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The United States Position on Revising the Paris Convention: Quid Pro Quo or Denunciation

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Abstract

This Comment will begin by examining the history and purposes of the Paris Convention and its revisions; second, it will examine the conflict between the developed and developing nations regarding the Convention revision; and third, it will examine the legal validity of denouncing the Convention and establishing a new multilateral treaty. Finally, this Comment will suggest the approach the United States should adopt to advance its position regarding the Paris Convention revision.

THE UNITED STATES POSITION ON REVISING THE PARIS CONVENTION: QUID PRO QUO OR DENUNCIATION

INTRODUCTION

Developed nations, especially the United States, insist that any proposed substantive revision of the Paris Convention for the Protection of Industrial Property¹ (Paris Convention or Convention) continue the system of reciprocity and equality among member states.² Lesser developed countries (LDCs),³ on the other hand, suggest that a program of preferential treatment⁴ for developing countries be included in the substantive revision of the Conven-

1. Paris Convention for the Protection of Industrial Property of 1883, 25 Stat. 1372, T.S. No. 379, 10 Martens Nouveau Recueil 2d 133, *revised* Dec. 14, 1900, 32 Stat. 1936, T.S. No. 411, 30 Martens Nouveau Recueil 2d 465, *revised* June 2, 1911, 38 Stat. 1645, T.S. No. 579, 8 Martens Nouveau Recueil 3d 760, *revised* Nov. 6, 1925, 47 Stat. 1789, T.S. No. 834, 74 L.N.T.S. 289, *revised* June 2, 1934, 53 Stat. 1748, T.S. No. 941, 192 L.N.T.S. 17, *revised* Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931, 828 U.N.T.S. 107, *revised* July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305 [hereinafter cited as Paris Convention]. All citations to the Paris Convention within this Comment refer to the 1967 Stockholm text.

The Convention consists of 30 articles, of which the first 12 deal with questions of patents and other forms of industrial property, and the remainder with procedural and administrative matters, including the amendment of the Convention. There is no preamble and no general statement of the objectives of the Convention. Article (1), however, makes clear that the Convention is intended for the "protection of industrial property." It is in fact a charter of rights for patent holders, its essential concern being to determine and safeguard their privileges.

United Nations Conference on Trade and Development, Report by the UNCTAD Secretariat, the International Patent System: The Revision of the Paris Convention for the Protection of Industrial Property (Provisional Agenda Item 4) at 4, U.N. Doc. TD/B/C.6/AC.3/2 (1977) (footnote omitted) [hereinafter cited as UNCTAD Secretariat].

2. The United States would like the procedural system requiring unanimity in voting to continue as well. *See infra* note 18. Under the current system the patentee, that is the patent holder, is favored over the grantor country. *See infra* note 52.

3. For purposes of this Comment, the terms lesser developed country, LDC, developing country and developing nation will be used interchangeably.

4. The developing nations define "preferential treatment" in connection with international industrial property as a means to decrease the inequality between the developed and developing countries, rather than as the promotion of the interests of the developing countries to the detriment of the developed. U. ANDERFELT, INTERNATIONAL PATENT-LEGISLATION AND DEVELOPING COUNTRIES 265 (1971). The developed countries, in particular the United States, however, see the preferential treatment program as just that: a system to decrease protection of the developed countries for the benefit of the developing countries. The issue is strict and equal protection of industrial property versus rapid technology transfer to lesser developed countries.

tion.⁵ The developing countries suggest such a program is necessary to establish the "new economic order."⁶ This revision will decide whether the Convention will maintain the status quo of patentee protection of international industrial property or adopt a new system favoring technology transfer.

The World Intellectual Property Organization⁷ (WIPO) undertook a study of a possible revision of the Paris Convention⁸ on behalf of the developing countries.⁹ Subsequently, the members of the Paris Convention entrusted WIPO with overseeing the revision of the Convention.¹⁰ The purposes of the current revision are to

5. Furthermore, the developing countries want a voting system requiring less than unanimity. Such a system would give these countries which constitute a majority in number an advantage in pushing through substantive changes. Under the unanimity system, one country alone can block any amendment. *See infra* note 18.

6. The "new economic order" is discussed *infra* note 74. The developing countries perceive the current system as unjustly favoring the patentee. They advocate a system favoring the grantor country. *See infra* note 55.

7. The World Intellectual Property Organization (WIPO) was established at the Intellectual Property Conference of Stockholm in June-July, 1967. It was organized to coordinate the administrative activities of the Paris and Berne Conventions and to promote all intellectual property rights protected under these two conventions and various other special agreements. U. ANDERFELT, *supra* note 4, at 259. *See also* Braderman, *The World Intellectual Property Organization and the Administrative Reorganization of BIRPI*, 12 IDEA 673 (1968) (a detailed discussion of the organization and workings of WIPO); Goldsmith, *WIPO: A Noble Idea Whose Time Has Come*, 12 IDEA 691 (1968) (examination of the pros and cons of WIPO's establishment). *See generally* S.P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS §§ 92-100, at 145-52 (1975); UN, EVERYONE'S UNITED NATIONS 376-77 (1979).

Originally WIPO was not an agency of the U.N.; however, membership was open to any Paris or Berne Union member as well as any member of the U.N. or one of its specialized agencies. The latter was included because if WIPO were to become a U.N. agency in the future, the provision of accession of any U.N. member would be a prerequisite for agency recognition. S.P. LADAS, *supra*, §§ 92-94, at 146-47. WIPO has since become a specialized U.N. agency. Gansser, *Violations of the Paris Convention for the Protection of Industrial Property*, 11 INDUS. PROP. & COPY RIGHT L. REV., No. 1 (1980), *reprinted in* 63 J. PAT. OFF. SOC'Y 138, 142 (1981). A major concern of WIPO is the transfer of technology. Harris, *Technology Transfer and Industrial Property Protection: Problems Underlying Various European Patent and Other Conventions*, 19 IDEA 215, 227 (1977-78).

8. Paris Convention, *supra* note 1. The history and purposes of the Paris Convention for the Protection of Industrial Property (Paris Convention or Convention) are discussed *infra* notes 39-54 and accompanying text.

9. 15 J. WORLD TRADE L. 93, 93 (1981) (editorial). This proposal by developing nations indicated an affirmance of the recognized legal patent right and an acceptance of it as a component of the world's industrial property system. *Id.* The draft text of proposed Article 5A is set out at *WIPO: Revision of the Paris Convention*, 13 J. WORLD TRADE L. 564, 575-77 (1979) [hereinafter cited as *WIPO Revision*]. *See also* S.P. LADAS, *supra* note 7, § 107, at 175 (the roles of WIPO, UNCTAD, and UNIDO in facilitating the transfer of technology to the developing countries).

10. *See* Provisional Rules of Procedure of the Diplomatic Conference, WIPO Doc. PR/DC/2 (Apr. 23, 1979).

align the Convention to the modern needs of the developing nations;¹¹ to aid these countries in developing their own patent systems;¹² to further the transfer of technology, particularly to the developing countries;¹³ and to further cooperation among countries which have different systems of industrial property protection.¹⁴ The first Diplomatic Conference on Revision¹⁵ was not a success.¹⁶ Attempts to start committee work on substantive issues failed because the conference was deadlocked in a dispute over voting procedure.¹⁷ The voting rules conflict began in 1979; at Geneva in 1980

11. *WIPO Revision*, *supra* note 9, at 564. Developing countries aspire to rapid industrialization as the principal means for improving their standards of living. S.P. LADAS, *supra* note 7, § 1031, at 1888.

12. *WIPO Revision*, *supra* note 9, at 564-65.

13. *Id.* at 565.

14. *Id.* The primary reason for the differences in the systems of various countries is that each system grew independently without any conscious thought of international effects or needs. S.P. LADAS, *supra* note 7, § 174, at 283.

15. The Conference was in session from February 4 to March 4, 1980 in Geneva. See WIPO, Diplomatic Conference on the Revision of the Paris Convention, Geneva, February 4 to March 4, 1980, PR/DC/3 (June 25, 1979) (includes a commentary by the WIPO Director General).

16. PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 470, at A-5 (Mar. 13, 1980). The United States officials had anticipated that the revision conference would not go smoothly. See PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 459, at A-8 (Dec. 17, 1979).

17. Decision, WIPO Doc. PR/DC/20 (Mar. 4, 1980); PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 470, at A-5 (Mar. 13, 1980). The Conference had been looked forward to with interest, and a planned ceremony to sign the revised text was set for the conclusion of the meeting. However, no decisions on substantive revisions were reached and, therefore, further revision sessions became necessary. A preliminary meeting meant to ensure success at the second revision conference ended in failure. The second Diplomatic Conference on Revision was held in Nairobi, Kenya from September 28 to October 24, 1981. *Id.*; PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 503, at A-14 (Nov. 6, 1980); PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 529, at A-15 (May 14, 1981). The U.S. delegation to the Nairobi Conference was headed by former Patent and Trademark Office (PTO) Commissioner William E. Schuyler. His appointment was recommended by current PTO Commissioner Gerald J. Mossinghoff who was unable to attend the revision conference as serious U.S. PTO budget and legislation issues were due to arise during its session. For a list of other United States delegates to the Conference, see PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 547, at A-11 (Sept. 24, 1981). At the annual meeting of the Patent, Trademark and Copyright Law Section of the American Bar Association, Commissioner Mossinghoff addressed the section stating:

We are heavily involved in preparations for the Second Session of the Diplomatic Conference for the Revision of the Paris Convention Given the importance of those negotiations to continued international protection of intellectual property of U.S. industry, and because of my personal involvement in the day-to-day operations of the office, I am strongly supporting the appointment of a special representative from the private sector to head the U.S. delegation. Prospects for complete agreement upon a revised text of the Paris Convention in Nairobi are not great; it is likely

a compromise was adopted over the objection of the United States.¹⁸

At the 1981 annual meeting of the Patent, Trademark and Copyright Law Section of the American Bar Association,¹⁹ the section went on record that it deplored the changes in voting rules adopted at the 1980 Geneva Conference for the revision of the Paris

that we will be discussing a third session of the Diplomatic Conference with you next year.

