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TRADE AND INVESTMENT DEVELOPMENT PROJECT

Final Report

**Intellectual Property Rights:
A Report on Legislation,
Administration, and Enforcement
in Central America**

SUBMITTED TO

U.S. Agency for International Development
Bureau for Global Programs, Field Support and
Research

SUBMITTED BY

Trade and Investment Development Project
Nathan Associates Inc.

IN COOPERATION WITH

Office of Legislative and International Affairs,
Patent and Trademark Office, U.S. Department
of Commerce

UNDER

Contract No. LAG-0797-C-00-2046-00

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1.0 DEFINITION OF INTELLECTUAL PROPERTY

There is no universally accepted definition of the term intellectual property. Property rights in tangible things entitle to the owner the unrestricted and exclusive right to dispose of the thing, possess it, use it, and exclude everyone else from interfering with it. This applies with equal force in the field of intangible property, of which intellectual property is a part. However, intellectual property is more difficult to identify than tangible property, like an automobile or land. Broadly, any new or original creation of the human mind or intellect is protectable as intellectual property. Generally, anything new or original may be protectable. As with any general statement, however, this statement is subject to many qualifications and limitations. The newness or originality may reside in the solution to a technical problem, in an original way of expressing an idea, or in a new way of identifying products as your own. The tools available for protecting the new and original are many, varied, and changing all the time, particularly to take into account changes in technology. For example, a new form of protection for computer chip topographies or layouts has recently emerged. Obviously, until the advent of computer chips, there was no need for such protection. Other new technologies--computer software, biotechnology, virtual reality and digital taping, to name a few --have tested the limits of traditional forms of protection.

The open-ended nature of intellectual property is reflected in the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967. There intellectual property is defined in Article 2 (viii) as including the rights relating to

- Literary, artistic and scientific works;
- Performances of performing artists, phonograms, and broadcasts;
- Inventions in all fields of human endeavor;
- Scientific discoveries;
- Industrial designs;
- Trademarks, service marks, and commercial names and designations;
- Protection against unfair competition; and

- All other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Even in the absence of a closed list of titles of protection in the field of intellectual property, recent international agreements require, at a minimum, certain types of protection to be offered by all countries. An example is the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS Agreement), concluded in the Uruguay Round of multilateral trade negotiations conducted under the sponsorship of the General Agreement on Tariffs and Trade (GATT). TRIPS requires members of the World Trade Organization to provide the legal means to protect copyright and related rights, trademarks, geographical indications, patents, layout designs (topographies) of integrated circuits, and protection of undisclosed information (trade secrets).

What follows is a brief discussion of these titles of protection to provide background to the discussion of treaties in the field and the present situation in the countries of Central America.

1.1 Patents

To be protected by law a patentable invention must be new in the sense that there is no indication that it has already been sold, published, or publicly used; it must be nonobvious in the sense that it would not have been obvious to one skilled in the particular industrial field; and it must be useful or be industrially applicable in the sense that it can be industrially manufactured or used.

A patent is issued by a government agency charged with that responsibility. This can be done with or without a search and examination of the patent application having been done. A search, as its name implies, involves searching the technical literature for relevant publications. The purpose of the search is to conduct the examination to determine whether the invention claimed in the patent application is new and nonobvious and therefore patentable. This is done by comparing the search results with the claimed invention.

The grant of a patent allows the owner or licensee to prevent others from making, using, selling, or importing products that incorporate the claimed invention. If the patent is to a process, however, the owner or licensee may prevent others from practicing the claimed process or using, selling, or importing products made by the claimed process.

1.2 Trademarks

A trademark is a sign that serves to distinguish the goods (as does the "service mark" with regard to services) of an industrial or commercial enterprise or a group of such enterprises. The sign may consist of one or more distinctive words, letters, numbers, drawings or pictures, emblems, colors or combinations of colors, or the form or other special presentation of containers or packages for the product (provided they are not solely dictated by their function). The sign may consist also of combinations of any of these elements.

Although in some countries and in some situations a trademark may be protected without registration, it is generally necessary for effective protection that a trademark be registered in a government office. In all of the countries of Central America that is the case.

If a trademark is protected, no person or enterprise other than its owner may use it--or any trademark so similar to it that its use would lead to confusion in the minds of the public--at least not on or in connection with goods or services about which such confusion might arise. The protection of a trademark is generally not limited in time, provided its registration is periodically renewed (typically, every 10 years) and its use continues.

1.3 Trade Names

A trade name is the name under which a company operates. This is distinct from a trademark, which is a mark a company uses to distinguish its goods or services from those of other companies. In some cases, a trade name and a trademark may be the same. For example, Coca Cola is both the trade name of the Coca Cola Corporation and the trademark owned by that company and used in connection with its goods, cola drinks.

To be protected, trade names do not necessarily require registration. For example, some countries provide that misappropriation of a trade name may constitute unfair competition and may be enforced in court without having a registration.

1.4 Geographical Indications

A geographical indication is defined as an indication that identifies a good originating in the territory of a "member," or

a region or locality in that territory, where a given quality, reputation or other characteristic of the good is attributable to its geographical origin. A common example is an indication that a wine comes from a particular region, such as the Algarve region of Portugal.

1.5 Industrial Designs

An industrial design is the ornamental aspect of a useful article. This ornamental aspect may be constituted by elements that are three-dimensional (the shape of the article) or two-dimensional (lines, designs, colors) but must not be solely dictated by the function for which the useful article is intended. To be eligible for protection in a country, industrial designs must be original or novel and must be registered in a government office (usually the same office as that which grants patents). Protection of an industrial design means that it may not be lawfully copied or imitated without the registered owner's authorization, and copies or imitations made without such authorization may not lawfully be sold or imported.

1.6 Trade Secrets

Those who control information that is not generally known or readily ascertainable, that has value because it is not known, and that is the subject of efforts to keep it secret must be given the ability to prevent others from disclosing, acquiring, or using the information in a manner that is contrary to honest commercial practices. Typically such information comprises customer lists, formulas for products, or industrial processes for making products or providing services.

1.7 Copyright¹

The subject matter of copyright is usually described as "literary and artistic works," that is, original creations in the fields of literature and arts. The form in which such works are expressed may be words, symbols, music, pictures, three-dimensional objects, or combinations thereof (as in the case of an opera or a motion picture). Practically all national copyright laws provide for the protection of the following types

¹Although copyright law is discussed here, the principal focus of the study mission was on industrial property law (patents, trademarks, and industrial designs).

of works: literary works, musical works, choreographic works, artistic works, maps and technical drawings, photographic works, and audiovisual works (formerly mainly called "motion pictures" or "cinematographic works"). The TRIPs Agreement requires computer software to be protected as a literary work.

Some copyright laws also provide for the protection of derivative works (translations, adaptations) and collections (compilations) of works and data (in the form of databases), and collections in which they, by reason of the selection and arrangement of the contents, constitute intellectual creations.

Copyright protection generally means that certain uses of the work are lawful only with the authorization of the owner of the copyright. The most typical are the following: the right to copy or otherwise reproduce any kind of work; the right to make sound recordings of the performances of literary and musical works; the right to perform in public, particularly musical, dramatic, or audiovisual works; the right to communicate to the public by cable or otherwise the performances of such works and, particularly, to broadcast, by radio, television, or other wireless means, any kind of work; the right to translate literary works; the right to adapt any kind of work and particularly the right to make audiovisual works thereof.

In addition to economic rights, authors (whether or not they own the economic rights) enjoy "moral rights" on the basis of which authors have the right to claim their authorship and require that their names be indicated on the copies of the work and in connection with other uses thereof. Moreover, they have the right to oppose the mutilation or deformation of their works.

The protection accorded through copyright is independent of any formalities, that is, copyright protection starts as soon as the work is created. This is a significant distinction from patents and trademarks that require an application to be made and examination performed before the grant of protection.

2.0 INTERNATIONAL AGREEMENTS UNDER WHICH ONE OR MORE COUNTRIES OF CENTRAL AMERICA HAVE OBLIGATIONS

The following is an inventory of international agreements in the field of intellectual property to which one or more countries of Central America are a member. For each agreement the Central American countries that are members are indicated, as well as whether it is U.S. policy that countries should become a member. In addition, a short description of the content of each agreement is provided. See Table 1 for a summary of this information.

Table 1. Membership of the Countries of Central America in Treaties on Intellectual Property

	Costa Rica	Honduras	Guatemala	Panama	El Salvador	Nicaragua	United States
Paris Convention ^a	No	Yes	No	No	Yes	No	Yes
Berne Convention ^a	Yes	Yes	No	No	Yes	Yes	Yes
UPOV Convention ^a	No	No	No	No	No	No	Yes
Geneva Convention ^a	Yes	Yes	Yes	Yes	Yes	No	Yes
Satellite Transmission Convention ^a	No	No	No	No	No	Yes	Yes
WIPO Convention	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Rome Convention	Yes	Yes	Yes	Yes	Yes	No	No
Nairobi Treaty	No	No	Yes	No	Yes	No	No
Central American Convention	Yes	No	Yes	No	Yes	Yes	No
Convention of Buenos Aires	Yes	Yes	Yes	No	No	Yes	Yes
Washington Convention	No	Yes	Yes	Yes	No	Yes	Yes
PCT	No	No	No	No	No	No	Yes
GATT Member	Yes	No	Yes	No	Yes	Yes	Yes
Signatory of Final Act to Uruguay Round	Yes	Yes	Yes	No	Yes	Yes	Yes

*It is U.S. policy that countries become members to this Treaty or Convention.

2.1 Convention Establishing the World Intellectual Property Organization: (WIPO: Convention)

Members: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. The United States is a member.

Content: The WIPO Convention does not establish any substantive obligations on its member states. Rather, it establishes the World Intellectual Property Organization (WIPO) and gives it the responsibility of administering the Paris and Berne Conventions (and any others it agrees to administer), promoting intellectual property protection, providing technical assistance to countries requesting it, and assembling and disseminating information on intellectual property protection.

2.2 Paris Convention for the Protection of Industrial Property (Paris Convention)

Members: El Salvador and Honduras. The United States is a member. It is U.S. policy that countries become members of the Paris Convention.

Content: The Paris Convention provides certain advantages to applicants seeking patent, design, or trademark protection in other countries.

There are rules that guarantee a basic right known as the right to national treatment in each of the member countries. Briefly; this right requires member states to treat nationals of other member states the same as they do their own nationals in respect of industrial property protection. This has limited practical effect, however, in countries that provide little or no protection to their own nationals.

Another basic right under the Paris Convention is known as the right of priority. This right entitles an applicant to file a first application for a patent in his or her own country and, within 12 months, in another country. No event in that intervening 12-month period, such as a publication or public display of the invention, will defeat the right to a patent. This same right of priority exists for trademarks and industrial designs, but the priority period is only 6 months in such cases.

The Paris Convention lays down a few common rules which all the contracting states must follow. The more important are the following:

Patents: Patents granted in different contracting states for the same invention are independent of each other: the granting of a patent in one contracting state does not oblige the other contracting states to grant a patent; a patent cannot be refused, annulled or terminated in any contracting state on the ground that it has been refused or annulled or has terminated in any other contracting state.

Trademarks: As in the case of patents, once the registration of a trademark is obtained in a contracting state, it is independent of its possible registration in any other country, including the country of origin; consequently, the lapse or annulment of a trademark registration in one contracting state will not affect the validity of registration in other contracting states.

Where a trademark has been duly registered in the country of origin, it must, on request, be accepted for filing and protected in its original form in the other contracting states. Nevertheless, registration may be refused in some well-defined cases, such as when the trademark would infringe acquired rights of third parties, or when it is devoid of distinctive character, or when it is contrary to morality or public order, or when it is of such a nature to be liable to deceive the public.

Each contracting state must refuse registration and prohibit the use of trademarks that constitute a reproduction, imitation, or translation--liable to create confusion--of a trademark considered by the competent authority of that state to be well known in that state as being already the mark of a person entitled to

the benefits of the convention and used for identical or similar goods. Service marks and collective marks must be granted protection.

