

## **Standing Committee on the Law of Patents**

### **Fifteenth Session**

**Geneva, October 11 to 15, 2010**

### **DRAFT REPORT**

*prepared by the Secretariat*

### **INTRODUCTION**

1. The Standing Committee on the Law of Patents (“the Committee” or “the SCP”) held its fifteenth session in Geneva from October 11 to 15, 2010.
2. The following States members of WIPO and/or the Paris Union were represented: Albania, Angola, Argentina, Australia, Austria, Azerbaijan, Barbados, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Brazil, Burkina Faso, Cambodia, Canada, Chile, China, Colombia, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Germany, Guatemala, Guinea, Haiti, Hungary, India, Iran (Islamic Republic of), Iraq, Ireland, Japan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Lithuania, Malaysia, Malta, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Oman, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Serbia, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Yemen, Zambia and Zimbabwe (86).
3. Representatives of the Eurasian Patent Office (EAPO), the European Commission (EC), the European Patent Office (EPO), South Centre (SC) and the World Trade Organization (WTO) took part in the meeting in an observer capacity (5).

4. Representatives of the following non-governmental organizations took part in the meeting in an observer capacity: American Intellectual Property Law Association (AIPLA), Asian Patent Attorneys Association (APAA), Centre for International Intellectual Property Studies (CEIPI), Chartered Institute of Patent Attorneys (CIPA), Civil Society Coalition (CSC), CropLife International (CropLife), European Committee for Interoperable Systems (ECIS), European Law Students' Association (ELSA International), Free Software Foundation Europe (FSFE), Fundação Getulio Vargas (FGV), German Association for Industrial Property and Copyright Law (GRUR), Institute for Trade Standards and Sustainable Development, Inc. (ITSSD), Institute of Professional Representatives before the European Patent Office (EPI), Intellectual Property Institute of Canada (IPIC), 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), Japan Patent Attorneys Association (JPAA), Knowledge Ecology International, Inc. (KEI), Latin American Association of Pharmaceutical Industries (ALIFAR), Médecins sans Frontières (MSF), Third World Network (TWN) and Union of European Practitioners in Industrial Property (UNION) (25).
5. The list of participants is contained in the Annex to this report.
6. The following documents prepared by the Secretariat had been submitted to the SCP prior to the session: "Status of Work Relating to the Non-Exhaustive List of Issues Agreed by the Standing Committee on the Law of Patents (SCP)" (SCP/15/INF/2), "Standing Committee on the Law of Patents (SCP): Status of Discussions, Suggestions and Proposals" (SCP/15/INF/3), "Draft Agenda" (SCP/15/1 Prov.), "Report on the International Patent System: Revised Annex II of document SCP/12/3 Rev.2" (SCP/15/2), "Addendum to the Report on the International Patent System: Revised Annex II of document SCP/12/3 Rev. 2" (SCP/15/2 Add.), "Experts' Study on Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights" (SCP/15/3), "Corrigendum of Documents: SCP/13/3 and 4 and SCP/14/2, 3 and 5" (SCP/15/4), and "Addendum to Corrigendum of Documents: SCP/13/3 and 4, and SCP/14/2, 3 and 5" (SCP/15/4 Add.).
7. In addition, the following documents prepared by the Secretariat were also considered by the Committee: "Report on the International Patent System" (SCP/12/3 Rev.2), "Addendum to the Report on the International Patent System" (SCP/12/3 Rev.2 Add.), "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), "The Client-Patent Advisor Privilege" (SCP/14/2), "Technical Solutions to Improve Access to, and Dissemination of, Patent Information" (SCP/14/3), "Transfer of Technology" (SCP/14/4), "Opposition Systems" (SCP/14/5) and "Proposal from Brazil" (SCP/14/7).
8. 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**

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

### **Agenda item 2: Adoption of the draft agenda**

10. The SCP adopted the draft agenda (document SCP/15/1 Prov.) as proposed, with the inclusion of new documents SCP/15/2 Add., SCP/15/4 and SCP/15/4 Add., and of a presentation by Professor Lionel Bently on the experts' study on exclusions, exceptions and limitations. In the Spanish version, a reference to document SCP/14/7 was added under item 5(b).

### **Agenda item 3: Adoption of the draft report of the fourteenth session**

11. The Committee adopted the draft report of its fourteenth session (document SCP/14/10 Prov.1) as proposed.

### **Agenda item 4: Report on the international patent system**

12. Discussions were based on documents SCP/15/2, SCP/15/2 Add. and SCP/12/3 Rev.2.
13. The Chair noted that the Report on the International Patent System was an open-ended document on which comments could be made. No delegation made comments on documents SCP/12/3 Rev.2, SCP/15/2 and SCP/15/2 Add.
14. The SCP agreed that document SCP/12/3 Rev.2 would remain open for further discussion at the next session of the SCP. Document SCP/15/2 will be updated based on the comments received from Member States.

## **GENERAL DECLARATIONS**

15. The Delegation of Brazil, speaking on behalf of the Development Agenda Group (DAG), assured delegations of their full support for a successful session of the SCP. The Delegation noted that, as explained in the DAG guiding principles, circulated as an official document of the Committee on Development and Intellectual Property (CDIP), the platform of the Group was centered on the need for incorporating the development of nations in all areas of WIPO's work. The Delegation stated that the agenda of the SCP session was a busy one reflecting development, which was largely positive in the overall deliberations of the SCP over the past few years. The Delegation welcomed the fact that the Committee had not only numerous preliminary studies to examine and take action on, but also proposals for a work program tabled by member countries. In its view, since March 2009, the SCP had provided an invaluable forum for discussions on a number of patent law related issues of interest to all members of WIPO, including some of clear importance to developing countries such as (i) exclusions, exceptions and limitations; (ii) the interface between transfer of technology and the patent system; (iii) patents and standards; and (iv) anti-competitive practices. The Delegation considered that the debate at the SCP had allowed for an extremely useful exchange of views on different aspects of patent law that had a direct bearing on how developing countries should

calibrate their national models of patent law taking into account their specific social and economic realities, leaving behind the process the dogma that granting patents and enforcing them would necessarily foster or lead to innovation. The Delegation noted that reaching an agreed work program continued to be desirable for the SCP. To that end, the Delegation considered that the Committee should gradually move towards identifying broad areas of common interests and start focusing on those areas. In its view, two elements were of vital importance in trying to reach an agreement on a work program of the SCP. First, discussions at the SCP should never lose sight of the fundamental trade-off at the root of the patent system. It considered that patents were a temporary waiver of competition rules by which government authorities granted investors exclusive rights for the economic exploitation of their innovation. The availability of the technical details of the innovation was an essential element of the trade-off balancing the interest of the inventor and those of society at large. The Delegation stated that one of the major tasks of the SCP was precisely to make sure that the two elements of the trade-off were not off-balance. Second, the thematic approach of the studies and discussions should not be seen as an end in itself. The Delegation was of the view that, while it was a first and possibly necessary step to understand better the specifics of all the issues involved, discussions on different aspects of patent law would have to progressively converge and eventually become integrated into clusters of elements of a common work program. The Delegation stated that the DAG was not proposing any degree of harmonization of substantive patent law, but rather, simply restating the fact that there was a clearly-established inter-connectedness among different clusters of topics in patent law. The Delegation stressed the importance of all studies submitted to the SCP, whether they were prepared by the Secretariat or commissioned to external experts, to be of high quality and balanced. Its major concern was that all studies should adequately reflect development considerations. Given the significance of those studies and the rich and substantive discussions in the Committee, the Delegation requested that comments and suggestions made by various members of the Committee on each study be collated separately under an addendum document with reference to each study. The Delegation considered that cross-referencing each study to the comments of Member States would allow a deeper appreciation of the contents of the studies, better understanding of the issue, and more efficient contribution to the objective behind the exercise of undertaking those studies. The Delegation further requested the Secretariat to keep the studies open for comments by Member States and other stakeholders. Further, referring to the decision taken at the twelfth session of the SCP, the Delegation expressed its hope that the non-exhaustive list of issues remained non-exhaustive and open to proposals for inclusions of subjects that were agreed to by all members. The Delegation considered that, for the purpose of mainstreaming the Development Agenda Recommendations into the substantive work, debate and studies in the SCP were indispensable ingredients for progress to be made. It recalled that the SCP was the first body at WIPO that met after the conclusion of the Assemblies during which Member States had approved a coordination mechanism and monitoring, assessing and reporting modalities for the implementation of the Development Agenda. Referring to one of the provisions concerning the approved coordination mechanism, which stated “to instruct the relevant WIPO bodies to include in their annual report to the Assemblies, a description of their contribution to the implementation of the respective Development Agenda Recommendation”, the Delegation considered that the Committee should, as soon as possible, start discussing how the SCP implement such reporting to the Assemblies. The Delegation suggested that the Chair consult informally with different groups on how best to report to the Assemblies or, alternatively, to allocate some time during plenary sessions for a discussion on the reporting process. The Delegation was of the opinion that Member States should express their views on that matter. In that connection, the Delegation thanked the Secretariat for providing the Committee with document SCP/15/INF/2 on the status of work relating to the non-exhaustive list of issues agreed by

the SCP and their connection with the Development Agenda Recommendations. The Delegation stated that that document provided useful information that might be used in the process of reporting to the Assemblies. The Delegation, however, noted that the document was a factual information sheet that reflected neither quality assessment nor any decisions by members of the SCP. Therefore, the Delegation considered that that document should not be taken in any way as an indication of how the Development Agenda was being implemented in the SCP. In its view, the implementation of the Development Agenda demanded the SCP to approach its work in a manner supportive of development, preserving the need for policy space within national patent legislations for development strategies and goals. Therefore, the Delegation expressed its belief that the reporting of the SCP to the Assemblies on the implementation of the Development Agenda would have to take the views of Member States on board, even if they happened to diverge. The idea was not necessarily that Member States should agree on the contents of the reporting, but rather that their views be incorporated into it. In its view, the best way to accomplish that was in a Summary by the Chair. The Delegation expressed its hope to discuss those proposals during the course of the current and the following sessions of the SCP. It considered that the Committee needed an agenda item dedicated to that matter during the SCP session that would precede the Assemblies in 2011. Recalling a proposal for a work program on exceptions and limitations by the Delegation of Brazil presented at the previous session of the SCP held in January 2010, and the decision of the Committee at that session that the proposal would be considered again at the fifteenth session of the Committee under agenda item 5(b), the Delegation stated that the DAG fully endorsed that proposal. It expressed its hope that the proposal would be approved during the current session so that the Committee could start implementing it immediately. In its view, there was no reason to wait any longer. The Delegation noted that it would express more detailed views under the appropriate agenda item on how it intended to proceed with the proposal which had received widespread support at the previous session, and which constituted a practical and empirical way to continue advancing work on exceptions and limitations. Regarding future work, the Delegation considered that, in addition to the proposal by the Delegation of Brazil, the Committee could make progress regarding all issues contained in the non-exhaustive list as well as others.

16. The Delegation of Angola, speaking on behalf of the African Group, welcomed the study on exclusions from patentable subject matter and exceptions and limitations to the rights commissioned to a group of academic experts from various regions, focused on issues suggested by members, such as, public health, education, research and experimentation and patentability of life forms, including from a public policies, socio-economic development perspective, bearing in mind the level of economic development. The Delegation further noted that the non-exhaustive list of issues took into account the social and economic reality, different levels of development and differences between national legal systems of countries. The Delegation expressed its belief that the patent system should play a central role in the areas of public interest and public policies related to development, education, health, environment, climate change and food security. With respect to the exclusions from patentable subject matter and exceptions and limitations to the rights, the Delegation welcomed the proposal made by the Delegation of Brazil, which pertained to very important issues and presented an opportunity to set up a work plan with three phases, but reserved its right to come back to the proposal later during that session. In principle, the Delegation did not have any objection to the proposal, and stated that it remained engaged to contribute in a constructive manner in order to improve the proposal. Regarding the issue of client-attorney privilege, the Delegation stressed the importance of clarifying the concepts and definitions relating to the client-attorney privilege in different countries and their implication, noting the existing differences between common law countries and civil law countries. The Delegation stated that it

sought clarification as to whether the countries that had introduced such privilege had based themselves on their own legal/judicial system. Due to the territorial nature of patents, the Delegation was of the view that the privilege issue regarding patents was a matter to be addressed at the national level, and that the possible actions at the international level could contribute to bringing ideas and instituting a dialog so that national activities in that area could be strengthened. In that light, the Delegation expressed its support to the idea that the Secretariat would be engaged in further studies that would provide more analysis on the issue. Concerning the issue of dissemination of patent information, the Delegation noted that 30 per cent of national patent offices around the world had their patent collections available in paper form only, according to the statistic presented in document SCP/14/3. Therefore, the Delegation considered that technical assistance in capacity building for patent offices was important for improving access to, and dissemination of, patent information to the public in order to strengthen the capacity of patent offices, to promote research and development in business, to increase awareness of technological environment at the global level and to stimulate national innovation and investment in technology. The Delegation expressed the opinion that the lack of human and infrastructural capacity of patent offices from developing and least-developed countries (LDCs), including access to on-line databases, should also be addressed, and that further analysis on the topic needed to be carried out by the Secretariat. Regarding the issue of transfer of technology, the Delegation expressed the view that it was an important element of the cooperation between WIPO and developing countries and LDCs. The Delegation stated that transfer of technology should be user-friendly and development oriented. Recognizing the importance of document SCP/14/4 on transfer of technology, the Delegation suggested that the preliminary study be updated to include information on how developing countries could overcome the impediments in order to facilitate transfer of patented technology. In addition, the Delegation expressed its belief that capacity building was needed in order to benefit from the transfer of technology. The Delegation expressed its high expectation in relation to the transfer of technology to LDCs in Africa, with a view to implementing Article 66.2 of the TRIPS Agreement. The Delegation further considered that transfer of technology could take place in the forms of joint ventures, investment, capacity building, transferring hardware and knowhow and collaboration with academia. The Delegation stated that the preliminary study should be revised in a way that established a link between transfer of technology, development and intellectual property, and defined the role of the patent system in transfer of technology. In addition, the Delegation considered that the role of multilateral and bilateral agreements on transfer of technology should be examined, and that discussions on how the patent system could affect and support transfer of technology should be held. Regarding the issue of opposition systems, the Delegation stressed the importance of leaving it to national authorities to define the appropriate system based on their national legal systems and domestic laws. The African Group expressed the view that the Committee's future work should be focused on themes of common interest which would meet the developmental considerations. In that regard, the Delegation noted that the non-exhaustive list of issues identified at the 12<sup>th</sup> session and updated at the 13<sup>th</sup> session of the SCP should remain open for further elaboration and discussions, and that any addition should be agreed by consensus. The Delegation requested that two new issues, namely, impacts of the patent system on developing countries and LDCs and patents and food security, be added to the non-exhaustive list. In addition, the Delegation proposed that a new preliminary study on patents and public health be prepared. Further, the Delegation noted that it would be useful for delegates to have a report of the Conference on IP and Public Policy Issues available in writing, and that a second conference on patents and public policy issues should be held in consultation with Member States.

17. The Delegation of Slovenia, speaking on behalf of the Central European and Baltic States, stated that its group remained committed to the ongoing work in the framework of the SCP and assured the Chair of its continuing support. The Delegation considered that the discussions which had been already started in the previous sessions of the SCP had highlighted the important issues relating to the wide range of relevant questions on the patent system as a whole. The Delegation expressed its conviction that, by addressing those issues, the Committee should be aiming at enhancing better access to patent information and ensuring a more efficient and user-friendly patent system. The Delegation stated that it was in favor of, and would work constructively in close cooperation with all members of the Committee towards, achieving a more harmonized international patent law that would bring benefits to all stakeholders. The Delegation expressed its willingness to promptly draft a balanced work program in order to enable the SCP to achieve its primary objectives.
18. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, reaffirmed its full commitment to the work of the SCP. It considered that the experts' study on exclusions from patentable subject matter and exceptions and limitations to the rights gave an excellent and comprehensive survey on the topic at the international, regional and national levels. The Delegation stressed the utmost importance of discussing those issues at the current session. Further, the Delegation expressed appreciation for the work that had been undertaken and looked forward to continuing in-depth discussions on the various issues on the agenda of the current session. Moreover, the Delegation reaffirmed its strong commitment to the international harmonization of patent law through the work of the SCP. The Delegation expressed its hope that a balanced work program could be established in a timely manner in order to achieve the objectives of the SCP. The Delegation called the attention of the Committee to the growing overlapping of work with other committees and working groups in WIPO, and requested that consideration be given to the objectives of each committee or working group before a particular subject be selected for further work.
19. The Delegation of Mexico, speaking on behalf of GRULAC, expressed its support to the work of the SCP, and reiterated its commitment to the progress made. In its view, efforts made by Member States and the Secretariat had created a necessary basis for understanding complex issues related to the international patent system, and the preliminary studies prepared by the Secretariat were a good point of departure for the debates at the Committee. As stated at the last Assemblies of WIPO, the Delegation attached great importance to a balanced work program for the SCP. The Delegation expressed the opinion that the proposal put forward by the Delegation of Brazil regarding exceptions and limitations to patent rights was a good basis for constructive discussions on the issue, which would enable the Committee to achieve a balanced patent system. The Delegation called on other regional groups to make progress toward tangible goals. It considered that the Committee needed to make progress on the topics put forward by the Chair, and by developing countries, and on the implementation of those topics.
20. The Delegation of Chile stated that the SCP needed to continue making progress on the substantive work and on drawing up a work program for the Committee. The Delegation considered that all delegates present in the room were aware of the differences that existed between different members when it came to the issue of patent rights. Nevertheless, one had to be clear that nobody would benefit if the SCP was not able to reach an agreement that would allow progress to be made on the issues raised. That was an error that had already been made in the past and that should not be repeated. The Delegation observed that such situation would not benefit those who wished to see greater flexibilities introduced, neither would it benefit those who thought that better harmonization and alignment was necessary. For that reason, the Delegation expressed

its hope to see, during the ongoing session of the SCP, the same constructive spirit as had been seen during the PCT Working Group and during the recent Assemblies so that the SCP's goal could be achieved. The Delegation noted that there were two items on the table to consider, one was the experts' study on exclusions to patentability and exceptions and limitations to the rights, and the other was a proposal by the Delegation of Brazil to set up an intersessional work plan. Without any prejudice to any comments the Delegation might make under the appropriate agenda items, the Delegation welcomed the proposal by the Delegation of Brazil, since it would allow the SCP to move forward constructively on some of the important issues contained on the non-exhaustive list of issues. The Delegation further stated that the majority of the members were aware of the importance of exclusions, exceptions and limitations to patent rights, and sufficient time had been allocated since the previous session of the Committee to carry out an in-depth analysis of the proposal. The Delegation therefore expressed its interest in discussing the proposal. At the same time, it stressed the importance of working on other issues on the non-exhaustive list, and invited interested Member States to present specific proposals, bearing in mind not just their own interest, but also the feasibility for the Committee to achieve a result. The Delegation noted that the SCP needed to have a horizontal methodology that would allow it to address the different areas of interest of the membership and set up a future agenda for work that would be balanced and that would allow it to make the best use of the time available and of the preliminary studies drawn up by the Secretariat on the issues included in the non-exhaustive list of issues, as well as on other issues that may be added in future discussions. The Delegation stated that the SCP needed to start its work on a mechanism for the Committee to report the implementation of the Recommendations of the Development Agenda to the General Assembly.

21. The Delegation of Ecuador expressed the need to maintain a balanced and open attitude to work in order to achieve the goals of the SCP. It shared the interest of working on the adoption of a coordination mechanism which would make effective the full implementation of the development dimension in the SCP, as was laid out in the Development Agenda. The Delegation reiterated its support to the Delegation of Brazil on its proposal on exceptions and limitations to patents, which included a process aimed at identifying exceptions and limitations in various legislations around the world and evaluating their effectiveness with respect to development. The Brazilian proposal was in line with Ecuador's point of view when it came to intellectual property rights. In addition, the Delegation expressed its interest in a new study on public health and patents, as proposed by the African Group.
22. The Delegation of Venezuela stated that, when considering the issue of patents, it was vital to recover the social goal of intellectual property which was to serve the interest of the whole, and not just the interest of the few or certain individuals, to facilitate a real social knowledge acquisition. The Delegation welcomed the proposal by the Delegation of Brazil, but reiterated what it had stated in the previous session of the SCP regarding paragraphs 13 and 14 of that proposal, which related to the WTO and the Doha Declaration on TRIPS and Public Health. In particular, the Delegation stated that there was a need for a revision and review of that system because the issue of responding to the needs of medicines and medical treatment in developing countries had still not been resolved. The system was a unique mechanism, aimed at providing responses to specific tailored needs, under which prices would be established unilaterally by the provider. However, the Delegation noted that there was only a single experience of using that system over the last few years. The Delegation stated that many developing countries would not agree with what was laid out in the TRIPS Agreement, which meant that they had not been able to reach agreements which had responded to the development need and the need to safeguard human rights related to the right to health,



a clean and healthy environment and food security, among other issues. Further, it stated that intellectual property was not an end in itself, but rather a means for technology transfer when it came to patents. However, in the Delegation's opinion, as history had shown otherwise, it was necessary to change the perspective in order to strengthen the system.

23. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Brazil on behalf of the DAG. The Delegation stated that the SCP should serve as a forum for developing the IP regime through providing guidance on the progressive international development of patent law. In its view, norm-setting activities in the SCP should move ahead and be balanced, dynamic, holistic and, more importantly, development-friendly. In that context, the Delegation stressed the importance of developing concrete solutions for the IP-related multifaceted challenges through setting up relevant guidelines and instruments in the SCP. The Delegation observed that, in order to realize all those aspirations, a flexible work program for the SCP that allowed for open discussion on a wide range of patent law related issues, including the inherent link between the patent agenda and public policy issues, should be devised. The Delegation welcomed the General Assembly's instruction to the WIPO bodies to include in their annual report the description of their contribution to the implementation of respective Development Agenda Recommendations in the framework of coordination mechanism and monitoring, assessing and reporting modalities. The Delegation noted that the General Assembly had also instructed the WIPO Bodies to identify the ways in which Development Agenda Recommendations were being mainstreamed in their work and had encouraged them to implement the Recommendations accordingly. In line with the General Assembly's instruction, the Delegation considered that the SCP should explore the ways in which the patent system could contribute to development in a manner conducive to social and economic welfare of Member States. The Delegation noted that the clear instructions given by the General Assembly should guide the SCP in developing a proper work program in which development concerns would constitute an inalienable element for the work program. Furthermore, the SCP should determine an effective methodology for reporting on the SCP's contributions to the mainstreaming of development. In order to fulfill the General Assembly's instruction in a proper manner, it would be necessary to have a permanent agenda item in all SCP meetings to discuss the interface of patents with development. The Delegation welcomed the initiative of the Secretariat to develop a cross-cutting and unified methodology for a reporting mechanism for all Committees. Such a mechanism should reflect the contributions of different Committees to development as well as the views and concerns of Member States regarding their expectation on mainstreaming the Development Agenda in all areas of WIPO's work. The Delegation was looking forward to discussing different proposals for the reporting methodology in the SCP. It stressed the importance that each Committee adopted its own reporting system to the General Assembly on the Development Agenda implementation. The Delegation expressed its appreciation for more balanced studies in which development consideration had been more adequately reflected. It considered that the studies should ensure high quality with due attention to development requirement of different countries, and should not provide a unified prescription for all. In its view, in the course of deliberations, there would be a possibility of identifying areas of common interest which could ultimately be integrated in the work program of the SCP.
24. The Delegation of South Africa expressed support for the statements made by the Delegation of Angola on behalf of the African Group and by the Delegation of Brazil on behalf of the DAG. The Delegation reiterated its position on the importance of a balanced approach between intellectual property rights and public use. In that regard, it commented on the three issues presented in the work of the Committee which it considered particularly important, namely, exception and limitations, transfer of

technology and dissemination of patent information. Underlining the importance of the issue of exceptions and limitations for South Africa, the Delegation stated that the key to success in dealing with the issue was to take into account the different levels of development of Member States and to consider how countries could utilize the exceptions and limitations in their respective countries. The Delegation noted with appreciation the study commissioned to external experts on exclusions from patentable subject matter and exceptions and limitations to the rights. Further, it supported the proposal of the Delegation of Brazil on exceptions and limitations to patent rights as contained in document SCP/14/7. In its view, the proposal resonated well its position of approaching the issue of the exceptions and limitations on intellectual property rights in a holistic manner. The Delegation also welcomed the fact that the proposal by Brazil provided a three-phase approach in dealing with the issue of exceptions and limitations in a systematic and focused manner, and it was looking forward to discussing that proposal and to developing a future work program for its immediate implementation. The Delegation noted that the issues of transfer of technology and dissemination of patent information were also of high priority to its country in the context of building capacity at the national level and that, therefore, it appreciated the preliminary studies prepared on those issues. The Delegation expressed its hope that the Committee would continue intensifying its work in those areas with the view of bringing out the socio-economic and development dimensions. Referring to the adoption of the coordination mechanism in monitoring, assessing and reporting modalities of the Development Agenda at the 48<sup>th</sup> Assemblies, it supported the proposal of the Delegation of Brazil on behalf of the DAG concerning the inclusion of an agenda item on those issues in the future agenda of the SCP. In its view, that would ensure that the Development Agenda was properly mainstreamed in the work of all WIPO Bodies. The Delegation was confident that the Committee would find a solution for its future work in the spirit of the WIPO strategic objectives to foster the development of the patent system in a balanced way to the benefit of all Member States, especially for developing countries, by giving due consideration to the Development Agenda.

25. The Delegation of the Plurinational State of Bolivia aligned itself with the statement made by the Delegation of Mexico on behalf GRULAC, and stated that the study prepared by the external experts on exceptions, limitations and exclusions showed the degree of complexity of the various issues covered. It underlined that intellectual property was not an end in itself but rather a tool to boost and foster development. In order to make the tool useful, particularly for developing countries, the Delegation considered that a set of requirements was needed to be fulfilled, such as to be balanced, not equally applicable to all but adapted to different levels of development and to particular interest and needs of members. The Delegation stated that it was particularly interested in the studies relating to the non-patentability of life forms, biotechnology, public health as well as the issue of transfer of technology. With respect to the external experts' study, it noted that not all parts of the study had been translated into Spanish, and therefore, the comments to be made by the Delegation were of a preliminary nature, as in-depth analysis in the capital was still being made. It further noted that when the documents were available in the working language of its country, the Delegation would be able to provide more pertinent contributions to the debate. Consequently, the Delegation requested to maintain the possibility of discussing the study on exclusions, exceptions and limitations at the sixteenth session of the SCP. In concluding, the Delegation supported the proposal made by the Delegation of Brazil on behalf of the DAG that the comments made by members be presented as an addendum to the studies.
26. The Delegation of Brazil, in reply to the Chair's plea for suggestions on how the reporting of the Development Agenda Recommendations should be discussed, expressed the view that the SCP should start discussing as soon as possible how it should report to the

General Assembly on the implementation of the Development Agenda. The Delegation suggested that informal consultations be held on that question, or some time be allocated during the plenary session for the discussion of the reporting process. In its view, Member States should be able to express their views on that matter. The Delegation stated that the reporting process would entail that the SCP would dedicate time in one of the two sessions before the General Assembly to discuss and share views on how the SCP was mainstreaming the Development Agenda in its activities. The Delegation reiterated that, an agenda item on the reporting process should be included in the sixteenth session of the SCP. It considered that such exercise should be open, and the report should reflect the different views of Member States on the issue, even if they happened to diverge. It explained that the idea was not necessarily that Member countries should agree on the content of the reporting, but rather that their views be incorporated. In its opinion, an agreement on how the reporting process would be conducted could be reflected in the Chair's summary of that session.

27. The Delegation of India aligned itself with the statement made by the Delegation of Brazil on behalf of the DAG, and expressed its satisfaction that the Committee had identified a range of important issues concerning the international patent system under the non-exhaustive list of issues, and had carefully deliberated analytical studies on some of them. The Delegation expressed its belief that those papers had served as a good basis for discussions of Member States' various stakeholders, and had enhanced the collective understanding and appreciation of those important and complex issues. The Delegation recalled that several Member States, including India, had made constructive suggestions and proposed follow-up actions to those studies in the previous SCP sessions. The Delegation noted that discussions on those papers had been substantive, valuable and illuminating and provided a fertile ground for the future work of the SCP. It expressed its hope that, in the current session, the Committee would be able to identify and agree upon a balanced work program on the basis of the suggestions and proposals made by Member States on those important and substantive studies. The Delegation thanked the Secretariat for commissioning a study to external experts on exclusions from patentable subject matter and exceptions and limitations to the rights. It noted that those issues were very important for India, since they had a direct relevance on promotion of public policies, access to knowledge, access to educational resources, public health goals, transfer of technology, and participation in the global knowledge economy. In its view, those issues were also significant to other developing countries that were at a critical stage of development. The Delegation reiterated its support to the proposal presented on exceptions and limitations by the Delegation of Brazil, and fully endorsed the steps proposed in paragraphs 25, 26 and 27 of document SCP/14/7. It expressed its belief that the next steps proposed in Brazil's proposal would contribute to advancing meaningfully the deliberations on that issue in the SCP, and therefore, expressed its hope that Member States would agree to the proposal as an element of a concrete work program under the agenda item on future work. The Delegation noted some factual inaccuracies found in some of the studies in reflecting the legislative and institutional framework in India. In view of the significance of those studies and substantive discussions in the Committee on those documents, the Delegation requested that comments and suggestions that had been made by various members of the SCP on each study be collected separately under an addendum document. In its view, cross-referencing the study to the comments of Member States would allow a deeper appreciation of the content of the study and a full understanding of Member States' perspectives on the issue. The Delegation noted that such an approach would more effectively contribute to the objective behind the exercise of undertaking the studies, namely, enabling a better and more comprehensive understanding of those important issues. Further, the Delegation recalled that a mechanism to ensure effective mainstreaming of the Development Agenda with all areas of WIPO's work had been adopted at the 48<sup>th</sup> session

of the Assemblies of WIPO. Since the SCP was the first Committee to meet after the Assemblies, the Delegation looked forward to productive discussions on how to operationalize the modalities of reporting to the General Assembly on the mainstreaming of the Development Agenda in the SCP and other WIPO committees. In that regard, it echoed the views expressed by the Delegation of Brazil as the coordinator of the DAG in its statement. The Delegation stated that meaningful mainstreaming of the Development Agenda in all areas of WIPO's work was an objective to which India attached utmost importance, and therefore it was prepared to engage constructively in those discussions. The Delegation requested the Secretariat to keep the study open for comments by Member States and other stakeholders. In line with the decision taken at the 12<sup>th</sup> session of the SCP, it also expressed its hope that the non-exhaustive list of issues remained non-exhaustive and open to proposals with inclusions of subjects agreed to by all Member States.

28. The Delegation of Switzerland stated that it would continue to commit itself actively in the elaboration of a balanced framework for a work program for the SCP. The Delegation was convinced that the atmosphere of cooperation would continue to reign, and it expressed its interest in the various subjects on the agenda, in particular, the question of the client-attorney privilege and the question of opposition systems. It was convinced that the SCP would be in a position to provide further clarification on those issues and expressed its hope that sufficient time would be allocated to the discussion. Regarding the coordination mechanisms, the Delegation favored, as was indicated in the decision of the Assemblies, a pragmatic and flexible approach that should use the mechanisms already available. The Delegation observed that, for example, reports to the General Assembly with particular references to questions concerning the Development Agenda could be issued for that purpose. The Delegation therefore considered that it would not be necessary to have a specific or a standing item on the Committee's agenda dealing with that matter. The Delegation had understood that the Secretariat was about to prepare a document proposing a reporting process of the various Committees to the General Assembly in a horizontal manner, which would be interesting to see before taking any specific decisions. With respect to the coordination, the Delegation stressed the importance of taking into account the work carried out in the various Committees in order to avoid duplication of work.
29. The Delegation of Egypt expressed support for the statement made by the Delegation of Angola on behalf of the African Group, as well as for the statement made by the Delegation of Brazil on behalf of the DAG. The Delegation noted that, despite the importance of all preliminary studies being discussed in the Committee, the Delegation was mostly interested in the studies concerning exceptions and limitations and transfer of technology, as those two studies were directly related to developing countries and the Development Agenda Recommendations. With regard to exceptions and limitations, the Delegation stressed the importance of the proposal made by the Delegation of Brazil, which dealt with all aspects regarding exceptions and limitations in an objective and comprehensive manner. It noted that they were of importance not only to developing countries, but also to the community of users both in developed and developing countries. The Delegation noted that the study prepared on transfer of technology was related to the core of the benefits obtained by developing countries from the international system for the protection of patents. The Delegation also stressed the importance of having Member States look into the means of preparing a report by the SCP with regard to the implementation of the Development Agenda, to be presented at the next session of the General Assembly. It considered that the opinions available to Member States as to how to implement the Development Agenda should be fully reflected. The Delegation expressed its confidence that serious and in-depth discussion, as well as raising

questions on studies prepared, were the best way to achieve success in setting up a work program for the SCP.

30. The Delegation of Uruguay supported the statement made by the Delegation of Mexico on behalf of GRULAC. The Delegation stated that the document on exclusions from patentable subject matter and exceptions and limitation to the rights should remain open and, as had been proposed by some delegations, the comments of the Member States made on that document should be compiled in a complementary document. The Delegation further stated that the Development Agenda coordination mechanism was a subject which should be considered with the greatest caution by the Committee. In its view, such mechanism should be horizontal, flexible and effective for the implementation of its objectives. Referring to the proposal of the Delegation of Brazil on limitations and exceptions to patent rights made at the previous session of the SCP, the Delegation stated that the plan of work put forward in that proposal was concrete and could lead to a genuine and fruitful exchange of views on the topics related to development. While appreciating the study prepared by Professor Bently, the Delegation noted that there were some aspects that had not been dealt with or had been dealt inadequately, such as those related to compulsory licensing. The Delegation stated that the analysis of the issues presented in the study should take into account the realities and substantive differences of legislative systems of each country and the effect of those differences on development. In its view, those aspects were not developed sufficiently in the study. While underlining the importance of further analysis of the issue, the Delegation expressed its belief that countries should have the opportunity to propose the names of experts who could add a useful understanding to this topic. In conclusion, the Delegation underlined the effect of exclusions and exceptions upon research and development, investment, as well as the transfer of technology, and reiterated that the proposal of the Delegation of Brazil on limitations and exceptions to patent rights could answer those challenges and provide basis for finding solutions.
31. The Delegation of Burkina Faso supported the statement made by the Delegation of Angola on behalf of the African Group. The Delegation expressed its hope that the current session of the SCP would achieve positive results.
32. The Representative of ICC observed that the SCP was addressing several issues of great interest for the business community including exceptions and limitations, client-patent advisor privilege, patents and standards and technology transfer. The Representative stated that businesses were directly impacted on those issues in their daily operations and were keen to contribute their experiences and views on the practical implications of proposals being discussed. With respect to exceptions and limitations, the Representative noted that ICC had long maintained that patents were critical tools to provide an incentive and were rewarded for innovation and investment in R&D and future inventions. Thus, he urged caution in any moves at the national or international levels to broaden exclusions from patentability, and recommended addressing concerns about overreaching subject matter through more appropriate patent law provisions, such as inventive step, sufficiency of disclosure or limitations on infringement. In his view, it was important to keep in mind that the widespread use of compulsory licenses could lower judicial certainty and reduce the incentives to research. Instead, fostering frequent use of compulsory licensing might hinder access to critical products and technologies. Turning to the topic of client-patent advisor privilege, the Representative reiterated his belief that an international framework for the mutual respect of communications with legal advisers on intellectual property matters was needed. In his view, that would contribute to making the IP system more effective, clear and transparent and facilitate international trade and development. He observed that such an international instrument would provide the guarantee of confidentiality required for full and frank exchanges between the owners of

IPRs their respective IP advisers, allowing them to clearly understand their rights and guide their actions. With respect to standards, the Representative noted that companies sought to both harmonize their way in which goods and services were designed through standards and to gain part of the return on investment through patent protection. He expressed his belief that neither the international patent system nor its national implementation required changes to address concerns about patents and standards. Touching upon the topic of technology transfer, the Representative stated that the availability of economically feasible options to address global challenges, including health, environment and food security, would depend on the effective development, commercialization and widespread dissemination of existing technologies as well as new and currently non-commercialized technologies. In his opinion, the private sector had been, and would continue to be, responsible for the vast majority of investment and the development and diffusion of the new and improved technologies that would be essential to meet those challenges. The ability to amortize those investments and assure a return to those who supply the necessary capital was secured by intellectual property protection of the inventions that would result from the private sector research and development effort. The Representative noted that the patent system was to correct the under-provision of innovation due to free riders by providing innovators with limited exclusive rights to prevent others from exploiting their inventions, and thereby enabling the innovators to appropriate the returns on their investments. At the same time, the patent system required innovators to disclose fully their inventions to the public. He considered that those fundamental elements of the patent system played an important role on the dissemination of knowledge and the transfer of technology. In addition, he noted that open innovation was becoming an increasingly popular model for organizations working in complex technological fields. The Representative observed that intellectual property played a critical role in supporting open innovation, because it provided the legal certainty necessary for broader sharing of technical information and know-how. Patents in particular played an essential role in supporting collaboration and partnerships between different organizations involved in developing such technologies. The Representative concluded that in consideration of potential mechanisms to foster the transfer of technology, the SCP should carefully look into the practical impact of its decisions on innovative activity and not resort to notions that might jeopardize the essential role of patents by creating additional uncertainties for intellectual property owners.

33. The Representative of AIPPI stated that since the WIPO/AIPPI Conference on Client Privilege in Intellectual Property Professional Advice held in May 2008, the SCP had studied problems relating to the lack of protection against forcible disclosure of IP advice. In his view, the SCP had made great progress in the study of the problems, but it had reached a crossroad. The Representative observed that, in order to achieve a practical outcome, the SCP first should study remedies, failure of which would force the SCP to challenge its own future in relation to that topic. The Representative noted that, from two preliminary studies and the discussions at the previous meetings, it was clear that client-patent advisor privilege (CAP) involved much more than privilege. The protection involved included professional secrecy combined with no discovery, and separately, a duty of confidentiality which was respected and enforced. Privilege and confidentiality involved rights or duties that applied to the client and duties that applied to the professional, whereas professional secrecy was an obligation imposed on professionals. The Representative observed that the positive outcome of the previous sessions of the SCP was that the issue of CAP was still on the agenda. He however expressed his frustration on the outcome that WIPO had no mandate from the SCP to do further work on it. The Representative observed that many IP NGOs had urged the delegates to begin the study of remedies in the previous session. In his view, the SCP's work had previously established the following points: the protection existed in nearly every country

but it was often inadequate; where the protection existed, there was a problem with protection being lost when advice was transmitted between countries; the intended beneficial effect of national law which provided the protection was compromised when the protection was lost. The Representative observed that the problem of the loss of protection was not capable of being solved except by an international arrangement. He stated that with the rise of the new professions of non-lawyer patent attorneys, non-lawyer trademark attorneys and those who gave advice in relation to IP generally, applicants for intellectual property rights, both in developing and developed countries, were unable to tell the truth to their advisors for fear of disclosure of what they had said. The Representative noted that any country which did not support further efforts by the SCP to resolve the loss of protection was in effect acting contrary to the law of the country itself. The Representative remarked that, without studying the effects of the issues rightly raised by some delegates, any conclusion as to whether the issues raised were positive or negative, was at best a guess. AIPPI's policy had been, and remained to be, working in cooperation with WIPO as a preference and priority. In his opinion, it was also preferable not to be challenged by negative factors of bargaining, delay and lack of authority, which could only be fixed by delegates and their governments. The Representative reported that AIPPI had conducted a survey of its own members by a questionnaire and had obtained information from 48 countries which was extremely valuable to the study of remedies. The Representative stated that the information had been analyzed thoroughly by AIPPI, and at the Congress of AIPPI in Paris the previous week, it had been resolved by AIPPI that resources should be made available to WIPO for the purposes of WIPO assisting the Member States in their study of remedies. It had also been resolved to urge the Member States of WIPO to mandate the Secretariat to conduct necessary studies to identify remedies to the problems of the protection and to define a preferred solution from the options for remedies.

34. The Representative of ITSSD noted that the Report on the International Patent System and other documents as well as discussions with Professor Bently made it clear that there was a presumption of market failure that required a remedy and that the preferred remedy was government intervention in almost all cases. He observed that one of the interesting issues about the Development Agenda was that it focused on issues which were probably more the reason of market failure, or in that case, the government failure. He considered that if there was a market failure and if there was not enough information and transparency to have a willing buyer and a willing seller engaged in private transactions that did not exploit the public interest, most certainly, it was because of lack of capacity at the national level in many of the DAG countries in terms of education, technical training, basic infrastructure and knowledge of the market and how to commercialize basic research and development results. He observed that the SCP had not discussed the role of the commercialization of a basic invention in bringing the invention to the market place so that the public may enjoy the fruits of labors and ingenuity that went into the invention. In his opinion, the Development Agenda was misplaced and much of the work that needed to be done to create greater capacity in those countries should be taken up by the CDIP with liaison to the SCP. The Representative understood that that was an extension of the Millennium Development Goals and an extension of bringing development to WIPO. However, he observed that, according to some studies, rule of law-based enabling environments adding capacity building level had promoted innovation, invention and commercialization at the market level to bring high technologies to the market place so that consumers could acquire them. Such dissemination of information within patents and even within trade secrets which were not otherwise disclosed was a public objective. The Representative further observed that studies had shown that foreign direct investment catering to knowledge development was attracted by legal and economic certainties created by laws and by treatment of private property rights, which did not necessarily indicate an extreme

neoliberal economic view point. He expressed his wish that the Secretariat and delegations took that into account before they enacted government solutions to perceived problems, which might create worse problems than anticipated.

35. The Representative of CEIPI supported the work on exclusions, exceptions and limitations and also the work on client-attorney privilege to be further undertaken at the SCP.
36. The Representative of GRUR continued to believe that the issue of the client-attorney privilege and the protection of confidential information exchanged between patent attorneys and their clients should be maintained on the agenda of the Committee. He noted that the assimilation of the legal status of patent attorneys with that of attorneys-at-law was an ambitious goal, but which could be attained, as demonstrated by the example of the German legal situation. In his view, the equal status of patent attorneys and attorneys-at-law regarding the protection of secrecy should be recognized and confirmed through a binding international instrument open to all Member States of WIPO. It would be an essential contribution to bridging the gap between common law and civil law countries. The Representative noted that the important role of the patent attorney professions for a well functioning of the patent system should be acknowledged by all Member States of WIPO, and in particular, by all members of the PCT Union. The Representative found the study on exclusions, limitations and exceptions prepared by external experts very informative and inspiring, and stated that its general message, i.e., to leave the actual exclusions as they were and to concentrate the Committee's attention on the exceptions and limitations to the rights, deserved further reflections and discussions. The Representative further stated that it would certainly be in the interest of developing countries to explore the flexibilities offered under the general terms of Article 30 of the TRIPS Agreement. He saw a clear borderline between the interpretation and application of Article 30 on the one hand, and the law on compulsory licensing having its source in Article 31 of the TRIPS Agreement on the other. He considered that the discussion on access to essential medicines for the sake of solving endemic health problems in developing countries and the final amendments to the TRIPS Agreement adopted in August 2005, based on Article 31, had clearly demonstrated the limits of an extensive interpretation of the flexibilities contained in Article 30 of the TRIPS Agreement. In his view, it was not sensible to explore that way anew. In addition, the Representative observed that the experts' study had overlooked the harmonizing effect of the Strasbourg Convention of 1963 on the unification of some fundamental concepts of patent law. Already in Article 2 of that Convention which had served as a basis and reference for the European Patent Convention (EPC), the *ordre public* and morality exclusions and the exclusion for plant and animal varieties were found. The Representative remarked that, in addition, the harmonizing effect of the Community Patent Convention (CPC) was based on expressed political commitments of the member countries of EPC to harmonize their national laws on the basis of the Strasbourg Convention, the PCT, the EPC and the CPC. In addition, he pointed out that the study on biotechnological inventions did not mention the effort of WIPO to establish some common rules and approaches to the protection of biotechnological inventions which had led to the so-called suggestive solutions adopted in 1988 or 1989. They had served as a basis for the first proposal of the European Parliament and Council Directive on the Legal Protection of Biotechnological Inventions, not adopted by the Council of Ministers. The Representative was of the opinion that the studies had an understandable bias in favor of academic discussion. However, in his opinion, they did not sufficiently take into account the vast amount of information contained in public documents prepared by governments, national parliaments or institutions such as the European Parliament, for the sake of legislative procedure, and reflected only the results of the procedures as they appeared in the public gazettes. The Representative stressed the importance of understanding how the various



interests were voiced and taken into account during legislative procedures in the interest of a balanced outcome, for example, why the first proposal for the Directive on the Legal Protection of Biotechnological Inventions had failed and was not adopted by the Council of Ministers, and why the proposed Directive on the patentability of computer-implemented inventions was rejected by the European Parliament in spite of the strong support from the member countries. In his view, such information would be of great interest, in particular for developing countries.