Address by Gerald J. Mossinghoff (August 8, 1981), *reprinted in* 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 85, 88.

18. PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 470, at A-5 (Mar. 18, 1980). The Provisional Steering Committee consisted of 24 nations which drew up rules of procedure for the conference. *WIPO Revision*, *supra* note 9, at 567. Preliminary sessions were held prior to the first Conference on Revision in Geneva. However, no major controversial issues were resolved. The developed countries failed to submit written comments despite the opportunity to do so. *Cf.* Provisional Rules of Procedure of the Diplomatic Conference, WIPO Doc. PR/DC/2 (Apr. 23, 1979) at 5 (rule permitting comment by member nations). For a history of the preliminary negotiations, see *WIPO Revision*, *supra* note 9, at 566-67. The Provisional Steering Committee was unable to reach an agreement and omitted the crucial voting requirement paragraph. PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 470, at A-5 (Mar. 13, 1980). At the 1980 Geneva Conference, the developed nations took the position that unanimity was required for adoption of any rules of procedure as well as adoption of the final text. All six prior revisions have been adopted unanimously. The developing nations, supported by the socialist nations, proposed a two-thirds voting requirement. The delegates adopted a compromise whereby the final text was to be adopted without objection, but if this goal were not obtained, a two-thirds majority would be sufficient, provided that no more than twelve members were to vote against. The United States was the only dissenter to the compromise arrangement and formally reserved the legal right to challenge any substantive action adopted by less than unanimity. *Id.*

At the annual meeting of the ABA/PTC Section it was:

RESOLVED, that the Section of Patent, Trademark and Copyright Law reiterates its opposition to any revision of the Paris Convention for the protection [sic] of Industrial Property, or the adoption of any voting rule therefore, by less than the unanimous vote of the member countries of the union present and voting; deplors the declaration by Ambassador Sene, President of the last held diplomatic conference (February 4-March 4, 1980), made without taking a vote and over the objection of the United States, that a voting rule had been adopted permitting adoption of a revision by two thirds majority provided that no more than 12 countries vote against the proposal; and urges that the United States persist in efforts to retain the existing procedure based on unanimous vote.

Resolution 102-1, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 29. At the Nairobi Conference, Ambassador Schuyler, head of the United States delegation, stated that it remains the United States position that the traditional voting rule of unanimity could only be changed by unanimous agreement. No unanimous agreement was reached on the voting rule, therefore, no rules of procedure have been legally adopted by the Conference so any text adopted over the objection of any member will not be valid and need not be respected by the Union members. Schuyler, *Erosion of the Paris Convention at Nairobi*, 1 PTC NEWSLETTER 2 (No. 2) (Winter 1982).

19. The meeting was held in New Orleans from August 7 to August 12, 1981.

Convention.²⁰ Furthermore, the section proposes that if the final text revision is determined to be unfavorable to the United States, the State Department should denounce the Paris Convention and establish a new treaty.²¹ The section strongly opposes any substantive revision which would allow "special dispensations or privileges for developing countries"²² or "impose special burdens on developed countries."²³

This Comment will begin by examining the history and purposes of the Paris Convention and its revisions; second, it will examine the conflict between the developed and developing nations regarding the Convention revision; and third, it will examine the legal validity of denouncing the Convention and establishing a new multilateral treaty. Finally, this Comment will suggest the approach the United States should adopt to advance its position regarding the Paris Convention revision.

20. *Resolution 102-1*, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 29.

21. PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 543, at A-1 (Aug. 27, 1981). The ABA/PTC Section has:

RESOLVED, that the Section of Patent, Trademark and Copyright Law, favoring in principle strong patent and trademark protection in all countries, and noting the changes in the Paris Convention proposed for the Nairobi Diplomatic Conference would seriously weaken such protection, urges the Department of State to initiate consideration of steps which might be taken, in the event of adoption of such adverse changes in the Paris Convention, including denouncing that Convention and forming with other nations a new Treaty based substantially upon the principles of the present Stockholm text of the Paris Convention.

Resolution 606-A, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 34.

The second session of the Diplomatic Conference on the Revision (Nairobi Conference) was not successful. WIPO Press Release No. 16, Geneva (Oct. 27, 1981). A third session will be held in Geneva from October 4 to October 30, 1982. WIPO Information Release (Jan. 20, 1982).

22. PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 543, at A-1 (Aug. 27, 1981) (paraphrasing *Resolution 102-2*, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 29).

23. *Id.* The ABA/PTC Section has:

RESOLVED, that the Section of Patent, Trademark and Copyright Law opposes any revision of the Paris Convention which would impose different, greater or lesser obligations on, or which would grant different, greater or lesser rights or privileges to, certain states or groups of states party to the convention, or to nationals thereof, than on or to other states or groups of states party to the convention or their nationals.

Resolution 102-2, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 29.

I. THE HISTORY AND PURPOSES OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

A. Industrial Property

The exclusive right to enjoyment is the essence of property.²⁴ Exclusivity is incident to every patent; therefore, patents have the characteristics of property.²⁵ Historically, the rationale for issuing patents has been to encourage public disclosure of new, scientific, and technical developments.²⁶ In effect, the inventor is given a monopoly on his invention.²⁷ The purpose of disclosure is to induce other inventors into activity which will result in additional technological advancement.²⁸

Nations use industrial property rights²⁹ to turn technology into economic gain. The owner of the rights, or designated agents, are able to monopolize the commercial market of this particular technology.³⁰ The right results in control of trade for a certain commodity and therefore is valuable.³¹ The value of the right fosters incentive to create further protectable technology.³² The ideal

24. P. ROSENBERG, *PATENT LAW FUNDAMENTALS* 9 (1975).

25. *Id.* This status is explicitly recognized in the United States patent law. *Id.* Thus, the major theories behind the patent system are incentive and property.

26. *Id.* at 1 (Supp. 1979). The specific rationale behind the United States patent law is the policy that one who has invested time and labor in developing a new product should be given the benefit of invention by being given the complete right to exclude others from the enjoyment of his invention. *Id.*

27. *Id.* at 9 (1975). The word monopoly is derived from the Greek words meaning "alone" and "to sell." *Id.*

28. *Id.* at 1 (Supp. 1979).

29. Industrial property rights fall within the area of law known as intellectual property, i.e., patents, trademarks, copyrights, trade secrets. Industrial property relates to patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source of appellations of origin, and repression of unfair competition. Paris Convention, *supra* note 1, art. 1(2). Inventor's certificates are a proposed addition to Article 1(2) of the Convention which sets out the areas protected by the treaty. See *WIPO Revision, supra* note 9, at 567.

30. The nature of the patent right is to give the patentee, i.e., the inventor, a monopoly on his invention for a specified amount of time. The monopoly grant is the right to control the use of the patent. *E.g.*, Patent Act, 35 U.S.C. §§ 1-376 (1976). Specifically, 35 U.S.C. § 154 grants a monopoly to a U.S. patentee for seventeen years.

31. A fundamental principle of all intellectual property is that the exclusive right is not in abstract ideas. Rather, the exclusivity is for the physical embodiment of the idea. P. ROSENBERG, *supra* note 24, at 10 (1975). Therefore, although it is essentially intangible, a patent, as well as other intellectual and industrial property, is an actual property right.

32. Payne & Bagarazzi, *Effect of the EEC Rules of Competition on Industrial Property Rights and Technology Transfer*, in RECENT DEVELOPMENTS IN LICENSING 245, 245 (A.B.A. Sec. Pat., Trademark & Copyright L. 1981).

international industrial property system achieves a balance between allocating control which spurs incentive to create and preventing abuse of the control which inhibits technology transfer.³³

B. *The Paris Convention*

The Paris Convention for the Protection of Industrial Property of 1883³⁴ has been the cornerstone of international regulation of industrial property for nearly a century.³⁵ The Convention makes no provision for patentability requirements; these are left to individual national legislation.³⁶ However, the Convention sets out a binding framework³⁷ for its eighty-eight member nations³⁸ (the

33. *Id.*

34. See Paris Convention, *supra* note 1. For a history of events leading to the 1883 Convention, see U. ANDERFELT, *supra* note 4, at 65-72.

35. 15 J. WORLD TRADE L. 93, 93 (1981) (editorial). The Berne Convention, and the Universal Copyright Convention of which the United States is a member, are the main treaties regarding copyright protection. See generally A. LATMAN, *THE COPYRIGHT LAW* 262-65 (1979). The Paris Convention is the most important of the multinational agreements on invention protection. Gerster, *Switzerland and the Revision of the Paris Convention*, 15 J. WORLD TRADE L. 111, 118 (1981). For the text of other multinational treaties in this area, see 2B-2J J. SINNOTT, *WORLD PATENT LAW AND PRACTICE: PATENT STATUTES, REGULATIONS AND TREATIES* (1981). In the introduction written for the original 1974 edition the author stated: "the text of the time-honored International Convention [Paris Convention] is published in these volumes. In spite of the apparently immanent [sic] adoption of the Patent Cooperation Treaty (which is also reprinted in this book), the older International Convention probably has a great deal of life left to live." 2B *id.* at viii.

