COMMENTS MADE BY MEMBERS AND OBSERVERS OF THE SCP ON DOCUMENT SCP/13/2 (STANDARDS AND PATENTS)

I. 15th session of the SCP, October 11-15, 2010 [Excerpts from the Report (document SCP/15/6)]

1. Discussions were based on document SCP/13/2.

2. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, stated that the preliminary study on standards and patents provided a clear, general description of standards and standard-setting processes and referred to the need to clarify relationships between the standardization system and the patent system and provided information on possible mechanism for preventing conflicts. It further stated that the preliminary study tackled a large number of important issues including the patent policies of standard-setting organizations, patent tools, legal mechanisms within the patent system, competition law aspects, dispute settlements and technical and patent information available under the patent system and the standardization system. The Delegation stressed the importance of those issues for the European Union and its 27 Member States. In addition, the Delegation informed the SCP that the question of industrial property rights and competition was one of the challenges identified in point 3.4 of the European Commission's Industrial Property Rights Strategy for Europe, published in July 2008. Within the framework of that strategy, the Commission also intended to make an assessment of the interplay between intellectual property rights and standards, particularly in information and communications technologies. The European Union and its 27 Member States considered that the continuation of debates on those matters would be helpful.

3. The Delegation of Brazil, speaking on behalf of the DAG, observed that the issue of standards and patents was of great importance due to the fact that the monopoly power conferred by a patent increased exponentially when the product or technology became the standard. Therefore, the DAG welcomed the discussion on the issue by the SCP. Referring to document SCP/13/2, the Delegation noted that some points should be further analyzed. In particular, the Delegation observed that the document did not differentiate between the standards designed for the promotion of interoperability and connectivity and standards related to areas of public policy such as security, public health and the environment. According to the view of the Delegation, those standards were different and therefore should not be treated in the same manner. The Delegation continued that the different aspects of public interest demanded plural tools and flexibility provided under the international regime for pursuing public policy objectives, and should not be undermined by stringent practices regarding standards and technical regulations in relation to patents. Additionally, in its view, the preliminary study, while trying to give a broad image, neither addressed anticompetitive behavior profoundly, nor it reflected the challenges and limitations countries had faced while implementing those standards. Further, the Delegation stated that no solution, but a generic reference to anticompetitive remedies, was referred to in the preliminary study. In this connection, the Delegation observed that the open source standards had a high importance for developing countries due to their reduced cost. Therefore, the goals of standards and patents should be to reflect a fair and balanced system, respecting the rights while assuring that society as a whole was not harmed by excessive prices or anticompetitive behavior. Recalling that the issue of patents and standards had been already addressed at the agenda of the WTO Committee on Technical Barriers and Trade, the Delegation stated that the discussions on the issue at WIPO should be pursued in a consistent manner with the WTO provisions on the subject matter.

4. The Delegation of Nepal expressed its appreciation for a comprehensive document which dealt with conceptual as well as technical issues. The Delegation, however, pointed out that some reforms were needed in that area so as to build the capacity of patent enforcement agencies of least-developed countries, as well as to rationalize the standards in products in the field of information and communication technologies (ICT). Noting that standards were relevant to the quality and reliability of

products, the Delegation observed that the standards also ensured conformity, better harmony and efficient delivery of quality along with desirable behavior associated with the delivery and the use of those standards. It also noted that market competition had sacrificed those standards and, thus, the consumer protection. In addition, the Delegation stated that the licensing of products had also been challenged by extensive and uncontrolled use of ICT. It further considered that patent pools might be the source of patent syndicalism.

5. The Delegation of India noted that the issue of standards and patents was a very complex one which might have many ramifications, particularly for developing countries. The Delegation stated that once a patented invention was incorporated in the standard, the patent holder could cultivate the competitive advantage thereby leading to high cost in transfer of technology. Noting that the preliminary study gave only one example of patent pooling, the Delegation stated that the study should include more examples and studies on issues of patent thickets and interoperability to understand the full implication of patents in standards. In addition, in the view of the Delegation, the preliminary study should explore the means which could be exploited to avoid anticompetitive practices by right holders. It was also stated that it would be useful to prepare a non-exhaustive compilation of patents in standards adopted in selected technological areas to enhance the understanding of the issue. In addition, the Delegation suggested that the Secretariat should prepare draft guidelines on patents in standardization which could facilitate the policy coherence in the international standard-setting process.

6. The Delegation of Switzerland expressed its appreciation for the preparation of document SCP/13/2 which provided a general description of standards and standardization procedures and information on the possible mechanisms that had been used to stop litigations. The Delegation requested more detailed analysis of the issue as well as a closer corporation with WTO, ITU and ISO. Underlining the need to have as many examples as possible on the subject matter, the Delegation suggested that the representatives of various standard-setting organizations provide tangible examples of possible solutions which could then be put together by the WIPO Secretariat in a document.

7. The Delegation of Uruguay stated that the patent system was in crisis and that the issue had not been dealt with within WIPO in the way that corresponded to the dimension of the problem. Referring to some independent studies which analyzed the patent system, the Delegation stated that the proliferation of applications for patents was not responded for new technologies. It further stated that it was often difficult to determine the nature of the inventiveness and the characteristics of inventions, and had problems with the clarity of description and other difficulties in understanding the scope of the inventions. The Delegation noted that the issue of standards and patents was related to the issues of transfer of technology, access and dissemination of technology and sustainable development. In the view of the Delegation, the transfer of technology was being affected by patent holder's rights exercised in an anti-competitive way. The Delegation considered that, in that situation, the intervention of governments was necessary in order to safeguard the public interest. The Delegation further stressed the need for an open-ended study on the issue at stake.

8. The Delegation of Venezuela supported the statement made by the Delegation of Brazil on behalf of the DAG, and stated that technical standards created a problem in the market place and became a barrier to innovation, the latter problem being vital for developing countries and being a part of the obligations of WIPO under the Development Agenda, as well as the UN Millennium Development Goals. The Delegation was of the view that the issue should remain on the agenda of the SCP for further analysis.

9. The Representative of ALIFAR stated that the flexibilities in the patent system should not be undermined through mandatory guidelines. She considered that such mandatory guidelines would deprive standardization organizations and industries of the flexibilities in order to develop technical regulations in accordance with their industrial policies and bases. Further, the Representative noted that, while competition legislation played a fundamental role in relation to patent law, there were many

countries which did not have a legal tradition in that area, and thus did not have experience in the use of such an important tool that would ensure the market to operate in a balanced manner.

