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(PCT UNION)

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

Sixth Session
Geneva, May 3 to 7, 2004

SUMMARY OF THE SESSION

by the Chair

INTRODUCTION

1. Mr. Francis Gurry, Deputy Director General, on behalf of the Director General, opened the session and welcomed the participants.
2. The list of participants is contained in the Annex.
3. The session's proceedings were informal and there was no formal report. This summary, prepared under the responsibility of the Chair, sets out the status of the matters discussed by the Working Group, noting the range of views expressed and areas where agreement has been reached, and identifying what future work needs to be undertaken.¹

ELECTION OF A CHAIR AND TWO VICE-CHAIRS

4. The Working Group unanimously elected Mr. Siep de Vries (Netherlands) as Chair for the session and Mrs. Margit Sümeghy (Hungary) and Mr. Yin Xintian (China) as Vice-Chairs.

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

CORRIGENDA AND CONSEQUENTIAL AMENDMENTS

5. Discussions were based on documents PCT/R/WG/6/5, 5 Add.1 and 5 Add.2.

6. The Working Group approved the proposed amendments of the Regulations² set out in the Annexes to documents PCT/R/WG/6/5, 5 Add.1 and 5 Add.2 with a view to their submission to the Assembly of the PCT Union (“the Assembly”) in September 2004, subject to possible further drafting changes to be made by the International Bureau.

RESTORATION OF THE RIGHT OF PRIORITY

7. Discussions were based on document PCT/R/WG/6/1.

8. Several delegations referred to the discussions in previous sessions of the Working Group and expressed their concern that, while they were in favor of the principle of allowing for restoration of priority rights in the case of applications under the PCT consistently with the provisions for such restoration under the Patent Law Treaty (PLT), the procedure would represent such a fundamental change to the system that it ought to be addressed in the Articles of the Treaty itself rather than in the Regulations. Some of those delegations indicated that they would not wish to block a consensus should the Assembly decide to adopt amendments of the Regulations providing for restoration of the right of priority but that they would make use of the proposed transitional reservation provisions, at least until such time as the matter could be addressed directly under their national laws. Others felt that the possibility for transitional reservations would not be sufficient to address their concerns and stressed the need for amendment of the Treaty itself.

9. One delegation expressed the view that Article 58(1) would not provide a sufficient basis for this matter to be dealt with in the Regulations only. It stated that Article 58(1)(iii) provided a basis only for Rules concerning details useful in the implementation of the provisions of the Treaty but not for Rules concerning matters which were not dealt with by provisions of the Treaty in the first place. The delegation also expressed its concern that a restoration of the right of priority would, in effect, extend the term of a granted patent by up to two months and, in general, questioned whether aligning the PCT requirements to those of the PLT should indeed be one of the objectives of PCT reform, noting that the PLT had not yet entered into force and, in light of differing views on the PLT, may not be ratified by many PCT Contracting States in the near future.

10. Other delegations were of the opinion that, while provisions concerning restoration of the right of priority would not be in conflict with the Paris Convention itself, inclusion of such provisions in the Regulations providing, in effect, for a 14-month priority period in certain

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

cases would be inconsistent with Articles 8(2)(a) and 2(xi) of the PCT, which referred to the Paris Convention with regard to the conditions for, and the effect of, any priority claim contained in an international application, and thus to the 12-month priority period under Article 4C(1) of the Paris Convention.

11. A number of delegations and representatives of users welcomed the general approach taken in the document, noting the importance of provisions for the restoration of the right of priority as a safeguard for applicants. The proposed provisions would not enable an automatic extension of the priority period to 14 months but would be applicable only in particular circumstances after a check by the Office concerned. Referring to the extensive discussions that took place in the context of the adoption of the PLT, those delegations and representatives of users expressed the view that provisions for the restoration of the right of priority were in compliance with the provisions of the Paris Convention, which only provided for a minimum standard with regard to the length of the priority period and thus left room for member States of the Paris Convention to grant longer periods of priority if they so wished. They were of the opinion that the Working Group should proceed with developing proposed amendments to the Regulations unless it was convinced that those amendments would clearly be inconsistent with provisions of the Treaty, which they felt not to be the case.

12. Noting the divergence of views as to whether the inclusion in the PCT of provisions relating to the restoration of the right of priority needed to be addressed in the Articles of the Treaty itself rather than in the Regulations, the Secretariat referred to earlier discussions in the Working Group concerning a possible revision of the Treaty and the apparent difficulties noted by the Working Group in that context, namely, the difficulty of defining the scope of any revision and the need to avoid the existence of two parallel systems during a prolonged period where some Contracting States had ratified a new version of the Treaty and others had not. The Secretariat pointed out that there were, however, precedents in WIPO for making changes to the effect of treaties in advance of their formal ratification, or which were not in strict agreement with their literal wording, where there was a consensus to do so. For example, the WIPO Assemblies in 1989, 1991 and 1993 had considered radical changes to the system of contributions by Member States under the WIPO Convention and the six other treaties administered by WIPO that provided for contributions to be paid by Contracting States. In consequence, in 1993, a unitary contribution system with revised contribution classes was introduced by consensus. The formal changes to the relevant treaties were only adopted in 2003, after it was agreed that the system had been shown to work, and the system was continuing even though those changes had not yet entered into force. Similarly, in the International Union for the Protection of New Varieties of Plants (UPOV), after the conclusion of the 1991 Act, it was agreed that the 1978 Act should remain open to accession by developing countries even beyond the dates of closing of the 1978 Act which had been set in the 1991 Act. The Secretariat suggested that Contracting States should consider the possibility of a revision of the PCT having a limited scope and whether a way could be found to voluntarily accelerate the effective entry into force of new provisions.

13. After some discussion, the Chair concluded that, while differing views had been expressed as to whether the inclusion in the PCT of provisions relating to the restoration of the right of priority ought to be addressed in the Articles of the Treaty itself rather than in the Regulations, a majority of delegations had expressed the view that, as had been decided by the Assembly, it would be desirable for the PCT to be aligned in that regard to the PLT. The question at hand was thus not whether such restoration should be provided for in the context of the PCT but rather how best to address the concerns expressed by those delegations who saw a need for amending the Treaty itself. On the one hand, the possibility for transitional

reservations provided one possible way for Contracting States not to apply the provisions concerned until such time as the position might be solved under their national laws. On the other hand, the suggestion by the Secretariat outlined in paragraph 12, above, merited further consideration.

14. The Working Group agreed that, while there was no agreement as to whether the proposals could be implemented without amending the Articles of the Treaty itself, the approach taken in the proposals should be further developed, and the Working Group invited the Secretariat to prepare revised proposals for consideration at its next session, taking into account the matters noted above and the comments and suggestions as to particular provisions noted in the following paragraphs.

Rule 4.10(a)(i)

15. One delegation suggested, noting particularly the proposed deletion of the words “, being a date falling within the period of 12 months preceding the international filing date,” that the term “priority period,” as used in proposed Rule 26bis.2(a)(i) and elsewhere, should be defined in the Regulations, either in Rule 26bis.2 or in Rule 2. Another delegation noted that the definition should take into account non-working days under Article 4C(3) of the Paris Convention. Another delegation considered that the definition should also make clear that the provisions of Rule 80.5 (concerning expiration of time limits on a non-working day or official holiday) should apply to the priority period.

Rule 26bis.2(a)

16. One delegation suggested that a receiving Office which had made a transitional reservation under proposed Rule 26bis.3(h) should not be required to notify the applicant of the possibility of submitting the request for the restoration of the right of priority in accordance with Rule 26bis.3, and that the proposed amendments of the Regulations should be further amended accordingly.