36. Gerster, *supra* note 35, at 118. The Swiss Federal Supreme Court regarded the Free Trade Agreement (FTA) as subservient to the Paris Convention and the Madrid Trademark Agreement. Payne & Bagarazzi, *supra* note 32, at 255-56. These two major treaties favor the trademark law of the forum state on questions of function, incidents and deceptive character of a trademark. *Id.*

37. G. BODENHAUSEN, *GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY* 14 (1968); Gerster, *supra* note 35, at 118. See also Paris Convention, *supra* note 1, art. 25 (Article 25 states "[a]ny country party to this Convention undertakes to adopt, in accordance with its Constitution, the measures necessary to ensure the application of this Convention."). Despite the great importance of the common basic rules, members have freedom of action which the developing countries have only recently started to utilize. Gerster, *supra* note 35, at 118; Paris Convention, *supra* note 1, art. 15; see *infra* note 45.

38. The breakdown of the Union members is as follows. Signatories to the Stockholm text [entire text]: Australia, Austria, Azores, Belgium, Benin, Burundi, Cameroon, Central African Republic, Chad, Congo, Denmark (including Faroe Islands), Finland, France (including Departments of Guadalupe, Guyane, Martinique, Reunion and all Overseas Territories), Gabon, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Holy See, Hong Kong, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Kenya, Korea (Democratic People's Republic of), Korea (Republic of), Lichtenstein, Luxembourg, Madagascar, Madeira, Malawi, Mauritania, Mauritius, Mexico, Monaco, Morocco, Nether-

Paris Union). The Convention has thus far been revised six times;³⁹ it was most recently revised in 1967.⁴⁰ In keeping with the Convention's purpose of protecting industrial property, the rights of patent holders have been extended with each revision.⁴¹

The two basic substantive rules of the Convention are the principle of national treatment⁴² and the right of priority.⁴³ National treatment means foreign owners of industrial property or their licensees are entitled to the same treatment accorded nationals of the country where the foreign owners or licensees have applied for, or been granted, a patent right. A grantor country extends national treatment to the citizens of all member nations who are

lands and Netherlands Antilles, Niger, Norway, Portugal with Azores and Madeira, Senegal, Spain (including Overseas Departments), Surinam, Sweden, Switzerland, Togo, Uganda, United Kingdom, United States of America, Upper Volta, Uruguay, Vietnam (under examination), Yugoslavia, Zaire; [bound in part]: Algeria, Argentina, Bahamas, Brazil, Bulgaria, Canada, Cuba, Czechoslovakia, Egypt, Hungary, Iraq, Libyan Arab Jamaheriya, Malta, Phillipines, Poland, Romania, South Africa (Republic of), Sri Lanka, Tunisia, Turkey, Union Soviet Socialist Republic; Signatories to the Lisbon text [entire text]: Cyprus, Haiti, Iran, Nigeria, Tanzania (Tanganyika only), Trinidad/Tobago, Zimbabwe; [bound in part]: Argentina, Bahamas, Malta, Phillipines, Zambia; Signatories to the London text [entire text]: Curaçao, Iceland, Lebanon, New Zealand, Norfolk Island, San Marino, Syrian Arab Republic; [bound in part]: Canada, Indonesia, Sri Lanka, Turkey; Signatories to the Hague text: Brazil (in part), Dominican Republic, Nauru (under question). 2H J. SINNOTT, *supra* note 35, at Convention of Paris, at 1-86 (1981). "Non-discrimination means both that there are no barriers to the entry of foreign patentees into a national market and that, once there, these patentees are treated in exactly the same way as national patent holders." UNCTAD Secretariat, *supra* note 1, at 4. See also Paris Convention, *supra* note 1, art. 2(1).

39. It was revised at Brussels on December 14, 1900; at Washington on June 2, 1911; at the Hague on November 6, 1925; at London on June 2, 1934; at Libson on October 31, 1958; and at Stockholm on July 14, 1967. See *supra* note 1.

40. Gerster, *supra* note 35, at 118. For a summary of the revisions through 1958, see U. ANDERFELT, *supra* note 4, at 72-92. The two basic principles of national treatment and the right of priority are unchanged. The most important of the Union's evolutionary areas has been Article 5. *Id.* at 72 n.23.

41. Gerster, *supra* note 35, at 118-19. For example, when the Paris Union was founded almost every member required the patentee to work his invention. Noncompliance resulted in forfeiture. However, it became evident that the patentee's right would be impeded by the obligation to work in all Union countries and as the ultimate motive of the Union is strengthening the patentee's position, the goal of revision became complete abolition of any requirement to work the patent. Immediate attainment of this goal was not possible, however, and the intermediate solution was possible compulsory licensing as a sanction for non-working. U. ANDERFELT, *supra* note 4, at 99. *But see id.* at 100 (where the author suggests that public interests have led to concessions for the less industrialized nations despite the goal of strong patent protection).

42. *WIPO Revision*, *supra* note 9, at 565. It is essentially the equal protection provision. Paris Convention, *supra* note 1, art. 2.

43. Paris Convention, *supra* note 1, art. 4; see U. ANDERFELT, *supra* note 4, at 70.

residents of a member nation or have an industrial or commercial establishment within a member nation.⁴⁴ The right of priority is a grace period which gives the applicant time to decide in which other countries a patent should be sought. During the period the applicant is protected in all countries of the Paris Union from the effect of intervening publications and patent applications.⁴⁵

The basic procedural rules of the Convention relate to membership, revision, and voting. Membership is available to any country upon unilateral declaration of intent;⁴⁶ and a new member must adhere to the latest revised text.⁴⁷ There is a provision for periodic diplomatic conferences to revise the text.⁴⁸ The established practice required unanimous consent to any amendment;⁴⁹ however, this requirement was never codified.⁵⁰ Thus, the developing countries were able to successfully challenge the requirement of unanimity.⁵¹

44. U. ANDERFELT, *supra* note 4, at 71.

45. P. ROSENBERG, *supra* note 24, at 322 (1975). The priority or Convention date is the first date on which a patent application for a particular invention is made in any member country. Each member must treat any parallel application filed in its patent office as though it were made on the Convention date. The act of filing a patent application in one Union member creates potential rights in all other Union members. However, no rights vest for the foreign inventor unless and until he complies with the requisite formalities in the member country where the application was made. Subsequent invalidation of the patent or application on which the right of priority is based has no effect on the rights of the patent holder with respect to his Convention date for this invention. *Id.* For illustration of this principle, see *id.* at 324-25 (1978). The priority period for a patent is twelve months; for a trademark it is six months. Paris Convention, *supra* note 1, art. 4(C)(1).

The Convention works toward lessening the differences among national patent laws. This is done through four categories of rules: 1) those of international public law which regulate the rights and obligations of member states, establish organs of the Union and facilitate administrative functions. These include, e.g., the provisions concerning ratification, accession, and denunciation; 2) the Union rules which require or permit members to legislate. The right of priority is the most important of these Union rules; 3) those rules of substantive law which concern the rights and obligations of private parties but only to the extent of requiring domestic law of the member to be applied, e.g., national treatment; and, 4) substantive law which concerns the rights and obligations of private parties not merely in the application of domestic laws, but those which may *directly* govern the situation at issue. These rules constitute the body of common rules which directly or indirectly must be respected by all member states. G. BODENHAUSEN, *supra* note 37, at 10-13.

46. Paris Convention, *supra* note 1, arts. 20, 21, 24.

47. *Id.* art. 23. See U. ANDERFELT, *supra* note 4, at 70.

48. Paris Convention, *supra* note 1, art. 18.

49. U. ANDERFELT, *supra* note 4, at 70.

50. *Id.*

51. See *supra* note 18 and accompanying text.

Since its conception, the foremost purpose of the Convention has been to achieve uniformity among national patent laws and to render these laws, in particular the working requirements rules, more lenient to patent holders.⁵² The unanimity rule hampered the Convention's evolution,⁵³ thereby leading to revolution by the developing nations.⁵⁴

C. *The Current Revision*

The developing countries consider the Convention's balance between the rights of the patentee and the public interest of the granting member nation to be inequitably weighted toward the patentee.⁵⁵ These countries contend that there is not enough protection against patent abuse, and that the patent holder has been protected to the detriment of the social and economic interests of the developing nations.⁵⁶ Consequently, the LDCs propose revision of the Convention in the areas of national treatment;⁵⁷ right of priority;⁵⁸ independence of patents;⁵⁹ compulsory licensing and revocation;⁶⁰ and importation of products manufactured by a process patented in the importing country.⁶¹

52. U. ANDERFELT, *supra* note 4, at 227. The thrust of the Convention is not to protect the patent granting nation, but rather the patentee. See S.P. LADAS, *supra* note 7, §§ 44-62, at 59-94.

