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WORLD INTELLECTUAL PROPERTY ORGANIZATION

GENEVA

**INTERNATIONAL PATENT COOPERATION UNION
(PCT UNION)**

**WORKING GROUP ON REFORM OF THE PATENT
COOPERATION TREATY (PCT)**

Third Session

Geneva, November 18 to 22, 2002

SUMMARY OF THE SESSION

by the Chair

INTRODUCTION

1. The session was opened by Mr. Francis Gurry, Assistant Director General, who welcomed the delegates on behalf of the Director General.
2. Mr. Philip Thomas (WIPO) acted as Chair of the session, as agreed by the Working Group, and Mr. Claus Matthes (WIPO) acted as Secretary. The list of participants is contained in Annex I.
3. The matters for discussion at the session were the following, as recommended by the Committee on Reform of the Patent Cooperation Treaty (PCT) (“the Committee”) at its second session held in July 2002 and agreed by the Assembly of the PCT Union (“the Assembly”) at its 31st (18th extraordinary) session in September-October 2002 (see the Committee’s report in document PCT/R/2/9, paragraphs 49, 125, 135 and 136, and the Assembly’s report in document PCT/A/31/10, paragraphs 44(ii) and (iii) and 65):¹

¹ Working documents for sessions of the Assembly, the Committee and the Working Group are available on WIPO’s Web site via <http://www.wipo.int/pct/en/meetings>.

- (i) options for a possible revision of the PCT;
- (ii) restoration of the right of priority; correction and addition of priority claims;
- (iii) outstanding proposals for reform of the PCT;
- (iv) common quality framework for international search and international preliminary examination.

The working documents are listed in Annex II.

4. The session's proceedings were informal and there was no formal report. This summary sets out the status of the matters discussed by the Working Group, noting the range of views expressed and areas where agreement has been reached, and identifying what future work needs to be undertaken. Particular interventions are in general not recorded in the summary.

EXPECTED ACCESSION TO THE PCT BY EGYPT

5. The Working Group was pleased to take note of a statement by the Delegation of Egypt that accession by Egypt to the PCT was expected in the near future.

APPROACH TO FURTHER REFORM: OPTIONS FOR REVISING THE TREATY²

6. Discussions were based on documents PCT/R/WG/3/3 and 3 Add.1.

7. In considering what approach should be taken to further reform of the PCT, the Working Group considered the questions of whether the Treaty itself should be revised and, if so, of how a possible revision of the Treaty should be achieved. In particular, the difficulties raised by the possible coexistence of original and revised versions of the Treaty would need to be addressed. It was noted that the Assembly had, on the recommendation of the Committee, requested that options for revising the Treaty be considered by the Working Group.

8. A number of delegations expressed the view that the Treaty would, at some stage, need to be revised. However, the question of whether, and more particularly that of when, a revision should be undertaken would depend on what changes to the PCT system were proposed and on the priority attached to them. If the desired changes were very extensive, they might be better introduced by way of adoption of a new Treaty to replace the existing one than by a revision of the existing one. Related developments in the harmonization of formal, procedural and substantive aspects of patent law needed also to be taken into account, notably, in the form of the Patent Law Treaty adopted in 2000, which had not yet come into

² References in this document to "Articles" and "Rules" are to those of the Patent Cooperation Treaty (PCT) ("the Treaty") and the Regulations under the PCT ("the Regulations"), or to such provisions as proposed to be amended or added, as the case may be. References to "national laws," "national applications," "the national phase," etc., include reference to regional laws, regional applications, the regional phase, etc. References to "PLT Articles" and "PLT Rules" are to those of the Patent Law Treaty (PLT) and the Regulations under the PLT.

force, and the draft Substantive Patent Law Treaty presently being considered by the Standing Committee on the Law of Patents.

9. The Working Group agreed that there was a limit to the kind of changes which could be achieved by amending the Regulations within the boundaries of the provisions of the Treaty, and that the way in which particular changes needed to be implemented would depend on their nature. The approach to further reform should not be constrained by a limitation to changes achievable by way of amending the Regulations. It was generally felt that the approach to revision of the Treaty should therefore be discussed progressively along with particular proposals for change to the system.

10. Certain delegations felt that further reform should await the development of experience once the recently adopted changes had been implemented, particularly those relating to the new enhanced international search and preliminary examination system. Other delegations, however, expressed the desire to proceed now with further reforms aimed at meeting the objectives agreed by the Assembly, including simplification and streamlining of procedures and avoiding unnecessary duplication in the work carried out by PCT Authorities and by national and regional Offices.

11. As to how a revised version of the Treaty should be introduced, it was generally felt that the difficulties which would inevitably be caused by the existence of parallel versions of the Treaty would need to be avoided or minimized. If both versions were to be in force at the same time, great confusion would arise for applicants, third parties, Offices and member States, both as to the right to file applications and the right to seek protection via the two versions in the Contracting States bound by them.

12. A number of delegations and representatives of users thus expressed a preference for simultaneous termination of the existing system and commencement of the new system. However, it was recognized that this could only be effective if sufficient time was allowed for all countries party to the existing version of the Treaty to adhere to the revised version, and it was inevitable that some time would be needed for this. It would be undesirable if any States party to the existing version were not bound by the new version by the time it came into force. In any event, transitional provisions would of course be needed to enable the continued processing of applications that were pending at the time of the commencement of the revised version.

RESTORATION OF THE RIGHT OF PRIORITY

13. Discussions were based on documents PCT/R/WG/3/2 and 2 Add.1.

14. There was little support for the proposal by the International Bureau in document PCT/R/WG/3/2 that the criterion for restoration of the right of priority should, at the choice of the applicant, be either "due care" or "unintentionality," with a higher fee being payable where the applicant chose to request the receiving Office to apply the "unintentionality" criterion.

