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INTERNATIONAL PATENT COOPERATION UNION
(PCT UNION)

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

Fifth Session
Geneva, November 17 to 21, 2003

SUMMARY OF THE SESSION

by the Chair

INTRODUCTION

1. Mr. Francis Gurry, Assistant Director General, on behalf of the Director General, opened the session and welcomed the participants.
2. The list of participants is contained in the Annex to this document.
3. The session's proceedings were informal and there was no formal report. This summary, prepared under the responsibility of the Chair, 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.¹

¹ The working documents for the session are available on WIPO's Website via <http://www.wipo.int/pct/en/meetings>.

ELECTION OF A CHAIR AND TWO VICE-CHAIRS

4. The Working Group unanimously elected Mr. Alan Troicuk (Canada) as Chair for the session and Mr. Yin Xintian (China) and Mr. Fabián Ramón Salazar García (Mexico) as Vice-Chairs.

SIMPLIFIED PROTEST PROCEDURE IN CASE OF NON-UNITY OF INVENTION

5. Discussions were based on document PCT/R/WG/5/1, Annex II.

6. The Working Group was in general agreement with the proposed amendments of the Regulations.² Several representatives of users expressed a preference for the retention of the current two-stage review which applied before certain International Searching and Preliminary Examining Authorities, noting that, under the current system, the payment of a fee for the examination of a protest could only be required after a prior review of the justification for the invitation to pay additional fees, whereas, under the proposed new system, it could be required without such prior review.

7. The proposed amendments of the Regulations set out in Annex II to document PCT/R/WG/5/1 were approved by the Working Group with a view to their submission to the Assembly of the PCT Union (“the Assembly”) in September 2004, subject to the comments and clarifications appearing in the following paragraphs and to possible further drafting changes to be made by the International Bureau.

Rules 40.1 and 68.2

8. The Working Group agreed that the time limits under Rules 40.1(ii) and (iii) and 68.2(iii) and (v) should be fixed at one month from the date of the invitations referred to in those Rules.

Rules 40.2 and 68.3

9. The Working Group agreed that Rules 40.2(c), (d) and (e) and 68.3(c), (d) and (e) should be amended to refer to a “review body” constituted in the framework of the International Searching or Preliminary Examining Authority rather than a “board of appeal or other review body,” noting that a board of appeal would be a review body within the meaning of the Rules.

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,” “PLT Rules” and “PLT Notes” are to those of the Patent Law Treaty (PLT), the Regulations under the PLT, and the Explanatory Notes on the PLT and the Regulations under the PLT.

10. The Working Group agreed that Rules 40.2(d) and 68.3(d) should not be deleted, as proposed in document PCT/R/WG/5/1, Annex II, but rather should be amended as follows:

“(d) The membership of the review body referred to in paragraph (c) may include, but shall not be limited to, the person who made the decision which is the subject of the protest. ~~The three-member board, special instance or competent higher authority, referred to in paragraph (e), shall not comprise any person who made the decision which is the subject of the protest.~~”

11. The Working Group agreed that the second sentence in each of Rules 40.2(e) and 68.3(e) should be amended by replacing the words “the protest shall be considered withdrawn” with the words “the protest shall be considered not to have been made.”

FURTHER CONSEQUENTIAL AMENDMENTS

12. Discussions were based on document PCT/R/WG/5/10.

13. One delegation questioned whether Rules 53.9(b) and 69.1(d), instead of being deleted, as proposed in document PCT/R/WG/5/10, should rather be amended to limit the application of those Rules to the case where, in accordance with Rule 69.1(b), the national Office or intergovernmental organization that acted as both International Searching Authority and International Preliminary Examining Authority wished to start the international preliminary examination at the same time as the international search.

14. The Working Group agreed that the Secretariat should study the matter further, with a view to submitting a revised proposal, if needed, to the Working Group at its next session.

PUBLICATION OF TRANSLATION FURNISHED BY THE APPLICANT

15. Discussions were based on document PCT/R/WG/5/1, Annex III.

16. The Secretariat explained that further study and consultation was needed before a revised proposal providing for publication of translations of an international application furnished by the applicant could be prepared. The revised proposal should take into account, in particular, the implications of provisions in national laws relating to prior art effect of international applications.

17. The Working Group agreed to revert to the matter at its next session.

INTERNATIONAL FORM FOR NATIONAL PHASE ENTRY

18. Discussions were based on document PCT/R/WG/5/1, Annex IV.

19. The Working Group noted that the use of a form for entry into the national phase could not be insisted upon by any designated Office, but agreed that the provision of streamlined means for entering the national phase was a possibility worth further consideration.

20. Some delegations noted that their Offices' national phase entry forms required extensive details and that there was no uniformity as to the contents of the forms used by the various Offices, and felt that it would thus not be practicable to establish a form which would include all such details for all Offices. It was stated that the legal consequences of non-fulfillment of particular requirements were not necessarily the same before all designated Offices. One representative of users suggested that the use of a standardized form would be of limited value since local attorneys were generally engaged to prosecute entry into the national phase.

21. However, some other delegations and several representatives of users felt that a simple standardized form which could optionally be used to enter the national phase before a number of designated Offices, while noting that further details would have to be provided later to certain Offices, would be useful for applicants and for at least some Offices. It was noted that a form acceptable as a minimum requirement could also have a harmonizing effect on national phase entry requirements in the longer term and that such a form would have to be user-friendly and functional. Further detailed discussion by the Working Group was not possible without having a draft of the form before it. Another possibility for streamlining national phase entry might be to establish a centrally available electronic means of completing different national phase entry forms to be used in proceeding before a number of designated Offices.

22. The Working Group agreed that further consideration should be given at a subsequent session to the possibility of providing streamlined means for entering the national phase, and invited the Secretariat to make proposals including a suitable draft form.

FORMALITIES CHECKING UNDER THE PCT

23. Discussions were based on document PCT/R/WG/5/4.

24. The Secretariat noted that there was an ongoing review of procedures within the International Bureau, drawing especially on the experience of its Receiving Office Section and its interaction with the International Bureau in its specific functions under the Treaty. A number of possibilities for improvement had been noted, particularly in respect of the use of certain Forms which appeared to be unnecessary. It was hoped that proposals would emerge soon in relation to this exercise, in parallel with the work of the Working Group.

25. Several delegations and representatives of users expressed gratitude to the International Bureau for the review of formalities checking that it had undertaken, as outlined in document PCT/R/WG/5/4, and for the information provided on the types and frequency of defects noted which would greatly aid discussions. Some delegations felt that the division of labor between the receiving Offices and the International Bureau as envisaged by the founders of the PCT was still appropriate and added value to the system, in particular from the applicant's point of view.

26. Other delegations called for the elimination of duplicative work by the International Bureau in relation to the work of the receiving Offices. One delegation expressed the view that the International Bureau should only check international applications for compliance with Article 11 and for defects which needed to be corrected in view of international publication. Others stated that duplicative checks did not improve quality overall since each person involved was likely to assume that it was someone else's responsibility to discover defects, and suggested that it would be more appropriate for the International Bureau to carry out a

limited quality control of the work of receiving Offices which would involve only a sampling rather than a systematic review of all international applications. One delegation suggested that the formulation of a uniform quality standard for receiving Offices should be considered, with the International Bureau reviewing the application of that standard by receiving Offices.