53. U. ANDERFELT, *supra* note 4, at 231.

54. See *id.* at 235. "This uniformity of substantive law of industrial property in what constitutes almost a third of the world is one of the great blessings of international trade. It would be a real misfortune for this uniformity to cease to exist. This could gradually happen because there has been no conscious effort made to date to keep development and evolution as uniform as practicably possible." S.P. LADAS, *supra* note 7, § 1028 at 1880-81.

55. *WIPO Revision*, *supra* note 9, at 565. See generally Greer, *The Case Against Patent Systems in Less-Developed Countries*, 8 J. INT'L L. & ECON. 223 (1973).

56. See Jeffries, *Regulation of Transfer of Technology: An Evaluation of the UNCTAD Code of Conduct*, 18 HARV. INT'L L.J. 309, 309-10 (1977). See also U. ANDERFELT, *supra* note 4, 100-02 (discussion of legal versus economic motives in the evolution of the Paris Union). See generally United Nations Conference on Trade and Development, *The Role of the Patent System in the Transfer of Technology to Developing Countries*, U.N. Doc. TD/B/AC.11/19 (1974) (discussion of the LDCs, their position in the international industrial property system, and the Paris Convention).

57. Paris Convention, *supra* note 1, art. 2. See *infra* notes 87-95 and accompanying text for discussion of national treatment.

58. Paris Convention, *supra* note 1, art. 4. See *infra* notes 96-110 and accompanying text for discussion of the right of priority.

59. Paris Convention, *supra* note 1, art. 4 *bis*. See *infra* notes 111-116 and accompanying text for discussion of independence of patents.

60. Paris Convention, *supra* note 1, art. 5. See *infra* notes 117-138 and accompanying text for discussion of compulsory licenses and revocation.

61. Paris Convention, *supra* note 1, art. 5 *quater*. See *infra* notes 139-150 for discussion of importation.

The developed countries agreed to revise the Convention⁶² and developing nations expected that their proposals⁶³ would provide the basis for the revised text.⁶⁴ At the Geneva Conference, however, the developed countries rejected the proposed draft of the developing nations, and declared that any favored treatment of the developing countries could only be transitional.⁶⁵ The developing nations insist that they be accorded special and preferential treatment as a permanent part of the Paris Convention.⁶⁶

II. THE CONFLICT

A. The Developing Nations

The tension between the developed and developing nations intensified when the developing nations organized the Group of 77⁶⁷ at the first United Nations Conference on Trade and Development (UNCTAD).⁶⁸ The Group of 77 is attempting to attack

62. *WIPO Revision*, *supra* note 9, at 566.

63. *See id.* at 565-66 for proposals.

64. *See* 15 J. WORLD TRADE L. 93, 94 (1981) (editorial).

65. *Id.* *See Committee Reports*, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 58; Schuyler, *supra* note 18, at 2; PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 562, at A-6 (Jan. 14, 1982).

66. *See WIPO Revision*, *supra* note 9, at 566.

67. The seventy-seven developing countries joined together to give their demands greater authority by speaking with one unified voice. The group has expanded to approximately 120 members. Nossiter, *Third World Pact on Sea Is Planned*, N.Y. Times, Mar. 9, 1982, at A11, col. 1. However, in U.N. terminology it is still known as the Group of 77. Dorsey, *Preferential Treatment: A New Standard for International Economic Relations*, 18 HARV. INT'L L.J. 109, 109 n.1. (1977).

68. United Nations Conference on Trade and Development, First Session, Group of 77: Joint Declaration of the Seventy-Seven Developing Countries Made at the Conclusion of the United Nations Conference on Trade and Development, Geneva, June 15, 1964, *reprinted in* K. SAUVANT, 1 THE GROUP OF 77 at 19-20 (1981). The seventy-seven original members were: Afghanistan, Algeria, Argentina, Bolivia, Brazil, Burma, Burundi, Cambodia, Cameroon, Central African Republic, Ceylon, Chad, Chile, Colombia, Congo (Brazzaville), Congo (Leopoldville), Costa Rica, Cyprus, Dahomey, Dominican Republic, Ecuador, El Salvador, Ethiopia, Gabon, Ghana, Guatemala, Guinea, Haiti, Honduras, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Laos, Lebanon, Liberia, Libya, Madagascar, Malaysia, Mali, Mauritania, Mexico, Morocco, Nepal, Nicaragua, Niger, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Republic of Korea, Republic of Vietnam, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Republic, United Republic of Tanganyika and Zanzibar, Upper Volta, Uruguay, Venezuela, Yemen, and Yugoslavia. *Id.* at 19.

Membership in the Group of 77 is open to developing countries located within Asia, Africa and Latin America. In exceptional circumstances, the Group of 77 may consider the application of a developing country outside these three regions if the country concerned has shown over a sufficient period of time that it has identified with the interests of the Group of 77 and has consistently supported the positions of the Group of 77. Working Group on

technological dependence, import dependence and foreign involvement⁶⁹ through international and local law,⁷⁰ including revision of the Paris Convention.⁷¹ Fifty-five of the lesser developed countries belong to the Paris Union.⁷² It is by means of this majority that the Group of 77 plan to change their status with respect to the Convention.⁷³ Many LDCs consider that the "new economic order"⁷⁴ justifies their harsh attacks on the international legal systems of intellectual property protection.⁷⁵

Membership: Report on Procedures for the Admission of New Members to the Group of 77 and on Membership of the Group, Geneva, April 28, 1976, *reprinted in* 3 K. SAUVANT, *supra*, at 83.

United Nations Conference on Trade and Development (UNCTAD) was the first international organization devoted to aiding developing countries, especially in the growing conflict between the developing and developed nations of the world. *See generally* B. GOSOVIC, UNCTAD: CONFLICT AND COMPROMISE (1972). The UNCTAD Secretariat has participated in the Convention revision by preparing a report from the perspective of the developing countries. United Nations Conference on Trade and Development, Report of the Group of Governmental Experts on the Role of the Industrial Property System in the Transfer of Technology, U.N. Doc. TD/B/C.6/AC.3/4 *alternatively numbered* U.N. Doc. TD/B/C.6/24 (1977).

69. *See infra* note 78.

70. For a discussion of Mexico's national legislation as a reaction to the problem of LDC transfer of technology, see Comment, *Multinational Corporations and Lesser Developed Countries—Foreign Investment, Transfer of Technology, and the Paris Convention: Caveat Investor*, 5 DAYTON L. REV. 105, 116-30 (1980) [hereinafter cited as *Caveat Investor*]. For a discussion of Switzerland's solution of bilateral treaties, see Gerster, *supra* note 35, at 111-18.

71. United Nations Conference on Trade and Development, The International Patent System as an Instrument of Policy for National Development (Provisional Agenda Item 3(b)) at 29-30, U.N. Doc. TD/B/C.6/AC.2/3 (1975) [hereinafter cited as *Instrument of Policy*].

72. Gerster, *supra* note 35, at 118.

73. *See supra* note 18. *See also* Dorsey, *supra* note 67, at 115 n.21.

74. United Nations resolutions call for a "new economic order." G.A. Res. 3201, S-6 U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3202, S-6 U.N. GAOR Supp. (No. 1) at 5, U.N. Doc. A/9559 (1974). *See also* G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974) ("new economic" charter of rights and duties). *See also* Davidow & Chiles, *The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices*, 72 AM. J. INT'L L. 247 (1978) (discussion of proposals by the "new order" of Codes of Conduct to balance the bargaining power in international commerce). *See generally* Murphy, *Decision 24, Mexicanization, and the New International Economic Order: The Anatomy of Disincentive*, 13 TEX. INT'L L.J. 289, 298-302 (1978) (discussion of the "new economic order"). The U.N. documents asserting the "new economic order" essentially admonish the developed nations to provide preferential and nonreciprocal treatment to developing countries particularly with respect to economic and social development and technological progress. *Id.* at 298-99. Certain proposals to implement the "new economic order," especially in dealings with MNCs are covered in Codes of Conduct, e.g., the UNCTAD Code of Conduct. Davidow & Chiles, *supra*, at 252-53. *See generally* Jeffries, *supra* note 56 (discussion of the UNCTAD Code of Conduct).

75. Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, S-6 U.N. GAOR Supp. (No. 1) at 8, U.N. Doc. A/9559 (1974).

The LDCs own only one percent of the world's patents, yet grant monopolistic rights to foreign patentees.⁷⁶ The Group of 77 asserts that the present system thereby grants preferences to foreign patentees within the LDCs' market.⁷⁷ The technology and capital gaps between the LDCs and developed nations undoubtedly will continue under this system unless steps are taken to alleviate them.⁷⁸

B. *The Developed Nations*

At present, the number of LDC Union members exceeds the number of developed country members;⁷⁹ however, the developed countries are the significant patentees and, until the recent challenge, were the controlling force in the Paris Union.⁸⁰ In United Nations terminology the developed countries are labelled Group B.⁸¹ These countries operate their technology transfer through

76. Ewing, *UNCTAD and the Transfer of Technology*, 10 J. WORLD TRADE L. 197, 199 (1976). In most of the developing nations a huge percentage of patents are sought out by foreigners. Even in some developed countries, however, foreigners file a greater percentage of applications than those filed by nationals. The reason probably is that inventions of the world outnumber inventions within a country. The possible explanation for the low number of applications by nationals within developing nations is the absence of technological background in research, education, and training. S.P. LADAS, *supra* note 7, § 1030, at 1886. The LDCs are interested in being included in the industrial property system because as their industrialization and inventive capacity increases their inventors will need universal protection. 15 J. WORLD TRADE L. 93, 94 (1981) (editorial).

