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Aspects of Intellectual Property Rights,
including Trade in Counterfeit Goods

STANDARDS AND PRINCIPLES CONCERNING THE AVAILABILITY
SCOPE AND USE OF TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS

Communication from India

The attached communication has been received from the Permanent Mission of India, with the request that it be circulated to members of the Negotiating Group.

Standards and principles concerning the availability, scope and use of Trade Related Intellectual Property Rights

To facilitate discussion in the Negotiating Group, this paper sets out the views of India on "the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights".

2. At the outset, India would like to point out that the scope of this agenda item is limited to "trade-related intellectual property rights". For the reasons explained in the paper, India is of the view that it is only the restrictive and anti-competitive practices of the owners of intellectual property rights that can be considered to be trade-related because they alone distort or impede international trade. However, other aspects of intellectual property rights have been examined in the paper since they have been raised in the various submissions made to the Negotiating Group and in order to place them in the wider developmental and technological context to which they properly belong.

3. India would also like to emphasize that, as mandated by para 5 of the TNC decision, the discussion on this agenda item should be governed by the concerns and public policy objectives underlying the national systems for the protection of intellectual property, including developmental and technological objectives. This is particularly important for developing countries because the intellectual property system has wide ranging implications for their economic and social development. Any principle or standard relating to intellectual property rights should be carefully tested against the touchstone of the socio-economic, developmental, technological and public interest needs of developing countries.

4. In this context, the nature of the intellectual property protection system should be clearly understood. The essence of the system is its monopolistic and restrictive character; its purpose is not to "liberalise", but to confer exclusive rights on their owners. Recognising the extraordinary rights granted by the system and its implications,

international conventions on this subject incorporate, as a central philosophy, the freedom of the member States to attune their intellectual property protection system to their own needs and conditions. This fundamental principle should inform and guide all of the discussions in the Negotiating Group on the intellectual property protection system.

Part - I Patents

Basic approach

5. The evolution of the patent system, both in industrialised and developing countries, would clearly establish the fact that there is a close correlation between the level of economic, industrial and technological development of a country on the one hand, and the nature and extent of patent protection granted by it on the other. In the crucial phase of their industrial development, many of the industrialised countries of today had either "no-patent" or "weak patent" standards in vital sectors in order to strengthen their own industrial and technological capabilities. It was only after they attained sufficient strength in these areas that they considered making changes in their patent system. The patent system is an instrument of national economic policy for the industrialisation and technological advancement of a country. In the case of developing countries, it is of foremost importance that the patent system does not block or hinder the building up of their own industrial and technological capabilities. It would therefore not be appropriate for the international community to think in terms of a patent regime that focuses merely on the protection of the monopoly rights of the patent owners, ignoring the enormous differences in the economic, industrial and technological development between industrialised and developing countries. There should be no attempt at harmonisation of the patent laws of the industrialised and developing countries nor should there be any imposition on developing countries of standards and principles that may be relevant to industrialised countries, but are inappropriate to developing countries.

6. Many economists have questioned the very hypothesis that a patent system is essential to encourage inventions and investments in research and development because, firstly, the patent system is considered to be important by very few sectors of industry and even in their case, the motivation for

obtaining a patent is often the apprehension that someone else would come upon the same discovery or invention within a short period of time. Secondly, investment in research and development and technological breakthroughs are taking place in a wide variety of industries where the patent system is not considered to be important either because the inventions are non-patentable or because the inventions and the know-how could be kept secret for a sufficient period before competitors could come upon them. Thirdly, in a wide variety of industries, investments in research and development are made by firms for maintaining their technological leadership and market position and they would do so regardless of the availability of patent protection. Lastly, even where patents are taken, the underlying know-how to operate the patent is kept secret in order to prevent others from operating the patent on the basis of the patent disclosure.