15. Several delegations and representatives of users emphasized the importance of enabling restoration of the right of priority, noting that unintentional errors and unforeseen difficulties in meeting the priority deadline were a fact of life for applicants and their representatives, notwithstanding their keen desire to respect it. Although a number of delegations expressed the desire for a single criterion to be established in connection with the restoration of the right

of priority by receiving Offices in the international phase, there was no agreement as to what that criterion should be.

16. A considerable number of delegations and representatives of users were of the opinion that the criterion to be applied by receiving Offices in the international phase should be “unintentionality,” stating that such an approach would be more user-friendly and also simpler for receiving and designated Offices to apply, and that it would bring about more uniformity among Offices. Several other delegations and one representative favored the adoption of the more stringent criterion of “due care,” on the understanding that any designated Office would be free to apply a more liberal criterion (such as “unintentionality”) to the application when it entered the national phase.

17. It was noted that, under the proposal for a “due care” criterion as just outlined, where the receiving Office refused a request for restoration, the dates for international publication and national phase entry would expire up to 14 months later than would have been the case if the request had been allowed. A subsequent request for restoration before a designated Office in the national phase on the basis of “unintentionality” would be difficult to sustain since, if it were to be allowed, the “proper” dates for international publication and national phase entry would, in retrospect, be up to 14 months earlier than had in fact been the case. The applicant may therefore be obliged to request early international publication and to enter the national phase early, on the basis of times calculated from the earlier priority date sought, in the mere hope that the request for restoration would be allowed by the designated Office.

18. The proposal by the EPO in document PCT/R/WG/3/2 Add.1 would enable the applicant to request restoration on the ground of “unintentionality” in the national phase if a request based on “due care” had been refused in the international phase. While some delegations supported the proposal, it was noted that it would oblige the applicant to request restoration during the international phase on the ground of “due care” even in cases where that criterion was clearly not complied with, simply in order to be able to pursue the matter further in the national phase on the ground of “unintentionality”. Some delegations and representatives of users pointed to the desirability of enabling the applicant to place on file, before the publication date, a statement of intention to request restoration later in the national phase and evidence in support of that request.

19. One delegation said that one of its user groups had suggested that a possible approach could be to automatically retain in the international application any priority claim which was based on an earlier application with a filing date earlier than 12 months, but not more than 14 months, from the international filing date, leaving the possibility of restoration to be governed by the national law and decided separately by each designated Office. Several delegations and representatives of users expressed the concern that such an approach, while in compliance with the requirements of the PLT, would lead to a diversity of practices among designated Offices and require the applicant to engage in a multitude of parallel procedures in which essentially the same issue was at stake.

20. Several delegations suggested that guidance should be provided in the context of the PCT as to the application of the two criteria, noting that no such guidance was provided in the context of the provisions concerning the matter in the PLT and that little information was available as to the present practices of the various Offices. One delegation suggested that it would be useful to conduct a survey of present practices by sending a questionnaire to all PCT Offices and Authorities. That survey should seek information as to the application of the criteria of “due care” and “unintentionality” in general, that is, not restricted to cases where

restoration of the right of priority was sought, but also in cases, for example, of late payment of annuities, in order to obtain guidance as to the differences between the two criteria and to assist in the establishment of guidelines. The questionnaire should also seek information as to the proof required.

21. Certain delegations suggested that provisions for restoration of the right of priority should not be proceeded with until a majority of PCT Contracting States provided for such restoration under their national law, which would be in compliance with the PLT. However, a majority expressed the view that a solution to this question of principle should not be delayed, noting that the inclusion in the Regulations of provisions dealing with restoration of the right of priority would, in the long term and notwithstanding the likelihood that a number of Contracting States would make transitional reservations, encourage national laws to provide for the matter in a harmonized way.

22. Several delegations expressed concern as to whether the draft provisions as proposed by the International Bureau were compatible with the provisions of Article 8(2)(a), which referred to the Paris Convention with regard to the conditions for, and the effect of, priority claims, and Article 27(5), which stated that nothing in the Treaty and the Regulations was intended to be construed as prescribing anything that would limit the freedom of each Contracting State to prescribe such substantive conditions of patentability as it desired. In the latter connection, it was pointed out that the inclusion of provisions in the PLT for restoration of the right of priority suggested that the procedure was not regarded as a substantive matter in the context of the PLT. One delegation commented that the distinction between procedural and substantive aspects of the proposal was unclear and should be further explored.

23. In connection with review during the national phase of a receiving Office's decision on a request for restoration of the right of priority, some delegations questioned whether there was a need, in proposed Rule 26*bis*.3(j), to distinguish between the "designated Office" on the one hand and the "designated State" on the other, and suggested that the provision might better refer to what was permitted or required in the national law. One delegation suggested that designated Offices should be able to review any decision by the receiving Office on the grounds that it was erroneous. Doubt was expressed by another delegation as to how far the Regulations could restrict the circumstances in which a decision of the receiving Office could be reviewed by a court in the national phase.

24. One delegation suggested that a provision similar to proposed Rule 26*bis*.3(k) should be included to enable receiving Offices, as well as designated Offices, to make transitional reservations in relation to proposed Rule 26*bis*.3(a) to (j).

