

REVIEW OF LEGISLATION¹

GHANA

The present document reproduces the introductory statement made by the delegation of Ghana, the questions put to it and the responses given in connection with the review of legislation undertaken at the Council's meeting of 27 to 28 November 2001.²

I. INTRODUCTORY STATEMENT

It will be recalled that at the last June review meeting the Ghana delegation indicated that for a number of reasons Ghana's TRIPS-implementing legislation had not yet been passed and that it was expected to be passed by the current review meeting. Unfortunately, the passage of the legislation has been delayed even though it is at the top of Parliament's legislative agenda. The delay could be attributed to several factors. Principal among them are the complexity of some of the components of the legislation; the assumption of office by a new government which subjected all the proposed bills to thorough review; and the pressure of legislative work. Legislative work for the adoption of the new TRIPS-compliant intellectual property legislation is, therefore, expected to be completed by the end of the next meeting of Parliament, which is scheduled for March 2002.

The new legislation has been specifically tailored, with the technical assistance of the WIPO and WTO, to meet the requirements of the TRIPS Agreement. It seeks to amend existing laws, which are not TRIPS-compliant and introduce new TRIPS-compliant laws where none exists. It will, therefore, cover all the areas requiring protection of intellectual property rights under the TRIPS Agreement namely, patents; trade marks; industrial designs; geographical indications; layout-designs (topographies) of integrated circuits; and protection of plant varieties. The legislation will offer increased protection of rights and enhance penalties for infringements.

Meanwhile, however, we have considered it necessary to notify the existing intellectual property protection legislation, which, though not fully compliant with the TRIPS Agreement and does not cover all areas, is nevertheless effective in protecting intellectual property rights in Ghana. The notification also provides outlines of the bills which comprise the proposed legislation. We have additionally provided responses to the "Checklist of Issues on Enforcement" based on the existing

¹ As regards laws and regulations notified by Ghana under Article 63.2 of the Agreement, reference is made to documents IP/N/1/GHA/1, IP/N/1/GHA/C/1, IP/N/1/GHA/D/1, IP/N/1/GHA/P/1, IP/N/1/GHA/T/1 and IP/N/1/GHA/U/1.

² The minutes of this meeting were circulated as document IP/C/M/34.

legislation and procedures and remedies available under Ghana's legal system. We shall be reviewing our responses to all questions submitted, when the new legislation is passed.

Ghana has a legal system which is heavily influenced by the Anglo-American common law model. It is through this pluralistic system that all rights are enforced. Under Ghana's existing intellectual property laws, therefore, intellectual property rights are considered private rights and consequently the onus of enforcing those rights lies primarily with the right holder.

Ghana's existing main dedicated Intellectual Property Laws and Regulations which we have notified, though belatedly, are the following:

- (a) The Patent Law, 1992 (PNDC 30SA);
- (b) Trade Marks Act, 1965 (Act 270);
- (c) The United Kingdom Designs (Protection) Ordinance of 1928 (Chapter 182) and the Textile Design (Registration) Decree of 1973 (NR CD 213);
- (d) Protection Against Unfair Competition Act, 2000 (Act 589); and
- (e) The Copyright Law, 1985 (PNDCL 110).

These Laws may be summarized as follows:

The Patent Law, 1992 (PNDCL 30SA)

This Law provides for original registration of patents upon satisfaction of the criteria of absolute novelty, inventive step, and industrial application. Ghana has joined the Patent Co-operation Treaty (PCT) and the Law makes provision for international applications.

The Trade Marks Act, 1965 (Act 270)

This Law entered into force after the passage of the implementing regulations in 1970. It provides for the registration of original marks which are able to distinguish goods of applicants. It, among others, enables marks to be registered in Parts A and B of the Register depending on their distinctiveness.

The United Kingdom Designs (Protection) Ordinance of 1928 (Chapter 182) and the Textile Design (Registration) Decree of 1973 (NR CD 213)

Presently Ghana has no original legislation for the protection of industrial designs in general. Its legislation is still based on English law and provides automatic protection of all designs registered in the United Kingdom.

The nationally independent legislation protects only textile designs and provides for the registration of both local and international textile designs. The composite TRIPS-compliant bill, awaiting passage, however, rectifies the shortcomings of this law.

Protection Against Unfair Competition Act, 2000 (Act 589)

This Act was passed in order to provide for protection against unfair competition, arising from confusion caused, in particular, in respect to a trade mark (whether registered or not); a trade name; and the presentation of a product or service.

The Act also covers commercial or industrial activities that damage another person's goodwill or reputation; misleads the public; discredits another person's enterprise or activities; and disclosure, acquisition or use of secret information by another person without the consent of the rightful owner. Thus the law provides protection of undisclosed information consistent with Article 39 of the TRIPS Agreement.

The Copyright Law, 1985 (PNDCL 110)

This Law gives protection to authors in respect of the list of protected works under section 2 of the law for a period of the life of the author and 50 years after his death.

The Law also provides for the protection of sound recordings and folklore and the establishment of a system of collective administration of authors rights.

The Law establishes a Copyright office and provides criminal sanctions for the infringement of Copyright.

The new Bill, among others, seeks to increase the term of protection to 70 years after the death of the author and enhance fines and penalties for infringements.

As I have already indicated, the existing legislation does not fully comply with the requirements of the TRIPS Agreement. The objective of the new legislation is, therefore, to be fully compatible with the TRIPS Agreement in all areas of protection.

The Bill on Patents, seeks among others, to amend section 62 of the Patent Law to incorporate fully the requirements of Article 34 of the TRIPS Agreement with regard to the reversal of the burden of proof in cases of infringement of process patents.

It also seeks to change the existing term of protection of patents from 10 to 20 years; delete the requirement that a patent should be worked in the country within a 10-year period; amend the existing provisions on compulsory licensing in the light of the obligation under TRIPS Articles 27.1 and 31; and provide penalties for persons who knowingly infringe patent rights.

As regards the new Trade Marks Bill it, among others, provides for protection against the use of identical or similar signs for goods or services that are identical or similar to those in respect of which the sign is registered; protection for well-known marks in compliance with Articles 16.2 and 16.3 of the TRIPS Agreement a 10-year period of protection; and for the removal of a mark after an interrupted period of at least 3 years of non-use.

The Bill also provides protection for service marks and establishes criminal sanctions for infringement.

Concerning the Industrial Designs Bill, its coverage includes the protection of the aesthetic appearance of a product and designs not dictated essentially by technical or functional considerations; the application of the first-to-file system; the concept of absolute novelty; right of priority under the Paris Convention; as well as the prevention of third parties not having the owner's consent from

making, selling or importing articles or products with copied designs. Furthermore, the Bill provides a 5-year term of protection with an option to renew for two further consecutive 5-year terms.

The new Bill on Geographical Indications seeks to provide a system of Geographical Indications protection which complies with Articles 22-24 of the TRIPS Agreement. It establishes a registration system for geographical indications for those producers carrying on activities within a specified geographical area of Ghana. The Bill includes an effective regime of both civil and criminal sanctions to prevent the unlawful use of a geographical indication.

Regarding Layout-Designs (Topographies) of Integrated Circuits, the Bill provide protection in compliance with Article 35 of the TRIPS Agreement. It protects only original layout designs which are the result of the creator's own intellectual efforts and not known amongst creators and manufacturers of Integrated Circuits at the time of their creation. It establishes a 10-year period of protection and makes it an offence for persons who knowingly perform any unlawful acts.

In the case of the protection of Plant Varieties, the Bill seeks to protect only varieties which are new, distinct, uniform and stable, for 20 and 25 years in cases of trees and wines respectively, give the right of registration to breeders and make unlawful the exploitation of the propagating material of the plant variety by third parties without the authorisation of the holder of the breeder's right. There will be exceptions for private and experimental purposes. There will also be provision for civil remedies and criminal sanctions for wilful infringements.

The new Copyright Bill, among others, revises the existing legislation in conformity with the requirements of the TRIPS Agreement. It broadens the definition of folklore and establishes a National Folklore Board. It also provides for a term of protection equal to the life of the author plus 70 years after his death.

The Bill strengthens the existing provisions on the authentication of copyright works and imposes levy for audio-visual works and other equipment used for copying protected materials. Furthermore, it increases protection for collective management of rights and enhances fines and penalties for infringement of rights.

It could be seen from the foregoing that Ghana's new TRIPS-implementing Bills, drafted to meet the specific requirements of the TRIPS Agreement, would offer effective protection, even TRIPS-plus protection in some areas, for intellectual property rights.

It is our hope, therefore, that Members will bear with us for the delay in its enactment and notification which has occurred in spite of our best efforts. This is an example of the implementation problems that some of us have been repeatedly complaining of.

II. RESPONSE TO A QUESTION POSED BY AUSTRALIA

PATENTS (INCLUDING PLANT VARIETY PROTECTION)

How does your country provide protection for new plant varieties as required under Article 27.3(b)? If your legislation is based on the UPOV system, on which UPOV Act was it modelled? Can new plant varieties be protected by patent in your country?

Plant varieties in Ghana are to be protected by a *sui generis* system. In this regard a draft protection of Plant Varieties Act is to be laid before Parliament soon. The draft Plant Varieties Act was modelled on the 1978 UPOV Act. A new plant variety cannot be protected by patent.

III. RESPONSES TO QUESTIONS POSED BY CANADA

1. Please describe how the enforcement obligations (Articles 41-61 of the TRIPS Agreement and throughout) have been implemented.

Draft legislation on various aspects of Intellectual property have been prepared and are soon to be laid before Parliament. The provisions in the draft legislation fully comply with the obligation under the TRIPS Agreement including the enforcement obligations under Articles 41-61.

2. What protection does your Copyright legislation afford to "foreign works"?

Ghana is presently a Member of the Berne Convention, the Universal Copyright Convention, (UCC) and the TRIPS Agreement. Ghana has reciprocal obligations under the foregoing Convention to protect works of Ghanaian citizens in a like manner as protection is extended to works of citizens of the member countries to those conventions. This obligation is explicitly provided for under section 2(2)(iii) of the Copyright Law, Provisional National Defence Council ("PNDC") Law 110 of 1985.

IV. RESPONSES TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

A. GENERAL PROVISIONS

1. Please describe if your legislation includes measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to your socio-economic and technological development as mentioned under Article 8 of the TRIPS Agreement. If yes, please explain how such measures are consistent with the provisions of the TRIPS Agreement.

Yes, Ghana's legislation contain measures necessary to protect public interest in sectors of vital importance to the technological development of the country as stated in Article 8 of the TRIPS Agreement.

Specifically, the existing Patent Law PNDC Law 305A and the draft legislation on Patent and Layout-Design (Topographies) of Integrated Circuits contains the following provisions:

- Section 54 of the Patent Law PNDC Law 305, allows the government, in the public interest, to exploit a patented Invention or the Sector Minister may designate a third person to do so without the agreement of the owner of the patent to whom an adequate remuneration would be paid.
- Section 54 is however not consistent with Article 31 of the TRIPS Agreement which requires certain obligations to be fulfilled for the use of the subject matter of a patent without the authorisation of the right holder.
- Section 13 of the draft law on Patents however contains measures necessary to protect public health and nutrition and also promote the public interest in sectors of vital importance to the country's socio-economic and technology development as stated in Article 8 of the TRIPS Agreement.