Rule 26bis.2(b)

17. In response to questions by one delegation and a representative of users, the Secretariat explained that, as defined in proposed Rule 26bis.2(b), a priority claim which was “considered void” was, for the purposes of the Treaty, considered not to have been made *ab initio*. The definition had been introduced as a mere drafting change to simplify the wording of the proposed text and not to change the substance of the present provision. One delegation noted that consequential changes in terminology concerning priority claims “considered not to have been made” should be considered elsewhere, for example, in Rule 82ter.

18. One delegation suggested that the Regulations should be further amended so as to provide that, as already provided under the Receiving Office Guidelines, a notice received after the expiration of the time limit under Rule 26bis.1(a) should be considered to have been received in time if it was received before the receiving Office had declared that the priority claim was considered not to have been made.

Rule 26bis.2(c)

19. It was suggested and agreed that the words “the contents of” should be deleted in Rule 26bis.2(c)(ii).

Rule 26bis.2(d)

20. One delegation suggested that the Administrative Instructions should be modified to ensure that the information to be published under Rule 26bis.2(d) contains a clear indication as to whether a priority claim has been considered void under Rule 26bis.2(b) or whether a priority claim has not been considered void under Rule 26bis.2(c).

Rules 26bis.3(a) and (b)

21. One delegation pointed to the need for clarification of the relationship between Rules 26bis.3(b) and 26bis.2, noting that the present draft would appear to permit an applicant to request the restoration of the right of priority much later than two months following the expiration of the priority period, for example, in the case where the applicant added a priority claim under Rule 26bis.1 and received a notification by the receiving Office under Rule 26bis.3(b), which would appear to afford a further period of one month in the time limit for requesting restoration of that priority claim.

22. One delegation suggested that it should be made clear that Rule 80.5 (concerning expiration of time limits on a non-working day or official holiday) applied to the time limit under this Rule.

Rule 26bis.3(c)

23. One delegation sought clarification as to the evidence which could be required by a receiving Office, and in particular as to whether Offices could require particular forms of evidence (for example sworn statements) and whether they could require further evidence if the evidence originally filed was considered to be insufficient to decide the matter. It was felt that the draft as proposed would permit such flexibility, without having to include express provisions to that effect, thus allowing each receiving Office to establish its own requirements, as had been previously agreed by the Working Group (see paragraph 49 of document PCT/R/WG/5/13). Such an understanding could, if desired, be reflected in the report of the Assembly in the event that it adopted amendments of the Regulations along the lines of the proposals.

24. A number of delegations were concerned that leaving the necessary evidence to be decided by the receiving Office meant that a decision by an Office which had very flexible requirements could result in the restoration of a right of priority on the basis of evidence which might not have been acceptable to a designated Office in a different Contracting State having regard to the latter's national law, even if restoration of the right of priority were permitted under ostensibly the same criteria (due care or unintentionality).

25. Other delegations and a representative of users, referring to one of the basic principles of international cooperation under the PCT, namely, trust in the work and decisions taken by other Offices during the international phase, considered that it was essential that the decisions of receiving Offices should be binding on designated Offices in the circumstances provided for in Rules 49ter.1(a) and (b), except in very limited circumstances where there was a

particular doubt that a requirement had been complied with. Consistency in the standards to be applied was desirable and might be pursued through the Administrative Instructions, Receiving Office Guidelines and sharing of relevant decisions, with the result that consistency would be encouraged while enabling each receiving Office to deal with matters using procedures familiar to it.

26. A representative of users was concerned that the term “reasonable in the circumstances” was not sufficiently certain as a time limit for filing a declaration or other supporting evidence. A minimum period of one month would be preferred. It was pointed out that Rule 14(6)(b)(i) of the PLT, on which this Rule was based, did not include a specific minimum time limit.

Rule 26bis.3(e)

27. One delegation asked whether the requirement that the applicant should have the opportunity to make observations would enable a formal hearing to be conducted and whether it should be possible to appeal decisions to the national courts. Another delegation considered that since the receiving Office’s negative decision can always be reviewed by the designated Office, there was no need to provide for an appeal. The Secretariat pointed out that the PCT was in general silent on these matters. The availability of hearings and appeals was neither required nor precluded by the Treaty; rather, the matter was left to national law.

Rule 26bis.3(h)

28. Two delegations and one representative of users questioned the need for a transitional reservation provision under Rule 26bis.3(h), referring, in particular, to the wording of Article 10. However, other delegations pointed to the need for such a transitional reservation provision so as to afford time for the provisions of the applicable national law, such as those enabling the Office to require the payment of a fee for restoration of the right of priority, to be adapted to the new system.

29. In response to a comment by one delegation that a three month period may be insufficient for Contracting States wishing to make use of transitional reservation provisions, the Secretariat noted that this was the period that had usually been provided for in such transitional reservations when included in the Regulations in the past. Another delegation noted that such reservations would need to be made before entry into force of the provisions concerned.

Rule 48.2(a)(ix)

30. In response to a query by one delegation, the International Bureau explained that, since the list of contents of the pamphlet under Rule 48.2 was comprehensive, information concerning a priority claim which had been considered void was included in Rule 48.2(a)(ix) even though such information was also referred to Rule 26bis.2(d).

Rule 48.2(b)(v)

31. The Chair noted that Rule 48.2(b)(v) should refer to Rule 26bis.2(d) rather than Rule 26bis.2(c).

Rule 49ter.1(a) and (b)

32. Following a query by one delegation as to whether it was possible for a national law to provide for the restoration of the right of priority based on a criterion more favorable than the “unintentionality” criterion, as referred to in the Comment on Rule 49ter.1(b), another delegation suggested that, in practice, an Office would necessarily also accept, under such national law, decisions by a receiving Office based on the criterion of “unintentionality” and that the Comment was thus unnecessary. Another delegation suggested that a reference to more favorable requirements should be included in Rule 49ter.1(b) for consistency with Rule 49ter.2(e).

33. One delegation suggested that, with a view to avoiding the need for transitional reservations under Rule 49ter.1(f) by States which did not wish to introduce provisions relating to the restoration of the right of priority into their national law, and to avoid an inequality between the provisions of Rule 49ter.1(a) and (b), Rule 49ter.1(a) should be restricted to any designated State whose applicable law provided for restoration of the right of priority based on the criterion of “due care”; alternatively, the words “whose applicable law provided for restoration of the right of priority based on that criterion” in Rule 49ter.1(b) should be deleted. That suggestion was opposed by one delegation. The Secretariat noted that, for consistency with the PLT, the proposal had been based on the general rule that Offices should provide for restoration of a right of priority on either the “due care” or the “unintentionality” criterion, any exception to that general rule being provided by way of transitional reservations.

Rule 49ter.1(c)

34. One delegation, supported by another, expressed the view that the reference in Rule 49ter.1(c) to the requirements applied under Rule 26bis.3 should be clarified so as to refer expressly to those procedural and substantive requirements for the restoration of the right of priority under Rule 26bis.3, non-compliance with which would have the consequences provided for in Rule 49ter.1(c). The delegation suggested that the relevant requirements were those set out in Rule 26bis.2(a)(i) and (ii) and the criterion applied by the receiving Office (“due care” or “unintentionality”).

Rule 49ter.1(f)

35. Following a query by a delegation as to the nature of the effects of a reservation made by a designated Office under Rule 49ter.1(f), the Secretariat explained that such a reservation would have both procedural and substantive effects. For example, there would be consequences both in terms of calculating the time limit for national phase entry before the designated Office concerned and in terms of the assessment of novelty and inventive step during the national search and examination. The Secretariat agreed that a Comment to that effect should be added to better clarify the effects of reservations under Rule 49ter.1(f).