7. Even assuming that the patent system plays a part in promoting inventive activity and diffusion of technical knowledge, the protection of the exclusive rights of the patent owner is only one side of the coin. Experience of developing countries clearly shows that a patent system can have serious adverse effects in sectors of critical importance to them, such as food production, poverty alleviation, nutrition, health care and disease prevention. The patent system can also have a dampening effect on the promotion of domestic research and development and the building up of domestic technological capabilities. It is therefore imperative that the protection of the monopolistic rights of the patent owner is adequately balanced by the socio-economic and technological needs of the country. An exclusive and undiluted focus on the monopolistic rights of the patent owner without any regard or concern for his obligations or the possible adverse implications of such protection for the host country will be particularly detrimental to the developmental efforts of the developing countries. Such a focus will only widen the gap between industrialised and developing countries and will be contrary to the efforts being made in other international fora to bridge this gap and to strengthen the developmental process of developing countries.

8. A patent law must focus equally on the duties and obligations of the patent owner as well as the remedial steps to be taken to prevent the possible abuse of monopoly rights by him. It should be clearly recognised that patents are not granted merely to

enable a patent owner to enjoy a monopoly for the importation of the patented article into the host country or to resort to restrictive and anti-competitive practices.

Working
of patents

9. The experience of developing countries would clearly point to four basic facts: firstly, patents are seldom worked in developing countries, even when it is techno-economically feasible to do so. Secondly, the working of the patent in the host country leads to saving of scarce foreign exchange (which is a major constraint to the economic development of developing countries) and the lowering of prices of products, particularly in critical sectors such as food, pharmaceutical, agro-chemicals and the like. Thirdly, without the working of the patent, there can hardly be any transfer or diffusion of technology and the promotion of industrial activity in the host country. Fourthly, without working, patent protection would degenerate into a mere monopoly for the importation of the patented article into the country, and a device for the reservation of the host country market by the patent owner.

10. Therefore, the working of a patent by the patent owner in the host country must be regarded as a fundamental obligation of the patent owner. The patent law should have a clear stipulation that patents are granted in order to secure that the inventions are worked in the host country on a commercial scale and to the fullest extent that is reasonably practicable without undue delay. The patent law should also make it unambiguous that the mere importation of a patented product does not amount to its working in the host country. The working of a patented invention should mean:

- where the patent has been granted in respect of a product, the making of the product
- where the patent has been granted in respect of a process, the use of the process.

Compulsory
licence

11. The patent laws of all countries of the world, both industrialised and developing countries, clearly recognise the need for a deterrent against the possible abuse of his monopoly rights by a patent owner and this deterrent is provided in the form of a compulsory licence. Such compulsory licensing is essential not only to remedy the failure of the patent owner to work the patent in the host country to a sufficient extent and on reasonable terms, but also to

meet the public interest needs of the host country.

12. The grounds for grant of a compulsory licence may be any one or more of the following:

- (i) Public interest needs.
- (ii) The patented invention is not being worked in the host country on a commercial scale or is not being so worked to the fullest extent that is reasonably practicable.
- (iii) The demand for the patented product is not being met on reasonable terms or it is being met to a substantial extent by importation from abroad.
- (iv) By default of the patent owner or by reason of his refusal to grant a licence or licences on reasonable terms -
 - (a) a market for the export of any patented product manufactured in the host country is not being supplied or developed;
 - (b) the establishment or development of industrial or commercial activities in the host country is prejudiced.
 - (c) the working or efficient working in the host country of any other patented invention is prevented or hindered.
- (v) By reason of the conditions imposed by the owner of the patent for the grant of licence under the patent, the manufacture, use or disposal of materials not protected by the patent or the establishment or development of industrial or commercial activities in the host country is prejudiced.

13. Compulsory licensing should be clearly recognised as the mechanism for preventing the abuse or misuse of his monopoly rights by a patent owner. It would be wrong to restrict the grounds for grant of compulsory licences to any specific or narrow circumstances. Taking into account its own needs and conditions, each country must be free to specify the grounds on which compulsory licences can be granted under its law and the conditions for such grant. The grant of compulsory licences may, however, be subject

to judicial review in accordance with the host country's legal system.