- The measures as stated in Section 13 of the draft Law on Patents are consistent with Article 31 of the TRIPS Agreement which requires certain obligations to be fulfilled for the use of the subject matter of Patent without the authorisation of the right holder.
- Article 31 also requires the authorisation of the use of the patented invention without the consent of the right owner to be subjected to judicial review.
- Section 13(9) of the draft patent law allows a person aggrieved by the Minister's decision to appeal to the courts.
- Section 16 of the draft law on Layout-Designs (Topographies) of Integrated Circuits also contain provisions on exploitation by a government agency or third person in the public interest, in particular, national security, nutrition health or the development of other vital sectors of the national economy.

The provisions of Section 16 of the draft law on Layout-Designs (Topographies) of Integrated Circuits are in full compliance with Article 31 of the TRIPS Agreement.

B. COPYRIGHT AND RELATED RIGHTS

2. Please state how your legislation provides for the protection of the exclusive rights of authors in relation to their literary and artistic works, as specified in Article 9 of the TRIPS Agreement which requires Members to comply with Articles 1-21 of the Berne Convention and the Appendix to the Berne Convention (1971).

Existing Law

The current legislation provides for the exclusive rights of authors in relation to their literary and artistic works in accordance with Article 9 of the TRIPS Agreement and Articles 1-21 of the Berne Convention.

Draft Law

The draft Copyright Bill goes further and provides rental right for works that are to be accorded copyright protection such as sound recordings, audiovisual, literary works to mention a few.

3. Please describe the protection accorded to authors of computer programs, databases or compilations of data.

Existing Law

The current Copyright Law PNDC Law 110, 1985 does not specifically mention computer programmes. However, since computer programmes are regarded as literary works, copyright protection is afforded to computer programmes. However databases and compilations of data are protected if the compilations are original in character and they involve some form of creativity. The law protects directories, anthologies, etc. The present law does not provide for rental rights.

Draft Law

The draft law expressly includes computer programs as literary works whatever may be the mode or form of expression. The law also protects databases or compilations of data or any other material which by reason of the selection or arrangement of contents constitute intellectual creations.

4. Please state whether your legislation provides for a rental right and, if so, the works to which it applies.

Existing Law

PNDC Law 110 did not expressly provide for a rental right, but provided for a general exclusive right.

Draft Law

The draft law provides that the author of any protected copyright work has the exclusive economic right to authorize the commercial rental to the public of originals or copies of works.

5. Please describe the rights granted to performers, producers of phonograms (sound recordings) and broadcasting organizations under your legislation.

Existing Law

Producers of sound recordings were granted the exclusive economic and moral rights in accordance with the Berne Convention.

Draft Law

Performers and Broadcasting Organizations are granted the following rights under the new Copyright Act in compliance with the TRIPS Agreement. The exclusive right to authorize or prohibit:

- The rebroadcasting, rental and distribution of fixation of a performance, or a broadcast.
- The fixation of the performance or the broadcast.
- The reproduction of a fixation of its broadcast or the performance.
- The communication to the public of the performance if the recordings have been published but equitable remuneration shall be paid to the performer or the communication to the public of the broadcaster.

6. Please state whether your legislation provides for any limitation or exception in relation to each of the rights described above in accordance with the relevant provisions of the Berne and Rome Conventions and in light of Articles 13 and 14.6 of the TRIPS Agreement.

Draft Law

The Bill provides for an equitable remuneration to be paid to the right holder where the work is already published and it has previously been fixed with the consent of the performer.

7. Please state the terms of protection of each right described above and the work or subject matter to which it applies.

Existing Law

- (a) Sound recordings, cinematographic works and broadcast protected until the expiration of 50 years from the date of making of the work or 50 years from the work being made available to the public.
- (b) Authors' rights are protected under the present law for the life of the authors and fifty years after his death.
- (c) Performance rights are protected.
- (d) Photographic works are protected until the expiration of 50 years from the date of the making of the recording.
- (e) The rights vested in the Republic of Ghana in respect of folklore exist in perpetuity.
- (f) The rights of a performer in respect of the performance are protected for a period of fifty years in the present law from the end of the calendar year in which the performance took place.

Draft Law

The new bill increases the duration of protection of all the above rights to seventy years.

8. Please state how your legislation grants the retroactive protection provided pursuant to Article 18 of the Berne Convention (the obligation of which derives from Article 9 of the TRIPS Agreement) and Article 14.6 of the TRIPS Agreement.

The new Copyright Act took into consideration Article 18 of the Berne Convention and Articles 9 and 14.6 of the TRIPS Agreement.

C. TRADEMARKS

9. Please give the definition of a sign under your national legislation and explain under what conditions it is protectable.

Existing Law

A sign is not defined in the Trade Marks Act 1965, Act 270. However, a mark is defined as follows: "mark" includes a device, brand, heading, label, ticket, name, signatures, word, letter, numeral or any combination thereof.

Under the Trade Marks Act, a mark must be registered in order to be protectable without prejudice to the common law remedy of passing off.

Sections 9 and 10 of the Act set out the conditions for the registration of a mark.

Under Section 9, a trademark is registerable if it contains or consists of at least one of the following particulars:

- (a) The name of a company, individual or firm, represented in a, special or particular manner;
- (b) the signature of the applicant for registration or some predecessor in his business;
- (c) an invented word or invented words;
- (d) a word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or a surname;
- (e) any other distinctive mark.

The provisions of Section 10 of the Trade Marks Act provide for an alternative form of registration based on the trademarks "capability of distinguishing" as compared to "inherently adapted to distinguish" as stated under section 9.

Draft Law

There is no definition of a sign in the draft law on Trade Mark. However, a mark has been defined as any sign or combination of signs capable of distinguishing the goods or services of one undertaking from the goods or services of other undertaking including words such as personal names, letters, numerals and figurative element. Under the draft law on trademarks a trademark is registerable if:

- (a) It is capable of distinguishing the applicant's goods or services from those of others;
- (b) it is not contrary to public order or morality;
- (c) it does not mislead consumers or trade circles as regards source or other characteristics of the goods or services concerned;
- (d) it is not a mark of a state or intergovernmental international organization except with authorisations;
- (e) it is not a well-known mark belonging to another person.

10. Please confirm whether or not services are a protectable subject matter in your trademark law. Please confirm if signs, such as trade names, are protectable. Please describe if elements such as sound, perfumes and containers are protectable.

Existing Law

Under the Trade Marks Act, 1965 Act 270, service marks are not currently protectable. Trade Names are also currently not protectable under the Trade Marks Act. Elements such as sound, perfumes and containers are also not protectable under the Trade Marks Act.

Draft Law

Signs such as trade names are protected under the draft law. Service marks will be protectable under the draft law on Trademarks. Elements such as sound, perfumes and containers are not protected under the draft law on trademarks.

11. Please explain what the requirements of use are, if any, as a condition for a trademark registration. Please explain the definition of use and the conditions of maintenance of a registration in that respect.

Existing Law

Use is not a requirement for registration of a trademark under the Trade Marks Act. Section 17(1) of the Trade Marks Act 1965 provides that any person claiming to be the proprietor of a trademark used or proposed to be used by him may make an application for registration of a mark. However the Registrar may take into consideration, according to Section 9(3) and 10(2) of the Trade Marks Act, 1965 use of a mark in arriving at a decision on distinctiveness.

There is no definition of "use" in the Trade Marks Act. However, the following provisions are applicable under the Act:

- Under Section 20(1) of the Trade Marks Act, a trademark can be renewed indefinitely by payment of the fee for renewal.
- However in accordance with Section 26(1)(a) a trademark can be taken off the register by the court or the Registrar upon an application by, an aggrieved person on the ground that the trade mark was registered without any bona fide intention on the part of the applicant for registration that it should be used in relation to those goods by him and that there has in fact been no bona fide use of the trade mark in relation to those goods by the proprietor up to the date one month before the date of the application.
- Section 26(1)(b) also empowers the court or the Registrar upon an application to take off from the register a trade mark for non-use for a continuous period of five years.

Draft Law

There are no requirements for use as a condition for the registration of a mark in the draft law on Trade Marks.

There is no definition of use in the draft law. However, an interested person may apply for the removal of trademark from the register in respect of any goods for which it is registered on the ground that up to one month prior to the filing of the application it had not been used for a continuous period of five years.

12. Please confirm whether or not your legislation permits that the registration of trademarks be indefinitely renewable.

Existing Law

Section 20(1) of the Trade Marks Act permits a trademark to be renewed indefinitely.

Draft Law

A trademark can be renewed indefinitely under the draft law on trademarks.

13. Please describe the special requirements, if any, prescribed by your legislation concerning the use of a trademark.

There are no special requirements.

D. GEOGRAPHICAL INDICATIONS

14. Please explain whether or not your trademark registration authority refuses a trademark application if it contains a geographical indication.

Existing Law

The main criterion for the registration of a mark under the Trade Marks Act is its distinctiveness. Section 9(1)(d) of the Trade Marks Act excludes from registration a word or words which in its ordinary signification of geographical name.

The Registry practice to date has been to refuse a trademark registration if it contains a geographical indication. If a word is recognised as a geographical indication, it will be refused unless the use is obviously fanciful.

Draft Law

The draft Trade Marks Act also contains provision prohibiting the registration of a mark if it is likely to mislead the public as regards the geographical origin of the goods or their nature or characteristics.

15. Please give the definition of a geographical indication in your legislation.

The draft Geographical Indications Act defines a geographical indication as "an indication which identifies a good as originating in the territory of a country or region or locality in that territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to geographical origin". This definition of geographical indication complies with Article 22.1 of the TRIPS Agreement.

16. Please describe and explain the provisions of your legislation establishing a link, if any, between the characteristics of an indication and its geographical origin.

The draft Geographical Indications Act establishes the principal that the protection is available irrespective of registration in Ghana. There are also provisions in the draft law which raise the presumption that the indication is a geographical indication with respect to the meaning of geographical indication as stated in the draft law. The draft law also contains provisions setting out conditions under which the geographical indication may be used:

- That the use should be by a producer carrying on activity in the geographical area specified in the Register;
- that the indication may be used with respect to products specified in the Register;
- thirdly, provided that those products possess the quality, reputation or other characteristic specified in the Register.

17. Please describe how additional protection is granted by your legislation to wines and spirits. Please mention other types of products, if any, covered by this additional protection.

The draft Geographical Indications Act explicitly allows civil proceedings to be instituted identifying wines and spirits not originating in the place indicated by the geographical indication in line with Article 23.3 of the TRIPS Agreement.

18. Please explain how exceptions under Article 24 of the TRIPS Agreement are used in your jurisdiction. Please provide examples of the use of the exceptions by courts or lists of names considered as generic in your jurisdiction.

The exceptions under Article 24 of the TRIPS Agreement have never been used in Ghana. No suit on the use of exceptions and no list of generic names exist in Ghana.

E. INDUSTRIAL DESIGNS

19. Please explain whether or not your legislation extends to the protection of designs dictated essentially by technical or functional considerations. Please explain how textile designs are protected.

