NEW JERSEY BAR/LES SEMINAR – MARCH 18, 1978

UNITED NATIONS CONFERENCE OF TRADE AND DEVELOPMENT (UNCTAD) ACTIVITIES RELATING TO TECHNOLOGY TRANSFER, PATENTS AND TRADEMARKS

BY

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I. CODE OF CONDUCT FOR INTERNATIONAL TECHNOLOGY TRANSFER.

A. STATUS – HAVE BEEN NUMBER OF GROUPS OF "GOVERNMENTAL EXPERTS" DRAFTING PORTIONS OF PROPOSED CODE OVER PAST FEW YEARS.

B. PURPOSE – LESS DEVELOPED COUNTRIES (LDC'S) WANT TO REQUIRE AGREEMENTS TRANSFERRING TECHNOLOGY TO THEM TO BE GOVERNED BY A MANDATORY CODE OF CONDUCT HAVING THE FORCE OF LAW.

C. WHY – LDC'S FEEL THAT:

1. DEVELOPED COUNTRIES (DC) HAVE TAKEN ADVANTAGE OF LDC'S FOR MANY YEARS.

2. DC HAVE AN OBLIGATION TO TRANSFER TECHNOLOGY TO LDC'S.

3. INCREMENTAL COSTS OF TECHNOLOGY TRANSFER ARE ONLY COSTS THAT SHOULD BE RECOUPED.

4. THEIR CITIZENS ARE AT AN UNFAIR DISADVANTAGE WHEN NEGOTIATING WITH LARGE DC CORPORATIONS AND THEREFORE HAVE USED THEIR GOVERNMENTS BOTH BY

1. LEGISLATION, AND

2. REGULATION (INCLUDING REGISTRIES) TO MAKE THE NEGOTIATIONS AT LEAST EQUAL.

5. WANT TO FOLLOW THE EXAMPLE OF MITI IN JAPAN.

6. TECHNOLOGY IS A PART OF UNIVERSAL HUMAN HERITAGE.

7. ALL COUNTRIES HAVE THE RIGHT OF ACCESS TO TECHNOLOGY.

8. LDC'S NEED SPECIAL TREATMENT IN THEIR TECHNOLOGY TRANSFER TRANSACTIONS.

9. LDC'S NEED AN UNRESTRICTED FLOW OF TECHNOLOGICAL INFORMATION.

10. AN INTERNATIONAL LEGALLY BINDING INSTRUMENT IS THE ONLY FORM CAPABLE OF EFFECTIVELY REGULATING THE TRANSFER OF TECHNOLOGY.

11. IT IS NECESSARY TO HAVE GUARANTEES TO SUPPLIERS OF RECIPIENTS OF TECHNOLOGY TAKING FULLY INTO ACCOUNT OF RECIPIENT ENTERPRISES IN LDC'S.

D. RESTRICTIVE BUSINESS PRACTICES – LDC'S FEEL THEY HAVE BEEN ABUSED BY OVER 40 RESTRICTIVE BUSINESS PRACTICES THAT DEVELOPED NATIONS' COMPANIES HAVE IMPOSED UPON THEM INCLUDING:

1. RESTRICTIONS ON THE USE OF TECHNOLOGY AFTER EXPIRATION OR TERMINATION OF THE AGREEMENT.

2. RESTRICTING THE FREEDOM OF THE ACQUIRING PARTY WITH RESPECT TO SIMILAR OR COMPETING TECHNOLOGIES OR PRODUCTS.

3. RESTRICTIONS AFTER EXPIRATION OF THE PATENTS OR OTHER INDUSTRIAL PROPERTY RIGHTS INVOLVED.

4. REQUIRING THE ACQUIRING PARTY TO GRANT EXCLUSIVE SALE RIGHTS TO THE SUPPLYING PARTY.

5. REQUIRING THE ACQUIRING PARTY TO GRANT BACK IMPROVEMENTS ON THE ACQUIRED TECHNOLOGY TO THE SUPPLYING PARTY.

6. RESTRICTIONS ON RESEARCH AND DEVELOPMENT ACTIVITIES OF THE ACQUIRING PARTY.

7. RESTRICTIONS PREVENTING THE RECEIVING PARTY FROM ADOPTING OR IMPROVING THE TECHNOLOGY.

8. REQUIRING THE ACQUIRING PARTY TO USE PERSONNEL DESIGNATED BY THE SUPPLYING PARTY.

9. FIXING THE PRICE WHICH THE ACQUIRING PARTY CAN CHARGE FOR PRODUCTS MADE USING THE TECHNOLOGY INVOLVED.

10. RESTRICTIONS ON EXPORT OF PRODUCTS MADE USING THE TECHNOLOGY.

11. REQUIRING THE ACQUIRING PARTY TO REFRAIN FROM CHALLENGING THE VALIDITY OF PATENTS AND OTHER INDUSTRIAL PROPERTY RIGHTS INVOLVED.

12. REQUIRING ACCEPTANCE OF ADDITIONAL TECHNOLOGY OR GOODS NOT NEEDED OR WANTED BY THE ACQUIRING PARTY.

13. REQUIRING THE ACQUIRING PARTY TO OBTAIN ITS RAW MATERIAL, EQUIPMENT AND OTHER PARTS FROM SPECIFIED SOURCES.

14. RESTRICTIONS IN PATENT POOL OR CROSS-LICENSING AGREEMENTS WHICH IMPOSE TERRITORIAL QUANTITY OR PRICE RESTRICTIONS.

E. LDC'S WANT THE CODE OF CONDUCT TO APPLY TO TECHNOLOGY TRANSFER ARRANGEMENTS BETWEEN FOREIGN ENTERPRISES AND THEIR SUBSIDIARIES, AS WELL AS BETWEEN INDEPENDENT ORGANIZATIONS.

To Hm

II. 1979 UNITED NATIONS CONFERENCE ON SCIENCE AND TECHNOLOGY FOR DEVELOPMENT (UNCSTD).

A. CHRONOLOGY AND STATUS.

1. U.N. GENERAL ASSEMBLY – SEVENTH SPECIAL SESSION – SEPTEMBER, 1975 PROPOSED UNCSTD.

a. FOLLOWED SERIES OF U.N. GLOBAL MEETINGS ON ENVIRONMENT, FOOD, POPULATION, ETC.

b. OBJECTIVES.

1. EXTEND LDC'S SCIENTIFIC AND TECHNOLOGICAL CAPACITY.

2. DETERMINE WAYS TO ACCELERATE ECONOMIC AND SOCIAL DEVELOPMENT THROUGH SCIENCE AND TECHNOLOGY.

3. CREATE APPROPRIATE INSTRUMENTS OF INTERNATIONAL COOPERATION FOR TRANSFERRING THE NECESSARY CAPACITIES AND TECHNIQUES.

c. U.S. DEPARTMENT OF STATE CALLED A MEETING ON NOVEMBER 17, 1976 IN WASHINGTON WITH REPRESENTATIVES FROM A NUMBER OF UNIVERSITIES, GOVERNMENTAL ORGANIZATIONS AND REPRESENTATIVES FROM THE PRIVATE SECTOR TO PREPARE FOR THE 1979 U.N. MEETING.

d. THE STATE DEPARTMENT HAS APPOINTED AMBASSADOR JEAN WILKOWSKI AS COORDINATOR OF U.S. PREPARATION FOR UNCSTD.

e. FATHER THEODORE HESBURGH HAS BEEN APPOINTED AS CHAIRMAN OF THE U.S. DELEGATION TO UNCSTD.

F. ON DECEMBER 15, 1977, SENATE SUBCOMMITTEE ON SCIENCE, TECHNOLOGY AND SPACE (CHAIRED BY SENATOR ADLAI STEVENSON) HELD THE FIRST CONGRESSIONAL HEARINGS ON UNCSTD.

G. STATE DEPARTMENT IS PREPARING A U.S. NATIONAL PAPER TO BE SUBMITTED TO THE U.N. BY MAY 1, 1978 DESCRIBING THE U.S. EXPERIENCE, NEEDS AND POTENTIAL IN SCIENCE AND TECHNOLOGY.

