M. Gabay (Deputy Attorney General, Jerusalem), S. Glembocki (economist, Buenos Aires), A. Vida (Deputy Director, Hungarian Technical Central Library and Documentation Centre, Budapest). The UNCTAD secretariat is grateful to all who have assisted in the work, but it alone is responsible for the contents of this report.

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\* 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 I. In its resolution 3 (I), para. 6, the Committee on Transfer of Technology requested the Secretary-General of UNCTAD to prepare the study in co-ordination with the World Intellectual Property Organization (WIPO). The UNCTAD secretariat held appropriate consultations with the International Bureau of WIPO before the preparation of the present report and with respect to the co-ordination of their respective activities in this field.

\*\* United Nations publication, Sales No. E.75.II.D.6.

\*\*\* See the report of the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology (TD/B/C.6/24-TD/B/C.6/AC.3/4 and Add.1). At the same session, the governmental experts from developing countries members of the Group of 77 made a Declaration on the role of the industrial property system in the transfer of technology, which is attached to the report of the Group of Governmental Experts, in annex IV.



PART ONE  
MAIN FEATURES OF TRADE MARKS

Chapter I

THE FRAMEWORK FOR TRADE MARKS

1. Trade marks are universally recognized as a device used by a producer or distributor to identify the goods he is making or selling. Through such identification it is generally possible to distinguish the goods according to their source or origin, i.e. to distinguish the goods of one enterprise from those of other enterprises.<sup>1</sup>

2. It has been stressed that the historical function of a trade mark is to indicate source or origin, and it has no significance apart from the business to which it relates. The Supreme Court of the United States has said that the law of trade marks is but a part of the broader law of unfair competition and that "the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his goodwill against the sale of another's product as his . . .".<sup>2</sup>

3. According to some views, trade marks serve a double function: protecting the public against confusion and deception by identifying the source or origin of particular products as distinguished from other similar products, and protecting the trade mark owner's trade and business as well as the goodwill which is attached to his trade mark.<sup>3</sup>

4. A mark which loses its significance as a device to identify goods or services from a particular producer or

distributor, as when it becomes a generic name, no longer receives the protection afforded by trade mark law.<sup>4</sup>

5. The present report is concerned with the impact of trade marks<sup>5</sup> on the economic development process. Part one examines the function of trade marks, the national and international framework of the trade mark system and its economic role. Part two of the report is concerned with trade marks in developing countries, focusing on statistics on trade marks registration, the role of trade marks and their costs and benefits in developing countries, and policy alternatives. Part three contains a general summary and conclusions setting the framework for new policies in this field.

A. The functions of trade marks

6. The original function of trade marks was the indication of origin. In order to understand this function, the history of trade marks will be looked at briefly. In the Middle Ages, two basic kinds of marks could be found<sup>6</sup>: first, the merchants' marks which were regarded as establishing the ownership of the goods to which they were affixed; secondly, the production marks whose purpose was to indicate origin or source. The merchants' marks were strictly proprietary marks and, therefore, their only func-

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<sup>1</sup> If instead of identifying goods, trade marks help to distinguish services, they are called "service marks". For the purposes of the Model Law on Marks, trade marks were defined, in section 1, para. (1) (a), as "any visible sign serving to distinguish the goods of one enterprise from those of other enterprises" (BIRPI, *Model Law for Developing Countries on Marks, Trade Names and Acts of Unfair Competition* (Geneva, 1967), p. 15). A leading expert in the field of trade mark law has stated that, in general, trade marks perform four functions, namely, "(1) to identify one seller's goods and distinguish them from goods sold by others; (2) to signify that all goods bearing the trademark come from a single, albeit anonymous, source; (3) to signify that all goods bearing the trademark are of an equal level of quality; and (4) as a prime instrument in advertising and selling the goods." Thus the main functions of trade marks, according to the author, are identification, source, quality and advertising. (See J. T. McCarthy, *Trademarks and Unfair Competition* (Rochester, New York, The Lawyers Co-operative Publishing Co., 1973), vol. 1, p. 86.)

<sup>2</sup> See Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws*, second edition (Boston, Little, Brown and Company, 1973), p. 303.

<sup>3</sup> See Stephen P. Ladas, *Patents, Trademarks, and Related Rights: National and International Protection* (Cambridge, Mass., Harvard University Press, 1975), vol. II, pp. 967-969.

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<sup>4</sup> Among the cases of trade marks adjudicated by United States Courts to be generic names, the most famous are aspirin, escalator, kerosene and shredded wheat. See J. R. Lunsford, Jr., "Consumers and trademarks: the function of trademarks in the market place", *The Trademark Reporter* (New York), vol. 64 (1974), p. 83. "From the time when the buyer can no longer designate the product concerned by a term other than the denomination in question, the judge will consider that the mark has become a common name within the public domain, consequently being able to be freely used by anyone" (Y. Plasseraud, "La marque de spécialité pharmaceutique", CBI Informations No. 11, 1975, p. 7 (secretariat translation)). A generic name is not always a trade mark that has lost its distinctiveness. Generic names can be scientific or customary designations of products without being originally trade marks.

<sup>5</sup> "The term 'brand name' . . . has not developed into any legal term of art. It is merely a colloquial way to refer to a trademark" (McCarthy, *op. cit.*, vol. 1, p. 108). In this report the term "brand name" will be used as indicated by McCarthy. Parallel to trade marks there is the concept of trade names used to distinguish companies, partnerships and businesses, as opposed to marks used to identify and distinguish goods and services. The *Model Law for Developing Countries on Marks . . .* (*op. cit.*) defines "trade name" as "the name or designation identifying the enterprise of a natural or legal person" (sect. 1, para. (1) (d)).

<sup>6</sup> See F. I. Schechter, *The Historical Foundations of the Law Relating to Trade-marks* (New York, Columbia University Press, 1925), chaps. II and III.

tion was to establish ownership. Production marks were used by the guilds to guarantee quality and to control entry to particular trades. Their use was compulsory and could be considered to have constituted a liability for the producer in the sense that they could be used to trace the workman who made or sold defective goods.

7. The transition from the typical regulatory mark of the Middle Ages to the modern trade mark<sup>7</sup> took several centuries and resulted from enormous transformations in the operation of the economic system. The development of national and international trade, the industrial revolution and the changes in the structure of production and distribution of goods and services in the last centuries was the background against which this transition took place.

8. Modern trade marks were really born in the second half of the nineteenth century, although their origin can be traced in some cases to the eighteenth century, as, for example, in the cutlery trade.<sup>8</sup> Laws on trade marks were enacted in several countries, such as France in 1857, the United Kingdom in 1862 and the United States in 1870.<sup>9</sup> Some of the now famous trade marks were created in the last decades of the nineteenth century, e.g. *Quaker* in 1895, *Coca Cola* in 1886 and *Kodak* in 1888.<sup>10</sup> W. H. Lever was probably the pioneer in the development of modern trade marks, when he began using *Sunlight* as the mark to advertise his product, not simply as soap but as *Sunlight*, in a manner unprecedented in extent and intensity.<sup>11</sup>

9. Although the economic role of modern trade marks will become much clearer in the discussion in chapter II, it is important to point out some basic differences in relation to the mediaeval trade marks. First, modern marks are not compulsory as the mediaeval marks were. Generally, it is up to the seller to use or not to use a trade mark. Secondly, modern marks are not aimed at identifying ownership as was the case with the proprietary marks of the Middle Ages.<sup>12</sup> Thirdly, modern marks are an asset for the producer instead of a liability.

10. The original rationale for the protection of trade marks was the protection of one manufacturer against attempts by another manufacturer to pass off his products as those of the former. The second main function of trade marks is closely related to that of the protection against what is usually termed unfair competition. This second function is said to be that of quality identification for consumers. As the consumers can trace the origin of a product, they are helped in their purchasing decision by

trade marks. Once a good is identified through a certain trade mark, it can be purchased again if the consumer is satisfied with it or not bought any more if he is not. It is argued that it is desirable to give legal protection to trade marks because this contributes to their role of protecting consumers against confusion in the market place.<sup>13</sup> Trade marks facilitate the quality checking carried out by consumers through their own experience. In this sense trade marks give a guarantee of consistency rather than a guarantee of quality.<sup>14</sup>

11. The first main function of trade marks, which was the indication of origin, has been transformed in modern times through brand proliferation (see chap. II, sect. C, below). Today in market economy countries, trade marks are not always an indication of origin. However, trade marks do embody goodwill<sup>15</sup> for the owner of the trade mark and as such are protected by law. The goodwill is generated by the advertising effort of the owner of the trade mark and/or the quality of the product with which consumers are satisfied.

12. In respect of the second function of trade marks, that is, the quality-identification function, doubts have been expressed as to its effectiveness. A report of the Economic Council of Canada contained the following observation in this regard: "It is helpful to make some evaluation of the effectiveness of the trademark system as a conveyor of buyer information. The result of this seems to be that this function has not been served as well as it might. Among the reasons for this is the fact that the predominant emphasis in the law has been related to the protection of

<sup>13</sup> For an analysis of the indirect ways developed in the United States to ensure the quality assurance function of trade marks, see E. W. Hanak, III, "The quality assurance function of trademarks", *The Trademark Reporter* (New York), vol. 65 (1975), pp. 318-335. In the experience in the United States "the means most frequently employed by courts to encourage trademark owners to preserve the quality assurance function of their marks is to deny them relief in equity against infringers of the mark on the basis of unclean hands if the nature of the underlying product is secretly and substantially altered" (*ibid.*, pp. 320-321). However, as is recognized by the same author, "the doctrine of unclean hands, in serving to assure that trademarks guarantee a certain level of quality, does have one serious limitation. Assuming that the trademark owner is denied relief because of his unclean hands, the result is not that both he and the infringer are prevented from using the deceptive mark, but rather that they both may use the mark. In short, the public now has to contend with two deceptive marks instead of one" (*ibid.*, p. 323). Section 43 (a) of the United States Lanham Act of 1946 would seem to present an opportunity for the consumer to enforce the quality-control function of the trade mark. It provides that any person who applies a false description or representation to goods and causes them to enter into commerce shall be subject to liability in a civil action by any person who believes he is or is likely to be damaged by such a false description or representation. However, the United States Courts have denied consumers standing to sue under this section (*ibid.*, p. 326).

<sup>14</sup> "A trade mark does not necessarily guarantee good quality. What it does guarantee is consistency." See S. A. Diamond, "The historical development of trademarks", *The Trademark Reporter*, vol. 65 (*op. cit.*), p. 289.

<sup>15</sup> Goodwill is "the attachment of buyers to, and their propensity to purchase, the product of the particular firm" (H. R. Edwards, *Competition and Monopoly in the British Soap Industry* (Oxford, Clarendon Press, 1962), p. 26). The economic value of the goodwill can be assessed by the amount paid for a business in excess of the value of the net tangible assets. It represents the value of the advantages of acquiring an established business.

<sup>7</sup> The differences between the mediaeval marks and the modern marks were well summarized by Schechter (*op. cit.*).

<sup>8</sup> *Ibid.*, chapter V.

<sup>9</sup> In 1870, Congress passed the first federal act providing for trade mark registration. The Act of 1870 was short-lived, for in 1879 the United States Supreme Court held that that Act was unconstitutional. See J. T. McCarthy, *op. cit.*, vol. 1, p. 115.

<sup>10</sup> J. R. Lunsford, Jr., *loc. cit.*, p. 76. The same article mentions that *Colgate* has been used since 1806, *Gordon's Gin* since 1769 and *Singer* since 1851.

<sup>11</sup> See Ch. Wilson, *History of Unilever* (London, Cassell, 1954).

<sup>12</sup> "... marks designating ownership are not trade-marks at all but merely proprietary marks, which may or may not incidentally serve to designate the origin or source of the goods to which they are affixed" (Schechter, *op. cit.*, p. 20).

the producer's or seller's interests, which only indirectly serves the buyer's interest in having more complete and better information. This pattern of emphasis means that many of the potential benefits related to this aspect remain undeveloped. Another reason of course is that the trade mark itself is only a very abbreviated way of expressing the full set of qualities of a product or service, and this constrains some of the extent of the product information role. Nevertheless important improvements can and should be made."<sup>16</sup>

13. Trade marks and patents of inventions are both considered intangible assets and recognized as industrial property rights. Through different means, they give a market power to the enterprises which own them. In the case of patents, a grant of monopoly for a certain period of time is in itself an indicator of market power, while in the case of trade marks this is achieved through the development of brand loyalty. However, although the economic consequences are rather similar, their rationale is quite different. Patents are granted to encourage inventions by private enterprises or individuals and to encourage prompt and adequate public disclosure of new technology.<sup>17</sup> Trade marks as such are not inventions and have no technological content. The rationale of patent protection is to promote technological innovation and, in this way to benefit, not only the innovators but also the society as a whole. Trade marks protect the trade mark owner's business from what is termed unfair competition as well as the public against confusion in the market place with respect to competing products available on the market.<sup>18</sup>

#### B. The national framework

14. Although marks have been used for centuries, legislation on them is relatively recent. It was in the second half of the nineteenth century that the majority of trade mark laws were passed in the countries that were then politically independent. As shown in table 1 and annex II, in 1900 all the countries that are now developed market-economy countries and practically all countries that are now socialist countries (eastern Europe) had trade mark laws. Of all the territories and countries which are now considered developing countries within UNCTAD, 51 had

trade mark laws in 1900; however, only 23 of them had patent legislation in 1900.<sup>19</sup>

15. While national laws on trade marks vary in their regulation in respect of registration, nature of the granted titles, duration of rights, renewals, assignments and licensing,<sup>20</sup> they share a number of basic features. It would appear that registration of trade marks is a feature common to all national trade mark legislation. The effect of registration, however, may differ. There is a broad division between countries where trade mark rights are held to accrue to the first user of the mark<sup>21</sup> and those countries where the first registrant acquires exclusive rights.<sup>22</sup>

16. The registration of a trade mark can usually be maintained for an indefinite period through the simple administrative procedure of renewal (see annex III for information on renewal periods). Indeed, so heavy is the emphasis on granting easy conditions for regularly extending the validity of a mark that it seems that only one country, Colombia, has a renewal period (5 years) shorter than the initial grant (10 years). Both in Asia and Latin America the most common provision is to make the first grant for 10 years and all subsequent ones for the same duration. In Africa the period most commonly found is 20 years.

17. In most legal systems, the trade mark may be licensed for use by someone other than the registered owner. The owner of the mark may decide "to dispose only of the right to use of such mark in part or in whole by granting to another person the right or authorization for the use of his trademark, either on an exclusive or non-exclusive basis".<sup>23</sup> Since a trade mark is an asset of the owner, it can be disposed of as part of the business.<sup>24</sup> In certain countries there may be a problem with the assignment of a trade mark separate from the goodwill of the business in which the mark is used. Such a mere assignment is still not possible in the United States.<sup>25</sup>

18. The law of most countries provides for the possibility of striking a trade mark off the register in case of non-use. In countries where the rights to a trade mark accrue through the use of the trade mark, abandonment

<sup>16</sup> Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa, 1971), p. 193.

<sup>17</sup> See *The role of the patent system in the transfer of technology to developing countries* (United Nations publication, Sales No. E.75.II.D.6), para. 10.

<sup>18</sup> "In reporting the bill which became the United States Federal Trademark Act of 1946 (Lanham Act), the Senate Committee on Patents pointed out the fundamental basis for trademark protection:

'Trademarks, indeed, are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trademarks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trademarks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not. This is the end to which this bill is directed.'

J. T. McCarthy, *op. cit.*, vol. 1, p. 54.

<sup>19</sup> See *The role of the patent system...* (*op. cit.*), table 4.

<sup>20</sup> See S. Ladas, *op. cit.*, vol. II, chapter 30.

<sup>21</sup> E.g., in the United States of America and Canada; see McCarthy, *op. cit.*, vol. 1, pp. 571-573, and Harold G. Fox, *The Canadian Law of Trade Marks and Unfair Competition*, 3rd ed. (Toronto, The Carswell Company Ltd., 1972), pp. 48-49.

<sup>22</sup> E.g. under the Uniform Benelux Trademark Law; see A. Komen and D. W. F. Verkade, *Het nieuwe merkenrecht* (Deventer, Kluwer, 1970), p. 45. French trade mark legislation is also based on this principle; see Yves Saint-Gal, *Protection et valorisation des marques de fabrique, de commerce ou de service*, 4th ed. (Paris, J. Delmas et Cie, 1972), p. H3.

<sup>23</sup> Ladas, *op. cit.* (vol. II), p. 1127.

<sup>24</sup> *Ibid.*, p. 1118.

<sup>25</sup> *Ibid.*, p. 1119; see also McCarthy, *op. cit.*, vol. 1, pp. 606-607. Article 6 *quater* of the Paris Convention deals with this problem in an international context; the full text is given in *Paris Convention for the Protection of Industrial Property*, World Intellectual Property Organization document 201(E) (Geneva, 1970).

TABLE 1

The spread of national trade mark legislation between 1873 and 1976:  
number of countries having trade mark laws in given years<sup>a</sup>

| Group of countries <sup>b</sup>                 | 1873 | 1884 | 1900 | 1911 | 1925 | 1934 | 1958 | 1967 | 1976 |
|---|------|------|------|------|------|------|------|------|------|
| Developed market-economy countries . . . . .    | 10   | 19   | 24   | 24   | 24   | 24   | 24   | 24   | 24   |
| Socialist countries of Eastern Europe . . . . . | 4    | 6    | 7    | 7    | 7    | 8    | 8    | 8    | 8    |
| Developing countries . . . . .                  | 1    | 9    | 51   | 53   | 60   | 63   | 81   | 89   | 91   |
| <i>of which:</i>                                |      |      |      |      |      |      |      |      |      |
| Africa . . . . .                                | 1    | 1    | 22   | 22   | 26   | 26   | 31   | 34   | 36   |
| Asia . . . . .                                  | 0    | 1    | 7    | 7    | 8    | 10   | 21   | 25   | 25   |
| Latin America . . . . .                         | 0    | 6    | 17   | 19   | 21   | 22   | 24   | 25   | 25   |
| Others . . . . .                                | 0    | 1    | 5    | 5    | 5    | 5    | 5    | 5    | 5    |
| Other States <sup>c</sup> . . . . .             | 1    | 2    | 2    | 2    | 2    | 3    | 4    | 4    | 4    |
| Total world                                     | 16   | 36   | 84   | 86   | 93   | 98   | 117  | 125  | 127  |

Source: Annex II below.

<sup>a</sup> Data given for years relating to the evolution of the Paris Convention for the Protection of Industrial Property: 1873, the Vienna Exhibition; 1884, entry into force of the Convention; 1900, 1911, 1925, 1934, 1958, 1967, revisions of the Convention; 1976, present status.

<sup>b</sup> For countries considered in each group, see annex II below.

<sup>c</sup> Holy See, Liechtenstein, Monaco, South Africa.

will result in the loss of the trade mark.<sup>26</sup> In countries where rights to a trade mark are based on registration, the registration is granted generally on the assumption that the proprietor will actually use the trade mark;<sup>27</sup> therefore, a procedure is often provided to clear non-used marks from the register.<sup>28</sup> A practical reason for removing non-used marks is that these marks make the work of those administering the national registers more difficult than necessary.

### C. The international framework

19. At the end of the nineteenth century, initiatives were taken for the formulation of an international convention for the protection of industrial property. Around the same time, national trade mark laws were being enacted. Trade marks were included in the Paris Convention for the Protection of Industrial Property, which was concluded in 1883 and entered into force the following year.<sup>29</sup> The Paris Convention did not create an international trade mark. It left the national trade mark systems in existence. This was embodied in the principle of independence of trade marks laid down in article 6, paragraph (3). Key elements of the Paris Convention are the notions of national treatment (article 2) and of a priority period (article 4). National treatment in this context means that nationals of any

country of the Union<sup>30</sup> enjoy in all other member countries of the Union the same protection as is granted to nationals of such members; it is essentially a principle of non-discrimination. The priority period means that nationals of one of the countries of the Union, by applying in one country of the Union for registration, are given a period in which to apply in any other country of the Union (for trade marks this period is six months); if they apply within this period, these applications by the same applicant are deemed to have been made on the same date as the original application.

20. Important provisions of the Paris Convention dealing specifically with trade marks are article 6 *quinquies* and article 6 *bis*.<sup>31</sup>

21. Section A (1) of article 6 *quinquies* provides that a trade mark duly registered in the country of origin (as defined in article 6 *quinquies*, A (2)) shall be accepted for filing and protected in the other countries of the Union, subject to the exceptions contained in section B of that article. The effect of sections A and B of article 6 *quinquies* read together is that if a trade mark is registered in the country of origin it is entitled to be registered in another Convention country, subject to three exceptions, namely: (a) if the mark is of such a nature as to infringe rights already acquired by third parties in the country where protection is claimed; (b) if the mark lacks any distinctive character or consists exclusively of signs or indications which serve in

<sup>26</sup> Ladas, *op. cit.*, vol. II, p. 1145. For Canada, see Fox, *op. cit.*, pp. 280-282; for the United States of America, see McCarthy, *op. cit.*, vol. 1, pp. 591-596.

<sup>27</sup> Ladas, *op. cit.*, vol. II, p. 1146.

<sup>28</sup> See in this connexion article 5 C(1) of the Paris Convention for the Protection of Industrial Property.

<sup>29</sup> The Convention was revised at Brussels (1900), Washington, D.C. (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967).

<sup>30</sup> The countries to which the Convention applies constitute a Union for the protection of industrial property (article 1). Article 3 provides that nationals of non-Union countries who are domiciled or have real and effective industrial or commercial establishments in the territory of one of the countries of the Union are to be treated in the same manner as nationals of the countries of the Union.

<sup>31</sup> See also foot-note 186 below.

the trade to designate quality, quantity, source, etc., or have become customary in the current language or trade practice; and (c) if the mark is contrary to morality or public order.<sup>32</sup> "Countries [of the Union] having less liberal [trade mark] legislation are required by this article to admit to registration ... foreign trade marks which cannot be registered by their own citizens."<sup>33</sup>

22. Article 6 *bis* provides that "the countries of the Union undertake, *ex officio* if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods". Even if not registered, well-known marks are to be protected, provided all the requirements of article 6 *bis* are met. This kind of protection is exceptional and is justified by the argument that registration or use of such a well-known mark would in most cases amount to an act of unfair competition.<sup>34</sup> It is up to the national authorities to determine whether a trade mark is liable to create confusion with a well-known mark.<sup>35</sup>

23. As indicated earlier (para. 19), the Paris Convention is based on the principle that a certain trade mark registered in one State is independent of the same trade mark registered in another State of the Union. This makes it necessary to make a separate application in each country where protection of the trade mark is desired. The rationale of the Madrid Agreement of 1891<sup>36</sup> was to provide for international registration through the International Bureau of Intellectual Property, and thereby to obtain protection for a trade mark in the contracting countries through one single application. The owner of a trade mark, however, cannot register his trade mark directly with the International Bureau. The application to the Bureau is to be made through the administration of the country of origin and a national registration in the country of origin is a prerequisite for an application to the International Bureau.

<sup>32</sup> Subject to the application of article 10 *bis*. The reference to article 10 *bis* enables member States to refuse or invalidate the registration of a trade mark if, for reasons other than those already mentioned in the article, its registration would constitute an act of unfair competition (G. H. C. Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as revised at Stockholm in 1967* (Geneva, BIRPI, 1968), p. 117).

<sup>33</sup> Ladas, *op. cit.*, vol. II, p. 1225.

<sup>34</sup> Bodenhausen, *op. cit.*, p. 90.

<sup>35</sup> *Ibid.*, p. 91.

<sup>36</sup> The Madrid Agreement Concerning the International Registration of Marks was revised at Brussels (1900), Washington, D.C. (1911), The Hague (1925), London (1934), Nice (1957) and Stockholm (1967). For the text of the Agreement, see WIPO, *Madrid Agreement Concerning the International Registration of Marks*, document 260 (E) (Geneva, 1975).

24. At present 87 countries belong to the Paris Convention and only 24 to the Madrid Agreement.<sup>37</sup> Moreover, whereas more than 50 developing countries are parties to the Convention, only six have joined the Madrid Agreement (four African nations, one Asian, and Yugoslavia).

25. Most of the international registrations made under the Madrid Union are owned by nationals of France, the German Democratic Republic, the Federal Republic of Germany and Switzerland, while the majority of the remaining members, especially the few developing countries belonging to the Union, have registered a small number of international trade marks (see tables 10 and 11 below).

26. Certain features of the Madrid Agreement seem to have prevented a larger membership. The main obstacle appears to be that an international registration automatically extends to all countries of the Union, even those in which the trade mark is not intended to be used. In those countries the registrations encumber the national registers.<sup>38</sup>

27. Also, as a registration in the country of origin is a prerequisite to an international application, nationals of those countries where registrations can be obtained fairly easily are at an advantage over nationals of those countries where the screening procedure is stricter or where the process of registration takes longer. Therefore, the countries in the latter category (such as the United States, the United Kingdom and the Nordic countries) have been reluctant to accept the idea of an international registration as provided by the Madrid Agreement.<sup>39</sup>

28. The fact that the membership of the Madrid Union has increased only very slowly (there were 17 members in 1925 compared with 24 today), and the failure of several key trade mark holding countries to accede to the Madrid Agreement, have led to a strong movement for a new kind of multilateral treaty on trade marks (within the framework of the Paris Convention). Consequently, at Vienna in 1973 the Trademark Registration Treaty was concluded.<sup>40</sup> This Treaty is not yet in force because so far only three States have deposited their instruments of accession.<sup>41</sup> This new Treaty, contrary to the Madrid Agreement, does not require a previous national registration. It provides for direct filing of an international application in the International Bureau.

<sup>37</sup> See WIPO, *Industrial Property* (Geneva), 16th year, No. 1 (January 1977), pp. 5 *et seq.*

<sup>38</sup> See Ladas, *op. cit.*, vol. II, p. 1480, which also states that the Nice amendment contained in article 3 *bis* has not materially changed the situation. Article 3 *bis* provides that "any contracting party may, at any time, notify the Director-General of the Organization ... in writing that the protection resulting from the international registration shall extend to that country only at the express request of the proprietor ...".

<sup>39</sup> Ladas, *op. cit.*, vol. II, p. 1481.

<sup>40</sup> For the text, see WIPO, *Trademark Registration Treaty*, document 265(E) (Geneva, 1973).

<sup>41</sup> See WIPO, *Industrial Property* (Geneva), 16th year, No. 1 (January 1977), p. 14.

## Chapter II

### THE ECONOMIC ROLE OF TRADE MARKS

29. In order to examine the economic function of trade marks from the point of view of business enterprises in a comprehensive way, a number of aspects of the market structure in which trade marks operate will be studied.<sup>42</sup> After defining a system of non-price competition, the product differentiation activities of enterprises will be analysed. In particular, the concept of brand loyalty and the role played by advertising in creating brand loyalty will be examined. Franchising will also be discussed and some reference will be made to the economic value of trade marks as intangible assets. Finally, some peculiarities of trade marks in the socialist countries of Eastern Europe and China will be pointed out.

#### A. The structure of the market

30. As has already been pointed out, the widespread use of modern trade marks is a relatively recent phenomenon and is one of the consequences of the modern transformation of the market structure in which the economic system operates. The typical market structure of the early decades of the nineteenth century, depicted in the economic literature as a system of perfect competition, has been fundamentally modified.

31. A market structure in which perfect competition prevails can be characterized by the existence of atomistic sellers and buyers, a perfectly homogeneous product, full mobility of resources and complete knowledge of all relevant data on the part of the sellers and the buyers. The market structure that emerged has exactly the opposite features and is called a system of imperfect competition. Instead of a large number of sellers, there is a limited number, and in some cases there is also a reduced number of buyers. The product is not a homogeneous one, barriers to entry and exit exist, and buyers and sellers do not have full knowledge of the market conditions. Whereas in the former model, business enterprises competed through prices, in the latter, different varieties of non-price competition can be found.

32. Within a system of imperfect competition, it is possible to find non-price competition not only among a reduced number of producers, i.e. in a differentiated

oligopoly,<sup>43</sup> but also among a relatively large number of firms, this case being called monopolistic competition.<sup>44</sup> Industries like those for motor cars, cigarettes or soft drinks are examples of differentiated oligopolies, while the retail trade is a typical sector where monopolistic competition prevails.

#### B. Trade marks and product differentiation

33. The term "product differentiation" in economic analysis refers to an imperfection in the substitutability—to buyers—of the outputs of competing sellers in an industry. "A general class of product is differentiated if any significant basis exists for distinguishing the goods (or services) of one seller from those of another. Such a basis may be real or fancied, so long as it is of any importance whatever to buyers, and leads to a preference for one variety of the product over another. . . . Differentiation may be based upon certain characteristics of the product itself, such as exclusive patented features; trade marks; trade names; peculiarities of the package or container, if any; or singularity in quality, design, colour or style. It may also exist with respect to the conditions surrounding its sale."<sup>45</sup>

34. Product differentiation thus gives scope for a type of competition which mainly tries to influence the demand curve, instead of accepting it, as is the case with price competition. In technical terms, while in perfect competition the cross elasticities of demand between different pairs of outputs will approach infinity, such elasticities will be perceptible and finite in the case of competition through product differentiation. In other words, in perfect competition outputs of different sellers are perfect substitutes from the point of view of the buyer, while in product differentiation competition they are just close substitutes.

35. Trade marks are one of the means of achieving product differentiation. Unlike patents and industrial designs, trade marks are the only element in the differentiation process that receive specific legal protection for unlimited time. While other elements making a product different in the eyes of the buyer are relatively weak because they are based on subjective circumstances or

<sup>42</sup> The empirical evidence used in this chapter is mostly derived from studies concerning the experience of the United States of America. Relatively little information was found concerning the experience of other countries. However, it would appear that given the importance of the United States economy and the spread of the marketing techniques applied by United States companies, the basic aspects of the United States experience can also be found elsewhere.

<sup>43</sup> An oligopoly is a market structure in which there are few firms, each of whose actions have a significant impact on the price and supply of the commodity, i.e. they are interdependent. Oligopolies can be homogeneous (as in the steel or aluminium industry) or differentiated, depending on the type of product which is sold.

<sup>44</sup> Monopolistic competition occurs when, despite the fact that many firms are engaged in the same activity, each seller has the possibility of achieving a certain degree of influence on the demand for his products.

<sup>45</sup> E. H. Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value*, 5th ed. (Cambridge, Mass., Harvard University Press, 1947), p. 56.

because the objective differences are easier to copy, a trade mark makes the process of imitation much more difficult.<sup>46</sup>

36. However, trade marks do not merely identify source or origin. They are a basic element in building up a reputation for the products to which they are attached and, therefore, for the firm which provides them. In other words, a fundamental function of trade marks is the creation of goodwill.

37. It is therefore desirable to understand how goodwill is created. In this connexion the behaviour of the buyer in purchasing differentiated goods and brand loyalty will be examined.

### C. Brand loyalty

38. A buyer who has imperfect knowledge of the products he is going to purchase and of the available alternatives can commit two types of purchasing errors. The error of commission occurs when the buyer makes a purchase on the basis of an inflated, or excessively favourable, pre-purchase assessment of the goods. In other words, he does not get what he thinks he is getting but something less. Errors of omission occur when the buyer demands less than he would if he had full knowledge. With respect to brand choice for a given product, these errors are often just the opposite sides of the same coin, i.e., an overly optimistic assessment of one brand implies an excessively pessimistic view of others.

39. While purchasing errors are frequently made by household consumers, this is not generally the case with industrial buyers purchasing capital and intermediate goods. The main reason behind this behaviour is the fact that the latter are well informed on the product's features and quality standards (which are usually specified by independent bodies exercising quality control) and have probably had the assistance of trained experts, assistance whose net cost per unit purchased is small (taking into account not only the large scale of purchases but also the savings achieved from avoiding errors). On the other hand, household consumers whose purchases are made on a relatively small scale rely on a number of clues, many of which are not accurate indicators of product value or quality at all.<sup>47</sup>

<sup>46</sup> The general case was well summarized by Chamberlin, referring to patents and trade marks: "Each makes a product unique in certain respects; this is its monopolistic aspect. Each leaves room for other commodities almost but not quite like it; this is its competitive aspect" (*ibid.*, p. 62).

<sup>47</sup> Studies carried out in the United States have shown that consumers may judge the richness of ice cream flavour on the basis of colour, the cleaning strength of detergent on the basis of suds level and aroma, the thickness of syrup on the basis of darkness, the "pick-up" of cars on the basis of tension in the spring controlling the accelerator pedal, the quality of beer on the basis of price level and the power of kitchen mixers on the basis of noise. See Donald F. Cox, "The sorting rule model of the consumer product evaluation process", in Cox, ed., *Risk and Information Handling in Consumer Behaviour* (Boston, Mass., Division of Research, Graduate School of Business Administration, Harvard University, 1967), pp. 324-368; A. G. Bedian, "Consumer perception of price as an indicator of product quality", *MSU Business Topics* (Michigan State University, Michigan), Summer 1971, pp. 59-65; A. G. Woodside, "Relation of price to perception of quality of new products", *Journal of Applied Psychology* (Washington, D.C.), February 1974, pp. 116-118; and R. W. Olshavsky and J. A. Miller, "Consumer expectations, product performance and perceived product quality", *Journal of Marketing Research* (Chicago, Ill.), February 1972, pp. 19-21.