Existing Law

The Textile Designs Registration Decree 1973, NRCD 213 provides a specific registration system to protect textiles. The Textile Designs (Registration) Decree give the copyright in a textile design to the registered proprietor; renewable for a period of five years in the first instance and for two further five years periods.

Draft Law

The draft Industrial Design Act excludes designs essentially dictated by technical or functional considerations from protection. This is in accordance with Article 25 of the TRIPS Agreement.

Textile Designs will be protected under the draft Industrial Designs Act. Under the draft law any three dimensional form or any material, whether or not associated with lines or colours, is an industrial design where the composition form or material gives a special appearance to a products of industry or handicraft and can serve as a pattern for a product of industry or handicraft.

The draft Industrial Designs Act contain provisions facilitating the registration of designs relating to the same class of the International Classification or to the same set or composition or articles, which applies to textile designs and this complies with Article 25.2 of the TRIPS Agreement.

20. Please explain how your legislation protects right holders of a design against importing of articles bearing embodied or copied design.

Existing Law

Section 19 of the Textile Design (Registration) Decree vests in any registered proprietor the right to institute a court action for infringement and for the court to grant in any such proceedings any remedy to which the right holder may be entitled.

Draft Law

Section 9(1) of draft Industrial Designs Act confers the sole right to the exploitation of a registered industrial design which include textile designs on the owner of the design. Section 9(4) of the draft law confers the right to institute court proceedings on the proprietors against any person who infringes the industrial design. Therefore, right holders of a design can institute court action against importers of articles bearing embodied or copied design.

21. Please state whether or not your legislation provides for the right to issue a compulsory licence for industrial designs.

No. There is no such provision.

22. Please indicate for what period of time your legislation grants protection for industrial designs.

Industrial designs are protected for period of five years from the filing date under the draft Industrial Designs Act. The registration can be renewed for two further consecutive periods of five years.

F. PATENTS

23. Please describe how your legislation defines the notions of: novelty, inventiveness and industrial application.

Existing Law

- Section 3(1) of the Patent Law PNDC Law 305A deals with the notion of novelty, providing that an invention is new if it is not anticipated by prior art, that is to say if it does not form part of the state of the art.
- Section 3(2) of the Patent Law Prior define prior art as every-thing made available to the public anywhere in the world by means of written or oral disclosure, use, exhibition or other non-written means provided that such disclosure occurred before the date of filing of the application to register the patent. A disclosure is not taken into consideration if it occurred within six months preceding the date of application and was due to acts performed by the applicant or his predecessor in title or it was an evident abuse committed in relation to the rights of the applicant or his predecessor in title.
- Section 4(1) of the Patent Law states that an invention shall be considered as involving an inventive step if having regard to the prior art relevant to the application claiming the invention, it would not have been obvious to a person having ordinary skill in the art.
- Section 5 of the Patent Law states that an invention shall be considered industrially applicable if it can be made or used in any kind of industry.

Draft Law

Section 3(1) of the draft Patent Act defines novelty as an idea not anticipated by prior art. The draft Patent Act states under Section 3(5) that an invention shall be considered as having inventive step if with regard to the prior art, relevant to the application claiming the invention, it would have been non-obvious to a person having ordinary skill in the art. "Industrial Application" is

defined under section 3(6) of the draft Patent Act, it being emphasized that industry is to be understood in the broadest sense.

24. Please explain whether or not in your legislation, patent or otherwise, patent rights are enjoyed without any exclusions. If exclusions are provided for, please describe in detail how these exclusions are applied in legal as well as practical terms.

Existing Law

The rights of the owner of a patent have been spelt out under section 28 of the Patent Law PNDC Law 305A. Limitations of the rights of the owner of a patent are also provided under section 30 of the Patent Law:

- (1) The first limitation concerns acts done only for experimental purposes, that is, for non-commercial purposes.
- (2) The second limitation is the exhaustion of patent rights. Under that principle once a patent protected article has been lawfully put on the market, the patent owner's right in respect of the products are exhausted. This limitation assures free circulation of goods. Article 6 of the TRIPS Agreement does not establish which level of exhaustion members shall adopt subject to its provisions on national treatment and most-favoured nation treatment. The Patent Law provides for a system of national level of exhaustion. This means that the rights of the owner of a patent would be exhausted only in respect of goods that have been put on the market in the country with his consent.
- (3) The third limitation is aimed at avoiding a situation in which the exercise of the exclusive right might be prejudicial to the public interest in maintaining free movement of vessels.
- (4) The fourth limitation concerns the term of the patent. Under the section, the term which is ten years in the first instance, can be extended to a two five year term subject to local working of the patent. Also in order to maintain the patent, renewal fees are to be paid commencing from the second year.
- (5) Patent rights are also affected by provisions on compulsory licensing on grounds of public policy and on interdependence of patents.
- (6) Finally, provisions on state exploitation of patented invention may also be relevant.

It is important to note that in practical terms, this section of the law on compulsory licensing and state exploitation of patented inventions have never been invoked before in Ghana.

Draft Law

The draft Patent Act also contains similar provisions on exclusions on patent rights. The exclusion can be found in sections 11(4), 12, 13 and 14.

25. Please explain whether your legislation provides for the exclusion of inventions from patentability based on ordre public or morality. If so, please explain the relevant section of your legislation and explain its formulation. Please also explain if it has been applied in practice.

Existing Law

The 1992 Patent Law provides for exclusion of inventions on grounds of public order or morality. The relevant provision can be found under section 6 of the Patent Law 1992.

Draft Law

The draft Patent Act contains provisions under Section 2(d) excluding inventions, the prevention within Ghana of the commercial exploitation of which is necessary to protect public order or morality. These provisions are intended to comply with Article 27.2 of the TRIPS Agreement. It is also relevant to note that these provisions on exclusion of inventions on grounds of public morality have not been applied in Ghana before.

26. Please explain whether or not diagnostic, therapeutic and surgical methods are excluded from patentability in your legislation. If so, please explain the relevant section of your legislation and explain its formulation.

Existing Law

Section 1(30)(d) of the Patent Law 1992 excludes diagnostic, therapeutic and surgical methods from patentability. The exclusion does not apply to products for use in any of the methods.

Draft Law

The draft Patent Act stipulates under section 2(c) that methods for treatment of the human body by surgery or therapy as well as diagnostic methods practised on the human or animal body are excluded from patenting. These provisions are in accordance with Article 27(3)(a) of the TRIPS Agreement.

27. Please explain whether or not plants, animals and essentially biological processes are excluded from patentability in your legislation. If so, please explain the relevant section of your legislation and explain its formulation.

Existing Law

Plants, animals and essentially biological processes are excluded from patentability under the Patent Law 1992 PNDC Law 305A. The provisions excluding plants animals or essentially biological processes from patentability are stated in Section 1(3)(b). The provisions have been formulated to allow microbiological processes and the products to be patented.

Draft Law

Section 2(f) of the draft Patent Act contains provisions excluding plants, animals and essentially biological processes from patentability. The provisions in the draft Patent Act have been formulated to allow the patenting of non-biological and microbiological processes. This section complies with Article 27.3(a) of the TRIPS Agreement.

28. Please describe how micro-organisms, non-essentially biological processes, microbiological processes and plant varieties are protected in your legislation. Please explain, in this respect, the relevant sections of your legislation.

Existing Law

Micro-organisms, non-essentially biological processes and micro-biological processes can be protected and are patentable under the Patent Law 1992. The term of the patent is ten years and, subject to local working, can be extended for two five-year terms. The relevant sections of the Patent Law are sections 1(3) and 31. To explain further:

- A patent can be granted for micro-organisms, non-essentially biological processes and microbiological process under the draft Patent Act.
- Section 2 states matters which are excluded from patent protection. Thus, micro-organisms, non-essentially biological processes and micro biological processes can be protected.
- The term of protection under the draft Patent Act is twenty years after the filing date.

29. Please explain how your legislation protects patent right holders against the importing and against the offering for sale of a patented invention.

Existing Law

- Section 28 of the Patent Law PNDC Law 305A, gives the patentee the right to preclude any person from importing and for offering for sale of a patented invention. The right holder can institute court proceedings against any person who imports or offers for sale his invention without his consent.
- Section 30(b) of the Patent Law, however limits the right of the owner of the patent to articles which have been put on the market by the owner or with his express consent.

Draft Law

- Section 11(2) of the draft Patent Act states that the importing and offering for sale of the patented invention can only be done with the consent of the right holder.
- Section 11(3) of the draft law gives the right holder the right to institute court proceedings against any person who infringes the patent.
- Section 11(4) gives the right to institute proceedings against any person importing and offering for sale of the patented invention without the owners agreement is the owner's most important right.
- The rights of the patent owner under the draft patent law however does not extend to the acts in respect of articles which have been put on the market in any country by the owner of the patent or with the owner's consent.

30. Please state if your legislation provides for patent product protection of pharmaceutical and agricultural chemical products. In the affirmative, please indicate the legal reference.

Existing Law

The Patent Law PNDC Law 305A does not exclude protection for pharmaceutical and agricultural chemical products. Section 1(3) of the Patent Law specifies the list of exclusions for patentable inventions.

Draft Law

The draft Patent Act does not exclude the protection of pharmaceutical and agricultural chemical products. Section 2 which contain matters excluded from patent protection does include pharmaceutical and agricultural chemical products.

31. Please clarify if the patent protection of a process, as provided for in your legislation, covers the product obtained directly by that process.

Existing Law

Under Section 28(b) of the Patent Law 1992, when the patent has been granted in respect of a process, the owner of the patent has the right to preclude any person where a process patent has been granted from making, importing, offering for sale, selling or stocking for any such purpose a product obtained directly by means of the process.

Draft Law

Under Section 11(2)(b) of draft Patent Act, making, importing, offering for sale, selling and using the product directly obtained by the patented process amount to exploitation of the patented invention and therefore requires the consent of the owner of the patent. Failure to obtain the consent of the patent owner constitutes an infringement. Thus, under section 11(3) of the law the patent owner can institute court proceedings against the person who infringes the process patent.

32. Please explain the additional conditions, if any, in your legislation other than the sufficient disclosure of the invention in Article 29 of the TRIPS Agreement (e.g. submission of justification for access to genetic material or prior informed consent to its use). If such additional conditions exist, please point out the relevant legislations and describe the additional conditions in detail.

Existing Law

The Patent Law, 1992 requires disclosure of the invention in a sufficiently clear and complete manner in the description and also indications of the best mode known to the applicant for carrying out the invention. There are no additional conditions. The relevant provision is Section 12(1) (a) of Patent Law 1992.

Draft Law

Section 5(5) of the draft Patent Act requires disclosure of the invention sufficiently clear and complete for the invention to be carried out by a person having ordinary skill in the art and also an indication or at least one mode known to the applicant for carrying out the invention. No additional conditions exist under the draft Patent Act. These provisions satisfy Article 29 of the TRIPS

Agreement which requires sufficiently clear and complete disclosure for the invention to be carried out by a person skilled in the art.

33. Please describe if your legislation provides for limited exceptions to the exclusive rights conferred by a patent. If affirmative, please make a reference to relevant legislation.

Existing Law

Section 30 of the Patent law 1992 states the limited exceptions to the exclusive rights which are conferred by a patent.