36. Another delegation noted that the reference in Rule 49ter.1(f) to “the national law applied by the designated Office” did not appear to apply to “a court or any other competent organ” as in Rule 49ter.1(c). The Secretariat noted that the same national law would presumably be applied by the designated Office and the courts in the designated State, and that it might therefore be preferable in Rule 49ter.1(f) to refer to the national law applied by

the “designated State.” A representative of users noted that, in any event, the reference should be expressed so as to be clearly applicable in the case a designated Office which was a regional Office.

Rule 49ter.2

37. The Secretariat noted that comments made in respect of certain provisions of Rules 26bis.3 and 49ter.1 might also be relevant to corresponding provisions of Rule 49ter.2.

38. In response to a query by a delegation, the Secretariat explained that the purpose of Rule 49ter.2 was to enable an applicant to request restoration of the right of priority during the national phase in any of the following cases: where the applicant had not requested such restoration during the international phase; where the receiving Office had made a reservation under Rule 26bis.3(h) and thus the possibility of requesting restoration was not available during the international phase; where the receiving Office did not provide for restoration on the relevant criterion; or where the receiving Office had refused a request for restoration during the international phase.

39. In response to a query by another delegation, the Secretariat confirmed that it was intended to provide for the addition of priority claims only during the international phase (under Rule 26bis) and not during the national phase (unless such additions were possible under the national law itself), and the wording of proposed Rule 49ter.2 should be reviewed so as to ensure that it did not imply that such additions were enabled under the latter Rule.

Rule 49ter.2(g)

40. One delegation suggested that reservations under Rule 49ter.2(g) should apply to at least paragraph (f) in addition to paragraph (a).

41. The Secretariat explained that, although it was likely that a designated Office which made a reservation under Rule 49ter.1(f) would in practice also make one under Rule 49ter.2(g), there were circumstances in which a designated Office may need to make a reservation under only one of those Rules, for example, where its national law provided for restoration of the right of priority by the Office during the national procedure but did not put in place procedures enabling such restoration by it as a PCT receiving Office.

42. In response to a query by one delegation, the Secretariat agreed that proposed Rule 49ter.2(g) should be reviewed with a view to clarifying the basis of the calculation of the time limit referred to in that Rule, that is, whether the calculation should be on the basis of the priority date before or after restoration of the right of priority.

RECTIFICATIONS OF OBVIOUS MISTAKES

43. Discussions were based on document PCT/R/WG/6/3.

44. There was a clear divergence of views among delegations as to the cases and circumstances in which mistakes in international applications and related documents should be rectifiable under Rule 91.

45. After some discussion, the Working Group agreed that the Secretariat should further consider how to take this matter forward, taking into account the comments and

suggestions noted in the following paragraphs, preferably by making use of the PCT Reform and PCT/MIA electronic forums.

46. While there was some support for a liberal approach to the correction of obvious mistakes, several delegations considered that proposed amended Rule 91.1(c)(i) was too broad, feeling that mistakes which only became apparent as a result of a lengthy investigation were not appropriate for rectification under Rule 91.

47. One delegation suggested that only mistakes in the request and other documents related to the procedure, but not in the description, claims and drawings, should be rectifiable under Rule 91, noting that mistakes in the description, claims and drawings could be corrected by way of amendments under Articles 19 and 34. It suggested that, since only *obvious* mistakes were rectifiable under Rule 91, it was not necessary that rectifications be physically entered in the application documents in order for their meaning to be known. The delegation suggested that providing for rectifications in the description, claims and drawings added complexity and placed an unnecessary burden on examining staff. It considered that, if rectifications of obvious mistakes in the description, claims and drawings were to be permitted, they should be limited to typographical and clerical mistakes which could be disposed of by clerical staff.

48. A number of delegations and representatives of users pointed out that existing Rule 91 already permitted the rectification of obvious errors in the description, claims and drawings, and considered that it was in the interests of applicants, designated Offices (in particular smaller Offices) and third parties for any mistake, where rectifiable and noted at a sufficiently early stage, to be rectified by only one action in the international phase, thus having effect for the purposes of the procedure before all designated Offices. While some difficulties were seen with the current proposals, they represented an improvement on the current provisions, which were not clear enough to allow uniform interpretation.

49. One delegation questioned the relationship between Rule 91 and other Rules offering correction procedures in the case of particular kinds of mistakes (such as Rule 26*bis* with regard to the correction of priority claims), and suggested that the more general Rule (Rule 91) should not apply where a more specialized Rule providing for correction was available.

50. One delegation noted that the term “obvious” had a special connotation in connection with patent law, that is, in determining whether the invention involved an inventive step (see, for example, Article 33(1)), and suggested that it might be preferable to avoid use of that term in connection with the rectification of mistakes.

51. Opinions differed on the extent to which extrinsic documents (that is, documents other than the one in which the mistake occurred) should be able to be relied upon in support of a request for rectification. It was noted that the application of two tests was involved: (i) the recognition that there was indeed a mistake, and (ii) an assessment as to whether the proposed rectification was the only meaning which could have been intended. Most delegations which spoke on the matter considered that the fact that there was a mistake needed to be apparent on the face of the document containing the mistake, without referring to extrinsic documents, but a few delegation felt that extrinsic documents should be able to be considered at least in the case of mistakes in the request form. Some delegations considered that the question whether nothing else could have been intended than what is offered as rectification should also have to be answered without reference to extrinsic documents, but

others considered that extrinsic documents should be able to be relied upon, at least in certain cases.

52. Among those delegations which favored reliance on extrinsic documents, there was a divergence of views as to whether the list of such documents appearing in Rule 91.1(c)(ii) was appropriate for all situations and whether it should be seen as exhaustive. There was a widespread feeling that it would usually not be acceptable to refer to extrinsic documents in relation to mistakes in the description, claims and drawings. Some delegations considered that the kind of documents which should be accepted as evidence relating to a mistake should be determined by the competent authority, depending on the facts of the particular case. Others felt that documents already on the file of the international application should always be able to be considered, although one delegation expressed concern that such an approach might lead to a large amount of background art being filed with the international application in the hope that it might later be useful for attempting to introduce changes in the application.

53. A number of delegations considered that it should be explicit in the Rule itself, rather than left to Guidelines, that a rectification was not permitted to go beyond the disclosure in the international application as filed. One delegation considered that this should be expressed as a limitation of the legal consequences of a rectification rather than as a component of the test for whether a mistake was obvious and thus rectifiable. It was noted that it may be necessary for a designated Office to have before it, when considering this issue, the application papers both as filed and as rectified.

54. One representative of users expressed the view that the priority document, being a clearly established document of record referred to in the request, should be able to be taken into account in deciding whether there was a rectifiable mistake in the international application. While there was some support for this view, particularly in relation to mistakes which had been introduced by errors in translation, most delegations which spoke on the matter considered that the description, claims and drawings should be viewed on their face in deciding whether there was a clear mistake. It was noted that a remedy in some cases might be available by way of provisions relating to “missing parts” (see documents PCT/R/WG/6/4 and 4 Add.1).

55. There was wide agreement that the current wording providing that “anyone” would need to “immediately” recognize that nothing else could have been intended was incapable of literal application and should be reviewed. A number of delegations considered that reference should be made to “the competent authority” rather than to “anyone.” One delegation suggested that the notional reader in all cases should be an average person with no special skills, and specifically that the application of Rule 91 should not require the involvement of patent examiners. Other delegations felt that rectification of mistakes in the description, claims and drawings should be dealt with by reference to a “person skilled in the art” and that the involvement of patent examiners was essential in relation to such rectifications.