10. The Representative of ITSSD, referring to documents SCP/13/2 and SCP/13/3, stated that the documents provided much discussion about possible abuse of the exclusive rights of the patentee. However, in his view, there was very little empirical evidence showing that such problems were actually occurring. According to the Representative, the government intervention mechanisms which were recommended, including the need to ensure that the essential patents were included in a standard, the need to determine a reasonable way of royalty and the need to determine when a government should intervene when there was a dispute between potential licensors and licensees, were solutions in search of a problem to solve. Noting again that the instances of abuse were small and the hypothetical conceptions of abuse were great, the Representative informed the SCP that the ITSSD had provided detailed comments on document SCP/13/2. The Representative expressed his concern about how emerging government procurement rules incorporated the government's need to intervene the market. Noting that the government procurement comprised a considerable percentage of a local economy, the Representative questioned whether the use of government procurement rules to express a preference or even to mandate free and open source, as well as royalty-free patent based standard, was a possible trade barrier and an intrusion on the exclusive rights associated with a freedom of contract, which was essential in all countries in order to make commerce and technological progress. The Representative stated that as was demonstrated in their comments to the study, there were cases of abuse in which government intervention was necessary. However, the Representative emphasized the fact that the number of abusive cases was small, and that the empirical data was lacking to justify all those intervention mechanisms. In his view, such mechanisms actually caused a degree of legal and economic uncertainty as to the rights of patentees and trade secret holders and freedom of contract, which might impede the necessary investment capital flow into entrepreneurial firms in both developed and developing countries, and preclude the foreign direct investment from multinationals. He further noted that it could also reduce incentives for innovators to invest their resources, time, effort, labor and money to produce technology that could benefit the public good.

11. The Representative of ICC referred to his statement made on the topic of standards and patents at the fourteenth session of the SCP, and stated that it remained valid for the ongoing session as well.

12. The Representative of FSFE stated that document SCP/13/2 provided a good starting point which correctly identified the central role of standards in enabling economies of scale and competition on a level playing field. The Representative stated that his comments would be limited to the area of software standards. The Representative quoted the speech of Mr. Karsten Meinhold of November 2008, the chairman of the European Telecommunications Standards Institute IPR Special Committee which stated that "IPRs and Standards serve different purposes: IPRs are destined for private exclusive use, Standards are intended for public, collective use". Further, the Representative stated that the topic deserved close scrutiny despite of its highly technical nature. He noted that, according to the OECD, SMEs made up between 90 and 98 per cent of companies in most economies. That reflected the situation in the software industry. In developing countries and countries in transition, the SMEs share of the economy tended to be even more pronounced. Barriers to entry into the software business were quite low. He observed that most of software giants could grow rapidly because they had not been hampered by their bigger rival's patents, and often because they had been able to implement existing open standards in innovative ways. Free software, also known as open source, lowered those entry barriers even further. According to the consultancy Gartner, 100 per cent of companies used at least some free software in their systems. The Representative further noted that Linux Foundation had projected that, in 2011, free software would underpin a 50 billion dollar economy. In the view of the Representative, free software held a unique opportunity for developing countries and countries in transition. When those countries import non-free software, they became dependent on the company that provided it to them. In contrast, when they used free software, they foster the growth of local companies thereby helping to create a local knowledge base of technologically skilled experts, who would further add value for the national economies. The Representative noted that that was an extremely condensed summary of the economic perspective on

free software and it constituted a necessary background to the debate on standards and patents. The Representative observed that, standards always implied a wide public access: an openness in both the process of creating the standard as well as access to the standard. He therefore was of the view that an open standard would necessarily had to meet higher standards of openness than those provided in paragraph 41 of document SCP/13/2. In his view, it was important to add that "*de facto*" standards were typically not standards, but vendor-specific proprietary formats that were strong enough to impose themselves on the market. It was for that imposition on the market that "*de facto*" standards were commonly used to describe monopolistic situations and corresponding absence of competition, which conflicted with the basic purpose and function of standards. The Representative stated that that observation was true in particular for the so-called RAND or FRAND approaches. He stated that RAND which stood for "reasonable and non-discriminatory" was actually discriminating against free software. He explained that such model required anyone who distributed a program that implemented the standard to pay royalties to the patent holder. In contrast, free software licenses did not allow for attaching royalty requirements when distributing a program. Any licensing model which required the royalties to be paid was impossible to implement in free software. Noting that some argued that the inclusion of standards in patents on RAND terms was a necessary incentive for companies to innovate, the Representative stated that their opinion was different. The Representative supported the statement made by the Delegation of Brazil on behalf of the DAG in highlighting that the monopoly power conferred by a patent was exponentially increased when the patent was included in a standard. In his view, if a company had been awarded a patent, it had already received a strong incentive to innovate in the form of a 20-year monopoly on the use of the invention to the exclusion of all others. Therefore, he questioned whether society should incur a further, more substantial cost by handing that patent holder a means to effectively control competition in the marketplace and the price of a patent license. Noting that the current software market was already rife with monopolies and dominant companies in several domains, the Representative stated that it should be the goal of norm-setting efforts to reduce the obstacles to competition in the software market, rather than increasing them. He stated that it would be useful for the SCP to analyze the various approaches on the grounds of their inclusiveness of the entire IT industry and all innovators, and identify the minimum requirements that were necessary to uphold standards as drivers of competition, innovation and economies of scale. The Representative suggested that the SCP carefully distinguish different areas for standardization, as the requirements in each area were quite diverse. He considered that, at the beginning of the process to create a standard, standard-setting organizations should require disclosure of patents that were necessary to implement the standard, along with their licensing terms. Further, they should also require that patents deemed essential to implement standardized software technologies should be made available royalty-free, in order to permit their implementation in free software, including software distributed under the GNU General Public License. In particular, the Representative recommended Member States to give a mandate for the SCP to create a cluster of experts to examine possible best practices or global norms with respect to certain issues regarding patents that were necessary to implement standardized technologies of so-called "essential patents".

13. The Representative of TWN, recalling his statement made at the fourteenth session of the SCP, stated that the issue of standards and patents were of critical importance for many developing countries due to its direct implications on industrial development of developing countries. The Representative observed that the problem was not limited to any particular technological area but had implications on all emerging technologies, including energy technology. The Representative underlined that a solution was necessary to bring more predictability and clarity to resolve the problems posed by the patent protection on standards. Therefore, noting the urgent need to develop a work program in that area, the Representative suggested that one of the necessary conditions for such work program should be the quality and quantity of information as a basis for deliberation. The Representative observed that such information was available in the public domain, however, was not at one place, thereby stressing the need to make such information in a single document. Further, the Representative urged the Secretariat to modify the preliminary study to include the information on implications of patents on standards on industrial development, especially of developing countries. It was of the view that an informed deliberation could be facilitated through a document which would compile case studies wherein patent protection on standards resulted in problems related to access to

protected standards, competition law concerns and abuse of patent monopoly. In addition, the Representative stated that the use of flexibilities available within the national and international patent law could be used to address those concerns; therefore the modified study should look into the possibility of using those flexibilities. The Representative further underlined that a compilation of patents in a particular area also was critical for an informed debate on the issue. In conclusion, the Representative urged the Secretariat to invite comments from all stakeholders so that those comments could be compiled to form a good source of information.

