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WORLD INTELLECTUAL PROPERTY ORGANIZATION  
GENEVA

## STANDING COMMITTEE ON THE LAW OF PATENTS

Thirteenth Session  
Geneva, March 23 to 27, 2009

### REPORT

*adopted by the Standing Committee*

#### INTRODUCTION

1. The Standing Committee on the Law of Patents (“the Committee” or “the SCP”) held its thirteenth session in Geneva from March 23 to 27, 2009.
2. The following States members of WIPO and/or the Paris Union were represented at the meeting: Afghanistan, Algeria, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Bolivia (Plurinational State of), Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Cuba, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Japan, Jordan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, Malaysia, Mauritius, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uruguay, Viet Nam and Yemen (105).

3. Representatives of the African Regional Industrial Property Organization (ARIPO), the African Union (AU), the Eurasian Patent Office (EAPO), the European Commission (EC), the European Patent Office (EPO), the International Telecommunication Union (ITU), the Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC), South Centre (SC), the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organization (WTO) took part in the meeting in an observer capacity (10).

4. Representatives of the following non-governmental organizations took part in the meeting in an observer capacity: Asian Patent Attorneys Association (APAA), Center for International Environmental Law (CIEL), Centre for International Intellectual Property Studies (CEIPI), Chamber of Commerce of the United States of America (CCUSA), Chartered Institute of Patent Attorneys (CIPA), CropLife International, European Communities Trade Mark Association (ECTA), European Law Students' Association (ELSA International), Foundation for a Free Information Infrastructure (FFII e.v.), Free Software Foundation Europe (FSFE), Fridtjof Nansen Institute (FNI), German Association for Industrial Property and Copyright Law (GRUR), Institute of Professional Representatives before the European Patent Office (EPI), Intellectual Property Institute of Canada (IPIC), Inter-American Association of Industrial Property (ASIPI), International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), International Association for the Protection of Industrial Property (AIPPI), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce (ICC), International Federation of Industrial Property Attorneys (FICPI), International Federation of Pharmaceutical Manufacturers Association (IFPMA), IP Federation (formerly TMPDF), IQSensato, Japan Patent Attorneys Association (JPAA), Knowledge Ecology International, Inc. (KEI), Latin American Association of Pharmaceutical Industries (ALIFAR), Max Plank Institute for Intellectual Property, Competition and Tax Law (MPI), Royal Institute of International Affairs (Chatham House) and Third World Network (TWN) (29).

5. The list of participants is contained in Annex I to this report.

6. The following documents prepared by the International Bureau had been submitted to the SCP prior to the session: "Draft Agenda" (SCP/13/1 Prov.2), "Standards and Patents (SCP/13/2), "Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights" (SCP/13/3), "The Client-Attorney Privilege" (SCP/13/4), "Dissemination of Patent Information" (SCP/13/5), "Accreditation of Observers" (SCP/13/6), "Report on the International Patent System" (SCP/12/3 Rev.2) and Addendum to the Report on the International Patent System" (SCP/12/3 Rev.2 Add.).

7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions reflecting all the observations made.

## GENERAL DISCUSSION

### Agenda Item 1: Opening of the Session

8. The thirteenth session of the Standing Committee on the Law of Patents (SCP) was opened by the Chair, Mr. Maximiliano Santa Cruz (Chile). The Director General, Mr. Francis Gurry, welcomed the participants. Mr. Philippe Baechtold (WIPO) acted as Secretary.

9. The Director General of WIPO noted that the number participants demonstrated the importance of the work of the SCP. As regards the proposed Conference on Intellectual Property and Global Challenges, to be held on July 13 and 14, 2009, the Director General recalled that the initial idea of the Conference as mentioned in the Chair's Summary of the SCP meeting in June 2008 was to strengthen WIPO's role in the interface between intellectual property and some of the other areas of public policy where questions of intellectual property had emerged. He observed that, in some of those areas, WIPO had not been as active in the past as it had been able to be. Therefore, one of principle aims was to show that WIPO was open for the discussions in respect of those areas in the Organization. The Director General informed the participants that some consultations had taken place with the Chair and the Group Coordinators last week, and he had had a number of consultations with different representatives of different groups with respect to the Conference. He noted that one of the items that he was responsible for himself in adding to the agenda of the Conference was the question of disability. In his view, it was appropriate to use the occasion of the Conference to address the issues concerning disability, since, while the question had arisen principally in the field of copyright with respect to, and enabling legal framework for, improving access on the part of the blind and the visually impaired to published works, there was important technology dimension associated with such question. An increasing number of technologies were being evolved to enable access on the part of the visually impaired to the Internet as well as to more regular form of published works. The Director General further recalled that there was an important development dimension to such question, since 95% of the visually impaired in the world were to be found in developing countries. He observed that the question was pre-eminently a global challenge, in particular, by virtue of the adoption of the Convention on Disability in 2008.

#### Agenda Item 2: Adoption of the Agenda

10. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, proposed that a discussion on the Conference to be held in July 2009, be included as an additional agenda item.

11. The SCP adopted the revised draft agenda (document SCP/13/1 Prov.2) with the addition of an agenda item regarding the July 2009 Conference, which was included in the final version (document SCP/13/1).

#### Agenda Item 3: Accreditation of Observers

12. The SCP approved the accreditation of the Royal Institute of International Affairs (Chatham House) as *ad hoc* observer (document SCP/13/6).

#### Agenda Item 4: Adoption of the Draft Report of the Twelfth Session

13. The Delegation the Islamic Republic of Iran requested the addition of its Delegation in the list of participants annexed to document SCP/12/5 Prov.

14. The Committee adopted the draft report of its twelfth session (document SCP/12/5 Prov.) as proposed, with an amendment in the Annex.

*General Declarations*

15. The Delegation of Senegal, speaking on behalf of the African Group, stated that its Group was aware of the fact that nowadays patented inventions touched nearly all aspects of their daily life and that its countries, in order to benefit from them, must seize the opportunity that patents could bring to them. It was with that spirit that the Group would try to contribute in the most constructive way possible within the SCP to finding a consensual work program which took into account the different concerns of different Member States. The Delegation observed that document SCP/12/3 Rev.2 on the International Patent System constituted a very good basis for the work and that it must remain open to any comments, suggestions and contributions which might come from Member States. During the last session, the Committee had managed to make an important step forward in drawing up the list of 18 issues which needed to be discussed and that list was not considered to hold any hierarchy amongst the different topics on it and it must remain open. In conformity with the recommendations of the Committee, four of those 18 issues had been the subject of preliminary studies. Those were on the Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights, the Client-Attorney Privilege, Standards and Patents and the Dissemination of Patent Information. The Delegation stated that, with regard to those four points, there was no doubt in their mind that exclusions from patentability may be considered in the light of historic, cultural and religious specificities but also in the absence of criteria for patentability which could vary from one country to the next, according to their legislation. That was why, as had been mentioned in the preliminary study, the scope of the exclusions from patentability required an in-depth evaluation. Concerning any exception with regard to what was patentable and limitations to the right, the Delegation noted that they constituted important means to deal with the undesirable secondary effects which might arise in any patent system. That might, for example, be with regard to anti-competitive practices as well as to public policy priority. The Delegation observed that the African Group had noted a jurisprudence reference made in paragraph 13 of document SCP/13/3 regarding the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, which authorized Members of the WTO to have a waiver to the limitation of exports with regard to the compulsory licenses for Members of the least developed country (LDC) group or who had insufficient manufacturing capacity in the field of pharmaceuticals. The Delegation considered that the reference made demonstrated the importance of those exceptions and limitations and showed well-founded concerns about the potential for disappearance of exceptions and limitations. The Delegation referred to another example of exceptions and limitations to the rights, namely, compulsory licensing, which was a legal mechanism provided not only in developing countries but also in developed countries. As regards the client-attorney privilege of the confidentiality of communication between advisers on intellectual property or intellectual property lawyers and their clients, the Delegation observed that, since it was difficult to see theoretically how that would work out in the future, time must be taken and more exchanges should be held with experts in that field and in capitals, to assess the situation. If there was an activity that had a link to general interest and if it was attempted to confine that in every circumstance to a private affair, that might certainly give rise to some concern and apprehension by the African Group. With regard to technical standards and patents, the Delegation noted that the important goal of creating technical standards should not be blocked by patents and it should not be made difficult to use an efficient system, one that was fair and balanced. Anti-competitive effects in the utilization of patents in order to create monopoly revenue which then would be an obstacle to the establishment of technical standards must be at the heart of the concerns within that framework. Those concerns were particularly relevant to developing countries where the

large majority were end-users of standards and therefore could not participate in creating and producing those standards. The Delegation stated that if patent information was a public good available to all and the dissemination of patent information promoted transparency in the market and legal certitude in transactions of intangible assets, such information should be disseminated at an international scale. The Delegation observed, however, that the reality seemed far more complex and requested more exchange of information and more consultations with experts in the field. The African Group stated that nothing yet was written in stone, and that a preliminary stage of studies should not only be deepened, but also be extended to other issues which were equally important. In its view, that would provide for better understanding of the possible implications, interference and interactions. The Delegation further stated that for its Group the way in which the Secretariat programmed the Conference for July 2009 was not completely in compliance with the mandate given to it. It believed that two days would not suffice in order to deal with all of the various questions that needed to be addressed during that Conference, and requested the Secretariat to provide more time for consultations before the agenda of that Conference would be set.

16. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, welcomed the four preliminary studies prepared by the Secretariat, which were part of efforts to develop a work program for the SCP. The Delegation observed that those studies might facilitate discussions on the four different issues related to global patent debate; however, those should not serve as definitive conclusions on those subjects. The Asian Group understood that the subjects of those four preliminary studies conducted by the Secretariat were not to prioritize some issues over the others, and that the list of issues was non-exhaustive. The Delegation stated that the Members of the Asian Group wished to propose additional items to the non-exhaustive list as the discussion unfolded and that the Group wished to highlight certain principles which should form part of the future work of the Committee. It believed that a thorough and extensive discussion on all issues highlighted in the non-exhaustive list would facilitate substantive progress of the Committee. The Group expected that there was a need for adopting a balanced approach for discussions on the possible international patent agenda. The Delegation felt that there were linkages between the patent system and public policy issues. Those should be dealt together in a manner where the public policy concerns would be taken into account while discussing the patent system. The Delegation emphasized the need for a pro-development and balanced approach in addressing all IP related issues. In that regard, the work of the Committee on Development and Intellectual Property (CDIP) and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) were of particular interest to the Asian Group.

17. The Delegation of Germany, speaking on behalf of Group B, appreciated the preliminary studies and the opportunity to discuss those documents with other delegations. The Delegation observed that the Report on the International Patent System gave an excellent and comprehensive survey on that topic. Group B looked forward to deepening the issues covered by the preliminary studies with the view towards enriching SCP members' common understanding of the complex questions in particular, and the international patent system as a whole. Group B acknowledged that the preliminary studies were conducted in very careful manner, avoiding bias in any direction and premature conclusions. They addressed important questions concerning the international patent system and they should serve as the basis for future discussion in the Committee. The Delegation expressed its conviction that, having reached the first milestone, the SCP would succeed in finding a balanced work program. Regarding the global dimension of intellectual property right, the Delegation welcomed the convening of the WIPO Conference on Intellectual Property and Global Challenges in July 2009 in Geneva which would address fundamental public policy issues in connection with

intellectual property right and it was looking forward to in-depth discussions at that Conference. Given WIPO's limited resources particularly in that time of economic uncertainty, the Delegation believed that it was extremely important that the SCP did not duplicate the work being undertaken in other WIPO Committees. In concluding, the Delegation reaffirmed its Group's strong commitment to international harmonization of patent law and the work of the SCP and it was confident that common ground reached in the SCP could also serve as a stepping stone for future work in WIPO in general.

18. The Delegation of Serbia, speaking on behalf of the Group of Central Europe and Baltic States (CEBS), expressed its satisfaction with the documents prepared by the Secretariat, which indicated the possible differences between the Member States and, being well-balanced, reflected in a good manner the interests of different sectors, Member States, right holders and other users. The Delegation therefore believed that the preliminary studies constituted a solid basis for future cooperative and quality discussions on the four issues and expressed its hope that the documents would serve the purpose to facilitate the effort in developing the SCP work program. Considering the patent system as a basis for an IP infrastructure for protecting innovation, the Delegation hoped to achieve progress and harmonization of the patent law. With regard to WIPO's dedication to the global issues, the Delegation stated that the CEBS Group endorsed the initiative for organizing a Conference on IP and Global Challenges, to be held on July 13 and 14, 2009, and impacts of global challenges on the intellectual property rights. Since there were a certain number of open issues, the Delegation hoped that further clarification on those topics would follow in due course. Because of the exceptional importance of all above-mentioned, the CEBS Group expressed special pleasure and readiness for more detailed discussion and exchange of opinion with other Groups and Member States.

19. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, reaffirmed its commitment to the work of the SCP, the aim of which was to define a balanced work program for the SCP as soon as possible, and reiterated its satisfaction with reaching an agreement at the twelfth session of the SCP on four issues, the preliminary studies which had been undertaken by the WIPO Secretariat. The Delegation also recalled that the choice of the four items from the non-exhaustive list did not imply any priority. The European Community and its 27 Member States appreciated that the preliminary studies were prepared in a comprehensive and objective way, without aiming to reach any conclusion. They tackled important issues concerning the existing international patent system and were a good basis for further discussion. The Delegation considered that the development of an international patent system and reduction in the divergence of patent law and practice in the various countries of the world would help in promoting innovation and bring benefits to their stakeholders. The Delegation expressed its belief that those preliminary studies would be a valuable contribution to the SCP's debate on international patent law harmonization. The Delegation recalled that the European Community and its 27 Member States also had supported the convening of the Conference on Intellectual Property and Global Challenges in July 2009 in Geneva, which would address many interesting public policy issues in connection with the intellectual property rights. The Delegation was looking forward to the discussion at the Conference and to its results. In concluding, the Delegation invited all countries to make further coordinated efforts with a view to achieving a balanced work program for the SCP.

20. The Delegation of the Plurinational State of Bolivia stated that the four preliminary studies prepared were extremely useful. The Delegation considered that the work program had to be improved and that the SCP had the possibility to deal with issues of interest to all

countries, in particular, to developing countries, since the purpose was to include them in the work program. As regards exceptions, limitations and exclusions, the Delegation pointed out that there were two exclusions of particular importance to its Government, namely, to exclude the possibility to patent living organisms and technological progresses related to climate change in view of the various serious situations faced at present. The Delegation observed that, although the present multilateral standards allowed for those exclusions and Article 27.3 of the TRIPS Agreement authorized regulations on different forms of life, its country was prevented from going ahead with that possibility. Noting an ethical criterion in particular from the technical point of view, the Delegation stated that patents on microorganisms were based on an artificial distinction which should be more defined, and patents dealing with forms of life should not be subject to patents. From the point of view of ethics and of interest to the native people of its country, the Delegation considered that one must not allow people becoming owners of life or allow for the privatization of forms of life, since life could not be considered as a form of goods and could not be owned. The Delegation stated that the new constitution of its country excluded, specifically in Article 255, patents on forms of life or on life and that the rectification of international treaties should be in relation with the harmony of life and biological diversity. The Delegation believed that the exclusion of any patent on a living organism was needed. With respect to the exception of patentability for technological forms related to climate change, the Delegation was of the view that those could not be considered knowledge which should be something holy to be preserved by the owner: the technology related to climate change was a matter of the public domain. In its view, it was not a private matter which could be regulated under a patent, since that prevented developing countries from access. The Delegation observed that developed countries should assume their historic liability in that area, that technology should remain within the public domain and not become private matter and that developing countries should be able to use it freely in order to fight climate change and to control it.

21. The Delegation of Thailand associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation stated that, after carefully reading the preliminary studies, it was pleased to see that the SCP had moved towards embracing the WIPO Development Agenda which was of great importance to the delegations in the room, particularly to those of the developing countries. The Delegation observed that the discussion about harmonization of patent laws was no longer mainly about enforcement and protection of right holders' interests, important as those issues might be. In its view, most appropriately, the focus appeared to have now shifted to the more active goal of finding a balance between private and public interests with the view to promoting economic as well as social, educational and cultural development for the international community as a whole. The Delegation observed that some significant and very key issues nevertheless remained to be explored, especially those of vital public interests, which were relevant not only for the developing world but also to the less-privileged segment in developed countries. The Delegation stated that those issues included important topics, such as technology transfer, patents and public health, patents and the protection of biological resources, which were all urgent issues that required prompt attention, as well as WIPO expertise in analyzing the subject matter concerned. In its opinion, in-depth analysis on those issues would help to guide the SCP in finding the appropriate balance that was needed so that harmonization would be most beneficial, fair and promote development in all aspects. The Delegation observed that, although there had been some suggestions with regard to the contrary, it wished to stress that the important work done in the SCP could not be regarded as repetitive to the work carried out by the CDIP. Rather, the two Committees could and did complement each other, since the CDIP alone could not totally move WIPO into a development oriented direction. The Delegation stated that the cross-cutting nature of the Development Agenda required the

concerted work of all WIPO Committees, and that the CDIP might face difficulties in making progress unless all the Standing Committees were also able to agree on development oriented norm-setting in their respective areas of work. To the Delegation, the answer as to whether or not the CDIP should get involved in the work of other Standing Committees, was very clear. That was not a matter of intruding in the work of other organs, but rather one of augmenting and enhancing the work towards a common goal. The SCP therefore had an important part to play in many issues under the Development Agenda. As such, it should assume a leading role in pursuing that agenda and setting development friendly norms for the benefit of the international community at large and efforts should therefore be joined together to strike a balance that would be acceptable, meaningful and beneficial to all.

22. The Delegation of Tunisia, supporting the statement made by the Delegation of Senegal made on behalf of the African Group, observed that the four preliminary studies, although they had been prepared within such a short time, succeeded to summarize the problems to be dealt with. Acknowledging that those preliminary studies as well as SCP/12/3 provided the basis of work and that those studies did indeed deal with extremely important issues while other issues and questions had not been replied to, the Delegation observed that considerable importance needed to be attached to those studies and also to the possibility to ask for additional studies on those issues, if necessary. The Delegation was of the view that those detailed reports showed the complexity of many technical and legal issues which intertwined in the realm of patent law and the determining role to be played by a given patent system, in particular, as regards transfer of technology and social and economic well-being. The Delegation stated that the report on the international patent system and the preliminary studies showed well that patent law differed very seriously from country to country: it was not identical. Despite those differences, national laws had more convergence in so far as the States concerned were bound to apply provisions of legal international instruments which guaranteed more or less their national interests. The Delegation was of the view that an international patent system would improve the situation and would make it possible to safeguard a certain degree of flexibility. The Delegation commended the Director General of WIPO on the initiative to organize a Conference on Intellectual Property and Global Challenges. The Delegation expressed its satisfaction with the inclusion of the new agenda item regarding the Conference so that the main issues proposed at the previous session of the SCP, in particular, implications of patents on matters of health, the environment, climate change and food security could be highlighted. In concluding, the Delegation requested the Committee to work on the basis of a balanced work program which would take into account the interest of the different users and of all countries, whether developed or developing. It was convinced that, with the cooperation and participation of all the delegations, the Committee would succeed in achieving results which would enable it to draw the relevant conclusions, important for the future work of the Committee.

23. 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 stated that the preliminary studies on the four issues were comprehensive and quite informative, and had clarified and opened many parts of the complex patent system. It welcomed the views of the Member States and different stakeholders and circles which could enrich the process. The Delegation's understanding of the documents was that the issues under discussion in the SCP were the ones which had cross-cutting implications in all aspects of the global activities of Member States as well as diverse legal and technical issues in different levels, which required comprehensive coordination and consideration at the national level. Therefore, the Delegation considered that document SCP/12/3 Rev.2 should remain open for further discussion. In reshaping the patent system in the process of the work of the Committee



alongside of addressing the legal issues at the national and international levels, the Delegation was of the view that taking into account the economic and security concerns of Member States could guide the Committee to the proper direction and would pave the way for satisfactory results. The Delegation stated that the matters highlighted in the Annex to document SCP/12/4 Rev. on some particular subjects should not be deemed priority over other subjects in document SCP/12/3 Rev.2. The Delegation supported the work of the Committee in a balanced and consensus-based approach on all subject matters covering the concerns of all. The Delegation welcomed any kind of studies on public awareness in the framework of seminars or conferences with respect to the consistency of the different parts of the patent system with patent policy objectives, and was of the opinion that such kind of conferences, as it had been the case, should be organized in a way that would deliver fruitful and satisfactory results, taking into account the time limit. The Delegation stated that the subjects described in document SCP/12/3 Rev.2 required comprehensive study and discussion, and that discussions on a similar type of issues in other Committees of WIPO or in other international fora should not be understood as a limitation of the mandate of the SCP. On the contrary, the Delegation was of the view that the SCP had a broad mandate that addressed all aspects of patent system.

24. The Delegation of Egypt expressed its support for the statement made by the Delegation of Senegal on behalf of the African Group, and observed that the Committee had embarked on a new task which it hoped would be more successful than the previous method, which had resulted in the waste of time because of the fact that some people had insisted on determining a specific procedure for the work of the Committee without taking into account the interests or the priorities of others. The Delegation stated that the SCP was obviously one of the most important committees of the Organization, since it dealt with issues of patents which were of paramount importance for large economic sectors in the Member States and critical issues such as development and public policy issues. In its view, that had become quite evident during the work of the previous session when agreement had been reached to hold a conference on patents and public policy issues. The Delegation hoped that the Committee would maintain the balance in its work and acknowledge the impact of its work on public policy issues. It was in that context that the Delegation welcomed the outcome of the work of the Committee and mechanisms of WIPO since the last session of the General Assembly. The Delegation hoped that the recommendations adopted by the CDIP would be implemented in order to promote the positive steps taken by the Member States lately. The Delegation observed that the recommendations concerning the Development Agenda, particularly those which related to Cluster B concerning norm-setting, represented guidelines which should be pursued by the SCP. While expressing its thanks to the Secretariat for the effort exerted in preparing the preliminary studies tabled for discussion by the current session, the Delegation stated that that effort was still insufficient because of the fact that those studies had been issued in three languages only and were not issued in the other official languages. That meant that the national authorities in his country and in numerous other countries would not be able to directly respond to the outcome of those studies and would require a long time to be able to study them. The Delegation therefore requested that the Secretariat try to provide those studies and other studies to be prepared in the future, in the other official languages including Arabic. The Delegation was of the opinion that, in order to enrich the effort of preparing such studies, the program of work of the Committee should include the organization of some briefings concerning those studies. Those studies should be discussed from different points of view. The Delegation was of the view that it might be a good idea to follow the procedure pursued by the Standing Committee on Copyright and Related Rights (SCCR). The Delegation stated that a recommendation at the twelfth session of the SCP calling upon the Secretariat to organize a conference on patents and some of the specific public policy issues

reflected the interest shown by Member States in those issues and represented a clear-cut mandate for the Secretariat. However, in the process of preparing for the conference, the Delegation had been facing some difficulties, for instance, it had noticed that the proposed conference was supposed to deal now with intellectual property issues in general, which could go beyond the competence of the Committee that was concerned only with patents. Further, in its view, the proposal of the Secretariat had gone beyond public policy issues, dealing with what was described as global challenges. Therefore, the Delegation was of the opinion that many would be faced with a conference which was not in line with the desire expressed by Member States. In spite of the importance of the issues proposed by the Secretariat for the conference, the Delegation considered that if those issues could be more appropriately dealt with within the framework of other committees, particularly the SCCR, which were more concerned with such issues. The Delegation encouraged the SCCR to hold a conference similar to the conference suggested by the SCP. In concluding, the Delegation observed that it looked forward to a fruitful session of the work of the Committee, and to a rich discussion on the report and the four preliminary studies which dealt with extremely important issues. It was confident that the serious and in-depth discussions and the exchange of questions and answers concerning those studies and the other studies to come was the best means of achieving progress towards the drafting of a program of work of the Committee.

25. As regards the question of language raised by the Delegation of Egypt, the Director General noted that the question had arisen in many of WIPO's committees, for example, the IGC, particularly with respect to the availability of documents in Arabic, Chinese and Russian. The Director General explained that it was a program and budget issue for the whole Organization, which would be raised in the context of the drafting of the Program and Budget for 2010/2011 biennium. The Director General recognized the fundamental importance of the question of language for an international organization as a means of communication. The Director General, however, explained that it had considerable budgetary consequences and that the question would be raised for Member States' consideration and decision on how to prioritize the limited budget.

26. The Delegation of Pakistan associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation felt that important progress had been made at the twelfth session during which Member States, after a long gap, engaged in meaningful discussions and it wished that momentum to continue. To avoid any future stalemate, it considered that the Committee should take concerns of all Member States on board, and that any irrational rushing into premature conclusion should be avoided. The Delegation stated that its country had always professed a balanced approach both in norm-setting and enforcement of IPR. It felt that there was an inherent link in the patent agenda and public policy issues. In its view, those should be dealt together in further deliberation at the Committee. In that regard, the Delegation appreciated the non-exhaustive list approach adopted by the Committee, and felt that all the issues in the non-exhaustive list were important and merited specific attention. Further, the Delegation welcomed the initiative to hold a global conference on patents and public policy issues. The Delegation was of the view that the inherent linkages between patents and climate change, public health and food security should be addressed at the conference in a balanced manner. In the Delegation's opinion, the program of the conference should relate to the question as to how the patent system could facilitate mitigating those challenges: the conference should discuss from a socio-economic perspective, whether the existing patent system had the potential to answer those challenges or if it needed to be improved; it should also discuss from the public policy perspective if the criticisms that the existing IP system was an impediment to innovation was true or misplaced. Regarding the four preliminary studies conducted by the

Secretariat, while appreciating the hard work which had gone into the preparation of those studies, the Delegation wished to know the authorship of those studies. In its opinion, those studies highlighted some important issues, but also got into convenient silence on some important issues of concern. The Delegation was of the view that overall, the Committee was on the right track; it should discuss all the issues in the non-exhaustive list in detail. That approach might appear to be slow, but it was better to be slow and firm than to be fast and crushing.

27. The Delegation of Morocco, supporting the statement made by the Delegation of Senegal on behalf of the African Group and the new approach of the SCP, stated that all issues of common interest were taken into account thus enabling the SCP to make progress in its negotiations in reconciling the contradictory interests at stake. Although striking a balance between public and private interests was not an easy task, the Delegation considered that it would be possible to meet the challenges with the efforts and wisdom of all concerned by implementing the substantive rights of patents taking into account exceptions and flexibilities provided for by international instruments at the advantage of the political interests of countries. The Delegation observed that the work of the SCP was however only part of a very vast work which was now being carried out under the aegis of WIPO. To appreciate the objectives of the work of the SCP, the Delegation was of the opinion that, a global vision taking into account what had been done in the past and what was still to be done in the future within the framework of other committees, was needed. The Delegation expressed its readiness to make a constructive contribution and hoped that it would be possible to achieve a balanced consensus for the advantage of everybody.

28. The Delegation of Chile stressed the importance of undertaking a work with regard to patents after a long period of suspension. The Delegation stated that now the conditions existed to carry out in-depth debates on all of the four issues covered by the preliminary studies in a constructive but gradual way. Without any prejudice to the discussions that would take place, the Delegation, however, believed that it was also important to continue working on the other themes of interest to members, i.e., those themes which existed in the list of 18 that could be found in document SCP/12/4. Referring to the importance of the Conference on IP and Global Challenges in July 2009, the Delegation stated that such Conference was vital to assist the work in the Committee, especially on those issues which were related to development. In its opinion, the Conference should take place in a way which was coherent and in compliance with the different questions that members themselves had raised.

29. The Delegation of Indonesia associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. It appreciated the agreement achieved at the twelfth session of the SCP on the non-exhaustive list of issues to be discussed at the current and the subsequent sessions of the SCP. The Delegation emphasized that the SCP should stick to its decision that the list of issues would remain open for further elaboration, with no order of priority. Furthermore, the Delegation encouraged the SCP to apply a balanced approach in choosing the next issues to be further discussed or studied. A balanced approach meant to take into consideration the different levels of development of Member States. Similar to the Asian Group, the Delegation appreciated the preliminary report prepared by the Secretariat, since that was regarded as part of efforts to develop a work program for the SCP, as well as to provide a factual account of the legal and policy framework. To that end, it emphasized that the factual descriptions were meant to form the context for further discussion and not to draw conclusions from the studies themselves. As regards the future work of the SCP, the Delegation stated that a balanced approach should lead the Committee's

deliberations, and suggested issues of high concerns for developing countries, such as technology transfer and the economic impact of the patent system, for the next studies to be submitted to the SCP. The Delegation was of the view that one of the main challenges of patent systems in developing countries was how to increase both the quantity as well as the quality of patents granted particularly to their own domestic inventors or innovators. If that problem could be addressed, it was certainly possible to have a more harmonized patent system acceptable to both developed and developing countries at a timely juncture.