56. There were no objections to the notion of a single time limit for the requesting of rectifications (see proposed Rule 91.2(a)), but several delegations felt that 28 months from the priority date was too late to enable completion of all the necessary actions before the end of the international phase, noting, in particular, that the proposals envisaged the republication of the international application if the rectification of an obvious mistake was authorized after international publication.

57. There was doubt expressed as to whether there was any benefit in allowing rectification of obvious mistakes in the description, claims and drawings during Chapter II proceedings, since such rectifications could in such cases be achieved by way of amendments under Article 34. In this connection, one delegation suggested that the time limit for requesting rectifications might appropriately be aligned with that for filing a demand for international preliminary examination.

MISSING PARTS REQUIREMENTS

58. Discussions were based on documents PCT/R/WG/6/4 and 4 Add.1.

59. The Working Group was generally in favor of the proposals contained in the document and invited the Secretariat to prepare revised proposals, for consideration at the next session, taking into account the comments and suggestions set out in the following paragraphs.

60. While a number of questions remained to be addressed, the revised drafting of Rules 4.18 and 20 in document PCT/R/WG/6/4 Add.1 was in general preferred to that in document PCT/R/WG/6/4. The references to Rules 4.18 and 20 in the following paragraphs are thus to those Rules as they appear in document PCT/R/WG/6/4 Add.1.

Rules 4.18 and 20

61. Some delegations expressed the view that there was no basis in the Treaty itself for the incorporation by reference of a missing element or missing part of an international application and therefore believed that an amendment of the Treaty would be required in order to implement provisions of the kind envisaged.

62. One delegation expressed the view that, since incorporation by reference of a missing element under Rule 4.18 would be conditional on compliance with the requirements of Rule 20.5(a) and (b), the proposed provision was not compatible with Articles 11(2) and 14(2) since, “at the time of receipt” of the international application, the missing element was not incorporated in the international application. The legal fiction established by Rule 4.18, according to which the missing element would be considered to have been incorporated by reference *ab initio* in the international application only if the requirements of Rule 20.5(a) and (b) were subsequently complied with, would not be sufficient to overcome the delegation’s concerns. In that delegation’s view, it would be necessary for such incorporation by reference to be unconditional so as to comply with those Articles.

63. One delegation expressed concerns as to compatibility of the proposal with the Articles of the Treaty and noted that the issue of missing parts could be dealt with, so far as a designated State was concerned, by appropriate provisions in the national law. That delegation and others stated that, in the event that the proposals were to proceed by way of amendment of the Regulations, a transitional reservation for designated Offices would therefore be needed in addition to that proposed for receiving Offices.

64. In response to a query concerning Rule 4.18 as to whether the applicant would need to establish on the face of the application documents that something was missing from them before an incorporation by reference could be effective, two delegations suggested that Rule 4.18 should be interpreted broadly so as to enable the incorporation by reference of any part or element contained in the priority document concerned, without having to satisfy such a

test. One delegation pointed to Note 5.21 on PLT Article 5(6)(b) (filing date where missing part of description or drawing is filed), which referred to the question “whether, in a particular case, a missing part of the description or a missing drawing is completely contained in the earlier application.” Another delegation observed that there was no apparent policy reason for applying a strict interpretation of the provisions since the time frame was such that the missing part or element would always be included in the application as published, and there was no possibility of abuse since the relevant subject matter had to be contained in the earlier application.

65. A suggestion by a representative of users that it should be possible for the incorporation by reference of a missing part or element of an international application to be effected by acts taken in the national phase was opposed by several delegations. The International Bureau confirmed that the Comment on Rule 4.18 was not intended to imply such a possibility and should be modified accordingly.

66. In reply to a query by a delegation, the International Bureau explained that Rule 4.18 used the wording “The request *may* contain a statement ...” since it did not seem appropriate to require the applicant to include such a statement in all cases. A reference to the statement was required in Rule 4 since only contents listed in that Rule could be included in the request. In practice, however, it was envisaged that the request form would include a pre-printed statement under Rule 4.18.

67. In response to a query by a delegation, the Secretariat confirmed that, under Rule 20.5(a)(i) as proposed to be amended in document PCT/R/WG/6/4 Add.1, it was intended that, for the purposes of incorporation by reference, the priority claim must have been contained in the international application on the date on which one or more elements referred to in Article 11(1)(iii) were first received by the receiving Office.

IMPROVING THE QUALITY OF INTERNATIONAL SEARCHES

68. Discussions were based on document PCT/R/WG/6/9.

69. There was strong support from both delegations and representatives of users for the principle of allowing further searching to be carried out within the international phase in order to increase the amount of relevant prior art which was found. Representatives of users pointed out the difficulties, expense and additional work which were caused if additional prior art was brought to the applicant’s attention only during the national phase. Most delegations considered that the proposals would provide a useful way of reducing the number of low quality patents granted, although two delegations suggested that measures to improve the quality of the existing international search might be more appropriate, or at least that the desire for this measure demonstrated the need to consider the improvement of quality in addition. Some delegations emphasized the need to increase the confidence of designated and elected Offices in using, rather than repeating, work that had been carried out in the international phase.

70. The Working Group invited the Secretariat to prepare revised proposals, for consideration at its next session, taking into account the comments and suggestions set out in the following paragraphs.

71. Two delegations were concerned about whether it was appropriate to introduce the proposed supplementary search by way of amending the Regulations. In particular, one

delegation considered that allowing the international search to be carried out in more than one step was a major change which ought to be addressed by an amendment of the Treaty rather than of the Regulations. Another considered that Articles 15 to 17 referred to a single Authority performing the international search and wondered whether it was consistent with this to have portions of the international search performed by different Authorities. However, another delegation understood these provisions to require that an international search should be carried out on each international application, but in no way to specify that the whole of the international search process must be done by only one authority, or that the international search could not be divided between a main search and a supplementary search.

72. Most delegations were keen to ensure that a supplementary search should be a true complement to, rather than a duplication of, the main search. There was support for the principle that the supplementary search should be oriented primarily to finding disclosures in languages in which the supplementary Authority was specialized but which were not an official language of the main Authority. One delegation felt that a wider approach would be appropriate, taking into account that certain Authorities may have expertise in finding disclosures in particular areas outside the minimum documentation, in order to fill gaps which might exist in the main search. It was agreed that the scope of the supplementary search should be more clearly set out in the Regulations and/or the International Search and Preliminary Examination Guidelines.

73. One delegation noted that the main purpose of the suggested updating of the search during international preliminary examination was to find earlier patent applications which had not yet been published when the international search was carried out. It was suggested that this purpose might be achieved more efficiently by giving International Searching Authorities electronic access to the unpublished applications in other patent offices so that the relevance could be noted at the time of the original search.

74. One delegation expressed concern that the availability of extra searches might lead to a perception that cases in which the main search alone had been conducted were treated at a lower standard, but most delegations agreed that the supplementary search procedure should be available on an optional basis for applicants and for Authorities, which could choose whether to participate in it.

75. Many delegations and representatives of users felt that it would be preferable not to insist that applicants request supplementary searches at the time of filing but rather also to enable them to be requested after the results of the main search were available, for example, within one month of the establishment of the main search report. On the other hand, it was emphasized that the supplementary search procedure should fit in with the time limits for demanding international preliminary examination and for establishing the international preliminary report on patentability (whether under Chapter I or Chapter II), and that the new procedure should not have the effect of extending the international phase.