Industrial Designs: Industrial designs must be protected in each contracting state, and protection may not be forfeited on the ground that the articles incorporating the design are not manufactured in that state.

Trade Names: Protection must be given to trade names in each contracting state without the obligation of filing or registration.

As to indications of source: Measures must be taken by each contracting state against direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer or trader.

2.3 Berne Convention for the Protection of Industrial Property (Berne Convention)

Members: Costa Rica, El Salvador, and Honduras. The United States is a member. It is U.S. policy that countries become members of the Berne Convention.

Content: The Berne Convention rests on three basic principles and contains a series of provisions determining the minimum protection to be granted, as well as special provisions for developing countries:

National Treatment: Works originating in one of the contracting states (that is, works the author of which is a national of such a state or works which were first published in such a state) must be given the same protection in each of the other contracting states as the latter grants to the works of its own nationals.

Automatic Protection: Such protection must not be conditional upon compliance with any formality.

Independence of Protection: Such protection is independent of the existence of protection in the country of origin of the work. If, however, a contracting state provides for a longer term than the minimum prescribed by the convention and the work ceases to be protected in the country of origin, protection may be denied once protection in the country of origin ceases.

In addition to these principles, the Berne Convention establishes certain minimum standards of protection. First, protection must be extended to "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." Second, subject to certain limitations, the exclusive rights which must be recognized include the rights to translate, make adaptations and arrangements, perform in public, recite in public, communicate to the public, broadcast, reproduce, or use the work as a basis for an audiovisual work.

Certain "moral rights" are established, namely, the right to claim authorship of their work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honor or reputation.

As for the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author's death. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author's identity or if the author discloses his identity during that period. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making of the work available to the public ("release") or--failing such an event--from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of such a work.

2.4 International Convention for the Protection of New Varieties of Plants (UPOV Convention, 1991 Act)

Members: None of the Central American countries is a member. The United States is a member and it is U.S. policy that other countries become contracting parties.

Content: The UPOV Convention requires each contracting party to grant and protect breeders' rights. The breeders' right shall be granted where a plant variety for which protection is sought is new, distinct, uniform, and stable. A plant variety is new if it has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for the purpose of exploitation of the variety before a set length of time preceding the filing date. A plant variety is distinct if it is clearly distinguishable from any other variety the existence of which is a matter of common knowledge at the time the application is filed. The plant variety is uniform if, subject to the variation

that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics. The plant variety is stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

The decision by a national authority to grant a breeder's right is made on the basis of an examination to determine if it meets the foregoing requirements. The authority may grow the variety or carry out other necessary tests, have others do the growing or tests, or take into account the results of growing tests or other trials that have already been carried out. Moreover, the authority may require the breeder to furnish all the necessary information, documents or material.

Once granted, the breeder's right requires the breeder's permission to perform the following acts in respect of the propagating material: production or reproduction, conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting, importing, or stocking for any of these purposes. The breeder is also accorded rights in respect of the harvested material, certain products of the harvested material and essentially derived and certain other varieties. There are exceptions to the foregoing rights, including acts done privately and for noncommercial purposes, for experimental purposes, and for the purpose of breeding other varieties. Moreover, contracting parties may provide for so-called "farmer's rights." Specifically, they may restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest that they have obtained by planting, on their own holdings, the protected variety or one essentially derived from the protected variety.

2.5 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)

Members: Costa Rica, El Salvador, Guatemala, Honduras, and Panama. The United States is not a member.

Content: The Rome Convention secures protection in performances of performers, phonograms, producers of phonograms, and broadcasts of broadcasting organizations.

Performers (actors, singers, musicians, dancers, and other persons who perform literary or artistic works) are protected

against certain acts to which they have not consented. Such acts are the broadcasting and the communication to the public of their live performance, the fixation of their live performance, and the reproduction of such a fixation if the original fixation was made without their consent or if the reproduction is made for purposes different from those to which they consented.

Producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Phonograms are defined in the Rome Convention as "any exclusively aural fixation of sounds of a performance or of other sounds." When a phonogram published for commercial purposes gives rise to secondary uses (such as broadcasting or communication to the public in any form), a single equitable remuneration must be paid by the user to the performers, or to the producers of phonograms, or to both; contracting states are free, however, not to apply this rule or to limit its application.

Broadcasting organizations enjoy the right to authorize or prohibit certain acts, namely, the rebroadcasting of their broadcasts, the fixation of their broadcasts, the reproduction of such fixations, and the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Certain exceptions are allowed in national law to the above-mentioned rights. Subject to these exceptions, protection must last at least until the end of a period of 20 years computed from the end of the year in which (1) the fixation was made, for phonograms and for performances incorporated therein; (2) the performance took place, for performances not incorporated in phonograms; or (3) the broadcast took place, for broadcasts. (However, national laws ever more frequently provide for a 50-year term of protection, at least for phonograms and for performances.)

2.6 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention)

Members: Costa Rica, El Salvador, Guatemala, Honduras, and Panama. The United States is a member. It is U.S. policy that countries become members of the Geneva Convention.

Content: The Geneva Convention provides for the obligations of each contracting state to protect a producer of phonograms who is a national of another contracting state against the making of duplicates without the consent of the producer, against the im-

portation of such duplicates, where the making or importation is for the purposes of distribution to the public, and against the distribution of such duplicates to the public. "Phonogram" means an exclusively aural fixation (that is, it does not comprise, for example, the soundtracks of films or videocassettes).

2.7 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellite Transmission Convention)

Members: Nicaragua. The United States is a member. It is U.S. policy that countries become members of the Satellite Transmission Convention.

Content: This convention provides for the obligation of each contracting state to take adequate measures to prevent the unauthorized distribution on or from its territory of any programme-carrying signal transmitted by satellite. The distribution is unauthorized if it has not been authorized by the organization--typically a broadcasting organization--that has decided what the program consists of. The obligation exists in respect of organizations that are nationals of a contracting state.

2.8 Nairobi Treaty on the Protection of the Olympic Symbol

Members: El Salvador and Guatemala. The United States is not a member.

Content: All states that are party to the treaty are under the obligation to protect the Olympic symbol--five interlaced rings--against use for commercial purposes (in advertisements, on goods, as a trademark, etc.) without the authorization of the International Olympic Committee.

The treaty also provides that whenever a license fee is paid to the International Olympic Committee for its authorization to use the Olympic symbol for commercial purposes, part of the revenue must go to the interested national Olympic committees.

2.9 Central American Convention for the Protection of Industrial Property (Trademarks, Commercial Names and Advertising Expressions or Signs)

Members: Costa Rica, El Salvador, Guatemala, and Nicaragua. Honduras signed but did not ratify the convention. The United States is not a member.

Content: The Central American Convention provides a common legal scheme under which trademarks, commercial names, and advertising expressions or signs are protected. Protection is granted under national law; that is, there is not one office for the countries of Central America that grants trademarks.

The current convention dates to 1968, but has been undergoing revision. A draft of a protocol to modify the Central American Convention was approved by vice-ministers at a meeting in San José, Costa Rica, and was signed on November 30, 1994, at the Central American Council of Ministers by the plenipotentiaries of Guatemala, El Salvador, Nicaragua and Costa Rica. Ratification by the legislatures of three of the Central American republics will bring the new protocol into force; action is expected by mid-1995.

Once the protocol comes into force, the countries of Central America, with the assistance of WIPO, will draft regulations for the it. It is envisaged that once the protocol provisions dealing with trademarks have become fully effective, a new chapter will be developed to deal with patents, utility models, and industrial designs.

2.10 Convention on Inventions, Patents, Designs and Industrial Models (Convention of Buenos Aires)

Members: Costa Rica, Guatemala, Honduras, and Nicaragua. The United States is a member.

Content: The Convention of Buenos Aires, like the Paris Convention, provides for the right to national treatment and a right of priority. While the right of priority in respect of patents is 12 months (like in the Paris Convention), for designs or industrial models it is only 4 months (unlike in the Paris Convention which provides for 6 months for designs).

While the convention defines what constitutes an "invention" it does not define what a patentable invention is. Rather, it

includes several facultative provisions that establish reasons for contracting states to refuse to grant patents.

2.11 General Inter-American Convention for Trademark and Commercial Protection (Washington Convention)

Members: Guatemala, Honduras, Nicaragua, and Panama. The United States is a member.

Content: As in the case of the Paris Convention, the Washington Convention provides for a right of national treatment. The Washington Convention also provides that marks registered in one contracting state shall be admitted to registration or deposit and legally protected in other contracting states upon compliance with the formal provisions of the domestic law of such states. Such registration or deposit may be refused or a mark canceled under six circumstances, such as if the mark for which registration is sought would infringe the rights of third parties or if the mark lacks distinctive character.

The owner of a mark in one contracting state shall have the right to oppose the registration of that mark in other contracting states upon proof that the person seeking to register it "had knowledge of the existence and continuous use in any of the Contracting states of the mark on which opposition is based upon goods of the same class."

The Washington Convention includes some provisions that are very useful for the protection of trademarks, in particular well-known trademarks. For example, where registration is refused in a contracting state other than that of origin of the mark because of a previous registration or deposit of an interfering mark, the applicant may apply to cancel the interfering mark. One basis for such a cancellation is that the applicant enjoyed legal protection in another contracting state before the date of the application for the registration he seeks to cancel. Other bases for cancellation are that the person who putatively owns the interfering mark learned about it from another before adopting and using it for his own, or that the owner of the mark who seeks cancellation used the mark in the country in which cancellation is sought before the filing date or date of adoption.

In addition to the foregoing provisions concerning trademarks, the Washington Convention includes provisions on the protection of commercial names, repression of unfair competition, repression of false indications of geographical origin or source, and remedies.

2.12 Convention on Literary and Artistic Copyrights (Buenos Aires Convention)

Members: Costa Rica, Guatemala, Honduras, Nicaragua, and Panama. The United States is a member. The Buenos Aires Convention replaced the convention of January 27, 1902, which remains in force between the contracting parties and El Salvador.

Content: The signatory states are obliged to protect the rights of literary and artistic property in conformity with the convention. The term literary and artistic works is broadly defined--although there are certain exceptions from protection for news and miscellaneous items and extracts from literary or artistic publications. Once copyright protection is obtained in one state, it has effect in all other states without the necessity of complying with any other formality, "provided always there shall appear in the work a statement that indicates the reservation of the property right." A right of national treatment is provided for.

The Buenos Aires Convention establishes the following rights for the copyright owner: the exclusive power of disposing of the work, of publishing, assigning, translating (or authorizing its translation), and reproducing it in any form whether wholly or in part. Authorized translations are protected in the same manner as original works. The Buenos Aires Convention provides certain procedural advantages in the event of litigation. For example, the author of a protected work, except when proven otherwise, is considered the person whose name appears in the work. Thus, a lawsuit brought by the author or his representative shall be admitted by the courts of the signatory states.

3.0 THE TRIPS AGREEMENT, NORTH AMERICAN FREE TRADE AGREEMENT, AND THE MEMORANDUM OF UNDERSTANDING CONCERNING INTELLECTUAL PROPERTY

During the past decade, the United States has focused intensively on improving the protection accorded intellectual property worldwide. For additional leverage, improved intellectual property protection was made part of the trade negotiations of the United States. As part of the Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), the United States has sought to negotiate an agreement on intellectual property aimed at

- Establishing adequate minimum standards for the protection of intellectual property rights;

- Ensuring availability of effective procedures, internally and at the border, for enforcing those rights; and
- Taking advantage of the procedures in the GATT for the settlement of disputes regarding the members' obligations to establish the minimum standards and the enforcement procedures.

One of the agreements from the latest round of trade talks under the General Agreement on Tariffs and Trade (GATT)² is directed to intellectual property protection and its enforcement--the TRIPs Agreement. This effort has also resulted in such protection and enforcement being a key part of the North American Free Trade Agreement (NAFTA) which entered into force at the beginning of this year. The salient portions of the TRIPs agreement can be summarized as follows.