25. In the light of the discussions, the Working Group agreed that:

(i) the proposal to leave the choice of criterion to the applicant, as proposed in document PCT/R/WG/3/3, was not supported;

(ii) there was no general agreement as to which of the two criteria for restoration provided for in the PLT, namely "due care" or "unintentionality," should apply in the case of determinations by a receiving Office;

(iii) it would be preferable to continue to seek a solution under which a decision of the receiving Office to restore the right of priority would be given proper effect by designated

Offices, rather than to leave the matter to be determined separately by each designated Office under a variety of national laws;

(iv) it was necessary to ensure that any provision concerning restoration of the right of priority was compatible with Articles 8 and 27(5), although it was noted that, under the PLT, the restoration of the right of priority was not considered to be a matter of substance;

(v) practical problems and confusion would arise if receiving Offices were obliged to apply one criterion as a receiving Office and a different criterion as a designated Office or national Office;

(vi) whatever solution, if any, were to be found, there would be a need for guidance, preferably in the PCT Receiving Office Guidelines, on the practice to be followed.

26. It was agreed that the International Bureau should prepare a revised proposal presenting three options for further consideration by the Working Group providing, respectively, for the criterion of "due care," for the criterion of "unintentionality," and for the automatic retention of the priority date for the purposes of the international phase, leaving the question whether its restoration was allowable to the national phase. The revised proposal would also provide, under any of those options, for an indication of the intention to request restoration and for supporting evidence to be filed in the international phase and to be included in the international publication.

27. It was also agreed that the International Bureau should send a questionnaire to all PCT Offices and Authorities requesting information as to the application of such criteria under the various national laws and practices.

CORRECTION AND ADDITION OF PRIORITY CLAIMS

28. Discussions were based on document PCT/R/WG/3/2.

29. The Working Group approved the proposed amendments of Rule 26*bis*.1 and the proposed addition of new Rule 80.8, to the extent that the latter dealt with the correction and addition of a priority claim under Rule 26*bis*.1, with a view to their possible submission to the Assembly for adoption at its next session in September-October 2003.

OUTSTANDING PROPOSALS FOR REFORM OF THE PCT

Concept of Designations

30. Discussions were based on document PCT/R/WG/3/1, Annex II, item 1 (eliminate concept of designations).

31. It was agreed that, since the Assembly had now adopted amendments to the Regulations that in effect abolished the procedure for making specific designations, there was no need for further action on the matter in the short term, but that the International Bureau should prepare draft revised provisions of the Treaty, eliminating reference to designations, for consideration in the long term.

Nationality and Residence Requirements

32. Discussions were based on document PCT/R/WG/3/1, Annex II, item 2 (eliminate nationality and residence requirements).

33. It was noted that the concept of nationality and residence requirements had been already considered at the first session of the Committee, which had recommended that this matter not be referred to the Working Group for consideration.

34. Although there was still some support for eliminating the concept, at least in the long term, the Working Group agreed that an international application should not be allowed to proceed if the applicant did not comply with the nationality and residence requirements. However, it was agreed that a more limited question should be considered further by the Working Group, namely, whether an international application filed by an applicant who did not comply with those requirements should be accorded an international filing date, the defect being correctable, and that the International Bureau should present a draft proposal accordingly.

Conform PCT Requirements to the PLT

35. Discussions were based on document PCT/R/WG/3/1, Annex II, items 3 (conform PCT filing date requirements to PLT), 4 (conform PCT missing part-type requirement to PLT) and 29 (combine PLT and PCT into a single agreement).

36. It was recalled that, for conformity with certain provisions of the PLT, the Assembly had already adopted provisions for reinstatement of rights after failure to perform the acts necessary for entry into the national phase (see document PCT/A/31/10, paragraph 45(i)) and the Working Group was still considering a proposal for restoration of the right of priority (see paragraphs 13 to 27, above). It was also noted that the Assembly had already agreed with the view of the Committee that the language requirements for obtaining an international filing date were compatible with the PLT (see document PCT/A/31/10, paragraph 44(ii)). In addition, it was recalled that the requirement for the presence of claims as a filing date requirement under the PCT had raised a question of conformity with the PLT (see document PCT/R/WG/1/9, paragraphs 25 and 26).

37. The Working Group agreed that, as a matter of principle, the PCT should, as far as possible, be brought into conformity with the PLT. Although one delegation considered that this should be done as a matter of priority, other delegations were of the view that, in order to minimize inconsistencies between national and international procedures, the matter should not be proceeded with until more States had adhered to the PLT.

38. One delegation noted that although proposals to conform filing missing part-type requirements with those of PLT had been presented to the Working Group at an earlier session, those proposals had not been fully considered owing to lack of time. It was agreed that the International Bureau should resubmit the proposals for further consideration.

39. One delegation suggested that revision of the PCT should be looked at from a fundamental viewpoint. An important objective should be to establish a new treaty that applied to both national and international applications and that incorporated the PLT and the future SPLT. Another delegation emphasized that, at the 37th Series of Meetings of the Assemblies of the Member States of WIPO in September-October 2002, the Director General

had reiterated his commitment that the Secretariat would arrange a study of the impact of the patent system on developing countries, and noted that the results of that study would need to be taken into account in drafting such a new treaty.

40. It was agreed that, as part of its longer term work, the International Bureau should consider the amendments to the PCT Articles that would be needed to achieve greater conformity with the PLT.

Formalities Review

41. Discussions were based on document PCT/R/WG/3/1, Annex I, item 1 (reduce or eliminate formalities review).

42. Several delegations expressed the view that procedures relating to the checking of formalities by both the receiving Offices and the International Bureau should be reviewed so as to avoid unnecessary duplication of work and further streamline procedures. This would require consideration of many current processes, but would be particularly relevant to procedures relating to international applications filed and processed, in the future, in electronic form.

43. It was agreed that the International Bureau should work with interested delegations and representatives of users, using the PCT reform electronic forum, to identify:

(i) formalities checking processes that were carried out by both receiving Offices and the International Bureau, with a view to proposing changes to the Administrative Instructions and the PCT Receiving Office Guidelines to do away with any unnecessary duplication;

(ii) simplifications in the formalities review that could be progressively implemented together with the planned implementation of electronic filing and processing of international applications under the PCT.