Licence
of right

14. Experience of developing countries shows that the grant of compulsory licences is often mired in extensive and protracted litigation. Therefore, even though the law may provide for compulsory licence to prevent the abuse of patent rights, the remedial effect is not actually felt by the society. In certain critical sectors such as food, pharmaceuticals and chemicals, the implementation of public policy objectives is thereby nullified.

15. Therefore, apart from compulsory licences, developing countries should be free to provide for the automatic grant of non-voluntary licences in sectors of critical importance to them, such as food, pharmaceuticals and chemicals. The grant of such "licences of right" will not be subject to any administrative scrutiny or judicial review as the patents themselves will be deemed to be endorsed with the words "licence of right". The patent owner will be entitled to compensation in accordance with the host country's law.

Exclusions
from
patenta-
bility

16. An examination of the patent laws of the of the world would show that they almost invariably specify the inventions that are not patentable under their laws. Such exclusion from patentability applies both to general categories as well as to specific sectors or products.

17. By and large, the following types of inventions are excluded from patentability in the laws of most countries:

General Category

- (i) Discoveries, scientific theories and mathematical methods.
- (ii) Inventions whose use would be contrary to law or morality or injurious to public health.
- (iii) Methods for treatment of the human or animal body by surgery or therapy or diagnostic methods practised on the human or animal body.
- (iv) Schemes, rules or methods for doing business, performing purely mental acts or playing games.

- (v) Plant or animal varieties or essentially biological processes for the production of plants or animals.

Specific sectors/products

- (i) Atomic energy and nuclear inventions
- (ii) Computer programs
- (iii) Pharmaceutical products
- (iv) Food products (including beverages and flavourings)
- (v) Chemical products
- (vi) Micro-organisms
- (vii) Substances obtained by micro-biological processes
- (viii) Agricultural machinery
- (ix) Methods of agriculture or horticulture

18. It is relevant to note that the food, pharmaceutical and chemical sectors have been accorded a differential treatment in the patent laws of developing countries (and some developed countries) because of the critical nature of these sectors to their socio-economic and public interest needs. The experience of developing countries is that the unmitigated operation of the patent system in these sectors will have serious repercussions on their efforts to raise the standard of living of their people, especially the vulnerable sections of their society, in areas such as agricultural production, nutrition and health care. There is ample evidence to show that the prices of essential drugs have ruled at abnormally high levels in industrialised as well as developing countries, and the public health care system has had to pay excessively high cost, when those drugs were under the patent monopoly of a few transnational corporations. There is also enough documentary evidence to show that transfer pricing has been particularly rampant in the pharmaceutical sector leading to excessive prices being paid for bulk drugs and intermediates. A similar situation has also

prevailed in the case of patent monopoly in agro-chemicals that are crucial to enhancing the agricultural production of developing countries. Having regard to the impact of the patent system on these crucial sectors of their economy, most developing countries have either excluded food, pharmaceutical and chemical products from patentability or have limited the patent protection to process patents only or have shortened the duration of the patents in these sectors. The Negotiating Group should recognize the special needs and concerns of the developing countries in these sectors, which make it imperative for them to follow a special regime for patent protection in these vital sectors.

19. There are also a whole range of moral, ethical, environmental and other issues involved in the patenting of living things and genetically engineered micro-organisms. The full dimensions of scientific and technological development in these areas are yet to be comprehended. Even in industrialised countries, the legal and other implications involved in the granting of patents in areas such as bio-technology and genetic engineering are in a flux, and the wisdom of granting product patents in bio-technology and for higher forms of life is being subject to serious scrutiny.

20. Every country should therefore be free to determine both the general categories as well as the specific products or sectors that it wishes to exclude from patentability under its national law taking into consideration its own socio-economic, developmental, technological and public interest needs. It would not be rational to stipulate any uniform criteria for non-patentable inventions applicable alike both to industrialised and developing countries or to restrict the freedom of developing countries to exclude any specific sector or product from patentability.