3.1 Copyright

Where copyright and related rights are concerned, countries will be obligated to comply with Articles 1-21 of the Berne Convention for the Protection of Literary and Artistic Works. Article 6^{bis} of the convention is excepted because it concerns an author's "moral rights," not economic rights that are appropriate for an agreement on trade across national borders. TRIPs requires countries to protect computer programs as "literary works" under the Berne Convention and to protect compilations of data and other material that constitute intellectual creations because of the arrangement of their contents.

Under TRIPs, commercial rental of computer programs and cinematographic works, absent permission of the copyright owner, is to be prohibited; however, a country may be excepted from this obligation in the case of cinematographic works provided that such rental has not led to material impairment of the reproduction rights of the copyright owners. The exception to the ban on commercial rental for cinematographic works was negotiated by the United States because rentals of motion picture videos here have not resulted in any widespread copying and it was

²Of the countries of Central America that were the subject of this study, Costa Rica, El Salvador, Guatemala, and Nicaragua are contracting parties to the GATT. Moreover, all of these countries and Honduras signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and all are expected to ratify the results of the Uruguay Round. Although Honduras and Panama are not currently contracting parties to the GATT, both are seeking to become so.

believed, therefore, that a rental right for cinematographic works was not necessary for their protection in the United States.

Under TRIPs, performers must be given the right to prevent the unauthorized recording of their performances and, should such recording occur, to prevent reproduction of that recording. They also must have the right to prevent the unauthorized broadcast of their live performance and any other communication of that performance to the public. Sound recording producers must be given the right to prevent unauthorized reproduction of their sound recordings, directly or indirectly, and to prevent rentals of the sound recordings. These rights of performers and sound recording producers are to extend for 50 years from the date on which a performance or fixation occurred.

Broadcasters' rights under TRIPs are provided in alternative form. Broadcasters must have the ability to prevent fixation of broadcasts, reproduction of such fixations, rebroadcast by wireless means and any other communication of their broadcasts to the public, or, if a country does not provide rights to broadcast organizations themselves, it must ensure to the owners of the copyright in the subject matter of the broadcasts the possibility of preventing the activities mentioned. Broadcasters' rights will extend for at least 20 years from the date on which the broadcast occurred.

The TRIPs Agreement fails to provide full national treatment for motion picture and sound recording producers. Certain countries, especially some member states of the European Union, now collect revenue from the broadcast of sound recordings and films and impose levies on the sale of blank recording media and equipment because these can be used to make private, unauthorized copies of copyrighted works or works protected by related rights. The revenue collected by these countries is not distributed equitably to rights' holders from other countries.

3.2 Trademarks and Service Marks

TRIPs adds significantly to the protection provided trademarks under the Paris Convention in several ways. First, TRIPs defines trademarks and identifies elements that must be eligible, individually or in combination, for recognition as trademarks and expressly requires that service marks be registrable. Second, a system of publication and cancellation must be available in connection with the registration of trademarks and service marks. Third, protection of well-known marks also is extended to include service marks. In addition, protection of trademarks is required, even where the goods or services are not similar to

those used in connection with a registered mark, if the use of a similar mark on those goods or services would indicate a connection with a registered mark and would cause damage to the owner of the registered mark.

The term of registration for a trademark must be at least 7 years and the registration must be renewable indefinitely. Registrations can be canceled for nonuse only after an uninterrupted period of 3 years of nonuse, and, even then, a registration cannot be canceled if the nonuse resulted from conditions that were beyond the trademark owner's control. Conditions like import restrictions and other government requirements for goods and services are expressly identified as conditions justifying nonuse. Use in a country by a licensee of the mark's owner precludes a claim of nonuse.

Another important provision bars compulsory licensing for trademarks and allows assignment of trademarks with or without the business to which the trademark belongs. Governments are also prohibited from imposing special requirements on the use of trademarks, such as use with local marks or use in a way that detracts from the effectiveness of the mark in distinguishing the goods or services of the owner from those of others.

3.3 Geographical Indications

A geographical indication is defined as an indication that identifies a good originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is attributable to its geographical origin. TRIPs requires that member countries have the legal means for "interested parties" to prevent use of any means in the designation or presentation of a good that indicates or suggests, in a manner that misleads the public, that the good in question comes from a geographical area other than its true place of origin. To prevent confusion when two place names are the same, the provision is applicable even where an indication is literally true, but it implies that the goods come from a different territory. Member countries must also refuse or invalidate the registration of a trademark containing a geographical indication with respect to goods not originating in the territory indicated, where the use of the trademark would mislead the public about the true place or origin of the goods.

There are special provisions in TRIPs dealing with wines and spirits that prohibit even the use of indications in combination with "kind," "type," "style," "imitation," or similar words. There are exceptions, however, for terms that have become generic

and for marks that have been used on the same goods or services in good faith for 10 years preceding the conclusion of the Uruguay Round. The U.S. Bureau of Tobacco, Alcohol and Firearms (BATF) does prohibit the use of labels that would mislead consumers about the origin of alcoholic beverages; thus, the United States is already in compliance in that regard.

TRIPS calls for further negotiations on geographical indications in connection with wines and spirits.

3.4 Industrial Designs

In connection with industrial designs, TRIPS requires countries to provide protection for new and original industrial designs, with certain exceptions. Textiles receive particular mention to ensure that the requirements for protection are not so excessive that they effectively deny protection for textile designs, which tend to change frequently. Owners of protected industrial designs are to be able to prevent others from making, selling, or importing articles bearing or embodying their designs for a period of at least 10 years.

3.5 Patents

TRIPS contains some significant benefits for inventors. First, TRIPS requires that product and process patents be available in all fields of technology. The only permissible exceptions to that broad obligation are for diagnostic, therapeutic, and surgical methods for treating humans or animals, and for plants and animals, other than microorganisms, and essentially biological processes for producing plants or animals. Countries not providing patent protection for plant varieties must provide that protection through an effective sui generis system.

c One such sui generis system is that for the protection of so-called "plant breeders' rights" established under the International Convention for the Protection of New Varieties of Plants (the "UPOV Convention"). Under such a system, plant varieties that are distinctive, uniform, and stable are accorded protection. Though not specifically required by TRIPS, it is logical that countries excluding plant varieties from patent protection would adhere to the UPOV convention and provide for plant breeders' rights to meet their TRIPS obligations. Further, membership in the UPOV Convention is required in the model Intellectual Property Rights (IPR) Agreement proposed by the U.S.

government and under consideration by many Central American countries.

TRIPS specifies that patent owners must be given the right to prevent others from making, using, offering for sale, selling, or importing products covered by a product patent and from using a process claimed in a patent or using, offering for sale, selling, or importing at least the product obtained directly from use of the process. The right to assign or license rights under the patent is also ensured. TRIPS members are permitted to maintain limited exceptions to patent rights so long as those exceptions do not unreasonably conflict with the normal exploitation of the patent by the patent owner or prejudice his legitimate interests. This is intended to allow such things as exhaustion within a country after the sale of a patented product.

Of particular importance to patent owners are the restrictions that TRIPS places on compulsory licensing. First, countries will no longer be allowed to grant compulsory licenses if a patentee does not manufacture the patented invention in the country. Importation will have to be treated as "working;" therefore, only in circumstances in which a patentee makes no provision for marketing his product in a country would a compulsory license for "nonworking" even qualify under TRIPS. TRIPS also imposes conditions on all compulsory licensing to ensure that voluntary licensing is encouraged, that payment for any compulsory license is fair, that rights under a license are non-exclusive and can be transferred only under limited conditions, and that decisions regarding compulsory licenses are appealable. There are special provisions dealing with government use of patent rights and for use in national emergencies. Semiconductor technology may not be the subject of a compulsory license except as a remedy for an antitrust violation or noncommercial government use. Finally, dependent patent compulsory licenses may still be granted, but only if (1) the second invention represents an important technical advance over the first patent, and (2) the owner of the first patent receives a cross-license under the second patent. In addition, a dependent patent compulsory license is assignable only with the assignment of the second patent.

3.6 Semiconductor Chip Layout Designs

The TRIPS text incorporates and corrects the deficiencies of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits. Unlike the Washington Treaty, TRIPS (1) expressly covers articles incorporating protected chips; (2) ensures a reasonable royalty to the right-holder after notice in

connection with the disposition of stock on hand; (3) extends the term of protection to 10 years (Washington required 8); and (4) prohibits compulsory licensing in connection with semiconductor chip layout designs except as an antitrust remedy or for non-commercial government use.

3.7 Trade Secrets

While the TRIPs Agreement speaks of "undisclosed information," it is referring to what are commonly called trade secrets. The obligations look very much like the Uniform Trade Secrets Act in the United States. Those who control information that is not generally known or readily ascertainable, that has value because it is not known, and that is the subject of efforts to keep it secret must be given the ability to prevent others from disclosing, acquiring, or using the information in a manner that is contrary to honest commercial practices.

In addition to providing for the protection of trade secrets, TRIPs also calls for steps to be taken to protect against unfair commercial use of data submitted to government agencies to obtain marketing approval for pharmaceutical and agricultural chemical products containing new chemical entities. In this context, "unfair commercial use" means other parties relying on the data to obtain marketing approval for their own products, where they have made no financial contribution to the original submitter of the data.

3.8 Enforcement

The enforcement section spells out the details of an adequate judicial enforcement system, with transparent processes, written opinions, and the ability to appeal decisions. TRIPs addresses the particulars of judicial and administrative procedure, remedies, both temporary and final, and border enforcement, which is mandatory for counterfeit and pirated products, discretionary for other forms of intellectual property.

The obligations pertaining to border enforcement are problematic for developing countries, particularly for those of Central America in which customs offices have focused exclusively on tariff collection rather than on the interdiction of contraband. Moreover, opportunities for corruption in many countries have significantly curtailed the effectiveness of their customs offices. Nonetheless, under both TRIPs and the intellectual property obligations of the North American Free

Trade Agreement ([NAFTA] and free trade agreements with Mexico), countries must provide an opportunity for rights holders, who have valid grounds to suspect that counterfeit trademark or pirated copyright goods may be imported, to file an application with competent officials for the suspension of the customs authorities of the release into free circulation of such goods. Provisions regarding the inspection of goods, required evidence, posting of a security, and duration of the suspension are found in TRIPS and the other agreements mentioned.

3.9 Transition Periods

Developing countries, including all of the countries of Central America, will have a period of 5 years in which to bring their legislation into conformity with the obligations of the TRIPS Agreement, other than the national and Most Favored Nation (MFN) obligations. Any countries that do not now provide patent protection for pharmaceutical and agricultural products will have an additional 5 years (for a total of 10 years) to comply with that requirement. It is U.S. government policy, however, that countries be encouraged to meet their TRIPS obligations earlier than the transition period would allow. Indeed, the NAFTA and bilateral IPR agreements require an accelerated compliance timetable.

Many of the countries of the world, however, have already achieved the substantive standards that TRIPS requires with regard to the rights in connection with the various forms of intellectual property. It is in connection with enforcement where compliance might be slow. As the economies of these countries develop further, however, the countries will find that improving enforcement is necessary to protect the rights of their own nationals. Any changes they make for domestic enforcement will have to be granted to nationals of World Trade Organization (WTO) countries under the national treatment obligations that come into effect for all countries after one year.

3.10 Obligations of NAFTA Chapter 17 (Intellectual Property)

Chapter 17 of NAFTA, although brought into force before GATT/TRIPS, is largely based on GATT/TRIPS. This is because GATT/TRIPS negotiations had been under way for 5 years before NAFTA negotiations began. Because the NAFTA negotiation was among only three parties, as contrasted with the more than 100 countries involved in GATT, NAFTA generally embraces a higher

standard of protection for intellectual property. Among the areas in which NAFTA differs from GATT/TRIPS are the following:

- NAFTA provides more effective copyright protection for sound recording particularly in regard to rental rights.
- NAFTA provides explicit protection for encrypted program-carrying satellite signals.
- NAFTA requires protection for pharmaceutical and agrochemical products already patented elsewhere but only newly patentable in a country adhering to NAFTA ("pipeline protection").
- NAFTA prohibits dependent patent compulsory licensing, i.e., the compulsory licensing of one patent in order to practice the invention in another patent.
- NAFTA requires a minimum trademark term of 10 years.
- NAFTA provides for 5 years of exclusive use of data submitted to a government for marketing approval of a new chemical entity.
- NAFTA does not permit adhering countries to delay implementation for up to 11 years, instead requiring compliance with all provisions, with one minor exception, within several years of the entry into force of the NAFTA. For example, in the case of Mexico, the provisions on border enforcement must be complied with within 3 years of signature of the NAFTA, the provisions on layout designs must be complied with within 4 years of the date of entry into force of the NAFTA, and compliance with the substantive provisions of the UPOV Convention must be complied with within 2 years of the date of signature of the NAFTA.