27. The Working Group agreed to defer consideration of possible changes in respect of formalities checking by the International Bureau until experience had been gained of the extensive Rule changes that were due to enter into force in January 2004 and of the recently introduced possibility for electronic filing, which should reduce the incidence of formality defects, noting also that the International Bureau was conducting a pilot study on formalities checking processes. It was agreed that the matter would be revisited in one year, at which time the International Bureau would submit a status report on the matter for the Working Group's consideration.

RESTORATION OF THE RIGHT OF PRIORITY

28. Discussions were based on document PCT/R/WG/5/7.

29. Many delegations and representatives of users welcomed the general approach taken in the document, noting that it would further align the provisions of the PCT with those of the PLT. Certain delegations emphasized the need to ensure that the reservation provision in respect of the effect in the national phase for their countries was adequate. While some delegations stated that they would have preferred a simpler approach whereby the same criterion for restoration of the priority right was applied by all Offices, it was recognized that agreement on a single criterion was not achievable at the present time and that the proposed approach was thus a good compromise. Several delegations and representatives of users expressed the hope that a clearer form of drafting could be found to make the numerous possibilities involved easier to understand.

30. One user representative hoped that a way could be found, possibly by filing with the receiving Office of the International Bureau, to afford applicants the choice of having either the "due care" criterion or the "unintentionality" criterion applied during the international phase. Two delegations confirmed that their national Offices provided such a choice under national law and that they also intended to do so in their capacity as PCT receiving Offices.

31. Several delegations expressed concern that inclusion of provisions relating to the restoration of the right of priority may conflict with Articles 8(2)(a) and 2(xi) which related the terms "priority claim" and "priority date" to Article 4 of the Paris Convention, which provided for a priority period of 12 months with no provision for restoration where that period was exceeded. Two delegations felt that the introduction of a restoration provision under the PCT would represent such a fundamental change to the system that it ought to be addressed in the Articles of the Treaty itself rather than in the Regulations.

32. The Working Group noted that Rule 4.10 already allowed applicants to claim the priority, in international applications, of earlier applications filed in countries which were not members of the Paris Convention but were members of the World Trade Organization (WTO). Rule 4.10(d) provided the possibility for transitional reservations as to the application of the provision concerned in order to allow Contracting States as designated States to adapt their national laws in order to conform to the provision when it had been adopted by the Assembly. A similar approach could be provided in relation to the changes now under consideration. One delegation expressed its concern that, if a significant number

of States were to take advantage of such a transitional reservation provision, the changes would lose much of their effectiveness. Other delegations requested the inclusion of a further transitional reservation provision for receiving Offices whose applicable national law was not compatible with the proposed amendments.

33. One delegation suggested that the term “priority period” should be defined for the purposes of the proposed amendments. It was noted that the same term was used in the PLT and that it derived directly from the Paris Convention.

34. The Working Group noted that, under the proposals, the claimed priority date would be used throughout the international phase for the purpose of calculating time limits (for example, those for international publication and national phase entry), even if restoration of the right of priority was not requested by the applicant during the international phase or if restoration was requested but refused by the receiving Office, provided that the international application was filed within two months from the date on which the priority period expired. The Working Group also noted that such retention of a priority claim did not affect the question of relevant prior art for the purposes of the international search under Rule 33, since the relevant date for the purposes of the international search was in any case the international filing date. It was agreed, however, that Rule 33.1(c) should be reviewed with a view to specifically drawing attention, in the international search report, to written disclosures published within 12 to 14 months prior to the international filing date.

35. The Working Group agreed to refer the question of relevant prior art for the purposes of the written opinion of the International Searching Authority (Rule 43*bis*.1) and the international preliminary examination (Rule 64) to the Meeting of International Authorities under the PCT for consideration via its electronic forum, with a view to the development of a proposal for submission to the next session of the Working Group. It was noted that item (ii) of Rule 64.1(b), relating to cases where the international application “validly” claimed the priority of an earlier application might need to be reviewed in the light of the proposed amendments.

36. One user representative pointed out that the term of a patent was calculated, in most jurisdictions, from the international filing date, and that allowing priority to be claimed up to 14 months from the filing date of an earlier application would, in effect, enable an extension of term of up to two months. The representative accordingly suggested that restoration be subject to a disclaimer by the applicant of such an extension of term.

37. In response to a suggestion by one delegation that the terminology be changed to refer to the “restoration of the right to claim priority” rather than “restoration of the right of priority,” the Secretariat recalled that this matter had been discussed extensively at previous sessions of the Working Group and that use of the term “right of priority” had been agreed, noting that it was used in the PLT.

38. The Working Group agreed that the approach taken in the proposals should be further developed and invited the Secretariat to prepare revised proposals for consideration at its next session, taking into account the matters noted above and the comments and suggestions as to particular provisions noted in the following paragraphs.

Rule 4.10

39. The Secretariat explained that the proposal to delete the words “, being a date falling within the period of 12 months preceding the international filing date” in Rule 4.10(a)(i) was intended to reflect the distinction between an invitation to correct a defect in a priority claim and an invitation to request restoration of a right of priority. However, on further reflection, it was apparent that this proposal would need to be reconsidered in order to ensure that an applicant could be invited to correct a priority claim which erroneously indicated a filing date of the earlier application being later than the international filing date.

Rule 26bis.2

40. One delegation suggested that it would be more appropriate to “notify” the applicant of the possibility of requesting the restoration of the right of priority than to “invite” the applicant to submit a request for such restoration.

41. One delegation pointed out that no invitation to submit a request for restoration of the right of priority should be needed where the applicant had already submitted such a request or if the time limit for making such a request had expired.

42. The Working Group agreed that the time limit under Rule 26bis.2(a) should be 14 months from the priority date (or two months from the date on which the priority period expired; see paragraph 45, below) or one month from the date of the invitation, whichever expired later.

43. One delegation stated that the use of the term “canceled” was not appropriate in Rule 26bis.2(b) to (d).

44. Several delegations were of the opinion that information concerning a priority claim that has been canceled should be published in all cases under Rule 26bis.2(d), and not only upon request made by the applicant.

Rule 26bis.3

45. There was no support for the suggestion made by one delegation that the period for submitting a request for restoration of a right of priority under Rule 26bis.3(a) should, consistently with the time limit for correcting a priority claim under Rule 26bis.2(b), be increased to 16 months from the priority date. However, it was agreed that the way in which the time limit was expressed in item (i) of Rule 26bis.3(a) (“14 months from the date on which the earlier application was filed”) and in the chapeau of that Rule (“two months from [the date on which the priority period expired]”) should be made consistent, in particular taking into account the possibility that the last day of the priority period might fall on an official holiday or a non-working day.

46. Several delegations and a representative of users suggested that the International Bureau should review decisions under Rule 26bis.3(a)(iii) with a view to establishing a quality standard applicable to all receiving Offices. They also suggested that, in order to promote uniform standards, the terms “due care” and “unintentional” as used in that Rule should be defined or at least explained in the Regulations or guidelines. The Working Group agreed that the Secretariat should consider this matter further.

47. Several delegations and representatives of users supported a suggestion by one delegation that, in order to promote consistency of standards, copies of key decisions of Offices concerning requests for restoration based on the “due care” and “unintentionality” criteria should be made available in a central depository for consultation by Offices, applicants and third parties. One delegation proposed that the said central depository could be supplemented by relevant national legal provisions on the criteria used. The Secretariat agreed that such a facility could be made available on WIPO’s Website.