30. The Delegation of Algeria, supporting the statement made by the Delegation of Senegal on behalf of the African Group, appreciated all the efforts made by all Member States which had made it possible to restart the work of the SCP and to draw up a non-exhaustive list of issues. The Delegation considered that such a list constituted a good beginning for the work of the Committee and should remain open for extension. The Delegation hoped that a similar progress would be made in other committees within WIPO. As regards the four preliminary studies carried out by the Secretariat, the Delegation felt that more time was needed in order to examine them with all the attention that they deserved. Consequently, those documents as well should remain open for future comments by Member States. The Delegation requested that the Secretariat specify the experts who carried out those studies, and in the future, organize, at the beginning of the sessions of the Committee, information sessions which might make it possible to have a more constructive dialogue among members. The Delegation considered that, since the work of the Committee should move forward in a balanced manner that reflected the concerns of the developed and the developing world, the debate in the SCP should be guided by the cross-cutting issue of development. The Delegation welcomed the holding of a Conference on Intellectual Property and Global Challenges in July 2009. It noted however that the terms of reference for the Conference had been modified without consulting the Member States. The Delegation stressed the importance of holding consultations with Member States in an inclusive and transparent manner, and welcomed the inclusion of a new item in the agenda of the current SCP session, which allowed Member States to debate all the issues concerning the Conference, including its program and the outcome which it hoped to see from that Conference.

31. The Delegation of South Africa associated itself with the statement made by the Delegation of Senegal on behalf of the African Group. It noted the important potential role that could be played by patents in the area of economic development and emphasized the need to adapt the patent system to ensure a flexible approach to assist developing countries to adjust and face the current global challenges through extensive capacity building opportunities and technical assistance. The balanced approach of the Chair in guiding the work of the Committee addressed those concerns. The Delegation noted that the work of the Committee should continue to include the broader objective of WIPO's new strategic focus as highlighted by the Director General in his acceptance speech last year, and that the SCP should continue to apply its flexible approach that reflected the dynamic environment within which various issues were being considered. The Delegation noted with concern that the four preliminary studies failed to sufficiently take into consideration the developmental dimension of those issues and the impact that it had on developing countries. In view of the current work undertaken by WIPO under the auspices of the Development Agenda, the Delegation wished to emphasize that the focus of the work of the Committee should be on key issues relating to the needs of developing countries. It was in that manner that the recommendations of the Development Agenda be reflected in the work of the Committee and throughout the work of WIPO. The Delegation stated that it remained supportive of the Chair for a balanced approach in the work program of the Committee and encouraged that the open-ended list of issues remained non-exhaustive in the ongoing discussions of the Committee. To that effect,

the Delegation considered that, as to the future work of the SCP, issues relating to technology transfer, relations of the patent system and the work currently being undertaken by the Convention on Biological Diversity (CBD) and patents and health should be further analyzed and studied. Regarding the Conference that was scheduled to take place in July, the Delegation noted the importance of that Conference in the context of the current global debate on public policy issues. The Delegation remained open to continuous ongoing consultations to define the topics and modalities for the Conference to ensure that it remained focused and balanced in view of the limited time provided for such a Conference. Noting the efforts of the Director General to include the important issue that pertained to improved access for the blind and visually impaired, the Delegation, however, was of the view that the critical issue of improved access for the blind and visually impaired be emphasized in the right forum with the appropriate attention that it deserved with a view to the limited time allowed for the Conference to focus discussions on public policy issues. The Delegation was of the opinion that the issue be given the right attention and focus it deserved within the mandate of the SCCR. In its view, the Conference should revert to focus on its mandate that had been agreed to at the twelfth session of the Committee. As regards procedural aspects, the Delegation supported the need for increasing information sharing and transparency in preparations for the organization of the Conference. It believed that further discussions should be done through informal consultations with Member States in an open and transparent manner to maintain the balanced approach.

32. The Delegation of Ecuador observed that the documents were extremely constructive, balanced and valuable for the work. It believed that they were impartial and that those qualities should be maintained throughout the work of the Committee. The Delegation supported the statement made by the Delegations of Algeria and South Africa with regard to the time frame to study those preliminary studies. In its opinion, the work of the Committee was to specifically look at the public policy of each country, especially when with regard to norm-setting on biodiversity and access to genetic resources, which were related to traditional knowledge in many cases, and traditional cultural expressions. The Delegation, therefore, stressed the importance of maintaining relationship with the work that had already been carried out in the context of the CBD and in the IGC. The Delegation, agreeing with the Delegation of Egypt, stated that norm-setting must focus on Cluster B, transfer of technology and recommendation 45 of the Development Agenda. Concerning the Conference on Intellectual Property and Global Challenges, the Delegation expressed its support for the Conference, since the issues to be addressed during that Conference were of high importance in the area of public policy, health, the environment and others. It further believed that access to literary works and access for the visually impaired were relevant and important issues that could be taken up under the intellectual property and human rights. The Delegation fully supported the holding of the Conference, since the work to be carried out during the Conference would be of use to the SCP and to others.

33. The Delegation of Brazil stated that the Committee had no pre-established roadmap, yet the SCP agenda was open and the current task was to gradually resume the work of the Committee in an open mind and to carry on the process of building a balanced and inclusive agenda for the SCP. The new agenda must fully reflect the development dimension and fully take into account the 45 agreed recommendations of the WIPO Development Agenda. In the process of building that new agenda, the Committee should refrain from repeating the mistakes incurred in the past. With respect to the Report and preliminary studies prepared by the Secretariat, the Delegation made the following observations: even though document SCP/12/3 Rev.2, the Report on the International Patent System, was a document that was inclusive in the sense that it dealt with a wide range of subjects, it fell nevertheless short of

reflecting the views and main concerns of developing countries in many respects. The Delegation would further elaborate on that during the week. The Delegation had some reservations on the Annex that reflected in a less than precise way Brazil's IP legislation. Referring to document SCP/13/2 about patents and standards, the Delegation observed that patents and standards was a highly complex multi-disciplinary subject which had been discussed in other international fora such as the WTO. Document SCP/13/2 contained an inaccurate concept and failed to draw a clear line between standards on the one hand and technical regulations on the other. On the issue of exceptions and limitations which was contained in document SCP/13/3, Brazil believed that that was an issue crucially important for developing countries and equally crucially important for WIPO as it related to the Development Agenda. Exceptions and limitations dealt with areas of public policy and with the need for developing countries to make full use of the IP system. That was an issue with a straight relation to transfer of technology and to other developmental issues. Exceptions and limitations should, in the view of the Delegation, become a permanent agenda item of the SCP similarly to what was happening in the SCCR. The Delegation stated that it favored the discussion about dissemination of patent information, as the creation of a patent databases was one of the issues recurrent in the WIPO Development Agenda. As regards the issues concerning client-attorney privilege, the Delegation considered that there was indeed a wide array of legal systems and practices, and that the existence of different legal systems and practices indicated how big a challenge it was to discuss any international convergence on that field. The Delegation agreed with the decision to include the item on the Conference in the agenda, as there was a pressing need for further discussion on the Conference within the SCP. In its view, Member States needed to further elaborate on the mandate of the Conference and to present a more precise outline of how they wished the Secretariat to organize the Conference. The Delegation was of the opinion that the Conference should not be moved away from its original focus which was the IP impact on areas of public policy.

34. The Delegation of Kuwait supported the statement made by the Delegation of Sri Lanka on behalf of the Asian Group, and affirmed the importance of the Conference to be held in July 2009. The Delegation hoped that there would be positive consequences on the world economy as a result of that meeting, and that intellectual property was the real open door to save the international community from the crisis that the world was currently experiencing. Supporting the statement made by the Delegation of Egypt concerning the importance of having the documents translated in the various official languages, the Delegation hoped that the Secretariat would find such budget line for the production of documents in the official languages of the Organization, which would have great and positive effects on the activities of the countries as far as intellectual property was concerned.

35. The Delegation of Oman supported the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation affirmed the great importance of documents in the other official languages of the Organization. While recognizing the financial implications of the translation of documents, the Delegation believed that it was possible to initially concentrate on translating the preliminary studies so that absorption of those studies in capitals would permit better participation by the countries in the work of the various committees of WIPO.

36. The Delegation of Malaysia associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation stated that the future work program that took into account the interests of both the developed and developing countries was important to ensure a win-win situation for all Member States. The Delegation expressed its support for all efforts towards developing a balanced future work program that would be of

great benefit to all. The Delegation noted that document SCP/12/3 Rev.2 covered a wide range of issues relating to the patent system which pertained to the needs of all Member States. The Delegation was of the view that while the agreed four issues marked the beginning of a constructive discussion, all the other issues should be given equal opportunities to be deliberated so that the needs of all members were being equally considered.

37. The Delegation of Bulgaria supported the statement made by the Delegation of the Czech Republic on behalf of the European Union and its 27 Member States. It observed that, in its origin, the patent system had balanced the interests of society and individuals. It was a system that would encourage individual creativity and gave inventive minds the opportunity to invent something for the benefit of their own business. The Delegation considered that, over the years, for many reasons, the system had developed into a corporate protection system which protected mainly corporations, and consequently, the small and individual inventors and the small and medium-sized enterprises (SMEs) which were the majority of the industrial structure in all countries, had difficulties in using the patent system to get any benefits. In the Delegation's view, the Committee should look how the system could be made more appropriate to the needs of those who had inventive minds and who were creative and could later on use the fruits of their creativity, which should not be hindered by financial means or other obstacles. If the patent system again encouraged and responded to creativity of the individuals in SMEs, the Delegation believed that that would bring the patent system back into its roots. In its opinion, if more power could be given to those who create and not to the corporations, a balance between corporate interest and interest of the society at large would be created. The Delegation observed that one witnessed the speedy development of the Internet and digital technologies, which were not regulated in the beginning and regulated only after a fast technical progress. The Delegation was convinced that the SCP should think how the patent system could better empower the creators, individuals and SMEs.

38. The Representative of ALIFAR stated that while she appreciated the work undertaken by WIPO, she was concerned by the initiatives to harmonize certain aspects of patent laws in areas not covered by existing international standards, since that could limit some of the flexibilities available to WTO Members. In her view, preserving the flexibilities in national legislations should not be an end in itself, but rather a necessity and a precondition so that countries could adapt their patent systems appropriate to their own specific needs and circumstances. From that viewpoint, the Representative observed that, the harmonization process was a source of concern to the domestic pharmaceutical industry in Latin America. While noting that the agenda of the Committee had included subjects of interest for developing countries, and had balanced the subjects for discussion, the Representative was of the view that the definitions and interpretations which may result from those discussions could lead to a reduction of already limited room for maneuver for developing countries in designing and administering their patent system. The Representative believed that the work of the Committee would be valuable for enriching the knowledge of all participants without its outcomes leading to limitations of the flexibilities under the TRIPS Agreement in relation to patents.

39. The Delegation of Nigeria stated that the Conference should be limited to the mandate given, although it did not imply that the issues that had been elevated were not important. The Delegation considered that the selection process that highlighted certain issues in patents and not all the areas such as the Development Agenda had created problems. Regarding the issue of translation requested by some Delegations, the Delegation was of the view that such translations should be ready at the next session. While acknowledging the difficulties that the Secretariat might have to face, the Delegation observed that if documents could not be studied

earlier and common positions were not found beforehand due to lack of translation, a lot of time would be wasted in the meetings in order to come to common understanding. The Delegation further stated that a room must be given for countries to reflect their capacities in dealing with patents. In that regard, it considered that harmonization might be looked at very seriously from its benefits, and not from the usual way that it would deprive countries' areas of competence to handle things by themselves and not subjected to overriding international norms.

40. The Representative of KEI stated that the preliminary studies on the various topics that the Committee had chosen to focus on were a good start. The Representative pointed out the complexity of the topics that made it challenging to summarize in the documents. As regards the relationship between the current set of norms in the area of flexibilities and exceptions to patent rights, the Representative suggested that SCP look at the relationship between the bilateral trade agreements and the Anti-Counterfeiting Trade Agreement (ACTA) negotiations and some of the work of the customs authorities and in particular in the areas of injunctions, and to compare that to the work that had been done in the report on the area of flexibilities. The Representative further stated that how the limitations and exceptions related in particular to the cross-border flow of products was an important issue in the global patent system in the sense that many of the limitations and exceptions only had a domestic character and did not facilitate global trade.

41. The Delegation of Paraguay underscored the importance of patents and the patent system, and the controversies it raised, for developing countries when it was seen that they were not always going in the same direction of its economical, social or cultural needs. The Delegation welcomed the Conference on Intellectual Property and Global Challenges in July 2009, which would make it possible to debate on many different key issues in order to try and find solutions that could take into account two facets, i.e., technical transfer and assisting the poorest countries. The Delegation agreed with the idea of moving forward of standards in the patent system as long as the concerns of those economies that could not directly benefit from the system in assisting their government and civil society were taken into account. The Delegation observed that, despite of all efforts made, it had not yet been possible to use the patent system as a tool for its country's development, which was still pending but at the same time urgent. On the other hand, the Delegation believed that it was important that the norm-setting work took into account the direction of their countries and not be an attempt to undermine their fundamental values. Therefore, in its opinion, the complimentary role which could be given to the SCP and the CDIP could facilitate the work in a balanced and rational way. The Delegation observed that past schemes concerning patents and other types of intellectual property should be abandoned, and moved into a modern way of working taking into account the realities faced nowadays, such as information and communication, the problems of climate change, the need to preserve and to find new sources of energy and the food crisis. In concluding, the Delegation stated that, when dealing with all those different issues, the globalization of the economies having its impact everywhere should be looked at.

42. The Delegation of India associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. In the Delegation's view, the preliminary studies provided valuable information and a good starting point for open, constructive and forward looking deliberations that could take the work program in the SCP forward in a consensual basis. However, as other delegations had pointed, the Delegation observed that there were certain inadequacies in the studies and areas that might need deeper examination and scrutiny, especially from the perspective of development. As requested by a few other delegations, it would welcome if information on the authorship of the studies could be furnished as well as



the framework of reference and the research modalities employed in preparing them. The Delegation welcomed the fact that deliberations in that important Committee had widened from the earlier limited focus on harmonization to a broader range of public policy issues relevant to developing countries. It hoped that those studies contributed further in that direction and a broad, inclusive and balanced work program evolved for the SCP. The inter-linkage of patents with economic development and public policy challenges was important to the Delegation which viewed the intellectual property regime as an instrument for economic development. Given the varying degree of socio-economic development in countries, the Delegation believed that it was essential that individual countries should have the freedom to adapt the patent system to their specific national requirements. There could not be a one-size-fits-all approach. An international norm should be broad enough to allow the space and flexibility necessary for developing countries to formulate policies conducive to their economic development. Regarding the relationship with other WIPO Committees, the Delegation supported the Delegations of Egypt, South Africa and Thailand which pointed out the complementarity between Committees and the fact that development was a cross-cutting theme. The norm-setting cluster of the Development Agenda should serve as a guideline for the work of the SCP, whose work had to be compatible with the development guidelines accepted by the WIPO General Assembly. In terms of future areas of study within the Committee, the Delegation stated that studies on technology transfer, impact of patents on economic development and alternative models of innovation would be especially useful. The Delegation commended the initiative of the Secretariat in organizing the proposed global conference and it looked forward to productive deliberations on the four themes. It was however of the view that, given the mandate approved by the previous SCP, the limited time available and the fact that each of those four themes encumbered wide ranging substantive areas, the theme of the conference should be restricted to what had originally been mandated in the last SCP meeting.

43. The Delegation of Canada supported the statement made by the Delegation of Germany on behalf of Group B. The Delegation believed that the SCP was a key committee for WIPO and that it had great potential to deliver meaningful and practical outcomes for the benefit of all members. It was therefore pleased with the outcome of the last SCP, where members had voiced their opinions on past difficulties and stirred the SCP towards work that would deliver practical results. There were a number of topics on the table for discussion. Furthermore, the four preliminary studies also contained much useful information which merited further elaboration. In that regard, the Delegation felt that it was important that members worked together to find areas of mutual interest while mindful of the mandate of the SCP as well as the work being carried out by other committees. In its view, the SCP was a valuable tool for advancing international IP issues related to patents for both developed and developing countries, and positively contributes to the broader WIPO work agenda.

44. The Delegation of Cuba proposed, for the next session, to have prior consultations, be they formal or informal, within the framework of the Committee or before the Committee, so that enough time would be available to debate on all of the issues contained and gone into more depth. The Delegation also considered that the preliminary studies should be maintained open making it thus possible to better consider all the elements within the documents as a whole. As regards the Conference to be held in July 2009, the Delegation highlighted its importance to all members, and believed that questions such as the implication of patents on health, on the environment, on climate change and food safety should be included.

45. The Delegation of Japan associated itself with the statement made by the Delegation of Germany on behalf of Group B. The Delegation stated that the preliminary studies would enhance the exercise in finding common ground which would form the basis on future discussion at the SCP. Some of the issues, especially certain aspects of the exclusion from patentable subject matter and exceptions and limitations to the rights as well as dissemination of patent information, were among relevant topics to enhance the work-sharing efforts by many IP Offices around the world. In its view, how IP Offices could effectively address backlog was of great importance. In that context, the Delegation hoped that the understanding could be deepened on better ways to proceed in the work-sharing initiative by contemplating the aforementioned two issues, while other items such as standards and patents as well as the client-attorney privilege were also important. The Delegation hoped that those items would also enrich the discussions and help to agree on a well-balanced appropriate work program for the Committee.

46. The Delegation of the United States of America stated that the four background documents were an excellent backdrop for what it hoped would be a rich and in-depth exchange of views. The Delegation associated itself with the statements made by the Delegations of Canada, Germany on behalf of Group B, and Japan. The Delegation observed that the patent system was the foundation on which the knowledge economy was built. In its view, it provided the incentives and encouragement to innovators to take risks and focus their creative energies in making contributions for the betterment of mankind. As one of the main drivers of economic and social welfare, the Delegation was of the opinion that the patent system also held the keys to enabling all countries to seek the way through the current economic crisis and into a brighter future ahead. As such, the Delegation believed that it was vital that the patent system continued to provide strong incentives and protection for innovators to facilitate economic and social growth. For those reasons, it supported discussions in the SCP aiming at enhancing protection for inventors and facilitating inventors to obtain global patent rights. The Delegation also stated that discussions in the SCP should focus on how offices could better cooperate to improve both efficiency and quality of the patent examination process. In that respect, it believed that the studies prepared by the Secretariat on the dissemination of patent information held great promise as a pragmatic approach to technical cooperation that the Committee might decide to take up. The Delegation hoped that the spirit of cooperation that had been displayed at the past year's SCP meeting and at the Assemblies meeting would carry over to the discussions at the current session of the SCP.

47. The Delegation of El Salvador, referring to document SCP/13/4 on the client-attorney privilege, stated that that was extremely useful not only for the office but also for the attorneys working in its country and that the Delegation had been able to look at that type of information for the first time. Concerning the Conference on IP and Global Challenges, the Delegation felt positive about broadening the subjects which had been set out for debate in that Conference, and requested the Secretariat to provide more information so that the participation of all interested parties at the international level could be guaranteed. As regards the future work, the Delegation supported other Delegations who had requested to begin a study on transfer of technology, as the Delegation was concerned about, in particular, licensing issues. Further, it considered that the Doha Declaration on public health as well as the international environment on that area should be looked at, not only in the WTO but also in other fora.

48. The Representative of ICTSD stated that his organization had been active in the area of intellectual property rights for a number of years, mostly in cooperation with UNCTAD

working on development aspects of intellectual property issues, and trying to promote a development perspective on issues particularly relating to patents, transfer of technology, utility models and intellectual property in general. In that regard, the Representative welcomed the Committee having embarked on challenging discussions on many issues. In particular, the Representative expected stimulating and substantive discussions on four issues. In the spirit of making a positive contribution to the debate in the Committee and providing inputs to its discussion, the Representative announced that he made copies of a Policy Brief on technical standards and patents and a research paper on exceptions to patent rights, available for SCP participants.

49. The Delegation of Kyrgyzstan explained that although the experts from the intellectual property office of its country unfortunately did not speak any of the languages in which the documents were available, the Russian language was also a language in the patent administration. The Delegation therefore requested the translation of document SCP/12/3 Rev.2 in Russian so that its experts and specialists could have an in-depth consideration of the document and evolve their views on the problems dealt with. The Delegation expressed its strong willingness to participate actively in the work of the SCP and to conduct a professional analysis taking into account the legislation and the interest of its country. To achieve such objective, it noted that its experts needed to be provided with the possibility to work with the SCP documents. In its view, delegations from countries not having the three languages of the Organization were not on an equal footing with the other delegations, and it could even be described as discrimination. The Delegation therefore urged that ways and means to have translations in all the official languages of WIPO needed to be found. In that light, the Delegation expressed its support for the initiatives taken by the Director General to have a better use of the financial means available to the Organization.

#### Agenda Item 5: Report on the International Patent System

50. The discussions were based on documents SCP/12/3 Rev.2 and SCP/12/3 Rev.2 Add.

51. The Delegation of Brazil stated that the issues in the document could have been addressed in a deeper way, and allowing a clear understanding of the issues at stake in the international patent system. First, a great deal of the statistical data in Chapter II, entitled “Economic Rationale for Patents and Different Interests and Needs in the International Patent System” was presented on the trends of worldwide patent filing. The Delegation was of the view that the document assumed an existence of a growing international technology market. However, in its view, only a limited or reduced number of countries participated in the so-called growing international technology market. The Delegation observed that the growing figures in the backlog of patent filings in patent offices presented in Chapter II should be addressed more carefully. The Delegation considered that much of the backlogs could be attributed to poor quality allowed by some offices which had increased the expectations of applicants on claims which lacked inventiveness and novelty. Further, the Delegation stated that there was no direct or obvious link between IP protection and the attraction of foreign direct investment, since such link was non-conclusive. Concerning the issue of transfer of technology, in its understanding, the transfer of technology was an issue broader than flows of trade and development: transfer of technology must involve an effective spill-over for the local industry. Regarding the relationship between IP protection and foreign investment, the Delegation observed that Brazil had received a record flow of foreign investment in the previous year even though the number of applications had increased at a relatively low rate. As regards the benefits derived from the disclosure of patent

information, the Delegation stressed the risk exposed to the system by the growing number of private patent information databases which might lead to reduced access to technology by developing countries. In that respect, the Delegation referred to the recommendations 8 and 9 of the Development Agenda, which addressed directly the access to specialized patent databases. Brazil did favor the discussion about dissemination of patent information particularly because the creation of patent databases was part of the 45 agreed recommendations of the WIPO Development Agenda. Concerning the Chapter dedicated to several issues regarding the substantive aspects of the patent system, the Delegation felt that in some excerpts of the text, the national patent examination was described as a burden to the system. Its country, however, did not share the notion that pursuing substantive examination of patents already granted in foreign jurisdictions could be characterized as a duplication of work. The Delegation observed that the quality of the examination varied from one patent office to another, and that such notion had led to the impasse in the Committee on previous occasions. With respect to some perceived threats to the effectiveness of patents as incentives, the Delegation considered that other existing failures or the dysfunctions of the patent system, such as excessive and wide spread litigation due to trivial claims, were not thoroughly encompassed in the study. The Delegation suggested that, in the future, the report and studies prepared by the Secretariat would not move away from the central issue of the implications of the patent system in the context of public policy objective. Notwithstanding the existence of one Chapter related to development concerns, the Delegation observed that the cross-cutting nature of the development dimension should not be forgotten and that the 45 adopted recommendations of the WIPO Development Agenda should contribute to the work in the SCP. The Delegation also suggested that the Report should remain open for further comments.

52. The Chair invited Member States to send any updated information regarding Annex II to document SCP/12/3 Rev.2 to the Secretariat.

53. The Representative of KEI stated that comments on different sections of the Report could be made separately, since, for example, the discussions about software patents and the discussions about patents on life-saving medicines were different in terms of the topics that they raised and the discussions that took place.

54. The Chair reminded the Committee that various comments received from Member States and observers of the SCP were included in Annex III.

55. The Delegation of El Salvador found information concerning exceptions and limitations, in particular, as regards the exclusions from patentability, interesting. For instance, the information on the experience of the EPO and the ARIPO was appreciated. The Delegation suggested organizing an international seminar dealing with those issues so as to widely disseminate the contents of the Report and all the contributions.

56. The Chair noted that the possible organization of a seminar could be discussed under the agenda item of future work.

57. The Delegation of Morocco informed the Committee that it would transmit comments on the grace period to the Secretariat.

58. The Delegation of Brazil stated that it would send comments on Annex II. For example, on page 68, at least one of the 14 items listed as exclusions from patentable subject matter could not be so characterized.

59. The SCP agreed that document SCP/12/3 Rev.2 would remain open for further discussion at the next session of the SCP. If further comments are received from Member States, Annexes II and III of that document will be updated.

Agenda Item 6: Preliminary Studies on Selected Issues

60. Discussions were based on documents SCP/13/2, 3, 4 and 5.

61. The Delegation of Canada, supported by the Delegations of Japan and the United States of America, suggested a time limit for the discussion of each of the four preliminary studies so that each study would benefit from a full discussion.

62. The Delegation of Egypt, supported by the Delegations of India, Pakistan and Sri Lanka, suggested that, with a view to the concerns about the lack of availability of the preliminary studies in different languages, the Secretariat make an elaborate presentation on each of the studies.

63. The Delegation of Brazil noted that, although it agreed to have a balanced distribution of time among the four preliminary studies, that approach should not be strict, as one or two of the studies might attract more interventions or more attention than the others.

64. With respect to comments made by a few Delegations about the authorship and other issues about the preliminary studies, the Secretariat noted that it had authored the studies itself as mandated by the Committee at the last session. The Secretariat explained that its intention was to establish preliminary studies that were completely open to any comments and to any further development. It had never in mind to have something on the table that would fulfill and satisfy everybody. The Secretariat had also based itself on the Report on the International Patent System, since four topics stemmed originally from that Report, including its Annex II. The preliminary studies were intended to be factual and balanced. On purpose, the Secretariat had tried not to go into any conclusion and it preferred to have the Member States' comments on the aspects that it could not put into the documents. Therefore, the preliminary studies are simply a basis for further discussion and development.

*Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights*

65. The Secretariat introduced document SCP/13/3.

66. The Delegation of Egypt raised a question as to whether the words "to contextualize the legal framework" in paragraph 21, meant also the inclusion of studies relating to the socio-economic conditions linked to a particular legal regime and to a particular system of protection, and whether bilateral arrangements that had an impact on patent policy had been considered.

67. Following a question by the Delegation of the United States of America, the Chair clarified that he was inviting comments on the four preliminary studies, one by one, and that delegations were free to provide any suggestions as to how to proceed on a specific subject on a specific document, which would facilitate discussions on agenda item 8, future work.

68. The Delegation of the United States of America stated that, when agreeing to the adoption of the agenda, its understanding had been that the Committee would engage in the discussion of the four topics and then proceed to a discussion of future work as a separate agenda item, which, in its view, was a more pragmatic approach to ensure a balance.

69. In response, the Chair noted that if any delegation wished to make a point on future work during the discussions on the four subjects, he could not stop them from doing so.

70. The Delegation of Chile requested the Secretariat to elaborate the international framework that was being referred to in the preliminary study.

71. The Delegation of Costa Rica sought clarification as regards to paragraphs 23, 25 and 27. It had the impression that the Secretariat had assimilated the idea of invention to patentable subject matter which in its view could be seen in the second part of paragraph 23, and sought a specific example. As regards paragraph 24 and the following, the Delegation observed that not only the negative impact but also the benefits of exclusions should be highlighted. Further, the Delegation was of the view that paragraph 27 was not clear with regard to the function of exclusions. As regards the use of the terms “*ordre public*” and “public order”, the Delegation sought clarification as to the mechanics in choosing those terms. The Delegation further observed that more detailed information could be included in paragraph 76 with inputs from NGOs.

72. The Delegation of Bulgaria requested more information regarding a quantitative and qualitative analysis of the exceptions from the Secretariat. For example, a table could be provided on the different exceptions and limitations, country by country so that it could see which exceptions and limitations were more important and commonly appeared in national legislations.

73. The Delegation of Pakistan requested some examples of the exceptions from the patentability on the grounds of public order and morality granted at the national legislation.

74. The Delegation of India supported the Delegation of Bulgaria by stating that a quantitative and a qualitative analysis would be useful to everybody. It noted that it was broadly acknowledged that the issue of exclusions from patentable subject matter was grounded in the socio-economic context of a particular country. The report devoted some attention to the exclusion of plant and animal varieties, plants and animals and essentially biological processes from patentability. It also made the point that due to improvements in biotechnology, many inventions pertaining to plant and animal varieties had started to satisfy the criteria of patentability. The Delegation observed that it would have been relevant to also explain the impact of patenting plant variety on broader public policy issues, for instance, farmers’ rights, food security, even in an academic manner, to give a broader picture. Similarly, on the issue of excluding life forms from patentability and the view that that might be relaxed in view of development in genetic technology, the Delegation noted that that had implications in terms of public policy perspective which had a much larger dimension, and suggested that those points be addressed in a subsequent study or a supplementary study on the preliminary study.