International Filing Fee

44. Discussions were based on document PCT/R/WG/3/1, Annex I, items 15 (eliminate fee for each page in excess of 30 sheets) and 16 (re-assess fees).

45. It was recalled that, following the amendments of the Regulations adopted by the Assembly in October 2002 and the introduction of the “flat” international filing fee, which would come into effect on January 1, 2004, a process to determine the amount of that fee had already started. As part of that process, the structure of fees payable for the benefit of the International Bureau would be reviewed, including the need for a separate handling fee under Chapter II. (See document PCT/A/31/10, paragraphs 50 and 51.) With regard to the fee for each page in excess of 30 sheets, it was intended to review that fee at a later date, once electronic processing of international applications filed in electronic form was more fully implemented. In response to a concern expressed by the Delegation of Japan that elimination of the fee for each page in excess of 30 sheets might increase the filing of unnecessarily long international applications, the International Bureau observed that the need for an extra fee in respect of “mega-”applications might be considered (see also paragraph 96, below). In the light of these comments, the Working Group agreed that any further consideration by it of the matter should await the implementation of more fully electronic processing of international applications.

Receiving Office as Main Point of Contact

46. Discussions were based on document PCT/R/WG/3/1, Annex I, item 14 (payment of Chapter II fees directly with receiving Offices) and Annex II, item 25 (change addressee to which particular documents have to be sent).

47. One delegation suggested that, in order to make the PCT more user friendly, an applicant who so wished should be permitted to pay fees under Chapter II to the receiving Office instead of to the International Preliminary Examining Authority, and to permit the submission to the receiving Office of all documents that are required in the international phase. Another delegation referred to the desirability of having a consistent approach as to where documents could be filed. However, other delegations, while recognizing certain advantages for applicants, pointed to the problem of prescribing the amounts and currencies of the Chapter II fees payable to receiving Offices for the benefit of the International Preliminary Examining Authority, and to the extra workload involved in transmitting the documents concerned from receiving Offices to the relevant International Authority or the International Bureau, as well as the delays which would be likely to result from such a system. It was also noted that, in the future, with the greater implementation of electronic filing systems, it would become easier for applicants to submit documents directly to International Authorities and the International Bureau.

48. In the light of these comments, the Working Group noted the proposals and decided that the matter should be reconsidered at a later stage in the light of further experience gained with electronic filing and processing of international applications.

Divisional Applications

49. Discussions were based on document PCT/R/WG/3/1, Annex II, item 6 (allow for divisional applications to be filed under the PCT).

50. Several delegations supported the proposal that further consideration should be given to providing under the PCT for the filing of international applications as divisional applications of earlier international applications, with a view to taking the greatest possible advantage of the centralized processing offered by the international phase, particularly in cases where there had been a finding of lack of unity of invention. However, while there was no objection in principle to such a possibility, it was recalled that problems had been identified when such a proposal had been made in the past, in particular with regard to the added complexity involved, to the difficulty in according an international filing date in accordance with both Article 11 and the Paris Convention, and to the need for compliance with time limits for international search and international preliminary examination.

51. It was agreed that the International Bureau, in cooperation with the Delegation of the Netherlands, should further consider the matter and that any proposal which emerged would be considered by the Working Group at a future session.

Multiple Dependent Claims

52. The Representative of the EPO proposed to amend Rules 6.4(a) and 66.2(a), noting that the treatment in these Rules of "multiple dependent claims," and of multiple dependent claims depending on other multiple dependent claims, was unnecessarily complicated and might

usefully be simplified. It was agreed that the EPO should submit a written proposal for consideration by the Working Group.

Sequence Listings

53. Discussions were based on document PCT/R/WG/3/1, Annex I, item 5 (eliminate invitation for missing sequence listings).

54. The Representative of the EPO reported that about 50% of international applications containing disclosure of nucleotide and/or amino acid sequences were not accompanied by a sequence listing in computer readable form complying with the prescribed sequence listing standard and this made it impossible for the International Searching Authority to carry out a meaningful international search. The issuance of invitations under Rule 13*ter*.1(a)(ii) to furnish missing sequence listings or to correct defective listings was a burden on the Office, particularly as in some cases several invitations were necessary. The Representative therefore proposed that International Searching Authorities should no longer be obliged to issue invitations under that Rule, and suggested that there should be no obligation to search the international application if a sequence listing complying with the standard was not provided on the filing date or, if possible, the late filing of such sequence listing should result in the according of a later international filing date, similar to the case of late furnished drawings.

55. Several delegations and representatives of users opposed the proposals on the basis that applicants should continue to have the right to correct the formal defect of a missing or non-compliant sequence listing in computer readable form by furnishing such listing upon invitation by the Authority. It was noted that Rule 13*ter*.1(a)(ii) and (e) did not oblige the Authority to invite the applicant who had not done so to furnish a sequence listing in computer readable form complying with the required standard. However, if the Authority did not issue such invitation, it would have to carry out a full international search on the basis of the sequence listing that had been furnished (see Rule 13*ter*.1(c) and (e)).

56. With regard to the proposal to move the international filing date to the date on which a sequence listing in computer readable form complying with the standard was received by the Authority, noting that the purpose of the sequence listing in computer readable form was merely to allow the Authority to perform a meaningful search but not to disclose the invention, several delegations questioned whether the proposal was consistent with the filing date requirements of either the PCT or the PLT. It was noted that, for the purposes of disclosure, a sequence listing part had to be included in the description of the international application itself, and that Rule 20.2 already covered cases where sheets pertaining to that sequence listing part of the description were received after the international filing date.