48. There was no support for the suggestion of one representative of users that the Rules should prescribe a maximum fee for a request for restoration of the right of priority. The Working Group noted that, under Rule 26bis.3(c), an Office which provided for restoration on both the criterion of “unintentionality” and the criterion of “due care” would be free to charge different fees in respect of the two cases.

49. With regard to the possibility for the receiving Office to require that a declaration or other evidence in support of the statement of reasons be furnished under Rule 26bis.3(d), one delegation favored restoration of the right of priority on the basis of a simple statement by the applicant that the failure to comply with the priority period was unintentional. The delegation suggested that such a statement should also be sufficient for restoration on the “unintentionality” criterion under the PCT procedure and that this be made clear, for example, in the Administrative Instructions. Several delegations indicated that under their legislation a formal declaration and possibly the furnishing of evidence would be required rather than a simple statement, while other delegations observed that they had as yet no practice in this area. After some discussion, it was agreed that the question of what information or evidence each receiving Office was entitled to require in support of a request for restoration of the right of priority should be left to national law and practice.

50. One delegation suggested that Rule 26bis.3(d) should be worded so as to encourage applicants to file evidence required under Rule 26bis.3(a)(ii) as soon as possible, preferably together with the filing of the application. In addition, the receiving Office should be permitted to combine the giving of an opportunity to make observations on an intended refusal provided for in Rule 26bis.3(e) with an invitation to file evidence under Rule 26bis.3(d).

51. In reply to a question by a representative of users, the Secretariat confirmed that, under Rule 26bis.3(g), information on the criterion or criteria applied by each Contracting State would be published in the PCT Gazette as well as in the PCT Applicant’s Guide and the PCT Newsletter.

Rule 49ter.1

52. A suggestion by one delegation and a representative of users that Rule 49ter.1(c) should be deleted to ensure that a restoration of the right of priority by a receiving Office could not be reversed in the national phase was opposed by another delegation. In reply to a query by a representative of users, the International Bureau explained that the reference to “reasonable doubts” was modeled on terminology used in the PLT.

53. One representative of users suggested that the word “only” should be added before the words “if it has reasonable doubts” in Rule 49ter.1(c). The representative also suggested that wording similar to that used in Rule 51bis.2(b) be considered.

54. One delegation observed that Rule 49ter.1(c) was directed only to designated Offices whereas other provisions of Rule 49ter were directed, more generally, to designated States. The Secretariat suggested that the wording used throughout Rule 49ter should be reviewed for consistency and to ensure that it was clear what principles would need to be applied under the national law in general.

55. The Working Group agreed that a designated Office should not be permitted under Rule 49ter.1(c) to review a decision of the receiving Office to restore a right of priority merely because the information or evidence required by that receiving Office was not the same kind of information or evidence as that required by the designated Office under its national law. Instead, a review under that Rule should only be possible where the designated Office had reasonable doubts as to whether the decision of the receiving Office to restore the right of priority based on that information or evidence was correct. The Secretariat noted that the use of the term “reasonable doubts” in this context was modeled on wording used in the PLT.

Rule 49ter.2

56. One delegation suggested that a request for restoration of the right of priority which has been refused by the receiving Office under Rule 26bis should automatically be considered to be pending before each designated Office.

57. One delegation suggested that Rule 49ter.2(b) should be worded so as to encourage applicants to file evidence required under Rule 49ter.2(b)(ii) as soon as possible, preferably together with the filing of the application. In addition, the designated Office should be permitted to combine the giving of an opportunity to make observations on an intended refusal provided for in Rule 49ter.2(c) with an invitation to file evidence under Rule 49ter.2(b)(ii).

58. One delegation stated that, for consistency with Article 27(4), the word “shall” should be replaced by “may” in Rule 49ter.2(d).

59. One delegation suggested that consideration should be given as to whether the term “that provision,” which referred to any of the provisions of paragraph (a), was appropriate in Rule 49ter.2(f), having regard to other provisions of Rule 49ter.2, for example, paragraph (e).

60. There was no support for the suggestion made by one delegation that the time limit under Rule 49ter.2(a)(i) should be the applicable time limit under Article 22 instead of one month from that applicable time limit.

61. One representative of users pointed out that a Contracting State which did not provide for restoration of the right of priority in respect of national applications could nevertheless provide for such restoration in respect of international applications in accordance with Rule 49ter.2, in which case it would not need to make a reservation under paragraph (f) of that Rule.

62. In reply to a question by a delegation, the Secretariat confirmed that it was implicit in Rule 49ter.2(a) that the right of priority might be restored by one designated Office but not by others. The International Bureau observed that it was already inherent from the territorial

nature of patents, and the differences in national patent laws, that the scope and validity of a patent granted on a particular international application would not necessarily be the same in all Contracting States.

LATE FURNISHING FEE FOR LATE SUBMISSION OF SEQUENCE LISTINGS

63. Discussions were based on document PCT/R/WG/5/1, Annex I.

64. In introducing the proposals for the introduction of a late furnishing fee for late submission of sequence listings, the Representative of the European Patent Office (EPO) stressed their significance in view of the fact that sequence listings in electronic form for search purposes were furnished late in the case of about 50% of all international applications containing disclosure of sequences. This caused significant difficulties and delays in the international search of these applications. The Representative expressed the view that it was necessary both to cover the additional administrative cost involved and to provide an incentive for applicants to furnish sequence listings complying with the relevant standard at the earliest time possible.

Rules 13ter.1(a) and (a-bis)

65. There was general support for the concept of allowing the International Searching Authority to require a late furnishing fee where it needed to invite the applicant to furnish a copy of the sequence listing complying with the relevant standard, whether the listing was in electronic or (in rare cases) paper form. The Working Group noted, in the latter context, that a further amendment of Rule 13ter.1(a)(i) that had been agreed at its fourth session should also be included, namely, the insertion after the words “furnish to it” of the words “and to pay, where applicable, the late furnishing fee referred to in paragraph (a-bis).” The Working Group also agreed, consequential on that change, that Rule 13ter.1(a-bis) should be further amended by inserting “(a)(i) or” before “(a)(ii)” in both instances.

66. The Working Group agreed that, where sequence listings in both paper and electronic forms were required under Rule 13ter.1(a)(i) and (ii), the payment of only one late furnishing fee would be required.

67. One delegation suggested that the late furnishing fee should be payable in each case where the necessary sequence listing was not provided on the international filing date. A number of other delegations, however, considered that it was not appropriate to require the payment of a late furnishing fee where the listing was received before the International Searching Authority had started the international search, noting that real difficulties in processing would only be caused by late furnished sequence listings where the search had already started.

68. The Representative of the EPO proposed that a maximum amount of the late furnishing fee be fixed, and that the amount should be 25% of the international search fee. A considerable number of delegations and representatives of users expressed agreement with the proposal to introduce a maximum amount. Certain delegations believed that the fixing of fees associated with the international search should be left to the discretion of the International Searching Authorities. Some delegations supported the proposal that the maximum be 25% of the international search fee. Others considered that the maximum should be 25% of the international filing fee, referring to the need for uniformity amongst Authorities as well as consistency with the maximum amount of the late furnishing fee payable to receiving Offices

under Rule 12.3(d) and (e) in the case of late furnishing of a translation needed for the purposes of international search. One delegation suggested that the amount was largely arbitrary, since there had been no study on how the level of the fee related to the degree of burden involved for Authorities.