75. In response to the Delegation of Egypt, the Secretariat provided the following comments: with respect to the policy objectives and role of the exclusions from patentable subject matter, it had been highlighted that the public policy consideration was an underlying consideration with respect to exclusions and that public policy consideration might be

influenced by the socio-economic conditions and the countries' different priorities in their specific conditions. However, with respect to the further analysis on the international legal framework and the national legal aspect, the preliminary study concentrated on the current *status quo* on the legal framework, both at the international level and at the national and regional levels. The Secretariat further explained that bilateral agreements had not been considered in the document. On the questions raised by the Delegation of Costa Rica, the Secretariat provided the following comments: it had been difficult to provide clear-cut characterization of the definition of the invention and the specific issues under the exclusions from patentable subject matter, since the structure of national laws were different in that regard. For example, the definition of "invention", if it is provided, were very much different from one country to the other, and some countries did not provide a definition in their national laws. Therefore, certain subject matter might be excluded from the patentability through the definition of the invention, i.e., defining the invention in such a way to exclude certain subject matter from the outset of the patent protection, or in other laws, such subject matter might be excluded by specific provisions concerning exclusions from patentable subject matter. As the Secretariat had understood the coverage of the preliminary study as the exclusions from patentable subject matter, the document in paragraph 23 touched upon what were generally considered inventions or might not be considered inventions, and the preliminary studies tried to focus more on what were normally considered as exclusions from patentable subject matter. Concerning paragraph 27 relating to the benefits of the exclusions from patentable subject matter, the Secretariat observed that while it believed that some aspects might be covered by the policy objective of exclusions which were referred to in paragraph 29 onwards, additional inputs from any delegation would be certainly welcome. On the question regarding *ordre public* and public order in paragraph 49, detailed analysis on the difference between "*ordre public*" and "public order" was not conducted, and as stated in the last sentence of paragraph 49, both terms were used as having the same meaning. The Secretariat however noted that some delegations might have a different opinion. As regards the role of exceptions and limitations in paragraph 76, the Secretariat invited any input from Member States as well as IGOs and NGOs. With respect to the intervention made by the Delegation of Bulgaria concerning the quantitative or qualitative analysis on the exceptions and limitations, the Secretariat pointed out that Annex II to document SCP/12/3 Rev.2 provided a table concerning different national laws with respect to (i) the exclusions from patentable subject matter, and (ii) exceptions and limitations to the rights. If however the delegations wished, a different type of analysis could be conducted. The Secretariat explained that, based on the information contained in Annex II of the Report on the International Patent System, document SCP/13/3 highlighted the provisions which appeared quite often in the national and regional laws. With respect to the question by the Delegation of Pakistan concerning an example of the public order and morality, the Secretariat explained that one example relating to *ordre public* and morality, and which was in some national laws specifically mentioned, was the exclusion of the human body at any stage of development from patentable subject matter. Other examples were processes for cloning human, modifying the gene line, genetic identity of human or the use of human embryos for industrial or commercial purposes and processes for modifying the genetic identity of animals, which were likely to cause them suffering without any substantial medical benefit. As regards the comments by the Delegation of India, being aware of the socio-economic context referred to, the Secretariat explained that its intention was to establish as much as possible the facts that led to or influenced those exclusions, perhaps more from a legal point of view, in order to avoid going into one direction or the other. Thus far, the mandate had been preliminary studies and the Secretariat had tried to be as factual as possible to provide a basis.

76. In response to the question raised by the Delegation of Chile, concerning the international framework on exclusions from patentable subject matter and exceptions and limitations to the rights, the Secretariat elaborated on provisions of various international treaties, namely, the Paris Convention, the Patent Cooperation Treaty (PCT), the Convention on International Civil Aviation and the TRIPS Agreement.

77. The Chair invited delegations to express their views on document SCP/13/3.

78. The Delegation of Argentina declared, as a general comment, that it should have the opportunity to make further comments on the preliminary studies in the discussions of the next session of the SCP and reserved the right to continue to make comments at the next meeting on the documents presented during the 12th and 13th sessions of the SCP. The Delegation stated that, by and large, however informative the documents were, they did not contribute to a critical analysis of the consequences and ramifications that merely strengthening IP rights' protection, in respect of the various technical aspects discussed, could have for developing countries. The Delegation declared that a more balanced and holistic view would have allowed for a more comprehensive analysis of the various issues. IP rights' protection should not be seen as an end in itself, but rather as a means of promoting public interest, innovation, access to science and technology, and for developing various national creative industries with the aim of ensuring material progress and welfare. The documentation should include that dimension in its analysis. In that sense, the Delegation shared the concerns expressed by the Delegations of Brazil and China, at the 12th session of the SCP, on aspects not included but which should be discussed in the documentation (anti-competitive practices, transfer of technology in Annex II of document SCP/12/3 and the question of exceptions and limitations in the main body of that document). The Delegation indicated that, in general terms, the documentation did not include an economic or commercial dimension, or a competition policy perspective, which would allow the benefits and drawbacks of the issues discussed for developing countries and least developed countries (LDCs) to be assessed, as those countries had low levels of national patent applications. In Argentina, for instance, they accounted for no more than 10 per cent of the total.

79. In response to a question raised by the Delegation of Sri Lanka, the Chair clarified that delegations could express their opinion on the future step of the study, if they so wish, although there was an agenda item on future work. He noted that general statements, specific statements and observations and requests for clarification by Member States would show certain indications of the next work.

80. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, proposed that the second step for the preliminary study was to conduct a specific study on exceptions and limitations covering all the aspects with external experts. The Asian Group was of the view that two to three academic institutes should look into different angles of exceptions and limitations. Further, the Group suggested that regional free trade agreements and bilateral free trade agreements be also covered in the second study.

81. The Delegation of Germany, speaking on behalf of Group B, observed that the preliminary study highlighted the same general public policy objectives shared by many countries, although the concrete means as to how to reach those objectives might often vary. The Delegation noted that it was a very positive finding since policy objectives, as the study putted it, influenced by the socio-economic conditions and the countries priorities would change over time. Therefore, the statement continued, one would thus have expected difference rather than convergence. Referring to national and regional levels, the Delegation



noted that study provided the significant variety in the legal frameworks. Nevertheless, the Delegation observed that certain categories of subject matter were excluded from patentability in many countries. In a similar manner, the Delegation stated that certain exceptions and limitations to patent rights could be found in many national and regional legal frameworks. Further, Group B believed that in case of any exclusion, exception or limitation of patent rights, an appropriate balance between the interests of the right holders, other stakeholders and the general public should be struck. The Delegation suggested that the exact scope of those constraints under national or regional laws deserved more in-depth analysis, since the interpretations of the legislative provisions vary. In concluding, the Delegation expressed its anticipation of further debates on the issues at stake.

82. The Delegation of the Plurinational State of Bolivia stated that the preliminary study on exclusions made it possible to see the situation especially from a legal point of view, internationally. The Delegation noted that no analysis had been made on bilateral agreements. Further, the Delegation pointed out that the preliminary study mentioned the possibility of patentability of life forms being something that was related to the advances in science, and the patent system being analyzed in the light of recent technological advances especially as concerns the patentability of life. The Delegation nevertheless felt that there was also a need to take into account recent advances made in international law, specifically, international law relating to the rights of indigenous people, for instance the Declaration of the United Nations on the Rights of Indigenous People adopted in 2007. The Declaration stated that governments must take measures in order to protect the rights of the indigenous peoples especially those which were tied to their genetic resources, their seeds, medicines and knowledge of the nature of the flora and fauna amongst other things. The Delegation stressed the importance of verification and coordination of work with other fora such as the Food and Agriculture Organization of the United Nations (FAO), the CBD and in the United Nations on Human Rights. The Delegation considered that the possibility of patenting forms of life was one of the basic elements that the patent system was based on and substances and processes which existed in nature were discoveries and not inventions. Although in its view, those subject matters should not be subject to appropriation under the patent system, the multilateral situation had provided the possibility of patenting some forms of life as microorganisms, and a high increase in patenting genetic resources was observed. The Delegation further noted that, as a consequence, there were some social, economic and ethical consequences that might arise from such patenting in developed countries. It stated that, since many of those patents were in violation of the legislation in developing countries, there was a concentration of patents in very few institutions or people mostly in developed countries. According to the view of the Delegation, that situation led to a prejudice against developing countries in general, but specifically against those indigenous people who lived in those countries. The Delegation expressed its concern that indigenous people were threatened in their life styles and in their food security. It considered that there were ways of looking at exclusions with regard to the environment and health, and that patent offices should not be dealing with those matters. Patent offices must interpret legislation and see how it should be applied. Further, the Delegation continued that if it was up to the governments to decide what could and could not be patented, then ethical considerations had to be taken into account along with the legal considerations. The Delegation was of the view that exclusions were tied to a question of urgency. For example, in order to mitigate the consequences of climate change, the relevant technologies should be excluded from the system as well, and it was hoped that all of those comments would be taken into account and would provide with food for thoughts for a following revision of the preliminary study.

83. The Delegation of the Russian Federation pointed out that the Russian Federation had adopted the codified legislation in the field of intellectual property. The said legislation had expanded the number of subject matters to be excluded from patentability. According to that legislation, the following matters were excluded from patentability: processes of human cloning, modifying the germ line genetic identity of humans, uses of human embryos for industrial or commercial purposes. In that line, the Delegation intended to send the International Bureau the referred modifications to be added to the Annex II of document SCP/12/3 Rev.2. Regarding document SCP/13/3, the Delegation noted that paragraph 29 provided that, under many national laws, non-technical creations were not considered to be “inventions” within the meaning of the patent law. In that regard, the Delegation found it useful if the Secretariat could add the information on the main criteria as to how technical creations differ from non-technical. As regards the issue of compulsory licensing as an instrument to prevent abuses in cases of non-working or insufficient working of an invention protected by a patent, the Delegation pointed out that its legislation was in compliance with international laws, in particular with Article 5 of the Paris Convention. The Delegation stressed that the provision was an important tool for excluding abuse of non-use of a patent. As the issue of compulsory licenses in the Russian Federation was subject to decisions by a court, the Delegation explained that the process was considered to be very expensive and time consuming, which influenced the effectiveness of the application of the provision. In addition, the Delegation informed the members of the Committee that, under the legislation of the Russian Federation, the grant of voluntary licenses were possible. The information on applications in which a patentee expressed his wish to grant the right to use the invention to any person was published on an annual basis. In conclusion, the Delegation suggested to the Committee continuation of its work on document SCP/13/3, since it raised some problems which were of great interest to the Russian Federation.

84. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, recognized the importance attached to the issues covered by document SCP/13/3. As regard the exclusion from patentable subject matter and subjects not considered to be inventions, the Delegation observed that the international legal framework was given directly by the TRIPS Agreement. The Paris Convention and the regulations under the Patent Cooperation Treaty touch upon those issues indirectly. It was stated that, in Europe, a considerable level of harmonization had been achieved in the area concerned, through the Community Law and the European Patent Convention. As regards exceptions and limitations to patent rights, the Delegation mentioned that the following international documents were relevant: the Paris Convention, the Convention on International Civil Aviation, the Chicago Convention and the TRIPS Agreement, the Declaration on a TRIPS Agreement and Public Health and the Doha Ministerial Declaration. The Delegation noted that within the framework of the European Community, the important issues relating to compulsory licensing for pharmaceuticals, experimental use in the context of pharmaceuticals and biomedical research, farmers privilege and breeder’s exceptions had been harmonized. The European Community and its 27 Member States believed that an appropriate balance between the right holders and the interest of the general public should be maintained.

85. The Delegation of Morocco observed that the TRIPS Agreement defined exceptions to patent rights and exclusions from patentable subject matter. It was noted that the national legislation provided for exclusions from patentable subject matter in accordance with international agreements, in particular, taking into account the interest of the public in general. Further, the Delegation suggested that it would be appropriate that work on those issues continued within the Committee and the document remained open for further comments.

86. The Delegation of Egypt stated that it had four comments of a methodological nature on the preliminary study. Supporting the suggestion of the previous speakers, the Delegation requested that the study remained open for comments and for further elaboration during the forthcoming session of the Committee. In connection with a response provided by the Secretariat on the question raised by the Delegation of India, the Delegation was of the view that the mandate did not particularly specify that the preliminary study to be of a legal nature; therefore the Delegation suggested that there was no need for a new mandate. As regards paragraph 32 of the preliminary study which mentioned that countries shared similar aims related to the patent system, that is, the need to protect innovation, promote development, etc., according to the Delegation's view, the term "socio-economic conditions" used in that paragraph was not accurate. The Delegation argued that the socio-economic conditions in Switzerland were different from the socio-economic conditions in Sweden, but, generally, there were of the same level of economic development. The Delegation continued that, while the use of the term "socio-economic conditions" might be politically correct, it needed to be replaced by the level of economic development. In its view, it was the level of economic development which was a determining factor. The Delegation was concerned that the preliminary study did not mention the level of economic development and how that would impact on the patent system. Further, it was stated that the preliminary study made references only to market power without referring to monopolies and anti-competitive practices. While agreeing that the politically correct language was important as well, the Delegation stated that it should not obviate the need to refer to issues and the problems as they really were. In connection with the proposal made by the Delegation of Bulgaria on a quantitative approach, the Delegation suggested adding tables and statistics on the use of exceptions and limitations. The Delegation specified that, for example, a table could display the information on the use of compulsory licensing such as which members used it and how often it was used. According to the Delegation, such approach would be instructive and would show the patterns of use of exceptions and limitations in the various national legal systems. The Delegation agreed with the Delegation of Sri Lanka on behalf of the Asian Group which underlined the importance of including bilateral and plurilateral arrangements in the international aspects of the patent system and of conducting a study by an external group of experts in the fields, noting the development aspect. Recalling an excellent study commissioned by the government of the United Kingdom, which was renowned for its objectivity and balance, the Delegation concluded that such a properly commissioned study from a highly renowned group of experts was a positive way forward.

87. The Delegation of China underlined that the issues in document SCP/13/3 were the most important issues in all the countries. The Delegation explained that any country had relevant provisions on that subject in their patent law compared to the three other issues on the table. For instance, in its view, the issue of standards related to the process and provisions of standard making, and they were not the issues to be included in the patent laws but rather in other relevant laws. Whereas the issues dealt with in document SCP/13/3 were not avoidable. Therefore, the Delegation considered that it was worthwhile to give more consideration and more exploration on the issues described in document SCP/13/3. While the Delegation appreciated the content of the document, it identified some shortcomings. As an example, the Delegation referred to paragraph 43 of document SCP/13/3, which listed subject matters that no International Preliminary Examining Authority was required to conduct a preliminary examination, such as scientific and mathematical theories, performing purely mental acts or playing games, the mere presentation of information and computer program. The Delegation noted that those issues actually were subject of exclusions in the laws of most countries, including China. Therefore, the Delegation suggested that the Secretariat provide more

summary of different practices in different countries and give more explanation as to the reasons of exclusion and comparison of different countries' practices. That type of study, in its view, would be conducive for the future harmonization of the patent law. Further, it was stated that the Chinese Congress had adopted a revision of the Patent Law on December 27, 2008. The revised legislation contained two points relevant to the discussion on the table, i.e., exclusions from patentable subject matter and exceptions to patent rights. As regards the exclusions, the Delegation informed the Committee that, after the revision, the Chinese Patent Law newly stipulated that using of genetic resources illegally and inventions thereof were not patentable. As for the exceptions and limitations to patent rights, the revised Patent Law allowed the parallel importation. The Delegation noted that the exhaustion of rights was an important part of the exceptions and limitations, while the TRIPS Agreement was silent on that matter. The Delegation suggested that the exhaustion of rights be added in the document. In conclusion, the Delegation expressed its willingness to provide more information on the revised Patent Law.

88. The Delegation of Ecuador stated that the document did not cover a number of points, in particular, the issue of exhaustion of patent rights. In its view, the issue of exhaustion was related to the exclusion from patentability. The Delegation continued that the issue of exclusion was crucial due to its impact on the economic development of countries. The Delegation was of the view that developing countries should use the patent system focusing on issues which were of specific interest to them. The Delegation observed that, while there were exceptions for second use in the Andean region, they were not used because of its development conditions. Further, the Delegation noted that some countries, for example, the Andean region, had adopted provisions on exclusions from patentability specifically related to some technological advances. In that line, it was stated that there were discussions held within their Constitution on the misappropriation of the genetic resources. In conclusion, the Delegation requested that the document remain open for further discussions.

89. The Delegation of Pakistan clarified its question by stating that it had sought cases where inventions contained in patent applications had been refused on the ground of public order and morality under the national patent system. In its view, the main shortcoming of the document was that it did not explain the rationale of exclusion but provided the rationale of IP system. Further, it was stated that the preliminary study devoted substantial attention to the issues of exclusions of plant, animal varieties and essentially biological processes from patentability. Referring to paragraph 60 of the preliminary study, the Delegation noted that due to the advances in biotechnology, many inventions pertaining to plant and animal varieties had started to satisfy the criteria of patentability. However, in the view of the Delegation, that deduction in the study was made without explaining the impact of patenting of plant varieties on the farmer rights and food security, which were considered to be important public policy issues. Referring to the European Directive 98/44 on the Legal Protection of Biotechnological Inventions, the Delegation observed that the traditional limits to patentability had been newly defined in Europe by the Directive, which circumvented the prohibitions to patentability as defined in the European Patent Convention (EPC). The Delegation stated that according to the Directive, patents on plants and animals, on parts of human body and on genes were explicitly allowed. In its view, the Directive not only expanded existing patent laws and corroded some of the fundamental principles of the system of intellectual property rights, but also led to a serious violation of essential ethical principles. Further, the Delegation argued that the Directive violated the EPC and went far beyond on what was required by the WTO. It was further stated that the preliminary study did not focus on the adverse implications of broadening the scope of patentability modeled on the EU Directive. In addition, the Delegation highlighted that the case studies and national laws

quoted in the document were mostly from the developed countries. Therefore, the Delegation expressed its anticipation that the case studies from the developing countries on the issue of exceptions and limitations would also be quoted. Regarding the Article 30 of the TRIPS Agreement, in its view, a broad interpretation of Article 30 on exceptions was necessary for the developing countries. The Delegation understood that it was not a closed list of exceptions and new exceptions could be included from which the developing countries should benefit.

90. The Delegation of the Republic of Korea stated that the preliminary study reflected the objective and clear rules on the exclusions, exceptions and limitations. Regarding the suggestion made by the Asian Group, the Delegation welcomed the further study on the subject matter, assuming that the same opportunity would be given to the other agenda items to be discussed in the future. Further, the Delegation emphasized the importance of including the diverse and different views on the issue of exclusions, exceptions and limitations. It was observed that the document included only the legal standards of exclusions and exceptions, and in that way it was fairly objective. However, the Delegation considered that when there was a discussion on the detailed criteria on the exceptions and limitations, reflecting the social and economic needs of various countries, there could be many different views on that point. Therefore, the Delegation suggested including various views on the exclusions, exceptions and limitations. In conclusion, the Delegation requested that the detailed presentation on the preliminary studies, which could enhance the understanding of the issues at stake, be done by the Secretariat at the following sessions of the SCP.

91. The Delegation of Colombia referred to the legal framework in which the exceptions operated under its patent law. Citing Articles 53 and 56 of the Andean Agreement as well as the TRIPS Agreement, the Delegation stated that it was important to maintain existing flexibilities. It further underlined that the flexibilities should be given priority when considering the possible harmonization efforts. The Delegation noted that more time was needed to explore the issues of concern. In concluding, the Delegation emphasized the importance of maintaining the flexibilities and the freedom of national governments to shape the rules according to their own needs.

92. The Delegation of Islamic Republic of Iran associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group, and supported the statement made by the Delegation of Pakistan. The Delegation stated that the exceptions and limitations were the key issues in the patent system, which had enormous implications on different parts of the society in developing countries. In the global sophisticated technological environment, the Delegation observed that the laws and regulations in patent system could deeply impact on public policy objectives on one side, and the extent of presence of the States in international trade, on the other. Therefore, the extent of exceptions and limitations might promote or prohibit the innovation in a particular country. The Delegation said that, in the context of the work of SCP, the exceptions and limitations in the patent system should be viewed in a way that kept the balance between elements of the patent system itself, namely the right of patent holders and the public interest to the exceptions and limitations, and keeping the balance between the interests of Member States as a whole. It was further stated that the industrial infrastructure and public policy in different countries defined the assumption of each country to its patent system or elements of eligibility for protection, namely, novelty, inventive steps and industrial applicability, and that shaped the views of countries to look at exceptions and limitations to balance the system. In that context, the Delegation believed that, for example, public health, food security, the environment and other socio-economic considerations for developing countries made sense. In relation to the preliminary study, referring to

paragraph 23 concerning non-patentable subject matter and paragraph 27 concerning patentable subject matter excluded from patentability, the Delegation observed that the idea was to include such excluded matters within the patentable subject matter with justifications, such as emergence of new technologies. Referring to paragraph 32, the Delegation observed that, even public policy considerations evolved, certain subject matter was by nature not patentable. Further, as regards paragraph 34, the Delegation sought clarification as to whether the investor was a private entity and whether he was going to invest into technologies needed by the State concerned. The Delegation was of the opinion that there was a misinterpretation of the term “public order and morality” and its interrelation with the phrase “restricted by law” described in paragraphs 39 to 42 and 51 of the preliminary study. In its view, “restricted by law” referred to trade, while the “public order” was a concept which associated with the historical, cultural and social considerations of a nation which could not be affected by the technological developments. The Delegation considered that the exceptions and limitations were integral part of the IP system which worked to balance the IP system. The Delegation, however, was of the view that the preliminary study, in paragraph 74, referred to them as infringement. In the view of the Delegation, the same approach was taken in paragraph 76, which introduced the exceptions and limitations as impediments of innovative activities. The Delegation considered that a research exemption, which was recognized in any IP system was interpreted in a low-profile manner in paragraph 102. The Delegation further stressed that there was a need for a broad interpretation of compulsory licenses in the Paris Convention, the Chicago Convention and in the TRIPS Agreement. It was underlined that the issue of exceptions and limitations in the patent system was a major concern of the Delegation. In conclusion, the Delegation suggested that the preliminary study remain open for further comments and that the work on the document be continued, focusing on the implication of exceptions and limitations on countries with various levels of industrial and economic development.

93. The Delegation of Chile stated that the issue of exclusions from patentable subject matter and exceptions and limitations to the rights was an aspect of high relevance for developing countries, but also for the intellectual property system as a whole, given the state of development of the system. The Delegation observed that the exclusions, exceptions and limitations could be looked as hindering innovations or access. It was further stated that exclusions and limitations could actually constitute an essential element to the patent system representing a balance: the system which protected the rights of inventors and facilitated access to innovation and technology transfer. Referring to the exclusions from patentability provided by the TRIPS Agreement, the Delegation stated that there were no standards which referred to the matter in a substantive way. As regards exceptions, the Delegation cited the Paris Convention and the Chicago Convention, which covered to some extent the scope of application of those exceptions and limitations. Further, in relation to national legislations, it was noted that there was a great divergence in the standards in the different legal systems of the members, as provided in Annex II of document SCP/12/3 Rev.2, but also diverging views relating to public order and morality in different countries. The Delegation considered that it was important to take into account in which legal system, common law or civil law, the exceptions were dealt with. The differences, as well as convergences, regarding the concept “*ordre public*” or public order or civil protection in common law, could be identified among various systems. The Delegation believed that studying the different legal systems of various countries could facilitate an understanding of the issues and could move forward to creating a common vision on the need to harmonize the patent system. As there was a greater trend towards standardizing the patent registries, the Delegation believed that, there was a need to better explore the international context of exceptions and limitations on patents. It was suggested that a study could, for example, focus on which limitations and exceptions were

most frequently accepted and what their use was in the international arena. Observing that Annex II of document SCP/12/3 Rev.2 provided rich information on limitations and exceptions with regard to the national legislation of different members, the Delegation suggested that members needed to provide more information in order to update it. The Delegation assumed that, in order to analyze in-depth the way limitations and exceptions were applied by different countries, the study needed to look at the interpretation of exceptions and limitations by the tribunal and the courts. The Delegation underlined that, when conducting such study, it should be kept in mind that it was the justice system which interpreted the legislation in place, and which created complexity with regard to the patent system. The Delegation reiterated that information contained in Annex II of document SCP/12/3 Rev.2 could be broadened by requesting Member States to provide relevant jurisprudence and the way national legislation dealt with the issue of limitations and exceptions.

94. The Delegation of Brazil stated that the exceptions and limitations were part of the checks and balances of the IP system as they ensured the transfer and dissemination of a technology incorporated in the invention. The Delegation was of the view that a stronger IP system meant a balanced IP system, and a balanced IP system was one which contained substantive provisions on exceptions and limitations. It was stated that the issue of exceptions and limitations played a central role in the debate held at the World Health Organization (WHO) and in other international fora on the issue of access to health and access to medicines. The Delegation further noted that exceptions and limitations were equally central to the national policies of developing countries as they provided a leeway for developing countries to pursue their own technological and innovation goals. In its view, exclusions from patentable subject matter and exceptions and limitations to patent rights were viewed of utmost importance for reviewing the agenda of the SCP as it was closely related to fundamental development concerns. The Delegation observed that a number of recommendations of the Development Agenda addressed directly the issue in connection with norm-setting, public policy, technology transfer, access to knowledge and impact aspects. For instance, recommendation 17 of the WIPO Development Agenda stated that WIPO should take into account in its activities, the flexibilities existing in international IP agreements. In addition, recommendation 22 provided that WIPO should address in its working documents for norm-setting activities, issues such as potential flexibility, exceptions and limitations for Member States. As regards the preliminary study, in its view, while the document identified and described a wide circle of exclusions from patentability and exceptions and limitations to patent rights, it depicted a negative portrayal of exceptions and limitations. The Delegation was of the view that the study, to a certain degree, depicted the exceptions and limitation as a hurdle to technological advancements, or they were presented as a disincentive for investment. The Delegation was of the view that the preliminary study stated that considerations of ethical, health and environmental nature should be regulated by other laws than the patent law. The Delegation, however, believed that exceptions and limitations were an extricable part of the IP system. Therefore, patent law should not disregard ethical, health or environmental principles. Moreover, in its view, the preliminary study attempted to construe a relationship or connection between exclusions from patentability on the one hand, and patentability criteria on the other. The Delegation observed that, while the exclusions from patentability were the subject of the study, the substantive patentability criteria fell out of the scope of the study. Further, the Delegation was of the opinion that exclusions from patentability were aimed at different and, in general, specific policy objectives, while the patentability criteria related to the patent examination and the quality of patents granted. Therefore, the Delegation thought that such criteria should not be considered as an equivalent to exclusions. Referring to paragraph 76, the Delegation did not agree with the notion that exceptions and limitations might lead to reducing the incentive for investors to invest in

innovative activities. In opposite, it was observed that exceptions and limitations had brought competition into many economic fields. In considering the distinction made between disclosure and know-how, the Delegation advised that the distinction required caution. It was underlined that the concepts should not be construed as an excuse for inventors not to reveal the full content of the invention. It was said that the Committee should deal with the analysis of the benefits of exceptions and limitations, as well as with issue of the flexibility of the IP system. Regarding the future work, the Delegation requested that the preliminary study remain open for comments and contributions from delegations, especially focusing on how the study portrayed the national legislation of Member States. Further, it was advised that technical activities carried out by the Secretariat should encourage Member States, recipients of such technical assistance, to make full use of exclusions from patentability as well as of exceptions and limitations in a manner conducive to their own goals in the field of education, health, agriculture and technology fields. The Delegation stressed the importance of those issues in the context of the Development Agenda. In that regard, the Delegation supported the proposal put forward by the Asian and African Groups that the Secretariat prepare a study about the development and implications of the erosion of exceptions and limitations generated by the dissemination of TRIPS plus standards in bilateral agreements. Finally, the Delegation suggested that the exceptions and limitations be part of the permanent agenda of the SCP, as it was viewed to be a matter that deserved attention and deeper analysis in upcoming meetings.

95. The Delegation of Tunisia stated that the preliminary study was built upon a postulate according to which the patent system intended to promote innovation and to improve social benefits resulting from the innovation. In its view, the expression “social benefits” was apprehended from the broader sense of society and would not necessarily entail direct benefits that might be enjoyed by all individuals or groups of people in a given society, since IP rights were primarily private rights. It was observed that public policy objectives played a major role in crafting national IP systems, setting the patentability criteria and drawing the margin of exceptions and limitations. It was stated that the Committee should keep in mind that exceptions and limitations were intended to safeguard social and economic priorities of countries. The Delegation observed that paragraphs 77 to 94 of the preliminary study clearly demonstrated how existing international rules addressed issues relating to exceptions and limitations. While noting that those important provisions were often hard to put into real practice, the Delegation observed that they constituted a minimum that should be safeguarded. The Delegation further noted that despite the normative nature of the work of the Committee, the preliminary study had omitted to refer to the work achieved in the CDIP and, particularly, the relevant recommendations regarding the norm-setting activities. In its view, the preliminary study should be complemented by due reference to and inspiration from the Development Agenda. Finally, the Delegation joined the previous delegations which had requested complementing the study with tables and statistics, as well as a reference to bilateral and plurilateral agreements, and had asked the study to be open for further comments at the next sessions.