77. Instrument of Policy, *supra* note 71, at 28. UNCTAD considers the Convention to have become a "reverse system of preferences granted to foreign patent holders in the markets of developing countries." *Id.* See also UNCTAD Secretariat, *supra* note 1 (proposals by the Secretariat on behalf of LDCs).

78. Hart, *The Capital Gap and the Transfer of Technology*, in RECENT DEVELOPMENTS IN LICENSING 235, 235 (A.B.A. Sec. Pat., Trademark & Copyright L. 1981). The LDCs often lack necessary development resources in human, technological, and economic areas. They are hampered by poverty, illiteracy, political unrest, and inflation. Furthermore, fear of domination causes LDCs to be reluctant to accept capital from developed countries for technology research and development. *Id.* at 235-36.

79. Fifty-five of the eighty-eight member nations are LDCs. Gerster, *supra* note 35, at 118.

80. Jeffries, *supra* note 56, at 326 n.92.

81. *WIPO Revision*, *supra* note 9, at 567. This corresponds to the terms "Group of 77" used for developing countries and "Group D" used for the socialist countries. China does not belong to any group. *Id.* Yugoslavia is not a member of Group D. Jeffries, *supra* note 56, at 309 n.1. The developed nations are often termed industrialized countries.

This Comment concentrates on the United States position regarding the current revision. A problem faced by the United States is that the Group B nations are not taking a unified stand with respect to the Convention revision (unlike the developing countries). This Comment does not intend to suggest that the United States position is identical to that of all other Group B nations.

multinational corporations (MNCs).⁸² The Group B countries adhere to the ideas of reciprocity and equal treatment under international conventions.⁸³ The developed countries consider that the main purpose of treaties such as the Paris Convention is not the transfer of technology as suggested by the Group of 77; rather, it is effective protection of industrial property.⁸⁴ One noted commentator has proposed⁸⁵ that the "misconceived documentation" on industrial property rights by the United Nations and its agencies, e.g., UNCTAD, which favors developing countries, be ignored.⁸⁶

III. REVISION POSITIONS

The following five areas have remained unresolved by the Diplomatic Conferences on Revision. The LDC viewpoint will be juxtaposed with that of the United States.

A. National Treatment

The LDCs are not suggesting that the principle of national treatment⁸⁷ be eliminated. Rather, they recommend less rigid application of the principle to LDCs, to be accomplished by exceptions within the Convention.⁸⁸ They argue that this preferential

82. Jeffries, *supra* note 56, at 309 n.3; *Caveat Investor*, *supra* note 70, at 105 n.1. MNCs are sometimes referred to as multinational enterprises (MNEs), transnational corporations (TNCs), or transnational enterprises (TNEs). The terms are often used interchangeably although some scholars draw distinctions among the terms. *Id.*; Davidow & Chiles, *supra* note 74, at 247-48.

83. Harris, *supra* note 7, at 225-26.

84. *Id.* at 219.

A good legal system of industrial property in a developing country would not necessarily guarantee a ready access to technology, but a bad system may seriously impede it, because it is a factor in the element of confidence and legal security which stimulates investment.

In this connection, nonadherence of a developing country to a treaty arrangement that gives adequate protection to foreign rights of industrial property is an impediment to economic development. It is undeniable that the Paris Convention is the best existing international system of such protection.

S.P. LADAS, *supra* note 7, § 1030, at 1885.

85. The proposal is by Bryan Harris, head of the Intellectual Property Law Division of the Commission of European Communities and author of the work cited *supra* note 7.

86. Harris, *supra* note 7, at 224.

87. See *supra* note 44 and accompanying text.

88. UNCTAD Secretariat, *supra* note 1, at 25-26. For example, some exceptions might be duration periods for patent grants, standards for revocation and compulsory licensing and fee schedules. *Id.* at 26.

treatment is necessary to overcome industrial property domination by developed countries.⁸⁹

The United States position⁹⁰ emphasizes that this principle is essential to the Convention.⁹¹ Therefore, it seems that a system of preferential treatment in this area is irrational, and effectively eliminates the Convention. The United States proposes the employment of a technology transfer expert to negotiate for the LDCs in dealings with MNCs.⁹² It also advocates national promotion of local inventions which will result in benefits to LDCs.⁹³ New local technology would result in increased local employment, an improved economy, and access to the subsidiary knowledge required to work the technology after patent expiration.⁹⁴ The United States contends that such a system of local development can be implemented within the existing principle of national treatment.⁹⁵

B. *Right of Priority*

The UNCTAD Secretariat has made a number of suggestions regarding the priority right⁹⁶ which are aimed at benefitting LDCs.⁹⁷ First, the Secretariat recommends that the priority pe-

89. Dorsey, *supra* note 67, at 116; *see also* U. ANDERFELT, *supra* note 4, at 265-66 (Anderfelt suggests that there are two forms within which preferential treatment could be offered to LDCs and that both options have been illustrated in the international copyright field).

90. The position espoused in this Comment is based on the comments of the United States group of experts in response to the UNCTAD Secretariat's proposals. United States of America: Preliminary Comments on the Report by the UNCTAD Secretariat (TD/B/C.6/AC.3/2), U.N. Doc. TD/B/C.6/AC.3/4/Add.1 Annex V (1977) [hereinafter cited as United States Comments]; *see also* United Nations Conference on Trade and Development, List of Participants, U.N. Doc. TD/B/C.6/INF.1 (1975) (advisors and experts named).

91. United States Comments, *supra* note 90, at 22.

92. *Id.* at 7; *see also* Hart, *supra* note 78, at 235 (the author suggests that the developing nations lack the expertise, and more importantly, the wisdom, to decide which technologies are appropriate to accommodate their needs); S.P. LADAS, *supra* note 7, § 1032, at 1891-92 (the author suggests that the real problem in some cases is not technology transfer, but rather adaptation of foreign imported technology to the needs of the developing nations). There is doubt that these countries can adapt if left to themselves; the author enumerates the reasons for this. *Id.*

93. United States Comments, *supra* note 90, at 22.

94. *Id.* at 23.

95. *Id.* Distinctions in treatment based upon the invention origin can be used to encourage local research and development yet remain consistent with the current Convention provision for national treatment. *Id.*

96. *See supra* note 45 and accompanying text.

97. UNCTAD Secretariat, *supra* note 1, at 19-21.

riod should be reduced.⁹⁸ The rationale for this suggestion is the existence of modern means of communication which were not available when the right originated in 1883.⁹⁹ These methods have rendered a long priority period unnecessary.¹⁰⁰ Second UNCTAD recommends that the priority period should not be applied against third parties who in good faith have begun exploitation of an invention which is identical to one for which priority is claimed, but which has not been disclosed or published.¹⁰¹ The Secretariat contends that it is unjust to force a third party to stop use of his invention.¹⁰² Third, the Secretariat suggests that preferential treatment should be granted to LDC national inventors who in good faith¹⁰³ apply for a patent during the priority period of a foreign applicant.¹⁰⁴ Alternatively, the national inventor would be unable to patent his invention, resulting in disincentive for national inventors.¹⁰⁵ Finally, the Secretariat proposed that preferential treatment should also be considered in regard to the period of priority for inventions originating in LDCs.¹⁰⁶

The United States argues that UNCTAD's conclusions that priority rights create a disincentive for LDC researchers is untenable since patent rights inherently discourage research and develop-

98. *Id.* at 21.

99. *Id.* at 19. The 1883 priority period was six months. It is currently twelve months.
Id.

100. *Id.*

101. *Id.* Exploitation of a patent involves the sale, use, and licensing of the invention by the owner. Disclosure or publication occurs when the existence of a patent on an invention becomes known. Thus a national inventor may spend time and money exploiting an invention for which there is a patent application in another country, but which is not disclosed to the national.

102. *Id.* at 20.

103. "Good faith" is not defined by the Secretariat; however, assuming that UNCTAD wants the least rigid requirements for LDCs, good faith in this context most likely means that the national inventor has no prior knowledge of the foreign patentee's invention and no extensive search for foreign inventions is necessary.

104. *Id.* at 21.

105. *Id.* at 20. The national inventor would be unable to patent his invention as a result of the foreign patentee's application, thus the national inventor's investment of time, money and energy would be useless even though the foreign patentee's application was unknown to him. However, this may be a false argument in light of the disincentive nature of the patent system as a whole. A better argument for preferential treatment in this situation may be that given the different conditions under which the LDC inventor must work, it is only fair to give him extra time to file.

106. *Id.* at 21.

ment.¹⁰⁷ The United States argues that in practice it is rare that two applications for one invention are filed within the same one year period.¹⁰⁸ However, this seems to be a false argument in light of the need for an "interference area" in the practice of patent law.¹⁰⁹ Finally, the United States argues that a reduction in the period would contribute to the number of unworked patents in LDCs.¹¹⁰

C. *Independence of Patents*

The principle of independence of patents provides that the substantive requirements in one member nation are independent of the requirements in other member nations of the Paris Union.¹¹¹ A resulting problem is that forfeiture, expiration, or nullity of a patent in one member nation does not cause forfeiture of the patent in another member nation.¹¹² This can have a detrimental effect on the first grantor country, particularly on LDCs which do not have the technical staff necessary for a searching examination of an application.¹¹³ Consequently, the LDCs advocate a compulsory

107. United States Comments, *supra* note 90, at 17. The consideration here is the distinct possibility of another inventor being second.