76. One delegation suggested that applicants should only be able to request supplementary searches as an alternative to demanding international preliminary examination, so that both procedures would not be available in a particular case. On the other hand, one representative of users suggested that supplementary searches should be made available only as part of the international preliminary examination procedure, which would need to be carried out by a different Office from that which had conducted the main international search.

77. A number of delegations expressed concern that the proposals would increase the workload of receiving Offices in collecting and processing extra search copies, issuing invitations for translations, receiving and forwarding translations, and processing supplementary search fees. One alternative would be to require requests for a supplementary search and related documentation to be sent directly to the Authority concerned. Another would be to provide for such requests to be sent to and processed by the International Bureau, which possibility might be particularly useful to the applicant where a number of supplementary searches were requested in respect of a single international application. One delegation expressed the hope that, if receiving Offices were to handle translations, they would choose not to impose fees for late receipt, which were considered an unnecessary burden on applicants.

78. One delegation representing a country with a small Office considered that the proposed supplementary search system would be highly beneficial to such Offices but, like some other delegations, was concerned at the likely high costs for applicants, particularly individual applicants, who wished to use it.

79. A number of delegations emphasized that the supplementary search system, to be feasible, would need to be simple to operate, and felt that the procedures presently proposed were too complicated. The system should be established in as simple a form as possible, allowing further options to be added later if they were found to be needed. For example, the question of unity of invention should not be dealt with in a way which merely mirrored that applicable to the main search. One possibility was that supplementary searches, particularly if requested at the time of filing the international application, might have to be limited to the invention first mentioned in the claims. Some delegations and representatives of users indicated, however, that it was desirable to allow applicants to specify which claims should be the subject of supplementary search, noting that a more complete search in the international phase of all the inventions which it is desired to pursue would enable suitable amendments to be made before entering the national phase, avoiding the need to pursue amendments separately before a number of different designated Offices.

80. One delegation expressed the view that that the supplementary search should not involve the preparation of a written opinion by the search examiner. However, other delegations and representatives of users believed that an explanation of the relevance of citations discovered in the supplementary search would be necessary, particularly since it was likely that those citations would be in a language which would not be well understood by the applicant, the International Preliminary Examining Authority and some designated Offices.

81. Some delegations expressed concern that it would be impossible to eliminate duplication between the main search and any supplementary search. However, most delegations felt that, by defining the scope of the supplementary search carefully, such duplication could be minimized. Some delegations and representatives of users stated that, in any case, the possible duplication was no more than that which currently occurred when a designated Office repeated work that had already been done in the international phase, and that the amount of work involved overall should in fact be reduced if a more complete search was undertaken during the international phase, making it more likely that suitable amendments would be made before national phase entry.

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

82. Discussions were based on document PCT/R/WG/6/11.

83. The Delegation of Switzerland introduced the document, noting that it was intended not to modify or replace but rather to complement the proposals by Switzerland presented to the previous session in document PCT/R/WG/5/11 by submitting additional comments on different aspects of the proposals, such as the use of certain terms, the concept of the term “source” used in the proposals, the scope of the obligation to declare the source of genetic resources, and the possible legal sanctions for failure to disclose or wrongful disclosure of the source. The Delegation expressed its hope that, taking into account the additional comments it had made, the Working Group would be able to enter into a more substantive discussion of the proposals. The Delegation explained that the proposed amendments to the Regulations were intended to increase transparency in the context of access to genetic resources and traditional knowledge and the fair and equitable sharing of benefits arising out of their utilization, and to provide a simple and practical way forward which could be introduced in a timely manner.

84. The Delegation of Ireland, speaking on behalf of the European Community (EC) and its Member States, stated that the EC and its Member States would continue their active and constructive participation in discussions on the issue related to the origin of genetic resources and associated traditional knowledge in patent applications in various international forums, such as WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), the TRIPs Council and the Convention on Biological Diversity (CBD). The EC and its Member States would soon present to the IGC a concrete, balanced and effective proposal concerning the possible introduction of a system concerning the disclosure requirement, which should positively support the achievement of the objective of the CBD while, at the same time, not placing an unreasonable burden upon patent Offices and patent applicants.

85. The Delegation further considered that WIPO as the specialized UN agency responsible for the protection of intellectual property worldwide would be, from a technical viewpoint, the most suitable forum for tackling the issues of patent disclosure requirements relevant to genetic resources and traditional knowledge, that the proposals by Switzerland could help to increase transparency with regard to genetic resources and traditional knowledge, and that they could be coordinated with the future work undertaken, especially in the IGC. Accordingly, it urged the Working Group to have a substantial discussion on the proposals by Switzerland.

86. The Delegation of Brazil expressed the view that effective measures were urgently required within the patent system to prevent misappropriation of genetic resources and traditional knowledge and to support the objectives and implementation of the CBD. The Delegation noted that it was appreciative of the clarifications offered in respect of the policy objectives of Switzerland’s proposals, particularly of the aim of allowing the providers of genetic resources and traditional knowledge to verify whether the inventor and/or applicant had complied with prior informed consent and whether fair and equitable benefit sharing had been provided for. It noted, however, that, in order to effectively tackle “biopiracy,” the actual effects of merely enabling national laws to require disclosure of origin in patent

applications would be rather limited. To be truly effective, a requirement for disclosure of origin and prior informed consent would have to be a mandatory one, to be applied by patent authorities in all countries.

87. The Delegation of Brazil further stated that, while it appreciated Switzerland's comments on the definition of the term "source," it was concerned that too broad a definition would ultimately render the disclosure of origin requirement meaningless and ineffective in improving the substantive examination of patent applications and in ensuring compliance with prior informed consent and benefit sharing. Furthermore, if the aim was to ensure respect for prior informed consent and benefit sharing, patent Offices, in addition to requiring the disclosure of the origin of the genetic resources, should also ask applicants to provide information that would attest to their compliance with the national access and benefit sharing laws of the countries where the said resources were obtained. Such a requirement would be reasonable in that no entity interested in legally accessing the genetic resources under the sovereign jurisdiction of a State should have difficulty complying with it.

88. The Delegation of Brazil also expressed its concern as to whether, in establishing the relationship between traditional knowledge and the claimed invention that may trigger a disclosure requirement, the criterion of "conscious derivation" would be enough to give sufficient security to the custodians of associated traditional knowledge. The Delegation feared that such a criterion could become a convenient means for circumventing prior informed consent. Moreover, in order to ensure that the disclosure of origin mechanism would be truly effective, and that patent applicants would not be rewarded in any way for violating the source countries' laws on access and benefit sharing, disclosure of origin should be a necessary condition for the granting of patent rights. Failure to comply with the requirement should be sanctioned with the non-granting of the patents or their revocation in cases where such patents had been wrongly granted.

89. The Delegation of Egypt, speaking on behalf of the African Group, expressed its appreciation to the Delegation of Switzerland for its proposals and for the additional comments it presented to this session of the Working Group. In the Delegation's view, these proposals reflected the acknowledgment that the protection of genetic resources and traditional knowledge against misappropriation must be addressed in patent related legal instruments and, in particular, by introducing the necessary changes to those instruments so as to ensure that they provided for the declaration of source of genetic resources and traditional knowledge. However, in the Delegation's opinion, although the proposals represented a positive step, they did not match all of the African Group's expectations, in particular, in relation to making the declaration of origin mandatory as it was left to the discretion of national patent legislation. The proposals thus fell short of the comprehensive solution envisaged. In addition, the proposals only addressed inventions which were "directly based" on genetic resources. This might be too restrictive as an approach. The Delegation made reference to the African Group's own proposals, in different fora, including those relating to a mandatory disclosure of origin in order to effectively combat misappropriation of genetic resources and traditional knowledge as well as ensuring prior informed consent and equitable benefit sharing.