14. Referring to the statement made by the Representative of FSFE, the Representative of ITSSD stated that open-source software, royalty-free software and royalty-free technology standards sought parity with, and perhaps even priority over proprietary rights in patented software and other high technologies through the intervention mechanism of government interoperability frameworks. The ITSSD was of the view that such arrangements would impose a mandatory requirement that would give a preference and advantage in the market place to open-source software and royalty-free patent-based technologies incorporated within a standard. According to the view of the Representative, that was a discrimination issue from the perspective of WTO which the SCP could further look into.

15. The Representative of KEI referred to its statements made at the previous session of the SCP on the issue of standards and patents and recommended that the SCP should create a cluster of experts to examine possible best practices or global norms for mandatory obligations to disclose patents relating to standards for some essential technologies, such as energy and others.

16. The Representative of the ECIS stated that the topic on competition and intellectual property in the information technology industry was one of his great concerns. The Representative suggested that the SCP should establish a group that would study the issues concerning the relationship between patents and standards including the issue of disclosure of patents and of licensing terms in the standard-setting processes, as well as a consideration of whether it would be appropriate to adopt best practices or global norms in that field, whereby standard-setting organizations would require patent holders, who wished to have their patents to be included in standards, to express a willingness to license their essential patents through licenses of right as provided in Article 20 of the draft European Community Patent Convention.

II. 14th session of the SCP, January 25-29, 2010 [Excerpts from the Report (document SCP/14/10)]

17. Discussions were based on document SCP/13/2.

18. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States, stated that the preliminary study regarding standards and patents provided a clear description of standards and standard-setting processes. The study referred to the need to clarify the relationship between the standardization system and the patent system, and provided information on possible mechanisms for preventing conflicts. The study tackled a large number of important issues, including the patent policies of standard-setting organizations, patent pools, legal mechanisms within the patent system, competition law aspects, dispute settlement and technical and patent information available under the patent system and the standardization system. The Delegation emphasized that the European Union and its 27 Member States attached great importance to those issues. For example, the question of “Industrial Property Rights and Competition” was one of the challenges identified in the European Commission’s document, “An industrial property rights strategy for Europe”, published in July 2008. The Delegation stated that within the framework of that strategy, the Commission intended to make an assessment of the interplay between intellectual property rights and standards, particularly in relation to information and communication technologies. The Delegation supported further debate on those matters.

19. The Representative of the ICC observed that companies sought both to harmonize the way in which goods and services were designed through standards and to gain part of the return on investments through patent protection. Companies owning patents essential to the standard might seek to get a return on their investments through patent licenses, charging royalties in exchange for agreeing to share their proprietary technology with all implementers. Without that possibility, patent owners might be reluctant to participate in standard-setting activities and contribute with their technologies to new standards. He noted that while companies' viewpoints on the inclusion of patented technology into standards might vary depending on whether the company was a patent holder, an implementer of the standard, or potentially both, they generally were concerned about the costs associated with implementing the standard. The existence of many patent holders owning essential patents on a single standard might increase that concern. There was also a concern in respect of patent holders who might not be willing to license their essential patented technology to all implementers on reasonable terms. The Representative acknowledged that to ensure a wide dissemination of standardized technologies while maintaining incentives for innovation, several approaches were pursued to prevent possible conflicts. He noted that most standard-setting organizations sought an early disclosure of the existence of essential patents, and had requested that the patent holders declare their willingness to offer licenses to all implementers on fair, reasonable and non-discriminatory terms and conditions. Potential implementers could then contact the patent holder and discuss details of the licensing terms, which often would be customized to address all of the implementer's specific needs. There was a possibility that, once the standard was finalized, the patent holder might seek unreasonable licensing terms and the implementer would be pressured to accept them. That scenario was called "patent hold-up" or "patent ambush". The Representative, however, noted that patent hold-ups rarely occurred, in part because most participants who were interested in the standard's success and widespread implementation were motivated to act reasonably. More recently, some participants had required more transparency early in the standardization process ("*ex ante*" or before the standard was completed) of the maximum amount of patent royalties that might be charged on standard compliant products and/or services in connection with the patent holder's essential patent claims. He stated that, due to a number of reasons, the "*ex ante*" approach had not succeeded in some technology areas, e.g., telecommunication. Most standard-setting bodies that had considered the "*ex ante*" approach had permitted a voluntary *ex ante* disclosure of licensing terms to the standard-setting body, but had not required it. He explained that some companies preferred to negotiate a customized license that might address issues beyond just the essential patent claims, and that some patent holders did not actively seek licenses from implementers. The Representative believed that the scope of the exclusive patent rights was carefully designed under national patent laws in order to strike a balance between the legitimate interests of right holders and third parties. While noting that there had been some suggestions to exclude subject matter from patent protection or provide broad exceptions and limitations to the enforcement of patent rights to address concerns about patents and standards, the Representative disagreed with those suggestions and believed that neither the international patent system nor its national implementation required changes to address those concerns. In his view, the support for that position was found in the observation made in the preliminary study prepared by the Secretariat that "no national legislation includes a specific provision limiting the right conferred by a patent the exploitation of which is essential for the implementation of a standard." He further observed that some had suggested more aggressive use of commercial and competition law as a legal mechanism to challenge the abusive or otherwise illegal conduct of any patent holder or of any collective group of implementers. In this vein, he agreed with the statement in the document that "collaborative standard-setting activities, if properly conducted, may have competitive advantages to society at large" but that "if a standard-setting process is manipulated or disguised so that the participants, who are often competitors, could gain unfair competitive advantages *vis-à-vis* other competitors, such a process is likely to fall under the scrutiny of a competition authority."

20. The Representative of KEI complemented the Representative of the ICC for providing an explanation of issues that could go wrong within standard-setting processes when patents were involved. In his view, consumers encountered two different kinds of problems involving patents and standards; the first one was the case where the standard itself created market power, i.e., a patent

that might not have had any monopoly power created a monopoly power through the standard itself. This might be the case where the standard was legally mandated, such as the case of reformulated gas in California, or where it was very important so that everyone would likely use it. He considered that when excessive royalties were charged in the above cases, it could result in a high price of the products. The Representative stated that another problem that patents could create was a barrier to innovation. He disagreed with those who stated that there were not too many abuses like patent ambushes, and stated that, in reality, businesses complained about their difficulty in some areas in developing standards and were concerned about the problem of investing in products and bringing them to the market. In addition, since the existing mechanisms did not effectively deal with parties external to the standard-setting process, businesses were concerned about finding out about relevant patents later. He stated that some businesses acquired patent rights only for the purpose of enforcing them. Therefore, where abuses of patents came from parties that were not part of the standard-setting process, he suggested that a possible role for WIPO be to deal with those cases through the disclosure of essential patents by patent holders who had not participated in the standard-setting process. He considered that such a disclosure mechanism would allow standard developers to make a sound decision. The Representative wondered whether there was enough global thinking about the control of allied competitors' practices or abusive behavior. He noted that a broader collective effort to come up with a common understanding or some kind of open standard could be envisaged. The Representative expressed the hope that the Committee could bring forward specific concrete proposals in that area. He reiterated that the easiest first step would be to address the disclosure issue associated with those who stayed outside the standard-setting process and to try and develop global norms on it, as well as to study the effectiveness of ways of dealing with excessive royalty demands by patent holders for technologies associated with standards.