Product
versus
Process
patents

21. The question of product versus process patents has been the subject of much debate. Till the mid-1960s and 1970s, the patent laws of a number of industrialised countries allowed only process patents in the food, pharmaceutical and chemical sectors. The present technological strength of some of those countries in these sectors is attributed at least in part to their following only the process patent system for several decades. The development of the pharmaceutical and chemical industries in some of the highly industrialised countries of today owes its origin to their deliberately adopting a legal framework

that excluded or limited patent protection for drugs and chemicals.

22. The basic rationale behind process patents is that the same product can be manufactured by totally new and different processes. The grant of product patents will inhibit the discovery of more efficient and economical processes for the manufacture of the same product. The fruits of their inventive activity will not be available to these new inventors if their efforts are nullified by product patents given to the inventor of the first process. Such blocking of new research and development will be particularly harmful to developing countries striving to build their own technological capabilities.

23. Apart from this technological reason, the grant of product patents in food, pharmaceutical and chemical sectors has other adverse implications for their socio-economic development. Given the size of the population of several developing countries and their extremely low level of per capita income, it is imperative that essential articles such as medicine or food are available to them at reasonable prices, and that the monopoly rights granted through the patent system do not either lead to artificial prices being maintained in these sectors or competition being prevented from coming into the market. The policy options available to the developing countries are either to exclude these critical sectors from patentability or to provide for only process patents in these sectors.

24. Developing countries should be free to follow either of the two options. Should they choose to follow the latter option, they should be free to provide for process patents only in sectors of critical importance to them such as food, pharmaceutical and chemical sectors. There should not be any rigid and inflexible standard that product patent must be granted in each and every sector.

25. Where a patent is granted only for a process of manufacturing a product, the owner of the process patent will have exclusive right to only the use of that process, and he will not have any exclusive right to make, use, sell or import that product. In other words, the exclusive right will be confined only to the use of the process and it will not extend to the product covered by that process. Unless this

distinction is clearly recognised, the rationale behind the grant of process patents will be lost and there will be serious adverse consequences for the developing countries.

Duration
of patents

26. With regard to the duration of patent protection, given the enormous economic and technological gap between the industrialised and developing countries, there should be no uniform standard for patent duration. In fact, the optimum duration of a patent applicable alike to all countries and all sectors is a highly debatable issue.

27. The developing countries should be free to set the duration at a level significantly lower than that of the industrialised countries in accordance with their own developmental, technological and public interest needs. Secondly, developing countries should also be free to set a shorter duration of patents in sectors of critical importance to them, such as the food, pharmaceutical and chemical sectors, or to even exclude such sectors from patentability. Thirdly, considering the fact that the working of the patent - and not market reservation or importation by the patent owner - must be a fundamental objective of the patent system of developing countries, they should be free to link duration of a patent to its actual working in the host country, failing which the patent should be subject to revocation.

Government
use of
patents in
public
interest

28. As explained earlier, the patent system of developing countries should strike a rational and reasonable balance between the private monopoly interests of the patent owner and the larger public interest of the society. Therefore, where the public interest, and in particular, national security, food production, poverty alleviation, nutrition, health care or the development of other vital sectors of the national economy so requires it, the host country government or any third person designated by it should be free to work and use the patented invention in the country, including the importation of the patented product if necessary, without the consent of the patent owner on such terms and conditions as the host country government may decide.

Revocation
of patents

29. In order to mitigate the possible abuse of the patent system, the patent law should contain provisions for revocation of the patents in public interest. Specifically, where the host country Government finds that a patent has not been worked on a commercial scale

or has been only inadequately worked in the country without any valid reason or that the patent is being used in a manner prejudicial to the public interest, the patent should be liable to revocation. Such revocation will, however, be done after giving an opportunity of hearing to the patent owner and will also be subject to judicial review.