90. The Delegation of Algeria supported the position expressed by the Delegation of Egypt on behalf of the African Group.

91. The views expressed by the Delegations of Brazil and Egypt were generally supported by the Delegations of China, India, Indonesia, the Islamic Republic of Iran, Kenya and South Africa.

92. The Delegation of China suggested that the Working Group should discuss the issue more deeply so as to incorporate the proposal into the PCT system and to formulate the operational framework as fast as possible.

93. The Delegation of the Islamic Republic of Iran welcomed, as a positive step, the proposals by the Delegation of Switzerland concerning the declaration of the source of genetic resources and traditional knowledge in patent applications. It expressed the view that the matter required further consideration, including of the way in which traditional knowledge was taken into account in the context of patent laws, and that discussions should continue in parallel in different international forums and in particular in the IGC. The Delegation further stated that, if the necessity of a disclosure requirement was accepted, the provision of sufficient legal sanctions in the case of non-compliance with that requirement should be mandatory.

94. The Delegation of the United States of America noted that, although Switzerland had added clarity to the proposal, certain important concepts, such as the definition of traditional knowledge, remained unclear. The Delegation expressed its concern as to the substance of the proposal itself, noting that it would not achieve its stated goals of achieving timely solutions to access to genetic resources and traditional knowledge as well as the sharing of the benefits derived from such access. Rather, the proposal would sanction provisions in national laws to deny patent rights and challenge granted patents under prescribed circumstances, which would increase litigation, create a disincentive for innovation, and reduce any benefits that may be shared. The Delegation could thus not support the proposal.

95. The Delegation of the United States of America noted that Switzerland compared its proposal to disclosure requirements which were based upon fundamental principles of patent law or required as a practical matter to facilitate patent examination, but in the Delegation's view the disclosure requirement proposed by Switzerland was directed to matters falling outside patent laws such as access and benefit sharing. The Delegation expressed the view that patent laws were not the appropriate means for addressing matters of misappropriation of genetic resources and traditional knowledge, or other matters of general misconduct. Such thinking might lead States to attempt to advance other non-patent related goals, such as a tax reporting requirement, through the patent laws. The Delegation urged the creation of effective national systems of access and benefit sharing with respect to genetic resources and traditional knowledge which were independent from intellectual property laws, such as the access and benefit sharing regime currently in place at national parks in the United States of America, which it viewed as being the most effective way to ensure that benefits were shared with respect to inventions developed from genetic resources or traditional knowledge. Any disclosure requirement in the patent laws would be likely to delay or create uncertainties in patent rights from which benefits might arise, the result of which would be to harm incentives for innovation by undermining the patent system. Without patent rights, there would be little or no benefits to share.

96. The Delegation of the United States of America expressed its view that the IGC would be the most appropriate forum for discussion of the matters at hand and should, under its renewed mandate, continue its important and fundamental work, in particular, finalizing its work on definitions relevant to the establishment of any access and benefit sharing regime.

97. The Delegation of Japan referred to the risk that a decision to amend the PCT Regulations as proposed by Switzerland could prejudice the outcome of discussions in the IGC. The Delegation also noted that a change of the PCT Regulations would not provide a comprehensive solution of the matter since applications for an invention that involved access to genetic resources or traditional knowledge could be filed nationally instead of under the PCT, and that the issue should therefore be discussed in the IGC. The Delegation expressed the view that requiring a declaration of the source of genetic resources would neither be relevant to patentability nor useful for search; rather, it would be meaningless and distort the patent system. Furthermore, requiring prior informed consent would lead to a burden for the applicant, contrary to one of the objectives of PCT reform, namely, simplification of the PCT system.

98. The Delegation of India expressed its concern about the argument that patent laws were not the appropriate means for addressing matters of misappropriation of genetic resources and associated traditional knowledge but that such matters should be dealt with under criminal or other laws. The Delegation noted the existence of cross-linkages between laws in very different fields. For example, in the context of money laundering, there were cross-linkages between laws in different fields. Similarly, drug marketing approval authorities in certain countries were required to deny approval if the product was under a patent owned by a third person. The Delegation stated that, unless patent laws were accepted as being at the top of a kind of hierarchy in which other laws were subordinate to patent laws, it could not accept the argument that non-compliance with a disclosure requirement related to the origin of genetic resources and traditional knowledge could only be addressed under other laws but not within the framework of patent laws.

99. The Delegations of Algeria, Kenya and South Africa opposed the suggestion in the proposal by Switzerland that, if it were discovered after the granting of the patent that the applicant had failed to comply with the disclosure, the failure to disclose should not be a ground for revocation or invalidation of the granted patent except in the case of fraudulent intent. On the contrary, those Delegations considered that the fact that the applicant did not comply with the disclosure requirement would constitute a reason for the granted patent to be declared void or to be revoked.

100. The Representative of the EPI suggested that the appropriate sanction should depend on whether the disclosure requirement was considered to be a requirement as to substance, in which case the PCT would not be the appropriate forum to discuss the matter, or a requirement as to form and contents, in which case the failure to disclose should not be a ground for revocation or invalidation of the granted patent, except in the case of fraudulent intent, and suggested that this general question should be further considered by the IGC.

101. The Delegation of Norway reported that Norway had recently introduced a disclosure requirement into its national patent law and that non-compliance with that requirement was subject to sanctions in respect of false statements but that the requirement was not a condition of patentability.

102. The Representative of the ABA and the AIPLA expressed the view that the matter of disclosure was essentially a trade issue and should not be dealt with under patent law.

103. The Delegation of Australia, supported by the Delegation of the United States of America, stated that, although it was prepared to discuss disclosure requirements in the

Working Group, this could only usefully be done after the basic issues involved had been resolved in the IGC.

104. The Delegations of Algeria, Brazil, Egypt, India and South Africa were of the view that the matter should be considered by the Working Group, in parallel with discussions in other fora of WIPO, noting particularly that the WIPO General Assembly had expressly renewed the mandate of the IGC “without prejudice to work pursued in other fora.” The Delegation of Brazil, furthermore, expressed its concern with the lack of consensus within WIPO with regard to the appropriate forum to discuss matters related to disclosure and other genetic resources related issues. The Delegation of Brazil also stated its understanding that these were relevant matters to be discussed at least in the IGC, the SCP and the Working Group.

105. The Chair invited discussion of the proposed amendments of the Regulations contained in Switzerland’s proposal. While some delegations expressed the desire that the Working Group enter upon a detailed discussion of the proposed amendments, other delegations expressed the view that a detailed discussion would not be productive at this time.

106. The Delegation of Switzerland thanked the Working Group for the consideration given to its proposal and, noting the clear divergence of opinions, stated that it would attempt to reconcile the different views expressed in a further document to be submitted to the Working Group for discussion at its next session.

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

SINGLE REQUEST FOR THE RECORDING OF CHANGES DURING THE NATIONAL PHASE

108. Discussions were based on document PCT/R/WG/6/10.

109. There was considerable support in the Working Group for further consideration of the concept of permitting requests to be made centrally for the recording of certain changes in respect of international applications which have entered the national phase, noting the significant consequential benefits that would accrue if greater communication resulted in common formats and easier access to patent data for information and statistical purposes.

110. The Working Group invited the Secretariat to prepare revised proposals for consideration at the next session, taking into account the comments and suggestions set out in the following paragraphs.