Draft Law

Section 11(4) of the draft Patent Act sets out limitations of patent rights. It should be noted that these exceptions are not contrary to the provisions of Article 30 of the TRIPS Agreement.

34. Please explain whether or not your legislation provides for compulsory licensing. If so, please explain in detail the conditions under which a compulsory licence may be granted. In particular, please explain how your national legislation considers individual merits in the authorization of such use.

Existing Law

The 1992 Patent Law provides for compulsory licensing under sections 45, 46 and 47 under three specific situations. These are:

- (i) Compulsory licence for non-working;
- (ii) compulsory licence based upon the interdependence of patents;
- (iii) compulsory licence for products and process declared to be of vital importance by the Minister.

Sections 45 and 46 of the Patent Law 1992 stipulate that licence shall be granted after being individually considered.

Section 48 of the Patent Law also establishes that the person "satisfies the Tribunal that he has asked the owner of the patent for a contractual licence but has been unable to obtain such a licence on reasonable terms within a reasonable time".

It is also a precondition under Section 48 of Patent Law 1992 that the applicant offers a guarantee satisfactory to the court to work the invention sufficiently to remedy the deficiencies which gave rise of his request.

Draft Law

The draft Patent Act is in full compliance with Article 31 of the TRIPS Agreement with respect to compulsory licensing. Sections 13 and 14 stipulate that compulsory licences shall be granted after being individually considered. The language of sub-section 9 of section 13 requires evidence that the owner of the patent has received a request for a contractual licence from the applicant seeking authorisation, but that the person has been unable to obtain the licence on reasonable commercial terms and conditions within a reasonable time. Section 14(3)(c) of the draft Patent Act ensures that the right holder is paid adequate remuneration in compliance with

Article 31(h) of the TRIPS Agreement. Decisions on compulsory licences on grounds of insufficient or unreasonable supply of the market in Ghana shall be made by the courts, subject to appellate proceedings. Decisions on compulsory licenses on the grounds of public interest or infringement of competition law are to be taken-by the Minister subject to judicial review.

35. Please explain how your legislation explicitly ensures that a proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. In this context, how do you define "reasonable period of time". Please also explain how your legislation ensures that the use of a compulsory licence shall be authorized predominantly for the supply to the domestic market of the Member authorizing such use.

Existing Law

Section 48(a) of the Patent Law 1992 requires as a precondition for the person requesting for compulsory license to "satisfy" the court that he had made a request to the owner of the patent and was unable to obtain a licence on reasonable terms and within a reasonable time. The words "reasonable period of time" are not defined under the Patent Law 1992. To the best of our knowledge no litigation has been initiated under the Patent Law and no case law exists on the interpretation of this section.

Non-voluntary licences may be granted either by the court or the Minister who is assigned responsibility for patents. Non-voluntary licences granted by the Minister are for products and process declared to be of vital importance to the country. It therefore follows that the used of compulsory license is for the domestic market.

The courts can also grant compulsory licences for non-working of the patent in the country or for the refusal of the right holder to grant licenses on reasonable terms and thereby making the establishment of or development of industrial or commercial activity in the country unfairly or substantially prejudice. The language of section 45, 46, 47 and 48 is for the supply of the local market.

Draft Law

Section 13(a) of the draft Patent Law, requires evidence from the applicant that he made a request for contractual license, but has been unable to obtain the license on reasonable commercial terms conditions and within a reasonable time. The words "reasonable period of time" have not been defined in the draft Patent Act. The relevant section has not been interpreted in any case law.

The draft Patent Act under section 13(11) explicitly states that the exploitation by the Government agency or other person designated by the Minister shall be predominantly for the supply of the market in Ghana.

The wording of Sections 41 of the draft Patent Act is clear that the court will grant a non-voluntary licence for not working an invention in Ghana or insufficient exploitation of the patent in Ghana. Therefore the use of the compulsory licence is for the supply to the domestic market.

36. Please state if your legislation grants additional protection for innovations after the 20 years of patent protection has lapsed.

The Patent Law 1992 does not grant additional protection after the expiration of the patent term.

37. Please explain how your legislation provides for the enhanced patent protection of patents or patent applications pending on 1st January 1995.

Section 412(2) of the draft Patent Act states that patents granted under the law shall remain in force and shall be deemed to have been granted under the draft Patent Act.

38. Please explain how your legislation provides for the reversal of the burden of proof in relation to process patents.

Section 62 of the Patent Law provides for the use of patented process. Sub-Sections 7 and 8 of section 11 provide for the reversal of the burden of proof in relation to process patent. In this respect, for infringement proceedings where the subject matter is a process for obtaining a product, the burden is on the defendant to prove that the process used to obtain an identical product is different from the patented process. Any new product which is identical to the patented product shall be deemed to have been obtained by the process patent in the absence of proof to the contrary. These provisions are in full compliance with Article 34 of the TRIPS Agreement.

G. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

39. Please describe how your legislation protects Topographies.

Existing Law

Currently there is no legislation on topographies.

Draft Law

The draft Layout-Designs (Topographies) of Integrated Circuits purports to protect designs that are original in the sense that they are the result of the creators' own intellectual efforts. Under the draft law integrated circuit designs are to be afforded a ten year term of protection; the rights holder is given exclusive rights which include the right of reproduction, importation, sale and distribution for commercial purposes. Article 36 provisos of the TRIPS Agreement have also been provided for under the agreement.

40. Please explain what protection your national legislation grants to right holders against the unlawful importation, sale or distribution for commercial purposes of topographies including integrated circuits or other articles in which a topography is incorporated in accordance with Article 36 of the TRIPS Agreement.

The draft law on Layout-Designs (Topographies) of Integrated Circuits provides that the acts of importing, selling or otherwise distributing for commercial purposes the protected topographies without the authorization of the rights holder is unlawful. This includes reproduction whether by incorporation in an integrated circuit or otherwise in line with Article 36 of the TRIPS Agreement.

41. Please explain how your legislation provides for the derogation from Article 36 as specified in Article 37 of the TRIPS Agreement where a person has no knowledge or reasonable grounds to know when acquiring an integrated circuit or an article incorporating such an integrated circuit that it contains an unlawful topography.

The draft law provides that the effect of protection does not extend to a situation where a person has no knowledge or reasonable grounds to know when acquiring an integrated circuit or an article incorporating such an integrated circuit that it contains an unlawful topography.

42. Please state the term of protection granted by your legislation to topographies.

The term of protection proposed under the draft Layout-Design (Topographies) of Integrated Circuits Act is ten years.

H. PROTECTION OF UNDISCLOSED INFORMATION

43. Please explain whether or not your legislation grants a defined period of time for the protection of undisclosed information. If so, please give the time span.

The Protection against Unfair Competition Act, 2000, Act 589 protects undisclosed information, that is trade secrets or know-how indefinitely, provided the information is secret, has commercial value, because it is secret and has been subject to reasonable steps to keep it secret. These provisions are in line with Article 39.2 of the TRIPS Agreement.

44. Please explain how your legislation defines undisclosed information.

Undisclosed information is not defined in the Protection Against Unfair Competition Act; in the Act 589, the words "secret information" are used. Section 5(3) of the Act states that an information is secret if:

- (a) It is not, as a body or in the configuration and assembly of its components. generally known among or readily accessible to person within the circles that normally deal with the kind of information in question,
- (b) it has commercial value because it is secret, and
- (c) it has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret.

45. Please explain how your legislation defines data submitted to governments or governmental agencies.

There is no definition of the data submitted to governments or governmental agencies in the Protection Against Unfair Competition Act. 2000 Act, 589.

I. ENFORCEMENT

46. Please describe how your legislation provides for effective action against infringement of intellectual property rights.

Effective action against infringement of intellectual property rights is provided through a combination of legislation and the common Law. Matters relating to evidence, injunctions, damages

and other remedies including provisional measures are dealt with under the general Law of civil procedure for all civil wrongs.

47. Please explain whether or not your legislation provides for a mechanism to appeal to judicial bodies of final administrative decisions.

The general civil laws provide for an appeal to the High Court against administrative decisions.

48. Please describe how your legislation authorizes judges to order production of evidence by the opposing party. Please give precise information on what measures are taken to ensure the protection of confidential information.

By virtue of the rules of Court, the courts are authorized to order the production of documents. A party to a litigation is under obligation either automatically or upon order of the court to give discovery of any documents which it may have in its custody, possession or control which relate to the issues in the proceedings before the court. The court also has the power to make orders at the commencement of proceedings for the protection of evidence in those proceedings if there is a legitimate fear of such evidence being destroyed by granting an Anton Pillar Order.

49. Please quote provisions of your legislation that authorize judges to order a defendant to desist from an infringement.

The courts may grant relief for right holders by way of injunctions under the general jurisdiction of the court and the various intellectual property laws. Section 59 of the Patent Law 1992 states that on application by the owner of the patent:

"that court shall grant the following reliefs:

- (a) an injunction to prevent infringement where infringement is imminent or to prohibited the continuation of the infringement once infringement has started".

Section 11(3) of the draft Act also contains the following provisions which authorize judges to order a defendant to desist from an infringement:

"The owner of the Patent shall in addition to any other rights remedies or actions available to the owner have the right subject to subsection (4) and section 13 to institute court proceedings against any person who infringes the patent by performing, without the consent of the owner; any of the act referred to in subsection (2) or who perform acts which may lead to infringement."

With respect to imminent infringement, Section 22(2) of the draft Industrial Designs Act states:

"On the application by:

The registered owner; or

a licensee who has requested the registered owner to institute court proceedings for a specific relief and the registered owner has refused to do so. The court may grant an injunction to prevent an act which constitutes an infringement or an imminent infringement."

50. Please quote what provisions of your legislation authorize judges to order the payment to the right holder of adequate damages to compensate the injury he suffered.

The courts have general jurisdiction to award damages for infringement of intellectual property rights. Damages usually include the recovery of commercial losses associated with the infringement on flagrancy of infringement shall be taken into account in deciding whether additional damages should be awarded. An award of damages would normally be accompanied by any order for payment of legal cost incurred by the successful party. Under such order for costs, the successful party will normally recover a sum corresponding to the reasonable sums which were expended in the litigation. If such costs cannot be agreed between the parties the costs are fixed by the judge.

51. Please quote what provisions of your legislation authorize judges to order the payment of the right holder's expenses by the infringer.

The courts have jurisdiction under the rules of court to order for payment of legal cost incurred by the successful party. Under such order for costs, the successful party will normally recover a sum corresponding to the reasonable sums expended in the litigation.

52. Please explain if and how judges have the authority to order that infringing goods are placed outside channels of commerce or destroyed.

The courts have jurisdiction to order defendants to deliver infringing goods and copies as well as materials or implements used in their production. The Copyright Law allow for the seizure of infringing goods. There is also a provision for disposal or destruction of forfeited goods or copies by the comptroller of custom. The courts have inherent jurisdiction to indemnify a defendant for abuse of the courts' process. Where the court orders an interlocutory injunction, it will direct the plaintiff will pay damages to the defendant. The court may also require security for such undertaking to be given by way of deposit of money into the court's fund or by providing a guarantee. This will normally be the case where the plaintiff is a non-resident.