Rule 13ter.1(c)

69. The Working Group agreed that, if a sequence listing and any required late furnishing fee were received after the time limit fixed in the invitation but before the International Searching Authority had declared that a meaningful search could not be carried out, the Authority should use that listing. While one representative of users felt that a specific statement to this effect may be useful, the Working Group concluded that the words “shall not be required to search” provided sufficient flexibility to allow the search to be carried out anyway.

70. The Working Group agreed to further amend Rule 13ter.1(c) as follows:

“(c) If the applicant ~~has does not, within the time limit fixed in the invitation,~~ furnished the required sequence listing and paid any required late furnishing fee ~~comply with an invitation under paragraph (a) within the time limit fixed in the invitation,~~ the International Searching Authority shall only ~~not~~ be required to search the international application to the extent that ~~such non-compliance has the result that~~ a meaningful search can ~~cannot~~ be carried out.”

Rule 13ter.1(f)

71. The Representative of the EPO proposed the deletion of the words “, subject to Article 34,” from Rule 13ter.1(f), suggesting that the reference to Article 34 was confusing and misleading to applicants, noting that the Rule was intended to cover situations in which sequence listings were filed for the purposes of the international search and not as amendments of the international application. On the other hand, it was noted that applicants had a right under Article 34(2)(b) to file amendments of any part of the application as filed, including the sequence listing part. The Representative noted that it was extremely difficult, if not impossible, for an examiner to ascertain what amendment had been made to a sequence listing and to assess whether the amendment resulted in added matter within the meaning of Article 34(2)(b). It was important, in any event, to make a clear distinction between a sequence listing filed as an amendment of the international application and one filed for the purposes of Rule 13ter.

72. Several delegations expressed concern, however, that the simple deletion of the reference to Article 34 would have effects beyond the clarification intended. The Secretariat noted that the structure of Rule 13ter might be improved by making a clearer distinction between a sequence listing forming part of the description and one provided for the purposes of international search, and suggested that it might be desirable to review the wording of the Rule in that context.

73. The Working Group agreed that the issues outlined in paragraphs 63 to 72, above, should be further discussed by the International Authorities, using the electronic forum of the Meeting of International Authorities under the PCT, with a view to the submission of a revised draft of proposed amendments of Rule 13^{ter} to the Working Group for approval at its next session and subsequent submission to the Assembly for adoption in September 2004.

CENTRAL ELECTRONIC DEPOSIT SYSTEM FOR SEQUENCE LISTINGS

74. Discussions were based on document PCT/R/WG/5/3.

75. Many delegations expressed great interest in the proposals contained in the document, noting that there was a real need to provide systems enabling sequence listings to be efficiently filed and made available to International Authorities, designated and elected Offices and third parties, and to avoid the need to handle extraordinarily voluminous applications filed on paper. It was noted that the problem was an international one concerning national patent applications as well as international applications. While the specific proposals made represented a step in the right direction, a number of comments, concerns and suggestions were made, as outlined in the following paragraphs.

76. Several delegations were concerned that, for the purposes of disclosure of the invention, a reference to a deposited sequence listing might not serve the same function for the purposes of national law as the inclusion of the sequence listing part of the description as a part of the international application itself, and that proposed Rule 5.2(a)(ii) might not be sufficient to address this issue. Any solution would need to avoid inconsistency with, for example, Articles 3, 5 and 11.

77. Several delegations suggested that an alternative approach be considered, whereby a sequence listing in electronic form (only) would first be filed with the receiving Office as part of the international application (even if filed on paper); such a procedure had already been established in Part 8 of the Administrative Instructions. That sequence listing could be transmitted by the receiving Office to a sequence listing data bank which would then make it available, in accordance with the usual requirements and restrictions set out in the Treaty as to access to documents, to Authorities, designated and elected Offices and third parties. Even though the remaining part of the international application comprising the request, written description, claims and drawings (if any) might be received in a different format (on paper) and stored separately, the two parts would together be considered to constitute the application. For such a system to be workable, the data bank would of course need to be willing and able to meet the procedural and other requirements of the PCT.

78. It was agreed that, before a decision could be made as to the desirability of a deposit system of the kind proposed, the benefits which would accrue to different users would need to be established. It would need to be clear that the system would meet the requirements of users, including applicants, receiving Offices, the International Bureau, International Authorities, designated and elected Offices, and third parties with different interests, noting the different times and reasons for which a sequence listing would need to be available for different purposes. The data bank would need to allow reliable access to those in respect of whom access to the information was required or permitted at any particular time. It should permit easy downloading of sequence listings to the search databases used for search purposes by patent Offices including International Authorities. The means for both uploading and downloading information would need to be studied carefully, since normal Internet

connections might be inadequate for very large sequence listing files. It would also need to offer flexible access, including the selection of specific sequences in cases where a sequence listing contained more than one sequence. The necessary hardware and software requirements (including communication means as well as storage) would need to be studied.

79. Concerning the possibility that such a data bank might be established and operated by the International Bureau, a number of delegations and representatives of users raised the question of the cost of setting up and running the necessary systems and associated infrastructure.

80. One delegation suggested that an existing sequence listing database institution might be able to provide such a facility. The Secretariat noted that the proposal expressly mentioned that possibility, although the main existing sequence listing data banks had in the past not been in a position to undertake all the necessary patent-related functions, such as storage of listings with a guarantee of legal certainty as to their content on the filing date of the application and ensuring that the provisions of the Treaty concerning access and publication would be met.

81. The costs associated with various possibilities for the establishment and maintenance of such a data bank would, in particular, need to be identified and justified in the light of the potential benefits, as would the means by which it might be financed.

82. The Working Group agreed that the Secretariat, in consultation with the Meeting of International Authorities under the PCT, should prepare a revised proposal, including a study of the practical as well as legal considerations mentioned above, for submission to the Working Group at a future session.

“MISSING PART” REQUIREMENTS

83. Discussions were based on document PCT/R/WG/5/8.

84. The Working Group was generally in favor of the proposals contained in the document, and invited the Secretariat to prepare revised proposals, for consideration at the next session, taking into account the comments and suggestions set out in the following paragraphs, noting particularly that certain delegations considered that it would be necessary to include a reservation provision in respect of the effect in the national phase for their countries (see paragraph 91, below).

Rule 4

85. One representative of users expressed concern about possible unintended consequences of the proposed inclusion in the request under Rule 4.18 of a pre-printed statement that the contents of the earlier application(s) the priority of which was claimed were incorporated by reference. The representative suggested that the applicant be given the opportunity to omit the statement, noting that the applicant, in certain cases, may have good reasons not to have the whole contents of the earlier applications automatically incorporated by reference into the later filed application.

86. Suggestions as to how to address that concern included the possibility of limiting the incorporation by reference to drawings contained in the earlier application so as to avoid a possible conflict with Article 14(2) and the possibility of requiring the applicant to check a box in the request to take advantage of the incorporation by reference of the earlier application.

87. The Working Group, noting that the concern would only be relevant in very few cases, agreed that it would be preferable to retain a provision providing for the automatic incorporation by reference of the earlier application, but somehow limited to the purpose of possible subsequent inclusion of missing parts into the later filed application, including the case where the missing part included matter which was new in the application in question but which was completely contained in the earlier application.

88. Several delegations and representatives of users questioned the need for formal confirmation of the “incorporation by reference” statement under Rule 4.18 and suggested that it may be sufficient to further amend that Rule so as to clarify that the “incorporation by reference” (rather than the statement) was for the purposes of Rule 20.5(e); the expiration of the time limit under Rule 20.5(e) for the furnishing of missing parts would thus automatically result in the incorporation by reference ceasing to have effect.