57. In view of these objections and comments, the Working Group agreed not to proceed with the proposal. However, recognizing that it was desirable that sequence listings complying with the prescribed standard should be furnished together with the international application so as not to delay the start of the international search, it was agreed that the International Bureau should prepare a proposal which would permit Authorities to require the payment of a late furnishing fee where an invitation had to be issued under Rule 13*ter*.1(a)(ii) or (e).

58. The Working Group also agreed that, in order to facilitate the processing of sequence listings for the purposes of the international and the national phase of the PCT procedure, the International Bureau should further investigate the possibility of establishing a central

electronic deposit system for such listings. Under such a system, similar in certain ways to the system for the deposit of biological material with a depositary institution, a reference to deposited sequence listings would replace the need to include such listing in the description and to furnish such listings, in computer readable form, to Authorities and designated Offices.

Form of Amendments

59. The Representative of the EPO proposed that Rule 66.8(a) be amended to require the applicant to indicate the basis in the description for amendments rather than merely pointing out the difference from the sheets which had been replaced, which would make the process of examination of the amendments significantly easier. Furthermore, the representative proposed to amend Rule 66.8(b) so as to require the inclusion of sheets whose contents had been cancelled. This would render it unnecessary to specify the cancelled sheets in the international preliminary examination report under Rule 70.11, thus simplifying the production of reports. It was agreed that the EPO should submit a written proposal for consideration by the Working Group.

Time Limit for Response to a Written Opinion

60. The Delegation of Australia proposed that Rule 66.2(d) be amended so as to give International Preliminary Examining Authorities more discretion in fixing the time limit for response to a written opinion. It was agreed that the Delegation of Australia should submit a written proposal for consideration by the Working Group.

Electronic Transmission of International Search Report and International Preliminary Examination Report

61. Discussions were based on document PCT/R/WG/3/1, Annex I, item 18 (allow for electronic transmission of search/examination results).

62. The Working Group noted that it would be premature to make detailed proposals for the electronic transmission of search and examination results in advance of the implementation of electronic processing of international applications.

Copyright Issues Raised by the International Search and Preliminary Examination Procedure

63. Two delegations observed that the making and sending, by the International Searching Authority, of copies of documents cited in the international search report, as provided by Article 20(3) and Rule 44.3, could involve copyright infringement, in particular where it involved non-patent literature and the first digitization of a document. The International Bureau observed that the library community may also experience similar problems. It was agreed that the International Bureau, in cooperation with the Delegation of Canada and other Authorities, should study the matter with a view to having the matter considered by the appropriate body or bodies within WIPO.

Rectification of Obvious Errors

64. The Representative of the EPO proposed that Rule 91.1(b) be amended so as to refer to a "person skilled in the art" rather than "anyone" when determining whether a rectification offered by the applicant was "obvious" under Rule 91.1(b). Several delegations supported the proposal and also expressed the view that, in general, Rule 91 was unnecessarily strict. It was

agreed that the EPO and the International Bureau should work together to review Rule 91 and to submit a written proposal for consideration by the Working Group.

Irregularities in the Mail Service

65. The Representative of the EPO proposed that Rules 4.10 and/or 82 be amended so as to clarify that Article 48(1) would also apply to the 12 months priority period where the international application was received outside that period because of interruption in the mail service or unavoidable loss or delay in the mail. Several delegations supported the proposal and suggested that Rule 82, in particular Rule 82.2, should be reviewed more generally, with the aim of broadening its scope and adapting it better to the introduction of electronic filing of international applications. Moreover, related changes were proposed to be made to Rule 80.5, so as to take into account the fact that, in particular in geographically large countries, an Office may have different branch Offices in different parts of the country in different time zones and with different local holidays.

66. It was agreed that the Representative of the EPO and the Delegations of Australia, Canada and the United Kingdom, which had proposed further Rule changes along the lines just mentioned, should present written proposals for consideration by the Working Group.

International Form for National Phase Entry

67. Discussions were based on document PCT/R/WG/3/1, Annex I, item 11 (introduce international forms for national phase entry).

68. Several delegations and representatives of users supported the introduction of a standardized international form for entry into the national phase, including standard texts of declarations similar to those provided for in the case of the request form under Rule 4.17, on the understanding that the use of such a form by applicants would be optional and not a requirement for a valid national phase entry. The Working Group agreed that the International Bureau should prepare such a proposal.

Time Limit for National Phase Entry

69. Discussions were based on document PCT/R/WG/3/1, Annex II, item 19 (accommodate further deferral of national phase entry).

70. One delegation proposed that, in order to provide extra flexibility for applicants, the Treaty should be amended to provide for deferral of the time limit for entry into the national phase. While the proposal found some interest, it was opposed by a number of delegations on the grounds that it would increase uncertainty and thus upset the balance of interest between applicants and third parties. In addition, it was noted that the present provisions already permitted a Contracting State to provide for one or more such deferrals and that several States already did so. It was therefore agreed that the proposal should not be proceeded with at this stage.

Time Limit for Translations for National Phase

71. Discussions were based on document PCT/R/WG/3/1, Annex II, item 21 (defer time limits for submission of translations).

72. Several delegations and representatives of users stated that it would be desirable to permit applicants a further period of time, after the expiration of the period within which they must enter the national phase, for the filing of any required translation of the international application. At present, applicants had to decide whether to enter the national phase in States for which a translation was required significantly earlier than with regard to States where no such translation was required. Making more time available for furnishing of translations would also help to improve the quality of translations, to the benefit of Offices and third parties. It was noted that such extension was already granted by many designated Offices under their national laws in accordance with Article 22(3). On the other hand, some national laws presently did not allow for such extensions.

73. It was agreed that the matter should be considered further by the Working Group and that the International Bureau should present a draft proposal accordingly.