96. The Delegation of Indonesia stated that the preliminary study presented the fact that the nature and scope of exclusions of certain subjects from patentability and exceptions and limitations to patent rights were relative to the public policy objectives of a country. The Delegation associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. Concerning the preliminary study, the Delegation was of the view that it did not explore the experiences of developing countries in approaching the issues, for example, the experience relating to compulsory licenses. According to the Delegation, the preliminary study also fell short in describing the impact of the socio-economic development of those countries. Therefore, the Delegation echoed the voice of the Asian Group that there



should be further studies on the exceptions and limitations and most importantly it should take into account the development dimension. In conclusion, the Delegation stated that it would also be beneficial if the study could further illustrate the implementation of the 2001 Doha Ministerial Declaration on the TRIPS Agreement and Public Health, in particular, focusing on how countries could apply that subject for their respective public interest.

97. The Delegation of Switzerland associated itself with the statement made by the Delegation of Germany on behalf of Group B. As to the content of the preliminary study, the Delegation was of the opinion that it was balanced in two respects: it had neither too little nor too much information. It supported the statement of the Delegation of China that the study contained very rich information. Therefore, while noting that any report could be always more detailed, the Delegation thought that comprehensiveness was not necessary useful. Furthermore, the Delegation was of the view that it was very wise of the International Bureau to have presented a factual report, leaving the interpretation to the Committee. The Delegation stated that it could not subscribe to all interpretations that had been put forward in the Committee. The Delegation explained that the social and economic rationales for some limitations might vary; therefore it was not possible to give one solution that would be right for all national legislation. Concerning future work, the Delegation preferred a coherent discussion on the corresponding agenda item. Nevertheless, the Delegation expressed its objection to the proposal to establish an expert report. In its view, the International Bureau should be refrained from being unduly burdened with further studies. Therefore, the Delegation joined the proposals of the Delegations of Chile and China that Member States should provide more details to the International Bureau by responding to questionnaires to be sent by the Secretariat and to be further assembled in a table. According to the Delegation, that type of exercise would provide the requested details on the issues discussed.

98. The Delegation of India wished to place on record its appreciation to the Secretariat for putting together useful and factual studies. The Delegation stated that it was aware of many constraints and limitations faced by the Secretariat in preparing the studies. The Delegation felt that the preliminary studies had served the desired objective of initiating discussions on those important issues. The Delegation further continued that the next logical steps would be, as proposed by the Delegation of Sri Lanka on behalf of the Asian Group, to take the preliminary studies further to a group of experts, a panel, or academics who could put the issues in a broader public policy context reflecting the reality. In that context, the Delegation made a reference to paragraphs 34 to 37 on the role of exclusions, noting that they gave a general account that the exclusions have a positive or negative impact on the patent system. The Delegation stated that the focus on those paragraphs was on the impact of exclusions on the patent system rather than addressing the impact of exclusion from a public policy perspective, with reference to issues like public health, technology transfer, etc., which had a direct and undeniable bearing on the issue of exclusion. Referring to paragraph 32 of the preliminary study, the Delegation agreed that the public policy considerations were never static but would change over time, reflecting the needs and realities of countries. In its view, it would be useful if the paragraph could be complemented with country studies or concrete examples of how a different patent system had existed in developed countries when they had been at the stage of development where many developing countries were at present, and the role of that patent system in driving the development, particularly focusing on what exclusion and exemption had been employed during their stage of development. According to the Delegation, that type of study would be useful and instructive for many countries.

99. As regards substantive patent law harmonization, the Delegation of Argentina believed that there had still not been sufficient evidence to conclude that there would be benefits for

developing countries. Greater harmonization would entail, conversely, a significant reduction and even the loss of the flexibilities available to national jurisdictions as regards patents. It would compromise the scope available for public policy formulation and the economic, commercial, social and cultural development of developing countries.

100. The Delegation of Bulgaria supported the statement made by the Delegation of India that it would be useful to know how the exceptions and limitations had developed in developed countries over the years. The Delegation recalled that there were several countries which did not have a patent until after the World War II. It was reiterated that it might be useful to see how the patent laws evolved to reach the contemporary stage. The Delegation further proposed that the exceptions and limitations be presented in a table so that it was possible to see which countries apply how. Referring to Annex II of document SCP/12/3 Rev.2, the Delegation noted that it would be useful if the information could be organized by subject matter under the limitations and exceptions, as provided by paragraphs 23 and 43 of document SCP/13/3, rather than by countries. In conclusion, the Delegation noted that computer-related inventions should also have a separate heading, like biotechnology inventions, because how to protect software was always a question.

101. The Delegation of Kuwait thanked the Delegation of Sri Lanka for its statement on behalf of the Asian Group with regard to the exclusions, exceptions and limitations. The Delegation hoped that further studies would be based on scientific methodology. It noted that a great number of Delegations had expressed their opinions on economic and social considerations of the issues and their value for developing countries. In that light, the Delegation wondered whether a change in economic and social criteria in the future according to the economic conditions would have an effect on the exclusions and exceptions.

102. The Delegation of Guatemala shared concerns expressed by other Delegations, including the Delegations of the Plurinational State of Bolivia and China, regarding the genetic resources. The Delegation noted that there was no specific legislation on that issue in Guatemala. Nevertheless, Chapter 4 of the Examining Procedures specified clearly that, for example, an identification of a substance, a plant extract, and a chemical compound in a natural environment were not inventions but were discoveries. Furthermore, in relation to paragraph 51, the Delegation expressed its concern about bioethics. The Delegation requested more information with regard to protecting life, in view of uncertainty in that area. Concerning the protection of plants and animals, and specifically in relation to plants, the Delegation noted that its country was a member of the International Plant Protection Convention of the FAO and requested the Secretariat to provide more information on that matter.

103. The Delegation of China observed that paragraph 45 of document SCP/13/3 touched upon Articles 27.2 and 27.3 of the TRIPS Agreement. In its view, Article 27.1 was also relevant to the issue of exclusion, since the paragraph requested that all WTO Members should provide patents to any invention without discrimination as to the field of technology. In its view, according to Article 27.1, WTO Members did not have an obligation to protect creations of non-technical character. The Delegation noted that in many countries that issue was a very important and delicate one, and that numerous cases had been heard on that matter. Therefore, the Delegation suggested that the Secretariat conduct deep studies on the issue.

104. The Delegation of Kenya believed that the exclusions and limitations in the patent system should be viewed in the way that it provided a balance between the interests of the patentee and the public. The Delegation viewed that the exceptions and limitations were ways

to deal with the malpractice in the patent system. In its view, the limitations and exclusions should be left as flexible as possible in each country. The Delegation observed that most of the patents protected in developing countries were from developed countries, and some of those patents were considered to be unethical under the national law. In addition, the Delegation stated that each country had a leeway of interpreting what could be listed within the exceptions and the limitations, especially in relation to inventions of unethical character or posing security threats. In conclusion, the Delegation requested the Secretariat to examine the case laws of various countries on exceptions and limitations.

105. The Delegation of El Salvador considered that document SCP/13/3 was a good basis for the work of the Committee, and expressed its interest in having the document continued to be enriched with contributions. The Delegation was, in particular, interested in the issues such as compulsory licensing and amendments to the TRIPS Agreement on public health, etc. The Delegation stated that the document could be extended by using practical cases and looking at examples.

106. The Delegation of Thailand, associating itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group, stated that WIPO should carry on further studies on exceptions and limitations to patent rights. Since the Delegation was aware that it might be too much time consuming for WIPO Secretariat and it might not essentially produce any solid outcome if WIPO was going to carry out further studies on all the issues, it proposed that the focus of those studies be on the development aspects of IP on certain issues which were of particular interest to several delegations, for example, on public health and genetic resources.

107. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, made a statement regarding inventions in the field of biotechnology under the European law as follows: first, genetic sequences are not patentable in their natural state, and an invention relating to a gene sequence is only patentable under certain conditions, for example, if the gene has been isolated by means of a technical process and if the invention meets the normal patentability requirements of novelty, inventive step and industrial applicability; second, the EC Directive 98/44 is fully compatible with the EPC, and has been incorporated in the EPC through the Implementing Regulations; third, the EC Directive takes into account ethical concerns in at least two respects. The Delegation explained that the Directive established a European Group of Advisors on Ethics, which could provide advice on request, and that it also contained specific exclusions on the grounds of morality and *order public* with particular examples. Finally, the Delegation stated that the Directive was adopted after inputs from various stakeholders, including representatives of patients who were keen to benefit from advances in biotechnology.

108. The Delegation of Indonesia supported a proposal to prepare a further study on computer-related inventions. The Delegation suggested other important topics, namely, a second medical use and methods of doing business, for further studies. The Delegation appreciated the preliminary study, since its country was in the process of revising the patent law and looked forward to having further studies as requested by Member States.

109. The Representative of the EPO noted that the study on exclusions from patentable subject matter and exceptions and limitations to the rights clearly outlined international legal framework and the underlying policy objectives for the exceptions and limitations which were regarded as essential elements of any patent system. The Representative, supporting the Delegations of the Czech Republic on behalf of the European Community and its 27 Member

States and Germany on behalf of Group B, expressed its willingness to assist the work of the Committee and to provide additional inputs to the study regarding the treatment of the issue within the framework of the EPC, which had achieved a considerable level of harmonization also in the area of exclusions from patentable subject matter at the regional European level. The Representative expressed his support to the latest statement made by the Delegation of the Czech Republic on behalf of the European Community and its 27 Member States regarding the inventions in the field of biotechnology and the implementation of the EC Directive on the legal protection of biotechnological inventions. The Representative stated that the EPO held no political views of its own on biotechnology patents, and as the executive organ of the European Patent Organisation, it examined patent applications on the basis of the EPC. The Representative explained that the essence of the Directive was incorporated into the Implementing Regulations to the EPC, which provided the ground rules for considering the patentability of biotechnology inventions together with the other principle criteria valid for all patents.

110. The Representative of KEI noted that one area where the preliminary study could be strengthened related to goods in transit because of the recent news about the seizure of generic drugs which were manufactured in India and were sent to destinations in Africa and South America. The Representative considered that a study on goods in transit would help better understanding on the role of limitations and exceptions regarding a shipment of generic drugs which were temporarily at an airport or in a warehouse in Europe, but were not destined for the European market, but rather for the markets in developing countries, and suggested that the SCP focus its work in that area. The Representative further noted that the document did not include the so-called Part III of the TRIPS flexibilities, although it contained flexibilities that were set out in Part II of the TRIPS Agreement. The Representative explained that Article 44 in Part III of the TRIPS Agreement contained an important provision that allowed countries to forgo the enforcement of the exclusive rights in cases where compensation was given to patentees, and that it had been the primary area where the government of the United States of America issued compulsory licenses in the last three years, particularly after the decision of the *e bay v. MercExchange* in 2006. The Representative further noted that the study did not discuss the role of bilateral, regional and plurilateral trade agreements in limited injunctions or the relationship to the norm-setting about injunctions. The Representative was of the view that the TRIPS flexibilities were affected by the bilateral, regional and plurilateral agreements as well as by unilateral trade policies such as the Special 301 list of the United States of America, and that the issue be discussed in a global norm-setting. Further, the Representative noted that many examples on limitations and exceptions in the document were sector specific, for example, the United States of America provided a special prior use exception for business method patents and France had a special exception in the area of genetic testing. The Representative wondered how far could countries single out certain sectors for special limitations and exceptions with a view to the non-discrimination provision in Article 27 of the TRIPS Agreement, and questioned compliance with their obligations under the WTO rules.

111. The Representative of GRUR, referring to paragraph 109 of the document, was of the view that the background of the decisions of the Federal High Court of Justice was broader than it appeared in the document. The legal provision on the research exemptions was newly introduced into the German Patent Law in 1980, which read: the rights conferred by a patent shall not extend to acts done for experiment purposes relating to the subject matter of the patented invention. The Representative explained that that text could not be construed in isolation, since it was taken over from Article 27 of the Community Patent Convention as established in 1975 and confirmed again by the second version in 1989. The Representative

noted that the provision had been adopted by the other Member States of the European Communities due to the political commitment of those Member States to harmonize their national laws on the basis of the European Patent Convention and the Community Patent Convention. Since the case law before 1980 had given the exemption of a very limited and narrow scope, the decision by the Federal High Court of Justice in the case *Clinical Trial I* had received criticisms from various interested circles. The plaintiff submitted the decision of the Supreme Court of Justice to the Federal Constitutional Court. That Court however had confirmed the decision of the Federal High Court of Justice, and had rejected the constitutional complaint. The Representative further noted that the decision *Clinical Trial II* was generally considered as the act of the Federal High Court of Justice to draw a distinctive boarder line against any attempt to extend the research exemption too much into the direction of a hidden commercial exploitation of the protected invention. He explained that such slippery ground was caused by the wording, namely, whether the clinical trials were employed for wider purposes such as commercial interest.

112. In response to the statement made by the Representative of KEI, the Delegation of Brazil stated that, although it shared, to a large extent, the same concerns as expressed by the Representative of KEI, deciding on detaining or seizing goods in transits was neither a matter of exclusions from patentability nor exceptions and limitations to patent rights. In its view, the issue was more straight forward: goods in transit did not enjoy patent protection and the compatibility of the goods in transit with the law of the country in transit should not be assessed, since the goods in transit were not destined for the market in transit, but were destined for a third market. Therefore, the Delegation was of the opinion that the issue was a violation of the principle of territoriality, which fell outside the scope of the preliminary study. It considered that the issue under consideration was in a situation where no patent rights were granted in the manufacturing country as well as destination countries.

113. The Representative of ICTSD pointed out two studies produced in conjunction with the UNCTAD/ICTSD project on IP and sustainable development, which could be of relevance for the work of the Committee. The first work was the resource book on TRIPS Agreement and development that comprehensively looks at the TRIPS Agreement from a developing perspective and highlighted the implications of issues and options on development objectives, in particular, areas where developing countries could benefit from broad interpretation of the TRIPS Agreement in consistent with their development needs and development levels. The second study was entitled “Exceptions to Patent Rights in Developing Countries”, issued in October 2006. That study looked exhaustively at exceptions and limitations which developing countries could use and could benefit from in the context of a broad development oriented interpretation of relevant international standards. The Representative further noted that, in other committees of WIPO, particularly in the context of the SCCR, studies on exceptions and limitations had been commissioned to external experts, and that there had been a useful study on, for example, exceptions and limitations for libraries that looked comprehensively at almost all the laws and practices of the WIPO Member States.

114. The Representative of EAPO associated itself with the statement made by the Delegation of Germany on behalf of Group B. The Representative also agreed with the Delegation of China on the point that exceptions and limitations were the key to all the matters concerning the subsequent decisions. As regard the development of the international patent system, the Representative shared the view expressed by the Representative of EPO, since it appeared unacceptable to have flexibility as regards the decisions taken with respect to exceptions and limitations. The Representative explained that, under the Eurasian Patent Convention, a single patent prevailed on the territory of nine Member States. These were

States where it was established on the basis of constitutional priority for standards of international law, which went above the standards of national rights. The Eurasian patents could face limitations in the framework of the Eurasian Patent Convention, and could come against limitations which were applied in relation to national patents issued by each of those States. Taking into account the convention approach and the constitutional standards of international law as compared to those of national legislation, the Eurasian patent could not be cancelled or challenged in any of those States, if it came under limitations provided for exclusively by national legislation and not by the Eurasian Patent Convention. The Representative stated that, if an adoption of a given doctrine as regards the exclusions or the exceptions and limitations was failed, an application submitted in accordance with the PCT could face exclusions under the national laws and could turn the patents useless if the flexibility in the national laws allowed the introduction of various limitations.

115. The Representative of TWN stated that, as regards paragraph 13 of document SCP/13/3, the list of exceptions allowed by Article 30 of TRIPS Agreement was not a closed list, as mentioned in the UNCTAD/ICTSD 2006 study. With respect to paragraph 69, the Representative stated that, according to a study by Alston and Venner, the result for introducing plant variety protection in the United States of America was that there was an increase in public expenditure on plant variety improvement but private sector's investment in plant breeding did not appear to have increased. Given the concerns raised by Member States on the impact of patents and plant variety protection on farmer's rights and food security, the Representative suggested looking at the justification for patents on plants and plant variety protection. For example, one justification for it might be that there would be an increase in agricultural product activity or increased yields. In that context, she referred to a literature survey by two American economics professors in a 2008 book published by Cambridge University Press, according to which total factor productivity in the agriculture in the United States of America had not accelerated after the introduction of patents on plants, yields did not increase faster after patents on plant variety had been allowed, and the economic analysis indicated that plant variety protection in the United States of America had not caused any increase in experimental or commercial activities. As regards paragraph 76, the Representative pointed out that a study by Scherer found that issuing compulsory licenses did not lead to reduction of investment in research and development in 70 companies which were studied. It was found that those whose patents had been compulsory licensed actually significantly increased their research and development compared to companies of comparable size who had not been subject to compulsory licenses. Concerning paragraph 142, the Representative was of the view that the conditions for granting compulsory licenses were not largely harmonized due to the TRIPS Agreement, since, for example, a period of 30 days was considered as a reasonable period to fulfill the requirement to negotiate a voluntary license in circumstances in the European Union and in Canada, as opposed to Argentina's requirement for 150 days. The Representative further noted that in some countries, compulsory licenses could be very broad, for example, for any medicine used in the treatment of people suffering from HIV/AIDS, without identifying and listing all the patents involved. She added that compulsory licenses could be chosen to last until the end of the patent period in some States, but in other States, the compulsory license had to be renewed, and that who could apply for a compulsory license and how quickly compulsory license could be granted differed widely from country to country. On remuneration, the Representative stated that there was wide variety of practices, and referred to the United Nations Development Programme (UNDP) and WHO remuneration guidelines for medical technology. She explained that, in the United States of America, it was a 0% royalty for anticompetitive compulsory licenses and less than 0.1% of the value of the total product in a number of recent compulsory licenses even when it was not the remedy to anticompetitive conduct. She further noted that, in California, there

was a mandatory license in air pollution prevention inventions under the Clean Air Act. With respect to the history of developed countries using exceptions and limitations, the Representative noted that Spain had not allowed patents on chemicals or medicines until 1992 because they had not been able to afford the high prices. The Representative also suggested including in the study the extension that least developed WTO Members had received under the TRIPS. With respect to the concerns about the current crisis, the Representative stated that Member States might use the California example of mandatory compulsory licensing on the technology needed to deal with the climate change crisis. Similarly, with the financial crisis, the Representative noted that the heads of States of a number of countries, such as Ethiopia and Liberia, had said that the financial crisis was big enough to cause violence and chaos. The World Bank said it was unprecedented, and the IMF predicted pressure on balance of payments, for example, in Africa due to commodity exports and in Asia due to manufacturing exports. The Representative noted that, according to government statistics, there was a net outflow of royalty payments of 1.7 billion US dollars in 2005 alone in Malaysia. Given the fact that 98% of patents granted in Malaysia were to foreigners, in her view, more money flew overseas. She considered that, in the time of the balance of payment crisis, exclusions from patentability might be able to help the economic position. Given the importance of these exclusions and limitations to development in achieving public policy objectives and the need to preserve the adequate policy space to face the current crisis whether it is finance, climate or food, the Representative was of the opinion that the effect of bilateral and regional trade agreements on the ability to use the exclusions and limitations should be looked at. She referred to free trade agreements with the European Union and the European Free Trade Association, which might limit the effectiveness of some of the limitations such as compulsory licenses via requiring data exclusivity. She also noted that the US free trade agreements in the past had limited flexibility, for example, by removing plants, animals and new uses from exclusions, and might have rendered some exceptions and limitations less effective by the data exclusivity linkage, limiting compulsory licensing grants and restricting parallel importation. In her view, the Japanese free trade agreement, especially the investment chapter, also significantly limited the available exceptions and limitations.

116. The Delegation of Guatemala sought clarification regarding plant varieties. As regards its country, in Chapter 5 of the Agreement 15/1, each party should ratify the Convention of 1991 by January 1, 2006. Countries which had signed the free trade area agreement such as Central America had already ratified the treaty or were about to do so. In its view, there was a common objective both for the holders and the patent system: innovations should be encouraged and all inventions in all technical areas had to be protected. As regards plant variety protection based on UPOV, a system had been set up to protect plant varieties. The Delegation observed that there should be no dual protection in relation to the patent system, but innovative biological inventions should be encouraged. It explained that the patents referred only to new genes, or new nucleotides, of plants and also of new procedures, but not to new plant variety. Therefore, a bill to implement the UPOV Convention had been examined by the Parliament of its country.

117. The Representative of ALIFAR stated that the exceptions and limitations for industrial property were governed by the TRIPS Agreement. In the light of the Doha Declaration on Intellectual Property and Public Health, States might develop their public policy in various areas such as access to food, health, etc. As regards exclusions and limitations, the Representative stressed the importance of the ability of the countries to regulate what was patentable under the TRIPS Agreement as well as encouraging innovation, access to technology and access to medicaments at the lowest possible price. Referring to Article 30 of the TRIPS Agreement, the Representative pointed out that the use of an invention in order to

obtain the registration of a generic product before the expiry of the patent concerned would enable the countries to have rapid marketing of the generic version after the expiry of the patent. The Representative stated that many countries applied such exception, which was in accordance with the TRIPS Agreement. The Representative further suggested that the Secretariat's study also deal with the rights to industrial property in bilateral treaties.

118. The Representative of FSFE believed that the preliminary studies provided an excellent starting point for the discussion, and should be maintained as living documents that could accompany the debates and act as backdrop for the future work discussion. Referring to document SCP/12/3 Rev.2, the Report on the International Patent System, the Representative believed that the preliminary studies should take into account the systematic considerations in the Report. In particular, the economic rationale for the patent system should be taken into account and reflected for the considerations of document SCP/13/3. In his view, the rationale for exceptions and limitations should loosely be based on the ancient wisdom of "*primum non nocere*", i.e., the knowledge that actions could be more harmful than inaction, that is, inclusion of an area in the patent system could result in less innovation than its exclusion. He considered that the overarching principle for this SCP should be to maximize innovation, and that the economic rationale for patenting provided a background to understand when to avoid regulation through patents. As highlighted in document SCP/12/3 Rev.2, the economic rationale for patents was based on providing incentives in cases of market failure, disclosure of knowledge in the public domain, as well as technology transfer, commercialization, and diffusion of knowledge. The Representative therefore considered that the "three step test for inclusion in the patent system" should be based on demonstrated market failure to provide innovation, demonstrated positive disclosure from patenting, and effectiveness of the patent system in the area to disseminate knowledge. In his view, software failed all three tests. For instance, innovation in the IT industry had been dramatic before the introduction of patents, there was no disclosure value in software patents, and patents played no role in the diffusion of knowledge about software development. The Representative regretted that where the exceptions from the patent system were based on different views on patentable subject matter, such as software under Article 52 of the European Patent Convention, such exceptions were not covered by the study. Consequently, in order to provide an overview of the area covered by patents and the exceptions to that coverage, the Representative suggested that Member States mandate the Secretariat to provide an overview over the differences in patentable subject matter and reasons therefore.

119. The Representative of FFII noted that one of its main objectives was to fight software patents. While the European Parliament had given a strong signal in 2005 by rejecting the software patent directive proposal with an overwhelming majority, software patents were still being granted on a massive scale in Europe. He considered that it was a priority for the SCP to address software patentability in the framework of "subject matter exclusions", since new rules for software patents were being developed both by the EPO and by the courts in the United States of America, among others. The Representative observed that the economic benefit of software patents was very controversial, as economists had found that increased software patenting actually coincided with decreased R&D activity, a strong example of the well-known "patent paradox". He noted that even software patent proponents were worried about the legal uncertainty caused by complicated and inconsistent rules, which caused excessive transaction costs due to litigation and litigation prevention, and SMEs in the software realm could not afford the tremendous administrative burden of patents. In sum, the Representative believed that the exceptions in Article 52 EPC, Section 101 of the US Patent Act and associated case law needed due attention of the SCP and that the issue, which was not even on the non-exhaustive list of 18 issues agreed last year by the SCP, required priority.



120. The Representative of GCC stated that, according to the GCC rules, a patent application should not contradict the Islamic sharia, or what was called the Islamic jurisprudence. The Representative explained that that law was not in contradiction with exclusions regarding public order and morality in other regional and national patent systems. The Representative further clarified that patents issued by the GCC office were valid in all six Member States.

121. The Representative of MPI stated that, while recognizing the objective of the preliminary study and the intention of not deriving policy recommendations at that stage, from a technical point, it was helpful to start with a positive analysis describing the facts and then as a second step, drawing normative conclusions from the findings. He noted that, from the description of the different exclusions and exceptions, the importance of such exclusions and exceptions for the respective patent regime could not be assessed. Furthermore, he noted that a comparative analysis was difficult when the respective law regime as a whole was not taken into account. For example, if a national law did not provide exclusions from patentable subject matter, it might be due to the fact that the subject matter in question was not regarded as an invention. To avoid this problem, he considered that the document could be structured in a different way by organizing it as a country-by-country analysis than arranging it by the nature of the respective provisions. The Representative further observed that it was unclear what impact the exceptions and limitations actually had in practice, where a statute did not play any role in practice or it was not enforced. As an example, he noted that, although a compulsory licensing provision was provided for in the German patent law, in the last decades, only very few of such licenses had been actually granted. Compared to the amount of patents, it was a number that could be neglected. Even with the assumption that the threat of compulsory licensing induced voluntary licensing, he was of the view that the overall importance of that provision in Germany was low, while, on the other hand, compulsory licensing might play a great role in some other Member States. Although it might be difficult to assess whether the exclusions, exceptions or limitations presented in the preliminary study were of great or limited importance in practice, the Representative believed that that would be the best way to go in order to make further progress.

#### *Dissemination of patent information*

122. The Secretariat introduced document SCP/13/5.

123. The Delegation of Bulgaria stated that patent information was a tool that was widely underused not only in developing countries but also in industrialized countries, and that every effort to improve dissemination of patent information was most welcome. The Delegation observed that patent offices should be proactive in spreading patent information if they wished to sell their products to the market, in particular to research organizations. It noted that, when patent information had been still distributed on paper, several patent offices had had special publications directed to specific users in industry or in research. Another example was private and commercial IP information providers who managed to work in such a way that they could make profits from patent information, although the original data, the whole material, was possessed by patent offices. In its view, patent offices and all those working in the public sectors should learn how to better shape the patent information for the users. In that regard, the Delegation observed that the preliminary study would be better completed by additional information about private information providers who were working in the commercial market. He also considered that a number of private information providers would be ready to cooperate in providing free services, as that could be considered as a promotion to users who were not ready to pay expensive fees. The Delegation was of the opinion that it

would be useful if the document would have had a summary of WIPO's activities in the field of patent information. The Delegation was of the view that WIPO would be an ideal place to develop a portal or one entry point for accessing patent information on its web site. Referring to the proposal made by the Delegation of Japan at the General Assembly in 2008 regarding an establishment of Wikipedia for patent information, the Delegation stated that such a collective effort by those who were ready and willing to contribute and to share information was an excellent way to disseminate patent information.

124. The Delegation of Germany, speaking on behalf of Group B, observed that dissemination of patent information is one of the cornerstones of the international patent system. In its view, publication of innovations fostered technical advancement and thus was complementary to the grant of an exclusive right to the invention. Group B considered the publication of granted patents and patent applications to be an important source of valuable legal and technical information. The Delegation observed that the benefits of transparency were multiple. It might be rather obvious that inventors, patent examiners, researchers, business managers, economists and policy makers could draw from the information published. It however believed that far-reaching effects of patent information for public welfare and economic advancement was especially important for developing and emerging countries, which could not only benefit from the available knowledge derived from prior art but also identify potential licensing and technology transfer partners. Against that backdrop, Group B welcomed WIPO's activities to improve the availability of information on international applications and patents. In its view, the proposed web-based search service, the development of a cross language tool and the establishment of Technology Information Centers could improve the dissemination of patent information. The Delegation considered that such projects were good examples that reaffirm WIPO's leading role in the IP world by strengthening its core competencies as an international service agency for intellectual property matters.

125. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, considered published patent applications to be an important source of valuable legal and technical information. Furthermore, in its view, patent information was essential for ensuring the quality of granted patents, for example, by searching the relevant state of the art prior to filing a patent application. The Delegation supported the view that the use of patent information by businesses was also essential for formulating their IP policies or making important business decisions. The Delegation noted that patent information within the patent procedure before and after granting, namely, the standardized format of international applications, public availability of the contents of a patent application, access to the information about the changes in ownership, name, address or registered licenses, was an important element of the global patent environment. Moreover, the Delegation considered that the public availability and accessibility of a final court decision was also important for understanding the current legal status of a relevant patent application or patent. The Delegation welcomed the WIPO's activities relating to the centralized provision of information on international applications and patents. The Delegation was of the view that the establishment of a web-based service which would allow search and access to scientific and technical journals, development of a cross-language tool to provide the translation as well as synonyms or the establishment of Technology Information Centers could improve the dissemination of patent information. The Delegation reiterated its support to a WIPO digital access service to facilitate the exchange of patent priority documents. In its view, the study indicated certain possible directions for further development, such as establishing a one-stop portal for access to search and examination reports, to handle the increasing number of patent applications in a timely manner and to improve the quality of granted patents, or a reflection

on the role of patent information for development in several recommendations of the WIPO Development Agenda. In conclusion, the Delegation expressed its support for any effort contributing to timely and as complete as possible dissemination of patent information. The Delegation observed that the EPO Register Plus on the epoline<sup>®</sup> web site is one of the several good models in disseminating patent information.