4.0 TREATIES TO WHICH NO COUNTRIES OF CENTRAL AMERICA ARE MEMBERS AND TO WHICH THE UNITED STATES ENCOURAGES MEMBERSHIP

4.1 The Patent Cooperation Treaty

Although the Paris Convention does provide some advantages to applicants seeking protection in other countries, it can still be quite cumbersome to file applications in a number of countries, in particular where legalization requirements have to be met, as well as getting translations to establish a national filing date.

Accordingly, in 1966, on a proposal by the United States, the predecessor of WIPO launched a study on ways to reduce the duplication of effort involved in the search and examination of the same invention in a number of offices. The result was not what one might have expected--a system whereby a single search and examination of a given application would have worldwide effect. Rather, the result was the Patent Cooperation Treaty (PCT), a system that facilitates the procedural aspects of filing patent applications.

First, PCT establishes an international application, which, if the applicant follows in both form and content, must be accepted in national offices of the member states of the PCT. This is more significant than it may appear at first. Before PCT the idiosyncrasies of each national office had to be catered to. Now, a single application in the applicant's home office (in the United States, the U.S. Patent and Trademark Office [PTO]), in a single language (English, for example) can have the effect of regular national filings in as many member states of the PCT as one chooses to designate.

In addition to the international application, the PCT has three other features worthy of note--international publication, international search, and international preliminary examination.

International Publication: The international application is published by WIPO at the end of 18 months from the priority date, unless the application has been withdrawn. This should be compared with U.S. law, which requires the application to be retained in secrecy until a patent is issued.

International Search: An international search report is to be established within 3 months of the receipt of the application by the International Searching Authority (or 9 months from the priority date, whichever is later). The applicant then has the chance to amend the application, if he or she chooses. Unless preliminary examination is available and elected by the applicant, the applicant shall furnish a copy of the international application, translations, and fees to the designated offices and enter the "national phase" no later than the expiration of 20 months from the priority date. The national phase is the point in the process at which the international application becomes a national application in the offices of the countries designated by the applicant.

International Preliminary Examination: The PCT allows for an international preliminary examination, where accepted by member states and if elected by the applicant. Under this procedure, the international preliminary examining authority examines an

application, based on the international search report, and offers an advisory opinion as to patentability. The opinion is advisory only and need not be accepted upon entering the national phase. Under this route, the "national phase" is entered at the end of 30 months from the priority date.

5.0 RESULTS OF FACT-FINDING MISSION

From October 2 through 12, 1994, Richard Wilder (Office of Legislative and International Affairs, U.S. Patent and Trademark Office) and Wesley Boles (Nathan Associates) traveled to Guatemala, El Salvador, Costa Rica, and Honduras. In El Salvador and Costa Rica, Messrs. Wilder and Boles were joined by Randy Peterson of USAID/Guatemala. In Guatemala and Honduras they were joined by Kim Delaney, also of USAID/Guatemala. From December 5 to 9, 1994, Messrs. Boles, Wilder, and Peterson traveled to Nicaragua and Panama.

The purpose of the trip was to review the status of IPR legislation and enforcement in the countries visited. In addition, consideration was given to the ability of the countries visited to register trademarks and patents. Given that two or fewer days were spent in each country, the review was cursory. It is expected that the level of understanding of the situation in Central America will increase during 1995 if the recommendations are adopted. If so, it is proposed that the present study be updated at the end of that period.

Except for Costa Rica, the figures for the number of trademark and patent applications filed are for 1992 and are taken from Industrial Property Statistics (1992), published by the World Intellectual Property Organization in 1994. The last year for which such statistics are available is 1992. For Costa Rica, the figures are estimates for 1993 provided by Costa Rican government officials. The figures provided here are only for the purpose of comparison. Therefore, missing figures for 1993 or 1994 are not viewed as detrimental. For comparison, in 1993 188,099 patent applications were filed in the United States, of which 59 percent were by U.S. residents. In 1993 there were 139,735 trademark applications, of which 87 percent were by U.S. residents.

5.1 Guatemala

5.1.1 Statistics on Trademark and Patent Registrations

Trademark Applications Filed:

Total: 6,814
By Residents: 4,409
By Nonresidents: 2,405 (35 percent of all applications)

Patent Applications Filed:

Total: 73
By Residents: 10
By Nonresidents: 63 (86 percent of all applications)

5.1.2 Observations

Legal Status of Registry and Funding: Lic. Carlos Eduardo Illescas Rivera is the Registrar of Industrial Property, which is part of the Ministry of Economy. Funds for the registry are obtained through the Ministry, but only a small percentage (approximately 10 percent according to the Registrar) of fees taken in is appropriated back to the registry. Because of this, the Registrar indicated a desire to establish the Registry as an autonomous office within the Ministry of Economy. An initiative is currently in process with the Ministry of Finance to provide the registry with 70 percent of the fees it collects to help support its operations.

Conduct of Examination: The time required to conduct trademark examinations is approximately 8 months. The Registrar believed that that period could be reduced with increased automation.³

Patent applications are examined for form and substance. Resources, however, do not exist in Guatemala to examine adequately patent applications in terms of substance. Accordingly, some applications are sent to Spain for examination. The number

³In comparison, at the USPTO it currently takes approximately 5 months to issue the first "office action." The first office action provides an indication whether a trademark will or will not be registered. The goal is to reduce that to 3 months, which was the average in the past before a recent significant increase in the number of applications. Barring unusual circumstances, a final disposition of a trademark application at the USPTO can be accomplished in about 12 months.

of such applications is estimated at 12 per year. For the remainder, the Registrar indicated that some applications are examined by internal staff supplemented by outside technical consultants. The average pendency for patent applications is about one year. As a comparison, in the United States, average pendency time for patents was 19.5 months in fiscal year 1993.

Status of Intellectual Property Laws:

Trademarks: For the protection of trademarks, Guatemala applies the Central American Convention for the Protection of Industrial Property, signed on June 1, 1968, and effective in Guatemala as of June 18, 1975. Guatemala participated in the discussions on the new Protocol for Trademarks, which was signed by the Council of Ministers on November 30, 1994, and which, when ratified, will replace the convention. Upon coming into force, Guatemala trademark law will then comply with international standards through a legislative framework designed to adequately protect trademark owners, particularly owners of well-known marks, replacing an existing law that failed to prevent registration and use of such marks by third parties

Patents: For patents, utility models, and industrial designs, Decree Law No. 153-85 on Patents, Utility Models and Industrial Designs and Models (effective from 2/8/86) replaced the prior law (Decree Law No. 2011 of 1937). There are problems with the law, including several important areas excluded from coverage (including all chemical and pharmaceutical products), broad compulsory licensing provisions, and short patent terms. A new patent law is being finalized by the Ministry of Economy that is intended to bring Guatemalan law into compliance with international standards. It is expected that this law will be presented to Congress during the 1995 calendar year.

Plant Variety Protection: The patent law does not provide protection for plant and animal varieties, and Guatemala does not now currently provide a sui generis protection system for plant varieties. If Guatemala chooses to continue its exception for plant varieties, it must establish a sui generis system, such as under the UPOV convention.

Layout Designs (Topographies) of Integrated Circuits: No specific legislation exists.

Trade Secrets: No specific legislation exists.

Copyright: Copyright protection is provided by Decree Law No. 1037 of February 8-11, 1954. In June 1992, Guatemala enacted a new cable law (Decree 41-92) that requires cable operators to stop unauthorized retransmission of copyrighted programming.

Enforcement of Intellectual Property Laws: There are no reported cases of patent infringement problems in Guatemala, let alone patent infringement actions having been brought in the courts. It is likely, however, that a shortage of trained private sector attorneys and a lack of trained judiciary will result in uncertain outcomes should such actions be brought. Trademark infringement cases are relatively common, but the procedure to prosecute for infringement is long and complex. Generally, according to lawyers in the field, it takes 5 to 6 years for a case to go to judgment. Fines can be levied in instances in which judgment is rendered but not followed.

Status of International Agreements: It is U.S. policy to urge countries to become members of the Paris, Berne, UPOV, Geneva, and Satellite Transmission Conventions. Further, countries are encouraged to become members of the PCT. Of the foregoing, Guatemala is a member only of the Geneva Convention. It is understood that Guatemala is currently contemplating acceding to the Paris and Berne Conventions. According to José Carlos García, the Viceminister of Economy, opinions from other ministries in Guatemala are now being solicited and accession should take place during the calendar year 1995.

The positions of the Government of Guatemala on the UPOV Convention, Satellite Transmission Convention, and PCT are unknown.

The Government of Guatemala is considering the U.S. Model IPR Agreement.

It is likely that Guatemala will become a contracting party to the Protocol to the Central American Convention for the Protection of Industrial Property.

Position on Central American Office: Viceminister García expressed doubt that a Central American Office for the Registration of trademarks and patents could be established but said that a central system could be envisioned with branch offices linked by computer.

Need For Technical Assistance, Training, and Equipment: Both the Registrar and José Carlos García, Viceminister of Economy, expressed a need for further training for the staff in the registry and for more equipment to conduct their registration functions. In addition to training for the office, the Viceminister indicated a need for training for the private sector and for judges. The need for more training (of registry personnel, judges, prosecutors, and private sector) and equipment was echoed by Lic. W. Rodolfo Ferber Aguirre, Director of Strategic Planning, Cámara Empresarial de Guatemala. He believed that the problem with the

protection and enforcement of intellectual property in Guatemala was not in the law, but rather in a lack of training.

The Registrar indicated that the pendency of trademark applications could be reduced if adequate equipment (computers and necessary software) and training were provided.

5.2 El Salvador

5.2.1 Statistics on Trademark and Patent Registrations

Trademark Applications Filed:

Total: 3,749
By Residents: 1,739
By Nonresidents: 2,010 (54 percent of all applications)

Patent Applications Filed:

Total: 108
By Residents: 11
By Nonresidents: 97 (89 percent of all applications)

5.2.2 Observations

Legal Status of Registry and Funding: The Registrar of Industrial Property in El Salvador is Alfredo Gonzales Elizondo. The Registry of Industrial Property is situated in the Ministry of Justice. The registry is not autonomous. Accordingly, only a portion of the money received for the registration of trademarks and patents is retained, the remainder going to the general treasury. The Registrar, however, indicated that it may be possible to establish the Registry as an autonomous office, self-financed as in Costa Rica.

Conduct of Examination: Regarding copyrights, it is not necessary to register to obtain protection but only to make a deposit of the work.

Thirty-three persons are employed by the Registry, including four or five attorneys. According to the Registrar, this is not sufficient given the current workload and level of automation. For example, according to private sector sources, it takes approximately 2 years to register a trademark.

Regarding patents, the Registry does conduct an examination for substance (examen de fondo) within the Registry with the assistance of outside technical experts.

Status of Intellectual Property Laws:

Trademarks: For the protection of trademarks, El Salvador applies the Central American Convention for the Protection of Industrial Property, signed June 1, 1968. El Salvador participated in the discussions on the protocol concluded in San José, Costa Rica, September 22, 1994. The protocol was signed at a meeting of plenipotentiaries on November 30, 1994 and, upon ratification by three signatories, will replace the convention. Until the protocol comes into force, the law of El Salvador will have the same defects as those of current Guatemalan law, which fails to adequately prevent the registration of well-known registered trademarks by third parties.

Patents and Industrial Designs: The new industrial property law (Decree Law No. 596, published August 16, 1993) entered into force in October 1993. This law provides protection for patents, utility models, and industrial designs. To date, implementing regulations have not been promulgated.