21. The Representative of TWN stated that the functioning of many standard-setting organizations had been criticized. Academicians, society organizations and developing country governments had pointed out the absence of effective participation, non-transparency and corporate capture in standard-setting processes of many standard-setting organizations. He noted that the intellectual property protection of standards, especially patenting of standards, was a matter of concern for developing countries, because of its potential and actual use as an obstacle to frustrate competition with developing country enterprises. He was of the view that such practices had adverse implications for the industrialization of developing countries. He stated that there were well-documented cases of misuse of IPRs, especially in relation to patent protection of standards. Often patent protection of standards resulted in patent hold-ups, royalty stacking and refusal to license. In his opinion, mechanisms envisaged by many standard-setting organizations like disclosure requirement, royalty-free licenses, or reasonable and non-discriminatory terms did not offer an effective solution. As an example, the Representative quoted a study with respect to patent searches in the database of the ITU and in the patent pools by the South Center, which found that the patents listed for the implementation of the international standard MPEG-2 in ITU were far less comprehensive and important compared to those listed by MPEG LA for commercial licensing in implementing that standard. The same study also showed that often patent holders refused to license on a royalty-free basis and demanded high royalty rates. Similarly, the enforcement mechanism provided by the patent policies of standard-setting organizations were either not-existing or ineffective. Therefore, the Representative was of the view that there was an urgent need to change the current scenario in order to facilitate access to patent protected standards to developing country enterprises on an equitable basis. He noted that, in the long run, the governments should take steps at the international and domestic levels to eliminate proprietary standards and promote open standards. The Representative urged the Member States to take a pro-active role in regulating the standard-setting processes, instead of leaving it to the self-regulation of concerned stakeholders. Against that background, he urged the SCP to look at how far the flexibilities available within and outside the patent regime, including compulsory licenses, could be used to facilitate access to patented standards. In relation to the preliminary study on standards and patents, the Representative stated that the issue had great implications on the policy space for developing countries. In his view, the preliminary study did not make any analysis of the implications of patent protection of standards on the industrial development of developing countries. Further, he stated that the preliminary study needed to provide a few case

studies wherein patent protection on standards resulted in problems related to access, as well as competition law. In his opinion, that type of study would help to enhance the understanding on the implications of patent protection of standards and facilitate an informed discussion. In addition, he considered that the study fell short of providing a critical analysis of the policies of listed standard-setting organizations. In his opinion, the study should outline the positive and negative aspects of harmonized patent policies and of the implementation of common guidelines of the ITU's Telecommunication Standardization Sector (ITU-T), the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). In conclusion, the Representative reiterated that the study also needed to look at the use of flexibilities available in patent law, including compulsory licenses to address concerns relating to the patent protection of standards. He was also of the opinion that the study should add information on the details of patented standards, in the form of, for example, a non-exhaustive list of patented standards, which would enhance the understanding of Member States on the critical nature of the issue.

22. The Representative of ECIS stated that he focused on IP issues concerning interoperability and competition. The Representative stated that the SCP's focus on standards and patents had captured the attention of ECIS, since the issue was an extremely important one in which WIPO could play a constructive role, both in pursuing concrete measures and in competence-building. In his opinion, the latter was especially important in the developing world, which was heavily affected by those issues, but not involved in or necessarily aware of the relevant standardization processes and consequences. While noting that patents and standards were intended to achieve similar goals to encourage innovation and the development of new products, benefiting consumers and economic development, the Representative stated that their interplay was generating greater problems. For example, failure to disclose patents essential to the implementation of standards and excessive royalty demands threatened the viability of standards and the consumer welfare. The Representative believed that WIPO could play a crucial role in understanding and devising solutions to those problems, and encouraged the Committee to pursue them.

23. The Delegation of Uruguay stressed the need to continue studying the issue. It particularly emphasized the need to further analyze the cases involving conflicts between standards and patents with a view to finding possible solutions at the multilateral level.

III. 13th session of the SCP, March 23-27, 2009 [Excerpts from the Report (document SCP/13/8)]

24. The Secretariat introduced document SCP/13/2.

25. The Delegation of Germany, speaking on behalf of Group B, stated that the preliminary study provided clear general descriptions of standards and standards setting processes, it illustrated potential commentaries and friction between the standardization system and the patent system and provided the valuable information on possible ways to leverage the relationship between them. The Delegation further observed that the study highlighted that patent and standards served a common objective. They both encouraged innovation, as well as the diffusion of technology. In addition, the Delegation noted that the preliminary study recognized that companies participated in both, the patent and standardization environment which they accounted for the overall business models. In its view, such approaches improved competition in the market place and promote the dissemination of technology by ensuring, where possible, that patent based innovative products were made available to the public. The Delegation continued that according to the preliminary study, companies' approaches to standardization and the patent system might be complementary or conflicting depending on the context. For example, problems in the interplay of the two systems might arise if the patent right was enforced in a manner that might hamper the widest use of standardized technology, or a patentee believed that standard setting organizations and the members were not adequately taking its interest into account when developing standard. The Delegation further stated that against that backdrop, the paper addressed the considerable number of important issues including the patent policies of standard

setting organizations, patent pools, competition law aspects, dispute settlement, as well as technical and patent information available under the patent and the standardization systems. Group B considered that all perspectives relating to that important spectrum of topics deserved to be heard and they should be subject to further scrutiny, analysis and discussions in the Committee. Group B also thought that further discussions on the topic could be aligned with the activities of the WIPO Standing Committee on Information Technologies (SCIT), namely, with the Standards and Documentation Working Group. In its view, technical experience might provide the valuable input as to where concrete pitfalls of the relation between the standard setting process and the patent system appeared.

26. The Delegation of Brazil noted that the issue was complex and comprehended several elements. According to the Delegation, the preliminary study touched upon a wide array of elements which composed the debate on standards and technical regulations. The Delegation observed that the issue might also involve the elements dealt by sanitary and phyto-sanitary rules. Therefore, the Delegation considered that it was a multi-disciplinary debate, where cross-cutting issues might merge in the course of discussion. In addition, it was noted that accuracy was essential when discussing the relationship between patents and standards. According to the Delegation, document SCP/13/2 fell short of being precise when dealing with certain concepts. In its view, document SCP/13/2 defined standards in a rather extensive manner. The concept of standards, as presented by document SCP/13/2, comprehended norms and technical regulations. The Delegation noted that that understanding might undermine discussions in the Committee. In its view, the document did not differentiate between standards designed for promoting inter-operability and connectivity, and standards related to areas of public policy such as security, public health and the environment. The Delegation was of the opinion that they were different standards and they should not be treated in the same manner. The Delegation was concerned about the need for addressing patent protection to differentiated aspects of public interest. The Delegation stated that the adoption of patent technology in technical regulations might pose strength on areas of public policy, especially in the area of public health. The Delegation was of the view that flexibility provided under the international regime for pursuing public policy objectives must not be undermined by stringent practices regarding standards and technical regulations in relation to patents. The Delegation recalled that the patent and standards was an issue already raised in the agenda of the WTO Committee on Technical Barriers on Trade. In that regard, the Delegation believed that any discussion on the issue that might be decided to carry on within WIPO must be pursued in a consistent manner with WTO provisions on the subject. Due to the large background in addressing the issue, the Delegation believed that WTO was also an adequate forum for discussing the relationship between patents and standards and technical regulations.

27. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, stated that the preliminary study provided clear general descriptions of standards and standards setting processes. The document referred to potential tensions between the standardization system and the patent system and provided information on possible mechanism for preventing conflicts. In its view, the study tackled a large number of important issues, including the patent policies of standard setting organizations, patent pools, legal mechanisms within the patent system, competition law aspects, dispute settlement, and technical and patent information available under the patent system and the standardization system. The Delegation stressed the importance it attached to the issues, and noted that, for example, the question of industrial property rights and competition was one of the challenges identified in point 3.4 of the European Commission's document "An Industrial Property Rights Strategy for Europe", published in July 2008. Within the framework of the strategy, the Commission also intended to make an assessment of the interplay between intellectual property rights and standards, particularly, in information and communication technologies. The Delegation stated that the European Community and its Member States believed that the forthcoming debate on those matters would be helpful, and that it could be coordinated with the revision activities of the SCIT, which had been referred to by the Director General in his opening speech at the tenth session of the Standards and Documentation Working Group in November 2008.

28. The Delegation of the Russian Federation noted that document SCP13/2 was balanced and objective, and clearly described the patent policies of the standard setting organizations. The

Delegation stated that the patent policies were very different from one country to another, and, consequently, it was with a great deal of interest that they had learned about the different existing policies that were referred to in the preliminary study. The Delegation informed the members of the Committee that the issue of standardization in the Russian Federation was under the competence of the Federal Agency of Technical Regulation and Metrology, and that the Rospatent had began various activities in collaboration with above mentioned standard setting organization in order to ensure that the patent system was coherent with functioning of different standard setting processes. In its view, a close cooperation amongst the different standard setting organizations and the patent offices was a key to success. While noting that the document was valuable, the Delegation noted that it was mainly of informative character, therefore, it suggested that a more concrete activities, analysis and assessment to be done on the issue to enhance an understanding of the problems in the area. The Delegation stated that, in the Russian Federation, concerted efforts were made in order to avoid any conflicts of operational or technical character between the standards and patents. The Delegation expressed its high interest on the subject matter and hoped to learn from other delegations' experiences on the interface issue. In conclusion, the Delegation supported the statements of other Delegations who requested the availability of all the preliminary studies in other languages, including Russian.

29. The Delegation of the United States of America supported the statement made by the Delegation of Germany on behalf of Group B. The Delegation noted that the comments on the paper should not be seen as an endorsement of the draft document. The Delegation said that its country supported and strongly encouraged the use of open standards which were developed through an open collaborative process whether or not intellectual property was involved. In its view, open standards could improve interoperability, facilitate interaction, ranging from information exchange to international trade, and foster market competition. Open standard systems offered a balance of private and public interests that could protect IP with fairness, disclosure policies and reasonable and non-discriminatory licensing. The Delegation noted that, when developed by broadly accepted bodies or organizations, even voluntary standards could become widely adopted. Because of those benefits, the statement continued, use of open standards, in the traditional sense, was strongly encouraged whenever practical. The Delegation believed that the standards setting process should be voluntary and market driven. Furthermore, in its view, unnecessary government intervention could impair innovation, standards developments, industry competitiveness and a consumer choice. While encouraging innovation, the Delegation considered that a properly structured public and private partnership could potentially balance the interest of patent holders, who endeavored to exploit their patents, with the producers who wanted to license and produce goods covered by the standards at reasonable prices, and of the public, which sought the widest possible choice in the market place among inter-operable products. The Delegation noted that, in order to effectively respond to the challenges posed by globalization, the emergency of new economic powers, public concerns such as climate change and the need to remain current with evolving technologies, standard development organizations and the standard development process itself must be flexible and capable of adapting the most innovative and best performing technologies available. The Delegation believed that a patent owner should be provided an incentive to have its proprietary technologies included in the standard under fair and reasonable terms. In its view, without the commercial return, there was no incentive for investors to fund research and development into new technology. Therefore, the incentive to develop and use patented technologies in standards should not be undermined. The Delegation said that its country was a market driven, highly diversified society and its standards system encompassed and reflected that framework. Individual standards typically were developed in response to specific concerns and constituent issues expressed by both, industries and government. The Delegation was not in favor of a mandatory, single set of uniformed guidelines, which would deprive the United States of America, its diverse standards setting community, and its innovative industries of the current flexibility in developing standards according to different processes and policies. They were driven by the objective of the particular standard project and the related market factors. The Delegation stated that its government recognized its responsibility to the broader public interest by providing financial and legislative support for, and by promoting the principles of, its standard setting system globally. The Delegation explained that the industry competitiveness of its country depended on standardization,

particularly, in sectors that were technology driven. The Delegation said that the United States of America did not encourage government intervention; the issues had long been discussed and rejected because they hindered innovation, standards development, the US industry's competitive advantage and benefits to consumers. The Delegation further noted that the United States of America remained a strong supporter of a policy that allowed United States standards developers to participate in international standards development activities without jeopardizing their patents, copyrights and trademarks. The Delegation stated that, at present, more than 6,455 standards were approved as international standards with more than 18,000 in the pipeline, and 11,500 of them were American national standards. Thousands more adopted by the industry associations, consortia, and other standard setting organizations on a global basis. However, the number of disputes that resulted in litigation per year was typically in a single digit and the vast majority of those involved specific fact patterns. The Delegation, therefore, stressed that there was no crisis as claimed by some in standards setting. Referring to the competition law section of the paper, the Delegation noted that in its country, anti-trust enforcers sought to ensure that the market was competitive by preventing agreements or mergers that created or increased market power, or unilateral actions that used existing market power to protect or expand a monopoly. The Delegation further underlined that they focused on preventing harm to the competitive process, but not on ensuring competitors treat each other fairly. Therefore, they suggested not to use the word "fair" wherever it appeared before "functioning of the market", and when in connection with modified competition or market. It further noted that, in the United Sates of America, the term "abuse" was not used in conjunction with IP rights because the term was too abstract and was often confused with the concept of "patent misuse". Therefore, the Delegations suggested that the term "abuse" be replaced with "illegal collusive or exclusionary conduct" when discussing competition law aspects, since the section did not cover potentially anti-competitive agreements, such as horizontal practices among members of standard setting organizations that collude on prices or exclude competitors.