Therefore, they are prone to make purchasing errors especially with certain types of products, that may be called "experience goods".

40. Experience goods are those whose utility can be evaluated only after their purchase, e.g. canned foods, drinks, soaps, motor cars, appliances. On the other hand in the case of search goods, i.e. those whose quality and distinct features can be judged by a simple inspection before the actual purchase (for example, fresh fruits and vegetables), the possibility of purchasing errors are more limited because consumers have the information to act in an informed manner.

41. On the basis of household consumer behaviour in relation to experience goods, it seems that errors of commission could be made persistently over time, all based on nothing more than the mere existence of brands for experience goods.<sup>48</sup> This is generally called brand loyalty or trade mark allegiance.<sup>49</sup>

42. It seems then that trade marks are not only a basic element in the differentiation of products but they are a fundamental element in the development of business goodwill, especially in consumer goods where their utility can be assessed only after their purchase. At the same time, and as long as the assessment is not made in relation to prices,<sup>50</sup> artificially induced brand loyalty can actually reduce price elasticity of demand as between brands of experience goods.

43. The artificial brand loyalty is basically induced by introducing new brands on which the advertising effort is concentrated. The importance of brand loyalty has been fully recognized by marketing executives and in many consumer goods industries brand marketing has been extensively used.<sup>51</sup>

44. Brand proliferation has been one of the more important consequences of brand marketing. Table 2 shows some striking examples of brand proliferation in consumer

<sup>48</sup> This was demonstrated for example by W. T. Tucker, "The development of brand loyalty", *Journal of Marketing Research* (Chicago, Ill.), August 1964, pp. 32-35.

<sup>49</sup> In a pioneering study it was found that "a significant amount of brand loyalty to individual products does exist—more indeed than has hitherto been realized by many marketing executives. There are many instances where 90 per cent or more of a family's purchases have been concentrated on a single brand over three whole years". The empirical research was made on several experience goods and, at the same time, it was found that brand loyalty has little relation to consumption rates and socio-economic characteristics of consumers. See Ross M. Cunningham, "Brand loyalty—what, where, how much?", *Harvard Business Review* (Boston, Mass.), January-February 1956, p. 116.

<sup>50</sup> A. R. Oxenfeldt found the lowest correlation between price level and quality (using Consumers' Union brand evaluation scores) in experience goods and the highest in search goods ("Consumer knowledge: its measurement and extent", *The Review of Economics and Statistics* (Cambridge, Mass.), vol. XXXII, No. 4 (November, 1950), p. 310).

<sup>51</sup> "Brand marketing is built around a simple concept. The brand is usually a single product, although it may have more than one model, size, or flavour. ... Sharply focused advertising and promotion efforts support such brands, enabling them to maintain high levels of consumer awareness and acceptance despite significant internal and external competition" (J. A. Morein, "Shift from brand to product line marketing", *Harvard Business Review* (Boston, Mass.), September-October 1975, p. 56).



TABLE 2

## Product category size in the United States

| Product category                   | Number of advertised brands |      |                      | Consumer expenditure<br>(in millions of dollars) |          |                      |
|------------------------------------|-----------------------------|------|----------------------|--|----------|----------------------|
|                                    | 1968                        | 1972 | Percentage<br>change | 1968   | 1972     | Percentage<br>change |
| Deodorants, depilatories . . . . . | 33                          | 52   | 58                   | 285.4  | 474.6    | 66                   |
| Shampoos . . . . .                 | 27                          | 61   | 126                  | 266.6  | 441.6    | 66                   |
| Toilet soap . . . . .              | 25                          | 28   | 12                   | 321.5  | 360.1    | 20                   |
| Cigarettes . . . . .               | 43                          | 44   | 2                    | 7 125.2  | 8 737.2  | 23                   |
| Soups . . . . .                    | 12                          | 21   | 75                   | 617.7  | 689.7    | 12                   |
| Cereals . . . . .                  | 79                          | 91   | 15                   | 894.5  | 1 083.2  | 21                   |
| Coffee, tea, cocoa . . . . .       | 51                          | 63   | 24                   | 2 709.1  | 3 420.5  | 26                   |
| Heavy-duty detergents . . . . .    | 32                          | 45   | 41                   | 782.4  | 846.3    | 8                    |
| Total                              | 302                         | 405  | 34                   | 13 002.4   | 16 053.2 | 23                   |

Sources: Leading National Advertisers, *Multi-Media Reports* (New York), published for 1968 and 1972; *Annual Survey of Consumers Expenditures, Supermarketing*, September 1969, September 1973, as quoted by J. A. Morein, "Shift from brand to product line marketing", *Harvard Business Review* (Boston, Mass.), September-October 1975, p. 59.

goods in the United States. It is interesting to note that in 1972 there were, for example, 91 brands of cereals in that country.<sup>52</sup> Brand proliferation cannot be interpreted, however, as an evidence of the existence of a large number of producers. Many brands are sold by a relatively small number of firms using this form of business competition. Moreover, if the product is one for which consumers switch brands frequently, then brand proliferation on the part of existing firms reduces the expected sales of a newly entering firm, thereby producing a barrier to entry.

45. The rationale for the continuous introduction of new brands can largely be explained by the marketing needs of a relatively small number of manufacturers. In the case of the soap industry and in many items of the food processing industry, new brands are a way of achieving a larger share of the limited shelf space in supermarkets and grocery stores. In the soft drinks industry, new brands are introduced in order to secure a better utilization of the companies' distribution channels, e.g. multi-drink vending machines. In the pharmaceutical industry, new brands are constantly put into the market in order to draw the attention of physicians and convince them that the "newest is the best".<sup>53</sup> It is probably in the pharmaceutical industry that brand proliferation is most acute,<sup>54</sup> given the short life of many drugs (see chap. IV, sect. E, below).

46. The development of trade mark allegiance does not always or even usually require a continuous flow of brands. Many trade marks retain an enormous reputation over many years, especially where they are at the same time the trade mark of the company that is making the product. Regardless of whether market power is based on brand proliferation by a few firms or on consumers' long-run allegiance to existing brands, this power does not rest solely on trade marks, as is illustrated by the relatively innocuous use of trade marks in capital goods industries. To make the product differentiation function of trade marks effective, advertising is a necessary condition.

#### D. Specific brand advertising

47. Advertising is the crucial link in the chain of product differentiation activities. Although advertising need not be brand specific, the advertising effort is chiefly concentrated on the promotion of a particular trade mark. When the advertising message mostly tries to persuade or influence the consumer in his purchasing decision, it is called persuasive advertising. However, not all the advertising efforts are made with the aim of persuading consumers. A part of the advertising activity is informative and to this extent it may actually enhance buyer knowledge rather than detract from it, warp it, or overwhelm it with exhortation.

48. The relative weight of the informative and persuasive components<sup>55</sup> in the advertising effort may be assessed by looking at the type of product which is marketed. Data from the United States show very clearly that the highest advertising effort (measured in percentage of sales) is concentrated on experience consumer goods like soaps, cosmetics, food and drugs, while the lowest incidence is

<sup>52</sup> In a study on grocery manufacturing—baby foods, breakfast cereals, coffee, pet foods, prepared dinners—in the United States it was discovered that "the average food manufacturer offered 73 different items in 1959. From 1959 to 1965, he successfully added 45 new items—an increase of about 10 per cent a year. Brands introduced after 1949 accounted for 35 per cent of breakfast-food sales in 1960, 66 per cent of dry dog food, and 46 per cent of margarine. . . . [Most of the new products were either] new flavours, package sizes . . . or modifications in the formulation, processing, packaging, etc., of existing products." (National Commission on Food Marketing, *Studies of Organization and Competition in Grocery Manufacturing* (Washington, D.C., U.S. Government Printing Office, 1966), p. 27).

<sup>53</sup> See H. D. Walker, *Market Power and Price Levels in the Ethical Drug Industry* (Bloomington, Indiana University Press, 1971), pp. 38-48.

<sup>54</sup> UNCTAD, "Major issues in transfer of technology to developing countries: a case study of the pharmaceutical industry" (TD/B/C.6/4), para. 44.

<sup>55</sup> Surveys made in the United States among consumers indicate that 73 per cent of them thought that "advertising often persuades people to buy things they shouldn't buy". According to these surveys, it was found that the information content of advertising in all media was 36 per cent, being the highest in newspaper advertising (59 per cent) and the lowest in television advertising (31 per cent). See R. A. Bauer and S. A. Greyser, *Advertising in America: The Consumer View* (Boston, Harvard University, 1968), pp. 175-183.



found in respect of producer goods.<sup>56</sup> The advertising effort is mostly directed to household consumers (or, in the case of pharmaceuticals, to the physicians) in order to persuade them to purchase those goods which are difficult to evaluate before they are acquired. In the sector of producer goods, where advertising is generally more informative, advertising expenditures (as a percentage of sales) are lower. It seems, then, that advertising intensity and the information content of the advertising are inversely related. Advertising is least informative where the need for information is greatest (consumer-experience goods) while being most informative where the need for information is least (producer goods).

49. As will be shown in chapter III, trade marks tend to proliferate among those goods for which the advertising effort is highest and most persuasive, while they are less frequent among those products for which advertising is more informative. Trade marks are not simply an advertising message. They are a basic element in the persuasive content of advertising messages aimed at influencing consumer behaviour.<sup>57</sup>

50. With these conceptual distinctions in mind, it is possible to understand the rationale of the advertising effort from the point of view of business enterprise. Advertising expenditures are made in order to raise the firm's profits. Higher profits can be obtained by pushing up the demand curve and/or by making it more inelastic to price variations. Which of the two effects will finally be more important will depend on the reaction of the firm's competitors and on the type of product.

51. The position of the demand curve for a given product will not change if the advertising efforts of all the firms selling this product largely cancel each other out. In this case, competitive advertising shifts the curves back again and the only result of the individual firm's efforts may be reduced price elasticity. But if the whole industry's sales increase as a result of advertising, a higher volume of sales for each firm can be expected and then not only the shape of the firm's curve but also its position will be affected.

52. The type of product which is advertised is very relevant to the question whether advertising is more informative or persuasive, i.e. whether it does or does not make demand less elastic to price variations. In goods in which there are strong brand preferences, like drugs or cigarettes, the cumulative effects of advertising tend to make demand less elastic. In other consumer goods, the effect of advertising on the elasticity of demand is more ambiguous.<sup>58</sup>

53. In addition to its influence on the elasticity of the demand curve, brand loyalty has another important effect: it constitutes a barrier to the entry of new competitors into

<sup>56</sup> See United States Internal Revenue Service, *Source Book of Statistics of Income, 1972-1973 ed.*, and *Advertising Age* (Chicago, Ill.), 23 August 1976.

<sup>57</sup> For a study on trade mark selection in connexion with persuasive advertising, see C. J. Werkman, *Trademarks: their Creation, Psychology and Perception* (Amsterdam, J. H. de Bussy, 1974).

<sup>58</sup> Jean-Jacques Lambin, *Advertising, Competition and Market Conduct in Oligopoly Over Time* (Amsterdam, North-Holland Publishing Company, 1976), pp. 138-140.

the market, making more difficult not only the actual but also the potential competition. If the existing firms have high levels of advertising, such levels create an additional cost on any new entrant into the industry.<sup>59</sup> If, at the same time, economies of scale exist in advertising,<sup>60</sup> new entrants not only have to reach the average level of advertising obtaining in the industry but also achieve a high volume of sales to enjoy all the benefits from the advertising expenditure.

54. It seems, then, that in industries producing consumer goods which are easily differentiated, persuasive advertising not only is a basic source of product differentiation but also fosters the market power of the enterprises that carry out such an activity. Consequently, it may be expected that prices of advertised goods will be higher and the profits made by those companies larger.<sup>61</sup> Many of the empirical studies on these industries support this theoretical assumption.<sup>62</sup>

55. Brand specific advertising is an important factor in the creation of market power and in many consumer industries constitutes the main function of trade marks in market economies. As long as they identify origin or source and create goodwill for the enterprises which own them, trade marks are a basic source of market power.

56. This market power not only allows business firms to enjoy more profits in the domestic market but it is also an essential factor in their foreign expansion. Persuasive advertising of trade marked goods creates an intangible asset to be used in both domestic and foreign markets. For many of the corporations which became transnationals, especially those located in industries like food processing, cosmetics and soaps, the main asset behind their world expansion is not marketing in general but the successful operation of brand specific advertising.<sup>63</sup>

<sup>59</sup> See J. S. Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Cambridge, Mass., Harvard University Press, 1956), and W. S. Comanor and T. A. Wilson, *Advertising and Market Power* (Cambridge, Mass., Harvard University Press, 1974), chap. 4.

<sup>60</sup> See Lambin, *op. cit.*, pp. 127-130; Comanor and Wilson, *op. cit.*, chap. 9, for the evidence in this connexion.

<sup>61</sup> See Comanor and Wilson, *op. cit.*, chap. 6; Phillip Nelson, "The economic consequences of advertising", *The Journal of Business* (Chicago, Ill.), vol. 48, April 1975, p. 237, and in relation to a developing country, D. Chudnovsky, *Empresas multinacionales y ganancias monopólicas en una economía latinoamericana* (Buenos Aires, Siglo Veintiuno Editores, 1974), chap. VI.

<sup>62</sup> While the relation between advertising and profitability is generally accepted, this is not the case with the relation between concentration and advertising. See, e.g., L. G. Telsler, "Advertising and competition", *The Journal of Political Economy* (Chicago, Ill.), vol. LXXII, No. 6 (December 1964), who found no relation, while the opposite finding is that of H. M. Mann, J. A. Henning and J. W. Meehan, Jr., "Advertising and concentration: an empirical investigation", *The Journal of Industrial Economics* (Oxford), vol. XVI, No. 1, November 1967. A further debate was published in *The Journal of Industrial Economics*, vol. XVIII, No. 1, November 1969. See also D. F. Greer, "Some case history evidence on the advertising-concentration relationship", *The Antitrust Bulletin* (New York), vol. XVIII, No. 2 (summer 1973), p. 307.

<sup>63</sup> In this connexion it is interesting to mention a recent study where the domestic returns of both multinational and domestic groups based in the United States were calculated, taking into account, among other things, the advertising effort. A clear relation was found, showing not only that those firms spending heavily on advertising consistently showed higher rates of return than firms

57. This important feature gives a key to the understanding of the importance of trade marks, and has been one of the basic elements in the international marketing strategy. This is a question which will be examined in part two of this report.

### E. Franchising of trade marks

58. Franchising is an interesting development for an understanding of the function of trade marks. A franchise agreement is one in which the owner of a trade mark grants to another person or firm, for some consideration, the right to operate under this trade mark for the purpose of producing or distributing a product or service.<sup>64</sup> Franchising is a species of licensing of trade marks.<sup>65</sup> Franchise agreements are concentrated in services, and generally contain exclusive licences, detailed operational instructions for the services to be performed and strict quality standards.

59. These sorts of arrangements are very important in the United States—they account for over 38 per cent of the gross value of retail sales and originate 12 per cent of the GNP<sup>66</sup>—and have been expanding internationally. Franchising occurs in activities like automobile distribution, the bottling of soft drinks, car rentals, hotels and motels and laundries.

60. Along with the franchisor's intangibles, the franchisee usually receives territorial protection. His payments and obligations usually involve both capital and current transfers, the following being the most common ones: (a) franchise fees and non-returnable deposits; (b) royalties on gross sales; (c) tied purchases of inputs at prices greater than marginal cost to the franchisor;<sup>67</sup> (d) supply of fixed facilities through lease or sublease arrangements; (e) provisions for the recapture of franchise when the contract ends or when the franchisee wishes to sell the franchised business.

61. The various clauses set out in franchising agreements have led to a number of legal disputes and have also

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which advertised less, but also that those firms which were multinationals had higher returns than those operating only in the domestic market. For example, in 1966, high advertising firms (multinationals) had a domestic return of 17 per cent of parents' total assets while high advertising domestic groups showed a profit of 13.8 per cent. Low advertising enterprises (multinationals) reported a return of 13 per cent, while low advertising domestic groups had a profit of 11.4 per cent. See T. Horst, "American multinationals and the US economy", *The American Economic Review* (Menasha, Wis.), vol. 66, No. 2 (May 1976), p. 153.

<sup>64</sup> R. E. Caves and W. F. Murphy II, "Franchising: firms, markets and intangible assets", Harvard Institute of Economic Research, Harvard University, Cambridge (Mass.), Discussion Paper No. 422, June 1975 (mimeographed). A more comprehensive analysis of the concept may be found in D. Thompson, *Franchise Operations and Antitrust* (Lexington, Mass., Heath Lexington Books, 1971), chap. 2.

<sup>65</sup> See J. T. McCarthy, *Trademarks and Unfair Competition* (Rochester, N.Y., The Lawyers Co-operative Publishing Co), vol. 1, pp. 644-648; Yves Saint-Gal, *Protection et valorisation des marques de fabrique, de commerce ou de service*, 4th ed. (Paris, J. Delmas et Cie, 1972), p. M20.

<sup>66</sup> See Caves and Murphy, *op. cit.*, p. 1.

<sup>67</sup> For example, it was found that "in the fast food sector about 70 per cent of franchises are required to buy at least some of their operating supplies from franchisors, the median percentage of supplies sourced from franchisors being 50 per cent" (*ibid.*, p. 13).

been examined in the light of antitrust regulations in the United States.<sup>68</sup> These restrictions have some similarities to those found in trade mark licences in developing countries (see chap. IV, sect. C, below). A franchising agreement can be distinguished from a trade mark licence by the fact that in the former the advertising effort to keep the economic value of the trade mark is generally made by the franchisor, while in the latter it is usually carried out by the licensee.

62. The development of franchising sheds additional light on the function of trade marks. In many franchised services, trade marks no longer serve to identify origin because the consumer cannot be sure who in fact is the manufacturer, or who in fact is providing some service. However, this does not mean that trade marks no longer serve to create market power for the owner or franchisor, because it is precisely the goodwill attached to the trade mark which is the main reason why such types of business arrangements flourish.

### F. The private economic value of trade marks

63. Given the fact that trade marks perform important functions for business enterprises, it is not surprising to find that they are considered as a valuable intangible asset. The costs involved in having such an asset are of two kinds: first, those connected with the registration and renewal of the trade mark and, secondly, those involved in the advertising effort in creating and maintaining the economic value of the mark.

64. As shown in annex III, the costs of application for and registration of trade marks in the appropriate government offices are very low. The registration fees in the various countries range from \$0.68 in Chile to \$81.80 in Japan.

65. In addition to the direct cost of registration and renewal, some expenses are involved in searching the design of the mark and receiving legal advice. The amount of these expenses will vary according to the number of classes in which the mark will be registered, the number of countries in which it will be filed and the difficulties that could arise in the searching process. These costs will depend on the type of product, the size of the company and the extent of tests and studies being undertaken.

66. Once the product to which the mark is attached is launched,<sup>69</sup> the advertising effort usually continues in order to increase and maintain the goodwill. The advertising costs are therefore often reflected in the commercial value of the trade marks.<sup>70</sup>

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<sup>68</sup> See Thompson, *op. cit.*, chapter 5.

<sup>69</sup> According to *Advertising Age* (Chicago, Ill.), 22 December 1975, the cost of launching a new cigarette brand in the United States in 1976 was \$40 million.

<sup>70</sup> In 1924, for example, the trade mark *Dodge* was sold for \$74 million, and at that time the value of the mark *Camel* was assessed at \$10 million. In the 1950s, it was estimated that the mark *Maxwell House* had a value of \$42 million and *Jell-O* \$35 million, while in 1967 the trade marks *Coca-Cola* and *Coke* were listed as part of the Coca-Cola Company's intangible assets with a value of \$3,000 million. See A. Pillet, *Les Grandes Marques* (Paris, Presses Universitaires de France, 1968), p. 9, and Julius R. Lunsford, Jr., "Consumers and trademarks: the function of trademarks in the market place", *The Trademark Reporter* (New York), vol. 64 (1974), pp. 81-82.

67. However, many firms find it particularly difficult to assess the exact value of a trade mark,<sup>71</sup> although it is widely recognized that they are among the most valuable assets of business enterprises.<sup>72</sup> In any case, it is clear that the expenditures made in order to develop the goodwill creation function of a trade mark permit them to be considered as a valuable asset for business firms.

### G. Trade marks in socialist countries of Eastern Europe and China

68. Trade marks are used not only in market-economy countries, but also in the socialist countries.

69. In the USSR, trade marks have served primarily as factory identification and quality control symbols. The early Soviet Trade Mark Law of 1936 established, in addition to the typical and voluntary trade mark, production marks. A production mark was obligatory on all manufactured goods, their containers or wrappers, and had to show the factory's name and location, the ministry in charge of it, the quality of its goods and its standard number.

70. It is apparent that the main purpose of the production marks was identification of the product and its quality. For the producer such a mark was clearly a liability through which the consumer could claim quality defects or faulty handling of goods. In this sense, production marks were very different from the trade marks used in market economies and closer to the concept of production marks used in the Middle Ages.

71. The production marks clearly made sense in a seller's market, i.e. a situation in which buyers are prepared to buy, at existing prices, larger amounts of goods than sellers are currently able to produce. In that sort of market, production marks were means to maintain quality in goods, an incentive that otherwise would have been lacking.<sup>73</sup>

72. While trade marks were recognized in the Soviet Law of 1936, under the present legislation in the Eastern

<sup>71</sup> See in this connexion J. M. Lightman, A. D. Brufsky and R. B. Bangs, "Economic aspects of trademark utilization", *IDEA* (Washington, D.C.), vol. 11, No. 4 (winter 1967-1968), pp. 484-486. A typical reply to the question of the trade mark's value quoted in this paper was the following: "It is difficult to assign a value to this trademark which has contributed in a most significant way to making this particular brand of... among one of the most widely known throughout the world. It has been a major factor in the growth of the parent company's subsidiary engaged in the manufacture and sale of... I personally would estimate its value in the millions." (p. 485).

<sup>72</sup> "In assessing the value of a trademark as an asset, one cannot look to 'cost' for fair value. A trademark, *per se*, costs very little. Its real value as an asset is determined wholly by its strength in a free market. Whatever value is embodied in the trademark, over and above the worth of tangible assets, is derived from the market in which the goods are sold under the mark." V. J. Cook and T. F. Schutte, *Brand Policy Determination* (Boston, Mass., Allyn and Bacon, Inc., 1967), p. 172.

<sup>73</sup> The production mark "makes it easy to establish the actual producer of the product in case it is necessary to call him to account for the poor quality of his goods. For this reason, it is one of the most effective weapons in the battle for the quality of products." See V. A. Nikiforov in D. M. Genkin and M. A. Fialkov, eds., *Pravovoe regulirovanie gosudarstvennoi torgovli SSSR* (Moscow, Gos-torgizdat, 1957), as quoted in M. I. Goldman, "Product differentiation and advertising: some lessons from Soviet experience", *The Journal of Political Economy* (Chicago, Ill.), vol. LXVIII, No. 4 (August 1960), p. 349.

European countries (see annex II below) trade marks have acquired a status comparable to modern trade marks in developed market-economy countries.<sup>74</sup>

73. Behind the new trend in trade mark legislation it is possible to recognize, on the one hand, the changes that have occurred in the economic system of some socialist countries of Eastern Europe, such as to allow a certain development of competition among State enterprises, and, on the other, the increasing commercial and technological relations with developed market-economy countries.

74. Trade marks, as opposed to production marks, have purposes similar to trade marks in the developed market-economy countries. They make sense in a buyer's market situation, i.e. where sellers are willing to market larger amounts than buyers are currently willing to buy at existing prices, to attract and hold the customer and they are optional to producers and distributors.

75. As soon as a buyer's market situation began to develop in socialist economies in certain goods, the need for trade marks and advertising efforts<sup>75</sup> arose, and this seems to be the reason for the recent changes in trade mark legislation and functions.

76. Although the development of a buyer's market situation with regard to certain products and the increasing importance of advertising have led to a growing emphasis on the advertising and goodwill-creation functions of trade marks,<sup>76</sup> it seems that they have not had exactly the same functions as in developed market-economy countries.

77. Despite the considerable development of advertising in recent years it is important to point out that, on the one hand, the total expenditure on advertising is a tiny fraction

<sup>74</sup> "The purpose of a trade mark is to create popularity for the goods produced by a particular enterprise. Because of the trade mark, the consumer can distinguish these goods from similar articles; he connects the quality of the goods with the trade mark and therefore wants to buy just these goods." M. Boguslavsky and I. Cherviakov, *Protection of Industrial Property in the USSR: Inventions, Industrial Designs, Trade Marks* (Moscow, Novosti Press Agency Publishing House, 1967), p. 47.

<sup>75</sup> In relation to advertising in the Soviet Union, see P. Hanson, *Advertising and Socialism: the Nature and Extent of Consumer Advertising in the Soviet Union, Poland, Hungary and Yugoslavia* (White Plains, New York, International Arts and Sciences Press, Inc., 1974), who notes that "The products on which advertising has been concentrated, then, are of two main kinds: goods (or services) that are both new and 'sufficient' [those for which distributive stocks exceed stocks norms] and goods that are 'sufficient' but not new" (p. 50). In the first category are included several food products (Pacific fish, yoghurt), some durables (electric shavers, cameras) and household products like detergents. In the second group the author mentions milk products and cheeses, Georgian tea, watches, etc. In Hungary, where advertising is much more important than in the USSR, "branding is prominent and there are certainly markets (such as coffee and detergents)... where brand competition has been fairly strong... Western brands... are especially conspicuous, but they certainly do not predominate (p. 120).

<sup>76</sup> In the Parliament's debate on the Trademark Act in Hungary, Minister A. Kiss stated that "the trademark is a conventional, internationally acknowledged and accepted means of publicizing goodwill and distinguishing between products. The trademark draws the public's attention to the goods and services of enterprises... It symbolizes the goodwill of the enterprise and influences the buyer's choice. Hence it serves the interests of both enterprises and buyers", as quoted in A. Vida, "The New Hungarian Trademark Act", *The American Journal of Comparative Law* (Berkeley, Calif.), vol. XXII, No. 3 (summer 1974), p. 566.

of what is considered normal in the developed market-economy countries.<sup>77</sup> Although a growing competition is taking place among State enterprises, this has not been accompanied by a proliferation of brands as in the developed market economies, as can be seen from table 3 below.

78. As long as advertising remains relatively reduced and brands do not proliferate it seems that trade marks are mostly means to identify goods rather than to differentiate them.<sup>78</sup>

79. Regarding the quality-warranting function, it may be pointed out that the long tradition of production marks and the system of industrial standards have very clearly been factors favouring this function.

80. In addition to their internal function, trade marks have been used to promote exports. In fact, it seems that one of the main reasons explaining the increased use of trade marks has been the foreign trade with developed market-economy countries. This is not only reflected in a greater use of trade marks originating in the socialist countries of Eastern Europe but also in an increasing number of registrations in the Eastern European countries of trade marks from developed market-economy countries.

81. Contrasting with the recent changes in Eastern Europe, the Chinese approach to the problem is more similar to the early conception of trade marks in socialist economies. In the Chinese Regulations on the Verification

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<sup>77</sup> Hanson, *op. cit.*, estimated that Soviet expenditure on advertising was 3 per cent of British expenditure.

<sup>78</sup> A similar conclusion is reached by Lightman: "In the USSR, where the distribution of goods and services is subject to a system of State directives, trademarks have served primarily as symbols of identification for guarantee and quality control purposes. They have played a lesser role as tools for marketing, business promotion and 'goodwill' development", J. M. Lightman, "The USSR Trademark System and East-West Trade", *IDEA* (Washington, D.C.), vol. 10, No. 1 (spring 1966), p. 24.

of Trade Marks of 10 April 1963,<sup>79</sup> it is provided that "a trade mark is a distinctive sign representing the quality of goods" and that "the purpose of these Regulations is to strengthen the verification of trade marks and to encourage enterprises to guarantee and improve the quality of their products".

82. The emphasis on the quality-warranting function of trade marks is understandable in the seller's market situation that seems to prevail in China where practically no product differentiation activities appear to take place.

## H. Summary

83. Trade marks are used to differentiate products in a market structure in which business enterprises compete through product differentiation instead of prices. Once consumers develop trade mark allegiance towards a number of products in which persuasive advertising is concentrated, enterprises can consider the trade mark as a source of market power. This is particularly the case in industries manufacturing and selling consumer goods, where some trade marks have reached considerable value as intangible assets. In contrast to the consumer goods industry, persuasive advertising and the proliferation of trade marks are hardly found in capital goods industries. Therefore, trade marks cannot be considered as an important source of market power in those industries.

84. Although centrally planned economies have made relatively little use of trade marks in their industrialization process, the importance of trade marks has grown in recent years. The reasons for this development are the increasing commercial relations with developed market-economy countries and the changes produced in the economic system aimed at a greater emphasis on the production of consumer goods. However, despite the increased use of trade marks both in the external and domestic markets, their proliferation is limited.

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<sup>79</sup> As they appeared in *Industrial Property*, 13th year, No. 1 (January 1974), pp. 30-32.

PART TWO  
TRADE MARKS IN DEVELOPING COUNTRIES

Chapter III

MAIN FEATURES OF TRADE MARK REGISTRATIONS

85. This chapter contains some preliminary analysis of basic information published by WIPO. It begins with an explanation of some of the basic features of industrial property statistics, then takes up the following characteristics of trade mark registration: world distribution of trade marks; composition of the stock of trade marks; structure of ownership (nationals and foreigners, country of origin); international trade marks, and distribution of trade marks by class.

**A. Some basic characteristics of trade mark statistics**

86. Several observations will be made which may be helpful to a better understanding of statistical data. A single trade mark can be registered in as many countries as the owner chooses. In each country a trade mark has an independent life (see above, paras. 19 *et seq.*), regulated in its duration and scope by the respective national legislation. Thus, international statistics often overestimate the number of distinct trade marks registered or in force in the world. The only exception are those marks that are registered under the Madrid Union.

87. There is a difference between the economic and the legal value of a trade mark; while all registered trade marks have the same legal value and an unlimited life, as long as they are renewed, their commercial value and life expectation are widely different. Any stock of legally equal trade marks will contain trade marks of unequal commercial value and with different economic ages and life expectations.

88. Another important aspect relates to the definition of nationals and foreigners in the ownership of trade marks, a definition that may not be standard among the various

countries. A problem arises in so far as there are cases where corporations which are actually controlled by foreigners may appear as national entities. Under these circumstances, the trade marks registered by these corporations appear in the statistics as nationally owned. However, the underestimation of the ownership of trade marks by foreigners is not likely to be a serious distortive factor in the statistics because the current international legislation is not biased against foreign applicants and generally the owners of trade marks prefer to have them registered in their own names.

89. Finally, in those countries where trade mark protection is acquired by the adoption and use of the trade mark, as is the case in the United States of America, the official statistics underestimate the number of trade marks in force.

**B. Distribution of trade mark holdings in major economic regions**

90. In 1974, about 4 million trade marks were in force in the world. As can be seen from table 3, 70 per cent of the world stock was registered in the developed market-economy countries, more than a quarter was registered in the developing countries and only 3 per cent in the socialist countries of Eastern Europe. In the same year, 325,000 new trade marks were registered, with a geographical distribution roughly similar to that of the distribution of the existing stock. It is interesting to note that while developing countries account for about 8 per cent of world manufacturing production (1975), the trade marks registered in those countries account for 27 per cent of the world total (1974).

TABLE 3

Distribution of trade marks registered and in force in 1974

| <i>Groups of countries<sup>a</sup></i>      | <i>Trade marks registered<br/>(in thousands)</i> | <i>Percentage</i> | <i>Trade marks in force<br/>(in thousands)</i> | <i>Percentage</i> |
|---|--|-------------------|--|-------------------|
| Developed market-economy countries . . .    | 229.6  | 70.8              | 2 778.3  | 70.5              |
| Socialist countries of Eastern Europe . . . | 6.6  | 2.1               | 116.3  | 3.0               |
| Developing countries . . . . .              | 88.0   | 27.1              | 1 046.2  | 26.5              |
| Total world                                 | 324.2  | 100.0             | 3 940.8  | 100.0             |

*Source:* WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> For countries considered in each group, see annex II.

91. Japan is the country with the largest stock of trade marks in the world, nearly 700,000,<sup>80</sup> followed by the United States (383,000), France (379,000), the Federal Republic of Germany (282,000) and the United Kingdom (244,000). Among developing countries for which information is available, Argentina is the outstanding case, with 269,000 trade marks, followed by Brazil with 100,000.

92. The inadequacy of information, especially for developing countries, makes it very difficult to obtain any precise idea of the growth of the stock of trade marks over a period. Taking into account only those countries for which information is available for 1964 and 1974, it can be seen from table 4 that the number of trade marks in force in developing countries was greater in 1964 than in 1974.

TABLE 4

Distribution of trade marks in force in 1964 and 1974

| Groups of countries <sup>a</sup>                | 1964<br>(in<br>thousands) | 1974<br>(in<br>thousands) | Index<br>(1964 = 100) |
|---|---------------------------|---------------------------|-----------------------|
| Developed market-economy countries . . . . .    | 1 813.5                   | 2 580.9                   | 142                   |
| Socialist countries of Eastern Europe . . . . . | 35.1                      | 31.3                      | 89                    |
| Developing countries . . . . .                  | 396.1                     | 313.1                     | 79                    |
| Total   | 2 244.7                   | 2 925.3                   | 130                   |

Sources: BIRPI, *Industrial Property*, 5th year, annex to No. 2 (February 1966) and annex to No. 7 (July 1966); WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> The table is confined to those countries which have supplied data both for 1964 and for 1974.