53. Please quote what provisions of your legislation authorize judges to indemnify a defendant in the event of abuse by the plaintiff.

The courts have inherent jurisdiction to indemnify a defendant for abuse of the court's process. Where the court orders an interlocutory injunction, it will direct the plaintiff to give an undertaking that if the injunction was wrongly granted against the defendant the plaintiff will pay damages to the defendant. The court may also require security for such undertaking to be given by way of deposit of money into the court's fund or by providing a guarantee. This will normally be the case where the plaintiff is a non-resident.

54. Please explain how your legislation implements Article 50 of the TRIPS Agreement.

Ghana operates the common law system and therefore the courts have jurisdiction to adjudicate on enforcement of intellectual property rights and can order provisional measures before the full trial including the grant of interlocutory injunctions.

The court may also grant relief of the type known as an Anton Pillar Order after the case has started. Under this order the defendant is required to admit onto his premise a person named in the order to search for and take any thing specified in the order to preserve the evidence for the trial.

An application can also be made to the court for an interim award of damages. The plaintiff must show that it is likely that at a full trial a substantial award of damages will be made by the court and that pending the assessment of the issues at trial there should be an interim payment.

55. Please identify the competent authorities in your jurisdiction who receive requests from right holders for an application to suspend the release of counterfeit goods by the customs authorities.

The High Court.

56. Please indicate whether or not procedures are available to suspend the exporting of counterfeit goods.

There are no proceedings to suspend the export of counterfeit goods. However the right holder may apply to the court for an order of injunction.

57. Please quote what provisions of your legislation authorize the competent authorities to order the destruction or disposal of infringing goods.

The courts have jurisdiction to order defendants to deliver infringing goods and copies as well as materials or implements used in their production. Under Section 1 of the Merchandise Marks Act 1964, it is an offence to falsely apply to goods any trade mark or any mark so nearly resembling a trade mark as to be likely to deceive. On conviction of the offence any goods and things of any kind by means of or in relation to which the offence is committed may be forfeited to the state.

58. Please indicate whether or not your legislation provides for a *de minimis* imports exception.

There is no *de minimis* imports exception.

59. Please explain how your legislation implements Article 61 of the TRIPS Agreement.

Under Section 1 of the Merchandise Marks Act 1964 it is a criminal offence to falsely apply to goods any trademark or any mark so nearly resembling a trademark as to be likely to deceive. Where a person is convicted of an offence of any goods or things of any kind by means of or in relation to which the offence is committed shall be liable at the discretion of the court to be forfeited. The person who commits an offence there under is guilty of a misdemeanour.

V. RESPONSE TO A QUESTION POSED BY JAPAN

COPYRIGHT AND RELATED RIGHTS

Please explain exceptions or exemptions of the National Treatment and Most-Favoured-Nation Treatment under the Copyright and Neighbouring Rights Law, if any, as permitted in Articles 3 and 4 of the TRIPS Agreement.

There are no exceptions nor exemptions from the National Treatment and Most Favoured Nation Treatment under the Ghana Copyright Law.

VI. RESPONSES TO QUESTIONS POSED BY SWITZERLAND

A. GEOGRAPHICAL INDICATIONS

1. Please explain in detail how your legislation provides protection for geographical indications.³

Draft Law

No law currently exists for the protection of geographical indications. In order to comply with the provisions of the TRIPS Agreement a draft Geographical Indications Act is soon to be put before Parliament. The draft Act incorporates the requirements of Article 22 to 24 of the TRIPS Agreement.

The draft Act defines a geographical indication as "an indication which identifies a good as originating in the territory of a country or region or locality in that territory, where a given quality reputation or other characteristic of the good is essentially attributable to its geographical origin".

Natural or handicraft products are covered by the definition of Geographical Indications in the Act. Examples would be textiles, fruits, wines, coffee, wood and tea.

The definition of a geographical indication is in conformity with the definition of a geographical indication in Article 22.1 of the TRIPS Agreement.

The draft Geographical Indications Act is divided into four parts. These are:

1. Protection of Geographical Indications;
2. Registration of Geographical Indications;
3. Special Provisions Concerning Marks;
4. Regulations and Interpretations.

Section 1 of the draft Geographical Indication Act states explicitly that civil proceedings may be instituted to prevent unlawful use of geographical indications. Subsections 1(a) and (b) of section 1 are in line with Articles 22.2(a) and (b) and Article 23.1 of the TRIPS Agreement enabling parties to prevent the use of indications in a manner which would mislead the public and would also be contrary to honest business practices within the meaning of Articles 101 of the Paris Convention or with regard to geographical indications identifying wines and spirits not originating in the place indicated in the geographical indication in question. Section 1 makes it clear that the court may in addition to issuing injunctions to prevent such unlawful use, award or grant any other civil remedies that maybe appropriate.

³ This response to question 1 posed by Switzerland replaces that circulated in document IP/C/W/343.

B. PATENTS

2. Does your legislation grant patent protection to all categories of products or are there any exceptions? If so, please explain in detail what kind of exceptions exist and how they comply with Article 27 of the TRIPS Agreement.

The Patent Law 1992 grant patents protection relating to products and processes in all fields of technology. The exceptions to patentability are stated in section 1(3) of the law. The exceptions are:

- (a) Discoveries, scientific and mathematical theories,
- (b) plant or animal varieties or essentially biological processes for the production of plants or animals, other than microbiological processes and the products of such processes;
- (c) schemes, rules or methods for doing business, performing purely mental acts or playing games;
- (d) methods of treatment of the human or animal body by surgery or therapy as well as diagnostic methods; this provision shall not apply to products for use in any of these methods;
- (e) mere presentation of information;
- (f) computer programmes.

The new draft Patent Act also grants protection for inventions relation to products and process in all fields of technology. However the exceptions are:

- (a) Discoveries, scientific theories and mathematical methods;
- (b) schemes, rules or methods of doing business, performing purely mental acts or playing games;
- (c) methods for treatment of human or animal body by surgery or therapy, as well as diagnostic methods practised on the human or animal body; this provision shall not apply to products for use in any of those methods;
- (d) inventions, the prevention within Ghana of the commercial exploitation of which is necessary to protect public order or morality which includes:
 - i. the protection of human, animal or plant life or health; or
 - ii. the avoidance of serious prejudice to the environment; if the exclusion is not made because the exploitation is prohibited;
- (e) plants and animals other than the micro-organisms;
- (f) biological processes for the protection of plants or animals other than non-biological and micro-biological processes;
- (g) plant varieties.

Article 27 of the TRIPS Agreement set out three exceptions to the basic rule on patentability. These are inventions contrary to public or morality, diagnostic, therapeutic and surgical methods for the treatment of humans or animals and plants and animals other than micro-organisms and essentially biological processes for the production of plant or animals other than non-biological and microbiological processes.

Discoveries for example have been excluded essentially because the person who makes a discovery has not create anything. Also schemes, rules or methods for doing business concerns instructions to the human mind which cannot be patented.

In line with Article 27.3(b) a *sui generis* system has been provided for the protection of plant varieties.

3. Does your legislation, in accordance with Article 27.1 in combination with Article 31 of the TRIPS Agreement, consider importation as "working" a patent (and therefore preclude compulsory licensing, if a product is being imported)?

The Patent Law 1992 under Section 45(1) allows compulsory licensing for non-working of the patent. The definition of working has been provided under Section 31(5) of the law as follows:

"A patented inventions is worked if the patented product is made or if the patented process is used in Ghana, by any effective and serious establishment and on a scale which is reasonable in the circumstances, but importation shall not constitute working."

The draft patent Act also contain provisions on compulsory licensing and government use without the authorization of the right holder but are subject to conditions aimed at protecting the legitimate interests of the right holder.

These conditions in the draft law aimed at protecting the legitimate interests of the right holder are in full compliance with Article 31 of the TRIPS Agreement. The conditions also comply with Article 27.1 of the TRIPS Agreement which require technology whether products are imported or locally produced.

The provisions of Section 14(1) of the draft Patent Act explicitly state that the court may issue non-voluntary licence if the court is satisfied the patented invention is not exploited or is insufficiently exploited, by working the inventions locally or by importation in Ghana.

4. Does your legislation make the granting of a compulsory license subject to all the conditions enumerated in Article 31 of the TRIPS Agreement? Please cite the relevant provisions of law.

The Patent law 1992 contain provisions on compulsory licensing. The provisions however do not satisfy all the conditions enumerated in Article 31. The draft Patent Act also has provisions for granting compulsory licences which are in full compliance with Article 31 of the TRIPS Agreement. Sections 13 and 14 of the draft Patent Act contain conditions under which compulsory licences and government use or person thereby provisions of law.

5. Does your legislation provide for the principle of the reversal of burden of proof in a process patent litigation? Please cite the relevant provisions of law.

Section 62 of the Patent Law 1992 is on the presumption of use of patented process. This section however does not fully comply with requirements of TRIPS Article 34. Subsections 7 and 8 of Section 8 of the draft Patent Act provide for the principle of the reversal of burden of proof in a process patent litigation. The provisions are in full compliance with Article 34 of the TRIPS Agreement.

C. PROTECTION OF UNDISCLOSED INFORMATION

6. Please explain in detail if your legislation ensures that undisclosed test or other data submitted by an applicant to the responsible State agency in the procedure for market authorization of a pharmaceutical or of an agricultural chemical product is protected against disclosure and against unfair commercial use by a competitor, for example by prohibiting a second applicant from relying on, or from referring to the original data of the first applicant, when applying subsequently for market authorization for his own product. Does your legislation provide for exceptions to this? If yes, under what conditions would such exceptions apply? Does your legislation set a specific term of protection for undisclosed test or other data of the first applicant?

The Protection Against Unfair Competition Act 2000, Act 589, provides for the protection of undisclosed test or other data submitted to a state agency as a condition for approving the marketing of pharmaceutical or agricultural chemical products, which use new chemical entities. The relevant provision is section 5(4) which makes it an unfair competition where an act or practice results in an unfair commercial use of secret test or data which have been submitted to a competent authority for the purpose of obtaining an approval of the marketing of pharmaceutical or agricultural chemical products, which utilize new chemical entities. Subsection 4, paragraph b of section 5 contains exceptions to the disclosure. This is where it is necessary to protect the public and steps are taken to ensure that the data are protected against unfair commercial use. The legislation on undisclosed information does not set a specific term of protection for undisclosed test or data.

D. ENFORCEMENT

7. Please indicate remedies provided by your legislation, which constitute effective deterrents to infringements of intellectual property rights.

The remedies provided by legislation, which constitutes deterrents to infringement of intellectual property rights, are:

- a. Imprisonment;
- b. monetary fines;
- c. seizure, forfeiture and destruction of infringing goods and materials and implements for their production.

Trademarks

The Trade Marks Act does not provide for criminal procedures and penalties for wilful trademark counterfeiting as required by Article 61 of the TRIPS Agreement. However, section 1 of the Merchandise Marks Act makes it a misdemeanour for falsely applying to goods any trade mark or any mark nearly resembling a trade mark as to be likely to deceive. Under the general jurisdiction of the court, the courts can award damage for infringement or if the plaintiff desires an account for profit. An award for damages would normally be accompanied by an order for payment of legal costs incurred by the successful party. The draft Trade Marks Act makes provision for penalties with respect to infringement and provide for a fine or imprisonment for wilful infringement.