30. The Delegation of China observed that there were only few discussions on the issue of patents and standards during the last ten years, whether in China or at the international level. However, the Delegation noted that, lately, the issue was attracting more and more discussions. The Delegation stated that reasons for that development were various. On the one side, it was because of the formation of the TRIPS Agreement of WTO which promoted the IP protection globally. The TRIPS Agreement imposed strict obligations on the WTO Members, and anyone violating the TRIPS Agreement could face serious consequences. Second, it was because of the globalization of the economy and the development of new technologies. The Delegation noted that, for example, great progress had been made in the field of information technology or biotechnology, which had expanded the global trade. As regards the relation between patents and standards, the Delegation underlined the importance of the issue for national and public interests as well as right holders' interests, and supported the further studies on the interrelationship between patents and standards, as well as further discussions on the matter in the Committee. The Delegation further stated that, for instance, in China, some national standards were mandatory, for example, in the areas of construction and food. The Delegation was of the view that if there was a combination of those types of mandatory standards and patents, the patent holder would gain greater benefit, since the use of a patent would no longer be a free choice. In that context, the Delegation reiterated that the relationship between two areas was very important for the public interest and, therefore, it raised concerns and questions on how to reach consensus and common understanding on the issue among the Members of the Committee. Further, the Delegation said that, in China, there was a patent law as well as a standardization law. The question remained as to which law should treat which matters. It further noted that it would be difficult to stipulate in the patent law how to set up standards and the standard setting process. The Delegation was of the view that it was more natural and reasonable if standardization law contained provisions on patents. The Delegation explained that, during the revision of the Patent Law of China, there had been a lot of voices from different sectors on the question as to whether the Patent Law should contain provisions concerning the standard setting. The State Council and the Congress had decided that it was not appropriate to do so. Consequently, the issue was left to the revision work of the standardization law. Recalling the discussion on the issue of exceptions and limitations, the Delegation noted that the nature of those documents and the subjects were different, since

document SCP/13/3 was only related to patent law, whereas the issue of standards and patents were not limited exclusively to patent law. Therefore, the Delegation stated that the issue required different approach. In conclusion, the Delegation reiterated that it supported further discussions on the issue in the Committee without setting up a timeframe on when to finish, and when to find a solution.

31. The Delegation of Indonesia stated that the interplay between standards and patents was indeed an emerging challenge and a crosscutting issue with profound policy implications on development. The Delegation said that the issue was closely related to standardization, patentability, IPR protection and competition control on IPR misuse. Referring to the preliminary study, the Delegation noted that various initiatives were undertaken to address the issue. Nevertheless, it stressed that due to the cross-cutting nature of the issue, initiatives in those organizations should be better coordinated and complemented. In that context, the Delegation stated that WIPO with its mandate on IPR related issues, and its expertise on patent data information management, including patent search tools, could and should make great contribution in resolving the problems in standards and patents. In addition, the Delegation considered that WIPO should give due consideration to some other fundamental issues such as a balance between the private rights of IPR holders and the public interest. For the possible work plan, the Delegation suggested that the further study be conducted between WIPO and the international standard setting organizations such as International Organization for Standardization (ISO), ITU, and others.

32. The Delegation of Pakistan noted that the problems derived from the fact that the patent policies were rules established by the standard setting organizations as means of self regulations. Those rules did not bind parties who were not participating in the standardization procedures. In its opinion, the major problem was that IPR was misused in the standardization process. Consequently, the patent holders either undisclosed the patent information or agreed to grant royalty fee licenses on rare occasions only. Therefore, a patent holder could block the implementation of the IPR that had been recognized as standards by either refusing to grant a license or requiring such high royalties as to make it impossible for the dissemination and adoption of the standard. The Delegation was of the view that if IP was misused, it could cause tremendous difficulties for the developing countries to access the knowledge, as well as engaging in follow-on innovation process. In that regard, the Delegation considered that WIPO needed to look into detail on how to address those challenges to regulate patent misuse and ensure a disclosure of patent information. Further, the Delegation stated that attention should be drawn to the fact that standards and patents were closely related with other issues. Thus, according to its view, standards and patents were one of the important areas, where exclusion of patentable subject matter and exemption and limitation of exclusive rights of IPRs needed to be taken into account. It further noted that the patent information for standard setting and standards implementation were related to the issue of patent information dissemination. The Delegation further endorsed the statement of the Delegation of Indonesia regarding the future work. It noted that it was important that WIPO worked in close coordination with other organizations, so that there was a harmonization to the effect, and there was no discrimination between different standards which were being set, and their impact on developing countries.

33. The Delegation of Chile believed that the analysis and the study of the issue was highly relevant and that the document would be a very good tool to begin to better comprehend the area which was not very well known. The Delegation appreciated the content of document SCP/13/2 and was convinced that further study of the issue would be continued. The Delegation was of the view that the effects that certain contractual rules could have on competition law, the use of the dominant position with regard to the use of patents in standards, and especially the effects of technical advances on developing countries, should be taken into account. Noting that the issue of standards and patents were relatively new, the Delegation reiterated the importance of having the document open for further analysis, contributions and comments.

34. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, stated that WIPO, being the leading organization on patents, could elaborate the study into the area of inappropriate use of patents in the standard-setting activities. Specifically, the Delegation requested the Secretariat to

further study the issue in order to formulate possible draft guidelines on patents in standardization, which would consist of basic means of compulsory license, reasonable royalty calculation, exceptions from the patent subject and limitation to the exclusive IP rights with regards to IPR and standards.

35. The Delegation of Colombia noted that the number of products that needed to be interoperable and compatible had increased. The standards had made it possible to substitute one part of a product by another part so that it was possible to assemble those parts together. Further, the Delegation stated that standards reduced transaction costs, and provided platforms and the economies of scale for all of the businesses involved in different technical areas. The Delegation observed that there were difficulties with regard to standards and patents when the use of a standard was covered by several patents. It its view, one of the objectives of a standard setting organization was to enable those who were interested in developing the technology in question to do so, and to establish standardized technologies which could be used as broadly as possible across the market. The Delegation further observed that all of those in the technology sector might have an interest in having its own technology patented so that they could have the commercial use and the royalties coming back to them. The Delegation stressed that there was a need to strike a balance between the patent holders, in exploiting their patents, the manufacturers, who sought a license at a reasonable price so that they could produce the goods that were part of the standard, and the end users, the public, who sought a broad choice amongst the products. The Delegation stated that some of the concerns with regard to striking that balance were, for example, the fact that a patent holder might not divulge enough information with regard to a patent which was either pending or in force until the standards was set up. In addition, the Delegation was concerned about a competition issue where there was a problem of high royalties, which might have an impact on the standardize technology and its accessibility. In its view, the competition law dealt with issues such as abuse of a dominant position, or violation of the policies on patents within a standard-setting organization. When a company did not participate in the standards setting, the Delegation observed that the patent policy in force might not provide a satisfactory solution to the problem. The Delegation was of the view that it was the users who would have to have the freedom to choose the model which was the most beneficial to them. The users needed to look at the quality and the price, the technical merits of the product, the cost, technical assistance and other elements which would meet their specific needs and interests. The Delegation stated that its government believed that it was important to design a model that would enable States to promote the type of licensing which would assist them. Further, the Delegation stated that its country promoted free competition under its constitution, that competition rules should not be in favor of one business model or the other, and that the users should be able to use open licenses.