Plant Variety Protection: The new industrial property law does not exclude plant varieties from protection. Thus, El Salvador will not be obliged as a consequence of TRIPS to enact a sui generis system for the protection of plant varieties. Nonetheless, if El Salvador were to accept the model IPR bilateral agreement offered by the United States, it would have to adhere to the UPOV Convention and provide for the protection of plant varieties in accordance with its terms. In addition, it is understood that Mexico has proposed adherence to the UPOV Convention within 7 years as a condition to any free trade agreement between Mexico and El Salvador, a condition that would presumably apply to any other Central American republics entering into such a free trade arrangement.

Layout Designs (Topographies) of Integrated Circuits: No specific legislation exists.

Trade Secrets: A specific provision for the protection of trade secrets exists in Title Four of the new industrial property law of El Salvador.

Copyright: The new copyright law (Decree Law No. 596, published August 16, 1993) entered into force in October 1993, with the period of grace for videos ending June 1994.

Enforcement of Intellectual Property Laws: In discussions with private attorneys, some problems came up. Dr. Alfredo Espino Nieto indicated that there is a problem in El Salvador in the protection of notorious marks ("well-known marks"). The problem is that the Registrar and the courts were criticized in not applying appropriate legal standards to determine when a mark is well known. In particular, they were maintaining that if a mark was not known to them it could not be well known. The proper standard, however, is whether the mark is well known in the relevant sector of the consuming public, including knowledge obtained as a result of the promotion of the mark.⁴

Similarly, companies or individuals in El Salvador register marks they learn about from abroad and then wait for the legitimate owner to begin business or seek registration in El Salvador. At that point the registrant offers to sell the mark to the legitimate proprietor.

A basic element in these problems is that there is a lack of understanding of intellectual property in the judiciary. According to one local attorney, there are only two judges that understand the subject.

Infringement actions are decided in the first instance in mercantile tribunals. The Supreme Court can establish special courts. Because only a few cases are likely to come before the courts, however, it should not be necessary to establish separate courts.

Owners of intellectual property rights can ask customs authorities to enforce their rights, but these authorities are untrained.

Dr. Romeo Melara Granillo, Attorney General, indicated that the police have an office competent to investigate intellectual property rights violations, but he expected that they needed training to carry out such investigations. Dr. Granillo indicated that criminal actions against pirates could be initiated without a demand from the right's owner stating that "if it is an illicit operation it is illicit."

However, representatives from Windstreet, a Panamanian video distributor with offices in El Salvador, stated that to date the police have held they do not have jurisdiction over intellectual property disputes. Moreover, they stated that the cost of enforcement outstrips gains. Court action is time consuming and therefore expensive. Apparently, there is a provision in fiscal laws to maintain public order and protect consumers that could be

⁴See TRIPS Agreement, Article 16(2).

used by police to enforce intellectual property rights through the seizure of infringing goods.

Status of International Agreements: It is U.S. policy to urge countries to become members of the Paris, Berne, UPOV, Geneva, and Satellite Transmission Conventions. Further, countries are encouraged to become members of PCT. Of the foregoing, El Salvador is a member only of the Paris, Berne, and Geneva Conventions.

The position of the Government of El Salvador on the UPOV Convention, Satellite Transmission Convention, and PCT is unknown.

El Salvador is contemplating the U.S. Model IPR Agreement.

El Salvador, along with Guatemala and Costa Rica, participated in discussions on the Protocol to the Central American Convention for the Protection of Industrial Property. Honduras participated as an observer. It is anticipated that El Salvador will ratify the protocol. This view is shared by Dr. Roberto Romero Pineda, a private sector attorney.

Position on Central American Office: Mr. Grimaldi, Legal Adviser to the Ministry of Economy, indicated that this was a good time to consider establishing a common registry for Central America.

The Registrar of Industrial Property in El Salvador, Mr. Alfredo Gonzales Elizondo, stated that Costa Rica made a point at the meeting that adopted the protocol to the Central American Convention for the Protection of Industrial Property about the establishment of a Central American industrial property office.

Need For Technical Assistance, Training, and Equipment: Eduardo Ayala Grimaldi, Legal Adviser to the Ministry of Economy, indicated that the Registry needed assistance. Dr. Romeo Melara Granillo, Attorney General, indicated a need for training in the area of intellectual property. A basic problem is a need to reform the civil service and pay market rates for employees to retain good personnel once they are trained.

WIPO has proposed a program of training for El Salvador which the government is contemplating accepting. This program would provide for a comprehensive 3-year training program for the registry.

5.3 Costa Rica

5.3.1 Statistics on Trademark and Patent Applications

Trademark Applications Filed:

Total: 7,562

Patent Applications Filed:

Total: 181

5.3.2 Observations

Legal Status of Registry and Funding: The Intellectual Property Registry is within the Ministry of Justice. The Registrar is Lilliana Alfaro. The Intellectual Property Registry is part of a larger registry that in addition to intellectual property, registers other things, such as automobiles. The larger registry is autonomous. According to Ms. Alfaro, because of the autonomous nature of the registry, the fees taken in for registrations may be used by the registry for its own purposes. Accordingly, there is no lack of funding to purchase equipment and supplies, when needed.

Conduct of Examination: Trademark examination, both for substance and form, is conducted at the Intellectual Property Registry.

Patent examination for form is conducted at the Intellectual Property Registry. Examination for substance is conducted by people at local professional associations (colegios profesionales), such as associations of engineers or chemists.

Status of Intellectual Property Laws:

Trademarks: For the protection of trademarks, Costa Rica applies the Central American Convention for the Protection of Industrial Property, signed June 1, 1968. Costa Rica participated in the discussions on the protocol concluded in San José, Costa Rica on September 22, 1994. The protocol was signed at a meeting of plenipotentiaries November 30, 1994, and, upon ratification by three signatories, will replace the convention. Until the protocol comes into force, the trademark law of Costa Rica will have the same defects as those noted for the laws of El Salvador and Guatemala.

Patents and Industrial Designs: The relevant law is the Law on Patents of Invention, Industrial Designs and Models, and Patents of Improvement of June 13, 1983 (effective since July 13, 1983). The law is inadequate in a number of respects. It is reported that the U.S. pharmaceutical industry does not manufacture in Costa Rica because of the lack of adequate patent protection. However, the Government of Costa Rica appears to recognize the benefits of patent protection, including for pharmaceuticals. Moreover, it has been reported that the Costa Rican government has studied the effect on the treasury of providing better protection and concluded that there would be no increase in costs to the government.

Plant Variety Protection: Since plant varieties are excluded from protection, Costa Rica will have to provide for a sui generis system for their protection. Currently, Costa Rica does not have such a system.

Layout Designs (Topographies) of Integrated Circuits: No specific legislation exists.

Trade Secrets: No specific legislation exists.

Copyright: On May 10, 1994, the copyright law was reformed and now provides specific protection for computer software. Video stores have challenged the new copyright law in the sala cuarta or constitutional court. A decision is expected shortly.

Enforcement of Intellectual Property Laws: Whereas the cable industry in Costa Rica is substantially nonpirated, hotels continue to be problematic.

The market for videotape rentals and sales remains largely pirated. An attorney for Windstreet, a Panamanian distributor with offices in Costa Rica, plans to file an action against pirates. This should provide a test of the efficacy of the law.

As to copyright protection for computer software, at least one manufacturer has indicated an interest in taking on computer dealers to clean up the market. Such enforcement efforts are consistent with Costa Rican government policy in that software development is an area in which the country has shown progress.

There are no reported cases of enforcement of patent rights in Costa Rica. This is likely given the poor protection for patents, in particular pharmaceuticals. It is likely, however, as noted earlier, that the judiciary in Costa Rica would require training in intellectual property to be able to adequately handle cases before them.

Status of International Agreements: It is U.S. policy to urge countries to become members of the Paris, Berne, UPOV, Geneva, and Satellite Transmission Conventions. Further, countries are encouraged to become members of PCT. Of the foregoing, Costa Rica is a member only of the Berne and Geneva Conventions.

The position of the Government of Costa Rica on the Paris, UPOV, and Satellite Transmission Conventions and the PCT is unknown.

Costa Rica, along with Guatemala and El Salvador, participated in discussions on the Protocol to the Central American Convention for the Protection of Industrial Property. Honduras participated as an observer. It is anticipated that Costa Rica will sign and ratify the protocol.

Position on Central American Office: The Registrar of Industrial Property in El Salvador, Mr. Alfredo Gonzales Elizondo, stated that Costa Rica made a point at the meeting that adopted the Protocol to the Central American Convention for the Protection of Industrial Property about the establishment of a Central American industrial property office. This view does not appear to have widespread support in Costa Rica, either in government or in the private sector.

Need For Technical Assistance, Training, and Equipment: The registration of trademarks and patents at the Registry appears to take place without difficulty caused by a lack of equipment or supplies. With the changes to the trademark and patent laws in Costa Rica, however, there will be a need for training and technical assistance. This is especially so in the case of patents since the changes to the Costa Rican patent law will make it an attractive place to file and to transfer technology. It can be anticipated, therefore, that the volume of filing will increase.

According to Luis Pal Hegedus, a private attorney dealing with intellectual property matters, there is a need for training of judges, both in courts of first instance and in the Supreme Court. He emphasized the need for a permanent mechanism to provide training.

5.4 Honduras

5.4.1 Statistics on Trademark and Patent Applications Filed

Trademark Applications Filed:

Total: 2,469
By Residents: 699
By Nonresidents: 1,770 (71 percent of the total)

Patent Applications Filed:

Total: 30
By Residents: 0
By Nonresidents: 30 (100 percent of the total)

5.4.2 Observations

Legal Status of Registry and Funding: Dacio Castillo Flores is the Director of Intellectual Property, Sandra Deleon Delobo is the Registrar of Copyrights, and Karen Alfaro is the Registrar of Industrial Property. Both the Copyright and Industrial Property Registries are within the Ministry of Economy and fall under a newly created Directorate of Intellectual Property.

According to the Minister of Economy and Commerce, Lic. Delmer Urbizo Panting, there are constitutional problems in making the Intellectual Property Office autonomous. This opinion was disputed by Lic. Anibal Madrid, Executive Director of the Tegucigalpa Chamber of Commerce and Industry. All funds collected by the registries are added to the Government budget and not reallocated to support registry operations.

There has been some thought given to establishing branch offices for the Registry, such as in San Pedro Sula, but this has not yet been done.

A computer system was donated to the Copyright Registry by FIDE (Fundación de Inversiones y Desarrollo de Exportaciones), and the USAID Mission is also supporting the acquisition of computer equipment and supplies for this registry from local currency.

Conduct of Examination: The Industrial Property Registry conducts trademark examination, both for form and substance. For trademark applications the pendency is 2 to 3 months. In addition to reviewing trademark applications, the registry also performs preliminary searches for trademarks for businesses before their submission to ensure that the trademark is not already registered. The registry estimates that they conduct approximately 12,000 searches a year. No fee is charged for this service.

The Industrial Property Registry conducts patent examination for form only, not for substance. Examination for substance is conducted outside the Registry at universities or technical colleges. However, if the engineers who are consulted in the universities or technical colleges are not familiar with the invention for which protection is being sought, the application is rejected without further investigation.

In respect of copyright, it is not necessary to deposit a work until one wants to enforce rights in it.

Status of Intellectual Property Laws:

Trademarks, Patents and Industrial Designs: A new Honduran Industrial Property Law (Decree 142-93) became effective December 24, 1993. Although a great improvement over the old law, the new law has certain defects. Further, as noted below, the registry does not have the capacity to properly implement the new law. For example, Article 15 provides for a patent term of 17 years from the date of application for pharmaceuticals and medicinals. This is inconsistent with TRIPS obligations. In addition, TRIPS allows for the exclusion from patentability of plants and animals other than microorganisms. The Honduran law excludes plant varieties and species as well as animal species and races but does not indicate that this exclusion does not extend to microorganisms. Absent clear protection for microorganisms, the Honduran law is inconsistent with TRIPS and disinclines the biotechnology industry to seek protection there. On the trademark side, there are problems with the protections accorded to well-known marks (signos notoriamente conocidos) and with the provisions regarding use to maintain registration. The Government of Honduras has agreed to implement the most important recommendations for change suggested by the United States. These changes (in the form of amendments to the laws or additions to the regulations) are pending.