Patents

The Patent Law 1992 specifically provide for award of damages in section 59. The Patent Law also provide for a fine or imprisonment of not more than 2 years for intentional infringement of a

patent. The draft Patent Act also has provisions making intentional infringement of a patent punishable by a fine or by imprisonment.

Industrial designs

Section 22 of the draft Industrial Designs Act provides that it is an offence to perform an act stated in section 9 of the draft law as an infringement. The penalty is a fine or a term of imprisonment not exceeding two years or both.

Layout-designs

Section 15 of the draft Layout-Designs (Topographies) of Integrated Circuits Act provides that it is an offence to knowingly perform an act which is unlawful under section 4 of the draft law. The penalty is a fine or imprisonment for two years. The court may order seizure, forfeiture and destruction of layout-designs of integrated circuits or articles concerned and of any material or implements predominant use of which has been in the commission of the fine.

Plant varieties

The draft Plant Varieties Act makes provision for a fine or term of imprisonment not exceeding two years in relation to non-compliance or misuse of variety denomination.

Copyright

Civil and criminal remedies are provided under sections 43-45 of the current copyright law PNDC Law 110 of 1985. Civil remedies include action for damages, interlocutory orders such as injunctions, Anton Pillar Orders etc. The penal sanctions currently provided for under the 1985 law have not proved to be deterrent enough. The courts are inclined to apply fiscal penalties rather than custodial sentences. The new draft Copyright Bill currently before Parliament provides for enhanced criminal sanctions - a convict can be sentenced to a maximum of 5 years imprisonment and provision has been made for equally punitive fines.

8. Please describe any new initiatives that are planned to improve enforcement of intellectual property rights in your country, particularly initiatives related to criminal enforcement.

The Chief Justice has recently issue directives to the effect that cases involving infringement of intellectual property rights should be handled by the specially mechanised courts which have been established to deal expeditiously with such issues.

E. TRADEMARKS

9. Please explain how your legislation implements Article 62.2 TRIPS Agreement. Please indicate how long it takes on average to register a trademark. Please cite the relevant provisions of your law.

A draft trademark law is to be laid before Parliament this year. This draft law fully complies with obligations under the TRIPS Agreement. On the average it takes about six months to register a trademark.

10. Please explain in detail how Ghana protects service marks and cite the relevant provisions of law.

The Trade Marks Act does not contain provisions on service marks. However, the draft Trade Marks Act contains provisions on service marks. Service marks, on registration, are protected for a period of ten years and renewable for consecutive period of ten years under the draft Trade Marks Act.

VII. RESPONSES TO QUESTIONS POSED BY THE UNITED STATES

A. GENERAL

1. Please describe, in relation to each form of intellectual property covered by the TRIPS Agreement, including plant variety protection, the manner in which nation treatment and most favoured nation treatment are provided to nationals of other WTO Members.

There are no provisions in the intellectual property legislation on national treatment and most-favoured-nation treatment.

B. COPYRIGHT AND RELATED RIGHTS

2. Please explain how the copyright law of Ghana protects computer programs as literary works and compilations of data as required by Article 10 of the TRIPS Agreement.

Existing Law

PNDC Law 110 was passed in 1985 and did not specifically provide for the protection of computer programs as literary works in Ghana. However, in practice computer programs are protected as literary works in Ghana.

Draft Law

This defect is cured in the new copyright bill before Parliament. The bill specifies that computer programs should be protected as literary work. The Copyright law protects compilations of data which are original in character and it involves some elements of creativity such as directories, anthologies, etc.

3. Article 11 of the TRIPS Agreement requires that rental rights for computer programs and cinematographic works be available. Please cite to the corresponding provision of the copyright law of Ghana.

Existing Law

The current law does not make any such provision.

Draft Law

Clause 5(e) of the new copyright bill provides rentals rights for audiovisual works and computer programmes.

4. Please describe the protection the copyright law of Ghana provides for performers, and the term of the protection.

Existing Law

The current copyright law incorporates the protection that performers are granted under the Rome Convention of 1961.

Draft Law

The new bill however incorporates elements of the Rome Convention and the WIPO Phonogram and Performances Treaty (WPPT).

5. Article 14.2 of the TRIPS Agreement provides that producers of phonograms are to enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Article 14.2 requires that producers of phonograms are to have the right to authorize or prohibit the commercial rental to the public of originals or copies of their phonograms. Please describe how the copyright law of Ghana implements these obligations and indicate the term of protection.

Article 14.2 of the TRIPS Agreement regarding the protection of Producers of Phonograms is embodied in the new Copyright Bill but not in the current Copyright Law.

C. TRADEMARKS

6. Please describe the subject matter that can comprise a trademark under the trademark law of Ghana.

Existing Law

In the Trade Marks Act 1965, a mark is defined as follows; a mark includes a device, brand heading, label ticket, name, signature, word, letter, numeral or any combination thereof. Under the Trade Marks Act, a mark must be registered in order to be protectable. Sections 9 and 10 the Act set out the conditions for the registration of a mark. A mark is registrable under Section 9 of the Act if it contains or consists of at least one of the following particulars:

- (a) The name of a company, individual or firm represented in a special or particular manner;
- (b) the signature of the applicant for registration or a predecessor in his business;
- (c) an invented word or invented words;
- (d) a word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or a surname;
- (e) any other distinctive mark.

The provisions of section 10 of the Trade Marks Act provide for an alternative form of registration based on the trademarks capability of distinguishing as compared to inherently adapted to distinguish.

Draft Law

The draft Trade Marks Act defines a mark as any sign or combination of signs capable of distinguishing the goods or services of one undertaking from the goods of other undertakings including words such as personal names, letters, numerals and figurative elements.

Under the draft Trade Marks Act, a trademark is registrable if it is capable of distinguishing the applicant's goods or services from those of others. The mark must not be contrary to public order or morality and also not mislead consumers or trade circles as regards source or other characteristics of the goods. A trademark is not registrable if it is a mark of a state or intergovernmental international organization except with authorisation. Finally a mark under the draft law will not be registered if it is a well-known mark.

7. Please describe the procedure that must be followed to register a trademark in Ghana, citing the relevant provisions of the law, and describe the rights that the owner of a registered mark can exercise.

Existing Law

The procedure for the registration of a trademark is stated in the Trade Marks Regulation 1970, L1667. The following are the procedure for registration of a trademark:

- i. The application must be made in the prescribed form (Form TM No.2).
- ii. The application must contain the following:
 - (a) That the application is made in Part A of the Register; (the Trade Mark Register is divided into "Part A" and "Part B").
 - (b) The applicant is required to affix a representative of the mark on the Form (Regulation 2 of LI 667).
 - (c) The desired classification and the respective goods.
 - (d) The name and nationality of the entity applying for the mark.
- iii. Four (4) representations of the mark.
- iv. In cases where an Attorney/Agent is appointed to file an application for registration, the form authorising the agent must be filed (TM No.1).
- v. The application fee of US\$150 must be submitted with the application.

An exhaustive examination is carried out on the application by the Industrial Property Office before acceptance or refusal. The applicant may be invited to make amendments. All applications are published in the Commercial and Industrial Bulletin for possible opposition.

A mark is entered in the Register of Trade Marks if there is no opposition or where the opposition has been disposed of.

The right given to the registered owner of a trademark are stated in sections 4 and 5 of the Trade Marks Act which provide as follows:

Section 4(1). Subject to the provisions of this section, and to sections 7 and 8 of this Act, the registration (whether before or after the commencement of this Act) of a person in Part A of the register as proprietor of a trade mark (other than a certification trade mark) in respect of any goods shall, if valid, give or be deemed to have given to that person the exclusive right to the use of the trade mark in relation to those goods.

Without prejudice to the generality of subsection (1) of this section the right referred to in that subsection shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either:

- a. As being used as a trade mark; or
- b. in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark or to goods with which such a person is connected in the course of trade.

The right to the use of a trade mark given by virtue of this section by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as is referred to in subsection (2) of this section in any mode, in relation to goods to be sold or otherwise traded in any place, in relation to goods to be exported to any market, or in any other circumstances, to which, having regard to any such limitations, the registration does not extend.

Section 5(1). Except as provided by subsection (2) of this section, the registration (whether before or after the commencement of this Act) of a person in Part B of the register as proprietor of a trade mark in respect of any goods shall, if valid, have or be deemed to have given to that person the like right in relation to those goods as if the registration had been in part A of the register, and the provisions of section 4 of this Act shall have effect in like manner in relation to a trade mark registered in Part B of the register as they have effect in relation to a trade mark registered in Part A of the register.

Draft Law

The draft Trade Marks Act also contain the procedure for the registration of a mark. The procedure is as follows:

The application for registration of a mark shall be filed with the Registrar and shall contain a request, a reproduction of the mark and a list of the goods for which registration of the mark is requested, listed under the applicable class or classes of the International Classification. The application should be accompanied by the prescribed fee.

The application may contain a declaration claiming priority of an earlier national or regional application filed by the applicant or his predecessor for any state or party to the Paris Convention or the World Trade Organization.

The Registrar shall examine the application and if all formalities and the law has been complied with the application is published. Where the registration of the mark has not been opposed

within the prescribed time limit or where the registration of the mark has been opposed and the opposition has been decided in favour of the applicant, the Registrar shall register the mark.

The draft Trade Marks Act confers on the owner of a trade mark the right to the use of the mark in relation to any goods for which it has been registered. The registered owner of a mark also have the right to institute court proceedings against any person who infringes the mark by using without his agreement or who performs acts which make it likely that infringement will occur. The right extends to the use of a sign similar to the registered marks and use in relation to goods similar to those for which the mark has been registered.

The registration of a mark is for a period of ten years and renewable for consecutive periods of ten years upon the payment of the prescribed fee.

8. Please provide the length and terms of protection the trademark law of Ghana provides for a trademark.

Existing Law

The Trade Marks Act under Section 20 provides for a term of seven years renewable consecutively for seven year periods upon payment of the prescribed fee.

Draft Law

The draft Trade Marks Act provide for a term of ten years renewable for consecutive periods of ten years subject to the payment of the prescribed renewal fee.

D. GEOGRAPHICAL INDICATIONS

9. Please describe in detail how the laws of Ghana provide for the recognition and protection of geographical indications required by Article 22.2 of the TRIPS Agreement, citing to the relevant provisions of law or regulation, and provide examples of geographical indications so protected.

No law existed for the protection of geographical indication. In order to comply with the TRIPS Agreement, a draft Geographical Indications Act is soon to be put before parliament. The draft Geographical Indications Act incorporates Article 22 to 24 of the TRIPS Agreement. The draft Geographical Indications Act is divided into four parts. These are:

1. Protection of Geographical Indications;
2. Registration of Geographical Indications;
3. Special Provisions Concerning Marks;
4. Regulations and Interpretations.