Restrictive
and anti-
competitive
business
practices

30. It is a well-known fact that intellectual property owners and technology suppliers impose a variety of restrictive and anti-competitive conditions in agreements involving the licensing or supply of patents, trademarks, know-how and patented products. Such conditions are particularly rampant in the case of developing countries because of the unequal bargaining power between the transnational corporations and recipients in the developing countries and the imperfect nature of the international technology market. These inhibit the efforts of developing countries in building up their industrial, technological and export capabilities. At the same time, these conditions distort and impede international trade. The restrictive and anti-competitive conditions being imposed by the patent owners and technology suppliers cover a wide range, but typical among them are the following:

- (i) Tied purchases of inputs from the licensor or sources designated by him and prevention of purchases from any other source.
- (ii) Prohibition or restriction of exports from the host country.
- (iii) Prohibition of the licensee or the recipient from using articles, processes or technology which do not belong to the licensor or the supplier or his nominee.
- (iv) Restrictions on the use of the patents, trademarks and know-how, especially in matters such as the volume of production, marketing, distribution and pricing of the products.
- (v) Restriction on the use of the technology after the expiry of the agreement.
- (vi) Restriction on competition as between various licensees as well as between the licensees and third parties.

- (vii) Abusive transfer pricing practices in the supply of raw materials, intermediates and components.
- (viii) Grant back provisions, obliging the licensee or the recipient to assign improvements and innovations free of charge.
- (ix) Package licensing obliging the licensee or the recipient to make unwanted purchases.
- (x) Use of patent licences as a device for carving up markets among patent owners.

31. The Negotiating Group should work out a comprehensive list of these restrictive and anti-competitive conditions imposed by licensors. It is essential that the laws pertaining to intellectual property rights prohibit them and declare all licences, contracts and agreements containing such conditions to be null and void.

Part - II

Trade Marks

32. The use of foreign trade marks in the domestic market of developing countries has several adverse implications for their social and economic development. These have been well documented in many UN studies and academic publications. It is well recognised that foreign trademarks tend to encourage the production and consumption of non-essential and luxury goods in poorer societies, thereby distorting their socio-cultural objectives and values. Perceptive commentators have drawn attention to the typical and strong tendency in developing countries to imitate the consumption patterns and life styles of affluent countries, although they may be ill-suited to their own conditions and circumstances, and to this tendency being a major reason for foreign trade marked goods commanding a premium in most developing countries. There is ample evidence to show that this tendency has led to misallocation of resources towards the production and consumption of goods that are irrelevant to the basic minimum needs of the society in poor developing countries.

33. The use of foreign trademarks also entails

heavy outflow of foreign exchange not only by way of royalties and profits to the foreign trademark owner, but also by way of import of raw materials, intermediates, capital equipment and components for the production of non-essential goods. Foreign exchange being a scarce economic resource, such outflow places an onerous burden on the developing countries.

34. Furthermore, there is hardly any worthwhile transfer of technology in the production of such luxury goods. Typically, the marketing and market dominance are based on the power of the brandnames.

35. The use of foreign trademarks, backed by the enormous advertising and marketing power of transnational corporations, has also an adverse effect on the growth and development of domestic industry in developing countries. An important element of the industrial development strategy of developing countries is to encourage and promote the development of their small and medium enterprises, which is essential not only for building up their entrepreneurial base, but also for mitigating their problem of unemployment. It is particularly the growth of these enterprises that is inhibited by the market dominance of the well-known trademarks of the transnational corporations arising predominantly from their trademarks.

36. Thus, there are compelling socio-economic reasons behind the public policy objective of developing countries to regulate the use of foreign trademarks in their domestic markets. The freedom of developing countries to regulate the use of foreign trademarks in their domestic markets, in accordance with their national development objectives, should not therefore be curtailed.