H. NATIONAL RESEARCH COUNCIL IS PREPARING BACKGROUND STUDIES FOR THE U.S. PAPER ON 5 AREAS OF CONCERN TO DEVELOPING COUNTRIES:

1. POPULATION, HEALTH, AND NUTRITION;
2. ENERGY, NATURAL RESOURCES, AND ENVIRONMENT;
3. FOOD, CLIMATE, SOIL, AND WATER;
4. EMPLOYMENT, TRADE, AND INDUSTRIALIZATION; AND
5. URBANIZATION, TRANSPORTATION, AND COMMUNICATIONS.

I. STATE DEPARTMENT HAS ENTERED INTO A CONTRACT WITH:

1. FUND FOR MULTI-NATIONAL EDUCATION;
2. COUNCIL OF THE AMERICAS;
3. U.S. COUNCIL OF INTERNATIONAL CHAMBER OF COMMERCE; AND,
4. GEORGE WASHINGTON UNIVERSITY

TO IDENTIFY INCENTIVES AND CONSTRAINTS WHICH AFFECT THE DEVELOPMENT OF SCIENTIFIC AND TECHNOLOGICAL CAPACITIES OF LDC'S.

J. STATE DEPARTMENT WILL HAVE A SERIES OF WORKSHOPS AND SEMINARS IN THE YEAR IMMEDIATELY PRECEDING THE YEAR 1979 UNCSTD CONFERENCE WHICH IS SCHEDULED TO BE HELD IN AUSTRIA IN THE LATE SUMMER OF 1979.

B. LES HAS MADE A NUMBER OF SPECIFIC PROPOSALS FOR PRACTICAL WAYS TO ENCOURAGE TECHNOLOGY TRANSFER TO LDC'S. APPEARED IN LES NOUVELLES DECEMBER, 1977.

III. ROLE OF INTELLECTUAL PROPERTY SYSTEM IN TRANSFER OF TECHNOLOGY.

A. POSITION OF LESS DEVELOPED COUNTRIES (LDC'S) - PATENTS.

1. MAJORITY OF PATENTS IN DEVELOPING COUNTRIES ARE NOT USED.

2. PARIS CONVENTION DOES NOT TAKE INTO CONSIDERATION THE NEEDS OF DEVELOPING COUNTRIES.

3. WHAT LDC'S WANT:

a. NATIONAL TREATMENT - DISCRIMINATION IN FAVOR OF LDC'S.

b. ACTUAL WORKING OF PATENTS IN COUNTRY WHERE PATENT IS ISSUED.

c. DURATION OF PATENTS SHOULD BE SHORTER.
CUBA-"UNLIKELY THAT A NEW TECHNOLOGY COULD LAST MORE THAN 7 YEARS.

d. PATENTS SHOULD NOT INCLUDE THE EXCLUSIVE RIGHT OF IMPORTATION.

e. PATENTS SHOULD NOT BE USED TO LIMIT EXPORTATION OF PRODUCTS FROM ONE COUNTRY TO ANOTHER.

F. DISCLOSURE IN PATENTS IS INADEQUATE.

G. PRINCIPLE OF INDEPENDENCE OF PATENTS (IN EACH COUNTRY) MUST BE CHANGED.

H. IMPORTATION OF PATENTED ITEM SHOULD NOT CONSTITUTE WORKING OF PATENTS.

B. TRADEMARKS.

1. COUNTRIES HAVE THE RIGHT TO REVOKE OR CHALLENGE TRADEMARKS "FOR REASON OF PUBLIC INTEREST".

2. COUNTRIES CAN REVOKE OR FORFEIT TRADEMARKS WHEN THE OWNER OR LICENSEE OF THE MARK HAS SPECULATED OR MISUSED A PRODUCT PRICE-WISE OR QUALITY-WISE PROTECTED BY A TRADEMARK TO THE DETRIMENT OF THE PUBLIC OR TO A MEMBER COUNTRY.