36. The Delegation of El Salvador welcomed the fact that the Committee touched upon issues such as technical obstacles to trade, which was one of the areas being dealt with within the WTO, as well as competition law and other elements. The Delegation believed that the document contributed positively to the work of the Committee by informing on the various issues in relation to standards and patents. The Delegation requested more information with regard to the open source issue. Lastly, the Delegation echoed the voices of other Delegations who had requested that the document remain open for further discussions.

37. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation noted that document SCP/13/2 was informative, addressing different aspects of the interrelation between patents and standards and giving a basis for further discussions. The Delegation stated that the interrelationship between standards and patents was complex and required further studies. The Delegation was of the view that the governments protected and designed public policies, whereas the patent holders, as owners of private rights, protected their private interests. Therefore, the Delegation stated that the nature of the different interests should be taken into account in further studies. Further, the Delegation noted that the diversity of different industrial bases and standards policy at the national level made it more complex. Referring to paragraph 61 of documents SCP/13/2, the Delegation noted that the national patent laws were different from one country to the other with respect to formality requirements,

substantive requirements as well as judiciary procedures, and that each national legislation had its own relationship with standards. Noting the complexity of the issue, the Delegation reiterated the need for further studies on the subject matter in cooperation with relevant organizations, focusing on its implications to developing countries. In conclusion, the Delegation requested that the document be open for further discussions in the SCP.

38. The Delegation of India noted that the relationship between patents and standards was a complex issue which had many ramifications, particularly, for developing countries. The Delegation stated that while standards might be prescribed in various fields, the implementation of such standards, with the view to improving quality of products and services, required the use of intellectual property rights raised many questions. In its view, it would be appropriate to study the subject deeper so that the implications of standard-setting on IPRs could be understood clearly before moving forward on this matter. The Delegation continued that the usefulness or the lack thereof of contractual remedies to address the issue of strategic behavior which might sometime involve the misuse of IPRs by participants in the standard setting process was an area that could be explored more. According to the Delegation, it would also be useful if the full implications of the WTO Agreement on Technical Barriers to Trade on standards setting organizations and patent policies were brought out in more details. The Delegation further noted that the effectiveness of the use of compulsory licensing provisions for addressing issues of standard setting might also need further study. In conclusion, the Delegation urged for further exploration of the matter through studies and, where necessary, in collaboration with international standard setting organizations suggested by the Delegation of Indonesia.

39. The Delegation of the Republic of Serbia, speaking on behalf of the Group of Central European and Baltic States, stated that the issue of standards and patents was very important for all the countries of the region, because the patent system was held as a basic IP infrastructure for protecting innovation and, at the same time, it was seen as a tool for promoting goods at the foreign markets which met the prescribed standards. The Delegation noted that the standardization could be considered also as an additional difficulty in the process of granting patents, because the technical solution had to meet in advance all the conditions stipulated by standards.

40. The Delegation of Brazil, referring to paragraph 44 of document SCP/13/2 stated that an open source software was highly crucial for countries and, particularly, for developing countries. Its country had been defending that position in other international fora, including the World Summit on the Information Society. In the view of the Delegation, free and open source software allowed governments to make full use of the ICT technology. The Delegation continued that that approach was in line with the use of the information communication technology for achieving the Millennium Development Goals, and it was also recognized in the Tunis Agenda for the Information Society, which recognized that free and open source software was highly relevant and represented a tool for bridging the digital divide among countries.

41. The Representative of KEI took note of document SCP/13/2 which stated that the inherent tension existed between patents and standards, particularly, when the implementation of a standard called for the use of technology covered by one or more patents. For the detailed written comments on the issue of patents and standards, the Representative requested the SCP to consult pages 6 to 39 of Annex III of document SCP/12/3 Rev.2. The Representative proposed that the SCP gather information and evidence regarding State practices in terms of obligations to disclose patents on proposed standards. It further proposed that, in order to facilitate the information gathering process, the SCP develop a questionnaire for WIPO Member States. Innovative businesses and consumers should be given a forum on the WIPO webpage to share their views on the adequacy of the current system of managing disclosures. It further proposed that the SCP consider a disclosure mechanism based upon the proposal of March 10, 2005, “Draft proposals for a Treaty on Access to Knowledge” and the establishment of a working group on patents and standards.

42. The Representative of TWN stated that the world was in the middle of the biggest economic crisis since the depression of the 1930s. The Representative found it surprising that, at the time of such crisis when the United States of America, the International Monetary Fund, the European Union Member States, etc., had all recognized the need for regulation of markets, some Delegations could still assert that there was no role for the governments in the area. The Representative noted that the regulations which were needed to deal with the current crisis and prevent future financial crisis had not yet been determined, as crisis still affecting new countries through different transmission mechanisms. The Representative wondered what if, for example, banking capitals reserve standards and hedge fund regulation required a mathematical model or software which was patented in some jurisdictions. Further, the Representative implied the recognized role for government legislation in the area, in the form of competition law to deal with cases where patents and standards might have anti-competitive effect. The Representative continued that, unfortunately, developing countries often had less capacity to draft, implement and enforce competition law because that was a highly complex intersection of economics and law, and many developing countries did not yet have competition laws. In its view, given this situation, developing countries might need to regulate the area upfront rather than waiting for the anti-competitive effects to manifest themselves, and try and catch it through competition law. The Representative stated that, for example, standard-setting organizations could be required to set default penalty payments by imposing a maximum royalty in a case of failure to disclose a patent that appeared in a standard. In that context, the Representative noted the US practices of compulsory licenses which were of zero per cent royalty in the case of anti-competitive conduct, and less than 0.1 per cent of the value of the total product even when it had not been for anti-competitive conduct.

43. The Representative of FFII pointed out that the problems with standards and patents predominantly occurred in the field of software. The Representative noted that a frame of the EPC might have foreseen the potential problems in that field by excluding software as such from patentability. In its view, if the EPC would be followed to its spirit, most of the problems in the field would not occur. The Representative considered it incorrect to state that there was no crisis in the field. Software interface standards developers had to operate in a field of patents leading to tremendous cost, slow innovation and often technically suboptimal solutions. He stated that the history had shown that, in the IT industry, market domination of certain players tended to proliferate due to so-called network effects. In his view, patents exacerbated the problem. In conclusion, the Representative said that if software *as such* truly was exempt from patentability, as the EPC framers had written, most of the patent problems with standards would not occur, and competition that led to more innovation would increase.