Quality
assurance
function of
trademarks

37. Quality assurance is an important function of trademarks and it should receive as much attention as protection in any trademark regime. Very recently, in a "parallel imports" case, the import of a product bearing a well-known trademark from the subsidiary of a transnational corporation located in a developing country was prevented by another subsidiary of that transnational corporation manufacturing the same product with the same trademark in a developed country on two grounds, namely (a) the product manufactured by the subsidiary in the developing country was of an "inferior" quality (although it carried the same trademark), and (b) the export of the product from that

developing country had been prohibited by the transnational corporation. This shows that even where a product is manufactured in a developing country with the well-known trademark of a transnational corporation, there is no guarantee that its quality is the same as that of the product manufactured by the parent company or its subsidiary in an industrialised country, and on that ground alone, the export of the product from the developing country can be questioned in a litigation. Therefore, the trademark law should have a clear stipulation that the foreign trademark owner should give a categorical assurance that the quality of the product bearing his trademark is identical to the product manufactured by the licensor himself in his own country and that in any litigation or proceeding concerning the quality of the product, he will give an assurance to that effect. In particular, developing countries should have the freedom to regulate the quality assurance aspect of the use of trademarks which may extend not only to the quality control responsibilities of the trademark licensor but also to quality certification vis-a-vis products bearing the same trademarks in other countries.

Exhaustion
of rights

38. The doctrine of "Exhaustion of Rights" is linked to "parallel imports". The exhaustion of the exclusive rights of the trademark owner should not be limited to the same country or the same free trade area, but should extend globally. In other words, the principle of international exhaustion of rights should apply to trademarks.

Protection
of well-known
trademarks

39. There is no internationally accepted standard or criterion for defining a "well-known trademark". The concept of well-known trademarks can apply only to a given country and it cannot be applied internationally. Experience shows that a trademark may be considered to be well-known in one country, but it may not be known at all or it may not have the same value in another country. Whether a trademark must be regarded as a well-known mark in a given country should be left to be determined by that country in each case on the basis of the facts. There can be no universal application of the concept of well-known trademarks.

40. As regards the question of protection of such trademarks, it is the responsibility of the owner of a well-known trademark to apply for defensive registration of his trademark in accordance with the trademark law of the host country. It is not possible

for the host country government either to cancel the registration of a trademark already given (except where there is a contravention of the law) or to prohibit the use of a trademark that has not been registered. Usually, both statutory and common law protection is available for trademarks. It is for the owner of a trademark to take appropriate legal action against any infringement of the trademark by taking recourse to such statutory or common law rights as may be available to him under the national legal system.

Service
Marks

41. The need for protecting service marks is recognised. Whether Service Marks should be protected under the trade mark law by extending the definition of trademark to cover both goods and services or whether there should be a separate legislation for service marks or whether service marks should be protected in any other manner under the legal system of the country should be left to the free choice of the country concerned. It is not appropriate to lay down a uniform standard that the term "trademark" should include service marks also.

Term and
maintenance
of protection
of trademarks

42. As regards the term and maintenance of protection of trademarks, it is important to recognise the following:

- (i) There should be no uniform standard for the initial period of registration of a trademark and its subsequent renewal. Each country should be free to decide the appropriate period.
- (ii) The exclusive rights under the trademark law can be derived only from registration of the trademark in accordance with the provisions of the law. It cannot be derived merely on the basis of the use of the trademark. An unregistered trademark may at best be entitled to such right as may be available under the common law system of the country.
- (iii) The use of a trademark by a third party shall be considered as use by the trademark owner only if the third party is registered as a "Registered User" by the competent authority in accordance with the provisions of the trademark law of the country. The mere authorisation of the use of the trademark by a third party through a private sanction, without the third party being registered as a "Registered User", shall not constitute use

by the trademark owner for the purpose of "use" requirements.

- (iv) Each country should be free to stipulate any special requirements for the use of a trademark such as the size (as for example, in connection with the display of the generic name on a drug in conjunction with a brand name) or use in combination with another trademark (as for example, the use of a foreign trademark in conjunction with a domestic trademark).
- (v) Assignment of a trademark shall be subject to such terms and conditions as the national law may lay down to ensure that the assignment does not circumvent the basic provisions of the law.
- (vi) Each country should be free to cancel the registration of a trademark for non-use after a reasonable period, unless valid reasons are shown for such non-use. A trademark should also be liable for cancellation if it has been registered by the owner without any bonafide intention to use it in the host country.