126. The Delegation of India observed that, especially from the small-scale industries' point of view, pieces of patent information scattered in different places were problematic. The Delegation, therefore, suggested that different patent Offices come together to create a win-win situation, which would help the small-scale industries especially in developing countries.

127. The Delegation of the United Kingdom associated itself with the statements made by the Delegation of Germany on behalf of Group B and the Delegation of the Czech Republic on behalf of the European Community and its 27 Member States. The Delegation highlighted the use of patent information as a tool for identifying inventions and technologies which might be of interest for licensing. In its view, such use should provide an avenue for facilitating technology transfer. The Delegation believed that that was particularly relevant in addressing current challenges such as the issue of climate change. With the aim to make it easier to identify relevant patent publications for those interested in that area. The United Kingdom had presented a classification proposal on environmentally sensitive technologies to the IPC meeting, on which a number of delegations expressed their willingness to give further consideration. Secondly, the Delegation strongly supported the suggestion to establish a portal for access to search and examination reports. That would greatly facilitate the efficient and timely processing of patent applications, as well as the improvement of quality. In particular, it would help make the global patent system more effective by avoiding duplication of efforts on equivalent applications and reducing backlogs.

128. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, stressed the importance of the preliminary study on dissemination of patent information, as the issues had a direct link to the Development Agenda. In that regard, the Asian Group urged WIPO to explore the possibility of enhancing and expanding PATENTSCOPE<sup>®</sup> to create a global database of complete patent information that was free, easily accessible and user-friendly for LDCs and developing countries.

129. The Delegation of Serbia, speaking on behalf of the Group of Central Europe and Baltic States, stated that the issue of the dissemination of patent information was of special importance for the countries in the region. In the countries where economies were founded on the development of SMEs, the availability of technical information was of exceptional importance. The Delegation considered that the improvement of the digitalization of patent information to complete the electronic databases of patent information and granted patents enabled the easy accessibility to patent information which was of great importance for the development and improvement of SMEs.

130. The Delegation of Morocco stated that patent information was a source of technical information that could be regularly and continuously consulted, and enabled the promotion of research and development (R&D) in business. It also assisted in knowing the international environment to follow-up of the trend and development of R&D. It was a precious source of information concerning the most recent technical progress. Easy access to such information could also contribute to stimulate national inventiveness, and that could be translated into an increase in investment and transfer of technology. The Delegation observed that, in that

connection, its country was about to enhance the level of patents issued with an amendment to the relevant law. More specifically, a search report with an opinion on patentability which would help to get a better patent was proposed. The Delegation supported the proposal to disseminate patent information, in particular the databases with regard to search and examination. In its view, the dissemination of information played an important role in the innovation process, because it made it possible to generate new ideas and inventions, to use patents and to analyze freedom to operate. It supported also the creation of a database of patents which had fallen into the public domain.

131. The Delegation of South Africa stated that the only viable option to digitalize the country's patent documents was to become part of PATENTSCOPE®, and thanked the valuable assistance of WIPO. The Delegation suggested that Annex II to document SCP/12/3 Rev.2 be made available on the CLEA website which could possibly give rise to a new Comparative Law Section service within CLEA.

132. The Delegation of Algeria believed that WIPO should enhance its role concerning the assistance to the offices of developing countries for digitalization and registration of the patented information. The Delegation was concerned about the operation of the database, in particular, information included in the database. As indicated in paragraph 77 of document SCP/13/5, PATENTSCOPE® enabled free access to information contained in over 1.5 million applications for patents. Even if there were simple and advanced search functions, in its view, it was still difficult, in particular, for individual researchers and some businesses to retrieve relevant information. At the same time, with respect to business databases, the Delegation observed a cost problem. Questions such as how far international cooperation could advance and what the role of WIPO was to enable the offices of developing countries, the SMEs and the researchers from developing countries to access such database, were food for thought. The Delegation suggested that the diversity of languages used be also discussed given a shortcoming with automatic software translation. With respect to the Technological Information Center, the Delegation welcomed the pilot project and requested more information on that subject, such as how far the Technological Information Center could assist in promoting the transfer of technology and innovation. In closing, the Delegation observed that 15 offices responsible for PCT international preliminary examination could form a network so as to enable access to patent information.

133. The Delegation of Pakistan noted that according to the preliminary study, patent information could be useful for formulating an industrial policy as well as other policy areas in several ways, such as monitoring national technology performances, as an input into R&D policy, for encouraging efficient dissemination of technology and facilitating public-private partnerships. The Delegation, however, was of the view that even if patent information was sufficiently accessible for firms in developing countries, that assumed that developing countries had the necessary technological capacity to use the patent information for formulating their industrial and technology policies. The Delegation observed that, with regard to the patent information dissemination policy, the study stated that the wider national and international dissemination of patent information could result in a loss of control over the information by the authority that had created it. Therefore, the study suggested in paragraph 71 that patent information dissemination policies should take into account the right of patent offices to maintain rights on the use and re-distribution of their data, in particular to the right to receive income from the commercial use of the information. The Delegation stated that there was a need to clarify whether in relation to the use of patent information for conducting R&D work in accordance with research exemptions available under Article 30 of the TRIPS Agreement, that suggestion in the preliminary study implied that patent offices

should restrain the use of information for R&D for commercial purposes. The Delegation observed that the preliminary study also stated that the invalidity of a patent should not be confused with the freedom to exploit the invention, since exploitation of the invention might not be possible without exploiting or infringing other valid patents. That meant that for downstream innovation that might involve the use of multiple upstream technologies, some of which might be protected by patents. Consequently, the user must have information on the multiple patents involved. In its view, that could create a never-ending maze of patent information through which the user might have to go. In the opinion of the Delegation, such possibilities arose particularly due to the existence of patent thickets and patent trolls, making it particularly difficult, time-consuming and expensive for innovators in developing countries, in particular SMEs.

134. The Delegation of Canada fully associated itself with the statement made by the Delegation of Germany on behalf of Group B. The Delegation considered the timely dissemination of patent information that was comprehensive and readily accessible to be an important tool, supporting the promotion of social and technical advancement. As stated in the preliminary study, the technical and legal information that could be derived from patent information served a variety of function to a variety of users. The Delegation recognized the relationship between certain recommendations under the WIPO Development Agenda and the widespread access to patent-related information that would strengthen national capacities for analysis of said information and ultimately improve the quality of granted patents. The Delegation believed that improved access to information that led to a better quality product was a benefit to developed and developing countries alike. Consequently, it considered that the preliminary study and any subsequent work flowing from the associated discussion could result in a positive contribution for all Member States. In that light, the Delegation supported the current work undertaken by WIPO concerning the establishment of a web-based service which would allow search and access to scientific and technical journals with complete access being permitted to users from eligible developing and least-developed countries. It also supported the pilot project to establish Technology Information Centers to provide a diverse range of innovative support services, including increased accessibility of patent information. Additionally, the Delegation noted that the Canadian Intellectual Property Office had traditionally supported the greater dissemination of patent information by providing its expertise to WIPO in carrying out its patent information services program and the international cooperation for search and examination of inventions program. Furthermore, it stated that Canada was an active contributor to the enhancement of the international patent classification system in English and French languages which facilitated the efficient retrieval of patent information for both the examining offices and the general public. The Delegation believed that the dissemination of patent information, and particularly the establishment of a one-stop portal for national and regional search and examination reports, was an initiative that could provide the SCP with positive, tangible and practical results within a relatively short period of time. WIPO was set to launch on April 1, 2009, a digital access to a list of priority documents, which was essentially a database of patent documents to which applicants could request offices to upload priority documents and then permitted offices of subsequent filings to retrieve those documents with the applicant's authorization. WIPO's experience in the development of the digital access service and the utilization of the existing PATENTSCOPE® infrastructure could help to limit development cost associated with the establishment of a database of search and examination reports. The Delegation considered the issue of increased access and availability of patent information to be fundamental for the efficient functioning of the patent system. In its view, the timely and comprehensive dissemination of search and examination reports in foreign jurisdictions provided patent examination staff with an

effective work-sharing tool to reduce unnecessary duplication of work and led to the timely granting of quality patent right, a result that had benefits for all involved.

135. The Delegation of Indonesia stated that the preliminary study addressed part of the essence of patent systems, i.e., the dissemination of information and, at the same time, revealed a gap in information dissemination which contradicted the essence of patent systems. The Delegation appreciated the activities and projects carried out by WIPO in the area of patent information, particularly of the so-called PATENTSCOPE®. To that end, Indonesia associated itself with the statement of the Asian Group made by the Delegation of Sri Lanka. In paragraph 26 of document SCP/13/5, it was mentioned that patent information could only be one factor in contributing to innovation with other pre-requisite factors, such as sufficiently effective technological base with an adequate transfer of skills and sharing of know-how playing an important role in the innovation process. The Delegation requested further studies elaborating that subject. The Delegation observed that, another area that needed further clarification concerned the public domain and data exclusivity, particularly in pharmaceutical industries, since its IP Office, and possibly other IP offices, sometimes faced such issue.

136. The Delegation of Germany associated itself with the statement made by the Delegation of the Czech Republic on behalf of the European Community and its 27 Member States and the statement it had made on behalf of Group B. Supporting statement made by the Delegations of Canada and the United Kingdom, the Delegation supported a WIPO activity in establishing a one-stop portal for access to search and examination reports. Establishing a common database containing all office actions and search reports of national and regional patent offices would have the advantage of decreasing the applicants' burden and of allowing the utilization of previous work conducted by other offices without being compelled to do so.

137. The Delegation of France associated itself with the statements made by the Delegations of Germany on behalf of Group B and in its national capacity and the Czech Republic on behalf of the European Union and its 27 Member States. It observed that the dissemination of patent information was important in innovation and creating business strategies and industrial policies. The Delegation therefore expressed its willingness to facilitate dissemination of patent information by the French Industrial Property Office. The Delegation supported the incorporation of the national phase data concerning PCT international applications, particularly their search and examination reports, in the PATENTSCOPE®. It noted that digitalization of patent information allowed for priority documents to be easily exchanged between WIPO and national offices, and could be useful in consulting and exchanging search and examination reports at the international level.

138. The Delegation of Ecuador stated that the Secretariat's preliminary study would allow analyzing and reflecting on patent databases which it considered to be of great interest for its country. The Delegation noted that patent databases were used as part of technology dissemination even though in a somewhat limited way given the economic conditions of its country. While the PATENTSCOPE® initiative was important, the Delegation observed that other databases should also be taken into account, for example the Iberoamerican database by the Spanish Patent Office that included Latin American patents. The Delegation further noted that patent examination could be extended to search traditional knowledge databases that the countries had been or were enriching. The Delegation observed that there should be more information about the technology under patents, for example, a sort of Wikipedia could enable higher quality of examination when patent applications were considered. The Delegation observed that the quality of patents were equally important in developing countries where patents needed to have even more validity.

139. 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. It observed that the information contained in the document was useful and needed to be supplemented by more comments by Member States, elaborated and updated with regard to the efficient use of dissemination of information in the patent system. The Delegation considered that the technical information and different projects underway by WIPO described in the document were in line with the direction of providing technical infrastructure for dissemination of information in the patent system. In its view, achievement of the aim of dissemination of patent information, i.e., the improved innovation and the improvement of public welfare, by different Member States could depend upon the industrial basis and level of development of each country and its ability to absorb the information. The Delegation noted that the effective use of patent information could be achieved through the disclosure of patents, and that could be used by technical possibilities and abilities of the offices or relevant bodies of the government to arrange the information for economic use and for the ultimate aim of transfer of technology. Taking into account the very low share of developing countries in global patent registration, the Delegation found that it was notable that the rate of registration of international applications, in particular, in the field of new and emerging technologies that contained a shareable amount of information, was increasing. In that regard, referring to paragraph 31 of the document that described the importance of the use of such information in business, the Delegation considered it necessary to add more analytical information on the use of such information for developing countries. Regarding the patent information dissemination policy by patent offices for commercial use of information, the Delegation noted that, in many occasions, a majority of natural persons or SMEs were not in a position to pay for the information. Thus charging for the information by the office might discourage the innovation in such circumstances in developing countries. Concerning the work undertaken by WIPO with regard to the Development Agenda, as well as the measures currently underway on the technical infrastructure, the Delegation welcomed those efforts and supported the engagement in and inclusion of developing countries, in particular, in the countries that acceded to the PCT. The Delegation further noted that the expenses of information in non-patent databases for developing countries were also one of the issues that needed to be taken into account. The Delegation noted that transfer of know-how or disclosure of full information by the patent holder might burden developing countries which might be required to pay high royalties that resulted in discouraging the innovation. The Delegation stated that WIPO could play an efficient role in organizing and providing the possibility of free access to databases and advise and assist developing countries in that field. The Delegation was of the view that the preliminary study should remain open for further inputs from Member States, IGOs and NGOs and other relevant circles to elaborate on the best mode to use patent information.

140. The Delegation of El Salvador considered that patent information should offer benefits not just to innovators and not just for motives of protection, but also to the society to promote development and innovation. In its country's particular case, through national initiatives, it had worked on dissemination of patent information for some time, particularly in cooperation with WIPO. It had participated in the university initiative which had great results, the SMEs initiative, and carried out, in its national office, a series of initiatives dealing with inventors, universities and SMEs. The Delegation appreciated the creation of the Technological Center, and expressed its wish to learning more about, and to participate in, that project. The Delegation was convinced that the Technology Center would go hand-in-hand with the above national activities. The Delegation affirmed that the university project, the dissemination of patent information and others had had wonderful results within the framework of cooperation

with the European Patent Office, the Spanish Patent Office, the American Institute of Intellectual Property and WIPO.

141. The Delegation of the Russian Federation stated that document SCP/13/5 would be even more informative had it included issues concerning the specificities of patent applications at the national/regional level. It therefore suggested that, to achieve that end, the Secretariat develop a questionnaire to supplement the preliminary study. The questionnaire could include the following issues: what kind of information in applications was accessible to third parties and under which conditions, prior to the publication of applications, after the publication until the issue of patents, and after the issue of patents; can third parties access to correspondences submitted by applicants and what are the conditions for providing such information; what kinds of forms are being used by patent offices in their correspondence with applicants; how do patent offices handle personal data of the applicants when making the information accessible to third parties. The Delegation observed that such information would be useful for patent offices to ensure transparency for third parties, attorneys and other interested parties. The Delegation further noted its support to the creation of a portal for search and examination reports.

142. The Delegation of Japan associated itself with the statement made by the Delegation of Germany on behalf of Group B as well as those made by the Delegations of Canada, France, Germany in its national capacity, and the United Kingdom. The Delegation stated that the element of dissemination of patent information, which served various stakeholders including the patent offices and user groups, such as applicants or rightholders as well as the general public, was crucial for the global IP infrastructure. The Delegation welcomed WIPO's effort to offer PATENTSCOPE® search service on its website. It noted that the database did not only provide the contents of various international patent applications under the PCT, but also search reports prepared during the international phase. As was stated in the document, it was considered within WIPO that the PATENTSCOPE® be enriched by incorporating national phase entry data, especially search and examination reports drawn up during the national phase with regard to each PCT international application. The Delegation was of the view that, given the economic downturn on the one hand and enormous amount of duplicated patent applications around the world on the other, timeliness and high quality in patent prosecution had become an important issue more than ever. Therefore, the Delegation welcomed WIPO's endeavor to further improve its PATENTSCOPE® database by adding relevant information during the national phase such as search and examination reports at each designated national office. In its view, such an endeavor would surely assist the practical cooperation mechanism through work-sharing among IP offices. The Delegation noted that, in its country, the National Center for Industrial Property Information and Training (INPIT), had been offering intellectual property information, including the prosecution history, through the website called "industrial property digital library" or IPDL since March 1999. That website was open to the public free of charge. The Delegation noted that the Japan Patent Office also provided other patent offices with information concerning its search and examination results which were machine-translated into English through its advanced industrial property network (AIPN) since October 2004. The information was at present used in 32 IP offices around the world. It hoped that its initiative, coupled with the efforts by other IP offices and WIPO would appropriately address the issue of improving the timeliness and quality in patent examination thereby contributing to the reduction of the backlog at many patent offices. Although document SCP/13/5 contained a lot of fundamental useful information, the Delegation observed that the environment surrounding the dissemination of patent information was changing rapidly. It therefore requested the Secretariat to keep the document updated and open for further comments and suggestions. The Delegation suggested that the Secretariat



prepare, as an Annex to the document, for example, a catalogue or a table of various available databases or websites classified in categories, such as work-sharing etc. Referring to the intervention made by the Delegation of Bulgaria, the Delegation confirmed its suggestion made at the last General Assembly concerning a web-based one-stop service to share best practices regarding the successful linkage of business activities and IP with particular emphasis on those cases associated with developing countries, but failed to see how such suggestion would best fit into the working document at hand. While the current economic situation might affect the activity of the Secretariat, the Delegation assumed that the Secretariat would provide Member States with relevant information as appropriate in due course.

143. The Director General of WIPO thanked all delegations who had intervened and appreciated the convergence of interest that existed in that area, without prejudice to those delegations which had not yet spoken. He noted that the Organization had been carrying out a rich array of projects that related to patent information. For example, WIPO had digitalization and distribution projects with a number of countries, notably South Africa, Mexico with LATIPAT (the system for patent information for Latin American countries) Israel, the Philippines, the Republic of Korea, Singapore and Viet Nam, among others. With respect to those countries he had mentioned, the collections would become visible on the PATENTSCOPE® service in the middle of 2009, which would become a rich and important dimension to be added to PATENTSCOPE®. The Director General observed that WIPO had a number of projects in the context of the Development Agenda that related to patent information, or scientific information, for example, activities that had been proposed or projects with respect to patent landscaping, digitalization, databases on the public domain both in technology area and in the creative works area, and other projects for more specialized databases, particular scientific information. Another set of projects were the Technology Information Centers, the central idea of which was that they should seek to overcome the difficulties of access and utilization. The Director General noted that such difficulties could be overcome through the training of personnel and the setting up of a Center, which could be realized with a relatively small infrastructure and expenditure. He emphasized that all of those projects were compatible even though they were done across a range of fora within WIPO. In that respect, he welcomed the suggestion made by the Delegation of Sri Lanka on behalf of the Asian Group that WIPO should be aiming towards the establishment of a complete global database that would provide free public access. The Director General confirmed that WIPO was heading to that ultimate direction. Looking at the various projects that were underway within the Organization, he explained that the fundamental infrastructure would be provided, and the different databases mentioned earlier were accessed to the same database in different ways and for different purposes. Since data were not collected multiple times, there was no duplication. The Director General noted that one of the questions that should be reflected upon was the roles of various Committees with respect to many projects underway, for example, the CDIP, the SCP and the Program and Budget Committee in setting the Organization's overall direction, while all would ultimately fit under the strategic objective of global infrastructure. And one of the things to think about was the specificity of addition of the Committee in that context. As the role specific to the SCP, he suggested, in a non-exhaustive manner, a project concerning a database or portal of search and examination reports, the role of general oversight of the patent information activities, such as a questionnaire regarding various office practices suggested by the Delegation of the Russian Federation. On the point raised by the Delegation of South Africa concerning CLEA service, the Director General explained that a project was underway within WIPO to improve that particular service. Regarding the best practices example given by the Delegation of Japan, he

expressed his willingness to work together with the Delegation, and agreed that it was possibly a general question of communicating the utilization of intellectual property.

144. The Delegation of the Republic of Korea noted the importance of issues being discussed at the SCP. Among those issues, the Delegation believed that the dissemination of patent information had a particular meaning. This was because the patent system was designed to promote innovation and economic development, and especially at the time of economic downturn and the impact of climate change were becoming greater, the importance and the role of innovation for the economic development was increasing. The Delegation believed that the technology database could be a tangible basis of innovation in the sense that innovation mostly occurred upon the cumulated knowledge and that patent information was one of the systematically cumulated technological knowledge. In its view, the efforts to build a technology database in a global scale as well as in a national scale in developed countries were already on the right track. The Delegation noted that WIPO was on its way to collect patent information and to provide them in a global scale. It further observed that the IP Offices and private companies of developed countries had also achieved many improvements in this direction. As an example, the Delegation referred to the Korean Intellectual Property Office which had developed a machine-translation system to provide Korean patent information in English, enabling other patent offices to access the Korean patent information through that service. However, the Delegation was concerned by the fact that in developing countries and in the infant economies, there was significant lack of compiled data, and in many cases, the patent information stemming from the developed world did not meet the needs for the sustainable development of developing countries and the LDCs. The Delegation further stated that the level of patented technologies from the developed world did not respond to the needs of developing countries to build a systematically accumulated technological knowledge base for development. Therefore, the Delegation invited Member States of the SCP to expand the discussions to the area of intermediate technologies and to the technologies for development and for the basic needs of developing world such as, food security, water purification and energy matters in the further discussions. While noting that there was no doubt that the dissemination of patent information was a useful instrument for the innovation in a global and national level, the Delegation observed that that was not enough. The Delegation was of the view that coupling the patent information with the information of intermediate technologies would create the union of innovation and sustainable development and that union would accelerate the innovative activities in the local and village levels. The Delegation expressed its strong support of WIPO's initiative to establish technology information centers which was described in paragraph 94 of the study. As described in that paragraph, the Delegation continued, the strengthening the local technology base by building of local know-how and assisting the local users to create, protect, own and manage their intellectual property rights, as well as the inclusion of intermediate technology in the future work of the SCP would bring a concrete and tangible output in building a sustainable innovation base for the sustainable development.

145. The Delegation of Australia associated itself with the statement made by the Delegation of Germany speaking on behalf of Group B. In particular, the Delegation of Australia supported activities in technical assistance programs to assist in dissemination of patent information by electronic means. The Delegation noted that having electronically searchable databases assisted in increasing the use, value and availability of patent information for the benefit of nationals of each Member State. The Delegation encouraged efforts in finding solutions to access to databases for developing countries of patent and non-patent literature, as well as providing search services, developing capacity of offices to conduct searches, and the establishment of technology information centers. The Delegation supported the expansion of

the WIPO PATENTSCOPE® database to include fully searchable national patent collections and for WIPO to be a central repository for PCT national phase entry information, in particular national phase search and examination results, allowing all Offices access to that facility and the benefits provided. The Delegation supported the statements made by other delegations, in particular, by the Delegation of Bulgaria on the promotion of the use of patent information which warranted further investigation.

146. The Delegation of Mexico pointed out that the idea of a website to look for search and examination reports was very important. It informed that Mexico also had a project called LATIPAT which was supported by the Spanish Patent and Trademark Office, the European Patent Office and WIPO to create a service to access to search and examination reports. The project enabled the exchange of search and examination reports with the rest of the countries in Latin America. The Delegation stated that that type of projects on a wider scale would be very useful. The Delegation further observed that according to the experience of the Mexican Patent Office, people did not seek answers to the basic questions, but they posed specific questions, for example, on the feasibility of the use of the certain technology or how to avoid infringing somebody's rights. That was reported to be the direct results of the information services provided by the Patent Office.

147. The Delegation of Guatemala appreciated that the preliminary study on patent information, which was free and available for the use of patent Offices in various countries. The Delegation noted that, in Guatemala, PATENTSCOPE® was used extensively for search and examination purposes as well as for purposes of providing information to lawyers and examiners. Moreover, the WPIS system of WIPO was used in addition to what was mentioned in paragraph 11 of the preliminary study. The Delegation stated that in order to contribute to patent information availability through LATIPAT, the information was being digitalized; however, it was only available in Spanish. The Delegation further informed the SCP that, in April, they started a project of cooperation with universities, aimed at enabling them to use patent information, including basic information about patents, the international classification for patents and information on public databases such as PATENTSCOPE® and esp@cenet®. In conclusion, the Delegation stated that it was trying to promote innovation and development in order to increase national patent registration by its nationals, which at that time were less than 10%.

148. The Delegation of Chile noted the availability and usefulness of the patent information. In the view of the Delegation, the analysis of the subject required a serious consideration, in particular, supporting the dissemination of patent information in order to promote innovative capacity of various countries. The Delegation further observed that the issue was very important for developing countries and was considered under the WIPO Development Agenda. In its view, the capacity building was a great challenge for the establishment of technological infrastructures allowing more patent information dissemination. The Delegation considered that the coordination between the Secretariat and the national offices should be improved to support the work undertaken by the Offices for the better implementation of the system. Furthermore, it noted that the information systems should be inter-operable and search and examination for patents should be based on user-based technology. The Delegation stated that the benefits of a website with information about patents were obvious, particularly, for small and medium-sized enterprises. The Delegation, however, observed that the fact that patent information facilitated the analysis of examiners should not shadow the fact that examination has to take place in compliance with national laws. The Delegation suggested that, in addition to the six recommendations of the Development Agenda referred to in paragraph 40, recommendation No. 20 regarding public

domain be also included. The Delegation stated that the issue of patent information could be studied in more detail so that accessibility and transparency of the patent information would be improved. It further noted that there was no legal status information such as which national patent applications had been successfully registered and in which stage those patent applications were. According to the Delegation, that type of information would be important for those who wished to use inventions which had not be under patent protection.

149. The Delegation of Brazil stated that it favored discussions on dissemination of patent information, which was a subject in line with the WIPO Development Agenda recommendation Nos. 8 and 9. The Delegation observed that the message of the Development Agenda was that dissemination of patent information must be addressed through the development perspective, i.e., dissemination of patent information must be pursued in a way supportive of development and transfer of technology. In that regard, the Delegation highlighted two aspects related to patent information to which it attached the utmost importance. First one, with regard to sufficiency of disclosure, the Delegation recalled that the patent system was designed to promote social welfare and technological advancement by encouraging innovation and the disclosure of information to the public. The patent system laid on a trade-off: the inventor was granted a market monopoly to exclusively exploit the invention; he had however to reveal the contents of the invention in a manner sufficient to allow a person skilled in the art to replicate it. The Delegation observed that, nevertheless, there were many situations in which inventors tended to disclose the invention in an insufficient way so that a person skilled in the art was unable to replicate the invention. In its view, many patent offices accepted insufficient patent claims, which led to the grant of monopoly rights to inventors without effective and diligent disclosure of the details of patented technology. The Delegation stated that the discussion about dissemination of patent information must be carried out in conjunction with the discussion about sufficiency of disclosure. It believed that any decision by the SCP to enhance the dissemination of patent information must be preceded by an in-depth analysis of the problem of sufficiency of disclosure. Second, with respect to accessibility, the Delegation considered that there were many projects that the WIPO Secretariat should carry out in order to promote access by developing countries to patent databases: digitalization, compilation of national legislations, extending PATENTSCOPE® services, patent landscaping, increase in access to public domains technology and many others as mentioned earlier by the Director General. When carrying out any of those projects, the Delegation believed that WIPO must take into account the problem of accessibility which had three main aspects. They are: access must be free of charge; IT tools must be user friendly; and the available information must be complete.

150. The Delegation of Colombia stated that it was difficult to find reliable information about the geographic scope and the legal situation of patents in the different parts of the world. Further, the Delegation raised its concerns about the diversity of languages in the prior art which resulted in a big volume of technical information available only in some of the languages of other continents. The Delegation observed that such a situation made access to the information more difficult for the private sector and made the search of prior art more complex. Regarding the functions of the public and the private sector, the Delegation noted that it was mentioned in the document that the private sector should encourage the dissemination and use of patent information, while the patent offices should have the prerogative to maintain rights about the use and the re-distribution of those data. Referring to the efficient use of patent information, the Delegation observed that patent information was not used in the way it should be used in developing countries. The Delegation noted that document SCP/13/5 took the characteristics of such issue into account, and the possible weakness of the system given the different types of users and their different spheres.

Furthermore, the Delegation expressed its satisfaction with the reference to recommendation No. 8 of the WIPO Development Agenda in paragraph 83 of the document.

151. The Delegation of the United States of America supported the statement made by the Delegation of Germany on behalf of Group B as well as the statements made by the Delegations of Canada, France, Germany in its national capacity, and the United Kingdom. The Delegation believed that, in addition to stimulate innovation, investment and technology transfer, one of the most important benefits of the patent system was the dissemination of technological information for the benefit of all countries regardless of the level of development. In its view, the patent system delivered to society a wealth of knowledge in every patent upon publication, which promoted the development and improvement of technology and discouraged the duplication of unnecessary research. It observed that WIPO already played a critical role in patent information dissemination through its PATENTSCOPE® search service for PCT applications. However, for applications that were filed via the Paris Convention route rather than the PCT, there appeared to be a room for improvement in the dissemination of information. Welcoming the WIPO digital access service which would help IP offices and applicants obtain patent information for PCT and Paris route filings, the Delegation stated that further study on, and development of, a similar mechanism for the access and exchange of search and examination reports were warranted. Referring to the efforts by the trilateral and IP5 in undertaking work on a project entitled “Common Access to Search and Examination Results”, the Delegation believed that the project held great promise in helping patent applicants, small and large IP offices and the general public by streamlining patent examination and grant, and facilitating work sharing among IP offices and looked forward to continued study and work on those issues with other IP office partners and within WIPO.

152. The Delegation of Paraguay stated that it fully recognized that published patents were an important source of valuable technical information which did contain legal information as well. The Delegation explained that, while many efforts had been made in its country to disseminate patent information, it was still widely unknown and was not used as much as it should. The Delegation associated itself with the Delegation of Algeria, appreciated WIPO’s support in digitalization of documents, and supported fully the creation of a free and easily accessible global database.