74. Concern was expressed by some delegations that, since the 30-month time limit under Articles 22 and 39 applied to several acts which may need to be performed by the applicant in order to enter the national phase, it might not be permissible to modify, under Article 47(2), that time limit in respect of only one of those acts, and suggested that revision of Articles 22 and 39 may be needed.

75. It was agreed that the proposals to be prepared by the International Bureau should, if possible, include alternative implementations by way of possible amendments of the Regulations and a possible modification of the time limits under Articles 22 and 39, and a solution for the long term by way of revision of Articles 22 and 39.

Status Information on National Phase Entry

76. Discussions were based on document PCT/R/WG/3/1, Annex I, item 12 (make available to third parties, from a central source, "status information" on whether and where international applications have entered the national phase).

77. Noting that this matter was being dealt with in the context of the Standing Committee on Information Technologies (SCIT), the Working Group agreed that progress in the SCIT discussions should be followed.

Prior Art Effect; Reservations Under Article 64(4)

78. Discussions were based on document PCT/R/WG/3/1, Annex II, item 28 (delete Article 64(4)).

79. Several delegations and representatives of users expressed the view that deletion of Article 64(4) would be of great benefit for applicants since it would put all international applications on an equal footing with regard to their prior art effect, of particular importance following the recent adoption of the overhaul of the designation system, under which all Contracting States will, generally, be designated in all international applications.

80. The Delegation of the United States of America stated that it could not support the proposal to delete Article 64(4) and expressed the view that the matter could not be discussed in isolation from other prior art related issues currently under discussion in other fora, in particular, the Standing Committee on the Law of Patents (SCP). The Delegation suggested

that the SCP rather than the Working Group would be the appropriate forum to discuss this matter which, in its view, was of a substantive nature.

81. The Working Group agreed that further consideration of this matter, while it would be within the competence of the Working Group, should be deferred until progress had been made in discussions of prior art issues by the SCP. The possible revision of Article 64 was in any event a long term matter. It was noted that consideration of the question of prior art effect, so far as the PCT was concerned, would also necessitate a review of the scope of and interaction between Articles 11(3) and 27(5) with Article 64(4), and of the practices followed by certain Offices in this regard.

82. As a related matter, the Working Group agreed that the International Bureau should look into the possibility of amending Rule 48 so as to provide for the electronic publication by the International Bureau of translations, furnished by the applicant, of the international application.

Alignment of PCT with the TRIPS Agreement

83. Discussions were based on document PCT/R/WG/3/1, Annex II, item 26 (align the PCT with the TRIPS agreement).

84. The Working Group agreed that the matter should not be included in the work program of the Working Group at this stage but should be further considered in the longer term context of a possible revision of the Treaty itself.

Technical Assistance

85. Discussions were based on document PCT/R/WG/3/1, Annex I, item 20 (re-energize technical assistance).

86. The Working Group agreed that technical assistance, as envisaged by Article 51, should be provided to assist smaller Offices in respect of changes in procedures and practices, including the enhanced international search and preliminary examination procedure adopted by the Assembly, and to facilitate better use of international search and preliminary examination reports in the States concerned. The Working Group noted with satisfaction the confirmation by the International Bureau that this was a matter of high priority within WIPO's cooperation for development program.

International Search and Preliminary Examination

87. Discussions were based on document PCT/R/WG/3/1, Annex I, item 7 (oblige applicant to file the demand together with the request), and Annex II, items 5 (eliminate distinction between national/international application), 8 and 13 (allow for multiple international searches and international preliminary examinations), 9 and 15 (combine international search and international preliminary examination), 11 (make optimal use of the available ISAs (create "virtual ISA"), 14 (eliminate the concept of demands), 16 (review confidential nature of the IPER), 17 (allow for the filing of the demand together with the request) and 34 (positive examination results in certain PCT Authorities binding to certain Contracting States). See also the discussion of a common quality framework for international search and preliminary examination at paragraphs 101 to 111, below.

88. Some delegations and one representative expressed the view that it would be preferable to study the impact of the new enhanced international search and preliminary examination system on the overall PCT system and, in particular, on the use by applicants of the international preliminary examination procedure, before looking further into a possible merger of international search and international preliminary examination. One delegation felt that it would be preferable to avoid further enhancements of the international search and preliminary examination procedure in the international phase, leaving outstanding matters for resolution in the national phase.

89. A majority of delegations and representatives, however, were of the opinion that the Working Group's future work should include investigation of the possibility of further integrating the international search and international preliminary examination procedures with the aim of further strengthening the international phase, thus reducing the need for duplication of work by designated Offices during the national phase and providing a more useful and final result of the international phase for use by designated Offices.

90. Noting that the role and the use of international search and preliminary examination, and of the resulting products (international search report and international preliminary examination report), had changed over time and would continue to change in the near future, in particular following the recent adoption of the enhanced international search and preliminary examination system, several delegations and representatives of users expressed the view that a bold and fresh look should be taken at the overall approach to international search and preliminary examination, including possibilities of providing for additional services such as supplementary searches or "top-up" searches (towards the end of the international phase), "further international processing" upon request by the applicant, and international preliminary examination upon request by third parties. Several delegations also suggested a greater accommodation in the PCT procedure of the possibility for an Office to simultaneously process a national application filed with it and a corresponding international application in respect of which it carried out international search and preliminary examination.

91. Several delegations, including some representing smaller non-examining designated Offices in developing countries, stressed the need to further strengthen the international phase, in particular following the recent adoption of an enhanced international search and preliminary examination system, so as to ensure that designated Offices, and particularly smaller ones, would derive greater benefits from the results of the international phase.

92. Several delegations and representatives of users stressed the need, should the overall approach to international search and international preliminary examination be changed, to maintain a sufficiently flexible system which would allow the user to choose between different options and to maintain, in particular, a system which would allow the user to choose to receive the international search report before international publication of the international application concerned and before having to decide, with the incurring of further costs, whether or not to request international preliminary examination and whether or not to proceed into the national phase.