3. ARTICLE 7 OF THE PARIS CONVENTION (THE NATURE OF THE GOODS TO WHICH A TRADEMARK IS TO BE APPLIED) SHALL IN NO CASE FORM AN OBSTACLE TO THE REGISTRATION OF THE MARK.

4. NON-RECIPROCAL PREFERENCE TREATMENT FOR NATIONALS RESIDING IN LDC'S, BUT IN THE AREAS OF FEES.

5. PARIS CONVENTION SHOULD PROVIDE THAT LDC'S CAN REFUSE TO REGISTER OR CAN INVALIDATE A REGISTERED TRADEMARK WHEN IT HAS BEEN REVOKED IN THE COUNTRY OF ORIGIN.

6. ANY INDUSTRIAL PROPERTY OFFICE (SUCH AS THE U.S. PATENT AND TRADEMARK OFFICE) SHOULD BE OBLIGATED TO PROVIDE, ON REQUEST, INFORMATION CONCERNING TRADEMARKS DIRECTLY TO AN INDUSTRIAL PROPERTY OFFICE REQUIRING THE INFORMATION.

7. TRADEMARKS MAY BE REVOKED BECAUSE OF NON USE.

8. THE PERIOD OF 5 YEARS FOR THE CANCELLATION OF WELL-KNOWN MARKS SHOULD BE REDUCED TO 3 YEARS (ARTICLE 6 BIS (2)).

9. THE PRINCIPLE OF NATIONAL TREATMENT SHOULD NOT CONSTITUTE OBSTACLE AIMED AT REDUCING THE HARMFUL AFFECTS OF FOREIGN-OWNED TRADEMARKS IN LDC'S.

10. ARTICLE 6 QUINQUIES, RELATING TO PROTECTION OF MARKS IN ONE COUNTRY WHICH ARE REGISTERED IN ANOTHER COUNTRY, SHOULD BE REVISED "ACCORDING TO THE PRESENT NEEDS OF DEVELOPING COUNTRIES".

11. APPELLATIONS OF ORIGIN ARE THE SOLE, AND NOT TRANSFERABLE, PROPERTY OF THE COUNTRY WHERE THEY EXIST AND THEY PREVAIL OVER TRADEMARKS.

12. TRADEMARKS CONTAINING GEOGRAPHICAL INDICATIONS CAN BE REGISTERED ONLY BY MEMBER COUNTRIES WHENEVER THEY ARE THEIR OWN APPELLATION OF ORIGIN OR CAN BE INTERPRETED AS AN INDICATION OF SOURCE.

13. INDUSTRIAL PROPERTY OFFICE SHOULD BE THE COMPETENT AUTHORITY IN ALL QUESTIONS RELATING TO APPELLATIONS OF ORIGIN AND INDICATIONS OF SOURCE.

14. THERE SHOULD BE NO INDUSTRIAL DESIGNS. (CANCEL ARTICLE 5 QUINQUIES).

15. THERE SHALL BE NO SERVICE MARKS. (CANCEL ARTICLE 6 SEXIES).

IV. THE IMPORTANCE OF LDC'S VIEWS.

A. LDC'S HAVE MAJORITY IN UNCTAD, WIPO (WORLD INTELLECTUAL PROPERTY ORGANIZATION) AND U.N.

B. 80 COUNTRIES HAVE SIGNED PARIS CONVENTION.

1. 20 OF 20 DEVELOPED MARKET ECONOMY COUNTRIES.

2. 4 OF 4 SOUTHERN EUROPEAN COUNTRIES.

3. 7 OF 8 SOCIALIST COUNTRIES OF EASTERN EUROPE.

4. 43 OF 106 DEVELOPING COUNTRIES.

a. 23 OF 41 AFRICA.

b. 9 OF 35 ASIA.

c. 8 OF 25 LATIN AMERICA.

d. 3 OF 5 OTHER.

5. 5 OF 5 OTHER.

C. UNCTAD AND LDC'S BELIEVE THAT REVISING PARIS CONVENTION AND ENACTING CODE OF CONDUCT WILL ENSURE RAPID DEVELOPMENT OF LDC'S.