89. One representative of users suggested replacement of the specific reference in Rule 4.18 to Rule 20.5(e) with a more general reference as to the purpose of making such statement (such as, for the purposes of incorporation by reference of missing parts completely contained in the earlier application) so as to ensure that the statement would also be effective in the national phase before designated Offices.

90. One delegation expressed its concern that the proposed incorporation by reference could be considered to conflict with the disclosure requirements under Article 5 and suggested that an amendment of the Treaty may be required. Another delegation expressed its general concern about the introduction into the PCT, by way of amendments to the Regulations, of the concept of incorporation by reference, since, in its view, the concept would not be supported by any of the provisions of the Treaty and could thus be introduced only by revision of the Treaty itself.

91. Some delegations suggested that a transitional reservation provision be added so as to allow Contracting States whose national law was not compatible with the envisaged amendments of the PCT Regulations not to apply those amendments for as long as such incompatibility existed.

92. Following a suggestion by the Secretariat, the Working Group agreed that possibilities should be explored as to whether the proposed incorporation by reference could be extended to cover the contents of such earlier application for the purposes of overcoming Article 11(1) defects (such as missing claims or a missing description).

Rule 20

93. One delegation noted that the proposals in respect of missing parts in Rule 20 were not consistent with its national law.

94. One delegation suggested that the contents of Rule 20.4(b) should be moved to Rule 20.3.
95. One delegation suggested that Rule 20.5(b) be split into two paragraphs, one dealing with the situation where the missing part was submitted before, and the other after, an international filing date had been accorded. Such a change would result in further simplification of the Rule and, in certain situations, would also afford more time to applicants to meet the requirements under the Rule.
96. One delegation proposed that the applicant should be required to submit a certified copy instead of a simple copy of the earlier application within the same time limit within which the missing part must be furnished. A representative of users noted that in many cases it would not be possible to obtain such a copy within that time limit.
97. The Working Group noted that, under the corresponding provisions in PLT Rule 2.4, a Contracting Party could require that a simple copy be filed within the same time limit as that for furnishing the missing part and, in addition, that a certified copy be filed within a time limit of not less than four months from the date of the invitation to furnish such copy.
98. The Working Group invited the Secretariat to consider whether a similar option was needed in Rule 20.5, taking account of the fact that Rule 17 already required a certified copy of the priority document to be submitted within 16 months from the priority date.
99. In this context, several delegations and representatives of users suggested that a certified copy of the earlier application should not be required under Rule 20.5 in the situations covered by Rule 17.1(b) and (b-bis).
100. Two delegations suggested that the requirement under proposed Rule 20.5(e)(iii) that the missing part be completely contained in the earlier application should be deleted since, in some cases, such a check would be difficult for the receiving Office to perform, for example, where a translation of the earlier application was required or technical evaluation was necessary. This suggestion was opposed by two other delegations, noting that this matter had been fully discussed in the context of the corresponding provision in PLT Rule 2(4)(iv) and pointing to the fact that, under the PLT, the procedure might be applied by Offices as a purely clerical check (see PLT Note R2.04).
101. One delegation suggested that the International Searching Authority rather than the receiving Office should be responsible for checking whether the missing part was completely contained in the earlier application, as this check would not necessarily be purely clerical, in particular where the earlier application was in a different language.
102. In the course of the discussion, the Working Group noted that Note 5.21 on PLT Article 5(6)(b) expressly stated that, where it was subsequently determined, for example, in the course of substantive examination, that the missing part was not completely contained in the earlier application, the Office may rescind the filing date and re-date the application. However, no similar sanction appeared to exist under the PCT. One representative of users suggested that, in the case of an international application, non-compliance with the requirement that the missing part be completely contained in the earlier application could be dealt with in the national phase under national law provisions relating to added matter.

Alternatively, the procedure under Rule 82*ter* could be extended to cover such cases. One delegation suggested that a review procedure analogous to that proposed in respect of restoration of priority (review only in case of reasonable doubts) could be considered.

103. The Working Group invited the Secretariat to study the matter further. The Working Group agreed to defer further consideration of the appropriate time limits (one or two months) under Rules 20.3(d), 20.5(c) and 26.2.

104. One representative of users suggested that the time limits under those Rules should all be two months for consistency with the PLT. One delegation stated that it could accept a two month time limit under Rule 20.3(d) since the international filing date had not yet been accorded at that time, but still favored a one month time limit under the other two provisions.

SINGLE RECORDAL OF CERTAIN CHANGES DURING THE NATIONAL PHASE

105. The Working Group approved a suggestion by the Secretariat that the latter should study the possibility of providing for a request, to be made in a single document submitted to the International Bureau, to record certain changes concerning the applicant, inventor, licensees or security interests in respect of two or more designated or elected Offices in which the international application had entered the national phase, similarly to the procedure under PLT Rules 15, 16 and 17 under PLT Article 14(1)(b).

RECTIFICATION OF CLEAR MISTAKES (OBVIOUS ERRORS)

106. Discussions were based on document PCT/R/WG/5/2.

107. Several delegations and representatives of users expressed support in principle for the amendments proposed in the document. The Secretariat noted that, in general, the criteria for rectification of obvious errors under existing Rule 91 were very strict and not always easy to interpret. There was often great difficulty in deciding how to apply the requirement that a rectification be obvious in the sense that “anyone” would “immediately” realize nothing else could have been intended than what was offered as rectification. Read literally, this would suggest that a rectification might not be authorized if there was one person who would not immediately recognize that the rectification was obvious. The result was a range of different practices applied by the various Offices and Authorities.

108. One delegation expressed its concern that the proposals did not streamline or simplify the procedures for rectification but rather introduced new standards and added complexity to the system; in their current form, the proposals would not be acceptable to the delegation. The delegation suggested that rectification of mistakes should be restricted to mistakes of a minor nature, such as clerical and typographical errors, so as to keep the system simple and transparent.

109. After some discussion in which differing views were expressed, the Chair concluded that there was at present a wide variation in the interpretation of, and practice under, Rule 91, highlighting the need for an overhaul of the system so as to achieve more harmonized practices. The Working Group invited the International Bureau to further study the different practices and approaches, focusing, in particular, on the issues raised in the discussion. These included:

- (a) the definition of “mistakes” which should be rectifiable;
- (b) the question whether, in the light of such definition of “mistakes”, it was necessary to provide expressly that the omission of “an entire element or sheet of the international application” shall not be rectifiable; if so, what was meant by an “entire element” having regard to the term “elements” in Article 11(1)(iii), and whether it was necessary to explain that no change of meaning was intended by the proposed deletion of the words “even if clearly resulting from inattention, at the stage, for example, of copying or assembling sheets;”
- (c) the authorities (receiving Office, International Searching Authority, International Preliminary Examining Authority, International Bureau) which should be responsible for the rectification of mistakes appearing in different elements of the international application (request; description, claims and drawings; corrections and amendments; other documents) and the responsibility of different authorities in different stages of the international phase (Chapter I and Chapter II);
- (d) the basis on which the relevant authority should make the finding whether an alleged mistake is a rectifiable mistake, that is:
 - (i) the notional person who should understand what was intended (for example, a person skilled in the art, or a person in the relevant authority);
 - (ii) the question of what should be the “applicable date” to be used in determining the allowability of a rectification of a mistake, depending on the element of the international application (request; description, claims and drawings; corrections and amendments) or other document in question;
 - (iii) the circumstances (if any) in which account should be taken of the contents of extrinsic documents, including the question as to which documents should be considered to be extrinsic (for example, a cover-letter or other document of record contained in the files of the receiving Office on the international filing date; an earlier application the priority of which was claimed; instructions from the applicant to the attorney);
- (e) the question whether, in accordance with the principle of *lex specialis*, rectification of a mistake should be permitted under Rule 91 if a specific remedy existed elsewhere in the Treaty or Regulations, for example, in respect of correction of priority claims under Rules 26bis;
- (f) the time limit for submitting a request for rectification, including:
 - (i) the question whether a request for rectification of a mistake in the international application should be submitted before international publication; and