93. The reduction in the stock of trade marks in force in developing countries is due mainly to India, Cuba and Egypt. In these countries, the stock has declined in the past ten years mainly because of non-renewal of the registration of trade marks whose term expired during this period. In

<sup>80</sup> Regarding the Japanese case, "it might be interesting to note that there are about 700,000 registrations on the record, of which approximately 30 per cent are estimated to be in actual use". See R. C. Conlon, "Reacting to worldwide trademark developments in Asia", *The Trademark Reporter* (New York), vol. 65 (1975), p. 497.

fact, only the stock of trade marks in developed market-economy countries has increased in the period under consideration and therefore its share was larger in 1974 than in 1964.

C. Composition of the stock of trade marks

94. The composition of the stock of trade marks and changes in it for those countries which provide adequate data is shown in table 5. In 1974, 275,000 new marks were registered, 160,000 were renewed, 157,000 expired and 32,000 were cancelled. As a result, the net increment in stock was rather small, amounting to 246,000 or 0.6 per cent of the total.

95. New registrations were the most important factor in the growth of the trade mark stock, while renewals and expired registrations were roughly the same, the exception being socialist countries where renewals were three times larger than expired registrations.

96. The importance of renewals is different according to individual countries. In the United States and Brazil renewals are of little importance, while in the United Kingdom, Federal Republic of Germany and India they account for a significant share of the gross increment of the stock. Cancelled registrations are, in general, less important than those which expired naturally, again the exception being the socialist countries of Eastern Europe.

D. Structure of ownership of trade marks

97. A certain amount of information is available for an examination of the ownership structure of trade marks. This includes: (a) distribution between nationals and foreigners; (b) country of origin of foreign trade marks; (c) country of origin of foreign trade marks in developing countries. No data are available to analyse the distribution of trade mark ownership between corporations and individuals.

1. Distribution between nationals and foreigners

98. Table 6 presents the share of foreigners in the ownership of trade marks registered in the years 1964 and 1974.

TABLE 5

Changes in the trade marks in force during 1974

| Groups of countries <sup>a</sup>                | New<br>trade marks <sup>b</sup> | Trade mark<br>renewals | Trade marks<br>expired | Trade marks<br>cancelled |
|---|---------------------------------|------------------------|------------------------|--------------------------|
| Developed market-economy countries . . . . .    | 191 383                         | 102 197                | 101 497                | 20 384                   |
| Socialist countries of Eastern Europe . . . . . | 6 638                           | 6 609                  | 2 611                  | 1 339                    |
| Developing countries . . . . .                  | 77 231                          | 51 332                 | 53 088                 | 10 625                   |
| Total world                                     | 275 252                         | 160 138                | 157 196                | 32 348                   |

Source: WIPO, *Industrial Property Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> The table covers only those countries which, according to the statistics of WIPO for 1974, reported information on the different ways in which the stock of trade marks changed in that year.

<sup>b</sup> Information in this column is not comparable with data in other tables (e.g. table 3) which cover a larger number of countries.

TABLE 6

Share of foreigners in new trade marks registered in major economic regions in 1964 and 1974

| Groups of countries <sup>a</sup>                | Total new trade marks registered |       | Share of foreigners in total |                      |
|---|----------------------------------|-------|------------------------------|----------------------|
|   | 1964<br>(in thousands)           | 1974  | 1964<br>(percentage)         | 1974<br>(percentage) |
| Developed market-economy countries . . . . .    | 144.5                            | 229.6 | 19.8                         | 18.1                 |
| Socialist countries of Eastern Europe . . . . . | 6.7                              | 6.6   | 23.6                         | 51.1                 |
| Developing countries . . . . .                  | 78.3                             | 88.0  | 27.4                         | 49.9                 |
| Africa . . . . .                                | 7.3                              | 8.6   | 72.8                         | 88.4                 |
| Asia . . . . .                                  | 17.3                             | 27.2  | 56.1                         | 65.2                 |
| Latin America . . . . .                         | 53.4                             | 51.7  | 11.9                         | 34.0                 |
| Total world                                     | 229.5                            | 324.3 | 22.5                         | 27.4                 |

Sources: BIRPI, *Industrial Property*, 5th year, annex to No. 2 (February 1966) and annex to No. 7 (July 1966); WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> For countries considered in each group, see annex II.

99. For the developed market-economy countries the average percentage of foreign ownership was low: nearly 20 per cent in 1964 and 18 per cent ten years later. However, the average is strongly influenced by Japan and the United States, where the share of foreign ownership is much lower than in other developed countries. In some developed countries the share of foreigners in trade mark ownership is very high, as shown by the following examples for 1974: Norway, 84 per cent; Finland, 81 per cent; Australia, 59 per cent; Greece, 53 per cent; and Benelux, 44 per cent.

100. In the case of the socialist countries of Eastern Europe, the situation has changed in recent years. In the period from 1964 to 1974 the share of foreigners increased significantly. In 1974 it was on the average 51 per cent. It is likely that in the socialist countries the changes in the relations with market-economy countries and in the domestic industrial property system made the registration of trade marks by foreigners in socialist countries more attractive.

101. The data for all the developing countries show that the share of foreigners in trade mark registration has risen significantly—from 27 per cent in 1964 to 50 per cent in 1974. While Africa is the continent with the highest degree of foreign ownership in trade mark grants, Latin America is the lowest, with Asia in an intermediate position. Yet the three regions showed a similar trend towards a higher foreign participation in the ownership of trade marks.

102. As for patents, 84 per cent of the patents granted in developing countries were held by foreigners in 1972.<sup>81</sup> It is evident that in comparison with patents, trade marks are registered in a greater proportion by nationals of developing countries. In this connexion it should be mentioned that for a patent grant an inventive activity is required, whereas this is not the case for trade marks.

103. The trend in developing countries is also worth noticing. Trade marks are increasingly being registered by

foreigners, most of them located in developed countries, as is shown in the sections which follow.

## 2. Foreign ownership of trade marks

104. The structure of the international trade mark activity can be examined in table 7. Ninety-seven per cent of all trade marks registered by foreigners in 1974 had the developed market-economy countries as origin. Nationals of developing countries owned 2.2 per cent of all foreign trade marks and nationals of socialist countries owned less than 1 per cent.

105. Table 7 also contains similar data for some selected reporting countries. Except for Cuba, all the countries mentioned registered more than 95 per cent of their foreign trade marks in favour of nationals of the developed market-economy countries. Although Cuba had a majority of trade marks of the same origin, it also had a number of marks from socialist countries.

106. Only about 2,000 trade marks originating in developing countries were registered abroad in 1974. The highest share of trade marks belonging to developing countries was found in the United States, Argentina and Mexico. But even in these cases such marks did not account for more than 4 per cent of the total.

107. In contrast to the preponderance of developed market-economy countries in the ownership of trade marks held by foreigners in developing countries (95 per cent), only 1 per cent of the foreign trade marks in developed market-economy countries are owned by nationals of developing countries.

## 3. Country of origin of trade marks registered by foreigners in developing countries

108. Table 8 shows the principal countries owning trade marks in developing countries in 1964 and 1974. The United States had 34 per cent of such foreign trade marks, while the other four industrialized countries together held about 43 per cent of them. It is interesting to notice, however, that the relative position of the other four trade mark holders changed between 1964 and 1974. Japan and, to a lesser extent, France increased their shares at the

<sup>81</sup> See *The role of the patent system in the transfer of technology to developing countries* (United Nations publication, Sales No. E.75.II.D.6), para. 286.

TABLE 7

## Origin of trade marks registered by foreigners in 1974

(Percentages)

| Reporting groups of countries and individual countries <sup>a</sup> | Origin → | Developed market-economy countries | Socialist countries | Developing countries | Total |
|---|----------|------------------------------------|---------------------|----------------------|-------|
| Developed market-economy countries . . . . .                        |          | 98.3                               | 0.6                 | 1.1                  | 100   |
| Socialist countries of Eastern Europe . . . . .                     |          | 95.3                               | 4.0                 | 0.7                  | 100   |
| Developing countries . . . . .                                      |          | 95.4                               | 1.0                 | 3.6                  | 100   |
| Total world   |          | 96.9                               | 0.9                 | 2.2                  | 100   |
| <i>Selected reporting countries</i>                                 |          |                                    |                     |                      |       |
| United States of America . . . . .                                  |          | 95.8                               | 0.4                 | 3.8                  | 100   |
| United Kingdom . . . . .  |          | 97.8                               | 1.1                 | 1.1                  | 100   |
| Federal Republic of Germany . . . . .                               |          | 98.0                               | 1.0                 | 1.0                  | 100   |
| France . . . . .  |          | 98.4                               | 0.1                 | 1.5                  | 100   |
| Japan . . . . .   |          | 96.9                               | 0.4                 | 2.7                  | 100   |
| USSR . . . . .  |          | 96.5                               | 3.1                 | 0.4                  | 100   |
| German Democratic Republic . . . . .                                |          | 95.5                               | 3.6                 | 0.9                  | 100   |
| Spain . . . . .   |          | 98.0                               | 0.6                 | 1.4                  | 100   |
| Mexico . . . . .  |          | 96.3                               | 0.3                 | 3.4                  | 100   |
| Argentina . . . . .   |          | 96.2                               | 0.2                 | 3.6                  | 100   |
| Brazil . . . . .  |          | 97.4                               | 0.3                 | 2.3                  | 100   |
| India . . . . .   |          | 95.5                               | 2.6                 | 1.9                  | 100   |
| Cuba . . . . .  |          | 84.0                               | 14.8                | 1.2                  | 100   |

Source: WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva December 1976.

<sup>a</sup> For the countries considered in each group, see annex II.

expense of the United Kingdom and the Federal Republic of Germany.

TABLE 8

## National origin and percentage share of trade marks registered by foreigners in developing countries in 1964 and 1974

| Country of origin <sup>a</sup>   | 1964            | 1974            |
|--|-----------------|-----------------|
| United States of America . . . . .   | 34.0            | 34.3            |
| Japan . . . . .  | 5.6             | 15.1            |
| United Kingdom . . . . .   | 21.5            | 12.2            |
| Germany, Federal Republic of . . . . .   | 10.9            | 9.2             |
| France . . . . .   | 4.8             | 7.0             |
| German Democratic Republic . . . . .   | 0.8             | 0.9             |
| Argentina . . . . .  | 0.4             | 0.9             |
| Spain . . . . .  | 0.4             | 0.7             |
| Brazil . . . . .   | 0.2             | 0.4             |
| Mexico . . . . .   | 0.0             | 0.3             |
| India . . . . .  | 0.4             | 0.2             |
| Number of trade marks granted to nationals of above countries . . . . .                                  | 12 477          | 32 780          |
| Total number of trade marks granted to foreigners by developing countries considered in sample . . . . . | 15 753          | 40 330          |
| Number of developing countries considered in sample . . . . .  | 29 <sup>b</sup> | 54 <sup>b</sup> |

Sources: BIRPI, *Industrial Property*, 5th year, annex to No. 2 (February 1976) and annex to No. 7 (July 1966); WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> Countries are listed in descending order of percentages in 1974.

<sup>b</sup> OAMPI countries are included in the sample as one unit.

109. Socialist countries of Eastern Europe and developing countries had a minor share of the trade marks owned by foreigners in developing countries.

110. The importance of developing countries for trade mark holders can be assessed from table 9. This table shows the percentage of trade marks in developing countries in the

TABLE 9

## Share of trade marks registered in developing countries of total trade marks registered abroad, 1974

| Countries of origin <sup>a</sup>                | Percentages |
|---|-------------|
| <i>Groups of countries:</i>                     |             |
| Developed market-economy countries . . . . .    | 43.8        |
| Socialist countries of Eastern Europe . . . . . | 51.5        |
| Developing countries . . . . .                  | 72.0        |
| <i>Individual countries:</i>                    |             |
| United States of America . . . . .              | 42.6        |
| United Kingdom . . . . .                        | 38.4        |
| France . . . . .                                | 44.4        |
| Germany, Federal Republic of . . . . .          | 40.2        |
| Japan . . . . .                                 | 70.7        |
| USSR . . . . .                                  | 8.0         |
| German Democratic Republic . . . . .            | 60.8        |
| Spain . . . . .                                 | 19.5        |
| Mexico . . . . .                                | 62.5        |
| Argentina . . . . .                             | 78.7        |
| Brazil . . . . .                                | 61.7        |
| India . . . . .                                 | 81.8        |

Source: WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> For the countries considered in each group, see annex II.



total number of trade marks registered abroad by groups of countries and selected countries of origin in 1974. When nationals of developing countries register trade marks abroad, they tend to choose other developing countries for such registration: 72 per cent of trade marks registered abroad by nationals of developing countries were registered in other developing countries.

111. Among developed countries the outstanding case is that of Japan: 71 per cent of Japanese trade marks registered abroad were filed in developing countries.

112. Other developed countries had a lower share but, in general, developing countries were especially taken into account in their trade mark activity abroad.

113. In the case of socialist countries of Eastern Europe, more than half of their trade marks registered abroad were registered in developing countries.

114. The activity of registering foreign trade marks in developing countries is mostly engaged in by nationals of developed market-economy countries (as shown in table 7).

#### E. Marks registered under the Madrid Agreement

115. As mentioned earlier (see chap. I, sect. C), those countries that are members of the Madrid Union have an international system for registering marks. As is shown in

table 10, both registrations and renewals of these marks were mostly done by developed market-economy countries, the share of developing countries being insignificant.

116. The picture is very similar when the origin of these marks is examined. Developed countries were the origin of about 98 per cent of the marks to be extended to other countries. Very few marks originating in developing countries had an international registration (table 11).

#### F. Distribution of trade marks by classes

117. The International Classification of Goods and Services for the Purposes of the Registration of Marks<sup>82</sup> contains 34 classes for trade marks of goods and 8 classes for service marks. Those classes include more than 20,000 subdivisions. On the basis of a rearrangement of these classes according to main manufacturing sectors, table 12 shows the distribution of new trade marks registered in 1974 for selected developed and developing countries.

<sup>82</sup> Established by the Nice Agreement for the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957), revised at Stockholm (1967). Thirty-one States are members of the Nice Union (see WIPO, *Industrial Property* (Geneva), 16th year, No. 1 (January 1977), p. 11).

TABLE 10

Distribution of international marks (Madrid Union) 1974

| Groups of countries <sup>a</sup>                | Registrations | Percentages | Renewals | Percentages |
|---|---------------|-------------|----------|-------------|
| Developed market-economy countries . . . . .    | 8 664         | 97.81       | 3 350    | 96.60       |
| Socialist countries of Eastern Europe . . . . . | 175           | 1.98        | 107      | 3.08        |
| Developing countries . . . . .                  | 19            | 0.21        | 11       | 0.32        |
| Total   | 8 858         | 100.0       | 3 468    | 100.0       |

Source: WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> The table is confined to the members of the Madrid Union.

TABLE 11

Origin of international marks (Madrid Union) 1974

| Countries requested                             | Countries of origin <sup>a</sup> → | Developed market-economy countries | Percentages | Socialist countries | Percentages | Developing countries | Percentages | Total  | Percentages |
|---|------------------------------------|------------------------------------|-------------|---------------------|-------------|----------------------|-------------|--------|-------------|
| Developed market-economy countries . . . . .    |                                    | 64 194                             | 98.2        | 1 054               | 1.6         | 119                  | 0.2         | 65 367 | 100         |
| Socialist countries of Eastern Europe . . . . . |                                    | 16 366                             | 97.6        | 384                 | 2.3         | 27                   | 0.1         | 16 777 | 100         |
| Developing countries . . . . .                  |                                    | 16 975                             | 98.1        | 307                 | 1.8         | 28                   | 0.1         | 17 310 | 100         |
| Total   |                                    | 97 535                             | 98.1        | 1 745               | 1.8         | 174                  | 0.1         | 99 454 | 100         |

Source: WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> The table is confined to the members of the Madrid Union.

TABLE 12

Numbers of new trade marks registered in 1974, by classes

| Sectors <sup>a</sup>                                     | Selected developed market-economy countries <sup>b</sup> | Percentages | Selected developing countries and territories <sup>c</sup> | Percentages |
|--|--|-------------|--|-------------|
| Food (29-30-32-33) . . . . .                             | 15 457   | 15.4        | 1 298  | 11.2        |
| Tobacco (34) . . . . .                                   | 1 655  | 1.7         | 366  | 3.2         |
| Textiles and clothing (22-23-24-25-26-27) . . . . .      | 10 695   | 10.7        | 1 483  | 12.8        |
| Chemicals, excluding pharmaceuticals (1-2-3-4) . . . . . | 14 713   | 14.7        | 1 870  | 16.2        |
| Pharmaceuticals (5) . . . . .                            | 9 868  | 9.9         | 1 937  | 16.7        |
| Furniture, leather, paper (16-18-20) . . . . .           | 9 280  | 9.3         | 768  | 6.6         |
| Metals and metal products (6-8-21) . . . . .             | 7 117  | 7.1         | 709  | 6.1         |
| Machinery and transport equipment (7-11-12) . . . . .    | 10 085   | 10.1        | 1 269  | 11.0        |
| Miscellaneous (9-10-13-14-15-28) . . . . .               | 21 273   | 21.1        | 1 870  | 16.2        |
| Total  | 100 143  | 100.0       | 11 570   | 100.0       |

Source: WIPO, *Industrial Property, Statistics for 1974* (IP/STAT/1974/3), Geneva, December 1976.

<sup>a</sup> The classes of the International Classification of Goods and Services for the Purposes of the Registration of Marks established by the Nice Agreement (1957), revised at Stockholm (1967), to which trade marks are applied, are shown in parentheses for each sector.

<sup>b</sup> Australia, France, Federal Republic of Germany, Iceland, Monaco, New Zealand, Norway, Sweden, Switzerland, United Kingdom.

<sup>c</sup> Algeria, Cuba, Cyprus, Ghana, Hong Kong, India, Libyan Arab Jamahiriya, Malta, Morocco, Samoa, Zaire.

118. Chemicals, food, tobacco and textiles account for 60 per cent of trade marks in developing countries. The pharmaceutical industry had the largest concentration of trade marks in developing countries, accounting for 16.7 per cent of the total. In contrast, developed countries tended to have relatively more marks in food processing and in the non-pharmaceutical sectors of the chemical industry. It seems that it is in the pharmaceutical industry where trade mark activity is most important in developing countries. The reasons explaining such a factor will be discussed in chapter IV, section E.

### G. Summary

119. Nearly 4 million trade marks were in force in 1974. More than a quarter of the world total was registered in developing countries, and 70 per cent in developed

market-economy countries. Foreign-owned trade marks represented half of the total new registrations in developing and socialist countries, and 20 per cent in developed market-economy countries in 1974. The share of foreign-owned trade marks in total new registrations has risen significantly in the last ten years in all regions and particularly in developing countries. Whereas 95 per cent of the trade marks registered by foreigners in developing countries originated in developed market-economy countries, only 1 per cent of the trade marks registered by foreigners in developed market-economy countries was registered by nationals of developing countries. Chemicals, food, tobacco and textiles account for 60 per cent of new registrations in developing countries. The pharmaceutical industry alone accounted for 16.7 per cent of the total new registrations of trade marks in developing countries in 1974.

## Chapter IV

### THE ROLE OF TRADE MARKS IN DEVELOPING COUNTRIES

120. In this chapter the role of foreign-owned trade marks in developing countries is studied. In section A, a statistical picture of trade marks in licensing agreements is presented. Section B concentrates on the use of trade marks by transnational corporations. Section C deals with trade marks in transfer of technology agreements. In section D, the role of trade marks in the exports of developing countries is discussed. Finally, in section E, the special case of the pharmaceutical industry in respect of trade marks is examined.

#### A. Data on trade marks in licensing agreements

121. The growing share of foreigners in the structure of ownership of trade marks in developing and socialist countries has led to an important development: the licensing of foreign-owned trade marks by the parent to subsidiaries in transnational enterprises and by foreign corporations to independent domestic enterprises.

122. The economic importance and the implications of this phenomenon will be analysed below, in sections B and C. Here only a preliminary assessment of its statistical dimensions will be given, after an explanation of some of the limitations of the data.

123. Trade marks are generally licensed in combination with other elements such as patents, know-how and technical assistance, a circumstance which makes it very difficult to assess their individual importance. At the same time, when royalty payments are included for the license of trade marks, these are generally global sums for all the elements considered in the licensing contract and not solely for the use of trade marks as such.

124. However, even in licensing agreements which do not require royalty payments, long-term costs usually exist. These costs are related to the efforts licensees are usually required to make in order to keep and develop the commercial value of the mark. Thus most licensing agreements place a burden on the licensee irrespective of whether actual payments are required in the agreement or not.

125. No information has been collected on a regular basis on the licensing of trade marks. The only sources of data are reports by some countries that have started to regulate the transfer of foreign technology. In addition, an estimate is also available for the United States on the importance of trade marks in overseas licensing receipts.

126. In Mexico, out of 6,050 contracts covering transfer of technology, trade marks were included in 2,923 agreements, i.e. in 48 per cent of them.<sup>83</sup> In Argentina, the

share of contracts including trade marks in total agreements was still higher, namely 58 per cent.<sup>84</sup> In Peru it was even higher, namely, 71 per cent.<sup>85</sup> However, the number of contracts exclusively relating to trade marks was lower. In Mexico, there existed 1,609 such agreements and in Argentina 35.<sup>86</sup>

127. In a study made in Brazil<sup>87</sup> it was found that 13.2 per cent of transfer of technology agreements were for trade mark licences. However, the Brazilian figures are not strictly comparable to those referred to above for a number of reasons. First, each contract was divided into as many agreements as there were contractual elements (e.g. a contract in which both patents and trade marks were licensed was divided into two contracts, one for patents and another for trade marks). Secondly, as the Brazilian regulations do not allow trade mark licences between subsidiaries and parent companies, the sample did not include agreements of this kind. However, such licensing agreements were included in the figures of Mexico and Argentina.

128. As regards the type of ownership of the recipient enterprise, in Argentina it was found that trade marks were included in 61 per cent of the contracts between parent companies and subsidiaries, in 58 per cent of the agreements concluded by domestic firms and in 57 per cent of the contracts signed by foreign companies with third parties. In the case of Brazil, two thirds of the contracts on trade marks were signed by national firms.

129. In Mexico, the analysis of a sample of 618 of the 2,923 trade mark contracts showed that almost one third were in the food and drink sector, with a further 19 per cent in the metalworking sector, nearly 10 per cent in that of pharmaceuticals and slightly more than 8 per cent in sectors relating to other chemicals. In Argentina, the most important sectors in which trade mark contracts were referred to were those relating to pharmaceuticals, food and drink, vehicles, electrical machinery and other chemicals. The non-durable consumer goods sector accounted for 36 per cent of the trade mark agreements in Brazil and a

<sup>84</sup> See D. Chudnovsky *et al.*, *Aspectos económicos de la importación de tecnología en la Argentina en 1972* (Buenos Aires, Instituto Nacional de Tecnología Industrial, 1974).

<sup>85</sup> See ITINTEC (Instituto de Investigación Tecnológica Industrial y de Normas Técnicas), *Efecto del Proceso de Importación de Tecnología en el Perú (Período 1971/74)* (Lima, n.d.), p. 20.

<sup>86</sup> If in the case of Argentina it had been possible to consider also those contracts which did not require any royalty payments—as was done in the case of Mexico—the figure would have been much higher.

<sup>87</sup> F. A. Biato, E. A. A. Guimarães and M. H. Poppe de Figueiredo, *A transferência de tecnologia no Brasil* (Brasília, IPEA (Instituto de Planejamento Econômico e Social), 1973). All subsequent information on Brazil was taken from this study.

<sup>83</sup> J. Alvarez Soberanis, "La función económica de los acureros de licencia de uso de marcas extranjeras en los países en vías de desarrollo: el caso de México", WIPO, *La Propiedad Intelectual* (Geneva), 9th year, No. 2, 1976, table III. All subsequent information on Mexico was taken from this study.

quarter of them related to capital goods. In Peru, trade marks were included in 78 per cent of the contracts related to consumer goods, in 52 per cent of the contracts dealing with intermediate products and in 69 per cent of the contracts for capital goods.<sup>88</sup> This shows that in these four countries foreign trade marks are important in producer as well as consumer goods industries.

130. The studies under review gave some information on royalty payments. In Argentina, the contracts including trade marks accounted for a royalty payment of \$35 million in 1972, a figure representing nearly half of the total royalty payments by that country in that year. Some sketchy information is available for Mexico and Brazil. In Mexico the 618 contracts of the sample studied generated an annual payment of nearly \$8 million, while in Brazil they represented 5.8 per cent of total transfer of technology payments, i.e. about \$2.3 million. In any case, these figures are far from being accurate, not only for the reasons mentioned at the beginning of this section but also because of the methodology applied in calculating the figures.

131. Current payments for the use of trade marks do not seem to be very large, especially if they are compared with other items usually included in transfer of technology agreements. This impression is corroborated by an estimate made in the United States on foreign licensing receipts.<sup>89</sup> Extrapolating from the data provided by a small sample of companies, trade marks accounted for only 3.5 per cent of the total royalty income while, for instance, patents represented 52.6 per cent and know-how 31.9 per cent of licensing receipts.

132. Some information on the indirect costs in trade mark contracts could be obtained in Mexico and Argentina. More than a third of the 618 contracts chosen in Mexico for the sample studied were found to be not in line with the provisions of the Act of 1972 governing transfer of technology agreement.<sup>90</sup> Excessive payments, restrictions on exports and limitations on production were the most frequent cases for negative decisions of the Registry. In Argentina, it was found that restrictions on exports, especially for national companies, were more frequent in contracts involving trade marks than in the remaining agreements.

133. However, the most important indirect cost, i.e. the development of the mark by the licensee and the consequent benefit accruing to the licensor is very difficult to quantify and no attempts were made in that relation in those studies. The economic importance of this question will be the subject of section C below.

## B. Trade marks in the activities of transnational corporations

134. The statistical picture given in chapter III shows that trade mark activity is increasingly being carried out by

non-residents, not only in developing countries but also in some developed market-economy countries like the Nordic and Benelux countries and the socialist countries of Eastern Europe. An important proportion of these trade marks are directly used by the subsidiaries of transnational corporations to carry out their activities.<sup>91</sup>

135. In those developing countries in which the degree of industrialization has allowed a certain development of the manufacturing sector, trade marks mostly cover goods made in the country, while in the remaining developing countries they are used to commercialize imported goods.

136. Trade marks have been recognized by the exporters as one of the basic elements in the marketing of exports manufactured by industrialized countries. For the exporter, the registration of trade marks abroad is important,<sup>92</sup> as is the appropriate selection of trade marks for registration in foreign countries.<sup>93</sup> Despite the high degree of standardization that prevails in the selection of trade marks, they have often easily been adapted to the reality of countries with different languages and, especially, with acute class inequalities and widespread illiteracy.<sup>94</sup>

<sup>91</sup> Among transnational corporations two types may be distinguished for purposes of this discussion. First, there are those enterprises whose basic asset is marketing as such and in which specialized industrial technology is a secondary aspect of their market behaviour, for example those in the food, beverages, cigarettes, cosmetics and soaps sectors, and some specialized services such as car rentals, special restaurants, hotels and other services based on franchising. Secondly, there are those corporations with technological ascendancy, i.e. with an important expenditure in research and development, and where trade marks play an important role in their marketing activities, for example, those producing pharmaceuticals, electrical equipment and transport equipment. This means that only one group of transnational firms will not be taken into account, i.e. those operating in sectors in which technology and some marketing is important, but in which trade marks play a secondary role, for example chemicals, scientific instruments, rubber, paper, etc.

<sup>92</sup> See some interesting reports made by J. W. Sanger, a United States Trade Commissioner, in a number of developing countries in 1919-1921 (United States Department of Commerce, Bureau of Foreign and Domestic Commerce, *Special Agents Series*, No. 185: *Advertising Methods in Chile, Peru and Bolivia*; *ibid.*, No. 190: *Advertising Methods in Argentina, Uruguay and Brazil*; *ibid.*, No. 209: *Advertising Methods in Japan, China, and the Philippines* (Washington, D.C., U.S. Government Printing Office, 1919, 1920 and 1921 respectively)). The importance of trade mark registration to protect American exports is continuously stressed in the reports, especially owing to the fact that those countries have required registration to acquire trade mark rights, as opposed to United States prior use as a basis of property.

<sup>93</sup> In the United States Trade Commissioner's report on China (see foot-note 92 above), the difficulties found by American exporters in a country with no trade mark legislation and with a well-developed system of copying foreign trade marks, that still persists in Hong Kong, is well depicted (see Don Benson, "Chinese 'Brigands' steal brand names in Hong Kong", *Advertising Age*, 22 October 1962).

<sup>94</sup> In the United States Trade Commissioner's report on Peru (see foot-note 92 above), a good example of primitive brand loyalty is found in this quotation: "Against a 50 per cent literacy in Chile, there is less than a 20 per cent literacy in Peru. However, even the Peruvian Indian, who constitutes the bulk of the population, has learned to ask for things that he identifies by primitive symbols. The writer has sometimes observed natives asking for and buying flour in bags that carry pictures of such elemental things as sailing ships, golden stars, and crescent moons. Even they have learned to 'refuse substitutes' or apparent substitutes, as may be well illustrated by the following incident. A manufacturer of 'machetes' (a long knife commonly used for cutting cane or for similar work) had been doing

<sup>88</sup> See ITINTEC, *op. cit.*, table 23.

<sup>89</sup> J. M. Lightman, "Comparative income roles of United States industrial property rights licensed abroad", IDEA (Washington, D.C.), 1970, pp. 352-366.

<sup>90</sup> Act of 28 December 1972 governing registration of the transfer of technology and the use and exploitation of patents and trade marks (reproduced in document TD/B/C.6/AC.1/2/Supp.1/Add.1).

137. First, through purely representative agencies and, later, through manufacturing subsidiaries, many trade marks began to be used in developing countries in the early stages of industrial development. The famous *Sunlight* trade mark by which Lever transformed the marketing approach in consumer goods at the end of the 19th century, was already known in several developing countries in the 1920s and 1930s.<sup>95</sup> By 1919 General Electric had plants in Europe, Latin America and Asia, as well as long-time sales operations in Australia and South Africa. Ford and General Motors started with assembly operations in the 1920s in Latin America, Japan, Turkey and the British Dominions, in addition to their subsidiaries in Europe and Canada. These large corporations were followed by some American firms producing pharmaceuticals, cosmetics, typewriters, tyres and other consumer goods,<sup>96</sup> mostly through commercial branches but also with some assembly operations.

138. In the first stage of the import substitution industrialization process it is therefore possible to find an important foreign influence in the domestic development of consumer goods industries and, therefore, the introduction of marketing techniques, including foreign trade marks.<sup>97</sup>

139. The present report is concerned with the present situation in which an important number of developing countries have a sizeable domestic market with local production, especially of consumer goods, both durable and non-durable. Domestic production is carried out by foreign subsidiaries, by local firms with licenses of foreign owned trade marks and/or foreign technology and also by purely local firms, their relative importance being unequal and varying from sector to sector of industry.

140. In countries where the process of import substitution industrialization has taken place, a number of manufacturing sectors were developed with the participation of transnational enterprises. Market shares achieved by foreign subsidiaries in developing countries are substantial. Although complete figures are not available, some data collected at country level show that the phenomenon is widespread, especially in Latin America.

141. In Mexico, it was found that transnational enterprises hold 61.5 per cent of the value of domestic production of durable consumer goods and 30.2 per cent of

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an excellent business throughout interior Peru. Perhaps his machete was no better than other makes, but the Indians thought so. The name on the blade meant little or nothing to them, for they could not read. Its distinguishing feature was its bright blue paper wrapper. When the dealer sent in a duplicate order, he either forgot to specify the color of the wrapper or the manufacturer decided that any color of paper would do. But the Indians firmly refused to buy until the dealer had sent all the way to Lima for a supply of the familiar blue paper and had wrapped the knives himself. Then the Indians recognized the distinguishing mark that to them indicated a certain quality or brand" (pp. 48-49).

<sup>95</sup> See Charles Wilson, *History of Unilever* (London, Cassell, 1954), p. 358.

<sup>96</sup> "Americans in the food and beverage industries with specialized trade marked products moved abroad (in the 1920s)... They built or acquired plants that could use local ingredients, save transportation costs, get behind tariffs and be nearer their customers." See Mira Wilkins, *The Maturing of Multinational Enterprise: American Business Abroad from 1914 to 1970* (Cambridge, Mass., Harvard University Press, 1974), p. 62.