153. The Delegation of Sri Lanka, speaking in its national capacity, requested WIPO to develop a study containing information about royalty data of patent holders. Complete data on royalty extended to companies and business ventures would particularly enhance information and capacities of the governments on business transactions. It would also assist small-scaled business in developing countries to use as a tool in the decision making process. It observed that WIPO, working closely with the industry, was the best place to carry out such service as the dissemination of information.

154. The Delegation of Cuba stated that dissemination of patent information was particularly relevant for developing countries and for LDCs. The Delegation supported the continuation of the work to facilitate access to such information, which could be the creation of a database, accessible free of charge. It shared the concerns about the obstacles in connection with the cost and infrastructure, which often made access to patent information difficult or sometimes prevented it. It believed that WIPO could play an important role in the search for a solution. The Delegation noted that the first symposium for IP authorities to be held in September 2009 would deal with the development of the infrastructure of industrial property.

155. The Delegation of Denmark associated itself with the statements made by the Delegations of Germany on behalf of Group B and the Czech Republic on behalf of the European Community and its 27 Member States. The Delegation stated that it recognized the importance of access to patent information for both private companies and patent offices. It therefore supported the various initiatives that WIPO had already taken to improve access to patent information. It also supported the new initiatives proposed in document SCP/13/5, for example, to create an extended portal with patent information, and the development of a cross-language tool. The Delegation believed that such tools could benefit both large and small patent offices and that they could contribute to promote work sharing, which was important in order to deal with the work load and challenges faced by patent offices around the world.

156. The Delegation of Pakistan raised a concern regarding the utility of information disclosed in patent applications. The Delegation was of the view that for developing countries which were at a different stage of development from the developed countries, such information might not be enough for an effective replication of inventions or the effective utilization of the information disclosed in the patent applications. The Delegation therefore suggested that the Secretariat look into that aspect in its further studies.

157. The Delegation of Uruguay stated that in view of the complexity and the importance of the problems that had impacted on the patent system, it was necessary to continue and widen the work. The Delegation also observed that the extent of openness that had been shown by offering access to different visions enriched the task and reinforced the position of WIPO in advancing the patent system. The Delegation recognized the importance of the dissemination of patent information, specifically for developing countries, and stressed that access to such information was a problem in developing countries. In its view, not only the access to patent documents but also to the added value of extra information, which often was in private databases, was problematic due to their exorbitant cost for developing countries. The Delegation observed that WIPO's projects in creating databases contributed to an effort to closing the gap and to make access to information more democratic, which had a fundamental value *per se*. Noting the importance of non-patent information to understand the prior art in certain areas, the Delegation informed the Committee an initiative of the recently created Agency of Investigation and Innovation of Uruguay, which had been spending two million dollars per year to create a website which contained a series of databases freely available to national researchers, offices, development sectors and research sectors. The Delegation observed that such a national example could be borne in mind, along with other initiatives, in designing a WIPO project of the same kind. Regarding the databases and websites which would be of common access, the Delegation considered that not only the creation of databases but also easy access interfaces were extremely important, especially for developing countries. If information was available on the web, it had to be accessible to obtain the relevant information. Referring to the initiative to create a website with different databases for search and examination reports, the Delegation stated that such fundamental technology evaluation information would be extremely valuable for those who sought information about the value of the technologies contained in the different patent documents. The Delegation further stressed the importance of ensuring access to such information by many offices with a view to finding a solution to the backlog problems and to avoid overlap of efforts and a long pendency period to grant a patent.

158. The Delegation of the Dominican Republic appreciated WIPO's cooperation regarding the dissemination of patent information and the capacity building in the area of patents. It recommended the strengthening of logistics of those programs in order to step up as quick as

possible the cooperation projects on digitalizing patents and published applications, the installation of Technological Information Centers in IP offices in developing countries and LDCs as well as the training of the personnel who would administrate those Centers. The Delegation supported the creation of an easy, accessible, complete and free web portal which would contain all of the information about patents and results of patentability examinations done by different IP offices. Further, the Delegation stated that a non-patent database was useful information for industrial property offices as well as for inventors and SMEs.

159. The Representative of the EPO noted that document SCP/13/5 cast sample light on the various aspects of dissemination of patent information, the value of patent information as such and its significance for many stakeholders within a knowledge based society, including the general public and the offices. The Representative associated itself with the statements made by the Delegations of the Czech Republic on behalf of the European Community and its 27 Member States, Germany on behalf of Group B and in its national capacity, the United Kingdom and the United States of America. The Representative welcomed the initiative to address issues relating to dissemination of patent information with a view to promoting a common understanding regarding its potential uses, for example, in the context of research and development, market analysis, patenting strategies and technology transactions. The statistical analysis of patent data could allow conclusions to be drawn about the economic significance of patent application and patents. The Representative stressed the importance of the potential use of patent information in the context of enhanced cooperation among offices by means of utilizing each others' work results. Particularly, the Representative encouraged the Committee to constructively explore avenues towards the alignment and the simplification of the existing technical environments and tools in order to facilitate a wide dissemination of patent information. With reference to the preliminary study, the Representative welcomed the consideration of measures towards enhancing the accessibility of available work results and, in addition thereto, the building of confidence in the use of each others work. The Representative explained that the EPO, as a major data producer itself, was continuously trying to improve and simplify access to raw data. Consequently, the EPO patent information policy had recently been modernized and patent information was now being made available either at a very marginal cost or even free of charge, for example, by web services such as esp@cenet® or the publication server.

160. The Representative of ARIPO stated that ARIPO had signed a series of agreements with other patent offices of the Member States of WIPO for the cooperation and support in the field of patent information. As a result, the Representative explained that ARIPO had already started setting up IP units in institutions and universities in its Member States. In order to facilitate access to patent information in those institutions, he hoped that WIPO and other offices would fully support the efforts by ARIPO and other developing countries in making patent information available. Further, ARIPO used search and examination reports, particularly those of the EPO, in its examination process. Therefore, the Representative considered that access to search and examination reports of other offices would be helpful to ARIPO and small patent offices, and hoped that the proposal would lead to tangible results.

161. The Representative of the GCC sought information about patent applications, at the regional and national levels, which had not been published 12 months after the filing of the applications or any information about offices which did not publish applications.

162. In response, the Secretariat noted that it could provide lists of offices which did not publish or lay open patent applications at 12 or 18 months. Regarding the second part of the

question on unpublished patent applications, the practices of different offices were documented in different resources made available by WIPO.

163. The Representative of KEI stated that he concurred with document SCP/13/5 on the point that the difficulties in accessing patent status information increased legal uncertainty and hindered an efficient decision making by companies and policy makers, since the validity of patents had consequences with regard to negotiations and decisions on the possibility of concluding voluntary licensing agreements, granting compulsory license or manufacturing or importing of patent products. For detailed written comments on that issue, he referred to pages 14 and 15 of Annex III of document SCP12/3 Rev.2. The Representative observed that the SCP could explore the creation of a multilateral mechanism administered by WIPO to share information on disputes over patent quality. That could include the creation of a database possibly associated with the PCT or through a separate instrument. The database could include information about administrative actions such as patent re-examinations as well as private litigation between parties including both cases decided by the courts and those privately settled. The Representative further suggested that the SCP consider minimum standards for transparency of such disputes and placing the burden of disclosing information on patent challenges on patent holders. The sanction for non-disclosure could be the non-enforcement of patent rights. The Representative explained that that was an approach used in the United States of America when patent holders failed to disclose the US government rights in the patent database upon government funded research.

164. The Representative of ALIFAR observed that, unfortunately not all patents were published in a sufficiently clear and comprehensive way, that not all offices were as vigorous as one should be, and that the patents were not necessarily a very reliable source of technological information. The technological value disseminated depended on the technological maturity of the various countries, and that in turn had certain consequences regarding the use of the available information. The Representative noted that evaluation of patent information did not always make sure that the technology was not the subject of an application for a patent under way. In her view, there was a legal uncertainty. As regards the question of the interpretation of the scope of claims, the Representative noted that a broad claim could raise doubts in the mind of third parties on the subject of protection, which was an added difficulty for the operation of the system. The Representative stated that that question had to be linked with the increasing number of patents applications regarding the same subject or in the same patent families. The Representative observed that, in the pharmaceutical sector in Latin America, it could not be said that the information conveyed in the patents was a tool enabling the national industry to get in touch with the patent holder to negotiate a license or an agreement on the transfer of technology.

165. The Representative of FICPI noted that the dissemination of patent information was very important, particularly in view of transfer of technology to the countries concerned, but also to IP national offices and, within the framework of the PCT, on establishment of common search files for international searching authorities. The Representative drew the Committee's attention to the important issue of quality of patents, which was important for patentees and third parties. In his view, prior art search by inventors before filing a new application was one of the measures for reducing the total number of backlog. The Representative supported the pilot project on establishment of Technology Information Centers furnishing patent information services, as well as a wide range of innovations and invention support services. With the view to avoiding duplication of work, he considered that data stored should cover all prosecution history of examination procedures before IP offices, which was useful for patent attorneys from their users' point of view. In addition, the



Representative noted that the international patent classification (IPC) was an important searching tool.

*Standards and Patents*

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

167. 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.

168. 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.

169. 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.

170. 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.

171. 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 States 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.

172. 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.

173. 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.

174. 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.

175. 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.

176. 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.

177. 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. In 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.

178. 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.

179. 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.

180. 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.

181. 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.

182. 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.

183. 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.

184. 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.



185. 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.

186. 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.

187. 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.

188. 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.

#### *The Client-Attorney Privilege*

189. The Secretariat introduced document SCP/13/4.

190. The Delegation of El Salvador referred to the Germanic Romanic law, which its country applied, and the Anglo-Saxon law under which the client-attorney privilege conflicts could usually occur. The Delegation observed that, in its country, lawyers had the obligation to observe professional secrecy and violation of such obligation was subject to the criminal code. The Delegation was of the view that the Romanic law tradition could have been more reflected in the document. The Delegation explained that its national office offered a free assistance services for users, to which, in its view, the professional secrecy was not necessarily applicable, and requested that such cases be reflected in the document. The Delegation further suggested that the inclusion of best practices of national offices in Latin America would enrich the document with added-value.

191. The Delegation of China shared the concerns of many international attorney associations on the issue of attorney privilege in the area of patents: given that different countries in the area of attorney privilege had different systems and practices, patent attorneys' work could meet with difficulties. The Delegation was of the view that it was necessary to discuss the issue in the SCP in order for patent attorneys to provide better services to their clients. The Delegation observed that, since the attorney privilege issue was a general legal issue not limited to the area of patents, it was difficult for a country to establish a provision of the client-attorney privilege in the patent area only. On the contrary, an overall

consideration was needed. The Delegation noted that, for example, in China, the civil procedure law and the criminal law stipulated that anyone in possession of knowledge related to a case had the obligation to provide witness. A few years ago, its country revised the law of attorneys to the effect that attorneys should keep the information obtained during the professional practice secret if his or her client did not wish to disclose the information. The exceptions provided were any criminal facts or information that concerned the national security, public security or any information that threatened people's life and the safety on property. The Delegation therefore concluded that China had a professional secrecy obligation provision, but not a special attorney privilege system. Given the above, the Delegation considered that a focus should be given to different national legal systems, and further investigation, analysis and studies should be made. The Delegation took a cautious view toward the minimum standards, and considered that forming bilateral or multilateral arrangements was more practical. The Delegation further noted that, in the area of patents, various professionals, such as patent attorneys, patent agents or patent advisors, were involved in the services. Consequently, the Delegation observed that the questions as to whether the client-attorney privilege should cover those different professionals needed to be also considered.

192. The Delegation of Germany, speaking on behalf of Group B, stated that the preliminary study was important to both civil and common law countries of which the Group consisted. The Delegation agreed that the lack of uniform legal framework caused clients to risk losing confidentiality in advice they had obtained from IP advisors. On the other hand, in its view, the study showed how closely the aspect of confidentiality was linked with the scope of a party's duty to disclose information in legal proceedings. Further, the Delegation was of the view that the recognition of the client-attorney privilege in a foreign legal system had to be taken into account to safeguard comprehensive international protection of confidentiality. In the opinion of the Delegation, although an IP law might not be the only context in which such problems could arise, a global nature of trade and IPR made it the focal point. Group B therefore considered that the issue remained high on the agenda of the Committee. The Delegation supported further investigation of the issue, and believed that harmonization in that context would help creating a level playing field in international legal IP advice for the benefit of all stakeholders.

193. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, stated that since the client-attorney relationship was not regulated in any international IP treaty, national laws and practices relating to the application of the privilege lacked uniformity. In the context of the European Union, the issue was left to its Member States to regulate it under the laws regulating this profession. Rule 153(1) of the Implementing Regulations under the revised EPC also provided for privileged communications between the professional representatives and their clients, effective from April 1, 2009. The European Community and its 27 Member States considered such privilege as a basis for the guarantee of free and confidential communications between clients and their representatives. The Delegation welcomed further investigation of all the options for addressing the issue, in particular, the feasibility of setting up minimum standards.

194. The Delegation of the Russian Federation stated that a Federal law of December 30, 2008, governing the activities of the patent attorneys, their registration, attestation and obligations and rights of those attorneys would enter into force on April 1, 2009. He explained that, according to that law, a patent attorney was authorized to implement his professional activity independently, but also based on the agreement between the patent attorney and its employer (legal entity). The employer of the patent attorney who had

concluded a commercial contract with a client, for instance, with an applicant or a patent holder, had to ensure the security of the documents received from a guarantor or contractor and to ensure that the information would not be disclosed. The Delegation further noted that the Federal law also established that an independent attorney had to ensure the security of the documents made and received in the course of performance of his professional activity. He was not authorized to disclose or to submit information without any agreement with the person whom he was representing. The violation of those provisions was serious. A party whose rights and the legal interest had been infringed was authorized to file a complaint with the Patent Agency of the Russian Federation, which could adopt one of the following decisions: warning the patent attorney, or the Agency could go to court to bring an action against the patent attorney with remedies such as stopping the activities of the attorney for a period of one year or an exclusion from the list of attorneys for a period of three years. If a patent attorney had caused damages to the person he was representing, the patent attorney was liable under the legislation of the Russian Federation. In other words, the employer of the patent attorney as well as the independent patent attorneys were under an obligation not to disclose or transfer to third parties the confidential information he had received in the course of his work in order to provide services based on commercial contract. The Delegation further explained that the Russian legislation provided a restricted privilege, since confidential information could be submitted to third parties by the decision of a court or if it was established by the Federal law. The Federal law on the trade secrets stated that the holder of information, which was a trade secret, had to submit that information when it was requested by the government authorities. In its turn, the government authorities who received the confidential information were obliged to submit that information upon Court's request, or request of the law enforcement bodies, according to the rules as provided by the legislation of the Russian Federation. In that case, it would be the government who guaranteed the confidentiality of such information. In conclusion, the Delegation stated that taking into account the differences existed in legislation of various countries on the subject, the Russian Federation supported further studies on exploring a minimum standard of privilege applicable to communications with patent attorneys.

195. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, stated that the members of its Group were of different levels of development and followed different judicial and legal practices regarding patent attorneys and patent attorney privileges. The Delegation stated that the following issues should be further analyzed in order to provide Member States sufficient information from different stakeholders' perspectives: (i) the impact of patent quality and costs; (ii) cost and benefit analysis for developing countries' judicial and administrative systems; (iii) impact on competition; and (iv) other impacts on development and public policy objectives.

196. The Delegation of the Republic of Serbia, speaking on behalf of the Regional Group of Central European and Baltic States, expressed its support to the establishment of a working group to study the client-attorney privilege or protection from foreseeable disclosure of IP professionals' advice.

197. The Delegation of Argentina considered that the prerogative of professional secrecy in client-lawyer relations was a question of private law, for which national jurisdictions were responsible. Accordingly, the Delegation confirmed that it would be advisable to maintain the provisions of Article 2.3 of the Paris Convention and Article 1.1 of the TRIPS Agreement.

198. The Delegation of Morocco stated that, in principle, the national and regional patent offices were bound by the professional secrecy as regard the procedures relating to the patent

system. It explained that, its Office was a public establishment whose staff had a status that was covered by professional secrecy. It prohibited the publication, disclosure or use of documents coming from the WIPO services. Consequently, everybody could be assured that the submitted information would not be disclosed.

199. The Delegation of the Republic of Korea observed that further discussions on the issue of the client-attorney privilege was beneficial for developing countries as well for developed countries, since in many developing countries, inventors were sometimes reluctant to file their patents in concerns of loosing the information and confidentiality in the process of filing patents. The Delegation considered that IP practitioners had to participate actively in discussing and developing any future harmonization on the issue of client-attorney privilege, since, in many countries, the client-attorney privilege was regulated by the association of those IP lawyers rather than the laws of the government. The Delegation further expressed its wish to share more information and experiences of various countries regarding the client-attorney privilege and to establish a working group that would including IP practitioners.

200. The Delegation of Brazil noted that there existed a variety of approaches regarding the concept of the privilege and the professional secrecy. The Delegation observed that the issue was new for the members of the Committee, was complex and involved a new area of concepts to be yet discussed and understood by the SCP. It believed that two important concepts were transparency in the relation of attorney and his client and accountability of IP advisors and other professionals of the area. In its view, the complexity of the subject derived mainly from differences between the civil law system and the common law system, and requested further reflection on the reality of civil law countries. The Delegation stated that, when considering the client-attorney privilege issue, the SCP should bare in mind the fact that the IP system lay on different legal tradition and, as stated in Article 1 of the TRIPS Agreement, Member States were free to implement IP provisions in a manner consistent with their own legal system and practice.

201. The Delegation of Australia associated itself with the positions stated by the Delegation of Germany on behalf of Group B. It appreciated the WIPO-AIPPI Conference on Client Privilege in Intellectual Property Advice, which was held in May 2008, and the availability of the materials relating to the Conference on the WIPO web site. The Delegation stated that while its government was considering legislative changes, international developments would be beneficial to address the issues and would benefit all WIPO Member States. The Delegation also expressed the need for wide analysis of national laws.

202. The Delegation of France associated itself with the statement made by the Delegation of the Czech Republic on behalf of the European Community and its 27 Member States, and explained that, as a civil law country, its procedure was based on the submission of proof and had no discovery procedure. Therefore, there was no client privilege regulations in France, but the professional secrecy existed in accordance with the Law of 1971. The Delegation, however, informed the Committee that its national legislation had a similar system concerning legal advisors as of 2004. The Delegation observed that an increased risk of disclosing information exchanged by IP professionals and their clients due to an order by a foreign court was considerable. Therefore, it suggested that different options described in the document be given in-depth consideration in order to determine the best solution for the complex problem.

203. The Delegation of Norway associated itself with the statement made by the Delegation of Germany on behalf of Group B. It stated that a consultation process was underway in its

country to introduce a client attorney privilege for the Norwegian and the European patent attorneys. The Delegation explained that, by following such strategy, it avoided a burdensome and costly national authorization scheme and took care of the necessary delimitation of the group of professionals who would be covered by the exemption. According to the proposal, provisions on confidentiality and legal proceedings for lawyers, priests, doctors and health care personnel in the Civil Procedure Act would be expanded to encompass the Norwegian and the European patent attorneys.

204. The Delegation of Ukraine supported the statement made by the Delegation of the Czech Republic on behalf of the European Community and its 27 Member States, and appreciated the information provided by the Delegation of the Russian Federation regarding the development of its national legislation. The Delegation stated that, in its country, the privilege applied only to attorneys who were also barristers at the same time. The Delegation requested that the issue remain on the agenda and supported the development of minimum standards.

205. The Delegation of Chile considered the very issue of the client-attorney privilege important, since it was meant to provide better professional advice in intellectual property. In its country, professional secrecy was recognized and had a great tradition in the law profession. The Delegation observed that, in Chile, many of the professionals who were involved in registration of and giving advice on intellectual property were lawyers, and as a result, the professional secrecy covered those intellectual property advice providers. The Delegation noted that since the issue was about the jurisdiction of the State, the authorities such as the Ministry of Justice should be listened to so as to maintain coherent systems. The Delegation considered that the issue involved international aspects even though each country had a different tradition, and therefore, required more analysis. It stressed the importance of holding wide discussions on the subject in the SCP, taking into account all the comments of the members.

206. The Delegation of the United States of America supported the statement made by the Delegation of Germany on behalf of Group B. The Delegation believed that further study of the issue was warranted, and that WIPO could play a useful role in enhancing understanding of the issue. At a minimum, the Delegation stated that WIPO could develop a comparative study, perhaps based on a survey methodology of what the actual situation was in various countries with regard to the client-attorney privilege. In its view, that would help WIPO Member States gaining greater understanding of the differences that existed and would serve a practical tool for practitioners even in the current environment.

207. 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 the function and authorization of attorneys had been regulated in different jurisdictions as a general principle that applied to various types of attorneys. Usually in civil law countries, the authorization given to the attorney by the client, the scope of authorization and the commitments of an attorney were specified in the power of attorney and, in case of breach of trust, specific punishments had been given. Or, through a contractual arrangement, any kind of contradiction of the commitments were protected under the civil and criminal laws. The Delegation sought clarification as to whether the privilege system had any particular differences with the above. In connection with paragraph 2 of the document, the Delegation was of the view that enforcement of IP rights and a relationship between a client and an attorney were two different concepts: the first referred to the enforcement of the IP rights against third parties and the latter referred to the commitments of a natural legal person to

each other on doing or prohibiting any action. The Delegation requested further clarification with respect to the meaning of the client-attorney privilege and the scope of disclosure of communication in that paragraph. The Delegation wondered if the disclosure meant the information contained in the application, such information had already been disclosed before the Office, and also could be submitted before the court. The Delegation observed that, for example, if the non-disclosure of the communication by the attorney contradicted with the public order, public health or security matters, as it was the case in compulsory licenses in a particular country, the attorney was under a pressure from the client because of the breach of the trust and from the government. It also raised questions as to the extent of the communication covered by the privilege and as to the degree of punishment against the whole or partial disclosure of communication. As regards paragraph 54 of the document, the Delegation wondered whether an IP advisor in a developing country or an LDC, who had limited IP activities, had consequently limited scope of privilege, and where the scope of the privilege was different in the country of an IP advisor and in the country of his client, which country's law should be applicable. In relation to the resolutions of non-governmental organizations in paragraphs 30 to 42, which referred to harmonization, the Delegation observed that a widespread similarity of national laws was usually the basis for harmonization of laws at the international level. The Delegation further noted that, as indicated in paragraph 18, qualifications of attorneys, sufficient knowledge of the language of the country concerned and continuing education were very important.

208. The Delegation of Egypt stated that there was some wisdom in granting Member States certain freedom under Article 2(3) of the Paris Convention so that each country, in accordance with its legal system and its economic and social conditions, might be able to determine the best possible way and the best possible framework for organizing the client-attorney relationship, taking into account the need for an appropriate balance between private rights and the public rights and freedom and the consideration concerning the public order. The Delegation considered that the preliminary study needed further clarification in order to show the different perspectives of relevant parties concerned, and should concentrate more on the aspect concerning the need to ensure justice and to fight against monopoly.

209. The Delegation of Pakistan sought clarification from the Secretariat on two points. First, as regards paragraph 15 concerning the expression "general opinion", the Delegation asked whose opinion that could be. Second, concerning paragraphs 63 and 64 on the issue of recognition of the professional qualifications of patent attorney services between countries, the Delegation observed that such issue came under Mode 4 of the WTO GATS Agreement, and asked which organization was the appropriate forum to raise the issue.

210. The Delegation of Denmark associated itself with the statements made by the Delegations of Germany on behalf of Group B and the Czech Republic on behalf of the European Community and its 27 Member States. The Delegation noted that, as its country was looking into the topic at the national level, it welcomed the investigation in the SCP as to how the challenges posed by the interaction of different legal systems could be solved. The Delegation wished to place the topic high on the agenda of the Committee, and supported further investigation of the options outlined in the preliminary study, including the establishment of minimum standards on the privilege applicable to communications with IP advisers.

211. The Delegation of Colombia observed that legislation was sometimes too general and could not clarify the ways things were being organized. The Delegation explained that, in its country, IP advisory services was provided by lawyers, who were covered by privilege



applicable to lawyers in accordance with the corresponding legislation. The Delegation wished to arrive at an IP system where everybody would be fully informed about the nature and validity of the rights. It explained that, in Andean countries, that would be possible provided that administrative *démarche* for getting the patent would not be challenged. On the other hand, patentability and examination of applications did not prevent the applicant to file the necessary documents.

212. The Delegation of Japan associated itself with the statement made by the Delegation of Germany on behalf of Group B. The Delegation believed that IP owners should be able to communicate frankly with IP advisers and that third parties needed to consult IP advisers freely on matters such as patent infringement. In its view, the client-attorney privilege had come into play to address those principles, and the lack of uniform rules and regulations among countries sometimes caused problems. The Delegation was of the opinion that Member States did not necessarily have comprehensive information on different practices at respective countries with regard to disclosure proceedings or the client-attorney privilege. It also pointed out that the scope of the IP advisers was not clear enough in the document, and therefore needed to be carefully defined. The Delegation therefore was of the view that a further study on the topic, for example by a questionnaire methodology, would be an appropriate direction.

213. The Delegation of Angola noted that the issue was new to the Committee and shared the concerns voiced by other delegations. As regards the scope of the privilege, the Delegation noted that its legal system recognized privilege for attorneys and lawyers in a purely civil procedure. Such privilege, however, was not applicable to the business circles. As regards the international recognition of the privilege, it should be initially dealt with on a bilateral and multilateral basis. With respect to a multilateral framework, the Delegation was of the view that a recognition of the qualifications of the attorneys fell within the framework of services, and it should be governed by the TRIPS Agreement. It believed that the recognition of privilege should be dealt with on a bilateral basis and Article 2(3) of the Paris Convention should apply.

214. The Delegation of Tunisia was of the view that the client-attorney privilege was not consistent with certain tradition of civil law. The Delegation sought clarification as regards the compliance of the client-attorney privilege with the principle of the disclosure in the field of patents, i.e., whether the client-attorney privilege would be enforced in some countries after filing an application for a patent.

215. The Delegation of Indonesia associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation considered that particularly the rules that governed confidentiality of information required careful attention. It explained that, there was no specific law in Indonesia that regulated the relationship of client and IP advisor. Taking into account the complexity and different approaches in dealing with the client-attorney privilege, the Delegation was of the view that further studies were needed on the points mentioned by the Delegation of Sri Lanka as to provide more clarity on the issue of the client-attorney privilege.

216. The Delegation of India associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation was of the view that the preliminary study appeared to draw extensively on works undertaken by international associations of patent attorneys and reflected their concerns. The Delegation therefore sought a more comprehensive study taking into account views of all stakeholders, especially from the

perspective of public interest. In its view, the study did not devote sufficient attention to the client-attorney privilege as an exception to the general rule of disclosure. Where an exception was made available, it was provided on the basis that the relationship involved was of sufficient social importance to justify the sacrifice of availability of evidence. Hence, the Delegation observed that the need for such exception, where allowed, had to be related to the socio-economic conditions of the country concerned. Since such condition varied from country to country, in its view, the nature and extent of protection against disclosure would also vary. The Delegation was of the opinion that it was in reflection of such reality that Article 2(3) of the Paris Convention expressly left to national law the establishment of provisions on judicial procedures, allowing for diversity in judicial procedures between States. The Delegation was therefore of the view that every country should be allowed to set its level of privilege and extent of disclosure at a level that suited its socio-economic circumstances, ability and capacity to regulate and its particular level of development. The Delegation further stated that harmonization of client-attorney privileges implied harmonization of the law of exceptions to disclosure requirement. In its opinion, since disclosure was a substantive element of the patent system, harmonization of client-attorney privilege could have substantive implications and involve elements of substantive harmonization, and such harmonization would also keep more information out of the public domain adversely affecting the quality of patents, access to information and innovation, especially for developing countries. The Delegation therefore requested the Secretariat to undertake a more detailed and comprehensive study on the subject focusing on the above aspects.

217. The Delegation of Singapore supported the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. Singapore's legislation generally provided that communication with respect to any matter relating to patents between a person and a registered patent agent was privileged from disclosure in legal proceedings in Singapore in the same way as communication between a person and his solicitor. The Delegation noted that the international dimension highlighted in the preliminary study provided valuable information for its consideration. The Delegation therefore supported further analysis of the existing privilege and secrecy provisions in the various jurisdictions in order to enable the Committee to enhance its understanding on the situations in other countries as well as concerns of the various stakeholders, including patent holders, possible users, members of the public and patent attorneys and patent agents.

218. The Delegation of Turkey believed that the Committee should continue its deliberations on the topic, and stated that civil society groups as well as relevant public authorities were very much interested in the issue in Turkey. In its view, even if the privilege could be considered as a subject within the national jurisdiction of each Member State, there was an important international dimension to the topic. In Turkey, attorneys were given privilege by the law, but patent agents, which did not have to be attorneys, were subject to general law and obligations, and that law in practice would give discretion to the courts. The Delegation considered that the deliberations in the Committee would also assist its authorities for their further consideration.