93. The Delegation of Mexico expressed its concern that some of the proposals for possible future development that had been discussed in this session were not covered by the mandate given to the Working Group by the Assembly on the Committee's recommendation, some were new proposals and others were matters that the Committee had recommended, at its first session, not to be referred to the Working Group. After some discussion about the decision of

the Assembly in September-October 2002, the Delegation stated that, in the interests of flexibility and so as to make progress on the issues at hand, it did not wish to delay discussion of those matters by the Working Group, but reserved its position as to the possibility of later drawing the Committee's attention to the matter.

94. The Working Group agreed that the Secretariat should prepare for consideration at its next session an options paper on possible future development of the international search and preliminary examination system, including options whereby designated Offices, particularly smaller designated Offices, could derive greater benefit from the results of the international phase.

Unity of Invention

95. Discussions were based on document PCT/R/WG/3/1, Annex I, items 4 (simplify the non-unity procedure before the ISA) and 10 (simplify the non-unity procedure before the IPEA), and Annex II, items 10 and 18 (eliminate unity of invention procedure).

96. Certain delegations proposed the abolition of the protest system before International Searching Authorities under Rule 40 and International Preliminary Examining Authorities under Rule 68, with a view to reducing the workload of the Authorities. The majority of delegations and representatives of users, while recognizing that the procedures under Rules 40 and 68 were cumbersome, opposed the proposal to eliminate the protest procedure altogether on the grounds that it would remove the applicant's right to challenge a finding of non-unity of invention by an Authority, thus increasing the burden on applicants and designated Offices in the national phase and resulting in incomplete searches and examinations of a greater number of international applications. It was suggested that the problem of non-unity in excessively complex or "mega-"applications would be better dealt with by other measures such as by introducing an additional fee based on the number of claims present in the application.

97. The Working Group agreed that the International Bureau should prepare a proposal for simplifying the protest procedure under Rules 40 and 68. It was also agreed that, in order to discover more information about the experience of Authorities regarding this issue, the International Bureau should send out a questionnaire asking them to indicate how many invitations they issued per year under Rules 40 and 68, how many additional fees were paid under protest, and how many of the invitations were in respect of applications containing claims to more than, say, 10 inventions.

Greater Regionalization of International Searching and Preliminary Examining Authorities

98. Discussions were based on document PCT/R/WG/3/1, Annex I, items 17 (regionalize current International Searching and Preliminary Examining Authorities) and 19 (create Latin American and Caribbean Patent Office and give status of ISA/IPEA).

99. Two delegations reported that the feasibility of establishing a Latin American and Caribbean Patent Office was still being studied. The creation of such an Office would encourage innovation and obtaining patent rights in the region, but there were possible difficulties involved, including the need to cater for a multiplicity of languages.

100. The Working Group agreed that, since the objectives of uniformity of standards and greater exploitation of the results of work undertaken in other Offices were to be addressed in

the context of revised PCT International Search and Preliminary Examination Guidelines and the program for sustained quality and efficiency discussed in paragraphs 101 to 111, below, there was no need at present to pursue proposals for greater regionalization of Authorities. It was observed that it might not be possible to establish an International Searching and Preliminary Examining Authority in every region. One delegation noted that there appeared to be no present moves in the direction of establishing “a single International Searching Authority” as contemplated by Article 16(2), but it was agreed that the International Bureau need not prepare a draft proposal for revision of that Article.

COMMON QUALITY FRAMEWORK FOR INTERNATIONAL SEARCH AND PRELIMINARY EXAMINATION

101. Discussions were based on document PCT/R/WG/3/4 containing proposals by the Delegation of the United Kingdom for “a program for sustained quality and efficiency.”

102. The Delegation introduced its proposal, stating that a common quality framework was now essential because of workload problems, which were stretching the resources of even medium-sized Offices, such as that of the United Kingdom. Offices were, unfortunately, still reluctant to rely on work done by other Offices, because of a lack of confidence. An agreed mechanism underpinning the quality of work performed by Offices would help examining Offices to trust work done elsewhere and would reduce costs and difficulties for applicants. Furthermore, it would give non-examining Offices, which had no choice but to make use of the work of other Offices, more confidence in the effectiveness of the system. The Delegation suggested that such a mechanism would require three parts:

(i) a definition of what the work required (setting of search and examination standards);

(ii) a set of standards for management of an Office, which ensured that the staff performing the work were properly trained and had the necessary support to do the job, together with a quality assessment mechanism, such as procedures for internal review and customer feedback, to ensure it;

(iii) a validation mechanism, which checked and demonstrated to others that the first two parts were being done properly; this might include a system with assessment jointly by the Authorities.

103. The Delegation of the United Kingdom further offered to coordinate work aimed at developing a program for sustained quality and efficiency as it had suggested.

104. There was general agreement that the quality of international search and preliminary examination was fundamental to the functioning and the success of the PCT system, though it was pointed out that Offices could not be obliged to make use of a quality framework; participation could only be voluntary. There was also general agreement that combined PCT International Search and Preliminary Examination Guidelines would be the best place in which to define the necessary international search and preliminary examination standards and that the existing Guidelines should be modified accordingly to contain such standards. The Working Group noted that such work had already been commenced by the International Bureau and Authorities with a view to consideration of draft proposals by the Meeting of International Authorities at its next session to be held in February 2003.

105. While some delegations indicated that their views were preliminary, pending further consultation and consideration, it was apparent that there were differences on what should be done to ensure that a uniformly high quality of work was achieved. There was support by many delegations for an approach such as that outlined in document PCT/R/WG/3/4, including some form of external validation mechanism. Those delegations generally felt that an open system would provide benefits both to Offices and to applicants. One delegation suggested that a system based on ISO 9000 might be used. Some delegations suggested that Rules 36 and 63 might be amended to include the requirements of whatever form of quality system might be agreed.