<sup>97</sup> See D. M. Phelps, *Migration of Industry to South America* (New York, McGraw Hill Book Company, 1936).

the value of the output of consumer goods.<sup>98</sup> In Brazil, foreign firms control 100 per cent of the tobacco industry, 54 per cent of the value of production in foods, and 50 per cent of the market in clothing and shoes and very high participation in the transport equipment and capital goods industries.<sup>99</sup> In Argentina, while the foreign enterprises' share in total output was estimated at 31 per cent in 1972, in the last industrial census of 1963 they had 95 per cent of the value of the output of motor cars, 75 per cent of the value of the production of cigarettes and 60 per cent of the value of the production of pharmaceuticals.<sup>100</sup>

142. Similar situations, not as pronounced as in Latin America, can be found in other developing countries. In Ethiopia, for example, a strong participation of foreign firms was found in some sectors of the food industry and of the chemical industry, where most of the foreign-owned trade marks are concentrated.<sup>101</sup>

143. High shares of the market are both an indicator and a source of market power. Other indicators of market power are the level of profits, advertising expenditure and the prices of branded goods vis-à-vis available substitutes, all aspects of evidence being relatively scarce but showing a very definite pattern.

144. Profits achieved by foreign subsidiaries operating in industries where trade marks are conspicuous are high, especially when compared with their domestic counterparts.<sup>102</sup> Of course, not all profits can be attributed to

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<sup>98</sup> F. Fajnzylber and T. Martínez Tarragó, *Las empresas transnacionales: Expansión a nivel mundial y proyección en la industria mexicana* (Mexico City, Fondo de Cultura Económica, 1976), p. 159. According to *Advertising Age*, 19 July 1976, p. 62, foreign companies held 35 per cent of the market in canned goods; in condensed milk the market is shared by two transnational firms (Nestlé and Carnation); Kellogg has 94 per cent of the processed cereal market, Nestlé 95 per cent of the instant coffee market and in powdered chocolate two foreign companies have three quarters of the market. In a recent study it is observed that foreign firms hold three quarters of the market in soft drinks and 100 per cent of the market in baby foods. See O. Paredes López and Y. Gallardo Navarro, "La industria alimentaria en México y la penetración de las empresas transnacionales", *Comercio Exterior* (Mexico), vol. 26, No. 12 (December 1976), p. 1433.

<sup>99</sup> ECLA, *La presencia de las empresas transnacionales en la industria manufacturera de América Latina*, 1975, p. 56.

<sup>100</sup> See ILO, "The impact of transnational enterprises on employment and income: the case of Argentina", by J. V. Sourrouille, World Employment Programme research working paper WEP 2-28/WP 7 (Geneva, April 1976), chap. II, tables 1 and 4.

<sup>101</sup> See "Major issues arising from the transfer of technology: a case study of Ethiopia" (TD/B/AC.11/21), table 7.

<sup>102</sup> The measurement of profits in subsidiaries of transnational corporations is a complex issue and several factors have to be taken into account in addition to the conventional indicators. In this connexion see D. Chudnovsky, *Empresas multinacionales y ganancias monopólicas en una economía latinoamericana* (Buenos Aires, Siglo Veintiuno Editores, 1974), chap. III. Some evidence on profits made by foreign subsidiaries in developing countries can be found in the following sources: with respect to the soap industry in Kenya, S. Langdon, "Firmes transnacionales, transfert de goût et sous-développement: une étude de cas au Kenya (Transnational firms, transfer of taste and underdevelopment: a case-study in Kenya)", *Options méditerranéennes* (Paris), 5th year, No. 27; with respect to Mexico, Fajnzylber and Martínez Tarragó, *op. cit.*; with respect to Colombia, Chudnovsky, *Empresas multinacionales ... (op. cit.)* and "Major issues in transfer of technology to developing countries: a case study of the pharmaceutical industry" by S. Lal (TD/B/C.6/4), para. 40.

product differentiation activities, but in those industries where trade marks are important, a significant part of the returns can be explained by this factor.<sup>103</sup>

145. It seems that foreign subsidiaries spent more on advertising than their local competitors in the case of the soap industry in Kenya<sup>104</sup> and in a sample of business enterprises studied in Peru.<sup>105</sup> In the case of Argentina, the advertising effort made by transnational firms was greater than that carried out by local firms in pharmaceuticals and household durables, but this was not the case in food, clothing and textiles.<sup>106</sup> Finally, in industrialized countries it is generally recognized that trade marked products have higher prices.<sup>107</sup> No information is available on this question in developing countries, except for some pharmaceutical products (see section E below) but it is very likely that the same is true for developing countries.

146. Thus far, references have been made to certain indicators of market power. Regarding the sources of such a power, in those corporations in which marketing is their main asset and where trade marks are the most valuable element of such assets, it would seem that the possession of valuable trade marks is one of the most important sources of market power. This is specially the case with corporations producing consumer goods where, except in the pharmaceutical industry, no basic advantage arises from the possession of specialized production technology, while their main economic power is derived from their marketing approach in which trade marks have played a leading role.

### C. Trade marks in transfer of technology agreements

147. Foreign-owned trade marks are used through licensing agreements. While those agreements are usually signed not only between national enterprises with the foreign owner of a registered trade mark but also between affiliates of a transnational corporation and their parent company, only the former merit detailed consideration from the point of view of their impact upon developing countries. In the latter the importance of using a foreign-

owned trade mark is directly reflected in the marketing behaviour of the subsidiary.<sup>108</sup>

148. A trade mark is seldom licensed alone. In the majority of cases it is one of the elements in a transfer of technology agreement.<sup>109</sup> The quantitative evidence, reviewed in the statistical section, revealed that the problem has some importance in a number of developing countries. At the same time, some countries have started to regulate the licensing of trade marks, generally as part of their regulation of transfer of technology agreements.<sup>110</sup>

149. Behind these new developments, there has been a concern regarding the long-term negative effects that the license of foreign trade marks might have upon domestic enterprises. The main point against licensing foreign-owned trade marks has been that local enterprises relying on them for their commercial development have had some current benefits but substantial long-term costs. These costs are attributable to the fact that licensees are developing goodwill not for themselves but for the owner of the mark. "The licensee's efforts will result in greater 'prestige' for the licensor and not for the licensee. Once the licensing agreement is terminated—a fact which may occur at the option of the licensor when, for example, the sales of the licensee have reached significant levels—the licensee will find himself faced with the loss of the market which he had gained, or he will be forced to use his own trademark which may enjoy no good will."<sup>111</sup>

150. The reasons behind such a business behaviour will become clear through an examination of the position of both licensors and licensees.

#### 1. Licensor's position

151. The licensor's reasons for entering into a licensing agreement are quite clear. A licence is one of the possible ways to exploit a trade mark. Under a licensing agreement the licensee is usually required to make the advertising effort to maintain the market value of the trade mark. The licensor has some direct benefits, i.e. a royalty based on the sales of the trade-marked product, a captive market of licenses through which to sell some intermediate products or inputs to the licensee, etc., and a fundamental indirect benefit: the further development of a market in his name as long as the product is sold under his trade mark.

152. It is very important to differentiate the two types of benefits. The direct benefit to the licensor may not be

<sup>103</sup> In the case of foreign subsidiaries in Colombia, Chudnovsky (*Empresas multinacionales... (op. cit.)*, chap. VI) found that 40 per cent and 47 per cent of the variations of the rate of profit of pharmaceutical and metal firms, respectively, were explained by the advertising expenditure.

<sup>104</sup> In the case of subsidiaries, advertising amounted to 6 per cent of sales, while it was only 1 per cent in the case of local firms. See Langdon, *loc. cit.*, p. 71.

<sup>105</sup> The average percentage of sales spent on advertising was 2.1 for foreign-owned firms and 1.6 for Peruvian-owned enterprises. See W. P. Glade, W. A. Strang, J. G. Udell, and J. E. Littlefield, *Marketing in a Developing Nation* (Lexington, Mass., Heath Lexington Books, 1970), p. 119.

<sup>106</sup> See D. Chudnovsky, *Dependencia Tecnológica y Estructura Industrial: El Caso Argentino* (FLACSO (Facultad Latinoamericana de Ciencias Sociales), Buenos Aires, 1976), p. 22.

<sup>107</sup> It was recently reported that the French hypermarket chain Carrefour marketed a number of products "in plain white wrappers with little more information than the name of what was inside, such as biscuits or coffee, and miniscule type describing the composition. Although it was claimed that the product's quality was as good as any on the market, the price was as much as a third less than its branded rival". *The Guardian* (London), 6 April 1977.

<sup>108</sup> The only interesting feature to be pointed out in this context is that, in some cases, the parent company's contribution to subsidiary's capital is totally or partially made in kind, through the capitalization of the trade mark's market value.

<sup>109</sup> See *Major issues arising from the transfer of technology to developing countries* (United Nations publication, Sales No. E.75.II.D.2); see also *An international code of conduct on transfer of technology* (United Nations publication, Sales No. E.75.II.D.15).

<sup>110</sup> See Normative Act No. 15 of the Brazilian Patent Office, which became effective on 16 September 1975, the new Mexican Law on Inventions and Trade Marks (10 February 1976) and the Argentine Law No. 20794 of 1974. These statutes are discussed in chap. VI, section C, below.

<sup>111</sup> "The trademark and its function in the control of commercialization", *The Trademark Reporter* (New York), vol. 65, 1975, p. 84 (article originally published by the Brazilian Patent Office in the Official Bulletin of 15 October 1974).

very high and may not even exist, as in those contracts in which the mark is licensed without any royalty payment. However, the indirect benefit is far more important. It is the goodwill that the licensor is receiving out of the licensing of the mark which is generated by the licensee's efforts to maintain and increase the market value of the trade mark. This indirect benefit is very difficult to quantify, but nonetheless very important.

153. To be able to receive the direct and indirect benefits out of the exploitation of the mark the licensor must follow a careful policy but, at the same time, he has to bear some costs. What can be called the direct, or legal, costs are those incurred in finding and registering a mark and keeping it in force. These costs are rather low.<sup>112</sup> Far more important are the costs involved in the creation of goodwill, i.e. in giving an economic value to a mark.

154. The mere fact of licensing a mark usually involves no extra costs for the licensor. However, the licensor has by necessity incurred expenditures prior to entering into a licensing agreement. The licensor has had to build up the goodwill which attaches to his trade mark. To create this goodwill, advertising efforts have usually been made. The fact that the trade mark is already an asset (for example, when the product is already exported and sold with that trade mark) is what induces the would-be licensee to look for a licence.

155. To license a mark without any economic value would not make sense from the point of view of the licensee, unless the inclusion of a mark is an imposition of the licensor to sign a contract in which the most important content is the technology not directly related to the mark. Only in those special cases is the whole burden of the creation of goodwill on the licensee. In all the other cases, the licensor has had certain overhead costs, which can be amortized through the licensing agreement.

## 2. Licensee's position

156. In countries whose domestic markets have reproduced many of the traits of product differentiation competition and where foreign-owned trade marks are so widespread, it is understandable that some local firms have been willing to obtain licences of foreign-owned marks to develop their business activities.<sup>113</sup>

157. As transnational enterprises have leading shares in but not the whole market for the goods commercialized under the techniques of product differentiation, local firms are able not only to stay in business but also to have an acceptable performance while operating with a licence of foreign-owned trade marks. As long as they can transfer to the consumer of the product the burden of the licence—and this is possible with the degree of price inelasticity that the demand for these products is facing—they are willing to accept the direct and indirect costs of operating with them, becoming a sort of junior partner of foreign licensors. Although dependent on the owner of the mark for the further development of goodwill, they find in the current

<sup>112</sup> The fees to be paid for the application for and registration and renewal of a trade mark are shown in annex III. In addition, some allowance must be made for expenses connected with legal advice.

<sup>113</sup> The problem of trade marks for exports is discussed in section D below.

returns of the agreements the main reason for their acceptance. These kinds of domestic enterprises account for an important part of the trade mark licences in consumer goods industries and their behaviour, despite their nationality, is not very different from that of the foreign subsidiaries.

158. In addition to this extreme, but frequent, dependent position among domestic licensees, other intermediate cases might be found. Some local enterprises have licences of foreign-owned trade marks for selected products in order to penetrate particular markets while having developed their own trade marks in other less sophisticated products.

159. The independent marketing approach occurs less frequently. Accepting the rules of competition via product differentiation, some local firms have tried to develop their marketing strategy relying on their own trade marks as a way to receive all the benefits of goodwill creation for themselves. They have only accepted foreign-owned trade marks when this is the condition for receiving some technological know-how that would not otherwise be available. This is the main reason why they have strongly supported policy measures aimed at separating the technological contribution from related tying clauses, such as that of the compulsory use of foreign trade marks.<sup>114</sup>

160. The basic reason explaining the weak development of an independent business approach in relation to trade marks is the framework in which these firms operate. The success of domestic enterprises, assuming a neutral government policy, will depend very much on their size, financial strength and amount of market power, and on the other hand, on the degree and importance of transnational corporations' share of the domestic market. It is possible to imagine some potential in this sort of business approach in products in which advertising and the bias towards foreign brands is not extremely intensive but is more difficult to implement in the new and highly advertised products that subsidiaries are prone to introduce. Of course, a non-neutral government policy might change the framework in which these firms operate, provided a consistent approach is followed, not only in relation to trade marks but also in related areas of product differentiation activities (see chapter VI below).

161. So far the question of trade mark licences in consumer goods industry has been discussed. But, as pointed out in the statistical section, transfer of technology agreements including trade marks were also found in capital and intermediate goods industries. Here the problem has a different setting.

162. In capital and intermediate goods industries a competition based on product differentiation does not prevail, despite the variety of goods being produced. As long as a well-organized system of quality standards prevails and the consumers are industrial enterprises which generally employ skilled personnel for performing the purchasing function, there exists little room for subjective differences. The purchasing decision is basically made according to rather objective variables like efficiency, duration and easiness to run. But an important variable is also the

<sup>114</sup> Some evidence on this approach was found, for example, among pharmaceutical and household goods producers in Argentina. See also Chudnovsky, *op. cit.* (FLACSO, 1976), pp. 117-118.



commercial prestige of the supplier and this is particularly applicable to developing countries.

163. In countries whose industrialization process has basically been carried out by import substitution, traditional suppliers of industrial goods have enjoyed a goodwill first acquired through exports. When these industrial goods are manufactured domestically, the support of the trade mark through a licence from an internationally recognized firm is usually required in order for a domestic enterprise to compete in the internal market with foreign importers of industrial goods. It appears that this is the main reason explaining the importance of foreign trade marks and trade names in capital goods industries like electrical and non-electrical machinery, railway and naval equipment.

164. In general, it is possible to say that in capital goods industries, foreign trade names are a substitute for quality control for the purchasers, although a poor substitute as long as other ways to measure standards of quality are not followed.<sup>115</sup> State companies and foreign subsidiaries, as the more important customers, have also played a role in favour of foreign marks. It is often found that public biddings have required that any firm submitting a bid must have a licence of a well-known company to be considered as a reliable supplier, while foreign subsidiaries have usually preferred inputs made under licences of their suppliers in home markets. Given this situation, to compete more effectively domestic enterprises need to have a licence. The main consideration for entering into such a licensing agreement is the possibility of using the name of a well-known company, although there may well exist technical reasons for such an agreement too.

### 3. Some characteristics of trade mark licensing agreements

165. Trade marks are seldom licensed alone but, in many cases, they are the chief element of the contract. As a consequence of their inclusion, a number of practices often appear.

166. First, the contract usually states that the mark's ownership is duly recognized by the parties and cannot be subject to any sort of qualifications. At the same time, it is frequent to find provisions stating that the licensee cannot use the mark once the contract has expired nor can he register any similar mark to the one which is the object of the contract.<sup>116</sup>

167. Secondly, the licensor has the right to control the products made under the licensed trade mark in order to ensure that quality standards associated with the product are not lowered. At the same time, licensees are bound to follow the instructions received in order to maintain the quality of the product in question.<sup>117</sup>

168. Thirdly, the contract usually not only provides for control on the advertising design and especially the way in

which the mark is exhibited, but also frequently fixes an amount to be spent on advertising as a lump sum or percentage of sales.<sup>118</sup>

169. While the three characteristics mentioned are specific of trade mark licences, these contracts at the same time share many general features of transfer of technology agreements. In particular, well-defined territorial restrictions and tying clauses for the purchase of inputs may often appear.<sup>119</sup>

170. Although the presence of these features in the licences of trade marks does not necessarily mean that the licensor will take advantage of his position,<sup>120</sup> this might occur in certain cases. Some of the above elements can be used by licensors for predatory motives. For example, control on quality standards may be used to impose the purchase of certain inputs at prices higher than those coming from independent sources or the control on the content and amount of advertising may be utilized to promote not only the trade mark under licence but the trade name or other trade marks of the licensor. Regarding territorial restrictions, the licensors' trade mark rights may be used to avoid the free flow of goods, both within and between countries.

171. While the existence of such specific features may impose certain implicit costs on licensees, these costs are relatively low when compared with the long-term costs associated with the trade mark licence. This is the reason why new rules in Mexico and Brazil have tried to reduce such a long-term cost through the development of combined trade marks, i.e. to use a foreign-owned trade mark jointly with a domestic one, in order to share the benefits of goodwill development between licensors and licensees (see chapter VI, section C, below for a more detailed discussion of this issue). Regarding specific clauses in licensing agreements that might be used for predatory motives, they are controlled by a number of countries through general regulations on transfer of technology and/or through anti-trust legislation. For instance, the Andean Group countries, Argentina, Brazil, Mexico, Japan and Spain do not allow (with different degrees of flexibility) territorial restrictions on exports, while in the EEC countries, trade marks cannot be used to restrict the free circulation of goods among member countries. In connexion with tying arrangements, they are controlled by the United States of America, Zambia, New Zealand, Malawi, India and by the countries mentioned above.<sup>121</sup>

### 4. Franchising agreements

172. As was mentioned in chapter II, section E, above, a franchise agreement involves the licence of a trade mark

<sup>118</sup> See Chudnovsky, *op. cit.* (FLACSO, 1976), pp.109-113.

<sup>119</sup> See *Major issues arising from the transfer of technology...* (*op. cit.*), chap. II.

<sup>120</sup> A very detailed argument to show that restrictive practices in franchising operations like tying arrangements, exclusive dealings and territorial restrictions do not necessarily mean monopolistic behaviour and can be, on the contrary, procompetitive, assuming non-predatory motives and good business purposes, is made by D. Thompson, *Franchise Operations and Antitrust* (Lexington, Mass., Heath Lexington Books, 1971), chaps. 6-8.

<sup>121</sup> See *The role of the patent system in the transfer of technology...* (*op. cit.*), table 3.

<sup>115</sup> The importance achieved by trade marks in capital goods industries in developing countries is a reflection of the buyer's lack of technical expertise. Therefore, they are prone to commit purchasing errors like household consumers. In this sense, the ignorance of the buyer is in itself a source of product differentiation.

<sup>116</sup> See Chudnovsky, *op. cit.* (FLACSO, 1976), pp. 109-113.

<sup>117</sup> See ITINTEC, *op. cit.*, p. 20, for the Peruvian experience on this issue.



but has specialized operative arrangements. Such agreements are mostly agreements to provide services and, generally, the advertising effort is made by the franchisor.

173. Although franchising is less developed in developing countries than in the industrialized ones, and particularly the United States of America, it has some importance, especially in services like those concerned with car rental, recreation, hotels and restaurants.<sup>122</sup>

174. As in franchise agreements the development of goodwill and, therefore, the advertising effort is usually made by the franchisor, the long-run considerations that were discussed above in relation to trade marks licences are not applicable here. However, a number of current aspects are germane to this sort of arrangement.

175. First, explicit royalty payments are likely to be more frequent and probably higher than in the usual trade mark licence. Secondly, implicit costs like tying arrangements for the purchase of inputs and equipment and control over production and distribution are likely to appear often. Thirdly, local, regional and national restrictions regarding the territory of the franchise are common clauses in franchise agreements. While not all these terms will necessarily present predatory practice by franchisors, the weak bargaining position of franchisees may help their occurrence.

#### D. The role of trade marks in the exports of developing countries

176. Only about 2,000 new trade marks originating in developing countries were registered abroad in 1974 and 70 per cent of them in other developing countries. Contrasted with the importance that trade marks have had in the development of industrialized countries' exports and in transnational enterprises' strategy of approaching world markets, it seems that trade marks have been a neglected element in the export activities of developing countries.

177. Relatively few products originating in developing countries are marketed in developed countries under their own marks<sup>123</sup> and it is rare to find cases of an active policy of export promotion in which trade marks are included.<sup>124</sup> It is not difficult to find reasons explaining such a situation. First, exports originating in developing countries are still greatly concentrated in commodities, which are not usually sold under trade marks, although exceptions can be found

in the case of some fruits like bananas.<sup>125</sup> Secondly, those exports which can lead to product differentiation are generally undertaken through intermediate firms based in the developed countries and their marketing is done by them under their own trade marks. Thirdly, exports by subsidiaries of transnational corporations located in developing countries are undertaken through the marketing network and under the trade marks of these corporations. Fourthly, the growing share of foreign trade marks in the domestic market probably has not only reduced the importance of nationally owned marks in the local market but it seems that they have also had a negative effect on the development of marks for export products in the country of origin.

178. As long as there are no restrictions in developed market-economy countries on product differentiation and as long as such product differentiation is successfully practised in these countries in respect of consumer goods, developing countries could consider the possibility of using product differentiation when exporting consumer products to developed market-economy countries. If this course is chosen by developing countries, it will be necessary for them to promote their own trade marks.

179. Currently, many consumer goods manufactured in developing countries by transnational corporations are marketed under the trade marks of these corporations. This practice is generally encouraged in order to boost exports. Even countries that tend to be restrictive with regard to foreign trade marks for the domestic market tend to be liberal when dealing with licensing agreements of foreign marks for exports.<sup>126</sup>

180. Although this policy can increase the export activity of developing countries, the long-term consequences should be taken into account. It is not the country which gains a foreign market but the foreign corporation. The market can be easily lost for the country if the transnational firm decides to export from another country. It is the corporation's trade mark to which the goodwill accrues, not the country's product.

181. This does not mean that exports by foreign corporations must be discouraged. But some policy measures should be designed in order that developing countries may share some of the goodwill that the corporations are creating through their export capacity.

<sup>122</sup> See B. J. Walker and M. J. Etzel, "The internationalization of United States franchise systems: progress and procedures", *The Journal of Marketing* (Chicago, Ill.), vol. 37 (April 1973), pp. 38-46.

<sup>123</sup> See A. Vida, "The trade mark as a tool for the promotion of export of the developing countries", AIPPI (*Association internationale pour la protection de la propriété industrielle*) Proceedings, Budapest, vol. 5 (1975), pp. 65-74.

<sup>124</sup> One of the interesting exceptions is that of Cuba in relation to the exports of rum and cigars. The Cuban Government had serious problems until the trade marks *Bacardi* for rum and *Havana* for cigars could be fully recognized abroad once the enterprises which owned those marks were nationalized and their ex-owners started overseas production. But not only has Cuba undertaken a legal battle to be able to make full use of those marks, it has also carried out a careful policy on trade marks to help its exports efforts. See in this connexion, A. Vida, *loc. cit.*

<sup>125</sup> An interesting example of the use of a trade mark in connexion with a commodity is that of Chiquita bananas. These bananas are marketed by a transnational corporation, United Brands Company. In a decision of 17 December 1975, the Commission of the European Communities decided that United Brands Company had abused its dominant position in violation of Article 86 of the Rome Treaty, *inter alia*, by charging unfair prices to customers. These prices were held excessive in relation to the economic value of the product, especially where Chiquitas were concerned. They were 30 to 40 per cent more expensive than unbranded bananas only slightly inferior in quality. According to the Commission, prices should have been at least 15 per cent lower in the Federal Republic of Germany, the Benelux countries and Denmark. This decision has been appealed to the Court of Justice of the European Communities. José Micó, "Commission of the European Communities: decision regarding United Brands Company", *Journal of World Trade Law* (Twickenham, Middlesex), vol. 11, No. 1 (January-February 1977), p. 84.

<sup>126</sup> See, for example, the new Mexican Law on Inventions and Trade Marks of 1976.

182. Finally, countries should benefit from the reputation gained by certain names designating tourist sites or famous places in the promotion of their exports. These names are sometimes used by transnational corporations. In this connexion, the lack of specific protection of geographical designations against their possible misleading use in trade marks should be noted.

183. Little information is currently available on the questions raised in this section, namely, the use by developing countries of their own trade marks in the promotion of their exports and the use of trade marks by transnational corporations in exports undertaken by them from developing countries. Therefore, it would be advisable for developing countries to study these questions.

#### E. Trade marks in the pharmaceutical industry

184. The information on the registration of trade marks by classes (table 12) revealed that in 1974 the largest amount of trade marks in developing countries were registered in the pharmaceutical sector. Other sectors should also be closely examined to obtain a more detailed view of the impact of trade marks on the economies of developing countries. The example of the pharmaceutical industry is a striking and important example of this impact. Although no information is provided by WIPO on the number of trade marks in force covering pharmaceutical products, some data are available from other sources. Statistics on the number of brand names indicates that in 1974 in the United States there were between 14,000 and 35,000; in the Federal Republic of Germany, 24,000; in Italy, 21,000; in Japan, 17,400; in Canada, 17,000; in Belgium and in the United Kingdom, 9,500 and in France 8,500. In developing countries brand proliferation was also very pronounced. In Argentina there were 17,000 pharmaceutical brand names; in India and Colombia 15,000; in Brazil 14,000 and in Iran 4,200.<sup>127</sup>

185. As each pharmaceutical product<sup>128</sup> is sold under several brand names by various manufacturers, the actual number of products is smaller. In Argentina, for example, there were in the early 1970s 3,000 products and in Colombia 6,500. This means that in Argentina there were on average 5.6 brand names for each product, while in Colombia the average was 2.3.<sup>129</sup>

186. It seems that in the pharmaceutical industry product differentiation through trade marks has reached its highest development. Trade marks have become a basic source of market power in this industry, perhaps of greater importance than patents.

187. The commercialization of pharmaceutical products under such a brand proliferation is a very expensive business. Promotion costs reveal the importance of marketing in the drug industry. In 1967 such costs were on average 16 per cent of sales in the United Kingdom, 20 per

cent in Switzerland, 22 per cent in France, the Netherlands and the Federal Republic of Germany, and 26 per cent in Argentina.<sup>130</sup> In the United States they were from three to four times higher than the research and development expenditures.<sup>131</sup>

188. These promotion costs usually include a number of important elements: first, medical representatives to approach the physicians and promote the sale of the drugs made by the laboratory;<sup>132</sup> secondly, an extensive advertising network including medical literature, sponsored conferences, and business gifts,<sup>133</sup> and thirdly, free samples that serve to imprint the brand name of the product in the mind of the doctor and become an important barrier to the entry of potential competitors.<sup>134</sup>

189. This particular form of competition by product differentiation has been extended to many developed and developing countries through the activities of the large transnational corporations which dominate the industry. In this connexion, it is important to take into account that subsidiaries of foreign corporations have leading shares in many domestic markets<sup>135</sup> making drugs with different degrees of local manufacturing. Since the research and development activity is highly concentrated in the pharmaceutical industry<sup>136</sup> and orientated towards the health

<sup>130</sup> See J. M. Katz, *Oligopolio, firmas nacionales y empresas multinacionales: la industria farmacéutica argentina* (Buenos Aires, Siglo XXI, 1974), p. 23.

<sup>131</sup> See "A case study of the pharmaceutical industry" (TD/B/C.6/4), para. 45.

<sup>132</sup> A Brazilian legislator, Senator Ferreira, who is himself a doctor, recently conducted a survey on the medical representatives' activities. "He was visited on 18 of the 21 days by a total of 69 salesmen. He was given 452 free samples of drugs (after refusing extra quantities so as not to distort the counting); he received 25 gifts, including coffee pots, notebooks, plastic bags." See Robert J. Ledogar, *Hungry for Profits* (New York, IDOC/North America, 1975), p. 22.

<sup>133</sup> Senator Kennedy described the situation in the United States as follows: "What we have is a system of hard sell, rather than a system of objective information dissemination; we have salesmen instead of analysts; we have the tools of selling—gimmicks, gifts, bonus deals—rather than the tools of science and medicine—comparative information, analysis of risks and benefits of competing products", quoted in "A case study of the pharmaceutical industry" (TD/B/C.6/4), para. 57.

<sup>134</sup> The report of the Monopolies Commission on the behaviour of Roche Products in the United Kingdom states that free supplies given to hospitals "had three effects. First, a potential competitor would be discouraged since he would normally attempt to establish his initial sales in the hospital market; secondly, hospital doctors would prescribe Roche Products' branded reference drugs and this precedent would tend to be followed by the patient's general practitioner when the patient returned to his care; and thirdly, hospital staff would tend to regard the company's products as causing the smallest increase in the hospital's drug bill and would not be so readily aware of the cost of treatment for patients returned to the general practitioner's care." (United Kingdom, The Monopolies Commission, *Chlordiazepoxide and Diazepam: a report on the supply of chlordiazepoxide and diazepam* (London, H.M. Stationery Office, 1973), pp. 52-53.)

<sup>135</sup> See "A case study of the pharmaceutical industry" (TD/B/C.6/4), para. 26.

<sup>136</sup> See United States Tariff Commission, *Implications of Multinational Firms for World Trade and Investment and for U.S. Trade and Labor*, report to the Committee on Finance of the United States Senate and its Subcommittee on International Trade (Washington, D.C., U.S. Government Printing Office, 1973), p. 582.

<sup>127</sup> Figures quoted from "A case study of the pharmaceutical industry" (TD/B/C.6/4), para. 44, and Chudnovsky, *Empresas multinacionales...* (op. cit.), p. 113.

<sup>128</sup> A pharmaceutical product is defined by its pharmacological or generic name. A generic name in this case is not a trade mark that became generic, like aspirin in the United States, but the scientific designation of the product, e.g. acetyl salicylic acid.

<sup>129</sup> See Chudnovsky, *Empresas multinacionales...* (op. cit.), p. 113.

problems of industrialized countries, subsidiaries operating in developing countries generally receive the parent companies' research output and put it onto the market under new brand names. While the R and D expenditure is made in the industrialized countries where parent companies have their headquarters, the promotion effort is made not only in those developed countries but also in the developing countries. Marketing activities are highly decentralized but research activities are concentrated in a few countries.

190. Although the subsidiaries of transnational corporations play a leading role in developing brand proliferation, it is pertinent to point out that they also induce this form of competition by domestic private firms. In order to compete with foreign subsidiaries, domestic firms also rely on the continuous introduction of new brands. For example, in Argentina, one of the basic factors explaining the success of local enterprises in keeping an important share of the market is their marketing strategy. This strategy was mostly based on launching new brands. In 1972, while the six largest domestic enterprises introduced on average 7.5 brands per firm, the nine biggest foreign laboratories introduced less than half that number, 3.5 per enterprise.<sup>137</sup> In the case of Brazil, it seems that this marketing approach is the basis on which the remaining domestic firms can stay in the industry.<sup>138</sup>

191. In some cases the marketing activity of domestic enterprises has involved licensing agreements in which foreign-owned trade marks were included. Three kinds of approaches in this connexion were found in Argentina.<sup>139</sup> First, some domestic firms have used licences of foreign-owned trade marks as a permanent way of competing with subsidiaries of transnational corporations. Secondly, other local firms, especially the largest ones, have relied on this sort of agreement only to enter into some sophisticated lines of products but with the aim of reducing their dependence in the near future. Thirdly, trade mark licences appear to be imposed by some suppliers of the basic drug on the basis of which the final product is manufactured. Therefore, the licence was considered as an additional cost to obtain the basic drug.

192. However, brand proliferation has not necessarily involved the licensing of trade marks. Domestic firms have sometimes been able to stay in business by introducing new brands in product lines where subsidiaries are not very interested or where imitation is easier.

193. The implications of the form of competition that has taken place in the pharmaceutical sector are of great importance, especially for developing countries. First, the prices of trade-marked pharmaceutical products are higher than the prices of those sold under pharmacological or generic names. An interesting example is that of Costa Rica.

An investigation made in that country reached the conclusion that the gap in prices between trade-marked and generic drugs was from 43 per cent to 361 per cent for different firms and products.<sup>140</sup> In the case of Sri Lanka, the private sector imported 23 brands of tetracycline at an average price of \$16.92 per 1,000 capsules. By "shopping around" the State Pharmaceutical Corporation purchased tetracycline at \$6.33 after considering 45 offers.<sup>141</sup> Given the degree of price inelasticity prevailing in the demand for drugs through the use of the physician as an intermediary, manufacturers of branded products can charge whatever price the market will bear.<sup>142</sup>

194. Secondly, the distortion of information is a basic consequence of the brand proliferation. Doctors cannot remember the numerous brand names created by the companies to label the same drug and in this way prescriptions are biased towards those brands in which the promotion effort was most effective.<sup>143</sup> At the same time, the coined brand names do not give any indication of the components of drugs while generic names ensure the recognition of their pharmacological composition.

195. On the other hand, brand specific advertising carried out by the drug manufacturers provide doctors with little objective scientific information on pharmaceutical

<sup>140</sup> See C. Alfaro Lara, C. Calderón Rodríguez and G. Alfaro Lara, "Las transnacionales y el costo de los medicamentos en Costa Rica", *Comercio Exterior* (Mexico), vol. 27, No. 8 (August 1977), tables 4 and 5, p. 947.

<sup>141</sup> See "Case studies in transfer of technology: pharmaceutical policies in Sri Lanka" (TD/B/C.6/21).