108. *Id.* at 18. For example, in the United States over 100,000 patent applications are filed annually, yet fewer than 400 instances of conflicting United States applications for the same invention arise in a year. *Id.* See also S.P. LADAS, *supra* note 7, §§ 252-53, at 445-54 (general statistics on international patents).

109. The adversary proceeding in the Patent Office is known as an interference and is designed to determine which of the rival claimants is the first in time. In the United States the determination involves the dates of conception and reduction to practice as well as the diligence of the first to conceive and the last to reduce to practice during the overlapping period. H. WIKSTROM, *PATENT INTERFERENCE PRACTICE* 9 (1965); see also A.W. DELLER, 8 *DELLER'S WALKER ON PATENTS* §§ 604-05 (2d ed. 1973 & Supp. 1981) (text and cases on interference practice in general and the characteristics of interfering patents).

110. United States Comments, *supra* note 90, at 19.

111. Paris Convention, *supra* note 1, at art. 4 *bis*; see also S.P. LADAS, *supra* note 7, § 171, at 272 (further explanation of principle of the independence of patents).

112. S.P. LADAS, *supra* note 7, § 171, at 272.

113. UNCTAD Secretariat, *supra* note 1, at 22. In most countries the official scrutiny, i.e., the examination, is delegated to the patent office which is an administrative agency of the government. Those countries that pass upon the novelty of the inventions submitted to their patent offices have an examination system; those countries which do not make a determination on novelty before granting the patent have a registration system. Even in these latter countries, however, the applications are screened for compliance with form. P. ROSENBERG, *supra* note 24, at 336-37 (1975). The examination is in two stages: 1) search and retrieval of relevant prior art; 2) application of that prior art to the subject matter of the invention involving administrative determination of patentability. *Id.* at 338.

information exchange whereby the country of initial application must inform other countries of the results of its examination.¹¹⁴

The United States position on this point is not radically different from that of the LDCs. A compulsory exchange of information is also advocated by the United States. However, it notes that only certain information¹¹⁵ should be included, and thus the provision should be carefully drafted to avoid the exchange of irrelevant information.¹¹⁶

D. *Compulsory Licensing and Revocation*

The patent right is a monopoly.¹¹⁷ The two basic protections against abuse of the right are the compulsory license¹¹⁸ and the revocation of the patent¹¹⁹ for insufficient or non-use. In the opinion of the UNCTAD Secretariat, however, the Convention renders these two remedies ineffective against MNC monopoly abuses such as the non-working of the patent, the charging of excessive royalties, or the forcing of restrictions upon a licensee.¹²⁰

A compulsory license is an involuntary grant of use of the patent by the patent holder.¹²¹ Three major problems plague the application of this remedy. First, a country may require a patentee to grant a compulsory license for insufficient working of a patent, but it may do so only four years after the application date or three years after the patent grant, whichever is later.¹²² Second, there is a prohibition against granting a compulsory license if the patent

114. UNCTAD Secretariat, *supra* note 1, at 23. The report also suggests that results of validity of patent litigation should be exchanged. *Id.*

115. The areas of novelty and obviousness are suggested. United States Comments, *supra* note 90, at 20. The United States Patent Office is not equipped to handle a voluminous exchange of information. *Id.*

116. *Id.* Note that the present text of the Convention does not prevent a country from requiring such information from an applicant. *Id.* Canada does require submission of various information. *Id.*

117. S.P. LADAS, *supra* note 7, § 1, § 4, at 2, 5-6.

118. *Id.* §§ 16-17, at 25. Most developing countries and all developed countries, except the United States, have compulsory license provisions in their patent statutes. Note, *Is A Compulsory Patent Licensing Statute Necessary? A Study of the U.S. and Foreign Experience*, 7 L. & POL'Y INT'L BUS. 1207, 1207 (1975) [hereinafter cited as *Is Compulsory Licensing Necessary?*]

119. S.P. LADAS, *supra* note 7, §§ 16-17, at 25.

120. UNCTAD Secretariat, *supra* note 1, at 9-14.

121. *Id.* at 12.

122. Paris Convention, *supra* note 1, art. 5(A)(4).

holder justifies his lack of use by "legitimate reason."¹²³ UNCTAD seeks a better definition of this concept in order to achieve an applicable standard for the defense.¹²⁴ Third, the patent holder is not required to disclose the know-how of the patent's operation.¹²⁵ The Secretariat contends that unless disclosure is mandatory, this subsidiary knowledge will not be transferred to those willing to work the patent.¹²⁶

There are problems with the revocation procedure as well. A grantor country may not revoke a patent unless the grant of a compulsory license would be insufficient to prevent abuse.¹²⁷ Furthermore, the grantor may not institute forfeiture proceedings until two years after the first compulsory license.¹²⁸ The LDCs conclude that this is a disadvantage to the grantor country because that country is not exposed to the technology until it is of little or no value.¹²⁹

UNCTAD concedes that the compulsory license remedy is of minimal value.¹³⁰ However, the United States contends that the ineffectiveness of the remedy is not in the Convention text; rather, compulsory license provisions are rarely enforced,¹³¹ and compulsory licenses are seldom granted.¹³² The United States points out

123. *Id.* There is no standard for "legitimate reasons."

124. UNCTAD Secretariat, *supra* note 1, at 12.

125. *Id.*

126. *Id.* See generally *Is Compulsory Licensing Necessary?*, *supra* note 118.

127. Paris Convention, *supra* note 1, art. 5(A)(3).

128. *Id.*

129. UNCTAD Secretariat, *supra* note 1, at 12. The idea here is that the technology will become outdated. See generally *Is Compulsory Licensing Necessary?*, *supra* note 118.

130. UNCTAD Secretariat, *supra* note 1, at 10. But see *Is Compulsory Licensing Necessary?*, *supra* note 118, at 1211. Because of the many factors involved, such as national needs, priorities, the technological status of a country, and the criteria used by various countries, it is difficult to assess the impact of the compulsory license in correcting patent abuses. *Id.*

131. See Henry, *Multinational Practice in Determining Provisions in Compulsory Patent Licenses*, 11 J. INT'L L. & ECON. 325, 326-27 (1976).

132. United States Comments, *supra* note 90, at 12. But see *Is Compulsory Licensing Necessary?*, *supra* note 118, at 1211. The author advances seven arguments against a compulsory license: 1) it violates a property right; 2) it undermines the value of patents as an incentive to investments; 3) it hurts a large company which cannot recoup losses on frequent and costly failures; 4) it hurts a small company by forcing it to license a large company with which it cannot compete; 5) it calls for difficult-to-compute royalties which are lower than those available from arm's-length bargaining; 6) it is ineffective as a remedy for undesired, anti-competitive business practices; and 7) it precipitates unilateral and bilateral trade barriers. *Id.*

that a grace period for working a patent is a practical necessity; often the full value of a particular technology¹³³ is not realized at the time of conception.¹³⁴ Furthermore, it contends that the convention is flexible and is currently capable of meeting the needs of LDCs.¹³⁵ In fact, it is argued that redefinition of "legitimate reasons" will narrow the defense and, therefore, is inconsistent with the request for more flexibility toward LDCs.¹³⁶ A stricter standard would inhibit transfer of technology.¹³⁷ Finally, the United States suggests that the rare issuance of a compulsory license proves its success as an incentive for a patent holder to work a patent or grant a compulsory license.¹³⁸

E. Importation of Products Manufactured by a Process Patented in the Importing Country

Article 5 *quater* of the Convention prescribes that the grantor country must apply its national law on infringement in the case of importation of products that are manufactured according to the process patented in the importing country. This is true even though the product is manufactured in another country, and the process is not patented in that other country.¹³⁹ The protection extends to the sale and use of the products directly manufactured by the process.¹⁴⁰ This provision¹⁴¹ is an exception to the general freedom

133. For example, the successes of penicillin, the helicopter, and the ballpoint pen were not realized until many years after their development. United States Comments, *supra* note 90, at 12.

134. *Id.*

135. *Id.* at 10.

136. The United States experts suggest that redefinition would impose a harsh and arbitrary standard on patentees who had valid reasons for not working their patents. *Id.* at 13.

137. The redefinition would result in a disincentive to potential patentees to patent their inventions. Less technology would be transferred to countries using the new standard. See Harris, *supra* note 7, at 226.

138. United States Comments, *supra* note 90, at 12-13; see Cohen, *Compulsory Licensing of Inventions—The Paris Convention Model*, 20 *IDEA* 153, 189 (1979).

139. Paris Convention, *supra* note 1, art. 5 *quater*; G. BODENHAUSEN, *supra* note 37, at 85; S.P. LADAS, *supra* note 7, § 232, at 395.