(ii) the question whether rectification of mistakes in the description, claims or drawings of an international application should be permitted after the start of the international preliminary examination procedure or whether any mistake should be “correctable” at that stage only by way of an amendment;

(g) the need to provide that a rectification under Rule 91 should have no effect in any designated or elected Office where the processing or examination of the international application has already started (in the case of early entry into the national phase);

(h) the question whether the request for rectification should, in all cases, contain a brief explanation of the mistake and the proposed rectification;

(i) what, if any, further action is necessary where a mistake in the description, claims or drawings, or a mistake in the correction of a priority claim, is rectified after the international search report and the written opinion of the International Searching Authority have been established.

110. The Working Group also invited the International Bureau to study suggestions that Rule 82*ter* be amended:

(a) to require designated and elected Offices to rectify certain decisions taken by the receiving Office or the International Bureau during the international phase if that Office or the International Bureau accepted that the decision taken was erroneous;

(b) to avoid designated and elected Offices having to decide disputes between the applicant and the receiving Office or the International Bureau as to whether certain decisions taken by the receiving Office or the International Bureau during the international phase were erroneous.

111. One representative of users stressed the importance of present Rule 82*ter* as the only provision in the PCT which would guarantee applicants a review by designated and elected Offices of certain decisions taken during the international phase by the receiving Office and the International Bureau, noting that, in particular, certain receiving Offices did not, under their national laws and practices, offer any review procedure with regard to decisions taken by them during the international phase.

OPTIONS FOR FUTURE DEVELOPMENT OF INTERNATIONAL SEARCH AND EXAMINATION: MAKING GREATER USE OF INTERNATIONAL REPORTS

112. Discussions were based on documents PCT/R/WG/5/9 and 9 Corr.

113. The International Bureau recalled that the documents did not contain specific proposals oriented towards a specific goal but rather outlined a very broad range of possibilities, generally disposed towards improving the quality of patents which are issued around the world. They represented the very preliminary stages of an exploratory exercise. Any concrete measures would be a long way off and there would be much time along the way for consideration of the effect of the changes which would come into effect in January 2004, as well as the ramifications of any possible system which States wished to consider in more detail. With respect to the possibilities involving the conclusion of protocols to the Treaty,

these were envisaged as options that States might decide to participate in, allowing more flexibility within the system to meet the needs of particular States and users to the extent that they were considered appropriate in any case.

114. A number of delegations considered that further consideration of any of the options presented in the paper was premature and should not be continued in the present exercise of reform of the PCT. Others suggested that the Working Group might return to these issues, but not for at least 12 months. In particular it was felt that major changes had already been made to the system and the extent to which these worked in practice to address the issues at hand needed to be evaluated. It was pointed out that developing countries had taken on significant commitments towards the development of intellectual property law and infrastructure in recent years, especially those relating to the implementation of the TRIPS Agreement, and, even if new protocols were to be voluntary, they would still entail costs in preparation and evaluation of whether to join. In the latter respect, it was noted that it was sometimes difficult to understand the likely effect of a system in advance of joining it. Concern was expressed as to whether developing countries would be able to give sufficient attention to the negotiation process while their limited specialist resources were occupied in the implementation of the TRIPS Agreement. It was suggested that the result of any new protocol might be a further step towards a world patent, which was not desirable given the significant differences in levels of development and policy needs of the Member States. Some delegations expressed the fear that the establishment of a new protocol would transform the nature of the PCT from a treaty that facilitated international patent applications to a treaty that granted patent rights.

115. Furthermore it was noted by some delegations that there may be pressure on their countries to join any such protocols, and to incur the further costs involved in implementation, though other delegations noted that the aim of several of the possible measures was to reduce costs for small (as well as larger) Offices. It was pointed out that States might be able to achieve some of the same benefits, if they wished to pursue them, by way of national measures and bilateral, rather than international, agreements. Also, from the point of view of many developing countries, expansion of technical cooperation and assistance might be a better way of addressing the problems of small Offices. Concern was also expressed that, if protocols were truly optional, the adoption of different protocols by different States may lead to a tiered system, instead of treating all States equally. One delegation was concerned that the existence of protocols might have an effect on the system which changed its effect even for those which decided not to join the protocols. Some delegations expressed the view that, while the proposed protocols purported to address the workload problems faced by small Offices, those problems in fact were ones faced by large Offices and would be exacerbated by the proposed protocols.

116. Some delegations also considered that certain possible protocols, although leaving options open with regard to national examination and types of law, would reduce policy flexibility to the detriment of addressing specific local needs and policy objectives, including those relating to issues such as public health and the environment, and might form a barrier to development. Any move towards recognition of international search and examination reports might represent an imposition of PCT standards in respect of novelty, inventive step and industrial applicability, pre-judging questions of substantive patent law for which the proper forum for discussion was the Standing Committee on the Law of Patents. Furthermore, relying to a greater extent on international search and examination reports might hinder States which wished to do so from developing search and examination capacity within their national Offices.

117. On the other hand, a number of delegations considered that at least some of the possibilities envisaged in document PCT/R/WG/5/9 merited more detailed consideration. Several delegations considered that drafting of more specific texts regarding particular possibilities would aid discussion. Several delegations indicated, in particular, a wish to strengthen the international phase by improving, and making more consistent, the quality of the search and preliminary examination performed. This could result in the reduction of costs for applicants and of the workload of designated and elected Offices by allowing the results of search and examination to be used to a greater extent. The significant work in this direction which had already been done was noted, recognizing the importance of quality, and including the recent agreement to incorporate a chapter on a quality framework for International Authorities into the revised International Search and Preliminary Examination Guidelines.

118. Some delegations considered that any proposal which represented a move towards a “more binding” effect of an international search or examination report was not appropriate until a greater consistency of quality and degree of harmonization of substantive patent laws had been achieved. On the other hand, the delegation of one State with a small Office considered that PCT reports provided an enormous benefit to them and that any proposal which might improve the quality of those reports, or cause applicants to use the system in a manner which resulted in positive international preliminary examination reports, would be worth considering further. It was noted that a high quality report could be of great use, even if it was made to PCT standards, rather than specific national standards, as long as it was known to what extent the standards of the national law differed. Conversely, one delegation queried, if this was really the case, why it was necessary to spend time on substantive patent law harmonization.

119. One delegation of a State with a small Office considered that it was important to follow up quickly on the recent significant improvements to the system. Another such delegation pointed out that times and needs were inevitably changing and that it was essential to evaluate how the system could work best to the advantage of States which currently operated registration systems. However, another such delegation also noted that it would be necessary to ensure that any further measures taken did not in fact result in reduced quality of reports, which were vital to the national system.