<sup>142</sup> "The Kefauver Committee uncovered innumerable instances of branded products being sold at prices up to 1,000 per cent higher than others in the United States with no effect on the market shares held by the large companies. In Roche's case, a small British firm supplies its equivalent of Librium, under a compulsory licence, at prices 25 per cent lower than Roche but had not been able to capture even 3 per cent of the market for the drug by 1970; while in Italy, where there is no patent protection, seven firms were selling at prices 30 per cent lower than Roche without making a dent on Roche's 80 per cent share of the market. In India, Librium was sold in 1972 at Rs.16.00 (per 100 tablets of 10 mg each) when generic name equivalents were available from small producers for prices as low as Rs. 1.50." ("A case study of the pharmaceutical industry" (TD/B/C.6/4), para. 38 (c).) The situation was summarized as follows by Senator Nelson in the United States Senate Select Committee on Small Business: "For 20 years the large brand-name drug firms have spent billions of dollars in advertising and promotion trying to convince doctors and the public that brand-name drugs are in some indefinable, mysterious way superior to the same products sold under their official or generic name..." (*Financial Times* (London), 11 November 1977, p. 6).

<sup>143</sup> A serious consequence of this problem can be appreciated in the following quotation: "Tetrex, Tetracyn, Tetratco, Hostacycline, Upcycline, Ambramycin, Probacycline, Achromycin, Hacycline are all trade names under which the antibiotic tetracycline is available. A patient with a prescription for Achromycin will go from one chemist to another and be told that the drug is out of stock, whereas the chemist would have the same drug under other brand names. One patient had a prescription for pentazocine under one of its trade names—Fortral. Since pentazocine is not sold in this country (Sri Lanka) as Fortral, a special user's licence was obtained and the drug airlifted to find that pentazocine had been available all the while under the trade name of Sosegon, manufactured by the same company which sells it under the name of Fortral in other countries." See S. A. Wickremasinghe and S. Bible, *The Management of Pharmaceuticals in Ceylon* (Ceylon Industrial Development Board, March 1971), pp. 6-7.

<sup>137</sup> See Chudnovsky, *op. cit.* (FLACSO, 1976), p. 207.

<sup>138</sup> "Most of the larger locally owned firms that remain seem to base their success mainly on their commercial and marketing organizations. They make no pretense of trying to develop 'original' products and are perfectly willing to admit that their product lines consist of 'similar', that is, products originally developed by other companies". P. B. Evans, "Foreign investment and industrial transformation: a Brazilian case study", *Journal of Development Economics*, Amsterdam, vol. 3, No. 2 (July 1976), p. 125.

<sup>139</sup> See Chudnovsky, *op. cit.* (FLACSO, 1976), appendix.

products.<sup>144</sup> As this is the basic source of information for the majority of the practitioners, in many instances doctors prescribe either too many drugs or many ineffective drugs.

196. Thirdly, the main justification for the use of brand names in the pharmaceutical industry is the allegedly higher quality of this kind of product.<sup>145</sup> However, brand names as such do not assure quality. In the United States, the Food and Drug Administration has not found any particular disadvantage in generic products vis-à-vis the trade-marked drugs.<sup>146</sup> Problems of quality that appeared in some experiences of reducing brand proliferation, like that

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<sup>144</sup> A well-documented study on the practices of pharmaceutical firms regarding the information supplied to doctors in Latin America may be found in Milton Silverman, *The Drugging of the Americas: how multinational drug companies say one thing about their products to physicians in the United States, and another thing to physicians in Latin America* (Berkeley, University of California Press, 1976). For information on pharmaceuticals forbidden in the United States but sold freely in Central America, see O. Paredes López, "Consideraciones sobre la actividad de las empresas farmacéuticas en México", in *Comercio Exterior* (Mexico), vol. 27, No. 8 (August 1977), p. 940.

<sup>145</sup> See, for example, Dr. K. K. Datey, "A doctor diagnoses dangers of grand abolition", *Eastern Economist* (New Delhi), vol. 64, No. 25 (20 June 1975), pp. 1298-1301.

<sup>146</sup> "In fiscal year 1972 we had a total of 638 drug recalls. Of this total 291 were brand name and 347 generic products. Again the defects were encountered in big companies, small companies, brand and generic products. So much for a description of our programs in total drug quality assurance" (Henry E. Simmons, "Assuring total drug quality", *Journal of the American Pharmaceutical Association* (Washington, D.C., vol. NS13, No. 2 (February 1973), p. 97). See also Milton Silverman and Philip R. Lee, *Pills, Profits and Politics* (Berkeley, University of California Press, 1974), chap. 6, and David Schwartzman, *Innovation in the Pharmaceutical Industry* (Baltimore and London, The Johns Hopkins University Press, 1976), chaps. 10 and 11.

of Pakistan, seem to be related to the particular way in which policies were implemented.

197. The whole subject of trade marks in the pharmaceutical industry is of such importance that it merits a more profound investigation. Nevertheless, it seems difficult to find a social justification for this system of business competition.

## F. Summary

198. Foreign-owned trade marks are used in developing countries either by subsidiaries of transnational enterprises as one of the factors which enable them to achieve dominant market participation or by domestic licensees as a way of gaining a share of these profitable markets. While direct costs derived from the use of foreign trade marks are not very high in terms of royalty payments, the indirect costs are particularly important. Whereas the licensee receives a current return out of the use of the trade mark, the burden of the goodwill development rests on him. However, the benefits of the goodwill development accrue to the trade mark owner. In addition to this basic long-term cost, some practices often found in trade mark licensing agreements may also produce indirect costs.

199. In contrast to the widespread use of foreign-owned trade marks in the domestic market of developing countries, trade marks originating in developing countries are little used in their exports.

200. The pharmaceutical industry is probably the sector in which the proliferation of brand names is most acute. Not only the dominant firms, usually subsidiaries of transnational corporations, but also domestic firms operating in the industry have been engaged in this form of competition. As a consequence, prices of trade-marked drugs are higher than those sold under generic names.

## Chapter V

### THE COSTS AND BENEFITS OF TRADE MARKS IN DEVELOPING COUNTRIES

201. In this chapter the impact of trade marks on developing countries is discussed. Section A contains an analysis of the costs and benefits of trade marks generally. Section B concentrates on the costs and benefits of foreign-owned trade marks to developing countries.

#### A. Costs and benefits of trade marks generally

202. As was stated in paragraph 36 above, the main function of a trade mark is the creation of goodwill, and as long as this function is performed, the trade mark will keep its market value, and therefore will be an asset for its owner. Identification of a given source through a particularly successful and advertised trade mark might create a substantial market power. Identification of products and their quality is a secondary function of a trade mark ancillary to its basic function: creation of goodwill.

203. Bearing in mind this duality in the trade mark function, it can be argued that the costs of trade marks to society flow mostly from the primary function of trade marks—creation of goodwill—while the benefits to society flow from their secondary function—identification of source and quality.

#### 1. Costs of trade marks resulting from persuasive advertising

204. The cost to society flowing from the market power that trade marks contribute to can be of two main types, first, the costs derived from the misallocation of resources through advertising and secondly, the social impact of persuasive advertising expenditures.

205. Advertised trade-marked goods tend to be higher priced than the non-advertised ones. In this way, the development of non-price competition increases consumption expenditures at the expense of savings<sup>147</sup> and superfluous consumption at the expense of basic consumption.<sup>148</sup> This situation is often recognized by consumers.<sup>149</sup> At the same time, as advertising has a strong

<sup>147</sup> "At the level of aggregate consumption, our results with alternative specifications of the consumption function were broadly consistent with the hypothesis that advertising not merely affects the distribution of a given level of consumers' expenditure, but has also increased aggregate consumption at the expense of savings." (K. Cowling *et al.*, *Advertising and Economic Behaviour*, London, (Macmillan, 1975), p. 195). In the same direction see also J. K. Galbraith, *The Affluent Society* (Boston, Houghton Mifflin, 1958), and L. D. Taylor and D. Weiserbs, "Advertising and the aggregate consumption function", *The American Economic Review*, vol. LXII, No. 4 (September 1972), pp. 642-655. Evidence to the contrary is contained in R. L. Schmalensee, *The Economics of Advertising* (Amsterdam, North Holland Publishing Co., 1972).

<sup>148</sup> See Cowling *et al.*, *op. cit.*, and W. S. Comanor and T. A. Wilson, *Advertising and Market Power* (Cambridge, Mass., Harvard University Press, 1974).

<sup>149</sup> In a survey made in Europe by the EEC Commission in a sample of 9,500 consumers, 77 per cent of them considered that

influence on individual brand choice, inter-brand rivalries may intensify to the point where advertising efforts are merely cancelling each other out so that no firm can single-handedly initiate a de-escalation of advertising efforts without suffering severe losses at the hands of his rivals. It seems then that not only a misallocation of resources exists in advertising, but that it also leads, in some cases, to the wasting of resources.<sup>150</sup>

206. The resources involved in advertising activities are significant both in developed market-economy countries and in developing countries. In 1970, advertising expenditures were calculated for 20 selected countries by private sources (see table 13) as reaching a total amount of \$27.7 billion. On the basis of the average share that the advertising outlay constituted of the cost of the manufactured product, both in the developed and the developing selected countries, the UNCTAD secretariat estimated that the total world expenditure on advertising amounted to \$35.4 billion in 1970. Using the same calculation procedure, it was estimated that \$2.6 billion was spent in developing countries in 1970 and \$4.0 billion in 1973.<sup>151</sup>

Estimates of advertising expenditures, 1970 and 1973  
(In billions of current dollars)

| Group of countries                           | 1970 | 1973 |
|--|------|------|
| Developed market-economy countries . . . . . | 32.7 | 50.7 |
| Developing countries . . . . .               | 2.6  | 4.0  |
| Total  | 35.3 | 54.7 |

*Source:* UNCTAD secretariat estimate based on the information provided in table 13.

*Note:* The estimate is derived by applying the percentage shown in the last column of table 13 to the value of the manufacturing product of all countries included in each group of countries.

"advertising makes consumers buy goods which they do not really want", while 62 per cent of the respondents believed that "brands which are heavily advertised are more expensive than those which are less advertised or are not advertised at all". See *Advertising Age*, 26 July 1976, p. 20. See also foot-note 107 above.

<sup>150</sup> An important source of excess of resources being spent in advertising is when the demand for advertising messages on the part of the advertisers exceeds the demand for messages on the part of the consumers, which is the general case in consumer goods industries. See Camanor and Wilson, *op. cit.*, pp. 10-21. Also N. Kaldor, "The economic aspects of advertising", *The Review of Economic Studies* (Cambridge), vol. XVIII(1), No. 45, pp. 1-27; P. O. Steiner, "The economics of broadcasting and advertising: discussion", *The American Economic Review*, (Menasha, Wis.), vol. LVI, No. 2 (May 1966), p. 473.

<sup>151</sup> This estimate of advertising expenditure does not take into account another figure that should be included in assessing the resources involved in brand specific advertising, i.e. profits made by foreign firms and licensees in activities where trade marks are predominant. But, on the other hand, it includes advertising outlays which are purely informative.

TABLE 13

## Advertising expenditures in selected countries, 1970

| Countries   | Volume of advertising expenditures in millions of dollars | Advertising expenditures as percentage of GNP | Advertising expenditures as percentage of manufacturing product |
|---|---|---|---|
| <i>Selected developed market-economy countries:</i> |   |   |   |
| United States of America . . . . .                  | 19 600  | 2.11  | 8.11  |
| Germany, Federal Republic of . . . . .              | 2 694   | 1.56  | 3.63  |
| Japan . . . . .                                     | 2 115   | 1.14  | 3.17  |
| Canada . . . . .                                    | 1 037   | 1.25  | 6.32  |
| France . . . . .                                    | 997   | 0.72  | 1.99  |
| Italy . . . . .                                     | 489   | 0.56  | 1.75  |
| Australia . . . . .                                 | 457   | 1.44  | 6.26  |
| Spain . . . . .                                     | 276   | 0.92  | 3.70  |
| Turkey . . . . .                                    | 82  | 0.89  | 4.82  |
| Total of above                                      | 27 747  | 1.66  | 6.03  |
| <i>Selected developing countries:</i>               |   |   |   |
| Brazil . . . . .                                    | 350   | 0.92  | 3.84  |
| Argentina . . . . .                                 | 269   | 1.28  | 4.86  |
| Mexico . . . . .                                    | 214   | 0.68  | 2.97  |
| Venezuela . . . . .                                 | 55  | 0.55  | 2.17  |
| Chile . . . . .                                     | 39  | 0.62  | 3.43  |
| Egypt . . . . .                                     | 33  | 0.52  | 2.62  |
| Israel . . . . .                                    | 28  | 0.55  | 2.95  |
| Thailand . . . . .                                  | 15  | 0.22  | 1.38  |
| Saudi Arabia . . . . .                              | 5   | 0.17  | 1.92  |
| Guatemala . . . . .                                 | 4   | 0.22  | 1.37  |
| Ghana . . . . .                                     | 3   | 0.14  | 2.72  |
| Total of above                                      | 1 015   | 0.77  | 3.60  |
| Total of all countries listed                       | 28 762  |   |   |

Sources: UNCTAD secretariat's estimates based on the information provided by the International Advertising Association as quoted in P. R. Cateora and J. M. Hess, *International Marketing*, 3rd ed. (Lausanne, R. Irwin, 1975), p. 396.

207. The volume of advertising is high not only in industrialized countries but also in developing countries. In the group of selected developed countries mentioned in table 13, advertising expenditure amounted to 1.66 per cent of GNP and 6 per cent of the manufacturing product. In the United States, nearly twice as much was devoted to advertising as to privately financed research and development.<sup>152</sup>

208. Advertising outlays as a percentage of gross manufacturing output is higher in Argentina than in the Federal Republic of Germany, higher in Brazil than in Japan, in Ghana than in France and in Saudi Arabia than in Italy. Resources devoted to advertising activities in developing countries were 70 per cent higher than research and development expenditures.<sup>153</sup>

209. The importance of advertising in developing countries can also be measured by looking at advertising on radio and television. As shown in table 14, while advertising

<sup>152</sup> While total United States expenditure on research and development was \$17.9 billion, the portion financed by companies was \$10 billion in 1970, compared with an advertising volume of \$19.6 billion. See National Science Foundation, *Research and Development in Industry 1970* (Washington, D.C., 1972).

<sup>153</sup> Calculated on the basis of the information collection published in the UNESCO *Statistical Yearbook*, 1975.

TABLE 14

## Percentage share of advertising time in total hours of radio and television broadcasting

| Group of countries                          | Percentage of radio time <sup>a</sup> | Percentage of television time <sup>b</sup> |
|---|---------------------------------------|--|
| Developed market-economy countries . .      | 5.80                                  | 4.91                                       |
| Socialist countries of eastern Europe . . . | 0.89                                  | 2.20                                       |
| Developing countries . . . . .              | 19.84                                 | 11.85                                      |

Source: UNESCO, *Statistical Yearbook*, 1975.

(a) In the information relating to radio time, the following countries and territories are included: Afghanistan, Argentina, Austria, Barbados, Belgium, Benin, Bermuda, Botswana, Brazil, Congo, Cuba, Cyprus, Czechoslovakia, Egypt, Ethiopia, France, Greece, Hungary, India, Iran, Israel, Italy, Japan, Jordan, Madagascar, Malaysia, New Zealand, Nigeria, Norway, Poland, Romania, Socialist Republic of Viet Nam, Sudan, Sweden, Trinidad and Tobago, Turkey, United Kingdom, Yugoslavia, Zaire.

(b) In the information relating to television time, the following countries and territories are included: Argentina, Austria, Bahrain, Barbados, Belgium, Bermuda, Brazil, Cyprus, Czechoslovakia, Egypt, Ethiopia, France, German Democratic Republic, Greece, Hungary, Iran, Ireland, Italy, Japan, Jordan, Kuwait, Malaysia, Malta, New Zealand, Norway, Nigeria, Pakistan, Romania, Spain, Sudan, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Yugoslavia.

time accounts for 19.8 per cent of radio broadcasting time in developing countries, it is less than 1 per cent in socialist countries and represents 5.8 per cent in developed countries. In the case of television, the share of advertising time is even greater in Latin America: 26 per cent.<sup>154</sup> In countries where the degree of illiteracy is high, radio is the basic way to reach the largest sectors of the population. When the affluent groups of a country are to be reached, television is an ideal way to develop advertising activities, combined with newspapers, magazines and cinema.

210. In developing countries as everywhere else, advertising expenditure is concentrated on the promotion of consumer goods. The available information confirms such a pattern of sectoral distribution. In Argentina, research done in respect of firms with licence agreements<sup>155</sup> revealed that advertising expenditure as a percentage of sales was very high in cosmetics (13.6 per cent) and pharmaceuticals (12.6 per cent), and high in clothing (4.0 per cent), food and beverages (3.9 per cent), tobacco (3.3 per cent), scientific instruments (3.1 per cent) and household durables (2.7 per cent). A study in Peru<sup>156</sup> showed that advertising expenditure as a percentage of sales was relatively high in pharmaceuticals (4.2 per cent), food and beverages (2.4 per cent), automotive products (2.2 per cent) and in household durables (2.1 per cent).

211. Although the evidence is far from complete, it seems that advertising plays a considerable role in developing countries, especially in those countries whose internal markets are relatively large.

212. The figures showing the importance of advertising in developing countries give an idea of the magnitude of the resources involved in this activity. Not all advertising expenditures are devoted to persuasive advertising and therefore they cannot all be considered socially unjustifiable. But a large part of such expenditures are aimed solely at persuading consumers in their purchasing functions and can be regarded as a misallocation of resources.

213. While the above-mentioned conclusion is generally true in developing countries, the implications are more serious. In countries where resources required for solving the basic problems of underdevelopment are so scarce and/or have to be obtained from the industrialized world at a considerable cost, devoting such amounts of resources to advertising is hard to justify. To the extent that an important part of this advertising effort is made to develop the goodwill-creation function of trade marks, it is fair to suggest that trade marks play a role in this misallocation of resources.

214. In addition to the misallocation of resources to which trade marks contribute, there could be other social consequences that merit some consideration. First, persuasive advertising based on trade marks often provides mislead-

ing information,<sup>157</sup> or in other words, the persuasive content of the advertising message is much higher than its informative content. Secondly, it seems that advertising has a strong effect on child behaviour<sup>158</sup> and a serious influence on drug abuse.<sup>159</sup> Thirdly, some advertisers, who are among the largest trade marks holders, support television programmes with a strong content of violence.<sup>160</sup> These consequences cannot be attributed to every trade mark or to every advertising message. However, a significant number of trade marks are used through advertising messages, with all their possible social consequences, to persuade consumers of the advantages of purchasing a certain good or service.

## 2. Benefits brought about by trade marks

215. Trade marks provide a number of social benefits. Such benefits are derived to a large extent, as pointed out in chapter I, from the identification and guarantee function of trade marks when relied on by consumers in purchasing goods. The main benefits provided by trade marks are: reduction of losses associated with errors of commission; reduction of losses associated with errors of omission; reduction of resources and time spent on attempting to avoid these errors.

216. Regarding errors of commission, trade marks can reduce the incidence of repeated errors merely by identifying "good" and "bad" sources of goods and services.<sup>161</sup> Although specific evidence of the benefits of trade marks in this respect is not available, it seems that consumers' widespread reliance on trade marks, even in markets where buyers do in fact possess substantial expertise, indicates that some benefits are gained in this respect.

217. Trade marks contribute to avoiding errors of omission. Lacking trade marks to guide their purchases,

<sup>157</sup> In the survey already quoted on consumers' opinions, 76 per cent of them expressed the belief that "advertising often misleads consumers as to the quality of products" (*Advertising Age*, 26 July 1976, p. 20). Another example of misleading advertising is that of an American car manufacturer: the State of Illinois brought legal action against this manufacturer, alleging false advertising because some of its cars had engines different from those described in the advertising material (see *Financial Times* (London), 16 March 1977, p. 6).

<sup>158</sup> "A moderate television watching child today sees over 25,000 commercials per year ... 220 minutes of pure commercials per week try to shape his behavior." (United States Senate, *Advertising-1973, Hearings before the Consumer Subcommittee of the Committee on Commerce*, 93rd Congress, first session (Washington, D.C., U.S. Government Printing Office, 1973), p. 77.)

<sup>159</sup> See United States Senate, *The relationship between drug abuse and advertising, Hearing before the Consumer Subcommittee of the Committee on Commerce*, 91st Congress, second session (Washington, D.C., U.S. Government Printing Office, 1971).

<sup>160</sup> A recent study in the United States cited Chevrolet, Anacin, American Motors, Sears Roebuck and Eastman Kodak as the top five "most violent" advertisers. At the same time, it is generally believed that these programmes are one of the most important causes of the 250 per cent increase in violent crimes in that country. ("The clamor against TV gets results", *Business Week* (New York), 10 January 1977, p. 68.)

<sup>161</sup> "The greater the discrepancy between promised and actual experience qualities, the less likely the customer is to do further business with the same firm and the greater the likelihood that it will be worthwhile to recover damages or file charges for fraud." See M. R. Darby and E. Karni, "Free competition and the optimal amount of fraud", *The Journal of Law and Economics* (Chicago, Ill.), vol. XVI, No. 1 (April 1973), p. 72.

<sup>154</sup> See UNESCO, *Television traffic—a one-way street? A survey and analysis of the international flow of television programme material*, by K. Nordenstreng and T. Varis, Reports and papers on mass communication No. 70 (Paris, 1974), p. 19.

<sup>155</sup> See foot-note 106 above.

<sup>156</sup> See foot-note 105 above.



consumers would underestimate the quality of some goods as well as overestimate the quality of others. Consumers can match qualities and expectations with the identification provided by trade marks. "Brand names not only indicate quality but also give the consumer a means of retaliation if the quality does not meet expectations. For the consumer will then curtail future purchases. Often too, new products are associated with old brand names. This ensures the prospective consumer of the quality of the product."<sup>162</sup> This is the main indirect way to identify quality through the use of trade marks.

218. Finally, with respect to reducing resources devoted to error avoidance, the identification provided by a trade mark in some cases facilitates the process of purchase. This is particularly true of complex durable goods, such as automobiles and television and radio sets. It should be noted that privately operated product rating and reporting services—like *Consumers Reports* in the United States and *Which?* in the United Kingdom—could not operate were it not for the identification provided by trade marks. And of course the whole idea behind product rating is to reduce purchase errors.

### 3. Some conclusions

219. As long as trade marks are used to create brand loyalty among consumers through persuasive advertising, they are not merely a device which indirectly and beneficially reduces the incidence of quality misjudgements—i.e. errors of commission and omission. On the contrary, they contribute to errors of commission, errors which could be made persistently over time, reducing the price elasticity of demand as between brands of the same good. In other words, once consumers are used to buying the same brand, i.e. once they have developed trade mark allegiance, the producers can charge higher prices for their goods or at least they have power to do so, i.e. they have market power. Of course, this does not mean that every trade mark is used to create brand loyalty, or that every advertising effort is necessarily persuasive. However, it would appear that a substantial number of trade marks in certain consumer goods industries are used for such a purpose and the bulk of the advertising effort in consumer goods industries is of a persuasive character.

220. Trade marks yield benefits only in so far as they identify quality, thereby reducing purchasing errors or reducing the costs of identifying quality in other ways. Strictly speaking it is not necessary that trade marks identify the source of origin, since origin and quality are not necessarily synonymous. Nor is it necessary that trade marks establish market power; indeed to the extent that they do, or to the extent that they foster such power, they impose social costs. However, it would appear that these costs to society are benefits to the trade mark owner.

221. The main function of trade marks is goodwill creation through identifying origin or source, while the quality identification is a secondary function. Thus social costs exceed social benefits and the net over-all impact is negative in a number of key sectors. However, this duality in the trade mark function not only gives a clue to

understanding its net impact on society, but also provides a basis to suggest some policy proposals in this area (see chapter VI below).

### B. Costs and benefits of foreign-owned trade marks

222. In developing countries, particularly in Africa and Asia, foreign-owned trade marks represent the majority of new registrations and they certainly have the highest economic value and importance. Such marks consume most of the advertising efforts of the leading subsidiaries of manufacturing transnational corporations and of transnational advertising agencies, are strongly pushed through the mass media and become the symbols of the foreign business influence in the development process of the less advanced countries of the world. Their influence in the daily life of the affluent sectors of the developing countries' population is important, and their impact on certain products whose consumption extends across all sections of the population is such that they have practically redefined a number of basic needs.<sup>163</sup>

223. In so far as foreign-owned trade marks have such an importance in developing countries, not only has the behaviour of foreign manufacturing subsidiaries and licensees to be taken into account, but special consideration must also be given to the role played in this process by advertising agencies and the mass media. After these aspects have been taken up the economic and social impact of foreign-owned trade marks will be examined.

<sup>163</sup> Support for such a conclusion is furnished by the following: "The life of the middle to upper middle class bears a close resemblance to the same categories in America. A male Mexican shaves every morning with a TRAC II GILLETTE razor after applying an OLD SPICE shaving foam, or he connects his SUNBEAM or REMINGTON electric razor. He takes a bath with a DIAL, PALMOLIVE or COLGATE soap after washing his hair with BRECK shampoo. He combs his hair after applying ALBERTO VO5 hair conditioner or an ARAMIS hair spray. His clothes include ARROW shirts, COUNTESS MARA ties, FLORSHEIM shoes, HICKOK cufflinks and HART SCHAFFNER & MARX suits. His food is stored in a GENERAL ELECTRIC or WESTINGHOUSE refrigerator. His breakfast is likely to include SANKA or MAXWELL HOUSE coffee, QUAKER oatmeal, or KELLOGG'S RICE KRISPIES, or even pancakes prepared with AUNT JEMINA pancake flour, some of which may be prepared in an OSTER brand of cooking apparatus. He washes his teeth with CREST or BINACA toothpaste and with a DR. WEST'S or TEK toothbrush; he drives to his work in a FORD, DODGE or CHEVROLET automobile; uses in his work a PARKER or SHEAFFER pen on bond paper from KIMBERLY-CLARK. He smokes WINSTON or MARLBORO cigarettes and lights them with a CRICKET lighter. His photocopies are made from a KODAK or XEROX producer. His secretary uses an IBM typewriter. If he is overweight, he diets at noon with either Pfizer's LIMMITS or Mead Johnson's METRECAL. If he has a heavy dinner he will take a couple of ALKA-SELTZER antacid analgesic tablets and thereafter, before retiring upon his SIMMONS mattress, he might watch IRONSIDE or POLICE WOMAN on an ADMIRAL TV set or hear his favorite music on RCA VICTOR stereophonic equipment. On week-ends, if he is active in sports, he will use a WILSON tennis racket or PING or LYNX golf clubs. On his feet will be TRETORN sneakers or FOOT-JOY shoes. If he is a movie fan, he will see an MGM or a 20th CENTURY-FOX motion picture, and if he likes outdoors, he will go on a picnic with his family and eat KENTUCKY FRIED CHICKEN with a 7-UP or a COCA-COLA to wash it all down. A similar litany of foreign trademarks could be recited as part of the life and routine of the Mexican woman who comes from the middle class of Mexico" (Jorge Perez Vargas, "Major innovations regarding trade and service marks in the newly revised Mexican law on inventions and marks: a Mexican perspective", *The Trademark Reporter* (New York), vol. 66 (1976), pp. 188-189).

<sup>162</sup> See G. A. Akerlof, "The market for 'lemons': quality uncertainty and the market mechanism", *The Quarterly Journal of Economics* (Cambridge, Mass.), vol. LXXXIV, No. 3 (August 1970), pp. 499-500.



### 1. The role of transnational advertising agencies

224. The advertising agency is a key element in the development of persuasive advertising. In fact, persuasive advertising is the service that the agency sells, using for that purpose all the available means to reach the consumers. Such a service requires skilled personnel, a thorough knowledge of all technical and scientific developments to be used as inputs and a continuous assessment of the effectiveness of the different ways of developing advertising campaigns.

225. The activities of advertising agencies are both highly concentrated and internationalized. In the case of the United States agencies, the ten largest agencies accounted for 40 per cent of the total billings, while the seventy-seven largest agencies had 77 per cent of the total.<sup>164</sup> At the same time, the industry is becoming increasingly international, although the United States agencies practically dominate it.

226. The ten largest agencies of the world, whose billings account for 35 per cent of the world billings, had 42.5 per cent of their activities in foreign countries. As it is

possible to see in table 15, only the largest Japanese agency has a minimal foreign operation while, on the contrary, the United States agencies are becoming increasingly international. At the same time, the dominance of the United States agencies in world advertising activities is apparent. Only one of the ten largest agencies is non-American or without an American participation.

227. The internationalization of advertising activity is a concrete reality of our times. One way of appreciating this fact is by estimating the structure of ownership of advertising agencies' billings. As is shown in table 16, foreign participation in the advertising industry is very important, particularly in the developing countries. In those countries nearly 70 per cent of the total value of the agencies' billings in 1974 and 1975 were accounted for by foreign agencies or joint ventures with foreign agencies. While the United States and Japan are countries in which practically all advertising activity originates within the country, other developed market-economy countries like the United Kingdom and the Federal Republic of Germany, and some developing countries like Mexico and Brazil, show a strong foreign participation. In countries like Ghana, the Dominican Republic, Guatemala, Honduras, Indonesia, Jamaica, Morocco, Peru and Thailand, advertising is practi-

<sup>164</sup> Calculated from *Advertising Age*, 23 February 1976.

TABLE 15

#### The world's ten biggest advertising agencies by country, size and foreign content, 1975

| Rank  | Agency                                    | Nationality  | Total billings (millions of dollars) | Foreign content (percentages) |
|-------|---|--------------|--------------------------------------|-------------------------------|
| 1     | Interpublic Group of Cos <sup>a</sup>     | US           | 1 126                                | 57 <sup>b</sup>               |
| 2     | Dentsu Advertising                        | Japan        | 946                                  | 3 <sup>b</sup>                |
| 3     | J. Walter Thompson                        | US           | 900                                  | 52                            |
| 4     | Young & Rubican International             | US           | 801                                  | 40                            |
| 5     | Leo Burnett Co.                           | US           | 623                                  | 36                            |
| 6     | Ted Bates                                 | US           | 604                                  | 54                            |
| 7     | Ogilvy & Mather International             | US           | 581                                  | 54                            |
| 8     | International Needham Univas <sup>c</sup> | France/UK/US | 562                                  | 37 <sup>b</sup>               |
| 9     | Batten, Barton, Durstine & Osborn         | US           | 525                                  | 29                            |
| 10    | SSC & B-Lintas International <sup>d</sup> | UK/US        | 511                                  | 72 <sup>b</sup>               |
| Total |   |              | 7 179                                | 42.5                          |

Sources: *Advertising Age*, 23 February and 29 March 1976, and K. P. Sauvart, "Multinational enterprises and the transmission of culture: the international supply of advertising services and business education", *Journal of Peace Research* (Oslo), vol. XIII, No. 1, 1976, p. 49.

<sup>a</sup> The most important member of this group is McCann Erikson with \$775 million of billings, of which 70 per cent were abroad.

<sup>b</sup> Estimates for 1973.

<sup>c</sup> International Needham Univas (INU) consists of three partners:

|                          | Nationality | Billings | Percentage foreign | Percentage share in INU |
|--------------------------|-------------|----------|--------------------|-------------------------|
| Havas Conseil Group      | France      | 245      | 52                 | 37.5                    |
| Needham, Harper & Steers | US          | 213      | 22                 | 37.5                    |
| KMPH/Pemberton           | UK          | 94       | 31                 | 25.0                    |

The basis of International Needham Univas is an international co-operation agreements, with Needham responsible for the Western Hemisphere, Havas for the Continent of Europe, the Middle East and parts of Africa, and Pemberton for the United Kingdom, parts of Africa and Asia. The percentage of billings abroad refers to billings outside the three home countries.

<sup>d</sup> SSC & B Inc., New York, owns 49 per cent of SSC & B-Lintas International. Since SSC & B Inc., New York, effectively participates in the management of SSC & B-Lintas International, the billings of the two agencies have been combined. International Markets Advertising Agencies (IMAA) is a holding company jointly owned by agencies in 15 countries. The largest among them are IMAA/Man-Non-Sha (Japanese; billings 1973: \$83 million) and IMAA/Van Brunt (United States; billings 1973: \$23 million). The United States agency owns about 50 per cent in the holding company. IMAA is incorporated in New York.