140. G. BODENHAUSEN, *supra* note 37, at 85; S.P. LADAS, *supra* note 7, § 232, at 395.

141. Paris Convention, *supra* note 1, art. 5 *quater*. Article 5 *quater* states:

When a product is imported into a country of the Union where there exists a patent protecting a process of manufacture of the said product, the patentee shall have all the rights with regard to the imported product, that are accorded to him by the

to legislate national laws regarding infringement.¹⁴² Furthermore, the current text provides that products manufactured in any member country which are imported by the patentee into the country granting the patent shall not cause forfeiture of the patent.¹⁴³ UNCTAD contends, however, that the importation is not the working of a patent, and that this provision merely grants an importation monopoly to the holder of a domestic monopoly, adding to the problem of non-use of patents.¹⁴⁴

The United States sees no reason to modify this provision. Most inventions are not patented in LDCs,¹⁴⁵ therefore, the products derived from patents in other countries are available to LDCs,¹⁴⁶ and the added protection to imports is irrelevant. Furthermore, without protection against imports, a patent holder may not be able to establish local working.¹⁴⁷ The exclusion of infringing imports is necessary to continue local manufacture.¹⁴⁸

The United States also does not see a reason to delete this provision. It argues that if a patented process is not worked the patent should be licensed or revoked, and again importation of the product by the patentee is irrelevant.¹⁴⁹ Similarly, if a patent is worked, then importation by the patentee should not cause revocation. Revocation should follow non-use, not importation. Deletion of this provision may discourage technology transfer by prohibiting necessary importation.¹⁵⁰

legislation of the country of importation, on the basis of the process patent, with respect to products manufactured in that country.

Id.

142. S.P. LADAS, *supra* note 7, § 232, at 395. The article does not mandate that all processes or products must be granted patent protection. Rather, the point is that the rights of a product or process which is protected should not be circumvented by importation.

143. Paris Convention, *supra* note 1, art. 5(A)(1).

144. UNCTAD Secretariat, *supra* note 1, at 15-18. The Secretariat suggests that the advantages of domestic production, local employment, the attainment of experience and know-how, and capital outflow do not arise when the product is imported. *Id.* Article 5 *quater* encourages failure to work a process patent and creates price increases without a transfer of technology. Gerster, *supra* note 35, at 121. The request to eliminate the provision or not apply it to LDCs is justified on the idea that it strengthens import monopolies of foreign multinationals. *Id.*

145. United States Comments, *supra* note 90, at 8.

146. *Id.*

147. *Id.* at 16.

148. *Id.*

149. *Id.*

150. *Id.* at 17.

F. Summary

One noted commentator suggests that the only possible approach to eliminating the gap between developing and developed nations is for the LDCs to obtain unilateral concessions from the other Union members.¹⁵¹ It was thought that a unified challenge to the dominant position of the developed countries would result in cooperation for changes to the present system.¹⁵² The developed countries, and in particular the United States, have not placidly accepted the proposed changes.¹⁵³

Radical unilateral change is a solution which results in undesired disincentives.¹⁵⁴ As stated by a high official in the area of European intellectual property: "If intellectual property is inadequately protected, it cannot be adequately rewarded; and, if it cannot be adequately rewarded, it is far less likely to be forthcoming."¹⁵⁵

IV. DENUNCIATION OF THE PARIS CONVENTION

A. The Convention

The Paris Convention is a treaty of unlimited duration¹⁵⁶ which any member country can denounce by notifying the Director General;¹⁵⁷ withdrawal takes effect one year after the day of receipt of notification.¹⁵⁸ Unilateral denunciation of the Convention automatically applies to all texts so that a country which denounces the Convention leaves it entirely. Furthermore, denunciation by one country has no effect on the other members and the Convention remains in full force.¹⁵⁹ A country may not exercise the right of denunciation unless it has been a member for at least five years.¹⁶⁰

151. U. ANDERFELT, *supra* note 4, at 230.

152. *Id.* at 230-31.

153. See 15 J. WORLD TRADE L. 93, 94 (1981) (editorial); Schuyler, *supra* note 18, at 3 (recommends a United States campaign to modify the positions of the other developed countries, the more industrialized developing countries, and select socialist countries).

154. See S.P. LADAS, *supra* note 7, § 1030, at 1884-85.

155. Harris, *supra* note 7, at 227.

156. Paris Convention, *supra* note 1, art. 26 (1).

157. *Id.* art. 26 (2).

158. *Id.* art. 26 (3).

159. *Id.* art. 26 (2).

160. *Id.* art. 26 (4). A proposed revision eliminated this restriction, leaving only the one year notification requirement. However, the United States experts view these proposals as undesirable or stale. United States Comments, *supra* note 90, at 24.

Technically, the United States has the right to denounce the Paris Convention.¹⁶¹ However, to do so in anticipation of establishing a new treaty modeled after the current convention¹⁶² is unrealistic if not destructive of the world industrial property system.¹⁶³ Although the LDCs will undoubtedly feel the loss of United States industrialization, the Convention will technically continue in effect. Without the strong opposition of the United States, the Group of 77 will come to dominate the Paris Union and will introduce the program of preferential treatment.

All of the Group B countries must denounce the Convention if this action is to have significant effect on the developing countries. Although a minority in membership, the developed countries control the world's industrial property.¹⁶⁴ Uniform Group B action is not forthcoming,¹⁶⁵ but in any event such a break will destroy universal protection of industrial property. Some alternatives less radical than denunciation should be examined.

B. *International Law*

A fundamental and universal principle of international law is *pacta sunt servanda* which demands that rights and obligations of a treaty agreed to by signature, ratification, or accession must be respected.¹⁶⁶ There are, however, doctrines which may render written agreements nonbinding.¹⁶⁷

161. See generally Comment, *Termination of Treaties as a Political Question: the Role of Congress After Goldwater v. Carter*, 4 FORDHAM INT'L L.J. 81 (1980) (for a discussion of which branch of the U.S. government has the legal right and authority to terminate treaties).

162. PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 543, at A-1 (Aug. 27, 1981); *Resolution 606-A*, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 34; *Committee Reports*, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 58.

163. In moving for the adoption of Resolution 606-A, Mr. Donald W. Banner, an advisor to the Geneva Conference U.S. Delegation stated "[t]his resolution does not say that we should leave the Paris Convention. It merely says that we should look to where we will be when the Paris Convention is over." *Committee Reports*, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 58. It is inadvisable for the United States to conduct its affairs as if the Convention will soon end.

164. UNCTAD Secretariat, *supra* note 1, at 2.

165. Speaking in favor of Resolution 606-A, Mr. Robert B. Benson, another Geneva advisor states "[t]hey are forcing things through on us, and we are in fact standing alone." *Committee Reports*, 1981 A.B.A. SEC. PAT., TRADEMARK & COPYRIGHT L. SUMMARY OF PROC. 58.

166. BLACKS LAW DICTIONARY 999 (rev. 5th ed. 1979).

167. B. SINH, UNILATERAL DENUNCIATION OF TREATY 77-78 (1966); Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180 (1945); T. ELIAS, THE MODERN LAW OF TREATIES 40 (1974).

1. *Rebus Sic Stantibus*

Rebus sic stantibus is the recognized rule of international law that certain changes in circumstances will be grounds for termination of a treaty or a treaty obligation.¹⁶⁸ The Vienna Convention on the Law of Treaties¹⁶⁹ (Vienna Convention) codified the doctrine's limits.¹⁷⁰

According to the Vienna Convention, five conditions must be present in order for the doctrine to apply: first, the change in circumstances must relate to conditions existing at the time the treaty is to be concluded; second, it must be a fundamental change; third, it must be a change unforeseen by the parties; fourth, the original circumstances must have constituted an essential basis of consent of the parties to be bound by the treaty; and, fifth, the change in circumstances must have radically transformed the scope of obligations remaining to be performed under the treaty.¹⁷¹ The World Court defined fundamental changes as those which imperil the existence or vital development of one of the parties.¹⁷²

The United States could argue that the proposed changes from strict protection of the patentee to preferential treatment for LDCs

168. Toth, *The Doctrine of Rebus Sic Stantibus in International Law* (pts. 1-3), *JURID. REV.* 56, 147, 263, at 56 (1974). The principle is analogous to the contract law doctrine that frustration of purpose operates to excuse failure of performance, or to terminate the contract. See J. CALAMARI & J. PERILLO, *CONTRACTS* §§ 13-10 to 13-13 (2d ed. 1977); U.C.C. § 2-615 (1978); Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 *AM. J. INT'L L.* 895 (1967). Customary international law is the constant and uniform practices of nations. It must be accompanied by the conviction that the action is the exercise of a right or fulfillment of an obligation guaranteed or required by law; furthermore, the international community must acquiesce to or recognize the practice. Toth, *supra*, at 148. Treaties are a second source of international law; general principles of law recognized by civilized nations are a third source; case law, opinions of scholars, and writings of jurists are the fourth source. Kunz, *supra* note 167, at 180.

169. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 *I.L.M.* 679 (U.N. Doc. A/CONF. 39/27) [hereinafter cited as Vienna Convention].

170. Toth, *supra* note 168, at 163-64. The Vienna Convention not only defines the rules relating to the termination or suspension of treaties, but replaces the rules of customary international law of treaties. As a result, *rebus sic stantibus* is now a recognized rule of international law. *Id.* The Vienna Convention prefers that the doctrine not be unilaterally invoked. The invoking party must give notice to the affected parties, must attempt amicable negotiations, and then utilize judicial or arbitration proceedings. Vienna Convention, *supra* note 169, arts. 65-66. See also Toth, *supra* note 168, at 168.

171. Vienna Convention, *supra* note 169, art. 62 (1).

172. *Id.* art. 62. The World Court has found the major requirements of the doctrine to be the existence of a fundamental change of circumstances and the radical transformation of the scope of requirements imposed by the treaty. Toth, *supra* note 168, at 171-76.

meets the first, fourth and fifth requirements for invoking the doctrine. The third requirement is also easily met. The Vienna Convention only requires that the change be unforeseen, not unforeseeable.¹⁷³ This is narrower than the traditional legal foreseeability test¹⁷⁴ because almost anything is foreseeable, but almost nothing is actually foreseen.