111. Some delegations expressed concern as to the legal basis in the Treaty for making Rules for procedures extending well into the national phase of processing of international applications. Some delegations felt that the regulation-making power in Article 58(1)(ii) was not a sufficient basis to establish procedures for which there was no general basis in the substantive Articles of the Treaty. Other delegations, however, felt that there was an adequate basis, noting, in particular, that the proposals were consistent with the aims of the Treaty as expressed in the preamble and were in no way inconsistent with any specific provision of the Treaty.

112. Some delegations noted that the Treaty in general governed procedures only to the end of the international phase, whereas, after national phase entry, the application became subject solely to national law. Concerns were expressed that introducing such a system might have

consequential effects on the way in which other provisions in the Regulations were interpreted.

113. Other delegations pointed out that the international and national phases were not distinctly defined by the Treaty or Regulations, and that, in fact, certain features of the Treaty dealt specifically with matters obtaining long after the international phase was over. Those features included the fundamental principle that an international application has, for the purposes of the national law in all designated States, the effect of a regular national application having as its filing date the international filing date accorded under the Treaty (see Article 11). Other such features related to the provision of information (see Article 50), and the prohibition on requirements relating to the form or contents being applied to the application additional to those provided for in the Treaty and Regulations (see Article 27(1)).

114. Some delegations were of the view that the proposed system should only be applied in respect of changes concerning pending applications but should not apply to changes concerning granted patents.

115. It was generally agreed, as was proposed, that any such system should be limited, at least at the outset, to changes in the name and address of applicants, agents and inventors, noting that it would be difficult to achieve agreement at this stage on the kind of evidence which should be required for other kinds of matter.

116. A number of delegations were concerned that the proposed system would not be compatible with national laws which require the applicant to notify changes directly to the designated Office in a particular manner and with prescribed kinds of evidence, particularly in the case of a change of name. Moreover, it was noted that dealing with fees might pose difficulties. Consequently, it was felt that participation in any system would need to be on a voluntary basis for designated Offices or subject to transitional reservation provisions, although it was pointed out that the usefulness of the system would be considerably less if a significant number of Offices were to opt out of it.

117. One delegation expressed its concern that it would be too difficult to incorporate the proposed new system into established national procedures and that the new system would consequently result in greater, rather than less, work in designated Offices. It was noted, however, that certain checks would be carried out centrally by the International Bureau rather than the designated Offices concerned, meaning that there ought rarely to be any action required by designated Offices other than the recording itself. Other delegations considered that such a system ought to be very beneficial and should be considered further, even if it would imply changes to established national laws and systems.

118. One representative of users suggested that, since local agents needed to be informed about any changes concerning international applications which had entered the national phase, almost the same amount of work would be involved for the applicant as under the current system. The representative also expressed concern about the reliability of the new system in case of different applicants for different designated States or in case of multiple divisional applications divided from an international application which had entered the national phase, and suggested that a central register of ownership details would be desirable.

119. Delegations were generally content with the proposal that the applicant's request to the International Bureau could be made in either English or French, but some expressed the view that the communication from the International Bureau to the designated Office would need to

be in a language accepted by the Office. It was noted that this difficulty would be largely overcome by use of forms using standard language which could be translated into several languages. Delegations of two Contracting States whose official languages used alphabets other than the Latin alphabet stressed the need for translations.

120. One delegation expressed the view that, even if the applicant could make a request for recording of a change centrally to the International Bureau, each designated Office ought to notify the applicant when the change had actually been made.

121. Some delegations stated that, in order for such a system to work reliably, appropriate information technology systems would be needed both at the International Bureau and at the designated Offices. One delegation suggested that the proposal might be premature in that the International Bureau had not yet completed its systems for processing PCT applications in electronic form in the international phase. A delegation from a developing country considered that technical assistance would be required in some cases to ensure that Offices had the necessary capacity to handle electronic files.

National Phase Entry

122. One delegation inquired as to progress that had been made towards the related matter of centralized information on the entry of international applications into the national phase in different designated Offices (a matter on which the Office of the PCT as well as WIPO's Standing Committee on Information Technologies were working). The Secretariat informed the Working Group that preliminary discussions had taken place with a number of Offices which were known to maintain records allowing international applications in the national phase to be identified by means of their international application or publication number. The Secretariat was in the process of identifying common factors between the systems in those Offices and intended to extend the investigations to a larger group of Offices, with the aim of developing possible recommendations to Offices concerning record-keeping in order to allow the necessary information to be collected.

ASPECTS OF COPYRIGHT AND OTHER RIGHTS IN NON-PATENT LITERATURE MADE AVAILABLE BY INTELLECTUAL PROPERTY OFFICES

123. At previous sessions, the Working Group had considered copyright issues raised by the international search and international preliminary examination procedure, in particular, the possibility that the making and sending, by the International Searching Authority, of copies of documents cited in the international search report, as provided by Article 20(3) and Rule 44.3, could involve copyright infringement, in particular where it involved non-patent literature and the first digitization of a document (see document PCT/R/WG/5/5).

124. The Working Group had agreed at its fifth session "that, in order to ensure discussion of the issues at hand by both patent and copyright experts, the matter should be referred to WIPO's Standing Committee on Copyright and Related Rights (SCCR) with a view to establishing a joint (virtual) task force open to all parties invited to participate in the Working Group and the SCCR. It was envisaged that the task force would operate mainly using an electronic forum and that it be coordinated by the International Bureau. The task force would be asked to prepare a report for consideration by both the Working Group and the SCCR." (See document PCT/R/WG/5/13, paragraph 146.)

125. The Secretariat informed the Working Group that, upon further consideration, it appeared that the establishment of such a task force would be unlikely to resolve the issues that had been identified. The Secretariat accordingly suggested that it would be best for the matter to be further discussed among the International Authorities with a view, in particular, to exploring possible solutions based on existing exceptions to copyright and related rights protection contained in the Berne Convention for the Protection of Literary and Artistic Works. Any progress in relation to the issue could then be reported to the Working Group.

126. The Working Group agreed with the suggestion of the Secretariat mentioned in paragraph 125, above.

FURNISHING OF SEQUENCE LISTINGS FOR SEARCH AND EXAMINATION

127. Discussions were based on document PCT/R/WG/6/2.

128. The Working Group approved the proposed amendments of the Regulations set out in the Annex to document PCT/R/WG/6/2 with a view to their submission to the Assembly in September 2004, subject to the further amendments appearing in the following paragraphs and to possible further drafting changes to be made by the International Bureau.

Rule 13ter

129. The Working Group agreed that Rule 13ter.1(a) to (c) should be further amended to read as follows:

“13ter.1 Procedure Before the International Searching Authority

(a) Where the international application contains disclosure of one or more nucleotide and/or amino acid sequences, the International Searching Authority may invite the applicant to furnish to it, for the purposes of the international search, a sequence listing in electronic form complying with the standard provided for in the Administrative Instructions, unless such listing in electronic form is already available to it in a form and manner acceptable to it, and to pay to it, where applicable, the late furnishing fee referred to in paragraph (c), within a time limit fixed in the invitation.

(b) Where at least part of the international application is filed on paper and the International Searching Authority finds that the description does not comply with Rule 5.2(a), it may invite the applicant to furnish, for the purposes of the international search, a sequence listing in paper form complying with the standard provided for in the Administrative Instructions, unless such listing in paper form is already available to it in a form and manner acceptable to it, whether or not the furnishing of a sequence listing in electronic form is invited under paragraph (a), and to pay to it, where applicable, the late furnishing fee referred to in paragraph (c), within a time limit fixed in the invitation.