43. Experience of developing countries shows that, as in the case of patents, trademark licensing agreements also contain numerous restrictive and anti-competitive conditions imposed on the licensee by the licensor of the trademark. Many of the examples given in para 30 above, such as export restrictions, tied purchases, restrictions on volume of production, marketing and distribution and the like apply equally to trademark licensing agreements also. As in the case of patents, trademark licensing agreements containing such restrictive and anti-competitive conditions should be declared by law to be null and void.

Part - III

Copyright

44. The Berne Convention for the Protection of Literary and Artistic Works is more than adequate to deal with copyright protection.

Part - IV

Integrated Circuits

45. A Treaty on intellectual property in respect of integrated circuits has been concluded in the Diplomatic Conference held for conclusion of such a Treaty in Washington, D.C. from May 8 - 26, 1989. The Treaty has been adopted with 49 States voting in favour, 2 against and 5 abstentions. It is expected that WIPO will organise a special meeting on the subject for the developing countries to frame a Model Law which would provide a useful reference for national legislation on the subject. Now that this Treaty has been concluded, the intellectual property protection in respect of lay-out designs (topographies) would be dealt with by each country accordingly.

Part - V

Trade Secrets

46. Trade Secrets cannot be considered to be intellectual property rights. The fundamental basis of an intellectual property right is its disclosure publication and registration, while the fundamental basis of a trade secret is its secrecy and confidentiality. The laws of many developing countries clearly stipulate that the term "licensor" and "licensee" should not be applied to a transaction involving the supply of confidential know-how, and only expression such as "supplier" and the "recipient" should be used because such know-how cannot be regarded as a licensable right. The observance and enforcement of secrecy and confidentiality should be governed by contractual obligations and the provisions of appropriate Civil Law and not by intellectual property law.

47. Since trade secret cannot be regarded as an intellectual property, it is beyond the mandate of the Negotiating Group to consider this matter.

Part VI

Standards and Principles and GATT framework

48. Since its inception, the patent system has always been regarded as an instrument for the promotion of inventive activity and its commercialisation in the patent granting country. The underlying philosophy of the whole system is that if exclusive monopoly rights are conferred by the State on inventors, it will give a fillip to new inventions and the inventions will be followed by innovations and investments for the commercial working of the inventions, thereby leading to the industrial progress of the country. The typical definition of a patent itself makes it clear that the invention should not only be novel, but it should also be capable of industrial application. The patent system has not been conceived as an instrument for the promotion of international trade. The basic elements of a patent law, such as the definition of an invention, patentable and non-patentable inventions, product versus process patents, duration of a patent, exclusive rights of a patent owner, commercial working, compulsory licensing, restrictive business practices, revocation of patents and the like, have always been viewed in the context of giving protection and exclusive rights for the purposes of encouraging inventive activity and the balancing of such protection or misuse of the monopoly rights with public interest needs. Barring the restrictive and anti-competitive practices of the patent owners that definitely have the effect of impeding or distorting international trade, the other afore discussed features of the patent system are not related to international trade. Such effects as they may have on trade are merely incidental because the basic purpose of the patent system is not promotion of trade, but of inventive activity. Likewise, the basic purpose of a trademark system is to distinguish the goods of one manufacturer from those of another in the market place and to protect public against confusion and deception. The basic purpose of a copyright system is to give protection to copyright in literary, dramatic, musical or artistic work, cinematographic films and the like. The protection of intellectual property rights has no direct or significant relationship to international trade. It is because substantive issues of intellectual property rights are not germane to international trade that GATT itself has played only a peripheral role in this area and the international community has established other specialised agencies to deal with them. It would

therefore not be appropriate to establish within the framework of the General Agreement on Tariffs and Trade any new rules and disciplines pertaining to standards and principles concerning the availability, scope and use of intellectual property rights.