37. The Representative of FSFE stated that the agenda included several items of great interest to the FSFE and the free software or open source community at large. Free software relied on licenses to give users the freedom to use, study, share and improve a program. Although those licenses in turn relied on copyright, the Representative noted that free software was fundamentally incompatible with patents on software. He observed that free software underpinned an economy worth some 50 billion dollars. It had come to be widely used not only in general purpose computers but even more so in devices such as cars, televisions and elevators. The Representative applauded the SCP for commissioning the study led by Professor Bently which provided a useful overview of a complex field and represented a starting point for future debates. He considered that FSFE could bring practical experience on that matter to the table, as it was a key participant in the collective effort to convince the European Parliament to reject the proposed Directive on the patentability of computer-implemented inventions in 2005. The Representative stated that contrary to the statement made by the Representative of ICC, the relation between standards and patents was a problematic issue which needed to be addressed by the SCP. In the area of software, the Representative observed that patents by themselves were already problematic enough and noted that, so-called reasonable and non-discriminatory (RAND) terms added to the problem by discriminating against companies which had based their business models on free software. The Representative further noted that a vast majority of those companies were small and medium-enterprises (SMEs) which formed the backbone of most economies around the world. In that scenario, inventors had already received an incentive in the form of a government granted monopoly on the invention. In his view, it should not be necessary to provide further incentives by handing them control over the markets by including their patents in a standard on their own terms. The Representative reminded those arguing against state intervention in the market for patents that a patent system in itself was an intervention of the state, limiting and directing the free flow of knowledge. He was looking forward to the discussions on exclusions from patentable subject matter and exceptions and limitations to the rights. His view was that, in the field of software, only exclusions provided the security which software companies needed and exceptions would not suffice. The Representative proposed the following three-steps for inclusion of a subject matter in the patent system: if a subject matter was to be included in the patent system there should be, first, a demonstrated market failure to provide innovation; second, demonstrated positive disclosure for patenting; and third, effectiveness of the patent system in the area to disseminate knowledge. He noted that software thus failed all three of those tests.
38. The Representative of KEI suggested that the Secretariat provide standardized disclosure of the professional consulting that various experts undertook, as in the practice of other bodies of the United Nations Organization and some academic journals. With regard to the study on exclusions from patentable subject matter and exceptions and limitations to the rights prepared by external experts and the enforcement of those rights, the Representative suggested that WIPO provide an opportunity for the general public to make online submissions on those topics and to make comments on the various parts of the study. While noting that the topic was complex and information provided in the study was useful, the Representative observed that, in some areas, the study could be further developed. In particular, he stated that the discussion of compulsory licensing in case of

patents in the United States of America did not address several areas where such licenses were available or mandatory to address certain public interest objectives. The Representative noted that while in the United States of America there was no general compulsory licensing statute of the type that was found in most countries, it did have a statute for granting compulsory licensing for patents on nuclear energy or for patented inventions used to implement government standards in the Clean Air Act. The Representative further stated that in 2006, the Supreme Court of the United States of America in its decision involving e-Bay, the on-line auction service, had held that injunctions in patents could only be issued if other remedies for infringements were rejected, including granting of compulsory licenses on infringing patents. Since 2006, the courts in the United States of America had issued a number of compulsory licenses on patents including the ones which had benefited Microsoft, Toyota, Direct TV, Johnsons & Johnson, Abott Laboratories, and other leading technology and manufacturing firms. The Representative reported that compulsory licenses had been granted at least four times in the past four years on various medical technologies following the e-Bay decision, including for purposes of exporting the compulsory licensed products to Europe. In the field of clean energy, the United States Energy Storage Competitiveness Act of 2007 created a system of compulsory licenses for energy storage technologies. The Representative further stated that in March 2010, the United States of America enacted the Affordable Health Care for America Act which, among other things, had created mandatory compulsory licenses on patents for biologics when the patent holder failed to make timely disclosures to generic competitors. He explained that the United States of America also made frequent use of compulsory licenses to remedy anti-competitive practices including for those relating to undisclosed patents on standards for gasoline or computer technologies. Finally, the Representative noted that the experts failed to distinguish between compulsory licenses that were granted under Part II of the TRIPS Agreement concerning patent rights and those granted under Part III concerning the remedies for infringement of those rights. The Representative observed that the most commonly used mechanisms for obtaining a compulsory license in the United States of America were those associated with Part III of the TRIPS Agreement, including in particular Article 44 of the Agreement. Noting that compulsory licenses under Article 44 of the TRIPS Agreement were not subject to restrictions provided in Articles 30 and 31 of the TRIPS Agreement, the Representative observed that that issue was not explored in the experts' study. In conclusion, the Representative informed the SCP that KEI was preparing an updated review of the experiences with respect to compulsory licenses of patents to be completed in November 2010.

39. The Representative of TWN pointed out that developing countries were struggling to implement the flexibilities available under the TRIPS patent regime. Noting that there were legal, institutional and policy difficulties in the implementation and actual use of the TRIPS flexibilities, the Representative urged the SCP to focus its work on empowering developing countries to overcome those difficulties. Towards that end, the first important step, according to the view of the Representative, was to anchor the SCP work on real situations and not on myths and propaganda. In his opinion, WIPO, and even SCP documents, accepted certain myths and propaganda on patents as it was without any interrogation. Quoting Annex I of the study, which stated that "Another objection is that a finding of unpatentability encourages secrecy. The exclusion of particular fields from patentability will inevitably prompt those operating in these fields to look for alternative mechanisms of protection", the Representative observed that the excerpt suggested that in the absence of patents the invention would remain a trade secret which, according to his view, was not true in the case of many technologies, especially pharmaceuticals, where the disclosure was compulsory to market the new product. The Representative urged the SCP that its work and deliberations should reflect the realities of the twenty-first century instead of assumptions framed in the nineteenth century and should contribute to

address the development concerns especially those spelt out in the United Nations Summit on the Millennium Development Goals (MDGs). The Representative quoted paragraph 78(u) of the MDGs Summit Outcome document which was adopted on September 22, 2010 which read: "Promoting the strategic role of science and technology, including information technology and innovation in areas relevant for the achievement of the Millennium Development Goals, in particular agricultural productivity, water management and sanitation, energy security and public health. The capacity for technological innovation needs to be greatly enhanced in developing countries, and there is an urgent need for the international community to facilitate the availability of environmentally sound technologies and corresponding know-how by promoting the development and dissemination of appropriate, affordable and sustainable technology, and the transfer of such technologies on mutually agreed terms, in order to strengthen national innovation and research and development capacity", the Representative urged WIPO and SCP to treat patents as a developmental issue, so that the work of the SCP focused on achieving the above-mentioned development needs. In order to achieve that objective, the critical technology base was required in developing countries. He further stated that since WIPO was not the right forum to rewrite the fundamental rules of international patent law, WIPO and the SCP should focus on how flexibilities in patent law could be used to achieve developmental goals and also identify limitations, if any, to the use of those flexibilities. According to his view, many topics discussed at the 15<sup>th</sup> session of the SCP had the potential to achieve those goals, including such topics as standards and patents, exclusions from patentable subject matter and exceptions and limitations to the rights, dissemination of patent information, transfer of technology and opposition systems.

40. The Representative of APAA observed that all the topics in item 5 of the agenda were important and expressed its hope to see them all dealt with in the future work program. Nevertheless, noting that APAA had a small number of its own internal committees to deal with a full range of IP areas and only one committee was a Patents Committee, the Representative noted that APAA needed to be careful when selecting topics to be considered by that Committee. The Representative stated that the substantive consideration of the complex and controversial topics would not dare drive the Patents Committee to a halt. Thus, the Representative continued, in 2008, when making the deliberations for the next topic on patents to be considered by the Patents Committee, APAA decided to select the topic that did not appear controversial, the topic which would offer reasonably straightforward solutions and, as agreed by member countries of APAA, was important and in need of repair. Noting that the member countries of APAA included both civil law and common law countries, developing and developed countries, countries with and without patent attorney professionals, the Representative stated that, the topic which was regarded as important and non-controversial and therefore selected for consideration by the Patents Committee was a client-attorney privilege. The Representative therefore recommended the SCP to include the client-attorney privilege issue in the future work program with a view to achieving an early success. Noting the substantial work completed on the issue, the Representative stated that the SCP was in a short step away from being able to determine and recommend a framework of remedies. The Representative urged the SCP to commence the work on remedies promptly and to complete in a short time frame.
41. The Representative of the Centre for Technology and Society (CTS), research center and think-tank from Fundação Getulio Vargas (FGV) of Brazil, stated that the institution worked on the intersection between intellectual property law and new technologies, addressing those topics with a developmental view. Focusing on applied research, it worked closely with Brazilian governmental bodies and other national and international research institutions and activists towards promoting access to knowledge, digital

inclusion and innovative open business models, as complementary to the existing IP-based businesses. The Representative stressed the need to look for a more practical implementation of the Development Agenda goals at the SCP. She was of the view that studies such as one presented by Professor Bently worked towards that direction and was truly remarkable and a step further. While noting the importance of the understanding of different rationales of legal provisions on exceptions, she underlined the need to move further to understand how they had been used by Member States in practice. Noting that Article 30 of the TRIPS Agreement provided room for many interpretations and different mechanisms to implement exceptions to patent protection, she, however, stated that some studies and their experience demonstrated that several countries lacked the expertise and needed knowledge for implementation, or were under strong pressure not to implement meaningful provisions on exceptions and limitations under the national legislation. In her view, the current protection mechanisms had been used in a distortional manner, even by-passing due limitations, only prorogating unjustified monopoly, instead of fostering research and development, which should be the main reason for the protection. In all of those cases, she said that society faced damage on access to knowledge, which was the main asset for development in the context of the knowledge economy. She further stated that, among other issues, focus should be made on addressing questions such as how exceptions and limitations were being implemented by the Member States, whether they were being used to reach developmental public policies goals, and what were the political and/or technical difficulties to use them. In addition, she stated that one of the important technical issues which could be addressed would be how to ensure that patent applications were properly drafted so that the disclosure would provide sufficient information for accessing the technology after the expiration of the protection period. The Representative further noted that the preliminary study on exclusions from patentable subject matter and exceptions and limitations to the rights, although enriched by descriptive approach of each countries mechanism, was looking only at legal provisions, not at their implementation. Therefore, she underlined the need for more applied studies in that area and for that reason she expressed her support for the proposal made by the Delegation of Brazil on exceptions and limitations to patent rights. In her view, the further understanding of the issue would provide instruments to enable harmonization of the patent system in coherence with the Development Agenda and taking into account the reality of each country. In conclusion, she stressed the need to discuss the coordination mechanism with CDIP within the agenda item related to future work, as well as the issue as to how to make practical use of all the studies being analyzed.

42. The Representative of FICPI expressed its hope that discussions on substantive patent law harmonization, which would be good for the public at large and for the active and passive users of the system, would be resumed in due course. While noting that all the topics on the agenda of the SCP deserved serious consideration, the Representative stated that FICPI was particularly concerned about the client-patent attorney privilege issue, as members of FICPI provided in their daily work advice on strategy and on issues related to infringement and validity of IP rights to clients. They were active in more than 80 countries including industrialized countries as well as developing countries, such as Brazil, Colombia, India, Peru, South Africa and others. Noting that their clients resided not only in developed countries but many of them in relatively poor countries, the Representative stressed that the issue at stake was important not only in developed countries but also in developing countries. The Representative stated that FICPI had discussed those matters and passed resolutions in the years of 2000, 2003 and 2009. In particular, in 2009 in Washington, FICPI urged appropriate authorities in countries or regions to adopt measures or recommendations: (i) which would provide legal professional privilege in relation to communications between a client and a registered or accredited IP advisor, whether the IP advisor was in the same or different country/region

as the client and regardless the jurisdiction of the litigation; (ii) which would further provide that all countries or regions would recognize such legal professional privilege in other countries and regions; (iii) which would further provide such privilege in relation to communications of IP advisors in different countries or regions in relation to any client in IP matter in any country. In conclusion, the Representative supported the statement made by the Representative of APAA and the AIPPI resolution adopted at its Congress in Paris concerning the studies to identify appropriate remedies.

43. Referring to the statement made by the Representative of KEI concerning compulsory licensing in the United States of America, the Representative of ITSSD stated that he had submitted detailed comments on document SCP/13/3 which showed that the use of compulsory licensing in the United States of America was restricted to issues of abuse and extraordinary emergency circumstances. Referring to a non-commercial use by government within the Title 28, Paragraph 1498 of the United States Code, the Representative observed that the statute recognized the Fifth Amendment of the U.S. Bill of Rights which provided that no private property should be taken for public use without just compensation. In the view of the Representative, the just compensation meant full fair market value, which was incorporated into the TRIPS Agreement and the Doha Declaration. As regards the interventions made by the Representatives of TWN and FGV, the Representative stated that he shared their observations that the Development Agenda needed to be addressed especially with respect to capacity building initiatives in order to allow developing countries including LDCs to create the necessary infrastructure to examine applications for patents in order to raise the issue of exceptions and limitations. In his view, it was illogical to approach the issue of patents and the treatment of the rights to patents with respect to exceptions and limitations before consideration of the subject matter for patentability. Therefore, the Representative disagreed on the conclusions drawn that such capacity building and development needs were to be addressed within the SCP primarily. Rather, the Representative considered that the CDIP was the preferred venue to take up those types of issues in much greater depth and analysis, whereas the SCP would serve as liaison function as it currently was. Therefore, the Representative viewed the Brazilian proposal on exceptions and limitations to patent rights as an inappropriate proposal that until sufficient knowledge was acquired on capacity building and development needs.

#### **Agenda item 5: Preliminary studies on selected issues**

44. Professor Lionel Bently, Center for Intellectual Property and Information Law, Cambridge University, United Kingdom, who was the coordinator of the experts' study on exclusions, exceptions and limitations, made a presentation on the study.
45. The Delegation of Venezuela expressed the view that the issues regarding exclusions, exceptions and limitations had a philosophical, ethical or moral dimension, and that exclusions from patentable subject matter, for example, were set on a moral or an ethical basis. The Delegation noted that the only legally binding decisions in relation to exclusions, exceptions and limitations for its country had to be made by courts in Venezuela. On the issue of exclusions and exceptions, the Delegation considered that the way in which they could be applied needed to be looked at from the perspectives of human beings and human life. The Delegation considered that, in some countries, the standards of patentability set by the TRIPS Agreement had been a problem, and that private interest had been given priority over national interest. In its view, the philosophy of the patent system was the issue to be addressed.
46. In response to the question raised by the Delegation of the Plurinational State of Bolivia, the Chair stated that there would be no presentation on other Annexes of the study.

47. The Delegation of Argentina stated that, since the issue of exclusions from patentable subject matter and exceptions and limitations to patent rights were vitally relevant for developing countries in providing the necessary flexibility for public policies which enabled those countries to make progress towards effective development, it welcomed the study prepared by the experts group, coordinated by Professor Bently. With regard to the results of the study, with the objective of promoting discussion on development policy, the Delegation drew attention to the finding of the study that there was an increase in the number of international norms and standards limiting and regulating exclusions to patentability, which had led to increased cost and other effects for developing countries. The Delegation, therefore, considered that the study was very useful in showing the Committee that the exclusions, exceptions and limitations should not be applied internationally, but could be applied to adjust national policies in order to promote development.
48. The Delegation of the United Republic of Tanzania noted that it did not see in the study the possibility of reconciling the national legislature with the international legislature in relation to exclusions, exceptions and limitations. The Delegation therefore requested Professor Bently to share his view on how to move forward towards such reconciliation.
49. The Delegation of the Plurinational State of Bolivia stated that Annex III of the study did not fully fulfill the mandate, which was to analyze the issue of exclusions from patentability on life forms with a public policy and socio-economic development focus, and to analyze whether public policy, socio-economic development perspective could justify the exclusions of life forms from patentability with a view to the application of Article 27 of the TRIPS Agreement. The Delegation expressed the view that the study was not focused in that manner, and was limited to factual analysis of multilateral and bilateral agreements and certain legislations. It further noted that the study was limited to certain aspects of exclusions, exceptions and limitations. The Delegation stated that the terms of reference required the experts to analyze other aspects, such as the reflection of controversies or public policy and fundamental values of the society, which were very important for the Delegation. The Delegation expressed the view that the study should have had provided more information with regard to policy issues relating to the exclusion of life forms from patentability. With respect to the obligations concerning patentability of life forms under multilateral treaties and trade agreements, the Delegation expressed the opinion that the values of the Delegation's country and what might be a potential danger to human life and to the planet needed to be reflected on the patent system. In its view, the analysis of the exclusions relating to biotechnology was made only from the viewpoint of incentives or other protection mechanisms rather than looking into the controversy derived from other fundamental values of the society.
50. In responding to the observation made by the Delegation of Venezuela, Professor Bently agreed with the Delegation that many of the exclusions and exceptions reflected either ethical or moral ideas about what would be good for society. He further stated that many of the exceptions and exclusions involved a balancing between the desire to provide incentives to business and to invest in research and development that led to inventions and innovations on the one hand, and the other social values on the other. Professor Bently therefore considered that the Delegation of Argentina and the members of the group who had produced the study spoke from very similar perspectives. As regards the comments made by the Delegation of the Plurinational State of Bolivia in relation to Annex III, Professor Bently was of the view that the author of Annex III had engaged with issues of public policy and socio-economic development, even if the focus had been primarily descriptive. Professor Bently explained that, in order to get a fuller picture, Annex III might be looked at together with Annexes IV and V which concerned

health as well as with Annex I. He further explained that, as with any project, the study had to be cut up to make it manageable. For example, Annex IV which considered health had a lot of material on inventions that related to public policy and morality, which might be precisely a kind of information that was sought by the Delegation of the Plurinational State of Bolivia. In addition, Annex V which concerned compulsory licensing and exceptions in relation to health was clearly concerned with many of health consequences of patents. Professor Bently expressed his interest in receiving the feedback in more detail from the Delegation of the Plurinational State of Bolivia, and suggested that the Delegation submit it in writing so that it could be forwarded to Professor Barbosa. Professor Bently appreciated the comments made by the Delegation of Argentina concerning the flexibility, indicating that patent laws were applied from country to country. He emphasized that, while some of the flexibility came from exclusions, some of it also could be, or more of it could come from, exceptions. Professor Bently suggested that the delegations reflect on the question as to what more could be done with exceptions to accommodate the different social, cultural and economic priority of different countries around the world. Referring to the question raised by the Delegation of the United Republic of Tanzania concerning how the academic insight could be reconciled with the reality of the international norms, in particular Article 30 of the TRIPS Agreement, Professor Bently said that the variable use of exceptions was the reason not to interpret Article 30 narrowly. While it was not known exactly how Article 30 would be interpreted, he said that all the efforts towards taking advantage of the exceptions could be jeopardized if Article 30 turned out to be interpreted in an unfortunately narrow way. Therefore, the way he reconciled the two things was by seeing ourselves at that moment as actors in the process of forging an interpretation of Article 30 that was more positive and accommodating. He expressed his optimistic view that the experts' contribution was some parts of the background against which Article 30 would fall to be interpreted in the future, and that if countries embraced the idea of using the flexibilities in exceptions, hopefully the broad interpretation would be more likely to follow.

51. The Delegation of India sought clarification from Professor Bently regarding the possibility of substitution of exclusions with more nuanced exceptions. As Professor Bently had pointed out that one of the reasons why that could be beneficial was that many patent offices were not well equipped to detect subterfuge by patent agents and patent applicants who had sought to circumvent provisions on exclusions in national legislation, the Delegation sought clarification as to the chances that such subterfuge might be able to be detected in the area of exceptions which were even more limited, more specific and perhaps more difficult to detect. In addition, concerning the concrete example of computer programs where Professor Bently suggested that they were one area which could be considered not in the context of exclusions but in the context of exceptions, since that would enable computer programs to be patented while also allowing incremental and formulated innovation, the Delegation asked whether the same objectives could be served by alternative models of innovation, such as open source innovation.
52. In replying to the questions raised by the Delegation of India, Professor Bently stated that the reason he thought that exceptions to patentee's rights would be preferable to exclusions from patentability was that patent offices were not necessarily reliable in enforcing those exclusions in advance. When it came to applying the exceptions to patentee's rights, in his view, that did no longer happen in the institutional environment of the patent office. He considered that pressures from applicants and their patent agents and the institutional pressure to process a certain number of patent applications in a certain length of time, made it difficult to give full examination to the patent applications and to ensure that the provisions on exclusion was properly applied. The exception to patentee's rights would not be reviewed in the patent office but in the court – in a judicial

situation rather than in the situation of the bureaucracy with its own internal requirements. Because the exception was to be applied in the context of a dispute between two parties in the court, Professor Bently considered that those institutional pressures ended up quite different. Furthermore, he explained that the possibility of patent agents drafting claims and drafting patents around the exclusions did not arise, because the only question for interpretation was the statutory or legislative exception and how it applied to the circumstances. Professor Bently remarked that those points made him relatively confident that the problems with exclusions from patentable subject matter in terms of providing clarity did not arise in the context of applying exceptions to patent rights. He agreed that the judicial environment raised other questions that would need to be considered as well, such as the interpretation by the court and access to courts and access to justice that had their own dynamics. Professor Bently clarified that he was not necessarily recommending the same approach to everybody, stating that the analysis needed to be made in view of each country's own context. Responding to the question about whether systems of open innovation might constitute preferable mechanisms to either exclusions from patentability or exceptions to patentee's rights, Professor Bently noted that the study was not dealing with open innovation and with the potential use of that kind of equivalents to the creative commons on life sciences, licenses etc, the reason being that it was not within the mandate set by the SCP. Professor Bently nevertheless observed that the relation between the grant of patents or intellectual property rights and the creative commons open source style movements was not as simple as it might first had appeared. He explained that those were not alternatives, but that the enforceability of the licensing mechanisms that went with open-source software were dependent on the existence of rights in that software, and leading to a rather peculiar paradox: people who were often advocating for those positive systems that allowed widespread use of intellectual property rights and allowed for incremental development were often forced into the position that they end up being advocates for the property rights themselves. Professor Bently mentioned the example that the creative commons movement half supported for *sui generis* State-based rights because that enabled them to apply the creative commons contractual mechanisms to those property rights on stake. In his view, policy makers should consider the relative mix of those mechanisms and whether they could make open source systems workable and support open source systems.