120. Several delegations expressed concern that some of the possibilities would extend the international phase or delay the production of international search and examination reports, to the detriment of reasonable certainty for third parties. On the other hand, one delegation suggested that there may be situations where extra time in the international phase and delayed processing may be of benefit not only to the applicant but to all concerned.

121. Some delegations were of the view that, while many of the possibilities set out in the documents were worth considering, there was a risk that introducing measures by means of several optional protocols might result in a fragmented system, which might be more complex, rather than simpler, for users. It might also be difficult to bring the system back together into a coherent whole at a later stage.

122. Most representatives of users indicated a strong desire to increase the quality of the international search and preliminary examination by providing further options including multiple or top-up searches and additional possibilities for amendment and further examination in the international phase, so as to bring the international application to a point where it could achieve a positive international preliminary report on patentability. This would allow applicants to know that any patent granted would have a high presumption of validity

before the cost of translations into many languages need be incurred. However, it was emphasized that it was important that this remain optional. If it made the system more expensive in all cases, even where extra services were not desired, then it would make the PCT route less attractive for users instead of more attractive. User representatives emphasized that, among all the issues, the quality of the international search was of prime importance. One representative of users noted that it would be useful to measure the quality of searches made by different Offices and International Authorities by comparing search results on different members of patent families.

123. One representative of users also suggested that there were further areas which should be considered in relation to the quality of international examination reports, specifically their completeness, since under Rule 66.2(a)(v) at present, it was a matter of discretion for the International Preliminary Examining Authority whether it wished to accompany an international preliminary examination report with observations on clarity of the claims, description, and drawings, or the question of whether the claims were fully supported by the description. It was also noted that well-examined patents were a benefit for competitors, as well as applicants, since their position was more certain, benefiting both innovation and competition.

124. Some representatives of users also expressed a number of reservations. In particular, it was noted that even an optional protocol might become effectively mandatory. They also considered that the lack of harmonization of laws at present suggested that moves towards a system of binding reports would be premature. Also, lack of consistency of quality might lead to forum shopping. It was suggested that some of the objectives in the document might be pursued more effectively at the national level.

125. Some delegations considered that the expressions of concern related to issues which applied more to the creation of protocols than to some of the other matters in the paper, which were more in the nature of improvements to the quality of search and examination reports delivered within the framework of the existing system, without creating any new obligations on States. Several delegations felt that the type of matters considered in paragraphs 32 to 42 of document PCT/R/WG/5/9 fell into the latter category and were worthy of further consideration.

126. There was, clearly, a divergence of views as to whether, and to what extent, the issues considered in the documents should be taken forward by the Working Group.

127. The Working Group agreed with the suggestion that the Director General should undertake consultations, prior to the May 2004 session of the Working Group, on all matters relating to document PCT/R/WG/5/9, to ensure a successful outcome of the Working Group session in May. Without prejudging any of the outcomes, the consultations would relate to matters necessary for him to determine whether further documents should be put tãhat session and, if so, what subjects they should cover.

PROPOSALS BY SWITZERLAND REGARDING THE DECLARATION OF THE SOURCE OF GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE IN PATENT APPLICATIONS

128. Discussions were based on document PCT/R/WG/5/11 Rev. (a corrected version, in English only, of document PCT/R/WG/5/11).

129. The Delegation of Switzerland introduced the document, noting that it was identical in content to document PCT/R/WG/4/13, which had been introduced to the fourth session of the Working Group. As previously explained, the proposed amendments to the Regulations were intended to increase transparency in the context of access to genetic resources and traditional knowledge and the fair and equitable sharing of benefits arising out of their utilization, and to provide a simple and practical way forward which could be introduced in a timely manner.

130. There was general recognition of the importance of the issues relating to access to genetic resources and traditional knowledge and of the fair and equitable sharing of benefits arising out of their utilization. A number of delegations pointed out that these issues were important to the people of many States. Traditional knowledge and genetic resources were not owned only by indigenous peoples of developing countries. A way needed to be found to support economic and ecological benefits for all.

131. There was a divergence of views as to how best to achieve the common goal of finding timely solutions to the issues at hand. In particular, a number of delegations expressed doubt as to whether the matters were ones which should be addressed by means of changes to the patent system and, even if so, whether the Working Group was the appropriate forum to discuss these issues at the present time, noting that the subject was still being discussed more broadly at the international level in different forums, including WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Intergovernmental Committee").

132. Other delegations welcomed these proposals, believing that it was necessary to address the issues now and that it was timely for this forum to consider, at least to some extent, whether provisions of the type proposed were permissible under the PCT, whether they were desirable, consistent with other international agreements, and whether they would successfully meet the intended objectives.

133. Several delegations considered that the proposals seemed constructive and pragmatic and should be considered in more detail in the Working Group. Some considered that early agreement in this forum might send a useful signal elsewhere, encouraging further progress on these and related issues, including those raised in discussions on substantive patent law harmonization. One delegation considered that, while the same issues would, of course, affect national patent applications, the PCT was a good starting point because of its importance to applicants wishing to file applications in other countries.

134. A number of delegations considered that such discussions needed to be carefully coordinated with discussions in other forums, with the primary consideration of the policy objectives being done in the Intergovernmental Committee. In addition to the matter of duplication of discussion, those delegations noted that the issues were too broad to address in the context of the PCT in isolation and considered that it was important to ensure that the results which flowed into different policy areas were mutually consistent and supportive. Some of those delegations suggested that consideration might be given to the issues by the

Working Group in parallel with the Intergovernmental Committee; others considered that work should wait until the Intergovernmental Committee had formulated a clear policy direction.

135. Other delegations were not convinced that the patent system was the proper context in which to address concerns of benefit sharing. It was emphasized that, while it was important to address the underlying issues, they considered that the Working Group was not the appropriate forum for discussion of the matter. In particular, these delegations saw no conflict between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Convention on Biological Diversity (CBD). In their view, it was possible to implement those agreements in a mutually supportive manner. Furthermore, those delegations suggested that implementing measures whereby patents might be invalidated for failure to comply with the requirements of disclosure of source would be of benefit to no one. Rather, it would decrease certainty in patent rights, increase litigation and reduce patent filings. Without patents, little or no benefit would exist to be shared. It was also pointed out that the Working Group lacked the participation of indigenous peoples, who were represented in the Intergovernmental Committee, which had also recently been given a new and broader mandate. Examples of systems which these delegations considered were more appropriate to address access to resources and benefit sharing had been presented to the Intergovernmental Committee.

136. Some delegations, while welcoming the proposals as a positive start, considered that they did not go far enough. They considered that there may be a conflict between the existing international patent system, as enshrined in such international agreements as the TRIPS Agreement, and the CBD and, in any case, it was pointed out that there remained no effective internationally agreed and effective measures against bio-piracy. The measure proposed in the document under consideration would only permit, and not require, the introduction of laws to require disclosure of source of origin. It was recalled that a number of developing countries had proposed, in the TRIPS Council, an amendment to the TRIPS Agreement to ensure that all Members of WTO would require that patent applicants for inventions that use biological resources or associated traditional knowledge must disclose the source of origin of those resources and provide evidence of prior informed consent and of fair and equitable benefit-sharing.

137. One delegation suggested that the Swiss proposal would not achieve the goals of access and benefit sharing that it set forth, and explained that the proposal was likely to reduce benefits that may be shared by increasing litigation and creating a disincentive for innovation.