TABLE 16  
Structure of ownership of advertising agencies' billings  
(Percentages)

|  | Agencies, <sup>a</sup> 1974 |                |          | Agencies, <sup>a</sup> 1975 |                |          |
|--|-----------------------------|----------------|----------|-----------------------------|----------------|----------|
|  | Foreign                     | Joint ventures | National | Foreign                     | Joint ventures | National |
|  | 1974                        |                |          | 1975                        |                |          |
| <i>Groups of countries:</i>                                  |                             |                |          |                             |                |          |
| Developed countries excluding United States of America . . . | 40.9                        | 7.4            | 51.7     | 42.1                        | 7.1            | 50.8     |
| Developed countries including United States of America . . . | 7.8                         | 3.2            | 89.0     | 18.6                        | 3.1            | 78.3     |
| Developing countries . . . . .                               | 62.1                        | 6.8            | 31.1     | 62.2                        | 6.7            | 31.1     |
| Total including United States of America . . . . .           | 19.5                        | 3.3            | 77.2     | 20.4                        | 3.3            | 76.3     |
| <i>Selected countries:</i>                                   |                             |                |          |                             |                |          |
| United States of America . . .                               | 0.1                         | —              | 99.9     | 0.6                         | —              | 99.4     |
| United Kingdom . . . . .                                     | 69.4                        | 5.5            | 25.1     | 69.8                        | 4.8            | 25.4     |
| Germany, Federal Republic of . . . . .                       | 63.0                        | 11.9           | 25.1     | 64.8                        | 11.7           | 23.5     |
| Japan . . . . .  | 4.2                         | 1.0            | 94.8     | 4.2                         | 1.0            | 94.8     |
| Spain . . . . .  | 59.4                        | 18.4           | 22.2     | 59.8                        | 19.3           | 20.9     |
| Mexico . . . . .   | 61.3                        | 6.2            | 32.5     | 62.0                        | 5.8            | 32.2     |
| Argentina . . . . .  | 38.2                        | 22.6           | 39.2     | 39.7                        | 29.2           | 31.1     |
| Brazil . . . . .   | 63.6                        | —              | 36.4     | 61.8                        | —              | 38.2     |
| India . . . . .  | 28.7                        | 31.6           | 39.7     | 32.5                        | 39.1           | 28.4     |

Source: UNCTAD secretariat estimates on the basis of the information provided by *Advertising Age*, 29 March 1976.

<sup>a</sup> Foreign agencies were considered those in which foreign participation was higher than 50 per cent, while joint ventures were considered those in which there was a minority foreign participation. National agencies were those which were 100 per cent in local hands.

cally dominated by international agencies,<sup>165</sup> while in other developing countries there exists an important participation of locally owned agencies, for instance in India and Argentina.

228. The importance of advertising agencies' activities in developing countries not only reflects the extent reached by persuasive advertising through sophisticated techniques of consumer persuasion but also shows how consumption patterns have been influenced by this industry. Advertising agencies, particularly those originating in the United States of America, are becoming transnational and are a basic factor in spreading all over the world the product differentiation activities characteristic of consumer goods industries in industrialized countries.

## 2. Foreign participation in the mass media industry

229. Advertising expenditures are incurred by business enterprises in order to differentiate their products. Advertising agencies are the organizations with the know-how to carry out this activity. The message reaches the consumer through the various mass media. Newspapers, magazines, television, radio, outdoor advertising, direct mail, messenger and cinema are the usual media to reach the audience in which the advertisers are interested. Although none of these

media has the same degree of development in developing countries as in the industrialized countries,<sup>166</sup> they are none the less of considerable importance. Not only are radio and television used for advertising purposes but other media also are used.<sup>167</sup> The mass media industry in developing countries—and also in some developed countries—are receiving a considerable participation of foreign-owned sources.

230. Consumers not only receive the direct message that business enterprises utilize in their advertising campaigns, but are also subject to a variety of indirect ways of promoting consumption and, particularly, consumption of foreign goods or of goods made under foreign-owned brands. These indirect ways include a presentation of the consumption patterns of the more affluent classes and/or of foreign countries. The impact on consumers of these means

<sup>166</sup> For example, the number of radio receivers per 1,000 inhabitants is 80 in developing countries and 656 in developed countries, while in Latin America—the best provided region in the third world—the figure is 170. In relation to television, there were 15 television receivers per 1,000 inhabitants in developing countries in 1973 (in Latin America the figure was 67), as against 207 receivers per 1,000 inhabitants in developed countries (see UNESCO, *Statistical Yearbook*, 1974, pp. 830, 856).

<sup>167</sup> An interesting example is the Indian experience with advertising. "Vick and Lever Brothers have organized the use of Indian cinema for advertising. There are 5,000 cinemas in which the purchaser of a movie ticket gets a free sample of the introduced product and sees the commercial. The cinema reaches 120 million Indians" (from *Sales Management*, 1 October 1969, p. 44).

<sup>165</sup> It is possible that the foreign participation in those countries is overestimated because the small local agencies were not taken into account in the *Advertising Age* compilation.

of influencing consumption patterns has been called the demonstration effect.<sup>168</sup>

231. To a large extent, the mass media—and behind them the advertisers and the advertising agencies—are responsible for the demonstration effect. In so far as the mass media broadcast foreign-made programmes<sup>169</sup> or domestic programmes reflecting foreign tastes, the preferences and tastes of consumers are influenced so that they will buy goods bearing foreign-owned brands. These programmes are often sponsored by subsidiaries of transnational corporations.<sup>170</sup>

232. The rationality and the consequences of persuasive advertising on television were clearly stated by an expert on the subject: "Countless studies have revealed that advertisers are interested in supporting TV broadcasts under conditions which promise to produce audiences favourably affected by the broadcasts as far as the advertisers' interests are concerned and not otherwise. Advertisers' influence on the programme content to be broadcast is subtle and pervasive and when a broadcasting system permits advertisers any choice of the time when advertisements will be broadcast it weakens its own control over the quality of the programmes and gives some control to advertisers. The tendency thus started is cumulative and irreversible. And the end result, as in commercial TV in the United States, Canada and many developing countries, is that the advertisers obtain virtually total control over the identity and quality of the programmes. ... For the consumers the advertiser-supported TV programmes are like the 'prizes' or

<sup>168</sup> See J. S. Duesenberry, *Income, Saving and the Theory of Consumer Behaviour* (Cambridge, Mass., Harvard University Press, 1949), p. 27.

<sup>169</sup> While the United States, Japan, the Soviet Union and the People's Republic of China are highly self-supporting, the percentage of imported programmes in Latin America varies from 10 per cent (Argentina) to 84 per cent (Guatemala) with an estimated average of 50 per cent for the whole region. In Africa and the Near East approximately half of the programmes were imported, while Malaysia, Singapore and New Zealand imported nearly three quarters of their programmes. (See UNESCO, *Television traffic—a one-way street? ... (op. cit.)*.)

<sup>170</sup> Although complete studies on the subject are not available, some examples from developing countries are very suggestive. "In Kenya, multinational firms sponsored over 80 per cent of radio advertising in the Swahili language and over 75 per cent of all newspaper advertising in Swahili and English." (G. K. Helleiner, "The role of multinational corporations in the less developed countries' trade in technology", *World Development* (Oxford), vol. 3, No. 4 (April 1975), p. 174.) "With at least \$50 million in advertising funds, the world's three biggest tobacco companies are saturating Brazilian television with the kind of commercials that used to appear on TV in the United States in the 1960s, before such ads were legislated out", (*Business Week* (New York), 4 October 1976, p. 104). In Argentina, where the largest advertisers are generally foreign subsidiaries, the four largest car companies had eight hours and a half of advertising time in the month of November 1971 in the four TV stations of Buenos Aires (H. Muraro, *Neocapitalismo y comunicación de masa* (Buenos Aires, University Press (EUDEBA), 1974), p. 230). In Indonesia it was found, in a Jakarta TV audience survey in 1974, that "foreign products completely dominated the ten TV advertisements which were recalled by at least one in three adults who had viewed TV during the past seven days when the survey was conducted" (see Alfian, "Some observations on television in Indonesia", paper presented to the Conference on Fair Communication Policy, East-West Center, Hawaii, 29 March to 2 April 1976, pp. 10-11, as quoted in Cees Hamelink, *The Corporate Village: the Role of Transnational Corporations in International Communication* (Rome, IDOC, 1977), p. 117).

'premiums' enclosed in the package of soap or breakfast food: a lure to get him to buy the advertiser's product. The lure is tailored to attract the specific kind of audience which the advertiser requires."<sup>171</sup>

233. When the mass media, and particularly television, are used as instruments in the advertising campaigns of the large firms,<sup>172</sup> the impact on society as a whole is very extensive, not only to the audience actually receiving the message, but also to the potential consumers for whom the demonstration effect is so important.<sup>173</sup>

234. The other side of the coin is the financing of the mass media industry. Although no information is available on that issue, it is very likely that for a number of countries advertising revenues are one of the most important sources to finance the mass media, especially television.<sup>174</sup> This circumstance has to be taken into account when new policies with regard to the content of the advertising messages and the share of advertising in the mass media are considered.

### 3. Costs of foreign-owned trade marks

235. The implications of foreign-owned trade marks can be analysed in terms of the costs that they impose on society. These costs can be divided into: (a) direct economic and financial costs; (b) indirect economic costs; and (c) indirect social and cultural costs.

#### (a) Direct economic and financial costs of trade marks

236. The direct economic and financial costs of trade marks are attributable to the market power that trade marks help create. As has been discussed in chapters II and IV, such a market power means that an enterprise, which may be a subsidiary or a licensee of a foreign trade mark owner, can charge higher prices, resulting in higher profits. This is a clear indication of misallocation of resources. This misallocation may also have balance of payments consequences for the country concerned. A high profitability achieved by foreign firms leads either to an increased share of the market of the host country and/or an increase in remittances, thereby affecting the balance of payments.

237. Remittances can take place in several forms. First, through royalty remittances for the use of foreign trade marks. Secondly, and more important, through different means that are used to transfer profits, such as technical fees, dividends, interest payments, over-pricing of imports

<sup>171</sup> Opinion of Professor D. W. Smythe, quoted in UNESCO, *Television traffic—a one-way street? ... (op. cit.)*, pp. 50-51.

<sup>172</sup> The enormous costs of TV advertising and the discounts made by TV stations to large advertisers made this medium a quasi exclusive means of large firms. Some information on this issue is given by M. E. Porter in "Interbrand choice, media mix and market performance", *The American Economic Review* (Menasha, Wis.), vol. 66, No. 2 (May 1976), p. 402 and H. Muraro, *op. cit.*, pp. 228-9.

<sup>173</sup> See R. J. Barnet and R. E. Müller, *Global Reach: The Power of the Multinational Corporations* (New York, Simon and Schuster, 1974), pp. 175-184, for an interesting analysis of the effects of advertising on developing countries' societies, especially on the lower incomes sections.

<sup>174</sup> For example, advertising represents 85 per cent of the income of Spanish television (*Cambio 16* (Madrid), 24-30 January 1977, p. 31). In Indonesia, in 1973, about 73 per cent of the total TV income came from advertising (see Hamelink, *op. cit.*, p. 117).

and under-invoicing of exports. In this way, the misallocation of resources in favour of foreigners and particularly of transnational corporations is reflected either in the balance-of-payments burden implied in the remittance of profits under different headings or in the availability of greater resources to finance their business expansion within the country.

(b) *Indirect economic effects of trade marks*

238. The indirect economic effects are chiefly reflected in the development of national enterprises and in the process of industrialization. Domestic firms engaged in the manufacturing of goods the consumption patterns of which favour foreign-owned brands have either to enter into licence agreements to receive such marks or to accept a reduced share of the market.<sup>175</sup> In some cases they even go out of business.<sup>176</sup> If the first road is chosen, the long-term costs are high and are mostly reflected in the inability of the licensee to get the fruits of the goodwill creation associated with the foreign mark. The lack of control over the commercialization process affects also the development by domestic firms of their own marks, both for domestic and export markets. If the second road is the only alternative, the consequences can be appreciated in the reduced participation of nationally owned firms in industrial development.

239. Here again, the problem of misallocation of resources arises. On the one hand, local resources are invested in manufacturing products that do not meet the basic needs of developing countries. On the other hand, the actual manufacturing of the product is generally carried out with labour-saving techniques designed for markets of larger size, and with components that are usually imported. The question is not only one of the misallocation of resources in favour of industries owned by non-residents, but also a bias in the allocation of resources to certain sectors of the national economy which often do not make appropriate use of the relative availability of labour and nationally produced components.<sup>177</sup>

<sup>175</sup> An interesting example is that of soft drinks. "Twenty years ago, the Mexican soft drink market was divided equally between Mexican and foreign brands. Today, foreign brands control three quarters of the market. Coca Cola Export Co. alone controls over 42 per cent of all Mexican soft drink sales." (R. J. Ledogar, *Hungry for Profits* (New York, IDOC/North America, 1975), p. 113.)

<sup>176</sup> The acquisition of firms (both foreign and domestic) has been a very common feature in the growth of the food processing industry and of the tobacco industry. See, in this connexion, Thomas Horst, *At Home Abroad: A Study of the Domestic and Foreign Operations of the American Food-Processing Industry* (Cambridge, Mass., Ballinger Publishing Co., 1973), and "Marketing and distribution of tobacco: study prepared by the UNCTAD secretariat" (TD/B/C.1/205).

<sup>177</sup> This is clearly stated by Langdon referring to the Kenyan experience: "[Transnational corporations] also, as in the case of soap, generate industrialization inappropriate to Kenya's resource base and employment needs. And they establish patterns of demand which it is more and more difficult for small-scale, indigenous Kenyan industrialists to meet. In that sense, the transnational corporations' role in Kenya seems responsible for blocking, in a general way, the development of decentralized local industry in a wide range of sectors." ("Firmes transnationales, transfert de goût et sous-développement: une étude de cas au Kenya (Transnational firms, transfer of taste and underdevelopment: a case-study in Kenya)", *Options méditerranéennes* (Paris), 5th year, No. 27, p. 78 (secretariat translation).)

240. Of course these economic effects cannot be attributed only to trade marks. However, trade marks are one of the leading factors in the development of manufacturing sectors with heavy emphasis on product differentiation and it therefore seems unlikely that these sectors would have had such a development without trade mark protection.

(c) *Indirect social effects of trade marks*

241. The indirect social and cultural effects basically result from a modification of consumption patterns, from the type of product to which the trade mark is attached and from the situation of cultural dependence which has emerged.

242. Foreign subsidiaries, through their marketing efforts, modify consumption patterns and local tastes in order to sell their products. Instead of adapting the products to the local needs, they adapt the local needs to their products,<sup>178</sup> and this is mostly done through advertising.

243. To make a different product for the consumers in developing countries would not only be uneconomic for enterprises which have already developed a range of products for the markets of the industrialized countries, but it would also disappoint the more sophisticated consumers who are after products similar to those offered in foreign markets.

244. Once the structure of consumption is biased in favour of the kinds of products made by foreign subsidiaries or under foreign-owned trade marks, it does not make sense, from the point of view of these firms, to change the consumption pattern and the kinds of products involved. On the contrary, it seems reasonable for them to maintain the consumption structure which demands these kinds of products.

245. Foreign subsidiaries and licensees are leading factors in the creation and re-creation of consumption patterns in favour of advertised products bearing trade marks. Advertising plays a role in shaping values, tastes and attitudes which, on the whole, contribute to consolidate what could be called a consumption ideology. This ideology is not only shared by the élites of developing countries who can afford expensive patterns of consumption, but it also extends to sectors of lower incomes.<sup>179</sup>

<sup>178</sup> Although some adaptations are made in order to equate the product to the conditions prevailing in each host country, it would appear that in the majority of cases, the product is basically the same.

<sup>179</sup> "Global marketeers are not persuaded that there is anything wrong with spreading the thrill of consumption in poor countries. 'The factory girl or the salesgirl in Lima or Bombay (or the Harlem ghetto)' says Peter Drucker, 'wants a lipstick. . . There is no purchase that gives her as much true value for a few cents.' The fact that she is in all probability malnourished and without a decent place to live does not mean that she is spending foolishly. Albert Stridsberg, an 'international advertising specialist' writing in *Advertising Age*, says that we must rid ourselves of 'the conventional range of ideas about what will minister to the poor man's physical needs. The psychological significance of his spending his money on a transistor radio may be more important than the physical benefit generated by spending the same money for basic foodstuffs.' It is an interesting theory, especially when applied to a country like Peru where, it is estimated, a substantial number of all babies born begin life with serious, and possibly irreparable, brain damage due to malnutrition." (Barnet and Müller, *op. cit.*, p. 177.)

246. In relation to consumption patterns, the point is not only that the poor in developing countries spend their tiny incomes on goods that do not satisfy their basic needs, but also that the manufacturing of these products requires inputs not available in the country,<sup>180</sup> and/or creates less employment than the traditional activities.<sup>181</sup>

247. A consumption structure is developed in these countries in favour of goods made under foreign names, making necessary the continuous supply of these goods, through foreign subsidiaries or local licensees, but also make it necessary to have a continuous injection of persuasive advertising.

248. The basic negative consequence of such a process is that this structure of consumption and production is particularly ill-suited to meet the basic needs of the population of developing countries in terms of shelter, food, medical assistance, entertainment and transport. The leading trade-marked products are generally not designed to meet such needs, but rather the needs of the affluent sectors of the population.<sup>182</sup> In some cases the product is inappropriate as such for the social and cultural development of the recipient country and its introduction sponsored by persuasive—and not informative—advertising makes it even more inappropriate.<sup>183</sup>

#### 4. Benefits of foreign-owned trade marks

249. The benefits of foreign-owned trade marks are much more limited than their negative effects. Through

foreign trade marks, developing countries have access to a number of products, many of them made in the country by foreign subsidiaries or through licensing agreements. The most valuable are certain capital goods made under recognized trade marks, some specialized consumer goods like drugs and products for tourism where the appeal of the franchisor's name is usually important. The manufacturing of these products in the country supposes the transfer of new technology, the introduction of marketing techniques that might be beneficial in certain areas such as distribution, quality control and inventory control.

250. The fact that advertising efforts are made in the country contributes to the employment of skilled people to carry them out and creates a number of domestic linkages. Far more important is the role of advertising in financing the entertainment industry, local radio and TV programmes, and as a sizeable source of income for newspapers and magazines. Although the information on this is very scarce, in some countries this might be an important factor.

251. From the point of view of consumers, foreign trade marks provide a certain amount of information about new products and give them some indication of the quality of the goods they may want to purchase. The introduction of some modern products can save time and offer goods (e.g. food products) which would not otherwise be available out of season or in distant areas.

#### C. Summary and conclusions

252. Whereas the private benefits that the owners of a trade mark derive from its use and licensing are high, the net benefits accruing to society are low.

253. Consumers pay higher prices for trade-marked goods because of the advertising effort behind them. This extra price seems not to be compensated for by the quality identification provided by trade marks.

254. From a social point of view, persuasive advertising leads to a misallocation of resources. This misallocation is reflected in the increase in consumption expenditures at the expense of savings and in superfluous consumption at the expense of basic consumption.

255. In the case of foreign-owned trade marks in developing countries, the misallocation of resources in favour of subsidiaries of transnational firms and local licensees has led to their securing a larger share in the domestic market and to an increase of remittances abroad, affecting the balance of payments. At the same time, licensees contribute to developing goodwill which accrues to foreign trade mark owners. This is a serious social cost for the host country.

256. The indirect social costs are reflected in the modification of consumption patterns achieved through the demonstration effect and the kinds of products designed to satisfy these patterns. Thus, resources are devoted to producing goods or services that do not satisfy people's basic needs but rather the sophisticated consumption patterns of affluent sectors of the population favouring products sold under foreign brand names.

<sup>180</sup> *Ibid.*, pp. 182-184, and Ledogar, *op. cit.*, chaps. 8 and 9.

<sup>181</sup> See, for example, F. Stewart, "Choice of technique in developing countries", *The Journal of Development Studies* (London), vol. 9, No. 1 (October 1972) and "Technology and Employment in LDCs", *World Development* (Oxford), vol. 2, No. 3 (March 1974); Helleiner, *loc. cit.*, and Langdon, *loc. cit.*

<sup>182</sup> As was observed in a study on the subject "Transnational corporations' taste-transfer is redefining the basic need for things to drink into a demand for Coke or Pepsi . . . , the basic need for food into demands for Lyon's Maid ice cream or Cadbury's chocolate bars; the basic need for medical aids into demands for Aspro, Cafenol or Cofta; the basic need for baby nourishment into the particularly dangerous demand for Lactogen or Clucorin; the basic need for transport into a demand for Peugeot and Mercedes" (Langdon, *loc. cit.*, p. 78 (secretariat translation)).

<sup>183</sup> The most serious example is that of baby milk and the attempts made by the food manufacturers to replace breast-feeding by bottle feeding using milk preparations. "... the baby food companies, using high pressure promotion techniques, have misled poorly educated mothers in developing countries to renounce breast-feeding. Instead they are won over to bottle feeding, their babies using milk preparations. Because the mothers are often illiterate or semi-illiterate, they don't follow the manufacturer's detailed instructions. So bottles go unsterilized or the powder is over-diluted. The mortality statistics tell the rest of the story—wherever bottle feeding is introduced in unsophisticated communities, baby death-rates shoot up dramatically". See Jonathan Power, "On controlling the advertising of baby food", *International Herald Tribune* (Paris), 29 June 1976, p. 4. In this case children are suffering not only the indirect consequences of not receiving breast-feeding, but also the direct negative effect of an inappropriate product for the social conditions in which they live. Of course, this dramatic case is not the general rule but it is a very significant one.

## Chapter VI

### POLICY ALTERNATIVES

257. This chapter deals with a number of policy alternatives on trade marks in general, and particularly with foreign-owned trade marks. It should be pointed out that trade marks are one of the elements in the long chain of product differentiation activities by which the non-price competition between business enterprises is developed. In order to promote price competition and, thereby reduce the market power of the enterprises engaging in product differentiation, trade mark policies and a number of related issues should be tackled at the same time. Such related issues include restrictive business practices, consumer protection, regulation of advertising, foreign investment and transfer of technology in general. However, as the aim of this report is the analysis of the role of trade marks, the policy discussion will focus on trade mark policies. Changes in trade mark legislation will not be sufficient to solve the wider problems associated with trade marks. A policy of wider scope will be necessary.

#### A. Policies in relation to trade marks in general

258. Given the way in which trade mark protection has been built, policies aimed at reducing its social costs and increasing its social benefits must concentrate on reducing the market power achieved through trade marks and on enhancing their quality-warranting function in order to increase consumer protection. In this connexion a number of policy alternatives will be considered in this chapter: (a) abolition of trade mark protection in certain sectors; (b) revocation or compulsory licensing of trade marks; (c) regulation of some matters relating to trade marks; (d) quality identification through trade mark legislation; (e) quality identification independently of trade marks. These alternatives are not necessarily mutually exclusive and as the discussion will indicate, it may be contemplated that at least some of them can be implemented concurrently.

##### 1. Abolition of trade mark protection in certain sectors

259. It has been shown that from the consumer's point of view trade marks have no significance as indicators of origin, except in so far as they are indicators of quality. It has also been suggested that the trade mark system is costly to society and therefore to consumers. Consumers would be better off if other, less costly, quality control mechanisms could be devised. Alternative quality control mechanisms will be discussed later in this report (see paras. 278 *et seq.* below).

260. A possible approach would be to abolish trade mark protection in certain sectors. E. H. Chamberlin has pointed out that "if producers were free to imitate the trade-marks, labels, packages, and products of others, no one would have any incentive to maintain the quality of his goods, for they would inevitably be imitated by inferior

products at lower prices, put up to look identical. It is evident at once that, in fields where differentiation is possible, the consumer needs legal protection against inferior quality. The law of trade-marks and unfair trading safeguards him by putting a premium on differentiation and protecting the monopolies thereby established. Equally effective, however, would be a policy of permitting imitation provided only it were perfect, or of defining standards of quality by law."<sup>184</sup>

261. Abolishing trade mark protection in some sectors might reduce the possibilities of differentiating products and, in this way, the market power originating from product differentiation activities might well be diminished. If such a course of action were to be undertaken, the legal protection of trade names<sup>185</sup> could be maintained to identify the origin of the product. This identification could prove useful both for the consumer and for the implementation of any system of quality control. Abolition of the trade mark protection and maintenance of the protection of trade names may raise some practical problems in its implementation. Some of these problems may relate to the fact that some enterprises have relied on trade names while others have marketed their products under a multitude of trade marks, thereby keeping their trade names relatively unknown to the consumers. The abolition of the protection for trade marks would therefore put enterprises in the latter category at a serious disadvantage vis-à-vis enterprises in the former category.

262. The removal of trade mark protection in certain economic sectors would, of course, necessitate, in the law of countries where such rules do not already exist, some system for protecting the honest businessman and the public against fraud.

263. Although trade mark protection has not been abolished in any country up to the present,<sup>186</sup> steps have

<sup>184</sup> E. H. Chamberlin, *The Theory of Monopolistic Competition: A Reorientation of the Theory of Value*, 5th ed. (Cambridge, Mass., Harvard University Press, 1947), p. 249. On the same page, a related question is answered: "A final argument in favour of trade-mark protection might be that it stimulates variety and hence gives the consumer a wider choice. This is desirable to be sure, but within limits. The question is one of weighing variety at a higher price against a more uniform product at a lower one, and theory affords an answer neither as to how far differentiation will 'naturally' be carried, nor as to how far it should be carried. . . . However, in so far as individual initiative would be checked in the creation of variety by allowing perfect duplication, there is reason to believe that such a check would not be without advantages. . . . Useless differentiation would be discouraged. Complete standardization would not follow for the consumers' desire for variety would still have its natural effect in guiding production."

<sup>185</sup> See foot-note 5 above on the concept of trade names.

<sup>186</sup> The possibility of withdrawing trade mark protection for a particular sector has been contemplated in certain national legislation; for instance the new Mexican Law on Inventions and Trade Marks on 1976 contemplates in article 125 the possibility of

been undertaken towards that end in the pharmaceutical industry. As was pointed out in chapter IV (paras. 184 *et seq.*), the largest number of trade marks in developing countries are concentrated in that industry and it is there that the proliferation of brand names is most acute.

264. In India, the Hathi Committee<sup>187</sup> proposed the replacement of brand names of drugs by pharmacological or generic names in a phased manner. For a number of drugs extensively used, the pharmacological name should be immediately applied and for the remaining ones both the generic names and the trade mark should be used.<sup>188</sup>

265. India has decided to abolish brand names in the first instance in respect of the following five drugs: analgin, aspirin, chlorpromazine, ferrous sulphate and piperazine and its salts. At the same time it was decided that all single ingredient drugs included in the Indian Pharmacopoeia other than those in respect of which brand names have been abolished should bear labels displaying prominently the generic names, while brand names should be shown on labels in a less conspicuous manner.<sup>189</sup>

266. While in India these recommendations are under consideration, in Sri Lanka a rather similar proposal has actually been applied with a gradual reduction in the number of drugs and a changeover from brand names to generic names. In Afghanistan a statute imposing the use of generic names for pharmaceuticals was recently enacted.<sup>190</sup> In the United States, the State Assembly of the State of New York recently passed a bill that would require physicians to include the generic name of the drug on every prescription but would allow them to specify a brand if they felt it was necessary.<sup>191</sup>

267. While one of the main advantages of the Sri Lanka experience<sup>192</sup> was the gradual way in which it was

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prohibiting the use of trade marks in any sector, for social reasons. In this regard, developing countries have considered that article 7 of the Paris Convention for the Protection of Industrial Property should be deleted because it may be used against national policies on trade marks in particular sectors of the economy (see 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 (TD/B/C.6/24/Add.1, annex IV), sect. III, para. 6 (c)).

<sup>187</sup> India, Ministry of Petroleum and Chemicals, *Report of the Committee on Drugs and Pharmaceutical Industry* (New Delhi, April 1975), pp. 260-261.

<sup>188</sup> In relation to quality standards, the Committee stated: "scrutiny of the total number of substandard, misbranded and spurious products reported... will reveal that there are more instances of branded products being misbranded or spurious. There have been no instances where a product marketed under a generic name has ever been reported to be spurious." (*Ibid.*, p. 245.) In any case, it was proposed that the system of quality control should be enforced and that more facilities should be given to the undertaking of bio-availability studies for those few drugs in which they are important. On the question of bio-availability, see "A case study of the pharmaceutical industry" (TD/B/C.6/4), subpara. 91 (c).

<sup>189</sup> See statement submitted to the Lok Sabha on 29 March 1978 by Shri H. N. Bahuguna, Minister of Petroleum, Chemicals and Fertilizers, containing Government Decision on the (Hathi) Committee on the drugs and pharmaceuticals industry.

<sup>190</sup> The Generic Drugs Law, passed by the Council of Ministers under resolution No. 418 (it received the assent of the President on 18 June 1976).

<sup>191</sup> See *The New York Times*, 19 May 1977, p. A1.

<sup>192</sup> See "Case studies in transfer of technology: pharmaceutical policies in Sri Lanka" (TD/B/C.6/21).

implemented, this was not the case with a similar experience in Pakistan that led to a proliferation of spurious drugs. Attempts to reduce the proliferation of drugs were also made in Brazil through a government body called Central de Medicamentos (CEME).<sup>193</sup>

268. Regarding the imports of pharmaceutical products, developing countries have an immediate possibility of achieving large savings in foreign exchange. In the experience of the State Pharmaceuticals Corporation of Sri Lanka, the average price reduction was 30 per cent for all imported pharmaceuticals. Applying this figure to the total import bill of developing countries for pharmaceuticals in 1971 (\$905 million), the amount of foreign exchange saved would be \$270 million. It seems that a strong case can be made in favour of importing pharmaceuticals under generic names. Such importation will be more effective if import pooling arrangements are established. This question is now receiving increasing consideration in developing countries.<sup>194</sup>

269. Although an analysis of the difficulties found in applying such schemes would go beyond the scope of the present report, the case of the pharmaceutical industry is a good case for policy proposals aimed at shifting from non-price to price competition in the manufacturing sector through the abolition of trade marks.

## 2. Revocation and compulsory licensing of trade marks

270. An alternative solution to the sectoral abolition of trade marks is that of revocation or forfeiture of the trade mark for reasons of public interest.<sup>195</sup> This solution was envisaged by Decision 85 of the Commission of the Cartagena Agreement, article 77 of which provides that "a penalty of definitive cancellation of the trade mark or license shall be imposed when the competent national authority verifies that the owner or licensee of the mark has speculated or made unlawful use price-wise or quality-wise of a product protected by the trade mark to the detriment of the public or the economy of a Member Nation".

271. A different sort of penalty for misuse of a trade mark is that of compulsory licensing. In what is apparently the first case of its kind, an administrative law judge has

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<sup>193</sup> A basic list of medicaments was drawn up on the basis of which most of the country's chemically treatable health problems could be met. This list formed part of a "Master Plan" which included tight control on the sale and promotion of drugs, regulations on the content of package inserts and restrictions on the distribution of free samples. By the end of 1973 CEME was dealing with 108 pharmaceutical products, of which 52 were classified as essential. See *Business Latin America* (New York), 5 December 1973, p. 380. See also P. B. Evans, "Foreign investment and industrial transformation: a Brazilian case study", *Journal of Development Economics* (Amsterdam), vol. 3, No. 2 (July 1976), pp. 133-136.

<sup>194</sup> The Fifth Conference of Heads of State or Government of Non-Aligned Countries, held at Colombo (11-19 August 1976), adopted a resolution on co-operation among developing countries in the production, procurement and distribution of pharmaceuticals. This resolution expressed support for "the elimination, wherever possible, of brand names and the adoption of the generic names for pharmaceuticals" (see A/31/197, p. 150).

<sup>195</sup> This solution was explicitly recommended in the Declaration of governmental experts from developing countries members of the Group of 77 (TD/B/C.6/24/Add.1, annex IV, sect. III, para. 6 (a)). It should be added that a mark struck off the Registry would not be used again by another interested party.



handed down an initial decision in a case brought by the United States Federal Trade Commission against Borden Incorporated, a producer of reconstituted lemon juice with the brand name *ReaLemon*, ordering Borden for a period of ten years to grant a trade mark licence to any person or enterprise desiring to enter the business of producing and marketing processed lemon juice under the name *ReaLemon*. The decision contained the following reasoning: "The heart of the monopoly power preserved and maintained by respondent Borden lies in the *ReaLemon* trade mark and its dominant market position. For competition to enter the processed lemon juice industry, the barrier to entry which inheres in the *ReaLemon* trade mark must be eliminated. As a consequence, in the judgment of the undersigned, the only effective relief under the facts shown by the record in this case requires the licensing of the *ReaLemon* brand name to others wishing to enter the production, marketing and sale of processed reconstituted lemon juice".<sup>196</sup>

272. In order to avoid a reduction in the quality of the product, the administrative law judge considered that a royalty of 0.5 per cent of licensee sales paid to Borden to compensate its efforts in maintaining quality would be an appropriate solution. Although the final decision in that case has not yet been reached,<sup>197</sup> the proposal of compulsory licensing for trade marks deserves serious attention. It could become an alternative policy in cases where the utilization of a trade mark has been the main basis of a monopoly position.

273. The Mexican Law on Inventions and Trade Marks of 1976 provides for the possibility of compulsory licensing. Article 132 states that the Government can establish compulsory licences for reasons of public interest, mainly for social reasons rather than for reasons concerning the abuse of market power.<sup>198</sup>

### 3. Regulation of matters related to trade marks

274. The abolition of trade mark protection in certain sectors and the revocation or compulsory licensing of a particular trade mark are policy alternatives based on the crucial assumption that in particular sectors or specific cases the trade mark as such is the basic source of market power. If, on the contrary, trade marks are conceived as one of the elements in the long chain of product differentiation activities, it is possible to keep the use of trade marks and to try to reduce the market power achieved by their owners via the regulation of the other elements of the

<sup>196</sup> United States of America, Federal Trade Commission, Initial Decision Docket No. 8978, in the matter of Borden, Inc., 19 August 1976, p. 164.

<sup>197</sup> This decision has been appealed by Borden. See *Business Week* (New York), 20 September 1976, p. 37, and *Business International* (New York), 8 October 1976, p. 327. A comprehensive discussion of this issue may be found in J. Thomas McCarthy, "Compulsory licensing of a trade mark: remedy or penalty?", *The Trademark Reporter* (New York), vol. 67 (1977), pp. 197-254.