219. The Representative of the EPO stated that the revised EPC explicitly provided for confidentiality for communications between the professional representative and his client or any other person. The regulatory part of the EPC contained further new provisions which also governed the subject and gave examples of the types of information which were subject to professional secrecy, most notably communications or documents relating to the assessment of patentability, the preparation or prosecution of European patent applications or opinions

concerning the scope of protection. Further, the Representative supported the statements made by the Delegations of the Czech Republic on behalf of the European Community and its 27 Member States and Germany on behalf of Group B.

220. The Delegation of Chile clarified its previous statement by saying that, although it was important to further evaluate the issue, the Delegation did not consider it necessary to establish a working group.

221. The Representative of AIPPI noted that in 2003-2004, the courts in Canada and in Australia forced disclosure of non-lawyer patent advice, since neither Canada nor Australia recognized the non-lawyer patent attorneys in the United Kingdom for client privilege in their own countries. The Representative, however, observed that both Australia and the United Kingdom applied privilege to non-lawyer patent attorneys, but not between them: the United Kingdom did not recognize Australia's non-lawyer patent attorneys and *vice-versa*. The Representative noted that, at the AIPPI-WIPO Conference on privilege in May 2008, 20 experts had provided a very substantial comparative legal resource on privilege, and that the findings of the Conference included findings in relation to some of the matters on which the delegations had expressed their concerns. One of those issues was what was the theory that lay behind the privilege and what was the public interest in it. The Representative stated that the two major objectives of privilege and also the concept of professional secrecy were: first, the enforcement of the law by the giving of professional advice to the clients on the basis of full and frank disclosure; and second, the public interest in obtaining correct advice. In its view, they could not be achieved without full and frank disclosure. Therefore, the Representative observed that it was not surprising that the majority of countries provided such protection in a distinct public interest. He was, however, of the view that what was surprising was that such protection for full and frank disclosure was provided within their own borders, but not when the advice, which had been given within those borders, went beyond the borders. The Representative considered that, though not deliberate, it had a negative effect on what protection was intended for, that was, best advice and enforcement of the law. The Representative was supportive to the further study, and pointed out that it had no negative impact on anyone willing to make the study. The result could only be no change or a change which further supported the public interest in good governance. In his view, the result of such a change would be positive for obtaining advice of better quality as well. As contributions from the practitioners, the Representative stated that, first, the weight of the issue should not be judged only by the incident of litigation involved. He said that, in order to avoid communications on legal advice, the disclosure of which could be prejudicial, in practice, lawyers, patent attorneys and their clients had to apply strategies that involved additional costs. In his view, nobody could quantify the ways and costs which were involved in the practices, and they induced the opposite of what the national laws intended which was full and frank disclosure in order to obtain the public benefits. As to litigation, Canada has refused to recognize protection from disclosure and proceedings in Canada of a UK in-house patent attorney's advice and the same applies in Australia. He noted that those cases in aggregate involved both civil law and common law countries alike. Therefore, the Representative stated that it was not confined to common law countries, but had an effect in civil law countries as well. As a hypothetical example, the Representative noted that: a UK client consulted a UK patent agent about legal opinions received from the UK, Australia, Brazil, India, Canada and Nigeria, in which patents on the same subject were registered. He explained that all of the opinions would be subject to discovery in Australia and Canada, and if published in the proceedings, the opinions would not be secret any longer anywhere, including Brazil, India and Nigeria. In conclusion, the Representative suggested conducting a

more detailed study, which was well justified by and in support of the public interest in improving national governance.

222. The Representative of APAA was supportive for taking another step in-depth on the client privilege issue. While the home countries of the members of APAA included both developing and developed countries, common law countries, such as India, Malaysia, the Philippines and Australia, and civil law countries such as the Republic of Korea and Japan, the Representative was aware of the importance of the client privilege in the context of the global filing and jurisdictional litigation. In her view, where many prosecution and litigation arose in many jurisdictions, even if national law gave a sort of privilege to local IP advisers, it was not sufficient and might bring considerable chilling effect to hamper full and frank communication with clients. The Representative considered that, unless client privilege was admitted in every jurisdiction for both local IP advisers and foreign IP advisers, once a patent was litigated in one country with discovery proceedings, confidential information on infringement or validity between client and IP advisers in other countries was under the risk of forcible disclosure to an adverse party. The Representative explained that the courts of the United States of America had made inconsistent decisions on the issue of whether client privilege should be extended to communication between a foreign IP adviser and his clients, which had been made outside the United States of America, in relation to the foreign law. Thus, clients and IP advisers in the Asian region had confronted the problems of non-privilege due to the uncertainty of the United States case law. Speaking of a Korean example as one of civil law countries, the Representative said that confidential communication between Korean patent attorneys and lawyers and clients was found out of privilege, since the United States courts found no more than professional secrecy obligation in the Korea law. Concerning the Japanese experience as one of civil law countries, the Representative noted that the privilege of IP advices made by Japanese patent attorneys had been denied by US courts as seen in the case, *Honeywell v. Minolta* in 1986, where all communications made by Japanese patent attorneys had been forcibly disclosed. The Representative observed that, after the amendment to the Japanese Civil Code of Procedures in 1998, which gave rights to refuse to testify as an exception to document production order, the privilege of IP advice made by Japanese patent attorneys appeared to have become admissible before the United States courts as a matter of comity. In some cases, even under the amended Japanese law, he observed that no privilege was admissible before other courts, such as Australia and Canada in the light of *Eli Lilly v. Pfizer* case. The Representative was of the view that an international consensus to set minimum standards of the client privilege was necessary with a view to protect both local IP advisers and foreign IP advisers by way of mutual recognition in every jurisdiction without prejudice and without exception. She believed that it would be beneficial for applicants and patentees, third parties and the public. Referring to the APAA Resolution adopted in October 2008 in Singapore, the APAA urged that WIPO be a driving force to realize such international consensus on the client privilege. In her view, setting up a working group for further study on the client privilege issue could facilitate resolving step-by-step the current considerable differences in, for example, the scope of the privilege and the qualifications of IP advisers. The Representative believed that such universal client privilege would also raise the qualification of IP advisers for ensuring high-quality IP services.

223. The Representative of ASIPI noted that the client-attorney privilege had the nature of public order and that the issue was an actual issue, not a museum piece. The Representative supported the proposal made by AIPPI based on a study made by his organization, in which it had looked into, in particular, the protection of information in intellectual property advice by

non-lawyers and the protection of information coming from abroad. In his view, a further study regarding the existing situations in each jurisdiction was needed.

224. The Representative of ICC noted that his members, whether large or small businesses, operating locally or in export markets, required advice from professional advisors to understand how they could act within the limits of their own rights, and without infringing on the rights of others. For that reason, the Representative believed that the issue of client-attorney privilege was important, as it impacted on the quality of advice given to businesses in all countries by their local advisors or those in the markets where they had activities. Because of the increasingly international nature of commercial transactions involving IP rights, the Representative also believed that there was an important international dimension to the issue, which merited thorough consideration by WIPO. In his view, the issue was also important for the IP system in general, since privilege against disclosure of clients and advisor communications played a key role in the transparency of the IP system which was important for all stakeholders, and also helped to ensure respect for national laws. The Representative noted that the concept of confidentiality of professional advice was not a new concept in civil law countries nor in common law countries. In civil law countries, for example, it might already apply to different professions such as medical doctors, nurses, midwives, and attorneys-at-law. The Representative observed that IP professionals provided similar services to legal attorneys, but were not subject to the confidentiality obligation in several countries. It was the opinion of the Representative that assurance of confidentiality for communications between clients and their local professional advisors, including, for example, professionally qualified patent attorneys who might not be lawyers, encouraged full and frank exchange of information and advice between them. He believed that such full and frank exchanges promoted the rule of law by ensuring that clients had accurate and complete understanding of the IP rights that might apply to their activities. Therefore, the Representative was of the view that the client privilege promoted clear understanding of IP rights, and was at least as important to clients confronted by the IP rights of others as to IP right holders. Similarly, the Representative observed that full and frank exchange of information and advice between a client and a local IP professional helped better transparency of the scope and validity of IP rights by ensuring that the client understood what he could or could not do legally. He stated that the current differences in legal systems in regard to the protection of such exchanges of information and advice between clients and their local professional advisors meant that assurance of confidentiality was not available in many situations. This in turn meant that, in his view, local professional IP advisors were constrained to limit their advice by concerns that it might be disclosed publicly, for instance during litigation in their own country or elsewhere. The Representative noted that such situation could not be considered fully without also recognizing an increasing need for commerce in multiple jurisdictions across the world, with full understanding of all, possibly related, IP rights in all such jurisdictions. In his opinion, obstacles to such understanding were also obstacles to such commerce at a time when commerce was needed more than ever by all. In response to some Delegations which expressed concerns about the possibility of client-attorney privilege detracting from the role of the patent system in putting technical information in the public domain, the Representative clarified that the client-attorney privilege, or professional secrecy, applied only to advice given to a client by his or her professional advisor, and it did not cover publicly available information such as all the technical and other information relating to patents contained in patent applications. The client-attorney privilege, or professional secrecy, did not therefore in anyway detract from general patent disclosure requirements or the patent system's important role in putting technical information in the public domain. As an example of the client-attorney privilege, the Representative explained that, if an inventor or business sought advice on the validity of a

patent due to a risk of infringing that patent by putting his product on the market, such inventor or business should not be risked to be forced to hand over the advice he had obtained to the patent owner in later patent infringement proceedings. In conclusion, the Representative stated that the complexity of the issue called for further and deeper analysis to help clarify problems and identify opportunities and solutions, and urged the SCP to study the privilege issue further.

225. In response to the question raised by the Delegation of Pakistan, as regards paragraph 13, the Secretariat noted that it referred to the framework in which the question under consideration was brought up, namely, the WIPO-AIPPI Conference in which representatives from Member States, NGOs and other stakeholders had participated, and clarified that it was not meant to be generally reflecting the entire membership of the SCP. Concerning the question as to whether the issue should be dealt with in WIPO or WTO, the Secretariat stated that it was not an issue for the Secretariat to decide.

226. The Representative of FICPI stated that the increasing nature of global trade and IPRs made it very important to establish a level playing field so that individuals and companies, whether they were in developing countries or developed countries, were fully protected regardless of where the IP litigation occurred. In his view, clients who were in countries where there was no adequate recognition of privilege, or professional confidentiality, were at a serious and significant disadvantage. He continued that if the clients became involved in the litigation in foreign countries, which recognized and protected privileged information, and which allowed some discoveries, he would be protected from having to disclose any of its communications from its own IP advisers in that foreign country, whereas confidential communications between client and its IP advisers in its home country would have to be disclosed in the absence of recognition of the privilege. Therefore, in his view, it was important for all countries to adopt a minimum standard of privilege which would be recognized in all countries, regardless where the IP dispute or IP litigation occurred. He further continued that countries which did not adopt a minimum standard of privilege were subjecting their own citizens and companies to serious disadvantage when there was an IP dispute in other countries. Referring to the questions raised by some Delegations, the Representative clarified that the client-attorney privilege improved both patent quality and cost by ensuring more complete and frank disclosure, thereby providing more certainty and productivity. In addition, he stated that the client-attorney privilege protected the citizens and companies regardless of whether they were in developed or developing countries, and, the client-attorney privilege enhanced competition by securing better informed participation and increased certainty and productivity.

227. The Representative of GRUR stated that the protection of confidential information was guaranteed in Germany through various provisions contained, for instance, in the code on civil, criminal or administrative procedure, with an exception of the European patent attorneys or European trademark attorneys, which were not expressly mentioned in the various legal instruments. He stated, however, that the national perspective was not sufficient in view of the growing international impact of all professional advice, in particular, in the field of the protection of intellectual property. Referring to the international aspect of legal advice, the Representative noted that there seemed to be a concern not only for developed countries, but also for developing countries because all professional advisers having their residence in developing countries were constantly exposed to the uncertainties caused by the divergences in the protection of the professional secrecy. The Representative recalled that the protection of confidentiality was an element of due process of law guaranteed by the European Convention on Human Rights. Therefore, the Representative supported the initiative started

by FICPI, AIPPI, ICC and the other international NGOs to establish a reliable international legal framework for the protection of confidential information exchanged between a client and his professional IP adviser. The Representative noted that such international legal instrument would have to set out who was protected, what was protected, where and when the protection applied, how the protection operated and how it was going to be implemented. The Representative continued that the most reasonable approach was to set up a minimum standard of protection combined with the obligation to grant national treatment and most-favored-nation treatment. In his view, the protection should be accorded to the professional adviser, in addition to the client, because the obligation of the professional adviser to guarantee professional secrecy should also be respected. He stated that the secrecy could be lifted by the client. The Representative emphasized that the subject matter of protection was the confidential information as such, which was to be protected against all types of disclosure, be it through the production of the documents in discovery proceedings in the United States of America, or be it through the taking of depositions as witness where the professional adviser was exposed to questions about his advice he had given to the client and the confidential information he received. The Representative added that the protection should operate in all types of proceedings whether they were civil, criminal or administrative. The legal instrument should cover all types of proceedings be they for national or international courts, for instance the European Court of Justice, the Court of Appeal of the European Patent Office, a future European patents court on national or international administrative authorities, like the EPO and the European Commission before the Office in Alicante. The Representative stated that the European Commission should get involved in any negotiations about the initiative. It was convinced that the time was right to pursue the initiatives vigorously and urgently in WIPO.

228. The Representative of CIPA and EPI stated that the problems addressed in document SCP/13/4 were very well summarized in paragraph 261 of document SCP/12/3 Rev.2. According to his view, it was short, brief and understandable by all. The Representative stated that EPI and CIPA welcomed the fact that the SCP was looking very seriously to the problems caused by the non-uniform privilege provisions around the world. He noted that EPI and CIPA were willing to assist SCP and the Secretariat in any way possible in moving everyone to a solution to the benefit of all.

229. The Representative of IPIC stated that the issue of privilege for non-lawyer IP advisers had been a priority for IPIC for over 10 years. IPIC had commissioned numerous reports and legal opinions, as well as consulted all possible stakeholders on how it could be implemented in Canada for all IP advisers. The Representative stated that in Canada, there was a common-law solicitor-client privilege. However, in his opinion, Canadian courts had been slowly eroding the privilege for lawyer-IP advisers such that there was no longer certainty that IP legal advice relating to obtaining rights was protected by it. The Representative continued that, recently, Canadian courts had not recognized the statutory privilege of a UK patent attorney because there was no equivalent legislation in Canada. In his view, there were negative economic implications because of that development. It considered that IP owners needed certainty that they could rely on privilege to protect their IP legal advice, both, locally and around the world, in whatever country they did their business. They should be able to freely and fully communicate with their IP advisers on issues upon which they required such advice. The Representative further stated that IPIC urged WIPO to treat the issue as a matter of high priority and take the appropriate action to advance it as soon as possible.

230. The Representative of TWN noted that it was important in the discussion not to forget the public interest of the courts having sufficient information to make fair and accurate

decisions. The Representative stated that American courts had noted that the attorney-client privilege inhibited the search for truth and so should be confined within the narrowest possible limits. The Representative found it interesting that the Representatives of professional associations had not mentioned the problem of the abuse of the current level of privilege in many countries. As an example, the Representative mentioned the Nobel-Pharma case, where the inventors had given the Swedish patent agent a draft patent application which had included the citation to a book written by the inventor which had described the use of the invention more than two years earlier. The book was later held to anticipate the patent. However, the patent agent had deleted all references to the book from the patent application that had been filed in Sweden and the United States of America. The court had found that this evidence of actual deletion was defrauding the Patent Office. The Representative continued that if the communication with the agent had been privileged, the Patent Office and the court would never have found that out, and the patent would still be standing. The Representative noted that there were other cases where inventors had not mentioned their own public use of the invention more than one and half or two years before filing a patent application. And often only the inventor could know about the prior use. Therefore, the Representative considered that given the existing problems with the current level of privilege, even between lawyers and clients, there might be a need to consider the impact on patent quality and economies of extending the privilege even further. The Representative stated that the types of cases of abuse provided above even of the narrow lawyer-client privilege highlighted the importance of being very cautious of any further extension of it. In her view, in many jurisdictions, lawyers had the privilege because they had a strict primary duty to the court and that was enforced by a strong professional code of conduct. Abusing the privilege had serious consequences for lawyers. According to the opinion of the Representative, if that privilege was extended to other actors, such as patent attorneys and patent agents and in-house counsels who were not lawyers and did not have such a duty to the court, then that was more likely to result in abuse. Therefore, the Representative was of the view that there was a need for further examination of the situation on the ground in each country, as to whether the SMEs and domestic companies in developing countries, which were usually not intellectual property owners, would really be assisted by extending such privilege. She further noted that if the privilege was extended to patent attorneys and patent agents, that would create pressure on governments to extend the privilege to other professionals, like chartered accountants and auditors. In conclusion, the Representative stated that given the abuses seen even of lawyer-client privilege in jurisdiction that had strong professional codes of conduct and enforcement of these codes of conduct, extending the privilege without corresponding responsibility to non-lawyers and in-house counsels might need to be treated in caution.

231. The Representative of JPAA stated that the question of client privilege was an international issue. Therefore, the Representative strongly supported every activity to make an international agreement regarding client-attorney privilege between the Member States. In his view, first of all, it was necessary to study each national law on client-attorney privilege and the qualifications of the IP representatives or IP advisers. Therefore, the Representative stated that it supported all the efforts to establish a Working Group on the issue.

#### Agenda Item 7: Discussion on the July 2009 Conference

232. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, stated that, while appreciating the actions taken by the Director General on the SCP recommendation to organize a conference on patents and public policy issues, the process of organizing such a conference should be more consultative. In this regard, the Asian Group was of the view that



the broadening of the scope of the issues pertaining the conference could have had been discussed jointly with the Member States. In its view, the Member States should be given more details of the conference even prior to sending the invitations. The Delegation stated that a draft program of the conference should be posted on the WIPO website stipulating a deadline for comments from Member States. The Asian Group considered that the time for the conference was too limited, and that many substantive issues might not be able to be covered meaningfully during such a time period. Therefore, in order to focus the discussion, the Group proposed the subject of climate change, public health and food security to be discussed in line with the mandate given by the SCP at its last session. While the Group welcomed the initiative of the Secretariat in including the visually-impaired persons as part of the upcoming conference, the Group considered that the inter-linkages of the visually-impaired persons with patent technology and related aspects were very important and substantive issues. Since the Group attached great importance to that issue, it was of the view that adding that topic as a supplement to the other substantive themes would not do justice to such an important item. The Delegation recalled that the Asian Group strongly advocated for the visually-impaired persons during the last SCCR meeting, and stated its full support with that issue, in principle. Therefore, in order to enable more meaningful deliberations, the Delegation suggested that a separate discussion on such topic be held in the more relevant forum in the SCCR. The Delegation assumed that it was only a kick-off discussion on such theme and the follow-up conferences on specific themes would be organized by WIPO in the course of the year.

233. The Delegation of Costa Rica, speaking on behalf of GRULAC, recalled that the proposal for a public policy IP conference had come up in the twelfth session of the SCP in 2008, and observed that the format of the conference had been changed and, to date, Member States had not received enough information on the conference. Therefore, the Delegation requested more information about the structure of the conference, particularly with regard to the presentation of the agenda and the dynamics that would be used in the agenda. GRULAC also recommended the Secretariat to continue stepping up communication and consultations particularly on the subjects which would be dealt with and the way in which the participants would interact. The Delegation stated that its Group would push for an inclusive and transparent process so that the objectives of the conference decided by the SCP met the expectations of all Member States. The Delegation stressed the importance of the presence of representatives from other UN Organizations and International Organizations at the conference. The Delegation also considered it essential for WIPO to offer the necessary financial resources to ensure participation from Member States. As regards the subjects to be included in the agenda, GRULAC agreed with including subjects such as those related to patents with regard to health, the environment, climate change and food security. Since the Group considered that the conference must include specific subjects which were interesting to the members, the Delegation suggested the inclusion of genetic resources and traditional knowledge, digital gap and technology development and the visually impaired.

234. The Delegation of Germany, speaking on behalf of Group B, thanked the Secretariat for organizing an informal briefing meeting on the conference and the possibility to propose speakers and to feed them thoughts on the different subjects to be discussed. Group B was confident that the Secretariat would present a balanced program for the global challenges conference without over-burdening the two-day time frame allotted to it, in terms of both the selection of speakers and the choice of agenda items. After studying the mandate given to the Secretariat, Group B was of the opinion that the Secretariat should take responsibility for drawing up the conference program. The Delegation observed that it would be useful for the Secretariat to finalize the details of the program quickly in order to assure maximum

participation. The Delegation therefore welcomed the invitation to the WIPO Conference on Intellectual Property and Global Challenges in July 2009 in Geneva as submitted by the Secretariat. In its view, not only would the conference address fundamental public policy issues in connection with intellectual property rights, the objective was also to underpin WIPO's leading role in the world of IP. Group B considered that the conference was an important project that deserved the full attention of WIPO's membership and the broader IP public.

235. The Delegation of Senegal, speaking on behalf of the African Group, reiterated the importance of the Conference that it had in the area of patents and public policy. To that extent, the Group supported the initiative to hold a conference in July 2009. In its view, the conference would offer the Organization the opportunity to strengthen or to create partnership with other organizations and agencies in the UN system and to contribute to achieving the millennium development goals. The African Group hoped that the Secretariat would involve all Member States in consultations on the subjects, the format, the work program and the choice of speakers.

236. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, was of the opinion that public policy issues such as health, the environment, climate change, food security and disability, which would be discussed at the conference in connection with the intellectual property rights, provided a well-balanced program for such a two-day event. In its view, the further enlargement of the program would affect reaching the beneficial and effective outcome. The European Community and its 27 Member States trusted the Director General to finalize the program shortly in order to ensure the maximum participation.

237. The Delegation of China expressed its interest in the holding of a Conference on the IP and Global Challenges. The Delegation observed that facing the economic crisis in the world, the role of IP had been more and more important in various countries. Under such circumstances, the Delegation considered the two-day Conference very important, and expressed its high expectations. Since such a Conference had never been held, the Delegation requested that WIPO inform Member States about the agenda and the choices of speakers, and finalize, as soon as possible, its program so that Member States could get prepared. The Delegation also appreciated the possibility for Member States to express their opinions on the adjustments on the program.

238. The Delegation of the Republic of Korea understood that the conference was a kind of kick-off meeting in which Member States could remind all the people that intellectual property was important in responding to the global challenges. The Delegation was of the view that it required more time and more cooperation among different countries and different international agencies. Therefore, the Delegation proposed that WIPO prepare a plan on how to cooperate with different international agencies and how to allocate their roles in responding to the challenging issues.

239. The Delegation of South Africa associated itself with the statement made by the Delegation of Senegal on behalf of the African Group. It also supported the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. Noting the importance of the conference on IP and public policy issues, the Delegation observed that the conference would highlight the important linkage with IP and public policy issues and emphasize the role of IP in addressing the challenges faced by developing countries, particularly with regard to public health, climate change and the global food crisis. In that regard, the Delegation supported the

decision for the hosting of such a conference. Given the important nature of the conference and particularly the limited duration provided, it hoped for a focused discussion on public policy issues, maintaining a key development dimension in all its discussions. The Delegation therefore believed that the focus should revert to the original mandate as decided at the twelfth session of the SCP. Noting the need for increasing information sharing and transparency in preparation for the conference, the Delegation requested further information pertaining to the organization of the conference, namely, the program or agenda of the conference, the proposed structure of the conference and the list of speakers who were expected to be invited.

240. The Delegation of the Syrian Arab Republic expressed its hope to receive SCP documents in Arabic. As regards the Conference on Intellectual Property and Public Policy, the Delegation supported the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation had wished the conference to be longer so that the subjects could be discussed in more depth. It also believed that the conference was broadened beyond the mandate that had been given. The Delegation stated that, in the future, Member States should be consulted and duly informed so that their opinions would be taken into account. Further, the Delegation thanked the Director General for accepting an invitation to attend an exhibition in its country.

241. The Delegation of Sri Lanka, speaking in its national capacity, noted that an important negotiation would be concluded in December in Copenhagen. Seventeen years had passed since the adoption of the Rio Declaration on Environment and Development and the UN Framework on Convention on Climate Change (UNFCC), and twelve years since Kyoto Protocol, but the emission of green house gas had not yet declined. The Delegation stated that the transfer of technology was one of the key mitigation and adaptation solution in climate change, as mentioned in Kyoto Protocol and UNFCC. In that light, the Delegation was of the view that the conference should address cross-cutting nature of the transfer of technology against the backdrop of the climate change debate.

242. The Delegation of the United States of America associated itself with the statement made by the Delegation of Germany on behalf of Group B. The Delegation believed that the inclusion into the SCP agenda of a discussion of the conference reflected both a level of importance in interest of Member States in the topics proposed by the Secretariat for the conference, as well as sincere concerns as to whether the invited conference speakers represented a balanced view on the topics selected. The Delegation stated that the SCP mandate regarding the conference duly noted by the WIPO General Assembly called for the convening of a conference only and not for negotiation of its agenda nor for the negotiation of any outcome. With that in mind, the Delegation thanked the Secretariat for soliciting Member States' inputs into the topics for the conference. While the Delegation remained flexible with regard to the topics selected for the conference, it considered that the conference should not be overburdened with topics, thus ensuring adequate treatment of each topic keeping in mind the need for balance. In addition, with respect to finalizing the details of the conference agenda, the Delegation urged the Secretariat to consider topics of broadest appeal to stakeholders and which rationally fit within the context of global challenges and their intersection with intellectual property. The Delegation expressed its support to the current program proposed by the Secretariat. It hoped that the July conference would serve to re-invigorate WIPO as the appropriate forum for addressing questions involving intellectual property rights. The Delegation expressed its wish that, through the conference, Member States could gain a deeper appreciation for the proper place for intellectual property rights in promoting innovation and enabling society to face the global challenges.

243. The Delegation of Algeria associated itself with the statement made by the Delegation of Senegal on behalf of the African Group. The Delegation supported the convening of the conference, and stated that the importance of the issue concerning access for the visually-impaired should not be underestimated. Nevertheless, the Delegation questioned whether the inclusion of such item was in line with the terms of reference of the Conference, and sought an advice of the Legal Counsel.

244. The Delegation of Egypt supported the statements made by the Delegations of Senegal on behalf of the African Group and Sri Lanka on behalf of the Asian Group. The Delegation stated that the conference formed part of the package of the SCP, particularly of the twelfth session, reflecting a particular interest shared and presented by developing countries. It noted that the outcome of the conference, without prejudging possible agreement on its nature, was meant to raise questions about the important intersection of patents with public policies. Therefore, the Delegation believed that the exact notion of the mandate given was the wish of Member States to address specifically public policy. The Delegation further stated that that was no longer the arrangement of the Conference at its current stage of postulation, and hoped that the Secretariat would undertake consultations with Member States. The Delegation observed that it would not be possible to deal with any degree of depth with all the issues proposed by the Secretariat in two days. Therefore, it believed that its work should be focused on public policy issues pertaining to public health, food security and climate change. The Delegation further noted that a conference could also be organized in the context of other WIPO bodies, particularly in the context of the SCCR. Finally, the Delegation stated that the Conference should be used as a vehicle to progress the future work of the SCP.

245. The Delegation of the United Kingdom, noting that the original proposal regarding a conference came from its intervention during the last session of the SCP, recalled that the issue at that time was the role of WIPO. It recalled that, among a number of suggestions for future work, one had been the idea of holding a conference or conferences on the way intellectual property influenced other areas of policy, and that the words “intellectual property” were used throughout the discussion. In its view, the intention was that it would be an opportunity for WIPO to bring together the other international organizations who had been involved in specific policy challenges. At the same time, the Delegation observed that it had been envisaged as a conference for WIPO to address policy challenges. Since there might be new policy challenges of which the SCP had not been fully aware at the last session, the Delegation considered it reasonable for the Director General to organize a conference that covered a range of policy issues including the ones that had not been mentioned during the SCP last year. The Delegation expressed its satisfaction with the agenda already proposed by the Secretariat, and requested a prompt finalization of the program for a high-level participation.

246. The Delegation of Pakistan associated itself with the statements made by the Delegations of Sri Lanka on behalf of the Asian Group and South Africa. In its view, the conference should be focused on specific issues. The Delegation considered that there were inherent linkages between patents and public policy issues. Noting that a climate change was discussed at another forum, the Delegation suggested that the conference focus on how the patent system could facilitate in mitigating the challenges which we faced, the challenges which were mentioned by the Delegation of Sri Lanka. In its opinion, the conference should discuss from a socio-economic perspective and whether the existing patent system had the potential to answer those challenges or it needed to be improved.

247. The Delegation of Ecuador supported the statement made by the Delegation of Costa Rica on behalf of GRULAC. The Delegation expressed its support for holding the conference and to deal with the different issues which had been identified, namely health, the environment, climate change and food security, during the conference. The Delegation also noted that it was essential to address the relationship between human rights and intellectual property. The Delegation was therefore pleased to address the issue of the visually impaired. With regard to the environment and climate change, the Delegation believed that other organizations working on those issues, such as the United Nations Environment Program (UNEP), should be also taken into account, and noted the financial initiative of the UNEP which had a direct relationship with the industry that was working on environmental issues. The Delegation also recommended inviting the Intergovernmental Panel on Climate Change (IPCC) that is also located in Geneva.