Plant Varieties: The patent law of Honduras specifically excludes plant varieties from protection. Accordingly, to be consistent with TRIPS obligations, Honduras must establish a sui generis system for the protection of plant varieties. Honduras does not currently have such a system.

Layout Designs (Topographies) of Integrated Circuits: No specific legislation exists.

Trade Secrets: Title III of the Honduran Industrial Property Law (Decree 142-93) provides for the protection of trade secrets.

Copyrights: The new copyright law entered into force in December 1993 and was drafted with the assistance of WIPO. There are defects in the law, entered as a consequence of special interests making changes to the law before its adoption. As in the case of the patent and trademarks law, the Government of Honduras is in the process of addressing these defects, through amendments to the laws or in the drafting of the regulations. These reforms should be complete by June 30, 1995. Unlike in the case of the industrial property registry, the registry is well staffed and has sufficient equipment to do its job.

Enforcement of Intellectual Property Laws: To date, intellectual property enforcement efforts have concentrated on copyrights, in particular the cable industry. In that field there has been great progress. According to Hugo Llorens, Economic Counselor at the U.S. Embassy, the cable industry is 80 percent legal, although one company, Maya Cable, is still pirating premium channels. Video- and audiocassette sales and rentals are still largely pirated.

Again, according to Hugo Llorens, penal sanctions for infringement of intellectual property rights remain a gray area. In particular, the section in the penal code that would apply sanctions to "other properties" does not clearly apply to intellectual property.

There are no reported problems in the enforcement of patents and trademarks. That is not to say that the potential for problems does not exist, rather that there have been few actions. It is generally recognized that there is a need for training in the field of intellectual property for police and the judiciary to pave the way for an efficient implementation of the new laws in the field.

Status of International Agreements: It is U.S. policy to urge countries to become members of the Paris, Berne, UPOV, Geneva, and Satellite Transmission Conventions. Further, countries are encouraged to become members of the PCT. Of the foregoing, Honduras is a member only of the Paris, Berne, and Geneva Conventions.

The position of the Government of Honduras on the UPOV and Satellite Transmission Conventions and the PCT is unknown.

Honduras is not currently a member of the GATT but has accepted the Uruguay Round TRIPS standards as part of its GATT accession application.

Honduras is contemplating the U.S. Model IPR agreement.

Honduras participated as an observer in discussions on the Protocol to the Central American Convention for the Protection of Industrial Property. Whether Honduras will eventually accede to the protocol is uncertain. The feeling in Honduras is that its new trademark law that entered into force in December 1993 provides the same level of protection as that required in the Protocol to the Central American Convention on the Protection of Industrial Property. The question, therefore, as to whether to accede is a political one.

Position on Central American Office: The idea of establishing a Central American office was supported by Lic. Anibal Madrid, Executive Director of the Tegucigalpa Chamber of Commerce and Industry, though he recognized the political difficulties in doing so.

Need For Technical Assistance, Training, and Equipment: The Registrar indicated that there was a need for a new computer system to provide better access to the information contained in the Registry and to make the process of granting trademark protection more efficient. Moreover, to operate the equipment they have and that they want requires training for computer operators. Another need is for more and better trained staff. At the present time, the industrial property registry is operating with 16 staff, of which only 2 are lawyers. Low salaries make it difficult to recruit qualified technical people and budget increases for the registry have been rejected by the Congress.

According to Norman Garcia, Executive President of FIDE, seminars are needed for the private and public sectors, not only in Tegucigalpa (the capital), but also in San Pedro Sula (a principal manufacturing center). With necessary funding, his organization would be willing to mount such seminars.

5.5 Nicaragua

5.5.1 Statistics

Trademark Applications Filed

Total: 3,103

By Residents: 1,002

By Nonresidents: 2,101 (68 percent of the total)

Patent Applications Filed

Total: 42

By Residents: 3

By Nonresidents: 39 (93 percent of the total)

5.5.2 Observations

Legal Status of Registry and Funding: The Registry of Industrial Property is part of the Ministry of Economy and Development (MEDE). The Director General of Industry is Gustavo Mercado and reporting to him is Rosa Argentina Ortega C., Director of the Registry of Industrial Property. Dra. Ambrosia Lezama Lelaya is responsible for patent information and registration. Copyright is under the jurisdiction of the Ministry of Education.

The Registry of Industrial Property is not autonomous, but some contemplation has been given to making it so. Indeed, a paper was recently prepared by MEDE concerning a program for the reconversion and development of industry in Nicaragua. The paper indicates that one object of MEDE is to establish a Nicaraguan Organization of Industrial Property (ONPI), autonomous of the Nicaraguan government. Some in government and private circles, however, indicate that the Registry is not likely to become fiscally autonomous or self-financing. If it were fiscally autonomous, a large part, if not all, of the financing for development of the office could be generated by fees charged. Gustavo Mercado, Director General of Industry in MEDE, believed that even if ONIP were to become fiscally autonomous in the future, MEDE requires financial assistance now to bring the Registry of Industrial Property up to international standards in order to provide a proper basis for its becoming autonomous and self-sufficient.

Conduct of Examination: Trademark applications are examined for form and substance at the Registry. It takes approximately 6 months from the date of application to the date of grant to process a trademark application.

Patent applications are also examined for form and substance by the Registry, with pendency being approximately one year. Except for some limited expertise in the field of chemistry, the Registry does not have the technical capacity to examine patent applications itself. Thus, applications are examined by technically qualified persons, such as at universities. Those doing the examinations come to the Registry, however, to do the work. Those doing the work do not, however, have any legal

training or qualification. An examination of two cases showed that the examination for substance was cursory at best.

Status of Intellectual Property Laws: There is strong support in the executive branch of the Nicaraguan Government for enacting and enforcing stronger and more effective intellectual property laws. The principal impetus is a desire to adhere to the GATT and, therefore, to the TRIPS agreement. Moreover, there is recognition of the important role that intellectual property law plays in the development of a market-based economy. These last two points were made by Oscar Alemán, Director General of Foreign Trade in MEDE.

It is expected that following the ratification of GATT and the entry into the agreement with Mexico that modern industrial property laws will follow quickly. In particular, the revised copyright and patent laws will be passed by the National Assembly in a form consistent with international standards, including those set by TRIPS and NAFTA.

Trademarks: Nicaragua is a member of the Central American Convention for the Protection of Industrial Property. The convention codifies trademark law for Nicaragua. Nicaragua is expected to ratify the Protocol to the Convention that was concluded November 30, 1994.

Patent: A draft new patent law has been prepared by the executive but has not yet been submitted to the assembly. Director General Alemán offered his opinion that the draft legislation is consistent with obligations under TRIPS. After discussions with María de Alvarado, it became apparent that there is no knowledge of the patent law in the National Assembly.

Plant Varieties: It is not clear whether the new patent law will provide protection for plant varieties. If not, to be consistent with TRIPS obligations, Nicaragua will have to provide for a sui generis protection system for plant varieties. It is understood from Nicaraguan authorities, however, that they do not plan to sign on to the UPOV Convention until the government can conduct a definitive survey of what plant life exists within its borders. Such a survey may take several years.

Industrial Design: While the draft new patent law also contains provision for the protection of industrial designs, present Nicaraguan law does not.

Trade Secrets: No specific legislation exists.

Layout Designs (Topographies) of Integrated Circuits: No specific legislation exists.

Copyright: A copyright law was sent to the national assembly early in 1994. It was originally developed by WIPO and, according to local attorneys knowledgeable about the draft, was not in compliance with international agreements, including TRIPs. Moreover, according to representatives of the private sector and MEDE, it was brought further out of compliance through amendments entered by the National Assembly. According to private sector attorneys, the problem is a political one and not a lack of understanding of the law or of international obligations. The new copyright law is still within the National Assembly and, according to María de Alvarado, member of the National Assembly, consultations with interested parties are still ongoing, and the legislation is expected to pass by February or March 1995. The content of the legislation that will pass is not now known.

Enforcement of Intellectual Property Laws: Enforcement of intellectual property laws in Nicaragua is problematic. Reports are that the civil law is effective in obtaining a remedy that is, ultimately, ineffective. That is, one can obtain a court order that shuts down an infringer, but they open up again the next day, perhaps under a different name.

Part of the ineffectiveness of the court system is ascribed to the legislation, and part results from the lack of education in the judiciary about intellectual property. Indeed, in a meeting with Oscar Alemán, Director General of Foreign Trade, MEDE, he made the point that the problem with intellectual property protection in Nicaragua is not in the legislation but in its implementation. He indicated that for proper implementation, training was required for customs officials, the judiciary, the legal profession, and relevant government personnel.

Regarding copyright matters, in particular broadcast and cable retransmission, the market appears to be widely pirated. This is viewed by those in the television and cable industry in Nicaragua as being a consequence of a lack of understanding of intellectual property by the government, especially in the courts, and by a lack of pressure from copyright owners, including the Motion Picture Association of America. As to the latter, the view was that Nicaragua constitutes only 0.01 percent of the business of the MPAA membership and is, therefore, a very low priority.

Status of International Agreements: It is U.S. policy to urge countries to become members of the Paris, Berne, UPOV, Geneva, and Satellite Transmission Conventions. Further, countries are encouraged to become members of PCT. Of the foregoing, Nicaragua is a member only of the Berne and Satellite Transmission Conventions.

As indicated above, it is understood from Nicaraguan authorities that adherence to the UPOV Convention may be delayed for some years. The position of the Government of Nicaragua on the Paris and Geneva Conventions and PCT is unknown.

Nicaragua is in the process of negotiating a free trade agreement with Mexico that includes a chapter on intellectual property. Although discussions on that chapter are apparently complete, a copy of it is not yet publicly available.

The model IPR agreement has been presented to the Government of Nicaragua. Apparently, because of work in negotiating the above-mentioned free trade agreement with Mexico, they have not had a chance to complete review of the model IPR agreement.

As stated earlier, Nicaragua is a member of the Central American Convention for the Protection of Industrial Property and is expected to ratify the Protocol to the Convention that was concluded November 30, 1994.

Position on the Central American Office: Nicaragua is a member of the Central American Convention on Industrial Property, but there does not appear to be a strong impetus for establishing a Central American office for the granting of titles of protection that would have effect throughout the region.

Need for Technical Assistance, Training, and Equipment: There is a need for training in the public, the judiciary, and the registry. While the study team was in Nicaragua, the Ministry of Economy and Development (MEDE) presented the team members with a document entitled "Programa para la Reconversión y Desarrollo de la Industria en Nicaragua" (Nicaraguan Industrial Development and Reconversion Program). In that document MEDE described the elements that are necessary to support the Registry of Industrial Property in its preliminary development to enable it to implement obligations under TRIPs. The document states that, ultimately, MEDE would like to establish the autonomous ONPI.

The program of modernization and development of ONPI described in the MEDE document includes training, provision of equipment (mainly computers and software), establishing procedure manuals, and establishing programs of public information. The term of the program is 3 years at a total cost of US\$438,600. This cost would cover the salaries of an office coordinator, two lawyers, two engineers, and one computer expert. Other items covered are the costs of public information, transport, and computers. USAID's role in this development could be the provision of specialized training for MEDE personnel on topics such as the running of a modern industrial property office, searching of trademark applications, and use of computers and

computerized information systems, including CD-ROMs. All of these topics are offered by the USPTO and can be provided in Washington, D.C.

WIPO has provided a great deal of assistance and training to the Government of Nicaragua over the past couple of years. They have provided training to judges in the field of intellectual property. Government officials have participated in seminars on industrial property management and technology transfer and the protection and management of intellectual property in joint ventures. Moreover, government officials participated in the Ibero-American Regional Meeting of Copyright Registries and a seminar on the advantage of accession to the Berne Convention on copyright. Because of their membership in WIPO, Nicaragua will continue to be eligible for participation in WIPO training opportunities.