<sup>198</sup> In his explanation before the Chamber of Senators, the Mexican Minister of Industry and Commerce cited the case of a textile firm that had become bankrupt and, in order for the workers, who were to be subsidized by the Government, to continue with the business, it was necessary to continue using the same famous trade mark, which belonged to a person other than the company, and the Government had no legal means to provide for its use by the workers.

chain. For example, a policy of banning, reducing or taxing persuasive advertising<sup>199</sup> might be effective in promoting price competition and, therefore, reducing the market power. At the same time, a control of the use of advertising in the mass media can become very effective in reducing the extent of persuasive brand-specific advertising.

### 4. Quality identification through trade mark legislation

275. The quality identification function of trade marks might be enforced through a change in the trade mark law and procedures. Once such a function is explicitly recognized by law, not only consumers but also the government would be able to check the quality of a product. Trade mark rights might be cancelled if the trade market product no longer has the quality it had when it was first introduced.<sup>200</sup> To some extent, a reform of the trade mark law to enforce the quality-warranting function of trade marks would mean that trade marks could become a liability for the producers, but it would certainly be a much more socially balanced system than the present one.

276. In industrialized countries, and in some developing countries, the rapidly spreading practice of franchising and of licensing make it difficult to refer to trade marks as serving to identify origin.<sup>201</sup> It should be noted that in at least some countries trade marks may be licensed only as long as control is maintained by the licensor<sup>202</sup> over the quality of the goods that are sold by the licensee.

277. In Canada a proposal has been made to create a new mark, called a "product mark".<sup>203</sup> The product mark should have certain standards which the applicant has to define on registration, and if he licenses such a mark for use by others, this use should also be registered. In addition to the product mark and licensed product mark, the Canadian proposal suggests keeping the traditional trade mark, in the historic meaning of the term, as an indicator of source or

<sup>199</sup> While relatively little has been done to reduce the volume of advertising, many initiatives have been taken to regulate the content of the message in order to avoid misleading advertising. Examples can be found in a law enacted in Venezuela (September 1974), and in the Mexican Law on consumer protection (December 1975). See Inter-American Development Bank, Institute for Latin American Integration (INTAL), "El marco jurídico de la innovación tecnológica en América Latina (legislación comparada)" (Buenos Aires, December 1976), (mimeographed), vol. II, pp. 338, 462-463.

<sup>200</sup> While this system is generally applied in relation to capital and intermediate goods purchased by industrial enterprises, it is hardly used for consumer goods. In Latin America, for example, certification marks or labels like ITINTEC in Peru, INEN in Ecuador and NORVEN in Venezuela are relevant examples of the approach used in producer goods. See Carlos Correa, "El derecho de marcas en América Latina" (Buenos Aires, INTAL, August 1977), (mimeographed), pp. 24-26.

<sup>201</sup> The report of the Economic Council of Canada on intellectual and industrial property states: "A mark licensed by its owner to another may attest to particular features of the product or service, but it is neither an indication of source, nor an assurance that buyers have recourse to the owner, should the performance of the product prove to be unsatisfactory." (*Report on Intellectual and Industrial Property* (Ottawa, 1971), p. 207.)

<sup>202</sup> See J. T. McCarthy, *Trademarks and Unfair Competition* (Rochester, New York, the Lawyers Co-operative Publishing Company, 1973), vol. 1, chap. 18, part II.

<sup>203</sup> See Economic Council of Canada, *op. cit.*, p. 208. A critical examination of the proposal is made in Department of Consumer and Corporate Affairs, "Working Paper on Trade Marks Law Revision", Ottawa, January 1974.



origin and the certification mark, as an instrument to be used by organizations dealing with quality standards.

#### 5. *Quality identification independently of trade marks*

278. Although the trade mark system is not a particularly satisfactory means to develop quality standards, alternative means that would be just and effective are not easy to find.

279. Trade marks serve indirectly to identify a given level of quality but at considerable economic and social cost, namely the creation of market power. The issue is then to find alternative ways of assuring quality standards that would not only be able to reduce the economic and social costs, but also be more efficient.

280. A number of possibilities can be imagined for the development of a system of quality identification and guarantees that operate independently of trade marks. Included under this heading would be consumer education programmes (to make consumers behave more like professional buyers), information disclosure programmes (such as complete product labelling), government regulation of minimum standards of product performance, etc. The general aim of such ideas is to shift from subjective differentiation, as is promoted by the trade mark owners, to objective identification as should be achieved by industrial consumers facing well established systems of quality standards. The evidence concerning producer goods indicates that when quality guarantees are established independently of trade marks by a system of quality standards, then market power based on trade mark differentiation and advertising is not readily detectable. However, it is important to bear in mind that the alternatives mentioned do not necessarily mean the abolition of trade marks or a widespread development of compulsory licensing. They can be developed gradually, while the trade mark, as an industrial property right, remains as it is. But they would be more effective if the other aspects of the product differentiation process were also modified.

#### B. Fee policy in respect of trade marks

281. Some information on the fees charged by Trade Mark Offices in selected countries is shown in annex III of this report.<sup>204</sup> An examination of the information on fees reveals a number of interesting features. The figures show that fees charged by Trade Mark Offices in developing countries are, on average, half the amount of those charged in developed market-economy countries.<sup>205</sup>

282. While developed countries, with some exceptions, have a higher or equal fee for renewal than that charged for the registration of a trade mark, the majority of developing countries have a lower fee for renewal than for registration. Some countries, especially in Africa, do not charge any fee for renewal. It would appear that no country has a fee policy based on certain features of the trade mark as an

<sup>204</sup> For purposes of rough comparison, the several fee structures are considered only under three headings: application, registration and renewal fee for a trade mark in each class. The figures in annex III below are the latest data available and were converted into dollars at the official rate of exchange prevailing at each date.

<sup>205</sup> The average registration fee is \$32 in developed market-economies and \$17 in developing countries.

asset, trying to differentiate between trade marks of different economic value.<sup>206</sup>

283. In addition to the low revenues resulting from trade mark registrations in developing countries,<sup>207</sup> it is striking to find no economic criteria applied in the fee policy with respect to trade marks. Even the most elementary principle, charging a higher fee in the case of a renewal than in the case of a registration, is not applied in developing countries. By contrast, developed market-economies generally charge more in the case of renewals and, in the case of the United Kingdom and Japan, substantially more.

284. In the designing of a fee policy, several instruments can be used. First, fees for application and registration could be raised through the application of specific economic criteria, such as distinction according to the size of the enterprise, the sector in which it operates and its nationality. Secondly, in order not to encumber national trade mark registers with unused marks, and in order to take advantage of renewals, a strong case can be made in favour of higher renewal fees. Thirdly, given the considerable value acquired by certain trade marks as assets, either a tax or a fee in proportion to the value of this intangible asset could be levied.<sup>208</sup>

285. The criteria according to which a fee policy on trade marks is implemented will vary from country to country. The important aspect to be pointed out in this connexion is that, like tariffs and income taxes, trade mark fees can be designed towards specific purposes, in accordance with national development objectives.

#### C. Policies in relation to foreign-owned trade marks

286. As a consequence of the growing importance of international trade and investment, a significant number of trade marks have been granted to foreigners in recent years, as was shown in chapter III, section D, above. Although the share of foreigners in the ownership of trade marks is becoming very important in developing countries, especially those located in Africa and Asia, it can be said that it is a more generalized phenomenon. The socialist countries of eastern Europe, the Nordic countries, the Benelux countries, and some southern European countries like Greece, have also been significant repositories of registrations of trade marks by foreigners. For this reason, foreign-owned trade marks are really an issue to be taken into account.

287. The general aim of the policies in relation to foreign-owned trade marks should be to reduce the costs of using them—through licence agreements with domestic enterprises and directly by foreign subsidiaries of trans-

<sup>206</sup> El Salvador is the only country that charges a different fee for registration depending on the nationality of the applicant.

<sup>207</sup> A rough estimation of the incomes received by 64 developing countries on the basis of the number of trade marks in force and the fees charged for them suggests that less than \$2 million is collected per year, a sum which is clearly insufficient to meet the costs of running the national trade mark offices in those countries.

<sup>208</sup> Article 24 of Decision 24 of the Commission of the Cartagena Agreement provides that "On the proposal of the Board, the Commission may propose to member countries that taxes be levied on products bearing foreign trade marks that involve royalty payments, where the technology employed in the manufacture of those products is publicly available or readily accessible" (unofficial translation).

national corporations—and to promote nationally owned marks both for the internal market and for exports.

1. *Initiatives to reduce the costs associated with foreign trade marks*

288. A number of policy alternatives in fact exist for dealing with foreign-owned trade marks. A first approach would be to accept their existence but to try to reduce royalty payments for their use, and thus avoid some restrictive business practices associated with trade mark licences. A second line of action would be to develop combined trade marks, i.e. the joint use of a nationally owned mark with a foreign-owned one, permanently or for a limited time. Finally, the most radical possibility would be the banning of all foreign-owned trade marks, immediately or after a transition period. Of course, several variants are possible in any of these three approaches.

289. A ceiling on royalty payments for the use of foreign-owned trade marks, combined with the prohibition of payments between the subsidiaries and the parent companies of transnational corporations for the use of foreign-owned trade marks is, in one form or another, the policy applied in some developing countries like Brazil, India, the Republic of Korea and the members of the Andean Group. These measures are combined with rules aimed at reducing the most restrictive aspects of trade mark licences.<sup>209</sup>

290. In relation to combined trade marks, the new Mexican Law on Inventions and Trade Marks of 1976 and the recent Brazilian regulations of 1975 (Normative Act No. 15 of the Brazilian Patent Office) have had differing approaches. Article 127 of the Mexican Law states that "any trade mark of foreign origin or whose ownership corresponds to a foreign physical or legal personality that is destined to protect products manufactured or produced in the national territory, will have to be used linked with a trade mark originally registered in Mexico. Both marks must be used in an equally prominent way." According to Article 91 (XIII), marks registered in Mexico may not consist of words of a live foreign language or their corresponding phonetic equivalent, or in the combination of two or more words of a live foreign language. The trade marks originating abroad are those registered or used in a foreign country before they were registered in Mexico.<sup>210</sup> It is important to note that Article 127 only applies to those goods made in Mexico. Imported goods can be sold with foreign-owned trade marks without any linkage to a domestic mark.

291. Article 128 states that the licence of a trade mark that is foreign-owned or of foreign origin cannot be authorized unless such a mark is to be used jointly with a mark originally registered in Mexico and whose owner is the licensee. The obligation of the linkage must be fulfilled within the period of one year from the registration of the agreement and no duration is established for the obligation mentioned. In contrast with the Mexican provision, which

is mandatory and extends only to licences of trade marks of foreign origin, the Brazilian regulation is optional and makes no distinction regarding the nationality of the trade mark owners. The regulation states that any trade mark licence agreement must include a clause giving the licensee the option of using his own trade mark accompanied by the licensor's trade mark on products covered by the licence agreement. Therefore, the option is left open to the licensee but the provision mentioned is compulsory for any sort of trade mark licences, involving not only Brazilian and foreign-owned marks, but also agreements between national owners of registered trade marks. The Argentine Law No. 20794 of 28 October 1974 on transfer of technology provides that a combined trade mark is one of the possibilities allowed during a transition period of five years after which all foreign marks are to be forbidden in the country.

292. In the case of Colombia, the Royalties Committee has been encouraging the use of combined trade marks, especially in licensing agreements in which trade marks are the main object of the contract. So far this policy has actually been applied in four cases and the Committee has the intention of pursuing the same policy approach.<sup>211</sup>

293. The combined trade mark is a way of sharing the benefits of the development of the goodwill between licensor and licensee. However, apparently no time-limit has been established for that linkage in the case of Mexico and Brazil. With a time-limit, the combined trade mark is a means to help national enterprises to develop their own marks until they are sufficiently well known to stand on their own feet. Without a time-limit, the combined trade mark becomes an instrument in which the final recipient of the goodwill development may not necessarily be the domestic enterprise.

294. Thus far, the banning of all foreign-owned trade marks has not been attempted in any country.<sup>212</sup> If a country were to decide to carry out such a policy, two difficult problems would arise. First, how are the foreign-owned trade marks to be valued if any compensation is to be paid to the owners? Secondly, until foreign-owned marks are replaced by domestic ones, it would be necessary to use combined trade marks for a limited period until the consumers get used to the new names. Moreover, substantial costs would be involved in relabelling many goods.

295. No empirical studies appear to have been undertaken up to the present on the policy options discussed above. The comments that follow should be considered only as a preliminary analysis.

296. If it is assumed that the flow of foreign technology is unaffected by any regulation on trade marks, the problem of a negative reaction from the licensors will not exist, and therefore host countries will not be concerned with this aspect. If, however, even though the relatively minor role of trade marks in actual royalty payments is recognized, the importance of trade marks as fundamental intangible assets of corporations is stressed, a policy

<sup>209</sup> See C. Correa, *op. cit.*, pp. 36-41, on the Latin American experience, and *Business Asia* (Hong Kong), 3 December 1976, pp. 389-390, on the Republic of Korea.

<sup>210</sup> See Jorge Pérez Vargas, "Major innovations regarding trade and service marks in the newly revised Mexican law on inventions and marks: a Mexican perspective", *The Trademark Reporter* (New York), vol. 66 (1976), p. 197.

<sup>211</sup> See "Recuento de las labores del Comité de Regalías de Colombia" (1976-1977), Bogotá.

<sup>212</sup> The Argentine Law No. 20794 of 28 October 1974 established that, after a transition period of five years, foreign trade marks would be allowed only for the export of the product to other countries.

restricting or banning foreign-owned trade marks may affect future flows of foreign technology or capital. Nevertheless, the reaction of the suppliers will vary according to demand conditions, the type of industries and firms involved and the policies on related issues.<sup>213</sup>

297. With respect to the actual impact of a policy regarding foreign-owned trade marks on local enterprises, the situation is complex. As long as foreign subsidiaries continue to do business in the country using their trade names, even though they use domestically created trade marks, local firms which are engaged in manufacturing or selling competitive products can be at a serious disadvantage. In this connexion, it is important to bear in mind that in many cases the licensees are those who are really interested in having a licence of foreign-owned trade marks in order to be able to compete with transnational corporations in the domestic market. If a policy of combined trade marks is implemented, subsidiaries will use both the foreign trade mark of the corporation with which they are affiliated and a domestically created trade mark, which would be a situation not very different from the present one. Domestic firms using a combined trade mark will be in a better position to compete with subsidiaries, although it is not clear to what extent the goodwill development will be really a joint venture. In any case, and as long as the combined trade mark is permanent, it will be difficult for domestic firms to achieve a long-term autonomy in this aspect of their marketing policy.

298. In the case of the Republic of Korea the situation of domestic firms was apparently different. The Government has been trying to reduce the reliance on foreign-owned trade marks. This policy has not affected the sales of domestic licensees when they dropped the foreign-owned trade marks. According to a survey conducted by the Korean Patent Association, more than 80 per cent of the firms surveyed believed they would not have any problems if their foreign-owned trade marks were cancelled.<sup>214</sup>

299. In addition to the costs associated with relabelling products, any transfer of ownership of trade marks poses the problem of how to value the foreign-owned trade marks actually being used in the country. The price that the licensor would ask for the mark would be equal to the discounted value of the expected future profits that he attaches to the mark. In that case, the licensee would have to pay for the long-term cost of having the foreign-owned trade mark.

300. The introduction of measures aimed at reducing the costs associated with foreign trade marks for developing countries might in some cases necessitate a modification of some of the provisions on trade marks in the Paris Convention (see above, paras. 19 *et seq.*). In that connexion, developing countries have put forward a number of demands. The most important is that the principle of national treatment should not constitute an obstacle to

adoption of policies aimed at reducing the harmful effects of foreign-owned trade marks.<sup>215</sup>

## 2. Trade marks and imports

301. According to the principle of the territoriality of trade mark rights, the owner of a trade mark has protection under the law where the trade mark is in effect not only in relation to domestic competitors but also in respect of the importation of goods bearing trade marks that are either identical or sufficiently similar.

302. Thus, a trade mark owner is protected against imports that are introduced into the country by others than those authorized to do so by the trade mark owner in that country (parallel imports). While non-recognition of this principle could mean, in certain cases, cheaper prices of the goods sold in a particular country, in developing countries another factor must be taken into account: the protection of domestic industry. Trade marks can be a beneficial restriction with respect to parallel imports as long as domestic and nationally owned industries exist and can make use of such advantages. In this sense, a trade mark fulfils the same role as a tariff in protecting the development of infant industries. However, subsidiaries of transnational corporations would also benefit from this restriction on parallel imports.

303. The problem of trade mark protection against imports is different when a common market is established. Article 75 of Decision 85 of the Commission of the Cartagena Agreement states that a trade mark owner cannot stop the importation of goods carrying the same mark and coming from another member country.<sup>216</sup> In this case the scope of trade mark rights is limited as long as the encouragement of trade between member countries is the main objective of the common market.

304. In the European Economic Community, the principle of exhaustion of trade mark rights applies once goods bearing the mark have been sold by the owner of the mark or someone authorized by him. In cases where the mark has originated in common ownership, or as between affiliated enterprises, the principle of the free movement of goods inside the Community has prevailed over the trade mark rights.<sup>217</sup>

305. Proposals exist for a single trade mark to apply throughout the European Economic Community.<sup>218</sup> The EEC trade mark will not replace national trade marks, which will still be available for enterprises which do not require Community-wide protection.

<sup>215</sup> See Declaration of governmental experts from developing countries members of the Group of 77 (TD/B/C.6/24/Add.1, annex IV), sect. III, para. 6 (d).

<sup>216</sup> To avoid confusion, the Andean Group decision established that a clear indication of the member country in which the product was made must be stated with the trade mark.

<sup>217</sup> For a review of the jurisprudence of the Court of Justice of the European Economic Community, see Peter Hay and Dieter Oldekop, "EMI/CBS and the rest of the world: trademark rights and the European Communities", *The American Journal of Comparative Law* (Berkeley, Calif.), vol. XXV, No. 1 (winter 1977), p. 120.

<sup>218</sup> See "Memorandum on the creation of an EEC trade mark", document SEC (76) 2462.

<sup>213</sup> In the case of Mexico, the implementation of the combined trade marks has been rather difficult, given the negative reactions of many foreign-owned firms. The February 1978 deadline for linking foreign-owned trade marks with domestic marks was postponed for a year and the Government has been trying to approach the issue on a sectoral basis. See *Business Latin America* (New York), 16 November 1977, pp. 361-362.

<sup>214</sup> See *Business Asia* (Hong Kong), 3 December 1976, p. 389.

#### D. Summary

306. In order to modify some of the negative effects of trade marks, especially those owned by foreigners, policies at the national and international levels could be implemented. Initiatives have already been taken in some countries, but the problem has not yet been dealt with in a comprehensive manner.

307. Within the framework of trade mark regulation, a number of modifications can be proposed. Abolition of trade mark protection in certain sectors, revocation, compulsory licensing, enforcement of the quality identification function of trade marks and combined trade marks are some of the measures that might be implemented in any reformulation of trade mark policies. A policy on trade mark fees based on economic criteria might also be implemented.

308. This brief review of policy alternatives in the matter of trade marks has concentrated on those issues directly connected with trade marks. However, the indirect economic and social implications in terms of consumer protection, the modification of consumption patterns, the appropriateness of the product and cultural attitudes are also of importance. To change these features of the development process it is not only necessary to modify the

regulation of trade marks, but also to deal with a number of key related issues. These include, in particular, legislation on consumer protection, policy on quality standards, policy on foreign investments and technology in the area of consumer goods, the regulation of advertising in the mass media, regulation of the content of advertising messages<sup>219</sup> and advertising activities—especially those of the transnational agencies—and the question of restrictive business practices in the context of the type of competition that is being carried out in developing countries. Although changes in the trade mark legislation can have important effects on the way in which the development process takes place, these changes will be much more significant if they are conceived of as part of a more general policy to shift emphasis from non-price to price competition, from the fulfilment of fancied needs to the satisfaction of basic needs, and to reallocate resources from advertising to research and development or other activities aimed at the creation of technology and self-reliance.

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<sup>219</sup> Peru has been one of the few countries which have regulated the content of commercial advertising. The use of foreign names in advertising messages has been banned, and the advertising effort is required to avoid the promotion of foreign consumption patterns. Cf. Supreme Decree 003-74-OCI.

## PART THREE

### A FRAMEWORK FOR NEW POLICIES ON TRADE MARKS

#### Chapter VII

#### GENERAL SUMMARY AND CONCLUSIONS

309. The main features of trade marks and the impact of trade marks in general on the development process of developing countries have been analysed in the preceding chapters. Some of the main findings of this report may be briefly summarized in this chapter to serve as a framework for formulating new policies in this area.

##### A. General summary

310. Legislation on trade marks is relatively recent. The majority of trade mark laws were enacted in the second half of the nineteenth century. In 1900, all the present developed market-economy countries, all countries that are now socialist countries and practically all the Latin American countries had trade mark legislation. Trade marks constituted one of the industrial property rights that were included in the Paris Convention for the Protection of Industrial Property of 1883.

311. Modern trade marks emerged during the nineteenth century, although marks have been used for centuries. They are one of the instruments used in the process of product differentiation by which competition among business enterprises is developed in a number of industries. The main function of a trade mark is the creation of goodwill. It becomes an intangible asset for business enterprises as long as it helps to develop allegiance among consumers towards the product to which the trade mark is attached. The secondary function of a trade mark is to identify products and, indirectly, their quality.

312. Identification of a given origin or source, on an exclusive and permanently protected basis as conceived by the trade mark law, permits the creation of market power for trade mark holders. This power over price is achieved by persuasive advertising aimed at creating brand loyalty.

313. Persuasive brand-specific advertising is carried out mainly in consumer goods industries. These ordinary consumers are the targets of the advertising effort of business enterprises and are those whose trade mark allegiance is developed. Consequently, prices of advertised goods are generally higher and profits made in those industries are usually larger than in those sectors where the advertising effort is small.

314. Competition through product differentiation has brought about a proliferation of trade marks. In 1974, about 4 million trade marks were in force and nearly 325,000 new trade marks were registered in the world. Seventy per cent of the new trade marks were registered in developed market-economy countries, 27 per cent of them in developing countries and only 3 per cent in the socialist

countries of eastern Europe. The socialist countries of eastern Europe have attained a high level of industrialization although they have made limited use of the trade mark system. In contrast, while developing countries have accounted for about 8 per cent of the world manufacturing output they hold 27 per cent of the registered trade marks.

315. Of the trade marks granted by developing countries, 50 per cent are owned by foreigners. The participation of foreign-owned trade marks is higher in Africa (88 per cent) and in Asia (65 per cent) than in Latin America (34 per cent). At the same time, some developed market-economy countries and socialist countries had an important and growing share of foreigners in the structure of trade marks ownership.

316. Ninety-five per cent of foreign trade marks in developing countries are owned by nationals, mostly transnational corporations, of developed market-economy countries. These trade marks are used, in some cases, to cover imported goods and, generally, products made in the host countries by foreign manufacturing subsidiaries and licensees. For those corporations making consumer goods for which marketing is their main asset and for which trade marks are the most valuable element in such assets, this industrial property right is a major source of market power. This is an important factor in explaining the leading share in the market that has been achieved by subsidiaries of transnational corporations that are specialized in consumer goods.

317. Chemicals, food, tobacco and textiles account for 60 per cent of the new trade marks registered in developing countries in 1974. The pharmaceutical industry holds a larger amount of trade marks in developing countries than any other industry (16.7 per cent in 1974). There the competition through brand proliferation has reached the highest levels all over the world.

318. Domestic enterprises making similar goods must either accept a reduced share of the market or must enter into trade mark licence agreements. But even in those cases, although licensees of foreign-owned trade marks receive a current profit out of the licence, they cannot enjoy the results of the development of goodwill associated with the trade marks.

319. The market power derived from the use of foreign-owned trade marks is reflected in the profitability achieved by subsidiaries of transnational corporations and by licensees. This profitability can be reflected either in an increased burden on the balance of payments of the host country through the different kinds of remittances of

profits, or in the availability of greater resources to finance their domestic expansion.

320. Foreign subsidiaries and licensees are the main advertisers in consumer goods industries. This advertising effort is made through transnational advertising agencies—which hold 70 per cent of advertising billings in developing countries and high shares in many developed market-economy countries—and diffused through the mass media, where foreign influence in developing countries is considerable. Enormous resources are involved in brand-specific advertising. Part of the advertising effort made in developing countries has been devoted to promoting trade marks. An idea of the resources involved can be obtained by looking at the total advertising expenditures in developing countries. They are estimated at \$4 billion in 1973 or approximately 0.8 per cent of the GNP of these countries. In sharp contrast, the national research and development expenditures of these countries amount to only about one half of their total expenditures on advertising.

321. Because of the existence of trade marks, consumers pay higher prices than would appear to be justified by the amount of quality control they receive through the existence of trade marks. The advertising effort carried out by the producer is well rewarded by the accrual of assets in terms of goodwill for the trade mark owner. Thus, the gains of the producers are financed by higher prices paid by consumers. In the case of foreign-owned trade marks the situation is even more extreme. Although the advertising expenditures are born by the consumers of the developing countries, the accrual in goodwill is for the benefit of the non-resident owner of this intangible asset. These private benefits—mostly appropriated by the foreign trade mark owner—can be considered as net social costs to the recipient country.

322. In addition to these direct social costs, there are indirect social costs to be considered. The pattern of dependent industrialization is reinforced by trade marks. Foreign-owned trade marks have played an important role in shaping the consumption patterns in their favour, leading to a misallocation of resources in the production of goods and services which are less than well suited to the basic needs of the population of developing countries. In these circumstances, the social benefits that can be attributed to trade marks—an indirect way of identifying quality in consumer goods—are limited compared with the high social costs involved in the operation of foreign-owned trade marks.

323. This is the background for the concern that is being expressed, particularly in developing countries, about the current impact of trade marks. Some of these preoccupations have been reflected in new laws and policies on trade marks in countries like Mexico, Brazil, Argentina and the member countries of the Andean Group, in initiatives to shift from brand names to generic names in the pharmaceutical industry as was proposed in India and actually applied in Sri Lanka and Afghanistan, and in new approaches being developed in Canada and the United States of America. In addition, the current concern with consumer protection in industrialized countries—and its likely impact on developing countries—has important implications for devising new policies on trade marks and related areas.

324. The direction of these initiatives has been a shift from the traditional concern with the protection of the private interests of the trade mark holder (mostly a foreigner in the case of many developing countries) towards a more balanced system in which the interests of consumers are safeguarded. Concurrently, initiatives that have been taken in developing countries are aimed at promoting nationally-owned trade marks and at reducing the negative impact of foreign-owned trade marks upon the balance of payments, the domestic enterprises and the development process in general.

## B. Conclusions

325. A new policy approach will have to be considered in order to change the inadequate role that trade marks have played in the protection of consumers everywhere as well as to change the negative impact of trade marks on the development process of developing countries. Such a policy approach requires a comprehensive set of measures on trade marks and on related issues both at the national and international levels.

326. The aim of any policy should be to diminish the market power created by enterprises through product differentiation activities in which trade marks play a prominent role. One policy approach would be to deal with the rules and policies relating to trade marks only. Another policy approach would be to deal also with the other aspects of product differentiation activities—such as advertising—which complement trade marks. Neither of these approaches, if adopted by itself, will be sufficient to solve the problem under discussion. Trade marks and related areas should be examined together in order to obtain the necessary reforms.

327. Certain non-exclusive policy alternatives with respect to trade marks must be examined closely. In those industries in which there is a strong brand proliferation, such as the pharmaceutical, food and tobacco industries, the withdrawal of trade mark protection could be seriously considered. In the case of pharmaceuticals, the idea of switching from brand names to generic names has actually been applied in Afghanistan, India and Sri Lanka. Such a policy will bring about considerable foreign-exchange savings in respect of the import bill for pharmaceuticals, particularly when this policy is combined with an active search for the most competitive sources of supply in the world market (see para. 268 above), and a reduction in the domestic health expenditures devoted to pharmaceuticals.

328. Possible approaches specifically aimed at countering abuse of market power created through a trade mark would be revocation or compulsory licensing. The latter was recently adopted by the Federal Trade Commission of the United States (see para. 271 above). The Mexican Law on Inventions and Trade Marks of 1976 provides for compulsory licensing under certain circumstances of social need. Article 77 of Decision 85 of the Commission of the Cartagena Agreement provides for revocation in cases of misuse by the trade mark owner.

329. Initiatives to improve the quality control function of trade marks in respect of consumer goods could be taken either within the framework of trade mark law, taking into account the special interests of consumers, or outside the framework of trade mark law. The purpose of such initiatives would be to build a system of objective quality

standards. To mention an example of an initiative within the framework of the trade mark law, the Economic Council of Canada proposed the establishment of production marks, the quality of which would be registered with the mark. Alternatively, a number of national public and private institutions are engaged in the quality control of capital goods independent of the trade mark law. The scope of their activities could possibly be extended to consumer goods.

330. New policies could be developed in the area of trade mark registration fees. So far, fees charged by trade mark offices in developing countries are on average half of the fees charged in developed countries. Renewal fees in developing countries are generally lower than their initial registration fees; the opposite is found in developed countries. Fees could be charged according to certain criteria, for example, the size of the enterprise. Higher renewal fees could be charged by developing countries. Also, a tax on the market value of the trade mark could be considered, especially in developing countries.

331. Special measures could be taken in developing countries in respect of foreign-owned trade marks. In order to share the accrual of goodwill between the foreign trade mark owner and the local licensee, the idea has been developed recently of combined trade marks. This is the use in licensing agreements of a foreign-owned trade mark jointly with a trade mark that was created within the country. In Mexico, a foreign-owned trade mark may no longer be used by itself in the domestic market; it is required that the foreign mark should be combined with a

Mexican mark. A policy approach along this line, in conjunction with regulation of trade mark licences, ceilings in royalty payments, and measures to promote nationally owned trade marks in internal and export markets, might produce significant changes in the present situation.

332. A more integrated approach would combine the revision of trade mark policies with appropriate measures on related issues. Among the most important of such issues are control of advertising expenditures and content of advertising messages, regulation of advertising in the mass media, policies on foreign investment and transfer of technology in consumer goods industries, regulation of restrictive business practices and consumer protection legislation. Some of these aspects have not yet been examined in developing countries. However, they are of paramount importance in any serious attempt to accelerate the development process in fruitful directions.

333. It is against this background that the reformulation of trade mark laws and policies is to be considered. Clearly, a departure from traditional patterns is called for, both at the national<sup>220</sup> and at the international<sup>221</sup> level.

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<sup>220</sup> A number of suggestions have been put forward by developing countries to deal with the problems raised by trade marks in their economies. See Declaration of governmental experts from developing countries members of the Group of 77 (TD/B/C.6/24/Add.1, annex IV), sect. III, paras. 8-10.

<sup>221</sup> For the demands of the developing countries in relation to trade marks and the Paris Convention for the Protection of Industrial Property, *ibid.*, para. 6.





## ANNEXES

### Annex I

#### THE IMPACT OF TRADE MARKS ON THE DEVELOPMENT PROCESS OF DEVELOPING COUNTRIES

##### Agreed conclusions and recommendations of the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology<sup>a</sup>

1. The Group of Governmental Experts noted with appreciation the efforts of the secretariat of UNCTAD in preparing the report entitled "The impact of trade marks on the development process of developing countries".<sup>b</sup> The report addressed itself to a number of important issues having both direct as well as indirect relations to trade mark legislation and practices, including matters relating to consumer protection, fair trade practices, quality standards, ingredient labelling and advertising. Since there was delay in the availability of the report for consideration by national authorities and interested parties, the Group of Governmental Experts could give only general consideration to some of the more pertinent issues. The Group agreed that those issues raised by the report which directly relate to trade mark legislation and practices at the national level in developing countries should be taken into consideration by the Governments of these countries in formulating their national trade mark laws and policies and by the World Intellectual Property Organization in the current efforts to revise the Paris Convention for the Protection of Industrial Property and to develop a new model trade mark law for developing countries.

2. The Group of Governmental Experts was of the opinion that appropriate trade mark legislation can achieve an equitable balance between the public interest and the private interest and can be a useful instrument for economic and social development.

3. In this connexion, the Group of Governmental Experts agreed that the process of revision of the Paris Convention, as well as the preparation in WIPO of a new model law for developing countries on trade marks, should be guided, *inter alia*, by the following considerations:

(a) The purpose of trade marks is to serve the legitimate interests of consumers, by enabling them to distinguish and select goods and services, and the legitimate interests of their owners to protect the goodwill connected with the goods and services sold under their marks;

<sup>a</sup> Adopted by the Group of Governmental Experts at its session held at Geneva from 6 to 14 October 1977 and annexed to its report on that session (TD/B/C.6/24-TD/B/C.6/AC.3/4 and Add.1).

<sup>b</sup> Document TD/B/C.6/AC.3/3, the revised text of which is published in this volume.