(c) The furnishing of a sequence listing in response to an invitation under paragraph (a) or (b) may be subjected by the International Searching Authority to the payment to it, for its own benefit, of a late furnishing fee whose amount shall be determined by the International Searching Authority but shall not exceed 25% of the international filing fee referred to in item 1 of the Schedule of Fees, not taking into account any fee for each sheet of the international application in excess of 30 sheets,

provided that a late furnishing fee may be required under either paragraph (a) or (b) but not both.”

130. The Working Group agreed that Rule 13*ter*.2 should be further amended to read as follows:

“13*ter*.2 *Procedure Before the International Preliminary Examining Authority*

Rule 13*ter*.1 shall apply *mutatis mutandis* to the procedure before the International Preliminary Examining Authority.”

Rule 23

131. The Working Group agreed that Rule 23.1(c) should be further amended to read as follows:

“(c) Any sequence listing in electronic form which is furnished for the purposes of Rule 13*ter* but submitted to the receiving Office instead of the International Searching Authority shall be promptly transmitted by that Office to that Authority.”

SIGNATURE REQUIREMENTS

132. Discussions were based on document PCT/R/WG/6/6.

133. The Working Group invited the Secretariat to prepare revised proposals, for consideration at the next session, taking into account the comments and suggestions set out in the following paragraphs.

Signature Requirements for Withdrawals

134. The proposed amendments of the Regulations in respect of signature requirements for withdrawals were welcomed by one delegation and one representative of users.

135. Three delegations opposed the proposed amendments in respect of signature requirements for withdrawals for a variety of reasons. One view expressed was that the requirements and procedures for signature of documents should not vary at different stages of the processing of applications. The view was also expressed that there was no reason for departing from the approach of the Working Group agreed at its second session that the signatures of all co-applicants should be required for withdrawals. Another concern was that the notification procedure proposed under Rule 90*bis*.5(c) would impose additional burdens and workloads on Offices, as well as adding complexity to the procedures.

136. One delegation, supported by two representatives of users, suggested that it would be helpful to applicants and offices if provision were made in the request form, in the form of a check-box enabling the applicant to withdraw the designation of one or more States, thus avoiding certain problems arising from the recently implemented automatic and all-inclusive designation system, in particular in respect of States with “self-designation” provisions in their national laws, such as Japan, and the inventorship requirements in designating the United States of America. Another representative of users also noted that such a possibility could be used to avoid problems arising, in particular in the United States of America, from certain recent court decisions, or in order to comply with the terms of licensing agreements.

The Secretariat recalled the objectives of the new designation system and noted that to allow, in effect, for the exclusion of certain designations in the request form would constitute a substantial dilution of those objectives, which had been at the forefront when the Assembly decided to adopt the new system; rather, consideration should be given to addressing the difficulties by adjustments of national law.

Signature Requirements for Correspondence

137. The proposed changes in respect of signature requirements for correspondence (see proposed amended Rule 92.1) were welcomed by two delegations and one representative of users. Another delegation questioned whether the proposed changes achieved the stated objectives or were even needed since, where there was no common agent or appointed common representative, the signature of the “deemed” common representative (see Rule 90.2(b)) would be sufficient.

INTERNATIONAL PUBLICATION IN MULTIPLE LANGUAGES

138. Discussions were based on document PCT/R/WG/6/8.

139. The Working Group invited the Secretariat to prepare revised proposals, for consideration at its next session, taking into account the comments and suggestions set out in the following paragraphs.

140. One delegation confirmed that the proposal as presently drafted would achieve its primary objective of establishing prior art effect of the international application concerned under its national law. In view of this confirmation, the proposal was supported by two other delegations. One of those emphasized, however, the need to discuss a possible revision of Article 64(4) at some stage in the future.

141. One delegation and one representative of users, while welcoming the proposals in relation to the question of prior art effect, stated that the effects of international publication in an additional language other than those relating to prior art effect ought to be further examined and kept in mind as further proposals were developed. Such other effects included, for example, the affording of “provisional protection” to published applications (see Article 29).

142. One representative of users suggested that international publication in additional languages should not be restricted to languages of publication under the PCT, that there should be a longer time limit for submitting translations for publication, that additional language versions should be published only in electronic form as documents downloadable from the Internet, and that the fee for publication should vary depending on the particular electronic format in which a translation was provided.

143. One representative of users, while not opposed to the proposals *per se*, expressed concern that publication of international applications in multiple languages was out of line with one of the basic aims of the Treaty, namely, to give effect under multiple national laws to an international application filed in a single language. The representative suggested that the additional costs involved would deter most applicants from using the proposed system, and that the underlying issue concerning the prior art effect of published international applications should be dealt with in the context of the consideration by WIPO’s Standing Committee on the Law of Patents of a proposed Substantive Patent Law Treaty.

PCT REFORM: FAST TRACK

144. Discussions were based on proposals by the European Patent Office in document PCT/R/WG/6/7.

145. Several delegations expressed opposition to the proposed creation of a drafting sub-committee, noting that the Working Group had already been set up to permit a more efficient and faster discussion of proposals than was possible in the Committee on Reform of the PCT (“the Committee”) itself. Those delegations stressed the importance of having oral discussions by all Contracting States which wished to attend before any proposal was put to the Assembly. It was pointed out that there was already a degree of flexibility among members of the Working Group in that it had not been considered necessary in all cases to refer issues back to the Committee before proposed amendments were submitted to the Assembly.

146. Moreover, those delegations noted that it would, in any case, be extremely difficult to agree upon the composition of a smaller sub-committee, and stated that it would be undesirable to concentrate discussion in such a group since it would reduce Contracting States’ understanding of proposed changes, deprive the discussion of potential alternative insights, and reduce the acceptance of the results which emerged. It was also noted that it was not always easy to identify in advance whether matters were purely technical in nature or whether they gave rise to issues of more political importance.

147. There was general support for more effective use of the electronic forum for resolving drafting matters in advance of meetings, but several delegations emphasized that this should not become the primary means of debate, noting particularly the difficulty for some interested States to be effectively involved given their limited resources.

148. The Chair concluded that there had been no support for the proposal in document PCT/R/WG/6/7. Noting the general agreement in the Working Group on the usefulness of the electronic forum, he encouraged all delegations to make greater use of that forum in future.³

WORK PROGRAM

149. The Working Group agreed that the present summary by the Chair, together with the summary of the fifth session, should be submitted to the Assembly at its next session, to be held in September-October 2004, to inform the Assembly of the progress that had been made on the matters referred by the Assembly to the Working Group at its previous session in September-October 2003 (see document PCT/A/32/8, paragraph 20).

150. The Working Group agreed to recommend to the Assembly that, subject to the availability of sufficient funds:

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

(i) two sessions of the Working Group should be convened between the September 2004 and September 2005 sessions of the Assembly to consider proposals for reform of the PCT including, in particular, the matters mentioned above, on the understanding that the Committee could also be convened during that period if the Working Group felt it to be necessary; and

(ii) financial assistance allocated to enable certain delegations to attend sessions of the Committee should, exceptionally, also be made available, in the measure possible, for those sessions of the Working Group.

OTHER MATTERS

151. The Working Group noted with great pleasure the announcement by the Delegation of Brazil that Brazil's notification of incompatibility with the modifications of the time limits fixed in Article 22(1) had been withdrawn.

152. Following the announcement from the chair by Mr. Siep de Vries of his impending retirement, the Working Group and the Secretariat expressed their thanks to Mr. De Vries for his valuable contribution over many years to the development of the PCT system and wished him all the best for the years to come.

NEXT SESSION

153. The International Bureau indicated that the seventh session of the Working Group was tentatively scheduled for either the week of November 22 to 26, 2004, or that of November 29 to December 3, 2004.

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

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/
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[Fin de l'annexe et du document/
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