Section 1 of the draft Geographical Indications Act states explicitly that civil proceedings may be instituted to prevent unlawful use of geographical indications. Subsections 1(a) and (b) of section 1 are in line with Articles 22.2(a) and (b) and Article 23.1 of the TRIPS Agreement enabling, parties to prevent the use of indications in a manner which would mislead the public and would also be contrary to honest business practices within the meaning of Article 10*bis* of the Paris Convention or with regard to geographical indications identifying wines and spirits not originating in the place indicated in the geographical indication in question. Section 1 makes it clear that the court may in

addition to issuing injunctions to prevent such unlawful use, award or grant any other civil remedies that may be appropriate.

Natural or handicraft products are covered by the definition of geographical indications in the Act. Examples would be textiles, fruit, wines, coffee, wood and tea.

10. Please describe in detail the manner in which the higher level of protection required for wines and spirits under Article 23.2 of the TRIPS Agreement is implemented, citing to the relevant provisions of law or regulation, and provide examples of geographical indications for such products.

The draft Geographical Indications Act does not provide a higher level of protection for wines and spirits.

E. INDUSTRIAL DESIGNS

11. Please describe the procedure that must be followed to obtain protection for textile designs and cite to the relevant provisions of law or regulation.

The Textile Designs (Registration) Decree 1973 provides for a registration system, publication of applications, an opposition procedure and term of protection of five years renewable for two consecutive periods of five years each for textile designs.

To obtain textile design protection, Section 3(1) of the Textile Designs (Registration) Decree, 1973 NRCD 213 requires that an application in the prescribed form must be lodged with the Registrar. Section 3(2) of the law empowers the Registrar to make searches and request for such information as he may think fit. Where the application for registration of a textile design has been accepted, Section 6(1) of the Act requires that, the application is published in the Gazette for possible opposition. Where there is no opposition, the registrar upon payment of the prescribed fee register the textile design as required by section 7(1) of the Act.

Textile designs are protected under the draft Industrial Designs Act. Under Section 5 of the draft law, a person may apply to the Registrar for the registration of an industrial design. The application for the registration shall contain among others, drawings, photographs or other adequate graphic representations of the article embodying the industrial design.

Sections 6 to 8 of the draft law require the Registrar to examine the design and if satisfied that the requirements of the law have been complied with and the prescribed application fee paid, register the textile design and publish a reference to it in the Gazette and issue to the applicant a certificate of registration of the textile design.

Where there is an opposition to the registration of the textile design after publication in the Gazette, the Registrar is to send a copy of the notice of the opposition and the applicant within the prescribed period and in the prescribed manner is required to send to the registrar a counter-statement of the grounds on which the applicant relies for the application. The Registrar is to hear the parties if either or both wish to be heard and after considering the merits of the case take a decision on the application. The duration of the registration of a textile design as stated under section 10 is for a period of five years renewable for two further consecutive periods of five years upon payment of the prescribed fee.

F. PATENTS

12. Please describe in detail the way in which the patent law of Ghana implements Article 27 of the TRIPS Agreement, indicating any exceptions provided for, and including details regarding the protection for micro-organisms and non-biological and microbiological processes and plant varieties. Please cite to the relevant provisions of the law.

The Patent Law PNDC Law 305A provides patent protection in all fields of technology and a patent term of ten years renewable subject to local working for two consecutive terms of five years. Section 1(3) of the Patent Law provide exclusions from patentability which include:

- (a) Methods of treatment of human or animal body by surgery or therapy as well as diagnostic methods;
- (b) plant or animal varieties or essentially biological processes for the production of plants or animals.

Section 6 of the Patent Law also excludes inventions of the prevention within Ghana of the commercial exploitation of which is necessary to protect public order or morality.

The draft Patent Act provide for patent protection for any invention whether products or processes in all fields of technology.

The draft Patent Act also allow patent rights enjoyable without discrimination as to the place of invention. the field of technology whether the products are imported or locally produced.

Exclusions from patentability are also provided under the draft Patent Act. The exclusions include:

- (a) methods for treatment of the human or animal body by surgery or therapy as well as diagnostic methods practised on the human or animal body; this provision shall not apply to products for use in any of those methods;
- (b) inventions, the prevention within Ghana of the commercial exploitation of which is necessary to protect public order or morality, which includes:
 - (i) the protection of human, animal or plant life or health; or
 - (ii) the avoidance of serious prejudice to the environment;
- (c) biological processes for the protection of plants or animals other than non-biological processes;
- (d) plant varieties.

The draft Patent Act offers patent protection for micro-organisms non-biological and microbiological processes. The provisions which exclude certain inventions from patentability do not apply to micro-organisms, non-biological and micro-biological processes.

The draft Patent Act is fully in compliance with Article 27 of the TRIPS Agreement.

Plant varieties are to be protected by an effective *sui generis* system. The draft Act is soon to be presented to parliament.

13. Please describe in detail the rights provided patent holders under the patent law of Ghana and cite to the relevant provisions of law.

Section 28 of the Patent Law 1992 confers exclusive right to the patent owner where the subject-matter of a patent is a product to prevent others from the acts of making, using offering for sale, selling or importing for these purposes the product.

In the case where the subject-matter of a patent is a process, the exclusive right conferred will prevent others from the act of using, offering for sale selling or importing for these purposes at least the product obtained directly by that process.

The draft Patent Act also contain provisions on the rights of the patent owner.

Under the draft Patent Act, the exploitation of a patent requires the consent of the owner. The draft law defines exploitation to mean any of the following:

- (a) where the patent has been granted in respect of a product:
 - (i) making importing offering for sale selling and using the products;
 - (ii) stocking the product for the purposes of offering for sale, selling or using;
- (b) where the patent has been granted in respect of process:
 - (i) using the process; or
 - (ii) doing any of the acts referred to in paragraph (a) in respect of a product obtained directly by means of the process.

The provisions in the draft law also empower the owner of the patent to institute court proceedings against any person who infringes the patent by performing any of the acts referred above or who performs acts which may lead to infringement.

These provisions of the draft Patent Law are in full compliance with Article 28 of the TRIPS Agreement.

14. Please describe in detail any provisions in the laws of Ghana permitting unauthorized use of a patent, citing to the relevant provisions of law, and describe in detail the conditions under which such use can occur.

The Patent Law 1992 contains provisions permitting unauthorised use of patent.

Section 30 of the Patent Law 1992 lists the circumstances in which the law allows unauthorised use of patent. These includes acts done for scientific research; acts in respect of articles which have been put on the market in Ghana by the owner of the patent or with his express consent and the use of articles on aircraft, land vehicles or vessels of other countries which temporarily or accidentally enter the airspace territory or waters of Ghana.

Unauthorised use of a patent is also permitted under the patent law, sections 45, 46 and 47 through compulsory licensing in the following circumstances:

- (i) compulsory licensing for non-working of the patent;
- (ii) compulsory licensing based upon interdependent of patents;

- (iii) compulsory licensing for products and processes declared to be of vital importance.

The Patent Law 1992 under section 54 also allows exploitation of patented inventions by Government or third persons authorised by Government.

The provisions for compulsory licensing are not in full compliance with Article 31 of the TRIPS Agreement.

The draft Patent Act contains provisions for unauthorised use of a patent.

The circumstances under which unauthorised use of a patent is permitted under the draft Patent Act are as follows:

- (a) Acts in respect of articles which have been put on the market in any country by the owner of the patent or with the owner's consent.

This relates to exhaustion of patents rights. Under this principle once a patented article has been lawfully put on the market, the patent owner's right in respect of that products is exhausted. The TRIPS Agreement in its Article 6 does not establish which level exhaustion members shall adopt, subject to its provision on national treatment and most-favoured national treatment.

- (b) The use of articles on aircraft vehicles or vessels of other countries which temporarily or accidentally enter the airspace, territory or waters of Ghana.

This aimed at avoiding a situation in which the exercise of the exclusive right might be prejudicial to the public interest on maintaining free movement of vessels and aircraft.

- (c) Acts done only for experimental purposes relating to patent invention.

This concerns acts clone for non-commercial purposes.

- (d) Acts performed by a person who in good faith, before the filing or where priority is claimed, the priority date of the application on which the patent is granted and in Ghana was using the invention or was making effective and serious preparations for such use.

This limitations recognises the prior user's right established by good faith prior use or serious preparation for such use within the territory of Ghana. The right does not extend to use which is deferent on nature or purpose from the actual prior use or in the case of preparations envisaged prior use.

The draft Patent Act contains provisions on compulsory licensing and government use without the authorisation of the right holder.

Government use and compulsory licensing of patents in the draft Patent Act are subjected to conditions aimed at protecting the legitimate interest of the right holder. These conditions are contained in Article 31 of the TRIPS Agreement. These conditions are listed below:

- An application to use the subject-matter of a patent must be considered on its individual merit.

- There must be an unsuccessful attempt first to obtain a voluntary licence on reasonable commercial terms and conditions within a reasonable period.
- The licence must be non-exclusive.
- The use must be authorised predominantly for the supply of the domestic market.
- The right holder must be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the licence.
- The scope and duration of such use without the authorisation of the right holder must be limited to the purpose for which it was authorised.
- The decision on the grant and remuneration is to be subjected to judicial review.

15. What term of protection does the patent law of Ghana provide for patents? Please describe any provisions for extension of the term of protection and cite to the relevant provisions of the law.

Section 31 of the Patent Law 1992 PNDC Law 305A provides for a patent term of ten years renewable subject to local working for two consecutive terms of five years each. There is no extension of the term of protection under the Patent Law 1992.

The draft Patent Act grants a patent term of twenty years after the filing date of the application for patent. There is no extension of the patent term under the draft Patent Law.

G. LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

16. Please describe in detail the protection for layout-designs of integrated circuits provided under the laws of Ghana, including the term of protection, and cite to the relevant provisions of law.

The draft Layout-Designs (Topographies) of Integrated Circuit Act provides protection for layout-designs that are original in the sense that they are the result of the creator's own intellectual effort and are not common place among creators of layout-designs and manufacturers of integrated circuits at the time of their creation. The term of protection is ten years instead of eight years as prescribed in the treaty on Intellectual Property in respect of integrated circuits. The exclusive rights provided in the draft law include the rights of reproduction, sale and importation, sale and other distribution for commercial purposes. The draft law also protects articles containing infringing integrated circuits. The provisions of the draft Layout-Designs (Topographies) of Integrated Circuits Act are in full compliance with Articles 36 and 38 of the TRIPS Agreement.

H. PROTECTION OF UNDISCLOSED INFORMATION

17. Please describe in detail how the laws of Ghana provide for the protection of undisclosed information as required by Article 39.2 of the TRIPS Agreement and provide citations to the relevant provisions of law.

The protection Against Unfair Competition Act 2000 Act 589 provide for the protection of undisclosed information.

Section 5 of the Protection against Unfair Competition Act is based on Article 39 of the TRIPS Agreement which deals with secret information.

Section 5(3) of the act states that protection must apply to information that is secret, that it has commercial value because it is secret and that it has been subject to reasonable steps to keep it secret.

Section 5(1) does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to or acquired by or used by others without his or her consent in a manner contrary to honest commercial practices.

Under Section 8(1) of the Act, a person may seek redress for any act practice of industrial or commercial activities that results in the disclosure, acquisition or use by another of his secret information without his consent and in a manner contrary to honest commercial practices. The remedies available to a person who brings an action for acts of unfair competition include the following:

- a. an order of injunction to prevent the act or further acts or of unfair competition;
- b. a provisional order to prevent unlawful acts or to reserve relevant evidence;
- c. the award of damages as compensation;
- d. any other remedy as the court may consider fit to order.