The second requirement, however, may be the obstacle. Whether the change is fundamental in the legal sense is questionable. The Group of 77 argues that preferential treatment will not imperil Group B's existence or development. Although the dominance of the industrialized nations would be undermined, this is merely a balancing of the equities according to the LDCs. The developing countries contend that their vital development will be impaired without the implementation of the preferential treatment program.

The United States position is that institution of preferential treatment will imperil Group B, and furthermore, that the entire protective system for industrial property is at stake. Incentive for LDC and MNC inventors alike will be endangered if these revisions occur.¹⁷⁵ However, if the World Court does not accept the argument that there has been a vital change in circumstances, then there is no *rebus sic stantibus* justification for termination of the Paris Convention.¹⁷⁶

2. *Jus Cogens*

Jus cogens is the norm that a treaty is void if it conflicts with international law.¹⁷⁷ If a new norm of general international law emerges, any existing treaty which is in conflict with it is considered

173. Vienna Convention, *supra* note 169, art. 62 (1).

174. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43 (4th ed. 1971) (foreseeable consequences).

175. See S.P. LADAS, *supra* note 7, § 1030, at 1884-86. Another potential United States argument is that local LDC legislation may violate the Convention. See, e.g., Gansser, *supra* note 7, at 149-70.

176. If it is certain or reasonably expected that the change of circumstances is temporary, the legal consequences of the doctrine may be to suspend operation of the treaty during this period of change. Toth, *supra* note 168, at 272.

177. Vienna Convention, *supra* note 169, art. 53. A norm of international law is one which is recognized by the international community as a norm from which no derogation is permitted. *Id.*

terminated.¹⁷⁸ The concept of a *jus cogens* is surrounded by controversy.¹⁷⁹ It is rare that a treaty has been declared invalid as a result of being found repugnant to a peremptory rule of international law.¹⁸⁰

Nevertheless, the United States may argue that the preferential treatment proposed by the Group of 77 on behalf of the "new economic order" is a new peremptory norm of international law. It is unlikely, however, that at this time the proposed changes could be considered peremptory by the international community as a whole.¹⁸¹ Thus the requirements for a *jus cogens* would not be met.¹⁸²

3. Unequal Treaties

Unilateral termination of international agreements, and doctrines relating to it have had a long and troublesome history.¹⁸³ The right to unilateral termination remains controversial.¹⁸⁴

Inequality as a ground for the invalidation or termination of a treaty is not listed in the Vienna Convention.¹⁸⁵ Nevertheless, governments frequently state that agreements tainted with inequality are void.¹⁸⁶ In an unequal treaty, members do not make reciprocal promises; an unequal alliance means a difference in the status of the contracting parties.¹⁸⁷ A contextual inequality results in the

178. *Id.* art. 64. A norm of general international law is a peremptory legal rule having applicability in the international community because it is accepted by them as binding. C. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* 55 (1976). A particular *jus cogens* norm is valid unless it violates a general *jus cogens* norm. Otherwise, an internationally intolerable dualism would be created. *Id.* at 56.

179. C. ROZAKIS, *supra* note 178, at 2-3.

180. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 *AM. J. INT'L L.* 946, 949-50 (1967). At the Nuremberg trials a *jus cogens* was found in the rule of international law prohibiting employment of prisoners of war for work directly relating to war operations. *Caveat Investor*, *supra* note 70, at 135.

181. See Toth, *supra* note 168, at 148, 168, 280.

182. See generally C. ROZAKIS, *supra* note 178 (further discussion of *jus cogens* requirements).

183. A. DAVID, *THE STRATEGY OF TREATY TERMINATION* 3 (1975) (for history review).

184. *Id.* See generally B. SINH, *supra* note 167 (further discussion of unilateral termination).

185. A. DAVID, *supra* note 183, at 301.

186. *Id.* Factors which legally attain this result are not specified by governments or commentators. Sovereign inequality, coercion, and changing conditions are considered as factors applying to unequal agreements. *Id.*

187. *Id.* at 303.

objecting side being unable to confine retaliation to the alleged treaty violation within treaty remedies.¹⁸⁸ The objecting side is thereby forced to take punitive actions.

The legal validity of unequal treaties is unsettled,¹⁸⁹ and therefore, it is unlikely to be a successful vehicle for the United States in the Paris Convention conflict.

V. THE UNITED STATES APPROACH TO INDUSTRIAL PROPERTY

A. Technology Transfer

The motives behind technology transfer are altruism, i.e., redistribution of wealth, and commerce, i.e., promotion of business interests.¹⁹⁰ Property law and political considerations underlie the industrial property system.¹⁹¹ Although the developed nations may desire to aid the developing nations, nevertheless, it is the Convention delegate's main duty to represent his country.¹⁹² Personal altruistic motives must be put aside in favor of the business, people, and economy of his nation.¹⁹³ Furthermore, the technology concerned does not usually belong to the government; rather it is owned by the individuals and firms of the country which the delegate to the revision conference represents.¹⁹⁴

The industrial property system is a system of property ownership; technology transfer is a mere part of the system.¹⁹⁵ The industrial property system must be judged in its entirety and not by individual components.¹⁹⁶ The major purpose of the intellectual property system is efficient protection of the rights involved, not technology transfer.¹⁹⁷ Therefore, the United States cannot afford

188. *Id.* at 305.

189. *Id.* at 301-06.

190. Harris, *supra* note 7, at 219.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. Lall, *The Patent System and the Transfer of Technology to Less-Developed Countries*, 10 J. WORLD TRADE L. 1, 15 (1976).

196. *Id.*

197. Harris, *supra* note 7, at 227. "Human genius is the source of all works of art and invention. These works are the guarantee of a life worthy of men. It is the duty of the state to ensure with diligence the protection of the arts and invention." Gansser, *supra* note 7, at 141-42 (quoting the inscription which adorns the entrance hall of the World Intellectual Property Organization building in Geneva).

to be altruistic to the detriment of industrial property protection, incentive, or private enterprise.

B. *The Paris Convention*

One well known patent authority has stated that the Paris Convention "has been one of the finest pieces of international legislation regulating our world and ensuring equality of treatment in large and small countries alike."¹⁹⁸ The majority of international lawyers has not recognized the preferential treatment program,¹⁹⁹ recognizing "the inherent tendency of every legal system [is] to protect the vested interests with which it has become familiar."²⁰⁰

Protection of the technology owned by United States inventors and MNCs is the motive for United States membership in the Paris Union. Means of persuading the private owners of industrial property to part with their rights exist, such as financial inducement, legal pressure, or expropriation;²⁰¹ however, these measures are not within the contemplation of the United States.²⁰²

CONCLUSION

Rapid transfer of industrial property from the developed to the developing countries is analogous to the transfer of real property from the rich to the poor. By United States standards, a state policy preserving private rights should be the primary concern.²⁰³ Senator Moynihan, former Ambassador to India, has commented generally on the problem:

This is our circumstance. We are a minority. We are outvoted. This is neither an unprecedented nor an intolerable situation. The question is what do we make of it. So far we have made little—nothing—of what is in fact an opportunity. We go about dazed that the world has changed. We toy with the idea of stopping it and getting off. We rebound with the thought that if only we are more reasonable perhaps "they" will be. (Almost to the end, dominant opinion in the U.S. Mission to the United

198. U. ANDERFELT, *supra* note 4, at 236 (quoting Ladas, *The Fundamental Bases of the International Protection of Industrial Property*, P.I., 70: annex, April 1954, at 4).

199. U. ANDERFELT, *supra* note 4, at 234.

200. C. JENKS, *THE COMMON LAW OF MANKIND* 85 (1958).

201. Harris, *supra* note 7, at 219.

202. See Schuyler, *supra* note 18, at 3.

203. Harris, *supra* note 7, at 218.

Nations was that the United States could not vote against the "have-nots" by opposing the Charter on the Rights and Duties of States—all rights for the Group of 77 and no duties.) But "they" do not grow reasonable.²⁰⁴

The United States cannot donate its technology; United States inventors and MNCs expect and deserve fair and full protection of their investments.²⁰⁵ It is the responsibility of United States lawyers to ensure this protection within the industrial property system.

The proposed preferential treatment program is an impractical solution to the problems of LDCs. The complex and longstanding problems plaguing the developing countries may require changes in the system, but rapid and unequal changes are no remedy. The consequences of such a program are not foreseeable and could be disastrous. Therefore, the United States must oppose the system of preferential treatment.

The United States should avoid denunciation of the Convention. The developing countries exert intense pressure because they constitute a majority. Furthermore, the United Nations and its special agencies, such as UNCTAD and WIPO, by articulating the need for technology transfer for LDCs have raised the social consciousness of the international community toward the problems of the developing countries. Because the United States with the other Group B nations dominates the ownership and control of the world's industrial property, the United States should be able to exploit these property rights to strengthen its position against the LDCs seeking to gain technology control.

However, if the system of preferential treatment is adopted as part of the Paris Convention, the purpose of the Convention would be technology transfer, not universal protection of industrial property. Under these circumstances, any possible motive for United States membership would be eliminated, and the United States would have no alternative but to denounce the Paris Convention.

Regina A. Loughran

204. Moynihan, *The United States In Opposition*, 59 COMMENTARY 31, 41 (1975).

205. United States Comments, *supra* note 90, at 23.