53. The Representative of FSFE observed that the study dealt at some length with the practice of the EPO in granting software patents in Europe. However, that practice directly contravened the actual European legislation, namely, Article 52 of the EPC. He thus would be interested in knowing whether there was anything in the study or any considerations by Professor Bently on the actual court practice in Europe.
54. The Representative of TWN stated that the study was supposed to look at those issues from a public policy, socio-economic perspective bearing in mind the level of economic development and that that part of the mandate had not adequately been addressed. It had not been given enough space, despite that there were parts in references. With regard to the conclusion that there was a shift from exclusions to exceptions, the Representative noted that, in a way, such shift was useful. He requested further information regarding resource deficiency in developing country patent offices. He observed that many countries in the past excluded pharmaceutical inventions from patent protection, and they did not end up in complex situations because pharmaceutical product inventions were completely excluded from patent protection. In comparison, regarding software exclusion, he noted that the EPO accommodated software patents through interpretation instead of excluding them. Therefore, the Representative expressed the view that exclusions were coming from the policy perspective, and they were still needed to achieve certain policy goals of a certain country. The Representative observed that it was still good for countries to have a robust set of exclusions along with



exceptions. In his opinion, there should be a co-existence of both exclusions and exceptions. Further, the Representative asked whether, apart from those exceptions listed, there were possibilities of having more exceptions, taking into account Article 30 of the TRIPS Agreement.

55. The Representative of ITSSD emphasized a point that was, in his opinion, lost in the discussion, namely, the role of government in setting the right policy framework to promote so-called balanced interests. Much of innovation and inventions were performed by individuals, and individuals had to incur costs as well as time and effort in order to develop certain inventions in high technology. He wondered whether the role that those incentives played in creating private investments to bring those inventions and innovations to the public for the public good needed to be addressed more thoroughly.
56. Referring to the question raised by the Representative of the FSFE concerning the reconciliation of patent granting practices at the EPO and the full terms of Article 52 of the EPC, Professor Bently stated that he'd rather not comment in the SCP on specific issues relating to the EPC, but reiterated the point drawn out in the introduction that exclusions were prone to the pressures exerted on patent offices. In his view, the pressures exerted on the EPO did lead it to take a particular root to the interpretation of exceptions and then to change that root sometime 10 years ago, which facilitated the granting of patents for computer-implemented inventions. In his opinion, that showed that exclusions were not necessarily a good way to go, and that was one of the reasons why he had been suggesting that there were benefits to thinking in some areas of patent law about exceptions rather than about exclusions. In relation to computer-implemented inventions, he noted that the kinds of exceptions such as the experimental use exception, possibilities for cross-licensing and the compilation exception for interoperability which was in the draft Community Patent Convention (CPC) might be relevant. Professor Bently appreciated valuable observation made by the Representative of TWN, and clarified that, although there was value in thinking of replacing exclusions with exceptions where those exceptions could more productively achieve the same policy goal, a room was left for exclusions to continue to exist where they were aimed at achieving a different policy goal which could not be achieved by exceptions. In some circumstances, it would be useful to have both an exclusion and an exception, and it did not necessarily have to be an either/or. He reiterated that, in so far as the problem with exclusions had to do with issues of claim drafting, while a patent office might extend applying exclusions, exceptions could reassure users that their activities were free from liability. Professor Bently expressed his wish to further reflect on an example of a situation where the exclusion had not proved that problematic for patent offices to operate in the area of pharmaceutical inventions. With respect to the possibilities for more exceptions, he noted that, for example, scholars in the United States of America suggested new types of exceptions building on the concept of fair use in copyright. He was of the view that more debates would have to occur before taking the new ideas forward, since whether they could possibly pass the test under Article 30 of the TRIPS Agreement was not known. In his opinion, there was plenty of room for thinking about new exceptions to accommodate the legitimate interest in countervailing values that had ceased to exist. In replying to the Representative of ITSSD, Professor Bently clarified that he had not suggested that patent systems were not a good thing and that incentives to invest in research and development were not important. He explained that the study tried to address the best way to accommodate different kinds of values within the patent system. It was not intended to be a study advocating bringing the patent system to an end. Professor Bently noted that the traditional view of patents in economic terms had been incentives to research and development and incentives to disclose. However, there was a third stream of economic thinking which viewed patents in terms of incentives to exploit inventions. It was not concerned with how the invention came into existence at all,

but it concerned maximizing the exploitation of it. He explained that such thinking by the school of neoliberal economics tended to view patents as invaluable property right with very few exceptions, and tended to see the best way to facilitate exploitation was to promote contractual transactions. Professor Bently remarked that within that very logic, it assumed a ready capacity for transactions between a willing buyer and a willing seller who could locate one another readily and strike a deal. It also assumed that they had enough understanding of each other's economic, social and technical environment to forge that deal. In his opinion, while it could work in terms of a transaction between two US companies that knew about the law and that understood each other's relative bargaining power and were able to form a reasonable transaction, in many other circumstances, that presumption was not realistic. He explained that neoliberal economists would argue that if there was market failure as a result of the unwillingness or inability of two willing parties to enter transaction because of the information asymmetry about each other's situation, then the law should intervene and provide an exception. Therefore, those economists would actually provide for exceptions and limitations in some circumstances. Professor Bently observed that, in general, he found neoliberal economic arguments for intellectual property rights unpersuasive. In his view, the idea that everything should be turned into a property right and subject to transaction would naturally lead to the conclusion, for example, that the patent should last perpetually, the copyright should last perpetually, etc., so that somebody was in a position to optimize the exploitation. He referred to such an argument made supporting perpetually renewable copyright by Landes and Posner and a critique of that argument by Mark Lemley in the *Chicago Law Review*. He shared the views of the latter, although that did not mean that he was not interested in the position of exploiters, and in his view, the patent system was primarily there to incentivize research and development and it played a very important role in doing that.

57. The Representative of ITSSD observed that, in addition to market failure, there was also government failure. In his view, although the perfect and most beautiful framework in a regulatory sense might be idealized, that did not assure that incentives would not be dampened to the point of inactivity.

*Item 5(a): Standards and patents*

58. Discussions were based on document SCP/13/2.
59. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, stated that the preliminary study on standards and patents provided a clear, general description of standards and standard-setting processes and referred to the need to clarify relationships between the standardization system and the patent system and provided information on possible mechanism for preventing conflicts. It further stated that the preliminary study tackled a large number of important issues including the patent policies of standard-setting organizations, patent tools, legal mechanisms within the patent system, competition law aspects, dispute settlements and technical and patent information available under the patent system and the standardization system. The Delegation stressed the importance of those issues for the European Union and its 27 Member States. In addition, the Delegation informed the SCP that the question of industrial property rights and competition was one of the challenges identified in point 3.4 of the European Commission's Industrial Property Rights Strategy for Europe, published in July 2008. Within the framework of that strategy, the Commission also intended to make an assessment of the interplay between intellectual property rights and standards, particularly in information and communications technologies. The European Union and its 27 Member States considered that the continuation of debates on those matters would be helpful.

60. The Delegation of Brazil, speaking on behalf of the DAG, observed that the issue of standards and patents was of great importance due to the fact that the monopoly power conferred by a patent increased exponentially when the product or technology became the standard. Therefore, the DAG welcomed the discussion on the issue by the SCP. Referring to document SCP/13/2, the Delegation noted that some points should be further analyzed. In particular, the Delegation observed that the document did not differentiate between the standards designed for the promotion of interoperability and connectivity and standards related to areas of public policy such as security, public health and the environment. According to the view of the Delegation, those standards were different and therefore should not be treated in the same manner. The Delegation continued that the different aspects of public interest demanded plural tools and flexibility provided under the international regime for pursuing public policy objectives, and should not be undermined by stringent practices regarding standards and technical regulations in relation to patents. Additionally, in its view, the preliminary study, while trying to give a broad image, neither addressed anticompetitive behavior profoundly, nor it reflected the challenges and limitations countries had faced while implementing those standards. Further, the Delegation stated that no solution, but a generic reference to anticompetitive remedies, was referred to in the preliminary study. In this connection, the Delegation observed that the open source standards had a high importance for developing countries due to their reduced cost. Therefore, the goals of standards and patents should be to reflect a fair and balanced system, respecting the rights while assuring that society as a whole was not harmed by excessive prices or anticompetitive behavior. Recalling that the issue of patents and standards had been already addressed at the agenda of the WTO Committee on Technical Barriers and Trade, the Delegation stated that the discussions on the issue at WIPO should be pursued in a consistent manner with the WTO provisions on the subject matter.
61. The Delegation of Nepal expressed its appreciation for a comprehensive document which dealt with conceptual as well as technical issues. The Delegation, however, pointed out that some reforms were needed in that area so as to build the capacity of patent enforcement agencies of least-developed countries, as well as to rationalize the standards in products in the field of information and communication technologies (ICT). Noting that standards were relevant to the quality and reliability of products, the Delegation observed that the standards also ensured conformity, better harmony and efficient delivery of quality along with desirable behavior associated with the delivery and the use of those standards. It also noted that market competition had sacrificed those standards and, thus, the consumer protection. In addition, the Delegation stated that the licensing of products had also been challenged by extensive and uncontrolled use of ICT. It further considered that patent pools might be the source of patent syndicalism.
62. The Delegation of India noted that the issue of standards and patents was a very complex one which might have many ramifications, particularly for developing countries. The Delegation stated that once a patented invention was incorporated in the standard, the patent holder could cultivate the competitive advantage thereby leading to high cost in transfer of technology. Noting that the preliminary study gave only one example of patent pooling, the Delegation stated that the study should include more examples and studies on issues of patent thickets and interoperability to understand the full implication of patents in standards. In addition, in the view of the Delegation, the preliminary study should explore the means which could be exploited to avoid anticompetitive practices by right holders. It was also stated that it would be useful to prepare a non-exhaustive compilation of patents in standards adopted in selected technological areas to enhance the understanding of the issue. In addition, the Delegation suggested that the Secretariat

should prepare draft guidelines on patents in standardization which could facilitate the policy coherence in the international standard-setting process.

63. The Delegation of Switzerland expressed its appreciation for the preparation of document SCP/13/2 which provided a general description of standards and standardization procedures and information on the possible mechanisms that had been used to stop litigations. The Delegation requested more detailed analysis of the issue as well as a closer corporation with WTO, ITU and ISO. Underlining the need to have as many examples as possible on the subject matter, the Delegation suggested that the representatives of various standard-setting organizations provide tangible examples of possible solutions which could then be put together by the WIPO Secretariat in a document.
64. The Delegation of Uruguay stated that the patent system was in crisis and that the issue had not been dealt with within WIPO in the way that corresponded to the dimension of the problem. Referring to some independent studies which analyzed the patent system, the Delegation stated that the proliferation of applications for patents was not responded for new technologies. It further stated that it was often difficult to determine the nature of the inventiveness and the characteristics of inventions, and had problems with the clarity of description and other difficulties in understanding the scope of the inventions. The Delegation noted that the issue of standards and patents was related to the issues of transfer of technology, access and dissemination of technology and sustainable development. In the view of the Delegation, the transfer of technology was being affected by patent holder's rights exercised in an anti-competitive way. The Delegation considered that, in that situation, the intervention of governments was necessary in order to safeguard the public interest. The Delegation further stressed the need for an open-ended study on the issue at stake.
65. The Delegation of Venezuela supported the statement made by the Delegation of Brazil on behalf of the DAG, and stated that technical standards created a problem in the market place and became a barrier to innovation, the latter problem being vital for developing countries and being a part of the obligations of WIPO under the Development Agenda, as well as the UN Millennium Development Goals. The Delegation was of the view that the issue should remain on the agenda of the SCP for further analysis.
66. The Representative of ALIFAR stated that the flexibility in the patent system was very important and therefore, it was necessary to ensure that those flexibilities were available. Referring to the issue on standards and patents, the Delegation noted that while the patent legislation had a key role to play, a large number of countries neither had the legal tradition in that area nor had the necessary experience or tools which were important to ensure the functioning of the market.
67. The Representative of ITSSD, referring to documents SCP/13/2 and SCP/13/3, stated that the documents provided much discussion about possible abuse of the exclusive rights of the patentee. However, in his view, there was very little empirical evidence showing that such problems were actually occurring. According to the Representative, the government intervention mechanisms which were recommended, including the need to ensure that the essential patents were included in a standard, the need to determine a reasonable way of royalty and the need to determine when a government should intervene when there was a dispute between potential licensors and licensees, were solutions to solve the problem in the area. Noting again that the instances of abuse were small and the hypothetical conceptions of abuse were great, the Representative informed the SCP that the ITSSD had provided detailed comments on document SCP/13/2. The Representative expressed his concern about government procurement rules incorporated

the government's need to intervene the market. Noting that the government procurement comprised a considerable percentage of a local economy, the Representative questioned whether the use of government procurement rules to express a preference or even to mandate free and open source, as well as royalty-free patent based standard, was a possible trade barrier and an intrusion on the exclusive rights associated with a freedom of contract, which was essential in all countries in order to make commerce and technological progress. The Representative stated that as was demonstrated in their comments to the study, there were cases of abuse in which government intervention was necessary. However, the Representative emphasized the fact that the number of abusive cases was small, and that the empirical data was lacking to justify all those intervention mechanisms. In his view, such mechanisms actually caused a degree of legal and economic uncertainty as to the rights of patentees and trade secret holders and freedom of contract, which might impede the necessary investment capital flow into entrepreneurial firms in both developed and developing countries, and preclude the foreign direct investment from multinationals. He further noted that it could also reduce incentives for innovators to invest their resources, time, effort, labor and money to produce technology that could benefit the public good.

68. The Representative of ICC referred to his statement made on the topic of standards and patents at the fourteenth session of the SCP, and stated that it remained valid for the ongoing session as well.
69. The Representative of FSFE stated that document SCP/13/2 provided a good starting point which correctly identified the central role of standards in enabling economies of scale and competition on a level playing field. The Representative stated that his comments would be limited to the area of software standards. The Representative quoted the speech of Mr. Karsten Meinhold of November 2008, the chairman of the European Telecommunications Standards Institute IPR Special Committee which stated that "IPRs and Standards serve different purposes: IPRs are destined for private exclusive use, Standards are intended for public, collective use". Further, the Representative stated that the topic deserved close scrutiny despite of its highly technical nature. He noted that, according to the OECD, SMEs made up between 90 and 98 per cent of companies in most economies. That reflected the situation in the software industry. In developing countries and countries in transition, the SMEs share of the economy tended to be even more pronounced. Barriers to entry into the software business were quite low. He observed that most of software giants could grow rapidly because they had not been hampered by their bigger rival's patents, and often because they had been able to implement existing open standards in innovative ways. Free software, also known as open source, lowered those entry barriers even further. According to the consultancy Gartner, 100 per cent of companies used at least some free software in their systems. The Representative further noted that Linux Foundation had projected that, in 2011, free software would underpin a 50 billion dollar economy. In the view of the Representative, free software held a unique opportunity for developing countries and countries in transition. When those countries import non-free software, they became dependent on the company that provided it to them. In contrast, when they used free software, they foster the growth of local companies thereby helping to create a local knowledge base of technologically skilled experts, who would further add value for the national economies. The Representative noted that that was an extremely condensed summary of the economic perspective on free software and it constituted a necessary background to the debate on standards and patents. The Representative observed that, standards always implied a wide public access: an openness in both the process of creating the standard as well as access to the standard. He therefore was of the view that an open standard would necessarily had to meet higher standards of openness than those provided in paragraph 41 of document SCP/13/2. In his view, it was

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

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

modify the preliminary study to include the information on implications of patents on standards on industrial development, especially of developing countries. It was of the view that an informed deliberation could be facilitated through a document which would compile case studies wherein patent protection on standards resulted in problems related to access to protected standards, competition law concerns and abuse of patent monopoly. In addition, the Representative stated that the use of flexibilities available within the national and international patent law could be used to address those concerns; therefore the modified study should look into the possibility of using those flexibilities. The Representative further underlined that a compilation of patents in a particular area also was critical for an informed debate on the issue. In conclusion, the Representative urged the Secretariat to invite comments from all stakeholders so that those comments could be compiled to form a good source of information.

71. Referring to the statement made by the Representative of FSFE, the Representative of ITSSD stated that open-source software, royalty-free software and royalty-free standards sought parity with proprietary rights in patents in software through a mechanism of government interoperability frameworks. The ITSSD was of the view that such arrangements would impose a mandatory requirement that would give a preference and advantage in the market place to open-source software and a royalty-free patent-based standard. According to the view of the Representative, that was a discrimination issue from the perspective of WTO which the SCP could further look into.
72. The Representative of KEI referred to its statements made at the previous session of the SCP on the issue of standards and patents and recommended that the SCP should create a cluster of experts to examine possible best practices or global norms for mandatory obligations to disclose patents relating to standards for some essential technologies, such as energy and others.
73. The Representative of the ECIS stated that the topic on competition and intellectual property in the information technology industry was one of his great concerns. The Representative suggested that the SCP should establish a group that would study the issues concerning the relationship between patents and standards including the issue of disclosure of patents and of licensing terms in the standard-setting processes, as well as a consideration of whether it would be appropriate to adopt best practices or global norms in that field, whereby standard-setting organizations would require patent holders, who wished to have their patents to be included in standards, to express a willingness to license their essential patents through licenses of right as provided in Article 20 of the draft European Community Patent Convention.

*Item 5(b): Exclusions from patentable subject matter and exceptions and limitations to the rights*

74. Discussions were based on documents SCP/13/3, SCP/14/7 and SCP/15/3.
75. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, stated that the preliminary study clearly summarized and contextualized the current legal framework: provisions under the international legal framework and the provisions contained in national and regional laws, as well as the policy objectives. In relation to the study prepared by the external experts, the Delegation stated that the study provided an excellent and comprehensive survey of exclusions and exceptions and explored their interrelationship both at the international and the national/regional levels. The document was carefully prepared and contributed significantly to knowledge about the state of laws around the world in relation to the topic. Further, the Delegation stated that, given the length of the study, it would greatly benefit from a summary document translated in the working languages of the Committee. The Delegation also suggested

that in order to maximize the result and efficiency of the organization, all discussions on substantive patent law should be held in the SCP. The Delegation stated that it carefully considered the proposal from the Delegation of Brazil in respect of exceptions and limitations to patent rights. It recognized the importance attached to that issue. The Delegation reaffirmed that a strong intellectual property system with enforcement provisions was fully consistent with exceptions and limitations. Regarding the exclusions from patentable subject matter and subject matter not considered to be an invention, the Delegation observed that the international legal framework was provided for in the TRIPS Agreement, whereas the Paris Convention and the Implementing Regulations of the Patent Cooperation Treaty touched upon those issues indirectly. The Delegation recalled that, in Europe, a considerable level of harmonization had been achieved in that area through EU Law and the EPC, which resolved those issues at the European regional level. With regard to exceptions and limitations to patent rights, the Delegation stated that the Paris Convention, the Convention on International Civil Aviation (the Chicago Convention) and the TRIPS Agreement with the Doha Ministerial Declaration on the TRIPS Agreement and Public Health, were the relevant international instruments. Within the framework of the European Union, the issues relating to compulsory licensing for pharmaceuticals, experimental use in the context of pharmaceutical and biomedical research, the patentable subject matter in biotechnology and farmer's privilege and breeder's exception had been harmonized. Further, the Delegation pointed out that in cases of exclusions from patentability, exceptions or limitations to patent rights, an appropriate balance between the right holders and the interest of the general public should be maintained. Concerning future steps, the European Union and its 27 Member States were of the view that exclusions from patentability, exceptions and limitations to patent rights should not be discussed to the detriment of other substantive issues of patentability which the SCP had focused upon, such as the definition of prior art, novelty and inventive step. The Delegation stated that the European Union and its 27 Member States were convinced that a more balanced approach would be desirable to reach the objectives of the Committee. In that regard, the Delegation reiterated its hope that a balanced work program for the Committee would be established in a timely manner.

76. The Delegation of Brazil, speaking on behalf of the DAG, welcomed the experts' study on exclusions from patentable subject matter and exceptions and limitations to the rights. The Delegation stated that the correct understanding of that paramount issue should help Member States to calibrate their national IP systems in order to achieve the fundamental trade-off of the patent system, which was to guarantee the monopoly of a given product or process in order to stimulate, not stifle the innovation. Observing that the experts' study recognized the cost-benefit analysis underpinning the system, and that patents should be granted only to the extent necessary to rectify market failure, the Delegation referred to what the chief economist of WIPO had said, that in most cases, markets would not foster innovation on their own, and that in those cases, patents should be granted. Therefore, the DAG believed that the experts' study brought elements for a discussion which accepted the complexity of the subject, avoiding simplistic assumptions which ignored the systemic implications and the diversities of concrete realities. The Delegation agreed with Professor Bently who had stated that the TRIPS Agreement had extensively reduced the flexibilities available for countries in general. Therefore, a full understanding of the exclusions and limitations available was vital for a calibration of the national systems, considering the particularities of the countries and their socio-economical environments. The Delegation further observed that the important rationales which were developed in the study included the relation between human rights and intellectual property or the necessity of adjusting the legal provisions in order to reach the highest degree of innovation with the lesser possible social cost. Nevertheless, the DAG believed that the main goal of the study should be a comprehensive reflection on the patent system by analyzing the exceptions and exclusions, in order to provide real utility



for governments, such as transfer of technology and correct disclosure of patent information. The Delegation considered that any statement on “a common core” or “a set of standards” under no condition should imply harmonization of legal provisions or limitations on the reach of exclusions and limitations, for the particular characteristics of the countries which were expressed in the different patent systems. In addition, the Delegation stated that the seeming favoring of exceptions over exclusions was not coherently explained in the experts’ study. The Delegation explained that, in some cases, exceptions may raise litigation costs or stimulate sham litigation, while the possibility of ulterior legal liability for patent violation may reduce the incentive for investment of individuals in what they believe to be an exception, thus reducing innovation. Therefore, in the view of the Delegation, there was no conflict between exclusions and exceptions: they were complementary tools necessary to assure the systemic equilibrium and the policy space countries demanded to achieve their development. As professor Bently had emphasized, the Delegation considered that the utility of exceptions depended on the way they were interpreted by courts in countries with different legal traditions and by the dispute settlement system of WTO. The Delegation observed that due to dispute settlement understanding of WTO, in many legal systems, exceptions should be interpreted restrictively. If the supposed superiority of exceptions over exclusions depended on their being interpreted broadly, a strong case could be made against such rationale. Further, the Delegation stated that there was an urgent need of discussing the economic theory underlying the study, since the lack of a theoretical approach of the relation between intellectual property and innovation suggested an automatic and positive relation between them, a relation which was not observed in the reality. Overall, the DAG considered that those studies represented a positive step in the direction of the proposal made by the Delegation of Brazil. As regards the proposal presented by the Delegation of Brazil in document SCP/14/7, the Delegation stated that the proposal intended to provide a wide and sustained debate on exceptions and limitations to patent rights in three phases. The first phase should promote the exchange of detailed information on all exceptions and limitations provisions in national or regional legislations, as well as on the experiences of implementation of such provisions, including jurisprudence. That phase should also address why and how countries use, or how they understand the possibility of using, the limitations and exceptions provided in their legislations. In that connection, the Delegation noted that to a certain extent, the studies on exclusions from patentable subject matter and exceptions and limitations to the rights contained some elements of the first phase, which needed to be further developed. The second phase should investigate what exceptions or limitations were effective to address development concerns and what were the conditions for their implementation. The Delegation stressed the importance of evaluating how national capacities affected the use of exceptions and limitations. The third phase should consider the elaboration of an exceptions and limitations manual, in a non-exhaustive manner, to serve as a reference to WIPO Member States. The Delegation explained that the manual should help each country to adapt the international agreements to its internal IP system, maintaining the adequate policy space for its development needs. The Delegation noted that the optimal arrangement for the United States of America was not necessarily so for India or Malawi. Therefore, the DAG believed that the proposal should be promptly implemented, as the establishment of such working program would be an important step in the implementation of the Development Agenda.