248. The Delegation of Thailand associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation appreciated the Director General and the WIPO Secretariat for organizing the conference, and supported the statement made by the Delegation of the Republic of Korea that WIPO should prepare a plan on the issue of IP and public policy for the future. The Delegation noted that the issue was a very complex one which required expertise not only in the area of IP with the diplomatic background, but also in the area of public policy in, for example, climate change, food security or public health. In its view, it was important to encourage participation by delegates from the national government from the capital as much as possible. The Delegation however considered that holding a short conference with all the issues put together might discourage participation from the capital, especially from developing countries with limited financial resources for travel. Therefore, it suggested that the conference be held in a manner which increased the participation of experts from the capital as much as possible, by focusing on a single issue, or issues that were related to each other, and by extending the length of the conference. The Delegation considered that the level of participation by expertise was very important for producing solid and tangible outcome of the conference.

249. The Delegation of Angola associated itself with the statements made by the Delegations of Senegal on behalf of the African Group and Sri Lanka on behalf of the Asian Group, South Africa and Algeria. The Delegation recognized the importance of the Conference, addressing some important issues on the implication of the patent system on public policies. It requested the Secretariat to take into account the proposals placed by the Delegations of Senegal on behalf of the African Group and Sri Lanka on behalf of the Asian Group about the choice or addition of items on the program of the conference.

250. The Delegation of Brazil associated itself with the intervention made by the Delegation of Costa Rica on behalf of GRULAC. The Delegation stated that the conference had a key importance for developing countries and held a clear and varied relationship with the latter in the spirit of the WIPO Development Agenda. It considered that the conference intended to bring IP discussions close to the UN Agenda and closer to the United Nations Millennium Development Goal. In that regard, the Delegation recalled that one of the central demands of the Development Agenda was that WIPO should re-align itself and act in conformity with its circumstance as a UN Agency. The Delegation shared the concerns expressed by many delegations regarding the need for adequately involving Member States in the definition of the format and on the elaboration of the program of the conference. The Delegation highlighted that IP and global challenge was different and broader than the issues originally agreed by the Member States which was patents and areas of public policy. With regards to the scope of the conference, the Delegation believed that the conference should be attached to the mandate

which was basically the relationship between IP and areas of public policy, and stressed that the key was to preserve the element of areas of public policy. While the Chair's summary of the last session of the SCP mentioned important areas of public policy, such as climate change, public health and food security, the Delegation was of the view that other areas of public policy should not be set aside. It reiterated that other areas of public policy were the issues of the visually-impaired, the digital divide and the relationship between patents and genetic resources. Concerning the participation of other stakeholders, the Delegation believed that NGOs should be fully involved in the organization of the Conference as well as in the Conference itself. It was of the view of the Delegation that the NGOs had a lot of expertise not only on IP but also on issues of the broader UN Agenda. As regards the duration, the Delegation considered that it should be two or three days, depending on the program to be agreed. With respect to the outcome of the conference, it stated that the conference must also report back to the SCP. Whatever outcome the it might bring, the Delegation considered that the SCP would move on to the conference and then the conference must deliver the SCP an output for a continuing discussion in the SCP.

251. The Delegation of India associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group. The Delegation commended the initiative of the Secretariat in following-up on the last SCP meeting and organizing, for the first time, a global conference on public policy implications of patents. The Delegation welcomed the initiative that would help underlining the centrality of WIPO in the global discourse on intellectual property, and looked forward to productive deliberations and tangible outcome on the important themes. However, in view of the mandate suggested at the previous session of the SCP, the limited time available in a two-day conference and the fact that each of four themes encompassed wide-ranging substantive areas, the Delegation was of the view that the theme of the conference should be reverted to reflect what was originally mandated in the last SCP meeting. In its view, the expansion from the original focus on patents to a wider discussion on intellectual property rights would dilute the focus and substance of the deliberation which already appeared to be overburden with four large substantive themes in a two-day conference. The Delegation therefore suggested that follow-up events be held for more in-depth discussions and tangible follow-up on those important issues. The Delegation requested the Secretariat to share the proposed program, the panelist and other details of the conference with Member States, and stressed the need for undertaking preparatory work for such events in the future in consultation with Member States and in accordance with the mandate provided by them. That would have, in its view, foster greater confidence, transparency and a consultative result in the Organization.

252. The Delegation of Indonesia associated itself with the statement made by the Delegation of Sri Lanka on behalf of the Asian Group, and supported the statement of the African Group. The Delegation shared the view that climate change and other global challenges were issues of high urgency. On the issue of climate change, the Delegation endorsed the statement made by the Delegation of Sri Lanka in its national capacity. In that regard, the Delegation recalled the Bali road map in which the efforts to protect the world's sustainable development, including the subject of technology transfer, had been tabled, and suggested that WIPO look at the Bali road map as one of the primary references of the conference.

253. The Delegation of Kuwait commended the Secretariat for the initiative which came at a sensitive time when the whole world was looking at intellectual property in the role it played in economic and social development. The Delegation also emphasized the importance of the selection of speakers and the objectives of holding a conference, since other international organizations were following with great interest the work of WIPO and the conference that

would take place at the time of great economic crisis and the increasing number of unemployment. The Delegation considered that, since the Conference was the first of its kind, the time given to it was not enough for all the topics proposed and to reach the necessary conclusion.

254. The Delegation of Switzerland associated itself with the statement made by the Delegation of Germany on behalf of Group B. The Delegation considered that it was timely for WIPO to hold a conference addressing issues relating to the interface of intellectual property with other areas of public policy, and that it would serve as an important global forum to discuss those issues. In order to avoid overburdening its time frame, in its view, the conference should focus its agenda on a limited number of issues which were mentioned in the Chair's summary on the twelfth session of the SCP. The Delegation was confident that the Secretariat would set the program of the conference, including the selection of the speakers and the setting of the agenda items, in a balanced manner.

255. The Delegation of the Plurinational State of Bolivia endorsed the statement made by the Delegation of Costa Rica on behalf of GRULAC. The Delegation supported the holding of the conference which would allow it to analyze the relationship between IP and public policy. It considered that the subjects, such as health care, food security and the environment, had been appropriately chosen, since they were highly inter-relational issues. The Delegation was of the view that WIPO could not shy away from international efforts to fight against the challenges posed by climate change. As other UN organizations were taking various measures to address such issue, in its view, WIPO as part of its competence should join such global effort to deal with urgent problems such as climate change. The Delegation expressed its particular interest in subjects mentioned by GRULAC, such as genetic resources and issues related to the patent system or the intellectual property system in general. As regards invited speakers, the Delegation suggested inviting speakers from specialized agencies from the United Nations dealing with climate change.

256. The Representative of AIPPI stated that his organization had paid attention to a number of issues related to public policy, one of which had been public health and its impact on patents. The Representative referred to the resolution on the impact of public health on exclusive rights, which had been adopted by the Congress of his organization in September 2008, and expressed his willingness to contribute to the July Conference or any other activities of WIPO by offering the expertise of AIPPI.

257. The Director General noted that there was a considerable interest in the conference, which was a positive sign. As regards the mandate about which a number of delegations had spoken, after reading out the decision taken by the SCP at its last session, he stressed the necessity to focus on what would be good to do with the Conference and what kind of achievements were sought. In that respect, the Director General was of the view that one of the main focuses of the conference was supposed to be the interrelationship with other international organizations, as mentioned by several delegations. For example, he referred to the Report of the last session of the SCP, which stated "the Chair suggested that in the framework of the work program, WIPO organize a conference on patents and their relationship with other areas of public policy, inviting other international organizations, such as WHO, FAO, WTO, the Organization for Economic Cooperation and Development (OECD), etc.". He further referred to the statement made by the Secretariat at the last session of the SCP where it was said that the purpose of the conference was two-fold. The first was to show that WIPO was open to engage in a dialogue with, in particular, other international organizations concerning the relationship between its sphere of competence in intellectual

property and their spheres of competence. The Secretariat affirmed that it would seek to engage all of those other international organizations, many of which had very important intellectual property processes underway so that a good program of cooperation in the future could be built. The second purpose was to show that WIPO understood the importance of those issues and was open to their discussion. Therefore, in his opinion, the mandate had been focused essentially on other areas of public policy and an indicative list had been given. He was also of the opinion that there had been a great deal of emphasis placed on the relationship of WIPO with other organizations in the UN system and other processes that might be undertaken with respect to intellectual property. The Director General took the point that consultations should be intensified, and assured the delegations that WIPO would conduct further consultations with respect to the conference. He welcomed any suggestions with respect to speakers or topics. On the point that it was very difficult to deal with such a wide range of subjects in two days, the Director General agreed that the conference should be focused. He noted that the issues that were specified should be dealt with, notably, on the questions of health, with respect to which the heads of WTO and WHO had confirmed their participation, climate change, the environment and food security. He also noted that a number of delegations suggested that the subjects of genetic resources and biodiversity be included. The Director General observed that diverse views were expressed by several delegations with respect to the question of the visually impaired. He observed that it was an issue that involved the public policy of human rights and in particular involved the Human Rights Council, WHO and ITU. He considered that it would be good to be able to use the occasion of the Conference, without using too much of its time, to emphasize the importance of such issue and a contribution that could be made by intellectual property and in particular the patent system and technology with respect to access to published works for the visually impaired and the blind. The Director General, however, took the point that several delegations had hinted that it should not be the main focus of the conference or it should not occupy too much time, since there were so many issues that needed to be dealt with. As regards the outcome of the conference addressed by some delegations, the Director General considered that it should be aiming at inspiring and enriching the work of the SCP and the Organization in the future. In his view, the conference was not to spend two days trying to negotiate an outcome, but was to hear from experts and other organizations about some important questions.

258. The Delegation of Pakistan noted that, in its opinion, the conference should be focusing on how the patent system could facilitate in mitigating the public policy challenges, and it should discuss from a socio-economic perspective as to whether the existing patent system had a potential to answer those challenges. It sought any comment from the Director General on its view.

259. In response, the Director General stated that he agreed basically with the observation made by the Delegation of Pakistan. He considered that one of the main focuses should be what was the contribution of intellectual property to the mitigation or resolution of some of those challenges that we confronted, or some of the issues of public policy, which preoccupied the global community, whether they be the environment, climate change, health, access to medicines, food security or biodiversity. He however observed that the extent to which progress could be made was another question that everyone had raised, and requested delegations not to be too ambitious with respect to a conference over two days. Nevertheless, he envisaged the possibility that the conference would be the commencement of a dialogue rather than the conclusion of the dialogue.



260. The Chair stated that he would participate in the consultations so that they would be inclusive and take into account the interventions made and concerns raised by delegations.

261. The Delegation of Germany sought clarification as to the form of the consultation, i.e., whether it would be an open-ended consultation or with limited participation.

262. The Chair noted that he had in mind a consultation with the regional coordinators and two or three members from each Group, although more members were welcome to participate if they wished to do so. He suggested that the draft program of the conference be circulated before the consultation meetings.

263. The Delegation of Sri Lanka suggested that all the Member States be invited to the consultations in view of transparency.

264. The Delegation of Egypt believed that holding future consultations within the context of the body that would give rise to the conference, which was the SCP, would be a natural transparent manner of dealing with the conference, and that the consultations should be held in a venue that would allow the participation of all SCP members.

265. The Delegation of South Africa stated that the process should be open-ended and that all Member States should be given the option to attend the consultations. It also requested a prompt circulation of the draft program in order to receive feedback from the capital.

266. The Delegation of Germany noted that, in response to the suggestion made by the Delegation of Egypt, it preferred informal consultations rather than formalizing the way the issue would be negotiated. Further, it agreed with the Delegation of South Africa with respect to the prompt circulation of the draft program.

267. The Delegation of Algeria supported holding open consultations with all Member States.

268. The Delegation of Pakistan noted that the discretion of holding consultations should be with the Chair.

269. The Delegation of Brazil thanked the Chair for having been taking an initiative to urge the Secretariat to hold consultations from the beginning, and trusted the Chair of being as transparent and open as possible.

270. The Delegation of the Islamic Republic of Iran stated that an open-ended consultation was a normal practice in WIPO in all committees.

271. The Chair clarified the recent consultation process he had had been involved, and expressed his willingness to be more involved in the organization of the consultations. The Chair considered that, although the Secretariat had good enough judgment on the selection of speakers and subjects, Members States were the ones who gave the Secretariat the criteria on which the decision could be based, so that the agenda would be balanced and would take into account all view points, and that there should be regional representation bearing in mind the technical capacity.

272. The Committee supported the holding of a conference in July 2009 as suggested at the twelfth session of the SCP. The Chair of the SCP and the Secretariat will conduct

jointly open-ended consultations with all Member States on the program of the Conference, which will include the issues of health, the environment, climate change and food security.

## CONCLUSION OF THE MEETING

### Agenda Item 8: Future Work

273. The Chair invited the regional Groups to make their statements.

274. The Delegation of Costa Rica, speaking on behalf of GRULAC, requested that preliminary studies on the issues of technology transfer and sufficient disclosure be prepared for the next session. The Delegation also stated that its Group wish to continue working on the four preliminary studies that the Committee had looked at. GRULAC was interested in looking further at the exceptions and limitations and the dissemination of patent information. Further, the Delegation stressed the importance of enabling the Committee to take into account a calling of a panel of experts to facilitate its work.

275. The Delegation of Senegal, speaking on behalf of the African Group, stated that the four preliminary studies presented by the Secretariat and the discussions which ensued enabled the Committee to clarify some aspects of the issues dealt with. However, the Delegation suggested that more in-depth consideration be given to the preliminary study taking into account in particular the socio-economic aspects and the differences in the level of development and taking into account the differences in the legal systems. In its view, those various aspects of the issues should be examined further by independent experts selected in accordance with fair geographical distribution reflecting various legal systems. The Delegation believed that the conditions to make progress at the SCP was to enable the participation of all members in the discussions. In that light, the Delegation suggested that the existing and future studies be available not only in English, French and Spanish, but also in the other official languages. The Delegation further requested that the four in-depth reports be the subject of a detailed presentation at the next session of the Committee and that information meetings concerning their contents be held at the outset. The Delegation believed that the work of the Committee should make gradual progress to avoid any hasty conclusion. The African Group considered it essential to continue to work in the same spirit of cooperation shown by members of the Committee.

276. The Delegation of Sri Lanka, speaking on behalf of the Asian Group, stated that its Group had proposed tangible actions in terms of elaborating the preliminary studies. With regard to the study on exclusions from patentable subject matter and exceptions and limitations to the right, the Asian Group reiterated that the Committee conduct a study on exceptions and limitations covering all aspects with the external experts in the following areas: (i) regional trade agreement and bilateral trade agreement and the provision of exception and limitation; (ii) country studies, examples of how very different patent systems existed in developing countries when those countries had had been at the stage of development where many developing countries started with it. With regard to the report of dissemination of patent information, the Asian Group suggested that WIPO explore the possibility of enhancing and expanding PATENTSCOPE<sup>®</sup> to create a global database incorporating both public and private patent information with complete disclosure that was free, easily accessible and user-friendly for LDCs and developing countries. With regard to the report on patent and standards, the Asian Group proposed that further study be prepared to

formulate possible draft guidelines on patents in standardization, addressing the basic element of reasonable royalty calculation, misuse of IPR in standards, exceptions from patentable subject matter and limitations to the exclusive right with regard to IPR in standards. On the study on client-attorney privilege, the Group requested the Secretariat to further study on the element that had been suggested earlier, and welcomed a consultation with the Secretariat at an appropriate time, if necessary. As regards the non-exhaustive list of issues, the Asian Group proposed to include the item “intellectual property and the environment with particular attention to climate change and alternative sources of energy”. In addition, the Asian Group requested the Secretariat to translate all the documents in all the UN languages in the future.

277. The Delegation of Germany, speaking on behalf of Group B, welcomed the fruitful exchange of opinions and thoughts during the session, and stated that the thorough and balanced studies provided by the Secretariat had shown that the Committee had chosen the appropriate format and could rely on premium expertise from WIPO to drive the discussion forward. Therefore, Group B considered that the momentum should be kept within the Committee and blurring of focus or duplicating the work of other WIPO fora should be avoided. The Delegation was concerned that intersessional work or external expert groups would consume precious resources without guaranteeing adequate results. In its view, the Committee should refrain from creating a permanent agenda item out of one of the topics on the table, since it would unwrap the balanced work package the Committee had managed to put together at the last session. Group B was pleased that the discussion had revealed a great convergence of interest in the dissemination of patent information. The Delegation observed that it had become clear that the patent system as a whole, and the dissemination of patent information in particular, were means to foster public welfare and technological advancement in both developing and developed countries. Therefore, Group B considered that tangible results of the deliberations of the Committee as a whole underlined its strong support for the technical initiatives proposed by WIPO in the paper on dissemination of patent information. The Delegation stated that four studies by the Secretariat should be open to further comments and input by Member States. Group B also believed that certain issues from the studies could be subject to further investigation, in particular the issue of client-attorney privilege. In its view, the Secretariat could play a helpful role in providing questionnaires to streamline the flow of relevant information from the Member States.

278. The Delegation of the Czech Republic, speaking on behalf of the European Community and its 27 Member States, were of the opinion that the debate was useful and helpful. It considered that the results enabled Member States to outline further approaches to establishing a balanced work program for the Committee in order to make progress in the work of the future harmonization of patent law. As regards the preliminary studies and future debate within the SCP, the Delegation proposed the Committee to continue the discussion on the dissemination of patent information and the client-attorney privilege. However, the Delegation suggested that all four studies discussed be open to further written comments to be made by the members of the Committee. The Delegation was in favor of the creation of a global portal of patent information on the WIPO website through which, as a first step, search and examination reports prepared by national patent offices would be accessible. In its view, that was one of the possibilities to improve the quality of granted patents. As regards the issue of client-attorney privilege, the Delegation welcomed further investigation exploring possible ways to tackle the issues raised in the report. The European Community and its 27 Member States highlighted that the WIPO studies were of the high quality, and considered that further elaboration of studies made by external expert groups would consume precious resources without ensuring the beneficial and satisfactory outcome. After having finalized the debate on the four items, the European Community and its 27 Member States proposed that

following items be chosen from the issues in document SCP/12/3 for further examination in the same format: economic impact of the patent system and opposition systems. As regards the possible new items to be included in the non-exhaustive list of issues, the European Community and its 27 Member States suggested to add the following issue: quality of processes and all related patent products. The European Community and its 27 Member States continued to believe that a well-balanced work program would be adopted in the near future, and that the practical results of the Committee's discussions would improve the current patent system and would bring benefits to stakeholders.

279. The Delegation of Serbia, speaking on behalf of the Group of Central European and Baltic States, associated itself with the statement made by the Delegation of the Czech Republic on behalf of the European Community and its 27 Member States.

280. In view of the available time remaining for further discussion, the Chair invited delegations to submit national statements in writing, which would be reflected in the Report. Consequently, the Delegations of Argentina, the Russian Federation and South Africa as well as the Representative of FSFE submitted their statements as follows:

281. The Delegation of Argentina supported a substantive, wide-ranging and open debate on the issues listed in paragraph 85 of document SCP/12/5. It considered that list to be non-exhaustive and open to future suggestions which might come out of the discussions. Only in those conditions could the direction and features of the future work of the SCP be determined. On the path towards a consensus-based decision, the SCP should maintain a balanced focus in its discussions, studies, deliberations and results. The SCP should focus its current work on the ramifications and consequences, as regards development, of certain policy approaches and IP standardization activity. The debate should include substantive analysis of the consequences of the adoption of such approaches on the part of countries that were at different stages of social, economic and technological development. The adoption of the Development Agenda marked the beginning of international efforts on IP rights oriented towards the needs of developing countries. Consequently, the driving force behind WIPO's activities and discussions must be the achievement of development-oriented results. One perspective taken for granted, – without going into too much depth – that development was the direct consequence of the strengthening of IP rights' protection, was no longer valid in that context. Systematic evaluation of the consequences that improved standards of IP rights' protection could have on access to science, technology and knowledge, theories and practices, especially in LDCs and developing countries, was therefore unavoidable. In that context, the costs and benefits of improved IP rights' protection should be weighed up, the necessary flexibility in negotiations for the sake of public interest should be safeguarded, the specific development needs of each country should be provided for and an IP system which effectively promoted innovation and technological development, depending on the level of development of each Member State, should be guaranteed. The Delegation stated that it did support – at the current time – greater harmonization of patent law.

282. “The Delegation of the Russian Federation subscribes to the initiative set out in the address of March 25, 2009 to the WIPO Director General, Francis Gurry, regarding the creation of a working group for the resolution of issues relating to the “client-attorney” privilege, and also to other issues identified in the address, such as “patents and standards”, and “exceptions in relation to research”. In the opinion of the Delegation of the Russian Federation, the creation of such a working group will enable the issues raised to be studied in more depth, including those set out in preliminary studies prepared by the Secretariat. With regard to the four documents which were the subject of discussion at the 13<sup>th</sup> session, the

Standing Committee should continue work on the documents while taking into account observations and suggestions made by the delegations of various countries. In its addresses, the Delegation of the Russian Federation noted that of particular interest to it were documents SCP 13/2, 3 and 5 prepared by the Secretariat, in which Russia is prepared to take part in the future. We should like to emphasize that for the Russian Federation the priority remains issues of harmonization of substantive patent law, since harmonization will allow expenditure involved with the filing and assessment of an application to be reduced effectively, the quality of examinations conducted to be increased and their duration to be reduced, something in which users of patent systems in many countries of the world are interested. Therefore, in the future work of the Standing Committee it is appropriate to devote attention to these issues. The Russian Federation has already expressed its opinion regarding the official translation of documents and supports the proposal of many countries in relation to the translation of prepared studies into the official United Nations languages, and likewise of other Standing Committee documents in the future. In conclusion, we would like to note that the work of the Standing Committee both today and in the future should be carried out on the basis of a reasonable consensus and taking into account the interests of all WIPO Member States.”

283. “The Delegation of South Africa would like to align itself with the statement of the Delegation of Senegal made on behalf of the African Group. My Delegation thanks the Secretariat for the preparation of the four preliminary studies which were discussed during this session. The discussions within this Committee highlighted the need for further clarifications of comments and questions raised by Member States. In this regard, my Delegation views that the four preliminary studies should remain open for further debate at the next session of the SCP. We support the proposal to have external experts contribute to the four preliminary studies to enhance and develop them further taking into consideration the discussion of this Committee and the development dimension. The selection of experts should be balanced and transparent taking into consideration equitable geographic representation. My Delegation would also like to see WIPO hosting information sessions prior to the next session of the SCP on the four preliminary studies. Concerning the Conference to be held in July, my Delegation once again welcomes the decision to hold consultations in an open and transparent manner and we remain engaged in ensuring the success of the Conference. To this extent, the discussions within the Conference should continue to remain focused and linked to the work of the SCP.”

284. “Statement by FSFE: Mr. Chairman, we have followed the debates of this week with great interest. Our thanks go to you for your able chairmanship, and the Secretariat for their hard work to facilitate the dialogue. Regarding the future actions resulting from the work of the SCP/13, we have a few concrete proposals and comments. As a cross-cutting issue between exceptions and limitations and patents and standards, we think that WIPO should have a working group on interoperability issues with a focus on Information Technologies (IT). Standards are the dominant tool to achieve interoperability, which then drives competition, innovation and economies of scale. Yet in our experience, the existence of standards alone can be insufficient to achieve interoperability if there are no surrounding activities, such as interoperability testing and engineering. There are also other ways to achieve interoperability outside formal standardisation, such as shared code bases, often on the grounds of the Free Software model. Interoperability is an essential requirement for future trends in IT, which are based on modularity, re-combination, and re-use. Only through interoperability will the IT industry be able to sustain its high level of innovation, and only through interoperability will other sectors of economy be able to reap the benefits of ICT-enabled innovation and economies of scale. FSFE sees a strong public need for interoperability which in all likelihood outweighs the potential innovative effects of patents.

In our view this public interest justifies an exception on the ability to enforce patents against interoperability. This exception would provide legal safety for the entire IT sector against abusive patenting strategies that threaten to take entire markets hostage today. Secondly we think that it would be to the benefit of WIPO Member States to make use of the criteria highlighted in document SCP/12/3 for the economic rationale of patenting. The first step would be an assessment of how different areas meet the “three step test for inclusion in the patent system” of demonstrated market failure to provide innovation, demonstrated positive disclosure from patenting, and effectiveness of the patent system in the area to disseminate knowledge. Further fine-tuning of the patent system may be necessary in line with this facts-based application of the economic rationale for patenting, such as an area-specific adjustment of parameters like cost, time and scope of patents in order to best meet the requirements of each area. A study by the Secretariat might be a good start in order to understand the differences between the areas. Lastly, we would like to reflect upon the various remarks that have been made by different Member States throughout the week on the necessity to harness an encompassing set of tools for innovation to address pressing challenging for humankind, such as health, climate change or food security. The ability to meet these challenges will depend on WIPO’s ability to bring all innovative instruments to bear, including Open Innovation Models, Free Software, and Open Standards. Two examples can help to highlight the pervasiveness of these tools. Several Member States have suggested that the dissemination of patent information be based on the Open Innovation Model associated with the on-line dictionary Wikipedia. A quoted reason for this request was the understanding that the complexity of the subject matter makes it unlikely that any individual party could provide all the information. Without undervaluing the task of disseminating patent information, areas like health, climate change or food security are likely of even greater complexity, increasing the need for application of Open Innovation Models. Secondly, considering the power consumption of computational centres around the world and the increasing use of software in all areas it will for instance be harder to meet the challenges of climate change under exclusion of Free Software innovation. Free Software is defined by a unique level and granularity of user control for all layers of the software, allowing to enable or disable components as needed, and providing more effective power consumption control and allowing for optimisations that are not possible with proprietary systems. These advantages of Free Software for Green IT should be embraced on all levels, WIPO included. Over the past years, various Member States have repeatedly requested that WIPO become inclusive of all methodologies to foster innovation, including Copyright, Patents, Free Software and Open Innovation Models. Many Member States successfully employ a wider mix of methodologies on a national level already, such as Germany, which as part of its response to the financial crisis decided to invest 500m EUR into the focus areas Green IT, IT-Security and Free Software. Other examples exist from various Member States around the world, spanning all regional groups. We therefore humbly submit to the Secretariat that now would be the time to begin thinking about concrete ways of ensuring these tools for innovation are fully integrated into the knowledge and capacity building initiatives of WIPO. Further information from the Secretariat on these areas, case studies illustrating their practical application “in the wild” in varying contexts, relevant to both the developed and developing world, can only serve to inform the debates of all of WIPOs activities and committees.”

285. Following a proposal by the Chair, and after some discussions, the Committee:

(a) reaffirmed that the non-exhaustive list of issues identified at the twelfth session of the SCP held in June 2008 would remain open for further elaboration and discussion at its next session, and decided to include two further issues in the list, namely “patents and the environment, with a particular attention to climate change and

alternative sources of energy”, as well as “patent quality management systems” (see revised list in Annex II);

(b) agreed that documents SCP/13/2, 3, 4 and 5 would remain open for further discussion and comments at the next session of the SCP;

(c) decided that five studies will be prepared as follows, taking into account interventions of Members:

(i) the Secretariat will commission external experts a study on exclusions, exceptions and limitations focused on, but not limited to, issues suggested by Members, such as public health, education, research and experimentation and patentability of life forms, including from a public policy, socio-economic developmental perspective, bearing in mind the level of economic development;

(ii) the Secretariat will prepare a concept paper on technical solutions to improve greater access to, and dissemination of, patent information;

(iii) the Secretariat will expand the preliminary study on the client-attorney privilege (document SCP/13/4), to reflect the current state of play in this area, taking into account perspective of various stakeholders and using external experts, if necessary;

(iv) the Secretariat will establish preliminary studies on the two following additional topics contained in the non-exhaustive list of issues agreed at the twelfth session of the SCP: “Transfer of Technology” and “Opposition Systems”.

(d) The Secretariat will hold presentations of the studies at the beginning of the next meeting.

(e) Several delegations expressed the importance of engagement in the work of the Committee, and in so doing underlined the need for the studies prepared to be available in all official UN languages. The Committee requested the Secretariat to produce the cost estimates of translating the studies.

286. The International Bureau informed the SCP that its fourteenth session was tentatively scheduled to be held from November 9 to 13, 2009, in Geneva.

#### Agenda Item 9: Summary by the Chair

287. The Summary by the Chair was noted, and was agreed by all (document SCP/13/7).

288. The SCP further noted that the official record of the session would be contained in the report of the session. The report would reflect all the interventions made during the meeting, and would be adopted in accordance with the procedure agreed by the SCP at its fourth session (see document SCP/4/6, paragraph 11), which provided for the members of the SCP to comment on the draft report made available on the SCP Electronic Forum. The Committee would then be invited to adopt the draft report, including the comments received, at its following session.

Agenda Item 10: Closing of the Session

289. The Chair closed the session.

*290. The SCP unanimously adopted this report, during its fourteenth session, on January 25, 2010.*

[Annex follows]



LISTE DES PARTICIPANTS/  
LIST OF PARTICIPANTS

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