44. The Representative of FSFE noted that it was a fortunate coincidence that the SCP discussed the issue of standardization and patents on the global day for document liberation and open standards, during which hundreds of groups around the world highlighted the role and impact of open standards for interoperability, competition, innovation and political sovereignty. The Representative stated that document SCP/13/2 provided a good starting point and correctly identified the central role of standards in enabling economies of scale and competition on a level playing field. The Representative continued that that could be supplemented with the perspective on innovation facilitated through standards by providing a broad basis for future innovation, ideally available to all innovators. All of those benefits depended upon wide public access of standards which the British Standards Institution (BSI) defined “as an agreed repeatable way of doing something. It is a published document that contained a technical specification or other precise criteria designed to be used consistently as a role, guideline or definition. Any standards was a collective work committees of manufactures, users, research organizations, government departments and consumers, which worked together to draw up standards that evolve to meet the demand of society and technology.” Therefore, in his view, standards always implied wide public access and openness in both setting of the standard as well as access to the standard. Consequently, he considered that an open standard would necessarily have to meet higher standards of openness than those provided in paragraph 41 of document SCP/13/2. Further, the Representative noted that it was important to add that *de facto* standards were typically not standards, but when specific proprietary formats, as the Secretariat correctly had pointed out in the introduction to the discussion, were strong enough to impose

themselves upon the market. The Representative stated that it was for that imposition on the market that *de facto* standards were commonly used to describe monopolistic situations in corresponding absence of competition which conflicted with the basic purpose and functions of standards. The Representative said that during the November 2008 workshop by the European Commission, the Chairman of the ETSI IPR Special Committee highlighted that IPRs and standards served different purposes: IPRs were destined for private exclusive use, standards were intended for public collective use. The Representative was of the opinion that while both exclusive rights and standards were regulations motivated by the public interest, upholding one necessarily deprived the other of its function. The Representative continued that that fundamental conflict was the basis for the common practice of the participants in standardization to assign copyright to standardization bodies to facilitate broad usage of resulting standards. He further noted that there was no such common practice in standardization with regards to patents, leading to a variety of attempted remedies, some of which were described in the preliminary study. In its view, it would be beneficial for the study to also add approaches, such as public patent grant force standards, like the Adobe public patent license on the PDF standards, or the sun open document patent statement. The grant by a Adobe was of interest, in particular, for its retaliation clause against legal usage of patents against wide adoption of the standards. In the opinion of the Representative, the study could be further expanded with an assessment of the effectiveness of the various attempted remedies most of which, in his experience, had failed to provide a level playing field for competition. As the necessity for approaches, such as ART+P, advocated for instance by Nokia, demonstrated accumulated reasonable royalties could easily become exorbitant. He further stated that the lack of reliability of insurances to license upon request, and lack of safety from third party patent claims, after standard had been published and became the basis of the market, were some of the reasons for the current crisis in IT standardization which was discussed also with contributions by various large US cooperation such as IBM, Google and others. For further reference, the Representative recommended the work of the Open Forum Europe industry association and its Special Interest Group on Standardization. According to the view of the Representative, the other issues were raised by the system that inherently biased against SMEs, which constituted the overwhelming majority of many economies, including the European Union, most developing nations as well as countries in transition. It further stated that the current practice of licensing conditions excluded whole sectors of the market from implementation of some standards. The most severe example for that practice was the exclusion of innovation, products and companies based on the free software model, also known as open source. In November 2008, it was projected that all companies would be using software based on that model by November 2009. The Representative stated that the exclusion of an entire and central sector of the IT industry seemed unreasonable and discriminatory, and was arguably in violation of the common patent policy of the ITU Telecommunication Standardization Sector (ITU-T), the ITU Radiocommunication Sector (ITU-R), ISO and the International Electrotechnical Commission (IEC) which stated the principle that a patent embodied fully or partly in a recommendation deliverable had to be accessible to everyone without undue constraints. The Representative believed that it would be most useful for the SCP to analyze the various approaches on the grounds of their inclusiveness of the entire IT industry and all innovators, and to identify the minimum requirements that were necessary to uphold standards as drivers of competition, innovation and economies of scale.

45. The Representative of the CCUSA stated that he had heard many times during the current SCP session the term “balance” used and, in his opinion, the concept and role of balance was a key when discussing standards matters. The Representative described standards and balance in the concept of stuck rocks. He imagined a stuck rock of 3 or 4 feet tall and only one of the rocks could be in an incorrect place and the whole rock pile fell down. In his view, that concept could be applied with respect to balance and a standard-setting process. The Representative stated that the impression about standards much depended upon different lenses through which standards were viewed. The Representative continued that beyond the IP experts and NGOs, there were many others that contributed to the balance of interest in setting a standard, for example, the standard developing community, who managed and understood the rules by which standards were developed, government users, public safety and environmental regulators, government procurement agencies who used standards, the participants in the standard processes such as those who made valuable contributions

of their intellectual property upon which standards were often based and which were key to the success of the standards, licensors of IP and users of standards and the antitrust competition policy experts. The Representative stressed that the point was that there were many ways to stick those rocks, but the pile of rocks would fall over if the balance was not carefully maintained. The Representative said that one way to look at the topic was to respond to the following questions: what were the problems, particularly within the context of the overall global standards community; what were the approaches and the tools available to address those problems; where were the solutions working, and where might there be gaps; and where the experience and knowledge of WIPO and members of the SCP, could improve the current solutions and fill those gaps. The Representative stated that with respect to problems, the preliminary study offered anecdotes of problems, however not in the context how well the overall system worked. He recalled that there were some statistics given earlier about the few problems existed in relation to the far great number of standards that actually existed. In his opinion, there were two classes of problems well described in the paper. The first problem had to do with unfair competition, when IP was not disclosed. The second problem related to a legend on reasonable offers to license the IP. With respect to solutions to those kinds of problems, the Representative stressed the importance of maintaining incentives to innovate, particularly, in the areas that were about to be standardized. As regards the unfair competition problems, in the view of the Representative, the preliminary study well described how certain antitrust and competition policy actions, particularly, in the United States of America, had reduced and addressed those problems. Concerning the licensing commitment, the Representative noted that the study described how the system regulating itself with patent policies of standard setting organizations, and the role of contract litigation with respect to assuring that commitment. The Representative believed that there was no need to create new solutions to problems that primarily exist in theory, but not in actual practice. In conclusion, the Representative stressed the importance of WIPO joining and supporting other global fora, including ISO, ITU and WTO.

46. The Representative of the ICTSD pointed out that the UNCTAD/ICTSD project on IPRs and Sustainable Development had made available a policy brief on interface between patents and standards in international trade discussions. The policy brief contained a number of recommendations on how to address tensions between patents and standards. In particular, it contained discussions on the use of competition policy and the involvement of competition authorities. The Representative hoped that the policy brief would be a useful contribution to the debate.

[End of document]