77. The Delegation of Argentina stated that the SCP needed to continue discussions on exclusions, exceptions and limitations to patent rights as they were related to fundamental issues of development and were of real importance for the implementation of the Development Agenda of WIPO. The Delegation stated that the exclusions, limitations and exceptions were tools which countries could use in conformity with the flexibilities provided by the international treaty. Further, the Delegation welcomed the

proposal made by the Delegation of Brazil with regard to the establishment of a work program on exceptions and limitations in the SCP. In its view, the proposal could be an important phase in the implementation of the Development Agenda. The Delegation was concerned about the limited use of exceptions and limitations by developing countries and therefore underlined importance of the manual to be prepared at the third phase of the proposal which would suggest ways of avoiding restrictions to the use of exceptions and limitations and other possibilities which could promote development.

78. The Delegation of the Plurinational State of Bolivia stated that the issue of patentability in the field of biotechnology was very important to its country, and noted that its comments were of preliminary nature, given the unavailability of Spanish translation of the full document. In its view, the experts' study provided a factual analysis of exclusions and exceptions based on the various different legislations, focusing in particular on the European and American legislations. However, the Delegation considered that the experts' study did not go beyond the factual description of the issues. The Delegation stated that given that it was an experts' study, it should have given the possibility of having a more open discussion and further contribution to the analysis made so far in the Committee on the issue. In its view, the main problem with the study was that it did not give responses to the mandate agreed upon by the SCP on the subject matter, as well the terms of reference agreed upon by the Secretariat and experts. The analysis of exclusions from patentability lacked analysis from a development and public policy perspective in that it did not look into factors which could justify the exclusion of human beings from patentable subject matter. The Delegation expressed concern that the authors of the study had interpreted the scope of work established in the terms of reference in a very narrow manner. In particular, the Delegation stressed that according to the terms of reference, the authors should have covered all areas, including exclusions, exceptions and limitations to reflect controversies, the area which was of high interest to the Plurinational State of Bolivia. The Delegation expressed its wish that the study include more information with regard to the political consideration given in some countries to exclude certain areas from patentability as well as implications of such exclusions on public policy and socio-economic development of countries. As regards the issues of patentability of human life, the Delegation stated that the experts' study should have better analyzed the links of patentability of life in multilateral agreements and free-trade agreements, in particular, the complexities which might be caused by those standards in society and their impact on fundamental rights, such as the right to food, health and development. The Delegation reiterated that patenting human life was not part of its country's culture and, therefore, it considered such development as posing a danger for the entire humanity. Further, the Delegation stated that another analysis that could be made in that area would be to revive the information on the trends that were taking place in patenting of human life, including the information on who were the owners of those patents and what type of biological life was being patented. The Delegation stated that, as had been shown in the experts' study, the United States of America and Europe allowed the patentability of discoveries of elements found in the human body and in nature on the basis of their isolation from their natural environment, and that that fact reinforced the belief of the Delegation that a review of Article 27.3(b) of the TRIPS Agreement was necessary to prohibit the patentability of animals, plants and any forms of human life. The Delegation further observed that the experts' study also mentioned the potential negative impact of protection of plants varieties for farmers which might get worsen with the implementation of the UPOV Convention 1991, which was mainly adopted by developing countries because of the pressure put on them by developed countries and obligations under the TRIPS Agreement. Referring to its proposal made in the TRIPS Council to review the relevant provision to prohibit all forms of patentability of human life, or life in general, the Delegation expressed its regret that the experts' study did not include any references to such recent events in international law making. The

Delegation stated that the Constitution of the Plurinational State of Bolivia prohibited the patentability of any life forms, because it was contrary to the values of indigenous people and that position had been communicated by the government of the Plurinational State of Bolivia in an official document to the TRIPS Council in March 2010. The Delegation stated that the topic should remain open in the future, and suggested that the Secretariat should translate the study in other official languages of WIPO to facilitate the further analysis of the issue. In addition, the Delegation supported the proposal made by other Delegations requesting that all the comments made on studies be compiled in an addendum to that document to allow people to have the opportunity of seeing various comments and observations made on the content of each study.

79. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Brazil on behalf of the DAG. The Delegation welcomed the experts' study on exclusions from patentable subject matter and exceptions and limitations to the rights as it was important for developing countries to keep their national policy space in formulating their national IP systems to use IP as a tool for development. The Delegation expressed its belief that the main objective of that study should be a comprehensive reflection on the patent system from the exceptions and exclusions perspectives which allowed countries to benefit from. The Delegation was not of the view that the international norms limited exclusions and gradually favored exceptions over the exclusions. In its view, the fact that both exclusions and exceptions led to the same policy goals could not provide reasonable grounds to shift from exclusions to exceptions. The Delegation considered that such substitution could have serious developmental implications which should be assessed carefully. In its opinion, exclusions and exceptions were complementary tools necessary to assure the systemic balance and preserve the policy space for countries to achieve their development, and therefore, they could not substitute each other. Finally, the Delegation expressed support for the proposal made by the Delegation of Brazil on exceptions and limitations to patent rights, as the proposal suggested bridging the gap between the existing provisions on exceptions and limitations and their actual implementation, and to that end proposing new possible areas relating to technology transfer and other public policy issues. The Delegation reiterated that the issue was of importance to developing countries, and it should be incorporated in the work program of the SCP.
80. The Delegation of the Russian Federation stated that document SCP/13/3 prepared by the Secretariat, as well as experts' study contained in document SCP/15/3, constituted a good basis for further analysis of the problematic areas in that field. The Delegation stated that the topic was of particular importance to its country as legislation of the Russian Federation was undergoing the changes, in part, due to its accession to WTO. To that effect, on October 4, 2010, the President of the Russian Federation had signed the Federal Law on Amendments to Part IV of the Civil Code of the Russian Federation. One of those amendments concerned Article 1229 of the Civil Code which was amended to meet obligations under Articles 26 and 30 of the TRIPS Agreement. In particular, the amended provision read: "Limitations to the exclusive rights of patent holders or holders of industrial designs shall be established in individual cases, provided that such restrictions do not unreasonably conflict with normal exploitation of inventions or industrial designs and do not unreasonably prejudice the legitimate interests of right holder, taking into account the legitimate interests of third parties." Other amendments were included in Article 1362 in order to meet the obligations under Article 31 of the TRIPS Agreement. In addition, the Delegation stated that Article 1349 of the Civil Code listed, as non-patentable subject matter, the methods of cloning of a human being, and other inventions that were contrary to public interest, principles of humanity and morality, among others. The Delegation further informed the SCP that in the Russian Federation, there was a moratorium on research related to cloning of human being as codified in

Federal Law N54-F3 of May 20, 2002. Noting the advancement of science in biotechnology and advantages that such development could provide in the area of medicine, the Delegation stated that it also raised the ethical problems, in particular, in relation to the use of human embryo. In that regards, the applications for a patent relating to the methods of extraction of stem cells from the human embryos were not patentable subject matter in the Russian Federation. The Delegation supported further studies in that area. It also supported the proposal made by the Delegation of Brazil. However, it stressed that exceptions and limitations to patent rights, including compulsory licensing, should not become a barrier in effective functioning of the patent system directed towards innovative development of countries. The Delegation further informed the SCP that the Civil Code of the Russian Federation provided that the following actions would not constitute an infringement to patent rights: scientific research on a product or process incorporating an invention; use of an invention in emergency situations provided that the patent holder was notified as soon as possible and payment of a reasonable remuneration was made. In addition, there were provisions limiting the rights of patentees in cases of national security and national defense, as well as provisions related the right of prior use of an invention and compulsory licensing. The Delegation stated that above information was provided due to the fact that the experience of the Russian Federation on those issues was not reflected in the experts' study.

81. The Delegation of Australia stated that the scope of the issue under consideration was very broad, and that it constituted half of the patent system that should balance the innovation versus the broader public policy objectives. The Delegation expressed its belief that the studies prepared by the Secretariat and external experts provided good basis for the work in that area. In relation to the proposal made by the Delegation of Brazil, the Delegation expressed its willingness to contribute to the proposed work program; however, it encouraged the SCP to take note of the information already made available and the work which was underway in other Committees on the subject matter.
  
82. The Delegation of Spain expressed support for the statement made by the Delegation of Belgium on behalf of the European Union and its 27 Member States. The Delegation expressed its appreciation for the experts' study on the issue of exclusions from patentable subject matter, exceptions and limitations to patent rights. The Delegation stated that the documents contributed to the objective of shedding light on a very complex topic and it requested that the summaries of the documents to be translated into other languages of the Committee. In relation to the content of the experts' study, the Delegation stated that there should have been a greater coordination of all parts of the study to avoid duplication, especially in the annexes. While appreciating the efforts made by the Delegation of Brazil to contribute to the work of the Committee and enrich the debate on issue at stake, the Delegation made some comments on some aspects of the proposal. In particular, in relation to paragraph 6 of the proposal, the Delegation stated that it was surprising that compliance was placed at the same level as the debate about the limitations and exclusions in patent law. In its opinion, those areas operated on different levels: namely, on the one hand, the establishment of the substantive rights and, secondly, the necessary protection of those rights. Referring to paragraph 16 of the proposal, the Delegation underlined the need for the disclosure of the invention in patent application in a manner sufficiently clear to enable a person skilled in the art to put it into practice. In that regard, the Delegation noted the efforts of the Spanish Patent and Trademark Office to improve the quality of processed and issued patents through the implementation of ISO 9001: 2000 for the processing of PCT applications in 2007, and support for the policy of the EPO entitled "Raising the bar" which aimed at increasing the requirement level for the granting of patents within the framework of the EPC. Regarding paragraph 21 of the proposal, which stated that Paris Convention for the Protection of Industrial Property (Paris Convention) does not expressly prescribed specific provisions

on exceptions and limitations to patent rights, the Delegation quoted Article 5A(2) of the Paris Convention which provided that "Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work." Regarding the creation of a work program for the SCP on that subject matter, the Delegation made the following comments: first, it requested the Delegation of Brazil to identify which specific aspects related to exceptions and limitations to rights conferred by patents were not in the studies already presented by the Secretariat and whether such omissions, if any, would justify re-doing from the beginning what had already been done. Second, the Delegation emphasized that there was an overlap between the studies made for the SCP regarding exceptions and limitations to rights conferred by patents and the studies submitted to CDIP. In particular, the Delegation referred to document CDIP/5/4, entitled "Patent Related Flexibilities in the Multilateral Legal Framework and their Legislative Implementation at the National and Regional Levels" and stated that activities and studies concerning that matter should preferably be conducted in the SCP in the future in order to avoid overlap between the two Committees. Reiterating its support for the Brazil's proposal, the Delegation stated that the consideration of those issues should not be detrimental to other SCP's issues such as prior art, novelty and inventive step.

83. The Delegation of the Republic of Korea stated that the experts' study on exclusions from patentable subject matter and exceptions and limitations to the rights provided meaningful information in that it provided comparison on how each country formed its patent system and how it limited rights conferred by patents in order to contribute to the public interest. In addition, the Delegation noted some inaccuracies found in Annex VI of document SCP/15/3 in relation to its patent system, and stated that it would submit the amendments to the Secretariat in writing.
  
84. The Delegation of India expressed its appreciation for the study prepared by external experts contained in document SCP/15/3, as well as for the proposal made by the Delegation of Brazil. Referring to the content of document SCP/15/3, Annex II, the Delegation expressed its dissatisfaction with the following phrase contained in paragraph 3.34: "it has been suggested that the section 3(k) amendments effectively incorporated software patents into Indian patent law through the back door". In addition, referring to another part of the same paragraph, which stated that four Indian patent offices took differing interpretations on the question of computer programs as patentable subject matter, and that some of the Indian Patent Offices had modelled themselves on the approach at the EPO, the Delegation stated that such wording could give the impression that computer programs were not protected in India. The Delegation clarified that computer programs had been excluded *per se* from the patentable subject matter by the amendments which took place in 2002. The Delegation noted that the interpretation of those provisions had been done for many years and that the approach which had been followed by Indian patent offices was not simply an approach following the EPO, but patentability of such inventions were decided after considering various aspect of the technical effect of the software-related inventions. The Delegation further stated that, although the experts' study in other cases stated that the computer program protected under copyright law, such information was omitted in relation to India. In its view, the experts should have indicated that the computer programs at least were protected under copyright law of India. In addition, the Delegation stated that the analysis of the Indian provisions on the limitations to the patent rights only highlighted the compulsory license in case of public health. However, the Delegation noted that Indian patent law also provided provisions relating to the compulsory license in case of extreme emergency, as well as provisions related to the Doha Declaration on the TRIPS Agreement and Public Health allowing exportation of pharmaceutical products to countries with insufficient or no

manufacturing capacities. The Delegation also observed that Annex IV only provided information in relation to certain provisions relating to public health omitting, for example, provisions such as Section 47 of the India's Patent Act where the government could manufacture the patented product for distribution of the medicines to the hospitals and other public institutions. In conclusion, the Delegation stated that the provisions of the patent law in India were there to promote public health, in that they were not restricted only to the compulsory license in general, but there were other provisions where the government could acquire the patents in the public interest for governmental use.

85. In response to the questions raised by the Delegation of Spain, the Delegation of Brazil explained that the Brazilian proposal consisted of three phases. The objective of the first phase was to promote the exchange of detailed information concerning all exceptions and limitations provisions in national and regional legislations as well as of the experience of implementation of such provisions, including jurisprudence. The first phase also addressed why and how countries used and how they understood the possibility of using the limitations and exceptions provided in their legislations. The Delegation noted that the study coordinated by Professor Bently had given the Committee a very good first step in that direction. The Delegation observed that the study covered the exceptions and limitations that existed in the national legislations, but was more conceptual and did not go in detail in how those provisions were applied in national legislations. While the study had a specific focus on the United States and the European jurisprudence, the Delegation considered it important to analyze how those provisions were applied in other national and regional legislations. The Delegation further explained that the second phase of the proposal was to investigate which exceptions and limitations were effective to address development concerns and what were the conditions for their implementation. In that phase, it was important to evaluate how national capacity affected the use of exceptions and limitations. The Delegation was of the opinion that the experts' study had identified several exceptions and limitations which might have positive consequences for development, for instance, the Bolar exception in the United States of America. In its view, however, some other exceptions and limitations had a neutral effect. For example, the exception concerning ships and vehicles in transit was logical and useful, but did not necessarily have an impact on development. The Delegation further explained that, in the third phase, the Committee would take all those exceptions and limitations, gather them in a compilation as a non-exhaustive manual, which might serve as a reference to countries for their national legislations.
86. The Delegation of Norway supported the statement made by the Delegation of Belgium on behalf of the European Union and its 27 Member States. Referring to its statement made at the 14<sup>th</sup> session of the SCP, the Delegation considered it important to put exclusions, exceptions and limitations in the context of, and to consider them together with, substantive standards for protection in a given territory. The Delegation expressed the view that the study prepared by the external experts illustrated the need for a contextual approach.
87. The Delegation of the United Republic of Tanzania noted that the legislature had the reason for having provisions on exceptions and limitations, and stated that unless there were reasons to take a u-turn from those accomplishments by the legislature, there was no need for change. The Delegation considered that exceptions were interpreted differently from one country to another, and making a demarcation line between reasonable and outrageous positions was difficult. Nevertheless, the Delegation expressed the opinion that Article 27 of the TRIPS Agreement had not lost its meaning. The Delegation posed a question as to whether the Committee really needed to go into a particular situation where a country was interpreting the exceptions taking an outrageous position. In its view, it could be directed to a particular country, and countries were at

liberty to have the provisions if they thought the provisions still had their meaning or had a particular purpose for which they had been enacted in their legislation. The Delegation suggested being careful in taking another route without taking into account the local accomplishments surrounding the legislature.

88. The Delegation of Uruguay stated that the study prepared by the external experts was of a very high quality, met a very high academic level and gave an overview and review from a technical point of view. The Delegation, however, considered that it lacked another component, i.e., how those provisions worked in the various different scenarios, particularly in relation to the issue of development. It was of the view that, while the study was a very important basis and a starting point for the work of the Committee, it was not fulfilling the objective for which the study had been requested, which was to analyze the effects in concrete situations particularly taking into account the issues of public policy, development and its practical implementation.
89. The Delegation of France, speaking on behalf of Group B, referred to a proposal made by the Delegation of India to include all comments made by Member States in an Addendum to the study. The Delegation noted that it was not a common practice in WIPO to compile Member States' comments in separate documents, since those comments were reflected in the Reports of the meetings. For that reason, and taking into account the new language policy adopted by the General Assembly, the Delegation was of the view that unnecessary additional documents should be avoided. Therefore, it saw no need for specific additional documents compiling Member States' comments on the study.
90. The Delegation of India recalled that the proposal referred to by the Delegation of France was a proposal made first by the Delegation of Brazil on behalf of the DAG, supported by the Delegation of India. The Delegation further recalled that there was a precedent in the CDIP, where comments of Member States had been appended in a separate document which had been considered in conjunction with one particular study on technology transfer. In addition, the Delegation requested Group B to clarify its substantive difficulty with the proposal. It explained that the proposal was made for ease of reference for all who might be referring the studies. The Delegation stated that the proposal was made in a constructive spirit and with the objective of facilitating a greater understanding of the issues and appreciating various perspectives on the subject matter.
91. The Delegation of the Plurinational State of Bolivia supported the statement made by the Delegation of India, taking into account that the document had not been translated into Spanish and that several comments had been made by the Delegation with regard to the substantive issues in the study. In its view, it would be useful if anyone who had access to the study would be able to know the opinions of Member States on the contents of the study to be found in the addendum of that study.
92. The Delegation of Germany stated that the Committee had very exhaustive studies, and that every Member State was free to make comments on the studies and to deliver comments if the description was not correctly made by the Secretariat. The Delegation was of the view that the Committee should stick to that habit, and should not produce exhaustive additional documents, bearing in mind the cost for translation.
93. The Delegation of France clarified that Group B did not wish the proposed compilation of comments becoming a common practice of WIPO even if there had been a precedent. It further stated that the language policy of WIPO, adopted by the Member States and was applied retroactively to certain documents, should be an element that needed to be taken into account. In its view, there was no need to have comments separately annexed to the study, since they were reflected in the Reports of the meetings.

94. The Delegation of India clarified that the proposal was to extract comments made by Member States under each study and to put together in a separate document with a different number. It explained that the proposal did not ask for a compilation of Member States' comments on a particular study to be included in the study itself. The Delegation stated that, in the study, a cross-reference to the document compiling the comments could be made. It explained that the proposal was made to facilitate access to comments and observations made by Member States and other stakeholders on each of the studies. Therefore, in its view, the proposal would not increase the thickness of any document. The Delegation further stated that the translation load of WIPO would not be increased, since the comments had already been translated for the Reports. The Delegation considered that the compilation of comments could be simply on the website, and did not need to be printed out and distributed as documents for the following session of the SCP. As regards the issue of whether it was fundamentally necessary and how useful it could be, the Delegation acknowledged different perspectives, but expressed its belief that such a compilation would help the Committee appreciate the complex issues more comprehensively and more holistically, which was the final objective of the whole exercise.
95. The Delegation of Egypt referred to the WIPO language policy according to which a full implementation of that policy by the SCP was still under study, since it was being looked into and would be looked into by the Program and Budget Committee so as to be adopted at the next year's General Assembly. The Delegation stated that the study had to be based on the idea that the language policy should not have an impact on the objective work of the Organization. Therefore, in its view, if there was a need to summarize documents and not to enter into details, no doubt it would have consequences on all aspects of the Organization's work. In that light, the Delegation observed that if the comments of Member States on studies could not be added, requesting other studies to be undertaken might not be able to be called for, because that might also have a negative impact on the language policy.
96. The Delegation of Venezuela supported the statements made by the Delegations of India and the Plurinational State of Bolivia with regard to the compilation of comments by Member States, bearing in mind the fact that only the executive summary was translated into other languages. The Delegation stated that the topic of exclusions and exceptions was linked to development and to avoid monopolies, and was relevant to daily life such as the right to life and the right to health. Referring to the argument that the flexibility issues could not be dealt with before dealing with the issues of rights, the Delegation considered it a senseless dichotomy, because the rights of a right holder needed to be applied with flexibility.
97. Recalling that the language policy did not provide any limitation to submissions made by Member States, the Delegation of Brazil stated that the volume of translation could not be a relevant argument against its proposal.
98. The Delegation of the Russian Federation regretted that there was no analysis on the legislation of its country in the study prepared by Professor Sherman concerning the patentability of software, and expressed its wish to share information in that regard. The Delegation noted that, in the Russian Federation, as provided by the Civil Code, computer programs were treated as literary work under copyright regardless of the language used and regardless of the type of program. It explained that computer programs were not patentable under the legislation of its country. The Delegation further explained that, with regard to algorithms of programs, they could be innovative if they provided a technical result of a material object using a specific material technology. In



that case, there was a basis for recognizing them as a technical solution, and further looking into their patentability. The Delegation however, clarified that in order for an algorithm to be recognized as a technical solution, it should not be confined to a mathematical method or provision of mere information. The Delegation stated that the listing of programs in a programming language should not be regarded as disclosure of the invention, as in other cases, a description of the patent application should be presented in a natural language and be accompanied by flow charts, comments, etc., for it to be understood by average technical specialists in the field who were not specialists in programming but had a general understanding of computer technology.