5.6 Panama

5.6.1 Statistics

Trademark Applications Filed:

Total: 4,572

By Residents: 2,317

By Nonresidents: 2,255 (49 percent of the total)

Patent Applications Filed:

Total: 84

By Residents: 18

By Nonresidents: 66 (79 percent of the total)

5.6.2 Observations

Legal Status of Registry and Funding: The Directorate General for Industrial Property Registration is under the Ministry of Commerce and Industry in Panama (MICI). The Director of the Registry of Industrial Property is Lica. Celeste R. de Davis. A very small part of the funding for the Registry comes from fees paid by applicants for protection. Most of the fees are paid to the treasury. Accordingly, the Registry is in a constant state

of fiscal crisis as it depends on funding from MICI that is not always forthcoming. For example, in discussions with the Director of the Registry and attorneys in the private sector, it was revealed that there is not always sufficient money for the publication of the gazette. Without publication of the gazette the publication of trademarks cannot take place and without that publication the period of opposition cannot begin, at the end of which protection for the trademark begins.

In discussions with the Director of the Registry and Mayela Espino de Harris, Directora de Asesor Legal of MICI, it became clear that establishing the Registry as an autonomous entity within MICI was desirable to them and possible. The Maritime Registry is, as understood, autonomous. Reports from the private sector indicate that the Maritime Registry operates well and could serve as a legal and practical model for establishing the Industrial Property Registry as an autonomous office. This possibility should be further explored.

Copyright is administered by the Ministry of Education. There were no reports of problems with the administration of the copyright law in Panama. Likely, however, copyright enforcement in the Colón Free Trade Zone would suffer the same fate as for trademarks as reported below.

Conduct of Examination: Trademark examination takes place at the Registry, both for form and substance. There are two persons in the Registry with this responsibility full time, and others can help as needed if the workload warrants it. The total time for the registration of a mark, including the period for opposition, is, on average, 8 months. This time, of course, depends on the timely publication of the gazette. As noted earlier, this does not always occur because of a lack of funds.

Patent examination for form is done within the Registry and, in certain cases, for substance. The Registry has an agreement with WIPO to perform up to 100 patent examinations every year. In addition, the Registry has a similar arrangement with the Spanish Patent Office. Thus, if needed, the Registry could have up to 200 patent examinations done for them per year, free of charge. They use only a small part of this capacity since it only applies to applications originating in Panama. For foreign origin applications, the Registry requests information about the search and examination done by other offices and relies on that information to decide whether or not to issue the application. Thus, for foreign-origin applications, the time for examination depends directly on when the Registry receives the information about the corresponding foreign application.

The Registry generally gets high marks for getting the job done well and in a timely fashion. The only problems with time-

liness reported could likely be ascribed to the delays attendant with lack of funds to publish the gazette regularly.

Status of Intellectual Property Laws:

Trademarks, Patents, Industrial Designs, and Trade Secrets:

A new industrial property law dealing with all of the enumerated subjects has been drafted and should be introduced to the Panamanian Congress next year. The U.S. government has had an opportunity to review this law and provided the Government of Panama with observations on it. The current government, which came to power in September 1994, has apparently done a good job of consulting with private attorneys, especially those who represent foreign clients.

Layout Designs (Topographies) of Integrated Circuits: No specific legislation exists.

Plant Varieties: The draft industrial property law contemplates excluding plant varieties from patent protection. If this course of action is taken, Panama must implement a sui generis protection system for the protection of plant varieties.

Copyright: The new copyright law has been in force since January 1995.

Enforcement of Intellectual Property Laws: The Supreme Court handed down a bizarre decision 2 years ago that held that oppositions to trademark filings could not be decided by the Registry but, instead, must be resolved by the courts. The decision is under review and, therefore, in abeyance. The consensus in the bar and the government is that the Supreme Court realizes its error and is trying to find a way out. In the meantime, the Registry continues to decide oppositions, but under a cloud.

Sections 384 and 385 of the criminal code define counterfeiting. It is subject to a jail term of 1 to 2 years. Some members of the bar believe a term of 2 to 4 years is required to act as a sufficient deterrent.

The biggest problem is in the Colón Free Trade Zone (FTZ). There an investigator is sent but a trademark infringement action cannot be instituted. The government, either through criminal authorities or customs authorities, is not effective in deterring infringement. The only possible recourse appears to be through a civil action. In such an action, the plaintiff can establish a pretrial bond and goods can be seized, including in the free trade zone. A conservation measure is requested of the judge so that the goods cannot be released back to the accused infringer. One difficulty in civil matters in the FTZ is that there are two

civil courts having jurisdiction--one over one part and the other over the other part. This conflicting jurisdiction presents some conflicts that are difficult to resolve.

Regarding customs, there is currently no check at the border for questions of infringement, including in the free trade zone. Indeed, it has been reported that customs officials in the free trade zone believe that they do not have jurisdiction over intellectual property matters.

There is a plan to establish a new court having jurisdiction over intellectual property matters, as well as antimonopoly and antidumping matters. There is some precedent for this in Panama since there is a court to deal with admiralty matters.

It is understood that the new industrial property bill to be introduced in the Congress next year will explicitly give customs officials jurisdiction over intellectual property matters. Further, it is understood that, among other things, the new administrator of the FTZ, Victoria Figge, has marching orders from President Balladares to deal with intellectual property infringement in the FTZ. These orders are, apparently, a direct result of U.S. pressure exerted over the matter.

Status of International Agreements: It is U.S. policy to urge countries to become members of the Paris, Berne, UPOV, Geneva, and Satellite Transmission Conventions. Further, countries are encouraged to become members of PCT. Of the foregoing, Panama is a member only of the Geneva Convention.

It is expected that Panama will ratify its accession to the Paris Convention early in 1995. The position of the Government of Panama on the Berne, UPOV, and Satellite Transmission Conventions and the PCT is unknown.

Panama is not now party to the Paris Convention. It is anticipated, however, that accession will come in the next year. In addition, Panama has made an application for accession to the GATT and is very keen on being successful in its application.

Position on the Central American Office: Although Panama participated as an observer in the recent discussions on the Protocol to the Central American Agreement, there is no real political will to become a member. Provided the new industrial property law is adequate, there is no need to further pursue Panama's accession to the convention.

Need for Technical Assistance, Training, and Equipment: The Panamanian Registry will never be in a position to conduct a large volume of patent searches and examinations or searches and

examinations in a wide range of technologies. Indeed, the Registry's function regarding patents will likely be limited to providing information on and training in patents to the public. Given that reality, the Registry's needs regarding patents will be mainly for training on patent information and documentation. Periodic training for selected mid-level officers will be needed in patent law, in particular in international and foreign law developments.

The Registry will continue to search and examine trademark applications. The equipment they have appears to be adequate to the task. (Although an inventory of equipment was not taken, there was no indication from the Registry or the private sector that additional equipment or software was required.) The need is, as in the case of patents, for training on trademark information and documentation as well as training in international and foreign law developments.

6.0 POLICY RECOMMENDATIONS

6.1 Summary

The following policies should be pursued to provide stronger more effective protection for intellectual property in Central America.

USAID should support a program of training and technical assistance in the field of intellectual property for the public and private sectors in each of the Central American countries. This program should be appropriate in the light of the true needs of the countries and the availability of assistance from others.

As indicated earlier, the design of programs to provide training and technical assistance should take into consideration resources available outside the U.S. government to countries of Central America in training and technical assistance. These resources include the World Intellectual Property Organization, the United Nations Development Programme, The European Union (through the European Patent Organization), the Inter-American Development Bank, and the World Bank. Moreover, resources may be available from other national offices, such as the Spanish Patent Office.

The U.S. government should encourage regional approaches to intellectual property in Central America. These regional approaches could include expansion of the Central American Convention on the Protection of Industrial Property (which is

currently contemplated) to establishing a single office for the region to grant trademarks and patents.

The U.S. government should encourage autonomy for intellectual property registries to permit self-financing at adequate budgetary levels. Briefly, the fees taken in by offices for the registration of trademarks and patents is sufficient to fund the offices and help defray the cost of their modernization. In most offices in the region, however, most of the fee income goes to the general treasury, not to the registry.

Central American intellectual property authorities should be discouraged from conducting a substantive examination of patent applications. Rather, they should rely on examinations conducted in established offices, such as the USPTO.

6.2 Detailed Discussion of Policy Recommendations

6.2.1 Encouraging Regional Solutions

Currently, except for countries belonging to the Central American Convention, the standards and procedures for obtaining intellectual property protection vary, sometimes greatly, in Central America. Moreover, to obtain patent, trademark, and, where available, design protection, one must apply separately in each country in Central America. The differing standards and procedures increase costs because the information costs are higher than would be the case with a uniform regional system. Further, the need to file separate applications increases the costs of obtaining protection because of the duplication of official filing and attorney's fees. It would be in the interests of applicants, including U.S. applicants, to reduce these costs.

One way of reducing costs is to encourage regional approaches to intellectual property in Central America. These regional approaches can, broadly, take two forms. One is the harmonization of laws, such as through the Central America Convention on the Protection of Industrial Property. The Protocol to that Convention, completed September 22, 1994, is a vast improvement over the 1968 protocol but is still limited to trademarks and commercial names. It is anticipated that once the protocol comes into force (anticipated for 1995) that drafting of the regulations would begin. Drafting of the next chapter of the convention (that dealing with patent, utility models and industrial designs) would follow once it appeared that the new trademark provisions had been fully accepted. Very likely, WIPO would

be called on to perform the original drafting of these two instruments. This is to be encouraged. Indeed, the USPTO has informally indicated its support to WIPO for this effort.

The next step would be to work on a regional convention for the granting of patent, trademark, and design protection that would have effect in the countries of Central America, where protection is desired. Precedents exist for such solutions, including the following.

European Patent Convention: When filing a European Patent Application, the proprietor indicates (or "designates") the contracting states in which protection is desired. A single search and examination is then conducted and the European patent confers on its proprietor, in each contracting state designated by the applicant, the same rights as would be conferred by a national patent granted in that state. All infringement actions are dealt with under the national law of the contracting state involved.

The European Patent Convention (EPC) has not dispensed with the national grant procedures. The applicant therefore has the choice in seeking patent protection in one or more EPC contracting states between the national procedure in each state for which he desires protection and the European route.

ARIPO (African Regional Industrial Property Organization): ARIPO provides a mechanism whereby patent or industrial design protection may be obtained in 11 English-speaking African nations. A patent granted under the ARIPO system or an industrial design registered under the ARIPO system shall have in the designated contracting states the same effect as a national patent or design granted, registered or otherwise having effect in such state. However, a patent or design cannot be protected in a country if its subject matter cannot be protected according to the national law of such country.

When the ARIPO Office intends to grant a patent or to register an industrial design, it shall notify each designated contracting state thereof. (Within 6 months each such state may inform the ARIPO Office that the patent or design concerned shall have no effect in the territory of such state). After a patent is granted by ARIPO or after an industrial design is registered with ARIPO, the same shall be governed in the respective designated contracting states by the national laws of these states.

OAPI (Organisation Africaine de la Propriété Intellectuel): OAPI provides a mechanism whereby patent, trademark, and design protection may be obtained in 14 French-speaking African nations.

Unlike the case under the EPC or ARIPO, the patent, trademark, and design registrations with the OAPI Office automatically cover all 14 OAPI member states at once, without designation of and/or validation or confirmation in the various countries being required. It is therefore not necessary (or even possible) to designate the states for which protection is desired, because the member states of the OAPI, insofar as industrial and intellectual property are concerned, form one territory.

The Eurasian Patent Convention: The Eurasian Patent Convention was adopted and initialed February 17, 1994. Once in force, it will allow nationals of any country to obtain patents of invention from the Eurasian Patent Office to be set up in Moscow. Such regional patents will have effect in all countries of the Eurasian patent system. It is expected that most of the members of the Commonwealth of Independent States will become members of the Eurasian Patent Convention.