(b) Trade marks should not be deceptive or mislead the consumer;

(c) Trade marks and, in particular, certification marks and collective marks could serve as one of the appropriate means of ensuring the necessary standards of quality of goods;

(d) The protection granted to trade marks should not justify misleading and/or otherwise abusive practices forbidden under national laws relating, for example, to the prices and quality of goods and services;

(e) The consideration in WIPO of non-reciprocal preferential treatment for nationals of developing countries including the matter of trade mark fees, should be continued;

(f) The adoption in national legislation of appropriate use requirements for trade marks, including a defined term for starting use of the mark, is useful;

(g) The licensing of trade marks serves legitimate business interests and should be encouraged on mutually beneficial and equitable terms, including goodwill;

(h) Developing countries should consider the use of indigenous appellations of origin and trade marks belonging to enterprises in their countries for promoting their exports;

(i) The possibility of providing in national law for cancellation of trade marks violating the legitimate interests of consumers, producers and sellers should be considered;

(j) Continued co-operation between national authorities should be encouraged in order to avoid, to the extent feasible under national law, registrations of trade marks that are misleading as to origin.

4. The consideration in WIPO of the question of possible conflict between appellations of origin and other geographical indications and trade marks should be continued.

5. The Group of Governmental Experts was of the opinion that, during the current deliberations in WIPO on the revision of the Paris Convention, all Governments should take fully into account the concern expressed by the developing countries regarding their public interest and their ability to adopt appropriate legislation and policies in that interest.

## Annex II

## YEARS OF ADOPTION OF NATIONAL TRADE MARK LAWS

| Country  | Year of adoption of  |                        | Country                                   | Year of adoption of  |                        |
|--|----------------------|------------------------|---|----------------------|------------------------|
|  | First trade mark law | Present trade mark law |   | First trade mark law | Present trade mark law |
| <i>Developed market-economy countries:</i>         |                      |                        |   |                      |                        |
| Australia . . . . .                                |                      | 1955                   | Morocco <sup>31</sup>                     |                      |                        |
| Western Australia . . . . .                        | 1884                 |                        | French Protectorate . . . . .             | 1916 <sup>32</sup>   | 1917 <sup>33</sup>     |
| Southern Australia . . . . .                       | 1892                 |                        | Tangier Zone . . . . .                    | 1938 <sup>34</sup>   | 1938                   |
| Austria . . . . .                                  | 1858                 | 1970                   | Nigeria . . . . .                         | 1888 <sup>35</sup>   | 1965                   |
| Benelux . . . . .                                  |                      | 1971 <sup>1</sup>      | Rwanda . . . . .                          | 1888 <sup>36</sup>   | 1963                   |
| Belgium . . . . .                                  | 1879                 |                        | Sierra Leone . . . . .                    | 1913 <sup>37</sup>   | 1960 <sup>38</sup>     |
| Luxembourg . . . . .                               | 1883                 |                        | Somalia <sup>39</sup>                     |                      |                        |
| Netherlands . . . . .                              | 1893                 |                        | Former British Somaliland . . . . .       | 1938                 | 1938                   |
| Canada . . . . .                                   | 1879                 | 1970                   | Former Italian Somaliland . . . . .       | 1955                 | 1955                   |
| Denmark . . . . .                                  | 1880                 | 1959                   | Sudan . . . . .                           | 1969                 | 1969                   |
| Finland . . . . .                                  | 1889                 | 1964                   | Swaziland . . . . .                       | 1940 <sup>40</sup>   | 1967 <sup>40</sup>     |
| France . . . . .                                   | 1857                 | 1964                   | Tunisia . . . . .                         | 1889 <sup>41</sup>   | 1953 <sup>41</sup>     |
| Germany, Federal Republic of . . . . .             | 1818 <sup>2</sup>    |                        | Uganda . . . . .                          | 1889 <sup>42</sup>   | 1965 <sup>42</sup>     |
|  | 1874 <sup>3</sup>    | 1967                   | United Republic of Cameroon . . . . .     | 1888 <sup>43</sup>   | 1962                   |
|  | 1869 <sup>4</sup>    | 1968                   | United Republic of Tanzania <sup>44</sup> |                      |                        |
| Iceland . . . . .                                  | 1869 <sup>5</sup>    | 1968                   | Tanganyika . . . . .                      |                      | 1957 <sup>45</sup>     |
| Ireland . . . . .                                  |                      | 1963                   | Zanzibar . . . . .                        | 1893 <sup>46</sup>   | 1933 <sup>46</sup>     |
| Italy . . . . .                                    | 1868                 | 1948 <sup>6</sup>      | Zaire . . . . .                           | 1888 <sup>47</sup>   | 1964                   |
| Japan . . . . .                                    | 1888                 | 1960 <sup>7</sup>      | Zambia . . . . .                          | 1964                 | 1964                   |
| New Zealand . . . . .                              | 1889 <sup>8</sup>    | 1953 <sup>9</sup>      |   |                      |                        |
| Norway . . . . .                                   | 1884                 | 1961                   | <i>Asia:</i>                              |                      |                        |
| Sweden . . . . .                                   | 1862                 | 1960                   | Afghanistan . . . . .                     |                      | 1960                   |
| Switzerland . . . . .                              | 1879                 | 1890 <sup>10</sup>     | Bahrain . . . . .                         |                      | 1955                   |
| United Kingdom . . . . .                           | 1862                 | 1938                   | Bangladesh . . . . .                      | 1889 <sup>48</sup>   | 1940 <sup>49</sup>     |
| United States of America . . . . .                 | 1870                 | 1946                   | China . . . . .                           |                      | 1963                   |
|  |                      |                        | Democratic Kampuchea . . . . .            | 1954 <sup>50</sup>   |                        |
| <i>Southern European countries:</i>                |                      |                        | Democratic Yemen . . . . .                |                      | 1940 <sup>51</sup>     |
| Greece . . . . .                                   | 1893                 | 1939 <sup>11</sup>     | India . . . . .                           | 1889 <sup>48</sup>   | 1958                   |
| Portugal . . . . .                                 | 1883                 | 1940                   | Indonesia . . . . .                       | 1885 <sup>52</sup>   | 1961                   |
| Spain . . . . .                                    | 1850                 | 1929 <sup>12</sup>     | Iran . . . . .                            | 1931 <sup>53</sup>   | 1958 <sup>54</sup>     |
| Turkey . . . . .                                   | 1872                 | 1965                   | Iraq . . . . .                            | 1957                 | 1957                   |
|  |                      |                        | Israel <sup>55</sup> . . . . .            | 1938                 | 1940 <sup>56</sup>     |
| <i>Socialist countries of Eastern Europe:</i>      |                      |                        | Jordan . . . . .                          | 1952                 | 1952                   |
| Albania . . . . .                                  | 13                   | 1957                   | Kuwait . . . . .                          | 1961                 | 1962 <sup>28</sup>     |
| Bulgaria . . . . .                                 | 1892                 | 1967                   | Lebanon . . . . .                         | 1924 <sup>57</sup>   | 1946                   |
| Czechoslovakia . . . . .                           | 14                   | 1952                   | Malaysia <sup>58</sup>                    |                      |                        |
| German Democratic Republic . . . . .               | 1818 <sup>2</sup>    | 1954                   | Malaya . . . . .                          | 1950                 | 1956                   |
|  | 1874 <sup>3</sup>    |                        | Sabah . . . . .                           | 1949                 | 1949                   |
| Hungary . . . . .                                  | 1858                 | 1969                   | Sarawak . . . . .                         | 1957                 | 1957                   |
| Poland . . . . .                                   | 15                   | 1963                   | Mongolia . . . . .                        |                      | 1967                   |
| Romania . . . . .                                  | 1879                 | 1967                   | Pakistan . . . . .                        | 1889 <sup>48</sup>   | 1940 <sup>48</sup>     |
| USSR . . . . .                                     | 1667 <sup>16</sup>   | 1974                   | Philippines . . . . .                     | 1884 <sup>59</sup>   | 1947 <sup>60</sup>     |
|  |                      |                        | Republic of Korea . . . . .               | 1949                 | 1973                   |
| <i>Developing countries:</i>                       |                      |                        | Saudi Arabia . . . . .                    | 1939 <sup>61</sup>   | 1974 <sup>62</sup>     |
| <i>Africa:</i>                                     |                      |                        | Singapore . . . . .                       | 1888 <sup>63</sup>   | 1968                   |
| African and Malagasy Union <sup>17</sup> . . . . . |                      | 1962                   | Sri Lanka . . . . .                       | 1888 <sup>64</sup>   | 1953                   |
| Algeria . . . . .                                  | 1966                 | 1966                   | Syrian Arab Republic . . . . .            |                      | 1946                   |
| Botswana <sup>18</sup> . . . . .                   | 1923 <sup>19</sup>   | 1955 <sup>19</sup>     | Thailand . . . . .                        | 1931                 | 1961 <sup>28</sup>     |
| Burundi . . . . .                                  | 1964                 | 1964                   | Viet Nam . . . . .                        |                      | 1958                   |
| Egypt . . . . .                                    | 1939                 | 1939                   |   |                      |                        |
| Equatorial Guinea . . . . .                        | 20                   | 20                     | <i>Latin America:</i>                     |                      |                        |
| Ethiopia . . . . .                                 | 20                   | 20                     | Argentina . . . . .                       | 1876                 | 1900 <sup>56</sup>     |
| Gambia . . . . .                                   | 1916 <sup>21</sup>   | 1958 <sup>22</sup>     | Bahamas . . . . .                         | 1906 <sup>65</sup>   | 1960 <sup>65</sup>     |
| Ghana . . . . .                                    | 1888 <sup>23</sup>   | 1965 <sup>24</sup>     | Barbados . . . . .                        |                      | 1949 <sup>66</sup>     |
| Guinea . . . . .                                   | 25                   | 25                     | Bolivia . . . . .                         | 1893                 | 1965                   |
| Kenya . . . . .                                    | 1897 <sup>26</sup>   | 1965 <sup>27</sup>     | Brazil . . . . .                          | 1875                 | 1971                   |
| Liberia . . . . .                                  | 1868                 | 1924                   | Chile . . . . .                           | 1874                 | 1931                   |
| Libyan Arab Jamahiriya . . . . .                   | 1956                 | 1962 <sup>28</sup>     | Colombia . . . . .                        | 1890 <sup>67</sup>   | 1971                   |
| Malawi . . . . .                                   | 1889 <sup>29</sup>   | 1962 <sup>30</sup>     | Costa Rica . . . . .                      | 1896                 | 1975                   |
| Mauritius . . . . .                                |                      | 1970                   | Cuba . . . . .                            | 1884 <sup>68</sup>   | 1936 <sup>56</sup>     |
|  |                      |                        | Dominican Republic . . . . .              |                      | 1937                   |

| Country             | Year of adoption of  |                        | Country                            | Year of adoption of  |                        |
|---------------------|----------------------|------------------------|------------------------------------|----------------------|------------------------|
|                     | First trade mark law | Present trade mark law |                                    | First trade mark law | Present trade mark law |
| Ecuador             | 1928                 | 1971 <sup>69</sup>     | <i>Other developing countries:</i> |                      |                        |
| El Salvador         | 1921                 | 1921                   | Cyprus                             | 1892 <sup>74</sup>   | 1971                   |
| Guatemala           | 1897                 | 1924                   | Fiji                               | 1886 <sup>75</sup>   | 1933 <sup>75</sup>     |
| Guyana              | 1888 <sup>70</sup>   | 1956 <sup>70</sup>     | Malta                              | 1899 <sup>76</sup>   | 1899 <sup>77</sup>     |
| Haiti               |                      | 1960                   | Samoa                              | <sup>78</sup>        | 1972                   |
| Honduras            | 1919                 | 1957                   | Yugoslavia                         |                      | 1961                   |
| Jamaica             | 1888 <sup>71</sup>   | 1957                   | Bosnia and Herzegovina             | 1880                 |                        |
| Mexico              | 1884                 | 1975                   | Serbia                             | 1884                 |                        |
| Nicaragua           | 1907                 | 1968 <sup>28</sup>     | <i>Other States:</i>               |                      |                        |
| Panama              | 1890 <sup>72</sup>   | 1974                   | Holy See <sup>79</sup>             | 1929                 | 1929                   |
| Paraguay            | 1889                 | 1889                   | Liechtenstein                      | 1866                 | 1928 <sup>80</sup>     |
| Peru                | 1892                 | 1970                   | Monaco                             | 1955                 | 1955                   |
| Trinidad and Tobago | 1888 <sup>37</sup>   | 1955 <sup>73</sup>     | South Africa                       | 1892                 | 1963 <sup>81</sup>     |
| Uruguay             | 1877                 | 1940                   |                                    |                      |                        |
| Venezuela           | 1877                 | 1955                   |                                    |                      |                        |

Sources: BIRPI, *La Propriété Industrielle*, vol. 16, year 1900, pp. 49-51; *Katarov's Manual on Industrial Property all over the World*, 8th ed., prepared by Dr. André Reverdin, Geneva, 1976; Octrooibureau Los en Stigter, *Manual for the Handling of Applications for Patents, Designs and Trade Marks throughout the World* (loose-leaf edition), Amsterdam.

<sup>1</sup> Benelux Trade Mark Treaty ratified by the Netherlands in 1963, by Luxembourg in 1968 and by Belgium in 1969; effective 1971.

<sup>2</sup> Kingdom of Prussia.

<sup>3</sup> German Empire.

<sup>4</sup> Code of Commercial Law.

<sup>5</sup> See United Kingdom; independence in 1921.

<sup>6</sup> Law of 21 June 1942, No. 929; Rules of 8 May 1948, No. 795.

<sup>7</sup> Amended in 1975.

<sup>8</sup> British Colony.

<sup>9</sup> Amended in 1972.

<sup>10</sup> Amended several times, for the last time in 1971.

<sup>11</sup> Fees amended by Law No. 164/1975.

<sup>12</sup> Various complementary regulations.

<sup>13</sup> See Turkey; independence proclaimed in 1912.

<sup>14</sup> Until 1918 part of Austria-Hungary.

<sup>15</sup> Independence proclaimed in 1918; on 22 March 1928 an Ordinance was issued relating to the protection of trade marks.

<sup>16</sup> Russia.

<sup>17</sup> Countries belonging to the African and Malagasy Union: Benin, Central African Empire, Chad, Congo, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal, Togo, United Republic of Cameroon, Upper Volta.

<sup>18</sup> British protectorate of Bechuanaland; independence 1966.

<sup>19</sup> Trade Mark Proclamations; trade mark protection is still the same as under United Kingdom.

<sup>20</sup> No special legislation concerning industrial property.

<sup>21</sup> British colony; Trade Marks Ordinance.

<sup>22</sup> Trade Marks (Amendment) Rules; former British legislation is still effective; independence 1965.

<sup>23</sup> British Crown Colony of the Gold Coast; independence in 1957.

<sup>24</sup> Trade Marks Act; Trade Marks Regulations 1970.

<sup>25</sup> Former territory of French West Africa; no new trade mark laws, have, as of now, been promulgated since independence in 1958.

<sup>26</sup> British colony; independence in 1963.

<sup>27</sup> Amendment of the Trade Marks Act of 1962.

<sup>28</sup> Amendment of the Trade Mark Law.

<sup>29</sup> British Protectorate of Nyasaland.

<sup>30</sup> Legislation of the former Federation of Rhodesia and Nyasaland; independence in 1964.

<sup>31</sup> No unified legislation covering the whole of the territory of the Kingdom.

<sup>32</sup> Industrial Property Decree of the former French Protectorate.

<sup>33</sup> Industrial Property Ordinance of the former French Protectorate.

<sup>34</sup> Industrial Property Act.

<sup>35</sup> British colony; independence in 1960.

<sup>36</sup> German colony; independence in 1962.

<sup>37</sup> British colony.

<sup>38</sup> The Trade Marks Ordinance (Cap. 244); independence in 1961.

<sup>39</sup> No uniform patent, trade mark and design laws.

<sup>40</sup> British Protectorate; independence in 1968.

<sup>41</sup> Trade mark decrees; French Protectorate until 1956.

<sup>42</sup> British Protectorate; independence in 1962.

<sup>43</sup> German colony; independence in 1960.

<sup>44</sup> Tanganyika and Zanzibar merged in 1964; there exists no uniform legislation concerning trade marks.

<sup>45</sup> British mandated territory; independence in 1961.

<sup>46</sup> British Protectorate; independence in 1963.

<sup>47</sup> Free State of Congo; independence in 1960.

<sup>48</sup> British India.

<sup>49</sup> After the emergence of Bangladesh as a sovereign country in 1971, Trade Marks Invalidation and Summary Registration Order (1973).

<sup>50</sup> Ministerial Decree on the Registration of Trade Marks.

<sup>51</sup> Aden Ordinance No. 7 of 1940 (British Protectorate); does not extend to the entire Republic. There is no trade mark law in the territories of the Republic other than Aden.

<sup>52</sup> Netherlands Indies; independence in 1945.

<sup>53</sup> Law on the registration of trade marks and patents of invention.

<sup>54</sup> Amended Patents and Trade Mark Regulations.

<sup>55</sup> State created in 1948; former British mandated territory of Palestine.

<sup>56</sup> Law amended several times.

<sup>57</sup> French mandated territory; independence in 1943.

<sup>58</sup> Former British Protectorate; independence in 1957; no unified federal legislation.

<sup>59</sup> Spanish colony; independence in 1946.

<sup>60</sup> Law amended for the last time in 1968.

<sup>61</sup> Trade Marks Ordinance.

<sup>62</sup> Royal Decree No. 24 of 20 July 1974.

<sup>63</sup> British colony; independence in 1963.

<sup>64</sup> British colony; independence in 1948.

<sup>65</sup> British colony; independence in 1973.

- 66 British colony; independence in 1966.
- 67 United States of Colombia (Code of Criminal Law).
- 68 Spanish colony; independence in 1898.
- 69 Supreme Decree No. 974.
- 70 British colony; British legislation was continued after independence in 1966.
- 71 British colony; independence in 1962.
- 72 See Colombia; independence in 1903.
- 73 Trade Mark Ordinance; independence in 1962.

- 74 British colony; independence in 1960.
- 75 British colony; British legislation continued after independence in 1966.
- 76 British colony; independence in 1964.
- 77 Law amended for the last time in 1970.
- 78 For period before independence (1962), see New Zealand.
- 79 Generally, Italian legislation is applicable.
- 80 Law amended for the last time in 1964.
- 81 Law amended in 1971.

### Annex III

#### BASIC FEES AND DURATION OF TRADE MARKS

(Figures converted into dollars at the official exchange rate prevailing at dates indicated)

| Country                                       | Fees <sup>a</sup>   |                     |                     | Duration<br>(number of years) |                   | Date<br>of<br>publication<br>of fees <sup>a</sup> |
|---|---------------------|---------------------|---------------------|-------------------------------|-------------------|---|
|   | Application<br>fee  | Registration<br>fee | Renewal<br>fee      | First<br>period               | Renewal<br>period |   |
| <i>Developed market-economy countries:</i>    |                     |                     |                     |                               |                   |   |
| Australia . . . . .                           | 15.11               | 25.19               | 37.78               | 7                             | 14                | Nov. 1975   |
| Austria . . . . .                             | 14.61               | 19.47               | 48.69               | 10                            | 10                | Jan. 1974   |
| Benelux . . . . .                             | 68.28               | —                   | 75.37               | 10                            | 10                | July 1976   |
| Canada . . . . .                              | 35.42               | —                   | 35.42               | 15                            | 15                | Jan. 1974   |
| Denmark . . . . .                             | —                   | 65.34               | 65.34               | 10                            | 10                | July 1976   |
| Finland . . . . .                             | —                   | 61.87               | 61.87               | 10                            | 10                | July 1976   |
| France . . . . .                              | 36.26               | 7.25                | 24.17               | 10                            | 10                | Apr. 1975   |
| Germany, Federal Republic of . . . . .        | 7.52                | 12.54               | 30.09               | 10                            | 10                | Apr. 1968   |
| Iceland . . . . .                             | 7.96                | 3.32                | 11.27 <sup>b</sup>  | 10                            | 10                | Apr. 1975   |
| Ireland . . . . .                             | 14.12               | 12.10               | 36.31               | 7                             | 14                | Nov. 1975   |
| Italy . . . . .                               | 7.57                | 30.27               | 30.27               | 20                            | 20                | Jan. 1974   |
| Japan . . . . .                               | 20.45               | 81.80               | 173.82              | 10                            | 10                | July 1976   |
| New Zealand . . . . .                         | 9.99                | 11.99               | 39.97               | 7                             | 14                | July 1976   |
| Norway . . . . .                              | —                   | 50.17               | 50.17               | 10                            | 10                | Jan. 1974   |
| Sweden . . . . .                              | —                   | 44.61               | 89.23               | 10                            | 10                | Aug. 1974   |
| Switzerland . . . . .                         | 40.54               | —                   | 40.54               | 20                            | 20                | June 1973   |
| United Kingdom . . . . .                      | 40.34               | 60.50               | 147.23              | 7                             | 14                | Nov. 1975   |
| United States of America . . . . .            | 35.00               | —                   | 25.00               | 20                            | 20                | July 1972   |
| <i>Southern European countries:</i>           |                     |                     |                     |                               |                   |   |
| Greece . . . . .                              | 10.88               | —                   | 8.16                | 10                            | 10                | July 1976   |
| Portugal . . . . .                            | 5.00                | 9.69                | 15.76               | 10                            | 10                | Aug. 1974   |
| Spain . . . . .                               | 14.67               | 7.33                | 14.67               | 20                            | 20                | July 1976   |
| Turkey . . . . .                              | 1.79                | 17.87               | 14.30               | 10                            | 10                | Apr. 1975   |
| <i>Socialist countries of Eastern Europe:</i> |                     |                     |                     |                               |                   |   |
| Albania . . . . .                             | —                   | 30.00 <sup>c</sup>  | 37.50 <sup>c</sup>  | 10                            | 10                | Mar. 1969   |
| Bulgaria . . . . .                            | —                   | 21.28 <sup>c</sup>  | 21.80 <sup>c</sup>  | 10                            | 10                | May 1971  |
| Czechoslovakia . . . . .                      | —                   | 67.00 <sup>c</sup>  | 67.00 <sup>c</sup>  | 10                            | 10                | Jan. 1974   |
| German Democratic Republic . . . . .          | —                   | 36.04               | 67.57               | 10                            | 10                | Jan. 1970   |
| Hungary . . . . .                             | 163.93 <sup>c</sup> | —                   | 163.93 <sup>c</sup> | 10                            | 10                | Jan. 1974   |
| Poland . . . . .                              | 10.01 <sup>c</sup>  | 18.01 <sup>c</sup>  | 27.03 <sup>c</sup>  | 10                            | 10                | Dec. 1962   |
| Romania . . . . .                             | 18.33               | —                   | 18.33               | 10                            | 10                | Nov. 1975   |
| USSR . . . . .                                | 18.99               | —                   | 18.99               | 10                            | 10                | July 1972   |
| <i>Developing countries:</i>                  |                     |                     |                     |                               |                   |   |
| <i>Africa:</i>                                |                     |                     |                     |                               |                   |   |
| Algeria . . . . .                             | —                   | 13.20               | 13.20               | 10                            | 10                | July 1972   |
| Burundi . . . . .                             | —                   | 11.43               | —                   | unlimited                     | —                 | Jan. 1970   |
| Egypt . . . . .                               | 5.12                | 10.24               | 10.24               | 10                            | 10                | Aug. 1974   |
| Ghana . . . . .                               | 14.79               | —                   | 8.70                | 7                             | 14                | June 1973   |
| Kenya . . . . .                               | —                   | 15.40               | —                   | 7                             | 14                | July 1972   |
| Liberia . . . . .                             | 25.00               | —                   | 10.00               | 15                            | 15                | June 1973   |
| Libyan Arab Jamahiriya . . . . .              | 6.08                | 12.16               | 12.16               | 10                            | 10                | July 1972   |
| Malawi . . . . .                              | 2.80                | 5.60                | 5.60                | 7                             | 14                | Dec. 1974   |
| Morocco <sup>d</sup> . . . . .                | 7.67                | 1.28                | 7.67                | 20                            | 20                | June 1973   |
| Nigeria . . . . .                             | 4.56                | 4.56                | 7.60                | 7                             | 14                | June 1973   |
| Rwanda . . . . .                              | —                   | 20.14               | —                   | unlimited                     | —                 | Jan. 1970   |
| Sierra Leone . . . . .                        | 7.00                | 7.00                | 14.00               | 14                            | 14                | Dec. 1965/<br>May 1966                            |
| Sudan . . . . .                               | 11.49               | 11.49               | 28.72               | 10                            | 10                | May 1971  |
| Togo . . . . .                                | —                   | 22.42               | 22.42               | 10                            | 10                | Nov. 1975   |
| Tunisia . . . . .                             | —                   | 7.13 <sup>e</sup>   | —                   | 15                            | 15                | July 1972   |
| United Republic of Tanzania . . . . .         | 8.40                | 5.60                | —                   | 7                             | 14                | Mar. 1969   |
| Zaire . . . . .                               | —                   | 4.30 <sup>f</sup>   | —                   | unlimited                     | —                 | July 1976   |
| Zambia . . . . .                              | 2.80                | 5.60                | 5.60                | 7                             | 14                | Dec. 1964   |

| Country                            | Fees <sup>a</sup>  |                     |                    | Duration<br>(number of years) |                   | Date<br>of<br>publication<br>of fees <sup>a</sup> |
|------------------------------------|--------------------|---------------------|--------------------|-------------------------------|-------------------|---|
|                                    | Application<br>fee | Registration<br>fee | Renewal<br>fee     | First<br>period               | Renewal<br>period |   |
| <i>Asia:</i>                       |                    |                     |                    |                               |                   |   |
| Afghanistan                        | —                  | 2.22                | —                  | 10                            | 10                | Mar. 1969   |
| China                              | 10.31              | —                   | 10.31              | 10                            | 10                | Apr. 1975   |
| India                              | 4.75               | 10.68               | 11.87              | 7                             | 7                 | Jan. 1974   |
| Indonesia                          | 22.22 <sup>g</sup> | —                   | 22.22              | 10                            | 10                | Dec. 1962   |
| Iran                               | 27.03              | —                   | 23.84              | 10                            | 10                | July 1976   |
| Iraq                               | 1.40               | 8.40                | 8.40               | 15                            | 15                | Mar. 1969   |
| Israel                             | 14.08              | —                   | 42.25              | 7                             | 14                | Nov. 1975   |
| Jordan                             | 0.75               | 9.04                | 9.04               | 7                             | 14                | July 1976   |
| Kuwait                             | 7.96               | 5.70                | 3.42               | 10                            | 10                | July 1972   |
| Lebanon                            | 9.34               | —                   | 9.34               | 15                            | 15                | June 1973   |
| <i>Malaysia:</i>                   |                    |                     |                    |                               |                   |   |
| Malaya                             | 3.24               | 12.94               | 12.94              | 7                             | 14                | Jan. 1970   |
| Sabah                              | 3.24               | 6.47                | 4.85               | 7                             | 14                | Dec. 1965/<br>May 1966                            |
| Sarawak                            | 3.24               | 6.47                | 3.24               | 7                             | 14                | Dec. 1965/<br>May 1966                            |
| Pakistan                           | 6.04               | 12.08               | 10.07              | 7                             | 15                | Apr. 1975   |
| Philippines                        | 21.31              | —                   | 10.66              | 20                            | 20                | Apr. 1975   |
| Republic of Korea                  | 2.51               | 12.56               | 12.56              | 10                            | 10                | Jan. 1974   |
| Saudi Arabia                       | 2.88               | 5.76                | 2.88               | 10 <sup>h</sup>               | 10 <sup>h</sup>   | Apr. 1975   |
| Singapore                          | 6.47               | 16.18               | 16.18              | 7                             | 14                | Jan. 1970   |
| Sri Lanka                          | 3.26               | 5.22                | 5.22               | 14                            | 14                | Nov. 1975   |
| Syrian Arab Republic               | 68.76              | —                   | 68.76              | 15                            | 15                | May 1971  |
| Thailand                           | 14.29              | —                   | 14.29              | 10                            | 10                | Jan. 1970   |
| <i>Latin America:</i>              |                    |                     |                    |                               |                   |   |
| Argentina                          | 10.00              | —                   | 10.00              | 10                            | 10                | Aug. 1974   |
| Bahamas                            | 5.71               | 11.42               | 11.42              | 14                            | 14                | Jan. 1970   |
| Bolivia                            | 3.00               | —                   | 3.00 <sup>i</sup>  | 10                            | 10                | Nov. 1975   |
| Brazil                             | j                  | j                   | j                  | 10                            | 10                | —   |
| Chile                              | none               | 0.68                | 0.68               | 10                            | 10                | Apr. 1975   |
| Colombia                           | 38.33              | —                   | 19.16              | 10                            | 5                 | Aug. 1974   |
| Costa Rica                         | 19.25              | —                   | 6.42               | 15                            | 15                | July 1976   |
| Cuba                               | —                  | 14.58               | 14.58              | 15                            | 15                | Nov. 1975   |
| Dominican Republic                 | 6.00               | 15.00 <sup>k</sup>  | 15.00 <sup>k</sup> | 10                            | k                 | Apr. 1975   |
| Ecuador                            | 30.00              | —                   | 15.00              | 20                            | 15                | Nov. 1975   |
| El Salvador                        | 20.00 <sup>l</sup> | —                   | 20.00 <sup>l</sup> | 20                            | 20                | June 1973   |
| Guatemala                          | 10.00 <sup>m</sup> | —                   | 10.00 <sup>m</sup> | 10                            | 10                | Apr. 1975   |
| Haiti                              | —                  | 36.00               | 36.00              | 10                            | 10                | Apr. 1975   |
| Honduras                           | 25.00              | 30.00               | —                  | 10                            | 10                | Jan. 1974   |
| Mexico                             | 6.80               | 6.80                | 25.00              | 10                            | 10                | Apr. 1975   |
| Nicaragua                          | 9.96               | —                   | 6.80               | 10                            | 10                | Nov. 1975   |
| Panama                             | 25.00              | —                   | 9.96               | 10                            | 10                | Nov. 1975   |
| Paraguay                           | 7.94               | —                   | 25.00              | 10                            | 10                | Dec. 1962   |
| Peru                               | 1.20               | 7.94                | 7.94               | 10                            | 10                | Jan. 1970   |
| Trinidad and Tobago                | —                  | 13.33               | 13.33              | 5                             | 5                 | Nov. 1975   |
| Uruguay                            | 0.39               | 15.00               | 15.00              | 14                            | 14                | Mar. 1969   |
| Venezuela                          | 5.97               | 4.65                | 4.65               | 10                            | 10                | Nov. 1975   |
|                                    |                    | 14.94               | 14.94              | 15                            | 15                | Dec. 1976   |
| <i>Other developing countries:</i> |                    |                     |                    |                               |                   |   |
| Cyprus                             | 8.46               | 11.27               | 19.73              | 7                             | 14                | Apr. 1975   |
| Malta                              | 9.60               | 12.00               | 24.00              | 14                            | 7                 | Jan. 1970   |
| Samoa                              | 26.14              | —                   | 26.14              | 14                            | 14                | Nov. 1975   |
| Yugoslavia                         | 4.67               | 20.00               | 20.00              | 10                            | 10                | May 1971  |
| <i>Other States:</i>               |                    |                     |                    |                               |                   |   |
| Liechtenstein                      | 45.61              | —                   | 45.61              | 20                            | 20                | Jan. 1974   |
| Monaco                             | 3.63               | —                   | 3.63               | 15                            | 15                | Apr. 1975   |
| South Africa                       | 18.40              | —                   | 11.50              | 10                            | 10                | Nov. 1975   |

Sources: Octrooibureau Los en Stigter, *Manual for the Handling of Applications for Patents, Designs and Trade Marks throughout the World* (loose-leaf edition), Amsterdam; IMF, *International Financial Statistics* (Washington, D.C., 1962-1976); *The Statesman's Year-book, 1976-1977* (London, Macmillan, 1976).

Note. Given the different fee structures and dates for which the information was collected, the figures in this annex are not exactly comparable. They are intended merely to illustrate the major aspects of the fee policies adopted by different countries in relation to trade marks.

<sup>a</sup> Amounts of fees, expressed in national currencies, were taken from Octrooibureau Los en Stigter, *op. cit.* The amounts were valid at the dates indicated, the figures being converted into dollars at the official exchange rates prevailing at those dates. Thus the table gives an overview of the basic fees for application for and registration and renewal of a trade mark in each class, expressed in dollars, at the date specified.

<sup>b</sup> Including application and registration of renewal.

<sup>c</sup> Official exchange rate was used for conversion of national currency into dollars.

<sup>d</sup> Fees for ex-French Zone (South).

<sup>e</sup> Includes: Fiscal stamp and fee for registering the power of attorney; Fiscal stamp for certificate of registration; Clerk's fees.

<sup>f</sup> Filing fee.

<sup>g</sup> Includes: Basic fees  
Examination fee } = total filing fee

<sup>h</sup> Hijri years: under the Mohammedan era the Hijri or Lunar year is 11 days less than a Gregorian calendar year.

<sup>i</sup> For each renewal, the fee is augmented by \$3.

<sup>j</sup> The amounts of fees are not permanent; yearly alterations.

<sup>k</sup> Registration/renewal fee, for 15 years: \$20; for 20 years: \$25.

<sup>l</sup> Fees for foreigners.

<sup>m</sup> Fees for nationals.

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