99. The Delegation of the Plurinational State of Bolivia noted that there was a precedent in the SCP where comments on the Report of the International Patent System had been published in the Addendum to the Report.
100. The Representative of the EPO supported the statement made by the Delegation of Belgium on behalf of the European Union and its 27 Member States.
101. The Representative of ALIFAR stated that exceptions and limitations, which were norms specifically mentioned in the TRIPS Agreement and the Doha Declaration on the TRIPS Agreement and Public Health, were an essential element of all patent legislation as they provided a necessary flexibility for public policy on health and food security, among others. She considered that they enabled the balancing of rights and obligations, as referred to in Article 7 of the TRIPS Agreement. With regard to the design of national legislation, the Representative noted that when those norms were applied to specific cases, at least in Latin America, the mechanisms were used very cautiously and only where it was not possible to use other *ad hoc* measures for public health. The Representative observed that a mechanism for exceptions was very useful and necessary to overcome the barriers that could block activities through administrative means. Regarding the August 30, 2003 WTO Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, the Representative noted that the mechanism was used once by one African country over a long period of time, and that no other country without its own production capacity had found the need to import medicines with compulsory licensing. The Representative stated that the system was not very friendly, and very often, compulsory licenses generated conflicts. While noting that the documents put forward by the Secretariat were of great value, she found it useful to go into further depth of some concrete examples of the use of compulsory licensing and other exception measures, as some developing countries had a lot of experience in that respect. The Representative further observed that, very often, legal barriers were put up to the use of exceptions with regard to bringing in generic medicines to the market. In her view, looking at specific cases would enable the Committee to come up with best practices, and specific problems could also be looked at to help countries in search for specific solutions in order to bring medicines as soon as possible once the patents were expired. She considered that the Decision of August 30, 2003 of WTO could be used and would help countries to get access if clear and precise explanation of experiences was shared. In her opinion, then, countries could re-draft their own national legislation so that they would have transparent processes to follow. The Representative stated that a non-exhaustive manual on exclusions and limitations as proposed by the Delegation of Brazil could be a very useful tool to help countries who wanted to use such kind of measures.
102. The Representative of GRUR reiterated its support to the proposal made by the Delegation of Brazil. With respect to the compilation of comments, he stressed the importance of including contributions made by intergovernmental organizations and non-governmental organizations.

103. The Representative of FSFE noted that the study led by Professor Bently, which had provided a useful overview of the complex field, represented a starting point for future debates. He, however, regretted that the study and the mandate which the Committee provided had not included open innovation systems, of which free software was the most established example. He agreed with the Delegation of Brazil in highlighting that the patent system must strive for the equilibrium of rights among its users, including not only patent holders but also the society as a whole, so that the welfare of the society as a whole prevailed. In this view, they all constituted legitimate clients of the system. The Representative noted that the study highlighted the wide-spread consensus that computer programs should be excluded from patentability. He applauded the study for considering the economic context in which the costs and benefits of patents on computer programs must be considered. The study concluded that the costs of patenting in this particular area far outweighed any conceivable benefits. The Representative was of the opinion that the damage that software patents did to innovation and economic development struck at the very heart of the digital society. In his view, they created an incalculable business risk for anyone engaging in the development of software. Due to the fact that reliably identifying prior art in software went far beyond the capabilities of even the best-equipped patent office, he considered that software patents were routinely granted on inventions which had long existed, and were in fact not innovative at all. The Representative stated that it dovetailed with the conclusions drawn by leading independent experts in the field, such as the results of the 2008 Berkeley Patent Survey conducted by Pamela Samuelson, *et al.* According to that study, the startup executives interviewed in the survey had stated that patents generally had provided only weak incentives to engage in innovation. The Samuelson study found that a large share of startups, especially in the software industry, opted out of patenting altogether. While patents aided startups in the areas of hardware and biotechnology to capture competitive advantage, the Berkeley Patent Survey concluded that, for software and Internet companies, patents generally served a much less important function in almost all of the entrepreneurial activities. Moving on to the debate about exclusions and exceptions in the area of software, the Representative noted that Professor Bently's study strongly suggested that the cost-benefit calculation of patenting be improved by granting exceptions to patentee's rights. Contrary to the comments made by Professor Bently, the Representative considered that exceptions, which were merely defensive, did not suffice to mitigate the damage done by patents on software. As stated by the Delegation of Brazil on behalf of the DAG, the Representative also observed that the Committee must never lose sight of the fundamental trade-off at the root of the patent system: in order to provide an incentive to innovate, a monopoly was awarded. If the attendant risks for innovation and competition in the market were not carefully monitored, in his view, the market would be dominated by only a few companies. He was of the opinion that that was already the case in software industry. The Representative agreed with the statement made by the Delegation of the Islamic Republic of Iran that exceptions carried with them the dangers of restrictive interpretation and private ordering. For that reason, the Representative considered exceptions to be unsuitable as a tool to stimulate software innovation. Instead, in his opinion, exclusions should be used, and their implementation strictly monitored. As SMEs and individuals were having to fight a pitched battle against overwhelmingly powerful corporate interests and entrenched monopolies in the software market, the Representative was of the view that they should not be needlessly put on the defensive side. He considered that, in the area of software, exclusions worked in favor of SMEs because they provided clarity if properly implemented. In his view, exceptions worked in favor of the incumbent monopolies, which had the legal firepower to shape jurisprudence in their own interest. He further observed that, while the study considered at length the practice of the EPO, it neglected to point out that the EPO's practice was in direct contravention to the letter and spirit of the European Patent Convention's Article 52,

which stated that programs for computer were excluded from patentability. He agreed with the statement made by the DAG that patents should be granted only in areas where there otherwise existed a market failure to provide innovation. On that point, he reiterated his three step test for inclusion in the patent system which he had first proposed to the 13<sup>th</sup> session of the SCP, i.e., for any subject matter to be included in the patent system, there must be (i) a demonstrated market failure to provide innovation; (ii) demonstrated positive disclosure from patenting, and (iii) demonstrated effectiveness of the patent system in the area to disseminate knowledge. He considered that software failed all three steps of that test. The Representative stated that innovation in the software market was more vibrant than ever, and experience showed that patent-related disclosure was practically useless in the case of software. Further, in his view, the patent system in that field impeded the dissemination of knowledge instead of promoting it, and hence it followed that software should be excluded from patentability. The Representative supported the proposal of the Delegation of Brazil contained in document SCP/14/7 and the concrete suggestions therein on a work program for the SCP. The Representative, however, requested that exclusions from patentable subject matter should also be included in the debate, alongside the limitations and exceptions.

104. The Representative of IFPMA expressed his appreciation for the extensive study prepared by the external experts, which would enrich the debate within the Committee. The Representative considered that empirical evidence remained the key to achieving the desired result. In relation to the study prepared by Professor Visser in the context of health, the Representative expressed his belief that sustainable access to quality medicine could only be achieved by creating necessary incentives for medicine innovation. In his opinion, it was important to have a broader view of the policy objectives which was access to medicines rather than specifically focusing on certain tools to achieve that goal. The Representative further stated that other crucial pieces of the access picture included appropriate levels of health care infrastructure and financing, which were crucial factors for the effective operation. He was of the view that compulsory licensing by itself was not a sustainable approach, as it created strong disincentive to develop and market new medicines, which required passing through a costly and lengthy regulatory process often in the country in question. He considered that innovative companies were less likely to introduce products when copiers could immediately enter the market, which undermined R&D and investment. In his view, without a local approach or a launch of innovative products, generic companies might not also be able to obtain a necessary regulatory approval to serve their medicines. He considered that widespread use of compulsory licenses made efforts denied, or would delay patients' access to innovative products and hinder the introduction of good quality generic versions in the longer term. The Representative stated that the improvement of global health was a commitment shared by the research-based pharmaceutical industry and by WIPO Member States, and welcomed efforts by WIPO and the WTO to achieve that goal, working together in collaborative ways. He said that IP might be his organization's member companies themselves undertaking numerous multi-faceted initiatives to improve access to medicines and facilitate broader medicine development. He explained that such practical measures included training of researchers and healthcare workers as well as strengthening of local health care infrastructure. In relation to access to medicines which was a key part of the access picture, the Representative noted that numerous initiatives had been developed and deployed, such as tier pricing, donations, voluntary licensing and capacity building. He stressed the necessity of innovation and platforms which incentivize, and not undermine, the innovation. The Representative stated that companies of his organization were fully committed to undertake the job they do best, which was researching and development of new and more effective treatments. He expressed his belief that ensuring the correct policy environment which remained the

crucial role of governments was a critical aspect of the long term global health challenges faced by all.

105. The Representative of ICC noted that the studies on exceptions and limitations provided a comprehensive and in-depth discussion of exclusions from patentability and exceptions and limitations to patentees' rights. While he had not had an opportunity to review the study and its Annexes in detail, given the depth of the analysis of the situation in a number of Member States, he considered that such an analysis would take considerable time and effort, and expressed his wish to provide appropriate input in due course. As general observations, first, the Representative recalled that ICC had long maintained that patents were critical to provide an incentive and reward for innovation and investment in R&D and future inventions in all fields of technology. He added that patents were also an essential mechanism to facilitate the transfer of technology as well as to facilitate foreign direct investment. He observed that exceptions and limitations provided for under international law and at the national level in patent systems were appropriate elements in a well-functioning patent system that included the grant of rights and their enforcement. The Representative, however, cautioned against any activity at the national or international level to broaden exclusions from patentability – such that the exception swallowed the general rule – and undermined the functioning of patent systems as a whole. The Representative observed that document SCP/15/3, Annex III, brought an interesting review of patent exceptions in the health context. In that regard, he stressed that negotiations with right holders on licensing were usually a better tool to achieving policy objectives such as improved healthcare, food security and tackling climate change. Second, the Representative observed that there were some points in the Annexes where the analysis of international law, in particular the TRIPS Agreement, should be more rigorous. For example, he noted that there were statements on page 23 of document SCP/15/3, Annex I, and page 36 of document SCP/15/3, Annex II, suggesting that certain requirements under the TRIPS Agreement had little or no meaning. He also referred to a text found in one of the Annexes stating that the WTO “contracting parties have considerable wiggle room to exclude subject matter from patentability on the basis that it does not constitute an invention (or an invention in a field of technology)”. While acknowledging that international agreements were subject to interpretation by the members of those agreements and their governing body, the Representative was of the view that such statement and similar ones were made with little or no analysis with reference to the Vienna Convention on the Law of Treaties or to relevant decisions by panels under the WTO’s Dispute Settlement Understanding. The Representative considered that his view was consistent with that expressed by the Delegation of the United Republic of Tanzania, in particular in his point that Article 27 had lost its meaning. The Representative was concerned about such lack of rigor for two reasons. The first reason was that patents in all fields of technology played a critical role in incentivizing research and development, as well as facilitating the transfer of technology. In his view, suggestions that decisions as to whether and what to provide patent protection were uncertain ran counter to that role. The second reason was that business relied on legal stability to make investments, especially the long-term investments in research and development of new products and the work necessary to bring them to market. The Representative was of the view that, due to the lack of rigor of the analysis in the study and its Annexes, they suggested an unfortunate degree of uncertainty in the establishment and enjoyment of intellectual property rights. In his opinion, that uncertainty would frustrate the goals and aspirations of the patent system.
106. In relation to the statement made by the Representative of FSFE, the Representative of the EPO recalled that Article 52 of the EPC stated that programs for computers was excluded from patentability only to the extent to which a European patent application or European patent related to such subject matter *as such*.

107. The Representative of KEI took note of Professor Visser's study which examined selected case studies of countries where compulsory licenses had been granted for pharmaceuticals. The Representative recommended that the SCP request the Secretariat to produce a comprehensive annual report documenting the use of compulsory licensing by Member States including empirical data on the royalty rates set in each case. He noted that policy makers had long expressed interest in State practices in setting royalty rates, and he expressed his belief that WIPO could play a constructive role in that regard. Concerning the compilation of comments by Member States and observers, the Representative also pointed out the precedent in the SCP.
108. The Representative of TWN considered that exclusions, exceptions and limitations to patent monopoly were important policy tools to address certain development concerns. He stated that there was ample empirical evidence on the benefits of using exclusions, exceptions and limitations by most of the WIPO Member States. Even though the TRIPS Agreement imposed mandatory patent protection for inventions on microorganisms and pharmaceuticals, the Representative considered that exclusions were still an important tool to address critical development concerns in agriculture, public health, etc. He observed that the history showed that many advocates of a strong IP regime had used to exclude pharmaceutical inventions from patent protection and had developed state of art pharmaceutical industries. He noted that, since the Doha Declaration on the TRIPS Agreement and Public Health, developing countries had used compulsory licenses at least 52 times mainly in the form of government use order to ensure affordable medicines to people, and observed that compulsory licenses were also very frequent in developed countries, hence compulsory licenses were an important and legitimate tool to curb the abuse of patent monopoly and to meet the critical needs of people. The Representative expressed its belief that the limited policy space available in the post TRIPS era still allowed developing countries to design more exclusions and exceptions to meet their development objectives, as reflected under Articles 7 and 8 of the TRIPS Agreement and in the Millennium Development Goals. The Representative appreciated the efforts of academic experts who jointly produced a 400-page study containing very useful information and interesting observations. He, however, pointed out the following important gaps in the study. First, the study directly and indirectly advocated for the use of exceptions over exclusions. It also stated that policy objectives behind exclusions could be achieved through exceptions. The Representative stated that exceptions were not substitute for exclusions, and that there was historical evidence on the concrete benefits of exclusions. Second, the study had not adequately covered the public policy implications on the exclusions, exceptions and limitations irrespective of such a requirement under the terms of reference of the study. Third, the exclusion of certain types of pharmaceutical patents was critical for ensuring access to medicine in developing countries because such exclusions prevented ever-greening of patents and brought competition in the pharmaceutical market. In his view, such exclusions were well within the boundaries of TRIPS obligations. The Representative was of the opinion that the study had not examined the current practices in exclusions with regard to patenting of medicines, and observed that the study was also silent on the scope of potential exclusions on pharmaceutical patents. Four, the study did not adequately deal with the scope of policy space available currently for countries to incorporate exclusions, exceptions and limitations on patents in domestic legislations. Five, most findings of the study were based on the jurisprudence of EPO and the United States of America. At the same time, the study did not analyze the development implications of such jurisprudence especially for developing countries. Hence the study did not offer any new direction or way forward with regard to implementation of exclusions, exceptions and limitations on patent rights. The Representative requested that all stakeholders, including civil society organizations, be given an opportunity to provide detailed written comments on the study.

The Representative was of the view that the deliberation on exclusions, exceptions and limitations on patent rights should result in a work program, and considered that the proposal by the Delegation of Brazil was a move in the right direction. He urged Member States to keep discussions on exclusions, exceptions and limitations in a manner that was guided by principles and objectives reflected in Articles 7 and 8 of the TRIPS Agreement and the Millennium Development Goals.

109. The Representative of ITSSD reiterated that the use of exceptions was an avoidance mechanism to circumvent the need for critical infrastructure development and to circumvent the need to develop critical resources necessary to determine whether an application fell within the scope of patentability. In his view, it was almost like a default rule where there was the option of treating a patent developed by private means as a public interest asset. In his view, that was appropriate until the time when the critical resources that were necessary to evaluate the patentability of an invention were in place. He explained that financing, skill training and critical infrastructure were the three main areas that were always brought up when it came to compulsory licensing, because in most instances, a compulsory license was not going to get the government medicines, clean technology or software that was needed by the population. In many instances, he considered that the issue was a method of getting the technology to the people. With respect to Article 31 of the TRIPS Agreement, the Representative observed that everybody was speaking about Article 31 in a way as if they were certain as to the interpretation of the provision. The Representative noted that his comments to document SCP/13/3 had cited a number of studies which showed demonstrably that it was not withstanding the cause or the issuance of a compulsory license. In his view, most of the new causes seemed to be based on public interest rather than public emergency or actual empirical evidence of a patent abuse. The Representative highlighted the need to pay fair, full, adequate and complete market value, which was evident not only in Article 31 of the TRIPS Agreement but also in the Doha Declaration and in the waiver provision in Article 31*bis*. The Representative considered that the question at stake was what fair market value was and how to determine it, which might be a reason and a cause for a study of its own, considering that the fair market value was usually in a market in which a company was selling a product that the government wished to take by the issuance of a compulsory license. In his opinion, that was a market study, and it was not for the government to issue unilaterally a market price based upon their own assessment. The Representative therefore suggested that an analysis, or an example of how to undertake an analysis, to determine the fair market value in a developing country be undertaken under a future study, because, in the end, a compulsory license did not indicate a presumption that there was not a ready market with a willing buyer and a willing seller, which would be proven untrue in most cases.
110. In response to the question addressed to the Representative of WTO by the Delegation of Venezuela regarding the interpretation of Article 31 of the TRIPS Agreement, the Representative stated that the WTO Secretariat had no authority over the interpretation of the TRIPS Agreement.

*Item 5(c): Client-attorney privilege*

111. Discussions were based on documents SCP/13/4 and SCP/14/2.
112. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, stated that, in the framework of the industrial property system, the freedom of communication between professional representatives and their clients was fundamental in relation to the preparation of an application for a patent, the procedure for obtaining a patent as well as when an opinion was requested regarding infringement or annulment of

rights. It considered that the freedom of communication necessarily required the grant of the confidentiality of the communication between the professional representatives and their clients, both with respect to third parties, and particularly, in the event of judicial proceedings. The Delegation expressed its wish to endorse the Secretariat's recommendation for the next steps consisting of a detailed study on the treatment of the confidential information revealed to the professional representatives as granted by the different States. In particular, the Delegation observed that the study in question should also address how confidentiality of communications between professional representatives and their clients in one country was recognized in other jurisdictions, as well as exploring possible options of further recognition of the confidentiality between professional representatives and their clients beyond national borders. In addition, the Delegation noted that a detailed study to be prepared by the Secretariat should also be focused on norm-setting activities in that field. The Delegation considered that prerogative crucial to enable an appropriate communication without reservation between the client and his representative, enabling for the best defense of the client's interest.

113. The Delegation of Switzerland observed that, in order to better understand the issues surrounding the question concerning the client-attorney privilege, it might be ideal to have a summary of all the different national jurisdictions. The Delegation noted that even if it was an issue based on national legislation, solutions could be found within the SCP in order to assist the various legislations to make progress on the topic. The Delegation therefore suggested the possibility of drawing up a potential guide for the members of the Committee and for the responsible officials. It stressed the importance of looking at the practices in different countries as well as their implementation. The Delegation supported the statement made by the Delegation of Belgium on behalf of the European Union and its 27 Member States, i.e., a request to the Secretariat to draw up a detailed study on the issue of the recognition of client-attorney privilege and the confidentiality of communications within and between countries. The Delegation recalled its statement at the previous session of the SCP, and noted that the contents of that statement were still valid in terms of their position. The Delegation informed the Committee that its law on patent advisors would come into force on July 1, 2011, and noted that the privilege to maintain confidentiality was included in Switzerland's Criminal Code and would be taken into consideration in the work carried out by the Council on Patents. The Delegation stressed the importance of the subject for its country and expressed the hope that the work on the issue would make progress in the SCP.
114. The Delegation of Slovenia, speaking on behalf of the Group of Central European and Baltic States, aligned itself with the position expressed by the Delegation of Belgium on behalf of the European Union and its 27 Member States. In particular, the Delegation underlined the importance of in-depth analysis of the situation which arose when advice from professional representatives extended from one jurisdiction to another. The Delegation therefore suggested that a detailed study focusing on the cross-border elements of the client-attorney privilege be prepared by the Secretariat.
115. The Delegation of Nepal noted the importance of a study on the client-attorney privilege for Nepal, given its current process of legal reforms. The Delegation observed that the preliminary study was based on a cross-universal assessment of prevailing systems and drew out interferences between them as well as tried to synchronize theoretical propositions and practical aspects through adequate conceptualism, analysis and review of literature. The Delegation also noted that the preliminary study had clearly illustrated the principal mechanisms for applying and facilitating the client-attorney privilege in the international, regional and national context, and had described four basic approaches concerning international mechanisms. The Delegation expressed its appreciation to the Secretariat for the preparation of the preliminary study because of its neutrality and

fairness in the elaboration of its content. The Delegation pointed out that the preliminary study should clearly identify how to effectively implement the said international mechanisms and provide an assessment of pros and cons of such mechanisms. It also noted that the preliminary study should explore the possible risk mitigating measures as well as implications at national, regional and international levels. The Delegation suggested that WIPO commission an independent study providing a comparative analysis of the issue of client-attorney privilege in Member States so as to facilitate its practical implementation at the national level.

116. The Delegation of New Zealand agreed that the lack of cross-border recognition of client-patent advisor privilege was a major problem, and it considered that undertaking a work to identify solutions to the problem in the SCP to be valuable. The Delegation pointed out that, as indicated in the preliminary study, New Zealand's law already had provided for cross-border recognition of client-patent advisor privilege, including privilege in communications with non-lawyer patent attorneys.
117. The Delegation of Australia expressed support for the statements made by the Delegations of Belgium on behalf of the European Union and its 27 Member States, Slovenia on behalf of the Group of Central European and Baltic States and Switzerland, and agreed that the client-attorney privilege was a very important topic. It noted that the international differences that existed in relation to client-attorney privilege had recently received considerable attention within Australia, and that the Australian Government was in the process of considering legislative changes in that area. Consequently, the Delegation supported further work on the client-attorney privilege in the SCP, including a study on the principles and application of privilege afforded at the national level. In addition, the Delegation expressed its support for a study identifying potential guidelines or solutions to the problems related to the client-attorney privilege.
118. The Delegation of the Russian Federation thanked the Secretariat for the preparation of documents SCP/13/4 and SCP/14/2, and inclusion of the practice of the Russian Federation on the issue of client-patent advisor privilege in the latest document. Noting the relevant legislations which governed the issue of secrecy obligation of certain professionals in the Russian Federation, the Delegation underlined that Federal Law on Patent Attorneys prohibited the transmission or any disclosure, without the client's written consent, of information contained in documents obtained and/or produced as part of the performance of their activities, except otherwise provided by the relevant law. Thus, the Delegation explained that in the Russian Federation, patent attorneys had limited privilege, as information which constituted a professional secret may be passed on to third parties in accordance with federal laws and/or on a court decision. Noting that different practice existed on the issue among Member States, the Delegation stated that the issue of minimum standard of privilege applicable to communications with IP advisers deserved further analysis within the SCP.
119. The Delegation of the United States of America aligned itself with the views expressed by the Delegations of Slovenia on behalf of the Group of Central European and the Baltic States and Switzerland, and in particular with the views expressed by the latter concerning the possibility of a summary document to be prepared by the Secretariat. The Delegation pointed out that such a document could be of considerable value not only for legislators, but also for users of patent and legal systems in various countries. The Delegation aligned itself also with the views expressed by the Delegation of Belgium on behalf of the European Union and its 27 Member States, according to which the document in question would also serve for identifying practical and pragmatic suggestions on the next steps for further work on the topic.