138. One delegation considered that the lack of internationally agreed measures against bio-piracy had the potential to undermine the credibility and legitimacy of the patent system. The recent case of patents relating to the maca plant was cited as an example of such difficulties. The Delegation of the United States of America indicated that it had recently reviewed the database concerning these patents and stated that they pertained not to the plant itself but to chemically active isolates, compounds and compositions. Furthermore, the patents cited literature dating back to the 1960s pertaining to the traditional uses of the plant, which was also known as "Peruvian ginseng." The patents had been found to fully meet patentability criteria and also, in fact, disclosed the source of origin of the maca plant and other information. The Delegation stated that this could not be considered to be a case of bio-piracy, but that it continued to seek true examples of bio-piracy which would help to understand the nature of the problem.

139. One delegation suggested that the idea set out in paragraphs 30 to 32 of document PCT/R/WG/5/11 Rev., relating to the establishment of a list of government agencies competent to receive information on the declaration of source, was of particular interest and worthy of further study.

140. One representative of users stated that an essential feature of any national law requiring proof of having obtained prior informed consent would be a centralized procedure for showing that the requirement had been met. Without this, an alleged failure to obtain permission for use would become a standard attack in any country with such a provision. An applicant may have received consent from one source, but be attacked on the grounds that he should have sought permission from a different source. The consequence would be that fewer patent applications would be filed in these countries, resulting in there being no benefits for the applicant to share at all. Even if such systems were set up in countries with this type of legislation, it was pointed out that this would not help the case of inventions where the information was gained from a different country.

141. Doubt was expressed by one delegation as to the need to define the term "traditional knowledge." Comparison was made with the Paris Convention, where the term "invention" was not defined, but this had not prevented the development of an international patent system. Concern was also expressed that the proposal in document PCT/R/WG/5/11 Rev. to amend Rule 51*bis*.1 was too narrow in that it required a declaration only where the invention was directly based on the genetic resource or traditional knowledge. Nevertheless, it was recognized that the necessary degree of relationship was a matter which needed to be considered carefully.

142. One representative of users expressed doubts that the proposals in the document were compatible with the TRIPS Agreement and also considered that there would be no basis under the PCT for the proposed Regulations.

143. The Delegation of Switzerland thanked the Working Group for the amount of support which had been shown for the proposals. It recognized that there were problems which needed to be addressed and considered that there was a clear need for further discussions.

144. The Working Group agreed to discuss the issue again at its next session.

ASPECTS OF COPYRIGHT AND OTHER RIGHTS IN NON-PATENT LITERATURE

145. Discussions were based on document PCT/R/WG/5/5.

146. Following a suggestion by the International Bureau, the Working Group agreed that, in order to ensure discussion of the issues at hand by both patent and copyright experts, the matter should be referred to WIPO's Standing Committee on Copyright and Related Rights (SCCR) with a view to establishing a joint (virtual) task force open to all parties invited to participate in the Working Group and the SCCR. It was envisaged that the task force would operate mainly using an electronic forum and that it be coordinated by the International Bureau. The task force would be asked to prepare a report for consideration by both the Working Group and the SCCR.

147. The Representative of the European Community, also on behalf of the Member States of the European Union and of the Acceding Countries, expressed support for the proposed creation of a joint task force. For the sake of completeness, the Representative requested that

certain references to EC Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society be included in paragraphs 20 and 25 of document PCT/R/WG/5/5.

148. One representative of users expressed the opinion that certain Office practices referred to in document PCT/R/WG/5/5 (submission in electronic form of a search report and copies of cited documents to the applicant; making available of those documents via electronic file inspection systems) were permitted under certain exceptions provided for in existing copyright treaties.

DIVISIONAL APPLICATIONS UNDER THE PCT

149. Discussions were based on document PCT/R/WG/5/6.

150. The Secretariat recalled that the document presented three options which might be considered for providing for international applications as divisional applications of a parent international application, namely, a possible revision of the Treaty, possible amendments of the Regulations providing expressly for divisional applications, and other possible amendments providing a new procedure for “internal division” of international applications.

151. Several delegations and representatives of users expressed concern about adding a procedure to the PCT system which would allow for divisional international applications, noting the added complexity involved, the difficulty with according an international filing date in accordance with both Article 11 and the Paris Convention, the need for compliance with time limits for international search and international preliminary examination, and the added cost for applicants in respect of international search, international preliminary examination and national phase entry in respect of each divisional international application.

152. A number of delegations and a representative of users questioned the need, from an applicant’s perspective, to add the possibility of such a procedure to the PCT system. It was noted that, in cases of lack of unity of invention under the present system, applicants could take advantage of well established procedures both during the international phase (obtaining additional international searches and preliminary examinations) and after national phase entry (filing of divisional applications under the national law of the designated States concerned). Moreover, many applicants appreciated the current procedure since it gave them the option of deferring decisions (and related costs) concerning the filing of divisional applications until after entry into the national phase.

153. One delegation expressed the view that, in the future, should real progress be achieved towards making greater use of positive international preliminary reports on patentability, the possibility of filing divisional international applications during the international phase would be of greater importance than at present.

154. Another delegation was of the opinion that, in general, following the changes adopted in the recent past in the context of PCT reform, users needed time to familiarize themselves with the new system and, in general, preferred a stable rather than a constantly changing PCT system.

155. One representative of users suggested that, rather than adding a procedure to the PCT system which would allow for the filing of international divisional applications, the Regulations could be amended so as to require a designated Office, in the case of the filing of

divisional applications based on a parent international application which had entered the national phase before that Office, to apply PCT requirements as to form or contents (Article 27(1) and Rule 51*bis*) not only to the parent international application but also to the divisional applications.

156. Difficulties were seen by at least some delegations with each of the particular options set out in document PCT/R/WG/5/6. A revision of the Treaty would be the least problematic, legally speaking, but it should not be undertaken as an isolated measure. Amendments of the Regulations to provide expressly for the filing of divisional international applications was viewed by some delegations as inconsistent with the provisions of the Treaty concerning the date to be accorded as the international filing date. The option of providing for “internal division” of international applications received some support as a possible mechanism, but some delegations felt that it would be unnecessarily complicated and others stated that no basis for it could be found in the Treaty.

157. The Working Group accordingly agreed that the proposal should not proceed further.

PCT REFORM: FAST TRACK

158. Discussions were based on proposals made by the EPO in document PCT/R/WG/5/12.

159. Noting that the document had only been posted on WIPO’s Website on November 14, 2003, the Working Group agreed that the discussion of the proposals should be deferred to the next session of the Working Group.

160. Two delegations, in preliminary statements, while supporting in general the proposal to make greater use of the PCT Reform electronic forum in advance of Working Group sessions, expressed their concern about submitting proposals directly to the PCT Assembly without prior discussion in the Working Group, even if such proposals had been posted on the electronic forum and had not been objected to, and emphasized the importance of inclusive, full and transparent discussion by all Contracting States of matters related to PCT reform.

OTHER MATTERS

161. The Chair encouraged delegations and representatives to continue to progress the discussion of current issues via the PCT reform electronic forum on WIPO’s Website.³

³ See <http://www.wipo.int/pct/reform/en/index.html>.

NEXT SESSION

162. The International Bureau indicated that the sixth session of the Working Group was tentatively scheduled for May 3 to 7, 2004.

163. The Working Group noted the contents of this summary by the Chair.

[Annex follows]

ANNEXE/ANNEX

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