106. Other delegations, however, expressed doubts about the idea of an external review panel assessing the work of the Authorities and suggested instead that internal validation mechanisms should be relied on. With regard to any proposed external review panel, there were questions as to whether it was appropriate, as to its composition and methods of review, as to how its results should be used and reported, and as to what sanctions should be available in the event that adverse findings were made about the work of an Authority. It was stressed that the Authorities were aware of the need for quality in their own work and of the needs of the applicants and designated and elected Offices.

107. Some delegations and representatives of users also suggested that user choice was an important part of the solution: if all Authorities had universal competence, then users could decide for themselves where the best service was available. It was, however, noted that many applicants at present did not have such a choice as to the Authorities they wished to use.

108. Several delegations representing smaller and non-examining Offices stressed the particular importance of the quality of international searches and international preliminary examinations, since they often relied solely on these in decisions as to whether or not to grant rights. For the same reason, those delegations expressed their hope that, following the introduction of the enhanced international search and preliminary examination system, the use of the international preliminary examination procedure under Chapter II would not be allowed to “fade” since they did not have the capacity to do examination work which had not been completed in the international phase.

109. Several delegations and representatives of users stressed the importance to applicants of having the results of the international search in sufficient time to decide whether to withdraw the international application and whether to enter the national phase.

110. Other comments and suggestions included that:

(i) a common central database containing the entire PCT minimum documentation and accessible by all Authorities would help to ensure consistency;

(ii) mechanisms could usefully be provided for feedback from designated and elected Offices, as well as from applicants and their representatives who received searches carried out by different Offices on applications from the same patent family;

(iii) it may be useful for the International Bureau to arrange meetings or seminars at which Offices could exchange experiences in quality control;

(iv) an extensive examiner exchange program would encourage the development of consistent standards and practices;

(v) “top-up” searches might be introduced into the PCT system, providing for an additional search, late in the international phase, for potentially relevant material which had not yet been included in the relevant search databases at the time of the main international search;

(vi) in relation to the reference to “inventive concept(s)” in the suggested quality criteria in the Appendix, the search could consider the limitations of every claim, rather than a general inventive concept;

(vii) users would benefit from having a single search of a quality that could be relied on, without having to pay several Offices to obtain separate searches from each;

(viii) the definition and monitoring of quality may be a matter to be dealt with in the agreements between the International Bureau and the various Authorities.

111. The Working Group agreed that work in this area should continue along the following two paths:

(a) The standards to which PCT search and examination should conform should be established in the PCT International Search and Preliminary Examination Guidelines. Work should continue on revision of those Guidelines, which would be needed by January 1, 2004, when the recently adopted enhanced international search and preliminary examination system came into effect.

(b) A “virtual” task force should be established to consider which of the other points noted above, or in document PCT/R/WG/3/4, should be taken forward and how. The International Bureau would set up a page on its Web site, open to registration by any State or organization represented in the Working Group, with an electronic forum and mailing list to facilitate discussion. The work of the task force would be coordinated by the United Kingdom. The results of the work of the task force would be reported to the Working Group and to the Meeting of International Authorities, the first such report being requested by the end of April 2003.

FUTURE WORK

112. The Working Group agreed that specific proposals would be prepared, as mentioned above, by the Secretariat and/or the delegations specified, taking into account the discussion and conclusions reflected in this summary and other points of detail noted by the Secretariat, for further consideration by the Working Group, where possible at its next session. Proposals for consideration in the short term would primarily be dealt with by way of amending the Regulations, but longer term proposals involving revision of the Treaty should also be identified and draft provisions prepared.

113. The Working Group also agreed that further work would be undertaken on the question of a common quality framework for international search and preliminary examination as outlined in paragraph 111.

114. The Working Group further agreed that the Secretariat would prepare an options paper on possible future development of the international search and preliminary examination system, including options for a system whereby designated Offices, particularly smaller

designated Offices, could derive greater benefit from the results of the international phase. Working papers would, where appropriate, be made available on the PCT reform electronic forum for comment and discussion prior to the next session.

NEXT SESSION

115. The International Bureau indicated that the fourth session of the Working Group was tentatively scheduled for May 19 to 24, 2003.

116. This summary was issued by the Chair after taking into account the comments of the Working Group on the draft version.

[Annex I follows]

ANNEXE I/ANNEX I

LISTE DES PARTICIPANTS/
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[L'annexe II suit/Annex II follows]

ANNEX II

LIST OF WORKING DOCUMENTS³

- PCT/R/WG/3/1 Outstanding proposals for reform of the Patent Cooperation Treaty (PCT)
(document prepared by the International Bureau)
- PCT/R/WG/3/2 Restoration of the right of priority; Correction and addition of priority claims
(document prepared by the International Bureau)
- PCT/R/WG/3/2 Add.1 EPO proposals on the criteria for restoration of right of priority (proposed new Rule 26bis.3(a))
(proposals by the European Patent Office)
- PCT/R/WG/3/3 Options for a possible revision of the Patent Cooperation Treaty (PCT)
(document prepared by the International Bureau)
- PCT/R/WG/3/3 Add.1 Options for a possible revision of the PCT: EPO response to document PCT/R/WG/3/3
(proposals by the European Patent Office)
- PCT/R/WG/3/4 Reform of the PCT: Proposal by the United Kingdom
(A program for sustained quality and efficiency)
(document prepared by the International Bureau)

[End of Annex II and of document]

³ The working documents are available on WIPO's Web site via <http://www.wipo.int/pct/en/meetings>.