120. The Delegation of El Salvador considered document SCP/14/2 to be a good foundation for the future work on the issue of client-attorney privilege. Recalling that it was an open-ended document that could be improved and fine-tuned, the Delegation expressed its belief that the document should include more examples of experiences in different countries, in particular, cases based on the national experiences of developing countries. As El Salvador had a Roman-law system, the Delegation considered it useful to have access to information related to experiences of countries having also a Roman-law system, taking into account the fact that in El Salvador, the issue was regulated under both the civil law and the criminal law.
121. The Delegation of Brazil, speaking on behalf of the DAG, noted that, according to document SCP/14/2, the difference in the regulation of the client-attorney privilege existed not only between common law and civil law countries, but a variety of approaches existed also between countries having the same legal tradition, and that such difference of approaches among different systems and inside the same legal systems was reflected also in relation to the confidential information between a client and his or her patent advisor. In particular, the Delegation observed that the document stressed the fact that the treatment of confidential information between a client and his or her non-lawyer patent advisor in foreign courts was an issue far from being settled, and the evidence rule, the scope of protection of confidentiality, the professions covered by confidentiality and the treatment of foreign registered patent advisors and their qualifications were different from country to country. The Delegation considered that many of the mentioned issues went beyond patent protection or patent litigation because, they were more generally related to national judicial procedures that reflected the fundamental legal structure and tradition of each country. For that reason, the Delegation was of the view that it was neither practical nor realistic to seek a uniform rule that could involve fundamental changes in national judicial systems. The Delegation considered that privileged communications between a lawyer and his or her client was not based on the legal nature of the lawyer's work *per se* but on the judicial relationship that existed between the lawyer and the court. In addition, the Delegation pointed out that privileged communications such as those that took place between a client and his or her lawyer did not fall within the domain of the law of patents.
122. The Delegation of India reiterated its position expressed during the previous session of the SCP. The Delegation pointed out that, under the Indian Patent Act, there was no provision concerning the client-attorney privilege, and observed that such provision was neither included in the Paris Convention nor the TRIPS Agreement. For that reason, the Delegation considered that each country should be allowed to set its own level of privileges and extent of disclosure depending upon the social and economic circumstances and level of development of each country. In its view, the harmonization of the client-attorney privilege would imply the harmonization of exceptions to the disclosure which would then bring great secrecy and tie the hands of patent offices and judiciary to find out the relevant information which might be very critical to determine the issue of patentability. Since the disclosure of not only technical information but other relevant information relating to patent applications was a substantial element of the patent system, the Delegation was of the view that one of the important duties of the patent attorney was to promote dissemination of information about the patent application and therefore, any effort of harmonization of the client-attorney privilege would ultimately lead to a defective and unenforceable grant of patent. In its opinion, any confidentiality of the information between a client and his or her attorney could be protected through a non-disclosure agreement. The Delegation concluded that the protection of important information through client-attorney privilege would lead to a situation where vital information would be suppressed and kept out of the public access, and therefore, it could be detrimental to public interest, particularly in developing countries.

123. The Delegation of the Islamic Republic of Iran aligned itself with the statement made by the Delegation of Brazil on behalf of the DAG. The Delegation observed that no definition of the concept of client-attorney privilege had been provided in the preliminary study. The Delegation observed that the legislation of several countries, especially civil law countries, did not contain such concept of privilege, and that although there was an overall common practice on the issue of confidentiality of communication between a client and his attorney in both common law and civil law countries, the confidentiality in civil law countries stemmed from professional secrecy obligation, while in common law countries, privilege was intended to have different meaning. The Delegation therefore observed that the client-attorney privilege was a matter of private law which belonged to national jurisdictions of different countries, and consequently, harmonization of that topic would not be easy. The Delegation invited the Secretariat to further elaborate the interplay between the extension of the concept of the client-attorney privilege and the transparency of the patent system, whether such an extension would affect the transparency in patent law, as well as the possible results of an eventual harmonization of the existing procedures in the countries on the enforcement of IP. Finally, the Delegation underscored the need to assess the possible implications of such privilege for development. Referring to the statement made by the Delegation of India, it observed that the privilege would allow more information to be kept out of the public domain, and adversely affect the quality of patents and access to information and innovation especially in developing countries.
124. The Delegation of Brazil stated that, with respect to paragraph 138 of document SCP/14/2, there was no evidence to show that a different treatment of confidentiality and privilege applied to foreign patent attorneys in Brazil.
125. The Delegation of Japan aligned itself with the statements made by the Delegations of Belgium on behalf of the European Union and its 27 Member States, Switzerland and the United States of America.
126. The Representative of the EPO supported the statement made by the Delegation of Belgium on behalf of the European Union and its 27 Member States.
127. Referring to his statement on the client-attorney privilege made during the previous session of the SCP, the Representative of the ICC urged the Committee to consider detailed possible solutions to the problem related to the privilege, and WIPO to evaluate the advantages and disadvantages of the different solutions.
128. The Representative of AIPPI stated that, notwithstanding the two preliminary studies prepared by the Secretariat on the issue of client-attorney privilege, there was still a misunderstanding in relation to what privilege was, given that the issue was often considered as a tool for blocking the disclosure, a fundamental part of the patent system. The Representative explained that since the privilege related only to the instructions for advice which was given by an attorney to a client, it was not related to the fundamental fact of prior publication, and for that reason, the privilege could not be used as an instrument for concealing frauds (e.g., a fraud to the patent office). The Representative stressed the need for clarifying the issue, since the fears that the privilege could be an obstacle to disclosure were caused by the lack of informed debate. The Representative illustrated the outcome of the work carried out by AIPPI in that area, and stated that among the 48 countries that responded to their questionnaire, 96 per cent provided the client-attorney privilege and 76 per cent of them considered that kind of protection to be inadequate. In his view, that outcome manifested the existence of a serious problem in the system. The Representative further noted that 78 per cent of the countries

interrogated did not recognize the overseas non-lawyer intellectual property advisors, and that 52 per cent of them recognized neither the lawyers of other countries. In his view, the statistics elaborated by AIPPI, which dealt also with the issue of the qualifications of the IP professionals and limitations and exceptions, provided a good basis for further investigation of the issue. In addition to a study addressing the need for the recognition of protection from forcible disclosure in each country, the Representative stressed the need for a study on the inadequacies and anomalies of the current protection in the context of potential remedies. It observed that there would be no point, for example, in harmonizing around a topic which showed to be faulty itself. In relation to limitations, exceptions and waivers, the Representative stressed the need of investigating to what extent they should be part of a general principle. The Representative further stressed the importance of the certainty of protection, because the client and his or her advisor could not have confidence in the process of advising in an atmosphere without such certainty. Finally, in relation to further studies, the Representative recommended WIPO and Member States to use the work carried out by AIPPI.

129. The Representative of GRUR supported the position stated by the Representatives of AIPPI, FICPI, and ICC. The Representative expressed the belief that the legal status and privilege of lawyers and attorneys-at-law in respect of confidential information should be accorded or extended without discrimination also to patent attorneys and other intellectual property law advisors, and it should be fully recognized by all Contracting Parties through a possible international legally binding instrument without the requirement of reciprocity. The Representative stated that the protection of privilege generally available to lawyers or attorneys was in essence a human right issue. He pointed out that it was closely interrelated with the right of any party to court proceeding to have fair proceedings under the rule of law. The Representative observed that such approach was respected not only under European regional law, but also by the Universal Declaration of Human Rights administered by the United Nations. The Representative noted that, as regards the European law, it had been recently confirmed by the European Court of Justice in respect of competition proceedings, although it had limited the protection to legal advice given by the attorneys in practice and excluded in-house counsel from the scope of the privilege. In relation to the principle of non-discrimination, which was also a fundamental value under the Declaration of Human Rights, the Representative noted that patent attorneys, having a similar qualification and training as those of lawyers and giving legal advice of the same nature in the specific field of IP law, were excluded from the protection of the privilege for confidential information without justification, which constituted, in his view, discriminatory treatment. Concerning the issue of disclosure and the international legal framework, the Representative stated that it was based on a misunderstanding of the concept of enabling disclosure as contained in the international, regional and national legal instruments. The Representative stated that according to Article 29.1 of the TRIPS Agreement, a patent applicant had the obligation to disclose the invention for which patent protection was sought in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art, and according to Article 29.2 of the TRIPS Agreement, the competent authorities of a Member may require an applicant to provide information concerning the applicant's corresponding foreign applications and grants. The Representative noted that there was no obligation under international law, neither on the applicant nor the patentee nor the opponents in opposition, revocation or infringement proceedings, to lay open to the public or a competent authority or court, each and every element of the information in their possession or in possession of their attorneys or other legal advisors. Nevertheless, the Representative clarified that that did not allow the applicant or his attorney to willfully conceal knowledge about the state of the art available to them, which could be considered as a fraud against the patent office. The Representative further explained that the privilege could be considered an abuse when it was invoked to shield the patent

attorneys from giving legal advice to a gang of organized crime, or from schemes to undermine or infringe patents, trademarks and other IP titles. The Representative observed that the above mentioned behavior of the attorney was not only a matter of criminal law or professional personal liability, but also an issue of professional honesty, sanctioned by the rules of professional moral and behavior. The Representative noted that disclosure or discovery was an element of the rules of procedure of the courts in common law countries such as the United Kingdom or the United States of America, in particular in enforcement proceedings, where confidentiality of information came into play, as clearly indicated in the national laws of those countries, as well as in Article 43 of the TRIPS Agreement in relation to the rules of evidence. Otherwise, in his view, there would exist a gross conflict between disclosure and the right to a fair and equitable procedure under the rule of law. The Representative stated that the national law approach to or for the privilege was also not tenable in view of the international character of patent protection as clearly demonstrated by the very existence of WIPO as a specialized agency in the field of intellectual property, and in particular, by the PCT system with its distribution of responsibilities between receiving offices and the international PCT authorities. The Representative further observed that the whole system could only properly function if it was complemented by a network of patent attorneys representing their clients before the various national, regional and international authorities which closely cooperated with each other. In his opinion, the constant flow of information between those attorneys and their clients around the world, including also clients and attorneys from developing countries, should be protected, to the extent that such flow of information qualified for confidentiality.

130. The Representative of FICPI referred to his general statement and, in particular, to the three Resolutions passed by his Federation.
131. The Representative of AIPLA stressed the importance of the client-attorney privilege issue, and supported the continuation of discussion in the SCP, as well as the preparation of further studies, including studies of possible solutions to the problems.
132. The Representative of TWN stated that the extension of privilege would create a layer of secrecy around patents and compromise transparency in the patent prosecution. The Representative observed that even if there was a reason underpinning the difference between the concept of disclosure and confidentiality, in practice, a particular privileged communication could not be considered as an evidence in front of a Court, which then came into conflict with disclosure. The Representative stated that the issue of professional privilege played out only where there was a judicial or quasi-judicial body asked for the discovery of documents by requesting the advisor or client to submit the relevant documents. The Representative considered that it would eventually affect the quality of patents, and stated that the extension would be a backward step in an effort to improve the quality of patents. The Representative further stated that even if it had substantial law implications, it was not a substantive patent law issue. In his view, the SCP had little to offer to build the confidence of an IP applicant towards a patent attorney, and therefore, the Representative deemed it more appropriate to keep the issue in national legislation. The Representative further observed that since there was no legal recognition of patent attorneys in many developing countries, it would be impossible to grant privilege to foreign attorneys. Therefore, in his view, the discussion at the SCP had no relevance to those developing countries. In addition, the Representative noted that, given that the client-attorney privilege fell in the domain of trade in services, and in view of the ongoing WTO negotiations on domestic regulations, the Representative considered that the SCP was not the right forum to discuss the issue. The Representative observed that there were different opinions among AIPPI members, given that the Philippines, the Czech Republic, Argentina and Poland did not share the dominant view within AIPPI and

considered that the issue should be left to each country to implement under their own national law. The Representative considered that the preliminary study needed further improvement in four concrete areas. First, he stated that the study did not provide enough clarity in relation to the concept of the terms of patent advisor and patent attorney. Second, in his view, the study did not examine the adverse implications of the privilege on the quality of examination of the patent office or deduce the freedom to discover relevant documents. Third, he observed that while the study showed that the client-attorney privilege existed in many countries, it did not clarify the legal position with regard to the patent advisor privilege and did not provide the tabular representation on how many countries had extended the client-attorney privilege to patent advisors. Lastly, the Representative noted that the case law cited in the study, with the exception of the case of the United States of America, was not directly linked to the IP or patent law, and therefore, did not provide adequate information with regard to the issue.

133. The Representative of JPAA referred to his statement made during the previous session of the SCP, and supported the statement made by the Representative of AIPPI. He stated that the Committee needed to move forward in the investigation of the issue, in particular, in relation to exploring potential remedies offered by any effective means, led by either the Secretariat, a working group or external experts.
134. The Representative of CIPA and EPI supported the continuation of work on the client-attorney privilege in the SCP. The Representative drew the attention of the Committee to the word "client", which made it clear that the privilege was not an attorney privilege, but a client privilege. He echoed the words of the Representative of AIPLA in relation to the future work of the Committee.

*Item 5(d): Dissemination of patent information*

135. Discussions were based on documents SCP/13/5 and SCP/14/3.
136. The Delegation of Brazil, speaking on behalf of the DAG, stated that merely facilitating the access to the available patent information did not guarantee the transfer and the dissemination of technology. It noted that making effective use of the information was difficult in both developing and developed countries. Those difficulties related not only to the technology gap, but also to the insufficient description of the inventions in the patent applications. The Delegation was of the view that, if on the one hand the existence of a "global one-stop-shop" mechanism to access patent information was a desirable step in order to improve the processing of patent applications in a timely matter, on the other, such mechanism would not be suitable unless the quality of the information provided was useful and of a high standard. Therefore, the Delegation considered that the creation of any multilateral database must be preceded by a thorough study on sufficient disclosure, which must include, among other aspects, the disclosure requirement and "know how" and the use of database by developing countries. In its opinion, the exchange of search and examination reports would not, by itself, reduce the problem of backlogs, which needed to be assessed in a broader perspective, considering that the number of patent applications had considerably increased in the last two decades, while the quality of the granted patents was increasingly subject to criticism in terms of lack of novelty and inventive step. It welcomed the "Access to Specialized Patent Information" (ASPI), despite the clear need of training patent office employees and academics in order to put the available information into good use to reach economic development. In its view, special focus should be made on the costs of such a tool. Nonetheless, the Delegation pointed out that those initiatives such as ASPI did not implement by itself Recommendations 8 and 9 of the Development Agenda. In addition, recalling those recommendations, the Delegation stated that databases that were not freely accessible

constituted an obstacle to the international cooperation and a risk to the equilibrium of the system.

137. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, noted that patent documents constituted a valuable source of information from technical, business and legal perspectives. The technological data contained in such documents allowed innovators to learn from existing solutions to specific technical problems. The Delegation considered that such a rich body of technical information constituted the technical tool in research planning and management, contributing to a more efficient allocation of human and material resources. It noted that patent documents accumulated technical information that translated into innovation and progress for the benefit of the society as a whole. The Delegation stressed the importance of the dissemination and accessibility of patent documents as a source of technological, business and also legally relevant information. It considered that patent documents needed to be accessible to the greatest possible number of users in order to maximize the role in scientific and technical development. In its view, the harmonization of the international system for the dissemination of patent information should be guided by the objective of benefit to the users. Therefore, it was of the opinion that the system should aim at offering structured data that safeguarded consistency and operability of systems, and avoid duplication of work between institutions publishing patent information. The Delegation stated that the future work to be carried out by the Secretariat in that field should focus on access to patent information in digital format, particularly accessibility of full text data along with the availability of the information on the legal status of patents with a standard presentation of legal information for better comprehension. The Delegation acknowledged the great efforts carried out by WIPO concerning the standardization of norms of bibliographic data in patent documents, and the development of electronic documents in the user-friendly format, enabling the easy recovery of documents by users. In addition, the Delegation stated that the use of a classification system had a particular impact on the accessibility and dissemination of patent information. It stressed the need to join efforts for the improvement and harmonization of the different patent classification systems. The Delegation made a call to strengthen international cooperation in order to make the information contained in national and regional patent documents accessible in an easy and centralized way.
138. The Delegation of India stated that, since patent information was a unique source of technological business and legal information, access to such information became more important and relevant to developing countries, not only in improving the quality of examination of patent applications, but also in certain development activities. The Delegation, however, considered that due to limited resources, developing countries were unable to have any access to patent databases which were very expensive and beyond their reach, which led sometimes to defective grant of patents due to incomplete search facilities. It noted that, due to the lack of resources, developing countries were unable to digitize their own patent records. The Delegation therefore suggested that, in addition to the information relating to PCT applications currently available, PATENTSCOPE<sup>®</sup> be expanded to include non-PCT published applications as well as other non-patent literature. In its view, that would gradually help developing countries' patent system and research activities, and also help developing countries to manage their resources for other purposes.
139. The Delegation of Venezuela recalled its statement at the 14<sup>th</sup> session of the SCP, and supported the statement made by the Delegation of Brazil on behalf of the DAG.
140. The Representative of TWN stated that, regarding the accessibility of the databases, they should go beyond patent documents and should be available free of charge.

141. The Representative of ALIFAR underscored the important contribution that patent information had been making to society. She noted that activities carried out by WIPO to facilitate access to such information, including information relating to national patent proceedings, should be best used particularly by developing countries. In that regard, the Representative stressed the importance of the quality of information made available to users, as in her view, many patents did not comply with the disclosure requirement and those patented inventions could not be reproduced by a person skilled in the art. With regard to the creation of a database of multilateral nature suggested by some delegations, the Representative supported those delegations which considered that it should be followed by a study regarding the sufficiency of disclosure. In her opinion, the disclosure requirement had a close link with the patentability requirements of each country. Therefore, she considered that it should be thoroughly evaluated, while remembering the autonomy of each country in that area.

*Item 5(e): Transfer of technology*

142. Discussions were based on document SCP/14/4.
143. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, acknowledged that development and diffusion of new technologies were fundamentally important to face global challenges such as climate change, health and food security. It considered that facilitating technology transfer was an essential element of the Millennium Development Goals. Noting that the preliminary study highlighted that the recipient's capacity to absorb and apply the technology was fundamental to the successful completion of the transfer of technology, and that both the connection between intellectual property rights and technology transfer as well as the impact of such technology on innovation and development were complex issues, the Delegation was of the view that each country might adopt different parameters for the transfer of technology. In its opinion, some countries would be better placed than others to absorb and further develop the technology received, and others would require extensive investment and capacity building before reaching that point. Therefore, the Delegation agreed that it was not possible to draft a single policy which would maximize technology transfer and its positive impact on every country. Referring to several examples in the preliminary study that illustrated possible mechanisms and strategies to facilitate technology transfer, the Delegation noted that the suitable choice of the mechanisms at disposal would enable each country to establish the policy and legislation that benefited their particular needs within the framework of the current international commitments. The Delegation expressed its willingness to contribute to the development of policies designed to facilitate effective technology transfer. It reiterated its commitment to work towards the creation of new models to promote innovation, based on the close collaboration between the private and the public sectors. It welcomed and encouraged voluntary initiatives to facilitate a flow of technological knowledge on a global scale.
144. The Delegation of Brazil, speaking on behalf of the DAG, stated that the preliminary study narrowly focused on the issue of ensuring the availability of sufficient patent information, skilled IP professionals, and the involvement of public-funded research institutions, and on the role of the patent system in facilitating technology transfer. Referring to paragraph 52 of document SCP/14 which stated that the patent system could make positive contributions to efficient technology transfer only where the system functions in a way for which it is intended, the Delegation observed that it created its own opening for possible areas of interest that could have been developed in the preliminary study. The Delegation was of the opinion that a main weakness of the preliminary study was that it did not discuss how patents could be a barrier to transfer of technology, nor the

importance of preserving the public domain for the effective technological development of developing countries and LDCs. In its view, the discussion on transfer of technology ought to be broader and systematic, including issues such as the need for correct disclosure of patents, the use of exceptions and limitations, and the threat of anti-competitive behavior. Similarly, it considered that the important issue of standards of patentability could have a major impact either impeding or promoting technology transfer. The Delegation stated that specific challenges that the preliminary study had addressed included: (i) need for more clarity in respect of ownership of patents and scope of patent claims, rights and obligations of parties in licensing agreements, and an appropriate mechanism for enforcement of patents; (ii) addressing the information asymmetry through clear and complete disclosure of patent information and making them easily accessible to the public, services for matching patent licensors and licensees (match-making), and use of more patent experts for analyzing patent information and negotiating licenses; (iii) devising clear and balanced licensing rules, enhancing the quality of granted patents and financial incentives such as tax exemptions; and (iv) balancing the interests of patent holders and third parties, and preventing abuse of the system through mechanisms within and outside the patent system. While the preliminary study had devoted an entire chapter to the issue of public-private partnerships, including on the role of universities and public research institutions and the private sector, the Delegation recalled that, in developing countries and LDCs, the level of government support for research in public research institutions was low due to limited resources, in comparison to the level in developed countries. The Delegation, therefore, was of the view that models such as the Bayh-Dole in the United States of America could be a misleading venture to extrapolate on. Furthermore, in its opinion, the narrow focus on licensing of patented inventions ignored the fact that most of the economic contributions of public sector research institutions had historically occurred without patents. The Delegation expressed its belief that the 14 Recommendations of the WIPO Development Agenda provided a guiding framework for development-oriented transfer of technology. They should be demand-driven, transparent, neutral, accountable, and take into account the special needs of developing countries, in particular LDCs. The Delegation reminded the Committee of Article 66.2 and 67 of the TRIPS Agreement, which required Members to implement obligations relating to technical cooperation and transfer of technology. The Delegation considered that the discussion on transfer of technology ought to be broader and systemic, including issues such as the need of a correct disclosure of patents, the use of exceptions and limitations or the threat of anti-competitive behaviors. In its view, the capacity of absorption was paramount for the adaptation and further development of the technology, considering the different technology demands of the countries. Therefore, the Delegation supported a comprehensive assessment of the situation, including providing information on the level of transfer of technology reached, and also a deep understanding of the relation between transfer of technology and innovation. In its opinion, only then could public policies be adjusted to reach the desired level of effectiveness. The Delegation stated that its goal was to reach concrete and verifiable results in a reasonable lapse of time, since one way of spreading the benefits brought by intellectual property rights was by putting into good use the obligations related to technological transfer and cooperation. The Delegation therefore made specific proposals that should follow the preliminary study as follows: (i) further study should analyze barriers to technology transfer arising from patents, i.e., why the Bayh-Dole model might not work in developing countries that were not endowed with similar technological capacity that existed in the United States of America when it was introduced (to foster patenting by universities and linkages to industry); (ii) there was a standing proposal for convening an international commission or experts' group nominated by Member States to address issues pertaining to technology transfer identified above, and particularly, on the use of flexibilities in patent law (i.e., exclusions, limitations and exceptions) for promoting technology transfer; (iii) to organize a forum to



exchange countries' experiences on technology transfer in an upcoming session of the SCP.