Association of Southeast Asian Nations: At the annual conference of economic ministers in 1994, the Association of Southeast Asian Nations (ASEAN) announced that it would seek a common policy on the protection of intellectual property rights. In particular, it should seek similar and uniform standards for the protection of intellectual property among its membership.

Discussions with WIPO revealed that drafts of working papers addressing the question of a regional office were circulated in Central America in the late 1980s. At that time the reception was not favorable. It is likely that now the reception would be better, especially if the Protocol to the Central American Convention for the Protection of Industrial Property comes into force successfully. It is suggested that this issue be revisited to determine if there is interest in such a further step toward economic integration.

6.2.2 Encourage Autonomy for Intellectual Property Offices

The United States Government should encourage the intellectual property offices of Central America to seek autonomy. The principal reason for doing so is financial: autonomy would allow intellectual property registries to finance themselves at adequate budgetary levels. Briefly, the fees taken in by offices for the registration of trademarks and patents is sufficient to fund the offices and help defray the cost of their modernization. In most offices in the region, however, most of the fee income goes to the general treasury, not to the registry. An exception is Costa Rica. There the Registrar indicated that funds were available for any improvements to the office that might be re-

quired. This ability is a consequence of the autonomy of the National Registry, of which the industrial property registry forms part.

6.2.3 Substantive Patent Examination Should be Discouraged

Every patent law requires that an invention, to be patentable, must be novel and must not be obvious to a person skilled in the relevant area of technology. To determine if these requirements are met many offices conduct a substantive examination. Such an examination involves two steps. First, available technical references, such as issued patents and technical journals, are searched to find those that are relevant to the invention claimed in the application. Second, an examiner reads and understands those references and comes to a conclusion as to whether the claimed invention is new and nonobvious. If it is, and all other conditions are satisfied, the patent is issued. If not, the application is rejected, with an opportunity for the applicant to amend the claims or argue that the invention claimed is new and nonobvious, despite the opinion of the examiner.

The examination process is highly technical, not only in terms of the technology, but also of the law. Accordingly, examiners are specialists in their chosen field and highly trained. Specialization is required because of the large and growing number of fields of specialty in science and engineering. For example, the U.S. PTO has approximately 2,000 patent examiners specializing in fields as diverse as biotechnology, computer hardware and software, automobile emission controls, television and radio transmission, and toys. To expect that the offices of Central America could accomplish that level of expertise, even if they joined forces, is unrealistic.

Some registries have universities or technical colleges conduct the substantive examination. This is the case in Costa Rica and Honduras. Even in those cases, the personnel at the universities or technical colleges likely do not have the breadth of technical or scientific knowledge required to examine applications in all areas of science or engineering. Further, they likely do not have the requisite legal training to judge whether the legal requirements for patentability are met. Moreover, there is always the possibility of a conflict of interest arising when the examination is made by one other than a government employee.

In addition to requiring qualified examiners in large number to cover all areas of technology, a competent examination requires an extensive collection of technical literature in order

to do the search. While the offices visited do have technical literature, such as patents issued by national offices (such as the USPTO) or regional offices (such as the European Patent Organization), the materials they have are not sufficient. An example of the materials required to meet minimum international standards to conduct an adequate search, Rule 34.1 under the Patent Cooperation Treaty, requires the following minimum documentation for an international searching authority:

- Patents issued or applications published in and after 1920 by France, the former Reichspatentamt of Germany, Japan, the Soviet Union, Switzerland (in French and German only), the United Kingdom, and the United States of America;
- Patents issued by the Federal Republic of Germany and any published applications;
- Inventors' certificates issued by the Soviet Union;
- Utility certificates issued by, and the published applications for utility certificates of, France;
- Patents issued by, and patent applications published in, any other country after 1920 as are in the English, French, German or Spanish language and in which no priority is claimed, provided that the national office of the interested country sorts out these documents and places them at the disposal of each International Searching Authority;
- Published PCT applications, published regional applications for patents and inventors' certificates and the published regional patents and inventors' certificates; and
- Such other published items of nonpatent literature as the International Searching Authorities shall agree upon and which shall be published in a list by the International Bureau (of WIPO) when agreed upon for the first time and whenever changed.

To comply with the obligation to maintain this documentation, an office must maintain a collection of millions of documents, each one classified by its technical class and subclass.

Because of the high demands in number of trained personnel and amount of documentation, industrial property offices in Central America should be discouraged from conducting a substantive examination of patent applications. Instead, they should rely on examinations conducted in offices that meet international standards for doing such work. Broadly, this can be done in two ways.

First, the national offices in Central America could accept the results of searches done in other offices that do have the capability of performing an adequate search and examination. The majority of patent applications these offices receive have first been filed abroad, such as at the USPTO. Accordingly, these applications will receive a search and examination that meets or exceeds international standards. The offices of Central America could, in such cases, simply grant patents for inventions for which patents have been granted by offices meeting international standards. Such offices include those recognized as international searching and international preliminary examining authorities under the PCT. These include the Austrian Patent Office, the Australian Patent Office, the Chinese Patent Office, the European Patent Office, the Spanish Patent and Trademark Office (not recognized as an international preliminary examining authority), the Japanese Patent Office, the Russian Patent Office, the Swedish Patent Office, and the United States Patent and Trademark Office.

Second, for domestic applications, the offices of Central America should make arrangements for applications to be examined by an office meeting international standards, such as the Spanish Patent and Trademark Office. The Spanish Office has apparently already entered into such an arrangement with Guatemala. Limited resources are available through WIPO for examination to be conducted free of charge for the offices of developing countries. Further study should be made of the number of applications originating in Central America requiring examination and the availability of resources to conduct such examinations at little or no cost.

This is the trend internationally. That is, smaller countries recognize that they do not, and likely will not, have the capability to conduct patent searches and examinations. Accordingly, they are largely relying on the work done by offices that do have the capability. Examples of such countries are Slovenia and Singapore. The countries of Central America should be encouraged to adopt this approach.

6.2.4 Educational Seminars

Historically, one of the problems confronting developing countries wishing to establish a working intellectual property system is a lack of understanding of the topic. This lack of understanding exists not only in the general population but also in government, in the legal community, and in the business community.

Accordingly, it is recommended that USAID support training programs that will provide the needed information to each of these groups. Thus, training programs should be designed that provide information and training to the following groups in Central America: the general population (most likely through the media), government officials at intellectual property registries, ministry officials having responsibility for IPR, representatives (in the national congress or assembly) having IPR interests or responsibilities, members of the judiciary, police officials having IPR enforcement responsibilities, and customs officials.

6.2.5 Eliminate Duplication of Effort

A number of national governments, intergovernmental organizations and nongovernmental organizations provide training, technical assistance, and equipment to governments of developing countries interested in improving their intellectual property regimes.

Mechanisms should be developed to share expertise on intellectual property registration and enforcement available within Central America, Mexico, and South America.

An inventory should be taken of resources available outside the U.S. government to countries of Central America in training and technical assistance. These resources include the World Intellectual Property Organization, the United Nations Development Programme, The European Union (through the European Patent Organization), the Inter-American Development Bank, the World Bank, and national offices, such as the Spanish Patent Office. Further, some resources are available from the Customs Cooperation Council to provide training in enforcement of intellectual property rights at the border.

Moreover, within Central America there currently exists a great deal of expertise in the field of intellectual property, both in the public and private sectors. Such expertise also exists in Mexico and in some countries in South America. To the extent possible, use should be made of this expertise when conducting training and when putting on seminars. Further, industrial property offices can be modernized in cooperation with industrial property offices throughout Latin America.

7.0 FOLLOW-UP ACTIONS TO BE TAKEN

To implement the foregoing policies, it is recommended that follow-up actions in the following three categories be taken: training, legal drafting, and inventories.

7.1 Training

It is recommended that the following training be provided.

- A 2-day seminar to be held in each country in Central America. The first day would be an introduction to the public policy issues pertaining to intellectual property and to the international, regional, and local systems for protection that exist in the field. The second day would be a more in depth look at patents, trademarks, and copyrights-requirements for protection and enforcement. The target audience for the first day would be wide, including government officials involved in the field (both executive and legislative), private attorneys, representatives from industry. The target audience for the second day would be representatives from the intellectual property registries and private sector attorneys, each having some experience and needing to know more.

- A 2- or 3-day visit to Washington, D.C. for industrial property registrars from the region, vice-ministers having responsibility for intellectual property and selected members of national congresses having experience in intellectual property matters. The visitors would receive a tour of the U.S. Patent and Trademark Office and a presentation by its officers on its operation and purpose. This could be conducted in Spanish. They would also have meetings with representatives from the U.S. State Department, Department of Commerce, and the Office of the U.S. Trade Representative. The purpose of those meetings would be to explain U.S. policy in relation to intellectual property. These meetings would be in English, with translation if required. The overall goal of the trip would be fourfold:
 1. To teach what a modern patent and trademark office does and the resources required. The result should be to encourage industrial property offices to leave patent searching to other, larger offices.

2. To inform the visitors of U.S. policy in the field of intellectual property.
3. To see what resources are available and how they are used when an industrial property office is autonomous.
4. To provide an opportunity for the visitors to inform U.S. government officials of the situation regarding intellectual property protection in their countries.

— A conference specifically on the enforcement of intellectual property rights for police, customs officials, and members of the judiciary. The purpose of the conference would be to provide a deep discussion of the issues faced in deciding questions of patent, trademark, and copyright infringement. The conference should be over a 2-day period. The first day would be a generic discussion of intellectual property rights and how infringement questions are approached and resolved. The second day would include workshops for each of the three groups--police, customs, and judges. The workshops would look at the unique problems confronted by each of the three groups.

7.2 Legal Drafting

7.2.1 Patent, Trademark, and Copyright Laws

Virtually all of the countries of Central America have recently made changes to their patent, trademark, or copyright laws, or are planning to do so in 1995. The U.S. government, as a matter of course, has provided, and will provide, assistance to these countries. This assistance is offered through the office of the U.S. Trade Representative and takes the form of reviewing drafts of legislation and offering opinions about their compliance with obligations under the TRIPs Agreement and any other obligations, including bilateral agreements with the United States.

One particular area of concern is the protection of trade secrets. Of the countries of the region, only El Salvador, Honduras, and Panama (in its draft legislation) provide protection for trade secrets by statute. It is unclear what protection for trade secrets, if any, is available in Guatemala, Costa Rica, and Nicaragua. Again, services are available through the Office of the U.S. Trade Representative for the review of any draft legislation in this field.

It is recommended that these services be brought to the attention of relevant government officials, as appropriate.

7.2.2 Plant Variety Protection

None of the countries of Central America has legislation that provides sui generis protection for plant varieties. Such legislation is required under Article 27(3)(b) of the TRIPS Agreement for countries, such as Guatemala, Costa Rica, Honduras, and Panama, that exclude plant varieties from patent protection. These countries and El Salvador and Nicaragua will be obliged to provide protection for plant varieties in accordance with the UPOV convention if they enter into the model Memorandum of Understanding Concerning Protection of Intellectual Property Rights.

Accordingly, it is recommended that legal drafting services be secured, if needed, for the countries of Central America, to assist them in drafting appropriate legislation to protect plant varieties in accordance with the requirements of the UPOV Convention.

7.2.3 Layout-Designs (Topographies)

None of the countries of Central America has specific legislation to provide protection for layout-designs (topographies). These are the three-dimensional layouts of computer chips, including an active element and some or all of the interconnections of an integrated circuit. The obligation under the TRIPS agreement, as in the Model IPR Bilateral Agreement, is to apply Articles 2-7, 12, and 16(3), other than Article 6(3), of the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) and certain additional provisions. Article 4 of the IPIC Treaty allows contracting parties to implement their obligations through a special law on layout-designs (topographies) or its law on copyright, patents, utility models, industrial designs, unfair competition, or any other law or a combination of any of those laws.

An inquiry should be made of the governments of Central America about how they intend to meet their obligations under TRIPS regarding the protection of layout-designs (topographies). If they intend to provide protection under existing laws, they should indicate how. If they intend to implement their obligations through a sui generis form of protection, technical assistance to draft such a law could be offered.