18. Please describe in detail the manner in which protection is provided test data regarding pharmaceutical and agricultural chemical products submitted to the government in order to obtain marketing approval in Ghana and cite to the relevant provisions of law.

Section 5(4) of the Protection Against Unfair Competition Act. contains provisions for the protection of undisclosed test data and other data whose submission is required by the statutory bodies responsible for approving the marketing of pharmaceutical or agricultural chemical products which use new chemical entities. Exceptions to the protection of test data and other data are stated in section 5(4)(b) under the section disclosure can be made where it is necessary for the protection of the public and also where steps are taken to ensure that the data are protected against unfair commercial use.

Civil remedies are available to an aggrieved person whose secret test data or other data has been disclosed. Section 8(1) allows the aggrieved person to bring an action for:

- a. an order of injunction to prevent the act or further acts of unfair competition;
- b. a provisional order to prevent unlawful acts or to preserve relevant evidence;
- c. the award of damages as compensation; and
- d. any other remedy as the court may consider fit to order.

Sections 5(4) and 8(1) of the Protection Against Unfair Competition Act comply with Article 39.3 of the TRIPS Agreement.

19. Are other applicants for marketing approval for their own versions of a previously approved pharmaceutical or agricultural chemical products permitted to rely on data submitted by the earlier applicant? If so, how long a period of exclusivity is given the earlier applicant before such reliance becomes possible.

There are no applicants for marketing approval for their own versions of previously approved pharmaceutical or agricultural chemical products.

I. ENFORCEMENT

20. Please describe in detail the manner in which the laws of Ghana provide for effective action against infringement of intellectual property rights as required by Article 41.1 of the TRIPS Agreement.

The legal system of Ghana is the common law and matters relating to remedies for infringement of intellectual property rights are dealt with under the general law of civil procedure. The remedies that may be ordered by the judicial authorities are:

- a. Injunctions;
- b. damages;
- c. destruction or other disposal of infringing goods and materials/implements for their production;
- d. any other remedy.

Injunctions

Under the general jurisdiction of the court and under the various intellectual property laws the courts may grant relief for infringement in the form of an interlocutory or perpetual injunction. The courts may grant an interlocutory injunction if the court is satisfied that there is a serious issue to be tried and if the risk of damage to the plaintiff should the injunction not granted will not be compensated by an order for damages provided that the plaintiff gives an undertaking to compensate the defendant if it turns out that there was no jurisdiction for the injunction.

Damages

Under the general jurisdiction of the court and the provisions of the various intellectual property laws the courts have power to award damages for infringement or if the plaintiff desires an account for profit. Damages usually include the recovery of commercial losses associated with the infringement and flagrancy of the infringement shall be taken into account deciding whether additional damages should be awarded. An award of damages would normally be accompanied by an order for payment of legal cost incurred by the successful party. The order for costs is to enable the successful party to recover a sum corresponding to the reasonable sums which were expended in the litigation.

Destruction or disposal of infringing goods and material/implements for the products

The courts have Jurisdiction to order defendants to deliver infringing goods and copies as well as materials or implements used in their production.

Any other remedies

As an alternative to an award of damages the right holder may seek an account of profits instead of damages. This requires the court to assess the profits which the infringer has made as a result of his infringing act and pay this over to the right holder.

21. Article 43.1 of the TRIPS Agreement requires that judges be authorized to order production of evidence necessary to substantiate a party's claims where that party has been unable to obtain such evidence from the opposing party. Please describe how the laws or regulations of Ghana provide this authorization, citing to the relevant provisions of law or regulation.

The courts have authority to order the production of documents in court by virtue of the rules of court. A party to litigation has an obligation either automatically or upon order of the Court to give discovery of any document which it may have in its custody, possession or control which relates to the issues in the proceedings before the court.

22. Please describe in detail all of the civil remedies that are available to right holders under the laws of Ghana, citing to the relevant provisions of law or regulation.

The intellectual property legislation and the civil law of Ghana offer the following remedies to right holders:

- a. damages including recovery of profits and expenses including attorney's fees;
- b. injunctions;
- c. destruction or other disposal of infringing goods and materials or implements for their production;
- d. any other remedy.

Damages

Damages can be awarded against persons who infringe intellectual property rights by the courts under its general jurisdiction and also as provided under the intellectual property legislation. The right holder can also request for account for profit.

The Patent Law 1992 under Section 59 specifically provides for the grant of injunctions, damages or any other remedy provided for by law.

The draft laws on Geographical Indications, Layout-Designs (Topographies) of Integrated Circuits, Trade Marks and Industrial Designs specifically provide for award of damages for infringements.

The damages will usually include the recovery of commercial losses associated with the infringement and the flagrancy of the infringement will be taken into account in deciding the quantum of damages. An award of damages would normally be accompanied by an order for payment of legal costs incurred by the successful party.

Injunctions

The High Court has powers to grant an order for injunction and various intellectual property laws also specifically provide for the grant of injunctions. An injunction is granted where the court is satisfied that there is a serious issue to be tried and on the balance of convenience it is an appropriate remedy.

Destruction or other disposal of infringing goods and materials or implements for their production

The courts have jurisdiction to order defendants to deliver infringing goods and copies as well as materials or implements used in their production.

Any other remedy

As an alternative to an award of damages the right holder may apply for an account of profits instead of damages. This requires the court to assess the profits which the infringer has made as a result of his infringing act and to pay this over to the right holder.

23. Please describe in detail the provisional procedures and remedies available to right holders under the laws of Ghana, citing to the relevant provisions of law and regulation, and indicate any condition under which a right holder may avail itself of those procedures and remedies.

- (i) The Court may grant an Anton Pillar Order after the case has started. Under this order the defendant is required to admit onto his premises a person named in the order to search for and take into custody any document and any things specified in the order to preserve the evidence for trial.
- (ii) The Court also has powers to adjudicate on the enforcement of intellectual property rights and take provisional measures before the full trial including the grant of interlocutory injunctions.
- (iii) The Court can also award interim damages. The right holder must show that it is likely that at a full trial a substantial award of damages will be made by the court and pending the assessment of the issues at trial there should be an interim payment.

J. SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES

24. Please describe in detail the procedures under the laws of Ghana that provide for border enforcement at least for trademark counterfeiting and copyright piracy, identifying the competent authority and citing to the relevant provisions of law or regulation.

Section 1 of the Merchandise Marks Act 1964 makes it an offence for any person who falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be likely to deceive. The person is guilty of misdemeanour and when convicted any goods and things of any kind by means of or in relation to which the offence is committed shall at the discretion of the court be forfeited to the Republic.

Section 12 of the Merchandise Marks Act empowers the comptroller of customs upon representation made to him that the use of trade mark is fraudulent to order the importer or his agent to produce any documents in his possession relating to the goods and also furnish information as to the name and address of the person by whom the goods were consigned to Ghana; and the name and address of the person to whom the goods were sent in Ghana. The comptroller may communicate to

any person whose trade mark is being infringed any information obtained from the importer of the goods or his agent.

25. Please indicate if border enforcement is available to owners of other forms of intellectual property and, if so, please describe the procedures and remedies available in relation to each form of intellectual property, citing the relevant provisions of law.

Under section 12 of the Merchandise Marks Act, the Comptroller of Customs may seize goods imported into the country if he is satisfied that the use of a trademark is fraudulent. The comptroller may ask the importer of the goods or an agent of the importer to produce any document in relation to the goods and give information about the name and address of the person by whom the goods were consigned to Ghana and the name and address of the person in Ghana to whom the goods were consigned. Failure to comply with this request is an offence and renders the defaulter liable to a fine.

26. Article 58 of the TRIPS Agreement specifies procedures to be followed where the competent authorities can act ex officio. Please explain whether the competent authorities in Ghana are empowered to act ex officio and, if so, please identify the intellectual property areas subject to ex officio action.

There are no provisions for competent authorities to act *ex officio*.

K. CRIMINAL PROCEDURES

27. Please describe in detail how the laws of Ghana implement Article 61 of the TRIPS Agreement that requires Members to have criminal procedures and penalties, including imprisonment and/or monetary fines sufficient to act as a deterrent, at least for cases of wilful trademark counterfeiting and copyright infringement on a commercial scale. Please cite to the relevant provisions of law and regulation.

The draft Trade Marks Act provides for criminal sanctions for intentional infringement of a trademark. Under the draft Law, a person who knowingly infringes a trademark is guilty of an offence punishable by a fine or by imprisonment for a term of 2 years.

28. Article 61 also requires that remedies in appropriate cases include the seizure, forfeiture and destruction of infringing goods and any materials and implements the predominant use of which has been the commission of the offence. Please describe the provisions in the laws of Ghana that provide for such remedies, and describe the circumstances in which those remedies would be imposed, citing to the relevant provisions of law or regulation.

The courts have jurisdiction to order defendants to deliver infringing goods and copies as well as materials or implements used in their production.

There is also a provision under section 1(3) of the Merchandise Marks Act 1964 for the forfeiture of any goods and things of any kind by means of which an infringement of trademarks is committed.

29. Article 61 also indicates that Members may provide for criminal procedures and penalties in cases of wilful infringement of other forms of intellectual property. Please describe any provisions of the laws of Ghana that provide for such procedures and remedies, citing to the relevant provisions of law or regulation.

Section 72 of the Patent Law 1992 provides for a fine and imprisonment of not more than two years or both for international infringement. The Merchandise Marks Act, 1962 also contains provisions making false application to goods of any trade mark a misdemeanour. Under the draft Trade Marks Act wilful infringement of a trademark, is an imprisonment for a term of two years.

L. STATISTICAL QUESTIONS

30. Please provide statistical information related to civil copyright, trademark, geographical indication, industrial design, patent, integrated circuit layout-design, and trade secret enforcement for 2000, including the number of cases filed; injunctions issued; infringing products seized; infringing equipment seized; cases resolved (including settlement); and the amount of damages awarded.

The current Copyright Law provides civil, criminal and arbitration settlement remedies for copyright infringement. The stakeholders as well as the Copyright Office and the Law enforcement agencies ensure that the law is enforced. However data in this area is yet to be compiled.

31. Please provide statistical information related to criminal enforcement in the area of copyright piracy and trademark infringement for 2000, including the number of raids, prosecutions, convictions, and the amount of fines and/or jail terms (including whether the fines were paid and whether the jail term was actually served or was suspended) and any other information establishing that the criminal system operates effectively to deter copyright piracy and trademark counterfeiting.

Raids are effected upon information by the Copyright Monitoring Team and in collaboration with the police. However the Copyright Office has put into place an authentication/anti-piracy system of adhesive labels which are used to authenticate genuine as against pirated musical works. The Monitoring Unit of the Copyright Office regularly monitors the application of the authentication devices for musical works. Regular raids are also organized for literary and audiovisual works by the national anti-piracy committees. Those convicted of infringement are often given fiscal sentence. However a court recently sentenced a Copyright infringer to six months imprisonment. No authentic statistics are immediately available.