145. The Delegation of the Russian Federation highlighted the importance for its country of the preliminary study contained in document SCP/14/4 on the issue of transfer of technology, due to its link to the patent system, to trade, to investments and licensing, as well as to various problems that emerged on national and international level, in particular the issues of abuse of patent rights and balancing those rights with the users of those technologies, which were relatively new aspects for consideration in its country. Informing about new legislative activities undertaken in its country in that area, in particular Chapter 77, Part IV of the Civil Code on transfer of joint technologies, the Delegation noted that those laws implemented the strategic national priorities and transition to market economy and reflected the state policy of the Russian Federation in the area of research and development that would create the right economic conditions to bring innovative and competitive products to a market. The Delegation stated that the important issue remained to be resolved was the issue of a balance between the interest of the government and the patent holders in the realization of their rights. In conclusion, the Delegation expressed its interest in continuing the discussions on the issue of transfer of technology in the SCP.
146. The Delegation of El Salvador stressed the importance of questions tackled in the preliminary study, although it was a general study containing no conclusions. Noting the activities carried out in other sectors of WIPO, for example, various projects carried out by the sector headed by Mr. Takagi in which El Salvador had been participating, the Delegation suggested that WIPO carry out concrete joint projects in the area of transfer of technology.
147. The Delegation of India expressed its appreciation to the Secretariat for bringing out the study highlighting the various issues in the world of transfer of technology. The Delegation however observed that there were still some important issues which needed to be examined in greater detail so that patents did not become impediments to seamless transfer of technology. The Delegation also expressed agreement with the concerns expressed by the Delegation of Brazil in that regard. In its view, the sufficient and unambiguous disclosure of an invention in a patent document played a very important role in the dissemination of information and adaptation of technology. However, the Delegation observed that patent holders often did not disclose the required information in a clear and succinct manner to enable third parties to reproduce the patented invention, which directly affected the quality of patents, as well as the diffusion of technology. The Delegation further emphasized that the disclosure alone did not enable technology transfer, as there were other issues which remained to be highlighted. The Delegation explained that often the patent holders, particularly the big players, had been using patent trolls and patent thicket as a strategy to defer a smooth procedure for transfer of technology. Therefore, the Delegation suggested that the study should further examine as to how the patent system could better contribute to the seamless transfer of technology to narrow down the gaps. In addition, the Delegation suggested that a special study could be undertaken as a future work program in critical areas, such as food security and public health, in order to understand how the patent system could be used in a *sui generis* way to allow frequent transfer of technology in developing countries. In its view, the issue of technology transfer was a central point to the Development Agenda which was cross-cutting in WIPO's agenda. Therefore, the Delegation reiterated its proposal to put in place an independent commission to examine that subject in greater detail and come out with specific implementable suggestions and recommendations, taking into account the socio-economic conditions and technological advancement of

developing countries. It suggested that such a study examine the flexibilities in the patent law to facilitate the transfer of technology for development.

148. The Delegation of Venezuela stated that transfer of technology was an issue of vital importance. Noting that patents did not necessarily lead to transfer of technology which was an issue particularly related to the implementation of the Millennium Development Goals, to the issues of climate change and food security, the Delegation shared the observations made by the Delegation of Brazil, speaking on behalf of the DAG.
149. The Delegation of Egypt supported the statement made by the Delegation of Brazil on behalf of the DAG. It referred to its intervention made at the previous session of the SCP with regard to paragraph 176 of document SCP/14/10 Prov.1.
150. The Delegation of Burkina Faso supported the statement made by the Delegation of Brazil on behalf of the DAG. Referring to the TRIPS Agreement, in particular Article 66, the Delegation stated that developing countries were still waiting for the materialization of those provisions which had not been achieved since the establishment of the Agreement. The Delegation underlined the importance of transfer of technology for resolving problems in developing countries which were also relevant to developed countries, for example, a clandestine immigration and problems of employment.
151. The Representative of ALIFAR, noting that the issue of transfer of technology was a complex topic, stated that its importance was not due to a fact that IP involved investment, but due to obstacles that existed in developing countries in obtaining the technologies they needed for development. The Representative observed that among various issues, developing local capacity of experts in developing countries to use the technology through education, investment and research and development were the key for transfer of technology. In her view, developing countries also needed measures to incentivize companies to transfer their technology into their territories. Noting that there had not been enough such measures taken for the transfer of technology, the Representative stated that, in some sectors, such as in the pharmaceutical sector, companies were using patents as a barrier by prolonging the life of patents as long as possible in the market and thus making it impossible for third parties to enter the market. According to the Representative, such a strategy was done in a deliberate way to ensure the exclusivity. The reality for developing countries was that every year there were very few patents which were actually licensed. In its view, such a situation was blocking the realization of the objectives of the TRIPS Agreement. However, the Representative viewed the study of the issue of transfer of technology by the SCP positively, and considered that it could help deepen the understanding of the issue among countries and particularly induce investments in the industrial area. She further stated that if a solid pharmaceutical basis in countries could be developed through the transfer of technology that would assist in achieving the public health objectives, there would not be a need for such complex mechanisms as the decision of WTO on 30 August, 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.
152. The Representative of ITSSD stated that the preparation of the preliminary study on technology transfer was the first step in the technology transfer process. To elucidate some of the many steps included within technology transfer, the Representative mentioned the art of contractual licensing between willing buyers and sellers based on most available current information; the need to develop or learn how to develop a triple helix of collaboration between the public sector, the academic and the private sector; the proper use of the federally funded research and the stream through which the research money would flow to the various parties of the triple helix; a commercialization which was

named to be very important part of technology transfer transcending basic research and development; and lastly, the role of the market participant in the triple helix and the need to assess the market value in the particular market of the invention both in its early stages and in its market-ready stage. Those issues were the ones to be addressed in order to facilitate efficient technology transfer mechanism based on patents, or, in some cases, based on trade secrets, if that was the better economic choice under the given circumstances. Referring to the statement made by the Delegation of Brazil regarding the Bayh-Dole Act in the United States of America, the Representative stated that the ITSSD had undertaken significant research of the Brazilian technology transfer system and, in his view, that system was the one mirroring the Bayh-Dole Act, except for one main feature which was that the Brazilian Government retained an economic interest in all of the patents, both initial and derivative, which flew from the federally funded research. In his opinion, that system could be used by Brazil as a teaching mechanism for the LDCs, as well as India could use its own emerging mechanism for the same matter for the benefit of LDCs to show how federally funded money could flow properly.

153. The Representative of TWN, stressing that the transfer of technology was critical for the industrial development in developing countries, noted that before the establishment of the global IP regime, free movement of technology allowed the development of industries, particularly in developed countries. He observed that the technology transfer depended on various factors including infrastructure, education etc. However, in his view, intellectual property, especially patent law, was an important barrier to technology transfer. As far as other constraints were concerned, the Member States had a policy space to address them. The Representative stated that there was a very limited space available to developing countries to negotiate the barriers created by patents. Hence, it was important that the SCP focused on patents and technology transfer. Referring to the preliminary study on transfer of technology contained in document SCP/14/4, the Representative stated that it did not address the role of patents in transfer of technology, the potential and actual threats of patents, nor it provided the analyses of the implications of the TRIPS Agreement on transfer of technology, in particular, the TRIPS flexibilities in facilitating the transfer of technology as well as analysis of constraints faced by developing countries in negotiating voluntary licenses. In his view, the preliminary study also failed to report on the global scene of transfer of technology in a manner that would inform the SCP discussions. Noting that the review of the current state of play required a thorough examination of the historical background, together with a comprehensive analysis of the international legal framework on transfer of technology, the Representative observed that some of the critical UN reports on the issue had been ignored. In that regard, the Representative referred to a report which dated back to 1975 on the role of the patent system in transfer of technology to developing countries, prepared by the United Nations Department of Economic and Social Affairs, UNCTAD, and the International Bureau of WIPO, as well as a Compendium of International Agreements on Technology Transfer published by UNCTAD where it had listed technology transfer provisions in 28 multilateral agreements. The Representative further stated that it was high time to carry out a comprehensive assessment of the situation in order to develop a holistic understanding of the issue and chart the way forward. In that connection, the Representative stated that an independent panel or a commission of experts could be established to examine the issue of technology transfer and patents. In his view, such a commission would be able to fill in the information gap which existed on the issue, particularly, in areas that concerned developing countries, such as pharmaceutical, energy, agriculture and food processing technologies. Unlike one-off researches undertaken by external experts, a commission-led process would ensure comprehensive coverage of the issue that would pave the way forward in a transparent and inclusive manner. It could invite and accept submissions from all relevant stakeholders in all sectors, commission background papers in order to come up with

comprehensive analysis and recommendations. In his view, establishing such a commission would be the best way to address the importance and urgency of discussing transfer of technology by the SCP, and a sign of WIPO's commitment to its obligation to facilitate transfer of technology under Article 1 of the Agreement between the WIPO and the UN. Referring to examples of commissions which had had influential results across the globe, such as the Commission on Intellectual Property Rights (CIPR) established by the UK Government in 2001, and the WHO Commission on Intellectual Property, Innovation and Public Health in 2003, the Representative wished to see that example followed in WIPO.

*Item 5(f): Opposition systems*

154. Discussions were based on document SCP/14/5.
155. The Delegation of India, referring to the preliminary study on opposition systems, observed that although the document provided IP-opposition related provisions for various countries, it failed to provide information and examine the usefulness of the opposition systems, particularly the pre-grant opposition. The Delegation stated that according to their experience, a post-grant opposition system was not only cumbersome, but also very expensive particularly for the developing countries to fight against the misappropriation and piracy of their intellectual property. Therefore, in its view, the preliminary study should highlight the advantages of pre-grant opposition systems wherever they existed. Noting that the document misleadingly suggested that opposition systems provided rejection of the patent application on the ground of patentability alone, the Delegation referred to other grounds when the Indian opposition system could be invoked, namely, wrongful obtaining of the invention, prior use, prior publication, prior public knowledge, inventions which were excluded from patentability, non-disclosure or wrongful disclosure of source or origin of biological material used for the invention, failure to provide information of corresponding application, and others. The Delegation further noted that it would submit corrections in writing with respect to minor inaccuracies found in paragraphs 45 and 50 of the document. In conclusion, the Delegation suggested that the preliminary study be revised on the basis of comments and suggestions to reflect the changes in the relevant provisions of national laws.
156. The Delegation of Mexico stated that some amendments had been made to its legislation relating to the opposition system, in particular, to opposition procedures and third parties observations related to patent applications. The Delegation observed that those provisions were intended to ensure the inventive step of patented inventions and the high quality of patents. The Delegation promised to submit the referred amendments to the Secretariat in writing for further incorporation in the document.
157. The Delegation of Belgium, speaking on behalf of the European Union and its 27 Member States, noted that the opposition procedure was one way of ensuring patent quality and might constitute a rapid, easy and economical mechanism for third parties to challenge the grant of a patent. It observed that the study offered a general overview of the various opposition systems that were included in the patent granting procedures. The general overview was completed with references to regulations and practices, both national and regional, providing countries' concrete examples of opposition procedures. Finally, the document included procedures which were not exactly the opposition procedures, but enabled the intervention of third parties in the patent processing, thus, contributing to the improvement of the quality of granted patents. The Delegation welcomed more details on such procedures, including whether the applicant was entitled to comment on the third party observations. In that connection, the Delegation noted that, at the third session of the PCT Working Group held in June 2010, the European Union and its 27 Member

States recommended the development of a third party observation mechanism in the PCT system. The European Union and its 27 Member States recognized the role that the opposition procedure had to play in increasing the credibility of granted patents. The Delegation pointed out that in spite of the lack of an international treaty specifically dealing with the regulation of opposition procedures, with a view to general provisions in the TRIPS Agreement and the Patent Law Treaty, the Member States should attempt to make all procedures fair and equitable in order to avoid any excessively complicated procedures or procedures causing unjustified delays as regards to the grant of patents. In conclusion, the Delegation wished to recall and preserve the freedom of Member States to include or not to include opposition mechanism in their national legislation.

158. The Delegation of Brazil, speaking on behalf of the DAG, stated that the preliminary study on opposition systems contained in document SCP/14/15 provided a basis for commencing discussions on the subject of opposition systems in the Committee, which included, among others, pre-grant opposition, post-grant opposition and the grounds for opposition that Member States, particularly developing countries, could utilize in pursuit of development. The DAG attached great importance to the potential role the opposition system could play in fostering a strong and balanced mechanism of administrative review that prevents the grant of invalid patents as explained by the study. While the preliminary study suggested that patent opposition systems helped to enhance the quality of patent examination, the DAG believed that it should have also mentioned how patent opposition systems helped to advance public policy and public interest considerations in relations to patents, and thus be incentivized. Referring to Chapter II of the document, the Delegation noted that despite being an important tool, the number of patent applications or granted patents in respect of which oppositions had been filed was still very low. In addition, the Delegation stated that the preliminary study should provide an in-depth analysis of socio-economic impact of opposition systems, that the benefits of patent opposition systems were not sufficiently highlighted neither were the costs of failure to have an effective opposition system in place. In addition, the Delegation stated that it would have been useful if the preliminary study had also provided an analysis of the positive role played by opposition systems in many countries, notably in Japan. Referring to footnote 3 of the study, which stated "As an alternative, a patent Office which does not have resources to conduct substantive review may conclude cooperation agreement with other offices", the Delegation sought clarification whether that was a suggestion advanced by the study or whether such cooperation mechanism existed between offices in relation to patents opposition. The Delegation continued that, if such cooperation existed, it was unclear how examiners in one office could be sufficiently qualified to conduct reviews of patents applied in another office because of substantive standards of patentability could differ considerably between jurisdictions. In its view, information and capacity constraints to conducting reviews should be addressed properly and using different proven models. In addition, cooperation agreements should not be used to harmonize patent procedures with regard to opposition. Further, the Delegation stated that the DAG believed that strong opposition systems could serve as a catalyst for preventing the grant of questionable patents, thereby avoiding any undue indigence on the public domain. For that reason, it viewed the opposition system as one of the important elements of the patent system which merited more attention by the Committee. Therefore, the Delegation suggested that the follow-up studies on opposition systems should focus on the following issues: the positive role of pre-grant and post-grant opposition system should be further developed; experiences of countries in using opposition systems should be shared; impediments faced in the effective use of the opposition system should be addressed; and the question as to how to strengthen the opposition system, especially with a view to addressing the information and capacity deficit in developing countries to use the opposition mechanism effectively, should be analyzed.

159. The Delegation of Switzerland stated that document SCP/14/5 contained a good overview of the various different opposition systems existing in different countries. The Delegation stressed that those systems played an important role in guaranteeing the quality and credibility of patents and, moreover, constituted a rapid, easy and cost-effective means for a third party to contest a patent. Further, the Delegation reiterated its support for the work on opposition systems, as those systems provided added value to the patent system by enabling the improvement of the quality and the validity of patents and also by ensuring legal security. Noting that the issue of the improvement of quality of patents was a subject that Switzerland supported in general, the Delegation requested that all mechanisms pointed out in the preliminary study to be examined in detail, particularly, the system of re-examination of patents should be further explored on the points such as how close that system was to the opposition system and to what extent it could also be beneficial for improving the quality of patents.
160. The Delegation of the Russian Federation expressed its interest in further discussion on the issue of opposition systems. The Delegation stated that the Civil Code of the Russian Federation provided rules on challenging the grant of a patent, which could be administrative or judicial. As provided by the Civil Code, a patent for an invention may be recognized, at any time during its period of validity, as invalid in full or in part in the following cases: failure of the invention to meet the criteria of patentability; the claims for the invention cited in the decision to grant the patent contained features that were missing on the filing date of the application; grant of a patent in case several applications for identical inventions existed having the same priority date in breach of the conditions provided for by the Civil Code; grant of a patent with incorrect indication of the patent owner or inventor. A patent for an invention that was recognized as invalid in full or in part should be null and void as from the date of filing of the application for a patent. Licensing contracts concluded on the basis of the patent later recognized as invalid should maintain their effect to the extent that they were performed by the time of the decision on the invalidity of the patent. Recognition of a patent as invalid signified the reversal of the decision of the federal executive authority on the grant of a patent for the invention and annulations of the record in the corresponding official register. The Delegation further informed the Committee that as a result of Governmental Decree No. 1791 of December 1, 2008, the work of the Patent Office relating to the opposition system had been optimized. Due to the creation of a single technological structure and the deployment of an efficient management of human resources, the term for examination of opposition cases had been significantly shortened. In conclusion, the Delegation reiterated its interest in further analysis of the issue and expressed its hope for constructive debate in that area.
161. The Delegation of El Salvador, noting the legislation of its country on the opposition system, requested the Secretariat to include information focused on developing countries' experience on the issue.
162. The Representative of the EPO supported the statement made by the Delegation of Belgium on behalf of the European Union and its 27 Member States, and also the statement made by the Delegation of Switzerland.
163. The Representative of ALIFAR stated that it would be very useful to go into further analysis on the issue of third party observation mechanisms, collecting more detailed information on the procedures, usefulness and experiences in countries where pre-grant opposition systems also existed. In her view, on the basis of such information, some countries would be assisted in reworking their legislation to make it more effective.

164. The Representative of TWN recalled his statement made by TWN at the previous session of the SCP, as well as the statement made by the Representative of ALIFAR, and stated that there were certain bottlenecks which prevented the effective use of the opposition systems in developing countries. He stated that, therefore, the SCP's work should lead to eventually adjust those bottlenecks to various programs.

#### **Agenda item 6: Future work**

165. After consultations held by the Chair, Member States agreed on the following text:

"Following the decision of the 2010 WIPO General Assembly on the coordination mechanisms and monitoring, assessing and reporting modalities of relevant bodies on the implementation of the Development Agenda recommendations, Member States will be given the opportunity to express their views on this issue under a specific item to be included in the agenda of the 16<sup>th</sup> session of the Committee. These views will be considered in the context of the standardized procedure that WIPO will propose for relevant WIPO bodies.

"The non-exhaustive list of issues will remain open for further elaboration and discussion at its next session, and four further issues will be included in the list, namely, "Impact of the patent system on developing countries and LDCs", "Patents and food security", "Strategic use of patents in business" and "Enhancing IT infrastructure for patent processing".<sup>1</sup>

"As regards the future work, the Committee will address the following issues:

- (i) Exceptions and limitations to patent rights: The Secretariat will prepare a draft questionnaire for consideration by Member States at the 16<sup>th</sup> session of the Committee;
- (ii) Quality of patents, including opposition systems;
- (iii) Patents and health;
- (iv) Client-patent advisor privilege: The Secretariat will prepare a study taking into account the comments made by Member States;

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<sup>1</sup> The non-exhaustive list of issues contained the following: economic impact of the patent system; transfer of technology; competition policy and anti-competitive practices; dissemination of patent information (including the registration of licenses); standards and patents; alternative models for innovation; harmonization of basic notions of substantive patentability requirements (e.g., prior art, novelty, inventive step, industrial applicability, disclosure); disclosure of inventions; database on search and examination reports; opposition system; exceptions from patentable subject matter; limitations to the rights; research exemption; compulsory licenses; patent quality management systems; client-attorney privilege; patents and health (including exhaustion, the Doha Declaration and other WTO instruments, patent landscaping); relationship between the patent system and the CBD (genetic resources/traditional knowledge/disclosure of origin); relation of patents with other public policy issues; patents and the environment, with particular attention to climate change and alternative sources of energy; patents and food security; impact of the patent system on developing countries and LDCs; strategic use of patents in business; and, enhancing IT infrastructure for patent processing.

- (v) Transfer of technology: The Secretariat will update the existing preliminary study (document SCP/14/4), taking into account the comments made by Member States.

“Following requests from some Member States, the annexes of document SCP/15/3, which are available in English only, will be translated into other languages.”

166. The International Bureau informed the SCP that its sixteenth session was tentatively scheduled to be held from May 16 to 20, 2011, in Geneva.

#### **Agenda item 7: Summary by the Chair**

167. The Chair introduced the draft Summary by the Chair (document SCP/15/5 Prov.) with the following modifications: (i) in paragraph 8, the words “and other” were inserted after the words “the preliminary” in the first line; (ii) the text in paragraph 9 was replaced by the text as follows: “Comments made by members and observers of the Committee on the studies submitted at the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> sessions of the SCP will be compiled in separate documents and placed next to the relevant studies on the WIPO website. A hyperlink to the documents containing the comments will be provided in each study.”
168. The Delegation of France recalled its intervention that had been made on behalf of Group B where it had stated that, from the point of view of its Group, there was no use in compiling the comments in supplementary documents, and that such a precedent should not be created.
169. The Delegation of India stated that linking up the study with valuable comments made in the SCP by Member States and observers had great value, merit and usefulness. The Delegation considered that a hyperlink on each study to the document containing the relevant comments would allow those comments to be collated in a separate document for each study, and would avoid having one voluminous consolidated document containing comments made on all the studies considered by the SCP.
170. The Chair, referring to paragraph 10 of SCP/15/5 Prov., explained that that was referring to the mechanism through which the SCP would be reporting to the General Assembly. The Chair stated that such mechanism would be discussed at the following session of the SCP, and that there would be a specific agenda item on that issue. The Chair further stated that the mechanism itself, the basis or the form of reporting, would be decided by Member States at that session. In addition, in relation to paragraph 12(iv) which referred to a study to be prepared by the Secretariat on client-patent advisor privilege issue, the Chair stated that the Secretariat would take into account the comments made by Member States, including the points made on cross-border issues.
171. The Summary by the Chair (document SCP/15/5) was noted and agreed.
172. 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 8: Closing of the session**

173. The Chair closed the session.



174. *In accordance with the procedure previously adopted by the Committee (see paragraph 172 above), Committee members and observers are invited to comment on this draft report, which is being made available on the SCP Electronic Forum. The Committee will be invited to adopt the report at its next session.*

[Annex follows]

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